Federal Court  Cour fédérale

Date: 20211025

Docket: IMM-3013-20

Citation: 2021 FC 1137

Toronto, Ontario, October 25, 2021

PRESENT: Mr. Justice Diner

BETWEEN:

AIDAH M F A ALGHANEM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In this application, Ms. Alghanem seeks judicial review of a decision of an immigration officer [Officer] refusing her request for an exemption from the requirement to apply for permanent residence from abroad on the basis of humanitarian and compassionate [H&C] grounds, pursuant to s 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27

[*IRPA*]. I will grant her judicial review given the unreasonable application of both the law and the evidence to the outcome.

[2] Ms. Alghanem is a 64-year old citizen of Kuwait. She has three daughters and two sons, all of whom are adults and Canadian citizens. Their father – her ex-husband [ex] – lives in Kuwait, as do four of her siblings.

[3] The following background summarizes the salient points of statutory declarations filed by Ms. Alghanem and one of her daughters. The Officer did not question the credibility of either. According to this sworn testimony, Ms. Alghanem's ex was an absent father who was also emotionally abusive, controlling, and coercive with both Ms. Alghanem and their children.

[4] Ms. Alghanem and her family, including her ex, moved to Canada together from Kuwait in 1994 and became permanent residents. In 1997, her children and ex applied for and acquired Canadian citizenship. Ms. Alghanem chose not to apply because she would have needed to forego her Kuwaiti citizenship, as well as her employment and pension there, which she was concerned might impact the support she would be able to provide to her family.

[5] From 1998 to 2001, the family returned to Kuwait so that the children could know their family there. It was at this time that, in light of abuse at the hands of her ex and his family, Ms. Alghanem decided to leave her ex and return to Canada with her children as a single parent. Over the next seven years, Ms. Alghanem was the sole caregiver as a single mother, as her children pursued secondary and post-secondary education. Her ex would visit once a year, during which

time she and her children experienced more abuse, but Ms. Alghanem and her five children assisted and supported each other through it all.

[6] From 2006 to 2009, with the encouragement of her ex, Ms. Alghanem and her children all returned to Kuwait to try to reconcile as a family, in response to the ex's assurances that the situation would improve, and that better employment was available there. Ms. Alghanem, for her part, deposes that she acceded to her ex's encouragement to return in the hopes that her children could benefit from having a father in their lives, and that though they would live under the same roof, they could lead separate lives.

[7] Ultimately, Ms. Alghanem deposes that her ex's controlling and manipulative behaviour continued. The children all decided to leave him permanently and return to Canada in 2013. Ms. Alghanem followed shortly after in 2014, obtaining a visitor visa and relinquishing her permanent residence for failure to meet her Canadian residency requirements during her stay in Kuwait.

[8] Ms. Alghanem briefly returned to Kuwait to finalize her divorce in 2016. She otherwise continued to renew her visitor visa until July 24, 2018, when it was refused, and from which point forward she has remained in Canada without status.

[9] On December 20, 2018, Ms. Alghanem submitted her H&C application for permanent residency, citing her establishment in Canada, ties to Canada, and the consequence of being separated from relatives as factors, in addition to the fact that she did not qualify under any other

immigration program. As mentioned above, she provided a statutory declaration, in which she explained the hardships she would face if she returned to Kuwait, where she would be alone, unable to live with her siblings because of their own respective families, and where her ex would try to contact her.

II. Decision under Review

[10] The Officer refused the H&C application, noting that s 25(1) of *IRPA* is an exceptional measure, that there will inevitably be some hardship associated with being required to leave Canada, and that the onus of demonstrating the factors in support of the application falls entirely on Ms. Alghanem.

[11] The Officer acknowledged the strong bond between Ms. Alghanem and her children, but found that the assertion that she would not have a future in Kuwait was unsubstantiated. The Officer noted that Ms. Alghanem was born, raised, and lived the majority of her life in Kuwait, had her siblings and other family there, and that there was no evidence she could not maintain her relationship with her children from a distance via telecommunications, or that she would incur hardship from doing so.

[12] The Officer also noted that Ms. Alghanem's other four children had not provided any evidence of hardship that they or Ms. Alghanem would face as a result of her departure. The Officer also found Ms. Alghanem's assertion that her ex would try to contact her in Kuwait to be vague, speculative, and unsupported by corroborating evidence.

[13] The Officer further noted Ms. Alghanem's assertions that she had a pension and savings in Kuwait, finding it was reasonable to believe she could support herself and that even if she could not stay with her siblings, they could nonetheless support her reintegration in Kuwait, including emotionally. The Officer also noted Ms. Alghanem's submission that she is a strong-willed, resilient woman, traits the Officer found might assist her upon her return.

[14] The Officer attributed positive weight to Ms. Alghanem's relationship with her children, but found this to be outweighed by the negative weight attributed to what he termed her "disregard for Canada's immigration laws and regulations". Finally, the Officer found that because Ms. Alghanem's children were college or university graduates, it was reasonable to expect that they may wish to sponsor Ms. Alghanem in the future "under a more appropriate immigration stream" and that the evidence did not support that Ms. Alghanem or her children would suffer hardship as a result.

[15] In conclusion, the Officer noted the cumulative balance of the factors raised did not favour Ms. Alghanem, given the "immigration laws as they exist in Canada", noting that leaving behind family, friends, employment, or a residence is not necessarily enough to justify the exercise of discretion.

[16] Finally, the Officer stated that "to obtain H&C relief, an applicant bears the onus of demonstrating, having regard to all of the circumstances, that decent, fair-minded Canadians aware of the exceptional nature of H&C relief would find it simply unacceptable to deny the

relief sought." The Officer determined that on balance, Ms. Alghanem's submissions did not justify the relief sought.

III. Standard of Review

[17] The parties agree that the reasonableness standard applies. The Supreme Court of Canada's recent decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], which set out a revised framework to determine the standard of review, provides no reason to depart from the reasonableness standard followed in previous case law (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*]; *Osun v Canada (Citizenship and Immigration)*, 2020 FC 295).

[18] A court conducting reasonableness review scrutinizes the decision maker's decision in search of the hallmarks of reasonableness – justification, transparency, and intelligibility – to determine whether it is justified in relation to the relevant factual and legal constraints that brought the decision to bear (*Vavilov* at para 99). Both the outcome and the reasoning process must be reasonable (*Vavilov* at para 83).

IV. Analysis

[19] The sole issue to be decided by this Court on judicial review is whether the Officer's decision was reasonable. For the reasons below, I find that it was not.

[20] From the outset, I note that H&C exemption decisions are exceptional and highly discretionary, warranting significant deference to the deciding officer (*Miyir v Canada (Citizenship and Immigration)*, 2018 FC 73 at para 12; *Li v Canada (Citizenship and Immigration)*, 2017 FC 841 at para 15; *Nguyen v Canada (Citizenship and Immigration)*, 2017 FC 27 at paras 28-29).

[21] Broadly speaking, to uphold an officer's decision as reasonable, two elements must be present. First, the exercise of their broad discretion must be conducted within relevant factual and legal constraints, including applying the correct legal framework. The officer balancing the various H&C factors must "substantively consider and weigh all the relevant facts and factors before them" (*Kanthasamy* at para 25, emphasis in original).

[22] Second, where key evidence underpinning the case is overlooked, particularly that addressing central compassionate planks, the balancing will necessarily be deficient because those gaps in the reasons prevent the Court from knowing whether, if properly considered, the officer would have assigned them positive, negative, or neutral weight (*Bhalla v Canada (Citizenship and Immigration)*, 2019 FC 1638 at paras 21, 28 [*Bhalla*]).

[23] In this case, deficiencies are plainly evident in both of these elements. On the first element, as conceded by the Respondent, the test that the Officer set out as conditional to obtaining H&C relief was by and large a word-for-word reproduction of the test set out in the dissenting opinion of Justices Moldaver and Wagner in *Kanthasamy* at paragraph 63.

[24] It is true that despite their disagreements as to the appropriate test, both the majority and minority in *Kanthasamy* were largely agreed that the determinative issue when applying a s 25(1) exemption is that a balancing exercise take into account all relevant hardship and humanitarian considerations, and that hardship is not to be considered alone (*Kanthasamy* at paras 25-33, 45, 63, and 95-109). Such a weighing exercise is what the Officer claims to have undertaken in this case, and what the Respondent points to in asserting that notwithstanding the error in enunciating the test, the totality of the decision demonstrates that the Officer appropriately considered the essential elements of s 25(1) and arrived at a reasonable outcome in doing so.

[25] I cannot agree with the Respondent on this point. In looking at the propriety of adopting the minority's test in *Kanthasamy*, Ms. Alghanem is correct to point out that the failure by a decision-maker to justify a departure from binding precedent exceeds the constraints of reasonableness (*Vavilov* at para 112). To adopt the exact test set out by the *Kanthasamy* minority, instead of adopting the guidance of the majority in a binding decision, is indeed unreasonable, particularly in the absence of any explanation for the departure.

[26] I would agree with the Respondent that if this was one sole aberration, and the totality of the Officer's decision was otherwise well founded, the decision might still be justifiable. As has been noted previously, it is not the use of particular words that is determinative, but rather whether it can be said on a reading of the decision as a whole that the officer applied the correct test and conducted a proper analysis (*Farah v Canada (Citizenship and Immigration)*, 2018 FC 1162 at para 17; *Lopez Segura v Canada (Citizenship and Immigration)*, 2009 FC 894 at para 29).

[27] However, I do not find that this was an isolated error in in the presence of an otherwise reasonable decision: citing the minority was not simply an error of form enveloped by a justified, rational analysis. Here, the Officer failed to address crucial evidence, and also failed to apply that evidence to central H&C factors, which brings me to the second element that requires the redetermination of the matter.

[28] The Officer also ignored evidence in various key areas that should have been considered. First, the Officer makes the following statement:

> I give positive weight to the applicant's relationship with her adult children in Canada and acknowledge that they no doubt will miss each other should the applicant depart Canada; however, more negative weight is attributed to the applicant's disregard for Canada's immigration laws and regulations. She lost her PR status in Canada due to circumstances arguably within her control which include her failure to meet her residency requirements. She cannot now maintain that any ensuing hardship was not anticipated by the legislation or beyond her control.

[29] The Respondent argued in written submissions, and maintained at the hearing, that the "disregard for Canada's immigration laws and regulations" references Ms. Alghanem's visitor overstay, post-refusal in 2018. However, that is not what the Officer states in the decision. Rather, the Officer references Ms. Alghanem's "failure to meet her residency requirements".

[30] It is unusual to label a failure to retain the residency requirements as such, particularly given the circumstances and failed promises of the ex to reconcile and improve his behaviour.

[31] The Respondent also cites a series of cases, which stand for the proposition that Ms. Alghanem should not be rewarded for time spent in Canada illegally, including *Shackleford v*

Canada (Citizenship and Immigration), 2019 FC 1313 at paras 23-24; and *Edo-Osagie v Canada (Citizenship and Immigration)*, 2017 FC 1084 at para 17. While the Respondent might attempt to recast the Officer's words, it is clear to me that the Officer was focused on the failure to maintain permanent residency and that he overlooked key evidence and explanations about why that had occurred.

[32] Specifically, Ms. Alghanem and one of her daughters provided sworn evidence regarding how and why the change in her immigration status came about, including escaping a sustained domestic abuse over an extended period of time. Ms. Alghanem deposed that she made a calculated decision to sacrifice her own opportunity of obtaining Canadian citizenship in 1997 out of concern for her children and her ability to continue to provide for them. She made another when she returned to Kuwait and chose to forego her permanent residency in an effort to reunite her family under one roof, only to ultimately depose that she had no choice but to escape the situation in returning to Canada as a visitor in 2014, her permanent resident status having lapsed.

[33] In addressing the "disregard for Canada's immigration laws and regulations", the Officer did not grapple with this evidence. As *Kanthasamy* states, the very purpose of s 25, which is seen as a "flexible and responsive exception to the ordinary operation of the *Act*, or, in the words of Janet Scott, a discretion 'to mitigate the rigidity of the law in an appropriate case'" (*Kanthasamy* at para 19). I do not find it reasonable for the Officer, in light of this evidence, to find that the hardship that ensued from her return to Canada was within "her control", absent engaging with the stark evidence submitted.

[34] Second, the Officer found that Ms. Alghanem "has savings and a pension in Kuwait, [and] based on this information, it is reasonable to believe that she is able to financially support herself should she return. Further, the applicant continues to have personal ties in her home country, including her four siblings, to assist with her reintegration, if only emotionally".

[35] Once again, in making these findings the Officer did not discuss the evidence that said the opposite, namely, that on her last visit to the country, she stayed in her sister's house, which she could not do in the future. Furthermore, the evidence included various statements from Ms. Alghanem and her daughter as to the difficulty for a single woman in Kuwait.

[36] The Officer also faulted Ms. Alghanem for failing to provide objective evidence that her ex would contact her, finding the assertion to be vague, speculative and to be attributed little weight. Considering the facts the Officer did accept, namely, that Ms. Alghanem was married for 28 years to a man she and her daughter considered to be manipulative and abusive, and that the abuse had been concentrated when they returned to Kuwait and on the annual occasions he visited them in Canada, it was unreasonable to attribute little weight to Ms. Alghanem's concern that he would contact her if she returned to Kuwait.

[37] While highlighting her family ties in Kuwait, the Officer also failed to address the submission that the Applicant has raised her five children in Canada from 1994-1998, 2001-2008, and 2014-present, as a single parent for the majority of this time, including residing in a shared apartment since 2014. This evidence, once again, was front and centre of both statutory declarations, but not addressed in the Officer's decision. Given the focus of hardship and in light

of the factors that must be considered (both in *Kanthasamy*, as well as in the H&C Guidelines), the failure to address this evidence was particularly conspicuous and rendered the analysis incomplete.

[38] Finally, the Officer made a point of highlighting Ms. Alghanem's submissions that she was strong-willed and resilient and that these traits might assist her, implying that this might somehow reduce the hardship she would suffer upon her return to Kuwait. To weigh a person's ability to adapt or to withstand and overcome adversity against their concern of being separated from the five children they devoted their entire life to raising, and to treat resilience as though it somehow reduces hardship, is illogical. It also runs counter to the evidence of prior abuse escaped in Kuwait and objective country evidence of hardship as a single woman there. Such logic has no place in this analysis, and is manifestly unreasonable.

[39] Turning positive establishment factors on their head, and using them against an applicant as a sword rather than a shield, has been held to be unreasonable (*Singh v Canada (Citizenship and Immigration)*, 2019 FC 1633 at para 23). Put otherwise, to hold one's resourcefulness against them has been repeatedly admonished by this Court, since that ultimately means that the more successful, enterprising, and civic minded an applicant is in Canada, the less likely a s 25 application will succeed (*Singh v Canada (Citizenship and Immigration)*, 2019 FC 1142 at para 37).

[40] Unalive to the relevant factual and legal considerations constraining their decision, the Officer's reasons here were not properly justified and thus, unreasonable with respect to the

overlooked evidence. Furthermore, when considered along with the rest of the reasons, it appears as though the Officer fell into the trap the Supreme Court warned against in *Kanthasamy* (at para 33; see also *Bhalla* at paras 17 and 29), by elevating the discrete lens of hardship above all others, which limited their ability to consider and attribute sufficient weight to all relevant compassionate considerations.

V. Conclusion

[41] In this case, the Officer stated and relied on an incorrect legal test without justification, failed to consider compassionate evidence and factors that were relevant to the balancing exercise, and turned Ms. Alghanem's proven resilience against her in the assessment of hardship. Collectively, these reasons render the Officer's decision unjustified in respect of the facts and the law, and thus unreasonable.

[42] The judicial review is granted. The application will be remitted to another decision maker for redetermination.

JUDGMENT in IMM-3013-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter is to be sent back to a differently constituted panel of the tribunal for redetermination.

3. There is no question for certification.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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