

Federal Court



Cour fédérale

Date: 20211116

Docket: IMM-953-21

Citation: 2021 FC 1242

Ottawa, Ontario, November 16, 2021

PRESENT: Madam Justice Pallotta

BETWEEN:

MANJIT KAUR

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Manjit Kaur, seeks judicial review of the decision of a senior immigration officer (Officer) denying her application for permanent residence from within Canada under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] based on humanitarian and compassionate (H&C) grounds.

[2] Ms. Kaur is a 65-year-old widow from India who has been living with her son, daughter-in-law, and grandsons in Ontario since August 2013, when she entered Canada on a “super visa” that was valid until June 2018. Apart from a short visit to India in 2014, she has remained in Canada by extending her status. Ms. Kaur’s most recent extension provided her with temporary resident status as a visitor to Canada until February 20, 2021.

[3] A first application for permanent residence based on H&C grounds was refused in August 2019. Ms. Kaur filed a second H&C application that was refused in January 2021, and that decision is the subject of this application for judicial review.

[4] Ms. Kaur claims that her establishment in Canada, the best interests of her grandchildren, adverse country conditions in India, and mental health considerations justify an exemption from the legislative requirement to apply for permanent residence from outside of Canada. She alleges the Officer overlooked evidence and failed to adequately consider the H&C factors in support of her application. Also, she argues the Officer considered each factor separately without conducting a holistic assessment. Ms. Kaur submits that the Officer’s decision is unreasonable as a result.

[5] In addition, Ms. Kaur submits the Officer breached procedural fairness by failing to provide notice of a concern with the sufficiency of information in the H&C application about her inability to live independently. Ms. Kaur submits she should have been afforded an opportunity to respond to the Officer’s concern with further evidence.

[6] The respondent submits the Officer reasonably engaged with Ms. Kaur's evidence and submissions and did not violate procedural fairness. The respondent argues that Ms. Kaur is improperly asking this Court to reweigh the evidence.

[7] I am not persuaded that the Officer breached procedural fairness or that the decision is unreasonable. For the reasons below, this application for judicial review is dismissed.

II. Issues and Standard of Review

[8] The issues on this application for judicial review are:

1. Did the Officer overlook evidence, fail to adequately assess the H&C factors, or fail to consider the H&C factors holistically?
2. Did the Officer breach procedural fairness by failing to provide notice of a concern and an opportunity to provide further evidence?

[9] The applicable standard of review for the first issue is reasonableness, according to the guidance set out in the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. The reasonableness standard requires a deferential but robust form of review: *Vavilov* at paras 12-13, 75 and 85. A reviewing court must determine whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility: *Vavilov* at para 99. The reviewing court is to review the decision maker's reasoning, process, and outcome while refraining from deciding the issue itself: *Vavilov* at para 83. A reasonable decision is based on an internally coherent and rational chain of analysis and it is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85. The party challenging the decision bears the onus of demonstrating that it is unreasonable: *Vavilov* at para 100.

[10] Questions of procedural fairness are reviewable on a standard that is akin to correctness: *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific Railway*]. The duty of procedural fairness is “eminently variable”, inherently flexible, and context-specific: *Vavilov* at para 77. A court assessing a procedural fairness question is required to ask whether the procedure was fair, having regard to all of the circumstances (*Canadian Pacific Railway* at para 54), including whether the applicant knew the case to be met, and had a full and fair chance to respond (*Canadian Pacific Railway* at para 56).

III. Analysis

A. *Did the Officer overlook evidence, fail to adequately assess the H&C factors, or fail to consider the H&C factors holistically?*

[11] Ms. Kaur submits the Officer failed to consider the totality of her evidence and/or give sufficient weight to key H&C factors of establishment, adverse country conditions, and the best interests of the children (BIOC) in relation to her grandsons.

[12] Ms. Kaur submits that her establishment in Canada is reflected through her relationship with her son and his family with whom she has been living for seven years. The Officer found this did not provide sufficient H&C grounds to justify an exemption from the requirement to apply for permanent residence from outside of Canada. Ms. Kaur submits the Officer failed to recognize that she did not apply for H&C consideration “as a matter of convenience” and improperly assumed she could adequately maintain a connection with her family from India, while her application is processed in the prescribed manner.

[13] Ms. Kaur argues that the Officer overlooked her submissions and evidence that described the level of physical and mental hardship she would experience if forced to return to India. The adverse country conditions include that Ms. Kaur's spouse and parents are deceased, and she is financially incapable of supporting herself in India. Ms. Kaur had provided affidavits from her son and daughter-in-law living in Ontario, explaining their cultural obligation to care for her and provide financial support. Affidavits from Ms. Kaur's daughter and siblings who are living in India state they cannot care for her, and they want her to live with the son in Ontario. Ms. Kaur also submitted newspaper reports of crimes against the elderly in India, and a psychological assessment from Dr. Pilowsky that speaks to her mental state and the psychological hardship of moving to India and being separated from her family in Canada.

[14] According to Ms. Kaur, the Officer did not address the content of the affidavit evidence and gave no reason for assigning little weight to Dr. Pilowsky's report, thereby failing to address evidence that contradicted their findings: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1999] 1 FC 53 at para 17, 1998 CanLII 8667 (FCTD) [*Cepeda-Gutierrez*]. Furthermore, the Officer considered each factor in a silo without considering and weighing all of the relevant facts and factors together, including that she is a 65-year-old widow without family who can provide the care she needs in India, and she would suffer serious mental distress if she is required to leave Canada, even temporarily: *Kanhasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61.

[15] Finally, Ms. Kaur argues the Officer failed to undertake a just and reasonable analysis of the BIOC by failing to consider her relationship with her grandsons as described in the evidence, including in Dr. Pilowsky's psychological assessment.

[16] Ms. Kaur submits that a reasonable person would consider her circumstances to warrant an exception under section 25 of the *IRPA*, and the Officer "seems to have ignored all the evidence" and "failed to weigh the combined effect of various factors favourable for an application under Sec. 25(1) IRPA".

[17] In my view, Ms. Kaur has not established that the Officer's decision is unreasonable. She claims the Officer failed to engage with a majority of her evidence, but that is not accurate.

[18] As the respondent points out, Ms. Kaur's establishment in Canada relates to living with her son and his family in Ontario. The Officer considered the evidence that Ms. Kaur has been living with her son and his family for seven years, she receives emotional and financial support from them, and shares a close bond with her grandsons. The Officer accepted that Ms. Kaur has a strong attachment to her family in Canada but found she can maintain contact from India while her application is processed in the prescribed manner, and she can visit Canada. Ms. Kaur asserted that she is unable to travel back and forth due to her age, but the Officer noted a lack of evidence to indicate how her age or health would prevent her from travelling.

[19] The Officer also addressed the evidence related to adverse country conditions and mental health concerns, including Ms. Kaur's submissions that she is unable to manage her own

household or financial needs and will require a full-time caregiver in India. The Officer considered this against the caregiving tasks that she is capable of completing for her grandsons. On balance, the Officer found Ms. Kaur to be “an independent woman who is capable of taking care of herself and others”. While the Officer’s decision does not explicitly repeat or refer to statements made in the affidavits from Ms. Kaur’s family members living in India, it does refer to the substance of their evidence—that they are unable to care for her. The Officer accepted that these family members may not provide financial support, but found they could provide emotional support. The Officer was not required to refer to all of the evidence and is presumed to have weighed and considered the evidence unless the contrary is shown: *Li v Canada (Minister of Citizenship and Immigration)*, 2020 FC 754 at para 60 [*Li*], citing *Sing v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125 at para 90. Ms. Kaur does not identify any material points in the affidavits that were overlooked, and the Officer’s decision demonstrates a reasonable weighing of the factors.

[20] I agree with the respondent that the Officer addressed Ms. Kaur’s submissions related to crimes against the elderly in India and the newspaper reports she provided, which consisted of five reports of violent crimes against elderly victims, published between 2014 and 2017. Ms. Kaur argues that she provided only a few news articles and that crimes are increasing; however, she did not point to any evidence in this regard. The Officer reasonably found that Ms. Kaur had provided insufficient evidence to demonstrate that violence against seniors in India is at a level that would cause her to suffer undue hardship.

[21] Contrary to Ms. Kaur's submissions, the Officer fully addressed Dr. Pilowsky's psychological report and explained the weight given to it. The Officer noted Dr. Pilowsky's opinion that Ms. Kaur's psychological functioning is "presently intact" and that Ms. Kaur had reported being medically healthy. Although Dr. Pilowsky opined that Ms. Kaur would deteriorate psychologically if she had to return to India, the Officer noted that she was not diagnosed with any disorder and a number of the factual points underpinning the opinion had not been established, including that Ms. Kaur would have no form of support network in India. I agree with the respondent that the Officer addressed Dr. Pilowsky's clinical opinion, but assigned little weight to Dr. Pilowsky's opinion that Ms. Kaur would suffer "undue and undeserved" psychological hardship if her application to remain in Canada is denied because it was outside of her expertise in clinical assessments. As the respondent correctly states, it is up to the Officer—not Dr. Pilowsky—to weigh the submissions and determine whether H&C relief is warranted.

[22] Similarly, Ms. Kaur has not established a reviewable error with respect to the Officer's assessment of the BIOC.

[23] While Ms. Kaur has two grandchildren who are living in British Columbia, the Officer found there was little information about how Ms. Kaur's return to India would affect their best interests and assigned little weight to this factor. Ms. Kaur does not allege an error with this finding.

[24] With respect to Ms. Kaur's two grandsons in Ontario, the Officer considered Ms. Kaur's role in raising them, including teaching them the Punjabi language and religious traditions. The Officer also considered that Ms. Kaur's son and daughter-in-law work full-time and they rely on her to help care for their children. Ultimately, while the Officer accepted Ms. Kaur's role as "a loving grandmother who plays an active role in [her grandsons'] lives", the Officer found that the parents are able to provide a loving and nurturing environment for them, they can educate their children in the Punjabi language and traditions, and they will continue to facilitate a meaningful relationship between Ms. Kaur and her grandsons through visits and other methods while a permanent residence application is processed in the prescribed manner. I agree with the respondent that the Officer appreciated that Ms. Kaur plays an active role in caring for her grandchildren but found insufficient evidence that their best interests would be unacceptably compromised by her physical absence. BIOC is one factor in the overall analysis (*Li* at para 56) and the BIOC analysis will be different when the children themselves are not at risk of being removed from their environment and the separation relates to a relative other than a parent: *Garcia Garcia v Canada (Minister of Citizenship and Immigration)*, 2020 FC 300 at paras 57-59; *Li v Canada (Minister of Public Safety and Emergency Preparedness)*, 2019 FC 1235 at paras 35-37.

[25] In my view, the Officer was "alert, alive and sensitive" to BIOC considerations: *Kanhasamy* at para 38. An applicant has the burden of providing relevant information, including information regarding the BIOC: *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at paras 5 and 8. After assessing the evidence, the Officer was unable to conclude that Ms. Kaur's departure from Canada would compromise the best interests

of her grandchildren. In my view, that conclusion was open to the Officer, and Ms. Kaur has not established that it is unreasonable.

[26] In summary, the Officer's decision engages with Ms. Kaur's submissions, addresses the evidence, and reasonably concludes that the evidence is insufficient to warrant an exemption under section 25 of the *IRPA*. I agree with the respondent that Ms. Kaur's arguments relate to the weight the Officer assigned to the evidence; however, it is not this Court's role on judicial review to re-weigh the evidence: *Li* at para 57.

B. *Did the Officer breach the rules of procedural fairness by failing to provide the applicant with an opportunity to provide further evidence?*

[27] Ms. Kaur did not address the Officer's alleged breach of procedural fairness in oral argument. Based on her written memorandum, Ms. Kaur argues the Officer breached procedural fairness by failing to provide a meaningful opportunity to submit further evidence in response to a concern that "there is little information before [the Officer] to indicate that the applicant is unable to live independently due to her age, health, or other reasons". Ms. Kaur relies on *Egharevba v Canada (Minister of Citizenship and Immigration)*, 2013 CanLII 33228 (CA IRB) at para 86 [*Egharevba*], which cites *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC) at para 15 [*Baker*] for the proposition that "it would be a breach of procedural fairness for the visa officer to fail to provide a meaningful opportunity for the applicant and others whose important interests are affected by the decision in a fundamental way to present the various types of evidence relevant to their case and have it fully and fairly considered". She submits the Officer had a duty to provide notice because it is evident

from her H&C submissions that she made best efforts to put forward her case, and the Officer's decision considerably affects her interests.

[28] The respondent points out that the tribunal's decision in *Egharevba* was overturned: *Canada (Minister of Citizenship and Immigration) v Egharevba* (7 October 2014), IMM-2921-13 (FC).

[29] The respondent argues that Canadian courts have held, relying on the *Baker* factors, that the duty of procedural fairness owed by visa officers is at the low end of the spectrum: *Garcia Diaz v Canada (Minister of Citizenship and Immigration)*, 2021 FC 321 at paras 62-63. Ms. Kaur had the onus to adduce all relevant evidence for the Officer's consideration, and the Officer had no obligation to inform her of concerns about the points of weakness in her case. Ms. Kaur knew the case she had to meet, this was her second application for H&C consideration, and she made extensive submissions to the Officer. However, based on those submissions the Officer was not satisfied that H&C factors in her case warrant an exemption to the legislative requirements.

[30] I agree with the respondent that the Officer did not breach procedural fairness. Ms. Kaur alleged in her H&C application that she is unable to live alone in India. She prepared her H&C application with the assistance of a representative and had the opportunity to put forward submissions and evidence to support the allegation that she is unable to live independently due to her age, health, or other reasons, and to have her submissions and evidence considered by the Officer: *Baker* at para 22.

[31] The onus of establishing that an H&C exemption is warranted lies with an applicant. An officer is not required to highlight weaknesses in an application and request further submissions, or provide an opportunity to fill in gaps in the evidence: *Kisana v Canada (Minister of Citizenship & Immigration)*, 2009 FCA 189 at para 45; *Singh v Canada (Minister of Citizenship and Immigration)*, 2014 FC 983 at para 7.

[32] The Officer's concern relates to the sufficiency of Ms. Kaur's evidence. Ms. Kaur was required to "put her best foot forward" to establish her allegations: *Bradshaw v Canada (Minister of Public Safety and Emergency Preparedness)*, 2018 FC 632 at paras 76-83. In the circumstances, the Officer was not required to provide notice and an opportunity to respond to the concern.

IV. **Conclusion**

[33] This application for judicial review is dismissed. The Officer did not breach procedural fairness and the Officer's decision is reasonable.

[34] Neither party proposes a question for certification. I find there is no question to certify.

JUDGMENT in IMM-953-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. There is no question for certification.

"Christine M. Pallotta"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-953-21

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