Federal Court  Cour fédérale

Date: 20211122

Docket: IMM-5151-20

Citation: 2021 FC 1272

Ottawa, Ontario, November 22, 2021

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

ANASTASIA DIAMANTOPOULOU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is the judicial review of a decision of an officer [Officer] of Immigration, Refugees and Citizenship Canada denying a humanitarian and compassionate [H&C] application. For the reasons that follow, the application will be granted. The decision is not sustainable, as explained later, because the Officer did not address important evidence of hardship.

II. Background

[2] The Applicant is a 54 year old citizen of Greece. She came to Canada on a visitor's visa to leave her abusive husband, who continues to live in Greece.

[3] The Applicant's visa expired in March 2016 and she applied for H&C relief in November 2018 based on her establishment in Canada, the spousal abuse she suffered and the lack of support and protective mechanisms for women suffering domestic abuse in Greece.

[4] The Officer refused the H&C application on the basis of insufficiency of evidence. The Officer concluded:

a) regarding establishment, the Applicant did not provide "any objective evidence" of her employment in Canada or objective evidence of her level of establishment;

b) respecting hardship, there was insufficient "objective evidence" supporting the hardship the Applicant would experience if returned to Greece;

c) there was insufficient evidence to demonstrate that the Applicant would be unable to obtain assistance from the Greek state, police, courts or other social services as a victim of spousal abuse; and

d) the Applicant would be able to re-establish herself in Greece based on her familiarity with the country and language, her two adult sons being able to assist her and because she has transferable work skills.

[5] The Applicant submitted evidence of the harm she would suffer if returned to Greece in the form of a psychiatric report, and several letters from social workers describing her abuse and related mental health treatments. The Officer did not address this evidence.

III. Analysis

[6] The standard of review, while said by both parties to be "reasonableness", each had slightly different perspectives. I agree with the Respondent that the starting point for the issue is *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Pre-*Vavilov* decisions such as *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, *Wage v Canada (Citizenship and Immigration)*, 2009 FC 1109, and *Nwaeme v Canada (Citizenship and Immigration)*, 2017 FC 705, while useful, must be considered with caution.

[7] The Court, under *Vavilov*, must undertake a deferential but robust form of review. Decisions reviewed must exhibit justification, transparency and intelligibility. A reasonable decision must have a coherent and rational chain of analysis justified in relation to the facts and the law. In the context of the present judicial review, facts matter and must be addressed.

[8] Section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, sets out the Minister's broad discretion to grant an H&C application. It does not use words like "underserved" or "exceptional". These words have developed in the case law to circumscribe a wide discretion. In *Huang v Canada (Citizenship and Immigration)*, 2019 FC 265 [*Huang*], the Court summarized the basic principle at stake in the exercise of discretion:

> [17] Section 25 of the IRPA provides exceptional relief from what would otherwise be the ordinary operation of the IRPA. To obtain such relief, an applicant bears the onus of establishing circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another": *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, at para 21 [*Kanthasamy*], quoting from *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970) 4 IAC 338, at 350.
>
> [18] To meet this test, it is not sufficient to simply establish the existence or likely existence of misfortunes, relative to Canadian citizens and permanent residents of Canada. This is something that one would expect could be readily established by most persons facing removal to, or currently living in, a country where living standards are significantly below those in Canada. As the Supreme Court of Canada has recognized, "[t]here will inevitably be some hardship associated with being required to leave Canada": *Kanthasamy*, above, at para 23. Similarly, there will inevitably be some hardship associated with being an unsuccessful applicant for H&C relief from outside Canada.

[9] The Court, in *Huang*, underlined the need for "exceptional reasons":

> [20] Put differently, applicants for H&C relief must "establish exceptional reasons as to why they should be allowed to remain in Canada" or allowed to obtain H&C relief from abroad: *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, at para 90. This is simply another way of saying that applicants for such relief must demonstrate the existence of misfortunes or other circumstances that are exceptional, *relative to other applicants who apply for permanent residence from within Canada or abroad*: *Jesuthasan, v Canada (Citizenship and Immigration)*, 2018 FC 142, at paras 49 and 57; *Kanguatjivi v Canada (Citizenship and Immigration)*, 2018 FC 327, at para 67.

[10] The Court put the words "unusual", "underserved" and "disproportionate" in context as instructive, but not determinative, concepts. What must be weighed is <u>all</u> the relevant factors. Justice Little in *Rainholz v Canada (Citizenship and Immigration)*, 2021 FC 121 at para 99, made clear that an applicant does not have to meet a standard of "exceptional hardship".

[11] In the present case, the Court does not accept that the Applicant had to establish at an "exceptional" threshold any of the recognized H&C factors including, as suggested, that of establishment.

[12] However, this case need not be determined on the articulation and application of the proper legal standard either considered individually or globally. In my view, this case falls on the failure to meet the long established obligation of consideration of the relevant facts.

[13] The Applicant submitted a psychiatric report and letters from her mental health care providers on the important issue of the hardship she would face upon her return to Greece. The Officer failed to explicitly consider this evidence and instead proceeded immediately to a consideration of state protective mechanisms.

[14] This approach by the Officer raises the issue of "failure to consider relevant evidence": see *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration*), [1999] 1 FC 52, 1998 CanLII 8667 (FC) at para 17. Given its importance, this decision cannot rest solely on the presumption that a decision maker is presumed to have considered all the relevant evidence.

[15] The Officer erred by failing to address the Applicant's psychiatric and mental health evidence. As held by Justice Strickland in *Esahak-Shammas v Canada (Citizenship and Immigration)*, 2018 FC 461 at para 26, a court must consider the psychological evidence.

> [26] … This Court has held that when psychological reports are available and indicate that the mental health of applicants would worsen if they were to be removed from Canada, then an officer must analyze the hardship that applicants would face if they were

> to return to their country of origin. In that circumstance, an officer cannot limit the analysis to a determination of whether mental health care is available in the country of removal …

[16] An assessment of the adequacy of health care available in the Applicant's country can only properly be made after a proper consideration of the risk she would face. Ignoring the health care evidence undermines any conclusion of adequacy.

[17] Therefore, I find this decision to be unreasonable.

IV. Conclusion

[18] For these reasons, this judicial review will be granted. The matter is to be returned to the Respondent for a new consideration by a different officer.

[19] There is no question for certification.

JUDGMENT in IMM-5151-20

THIS COURT'S JUDGMENT is that the application for judicial review is granted.

The matter is to be returned to the Respondent for a new consideration by a different officer.

There is no question for certification.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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