

Federal Court



Cour fédérale

Date: 20220126

Docket: IMM-390-20

Citation: 2022 FC 83

Ottawa, Ontario, January 26, 2022

PRESENT: Mr. Justice McHaffie

BETWEEN:

FAY-ANN VEDAN JACKSON

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Fay-Ann Jackson seeks to set aside the refusal of her application for permanent residence on humanitarian and compassionate (H&C) grounds. She argues the immigration officer who refused her H&C application unreasonably assessed the best interests of her three Canadian children and the evidence of her mental health issues, and unfairly referred to evidence she did not have an opportunity to address.

[2] For the reasons below, I conclude the officer's reasons regarding the best interests of the children (BIOC) did not meet the requirements of transparency, intelligibility, and justification required of a reasonable decision. In particular, the officer neglected to consider a central argument raised by Ms. Jackson pertaining to the BIOC, namely the impact on her children of her jeopardized mental health if she returned to St. Vincent and the Grenadines, and applied an inconsistent approach to the importance of Ms. Jackson's physical presence when considering the interests of one of her four children in St. Vincent and her three children in Canada.

[3] The decision is therefore set aside and Ms. Jackson's H&C application is remitted for redetermination by another officer.

II. Issues and Standard of Review

[4] Ms. Jackson raises three issues on this application:

- A. Did the officer err in their assessment of the BIOC?
- B. Did the officer err in their assessment of the psychiatric evidence?
- C. Did the officer unfairly rely on extrinsic evidence?

[5] The first two of these issues go to the merits of the decision. They are to be reviewed on the reasonableness standard: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25. The burden rests on the applicant to show that the decision is unreasonable: *Vavilov* at para 100. A reasonable decision is one that is based on internally coherent reasoning; bears the hallmarks of justification, transparency, and intelligibility; and is

justified in light of the factual and legal constraints that bear on it: *Vavilov* at paras 99–101. The principles of justification and transparency require that a reasonable decision meaningfully account for the central issues and concerns raised by the parties: *Vavilov* at 127–128.

[6] The Minister argues the Court ought to apply a “palpable and overriding error” standard to the officer’s factual findings and inferences. I reject this argument for the same reasons I rejected it in *Xiao v Canada (Citizenship and Immigration)*, 2021 FC 386 at paras 8–10.

[7] The third issue is a matter of procedural fairness. In reviewing such issues, the Court asks whether the procedure leading to the decision was fair in all the circumstances: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54. This assessment can be considered to be akin to a correctness standard or as having no standard of review: *Canadian Pacific* at paras 54–56; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35.

[8] For the reasons below, I conclude that the first issue is determinative, as the flaws in the officer’s BIOC analysis were sufficient to render the decision unreasonable. I therefore need not address the final two issues.

III. The H&C Application and the Decision at Issue

(1) Ms. Jackson's experiences

[9] Ms. Jackson grew up in St. Vincent and the Grenadines. Her difficult childhood included abusive parents, an alcoholic father, abandonment by her mother at age 11, being sent to live elsewhere at age 13, and being sexually assaulted while in a relationship with the father of her first child. She was later in a physically abusive relationship with another man for five years. When she tried to end that relationship, the man attacked her with a machete at their son's day care, almost killing her. The man killed himself later the same day. Subsequent threats from the man's family led Ms. Jackson to flee to Canada in 2006, leaving her four children with family in St. Vincent.

[10] Ms. Jackson made a refugee claim in 2008, which was denied in 2010. A pre-removal risk assessment (PRRA) application filed in 2011 was also refused in 2012.

[11] Ms. Jackson was in a relationship with a Canadian at the time of her H&C application, and the couple has three children. The Canadian father was at times emotionally abusive to her.

(2) The H&C application

[12] In April 2018, Ms. Jackson filed an application for permanent residence on H&C grounds pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Further submissions were filed in July 2018. Ms. Jackson's H&C application was based

on three main factors: the hardship she would face in St. Vincent and the Grenadines if she were required to return; her establishment in Canada; and the best interests of her three Canadian children, then aged 8, 6, and 2. The hardship and BIOC elements are of particular importance on this application.

[13] With respect to hardship, Ms. Jackson's submissions referred to her current abusive relationship, her mental health issues, and both gender based and economic violence in St. Vincent. Her submissions on her mental health were supported by a report from Dr. Parul Agarwal, a psychiatrist who based her assessment on a meeting with Ms. Jackson in July 2018. Dr. Agarwal diagnosed Ms. Jackson with post-traumatic stress disorder (PTSD), major depressive disorder (MDD), and noted Ms. Jackson exhibited symptoms of battered women's syndrome. Dr. Agarwal gave her opinion that given the emotional and physical consequences of the machete attack in St. Vincent, the fact that Ms. Jackson felt abused, helpless and powerless there, and her belief that she is still not safe in that country, it would be extremely detrimental to Ms. Jackson's mental health to return to St. Vincent. Among other things, Dr. Agarwal noted that Ms. Jackson would be "faced with constant reminders of her extremely traumatic past," and would be "surrounded by traumatic cues" in St. Vincent.

[14] With respect to the BIOC, Ms. Jackson's submissions to the officer underscored that it would be in the best interests of the three Canadian children to have their mother remain with them in Canada. They noted that if Ms. Jackson were required to return to St. Vincent, the children would either have to stay in Canada without their mother, or go with her to St. Vincent. In the former case, both the physical separation from Ms. Jackson and their father's history of

emotional abuse to Ms. Jackson were raised as particular concerns. In the latter case, the children would be in an unfamiliar country where they had no connections and where Ms. Jackson would be constantly triggered due to the trauma of her past attack. Ms. Jackson's BIOC submissions also highlighted the difficult living conditions the children would face in St. Vincent, including risks of sexual violence, and poor educational opportunities.

(3) The H&C decision

[15] The officer issued a first decision refusing the H&C application on September 23, 2019. In this decision, the officer referred to submissions regarding Dr. Agarwal's report, noting that "the psychological report is not on file." It became clear to Ms. Jackson's counsel upon review of this refusal that due to an error on counsel's part, Dr. Agarwal's report had not been submitted with the H&C submissions. Counsel submitted the report on October 3, 2019 with brief supplementary submissions, asking the officer to reconsider their decision. The officer did so, taking Dr. Agarwal's report into account and issuing a further decision refusing the H&C application on December 24, 2019. It is this latter decision that is the subject of this application for judicial review.

[16] The officer's December 24, 2019 decision added reference to Dr. Agarwal's report in the discussion of establishment, noting it was "more than 14 months old when it was submitted on 3 October 2019." It also added a new section entitled "Other factors for consideration" which considered Dr. Agarwal's report at some length. The officer noted the diagnoses of PTSD, MDD, and symptoms of battered women's syndrome and Dr. Agarwal's reference to Ms. Jackson seeking mental health support in the past and being on antidepressant medication. The officer

also referred to Dr. Agarwal's conclusion that removal to St. Vincent would be detrimental to Ms. Jackson's mental health, but noted that a course of treatment was not suggested. The officer then wrote the following paragraph:

While I accept that the applicant has mental health issues, I assign only some value in the assessment's other conclusions without further documentary evidence to support the statements. I acknowledge Dr. Agarwal is an expert in her field; however, I am cognizant that she spent an unknown amount of time during a single session interviewing the applicant for the purposes of an immigration case. Further, I find that Dr. Agarwal does not indicate in her report that she witnessed the applicant's series of events in St. Vincent/Canada or that she consulted country condition documentation for the applicant's country of return. Accordingly, I find that the information in Dr. Agarwal's report concerning the circumstances of the applicant's life is not objective since it is likely based on information that was provided to Dr. Agarwal by the applicant. Moreover, I find the applicant has provided little evidence to establish, on a balance of probabilities, mental health treatment in Canada prior to the assessment or thereafter. Dr. Agarwal's assessment has insufficient probative value given the ease in which the applicant could obtain supporting material from her family doctor or counsellor.

[Emphasis added.]

[17] The officer went on to conclude that while they accepted that Ms. Jackson's current spouse has been emotionally abusive at some point, the evidence regarding these events was unclear about when and how often that abuse had occurred or whether it was ongoing.

[18] In their BIOC analysis, the officer considered the interests of Ms. Jackson's three Canadian children and those of the youngest of her four children in St. Vincent, who was 17 at the time of her H&C application. Although the son in St. Vincent was not referred to in Ms. Jackson's H&C application, the officer found it would be in his best interests for his mother to return to St. Vincent.

[19] With respect to the Canadian children, the officer noted the absence of information describing their other family, schooling in Canada, or the level of care provided by Ms. Jackson. Based on the general country conditions in Canada and St. Vincent, the officer found it is “somewhat in the children’s best interests to live in Canada and that their best interests are better served by remaining with both parents.”

[20] The officer then considered the two possible scenarios that would arise if Ms. Jackson’s application were refused, namely the children going to St. Vincent with their mother, or remaining in Canada with their father. The officer noted that the decision of which of these scenarios would apply was that of Ms. Jackson and her partner.

[21] In the former case, the officer was not satisfied that either the children’s integration in Canada or the country conditions in St. Vincent were such that residing in St. Vincent would significantly compromise their wellbeing or development. While noting differences in available education and health care would cause some adversity for the children, the officer found that the availability of public education and accessibility of health care in St. Vincent remedied much of the negative impact on the children from residing in St. Vincent.

[22] In the latter case, the officer disagreed that the children’s wellbeing or development would be greatly negatively impacted by remaining in Canada with their father and without their mother. While acknowledging they would be negatively impacted emotionally, the officer found that in such a scenario, they would still be able to have contact with their mother, and still have

access to education, housing, and health care in Canada, as well as a father able to provide for them emotionally and financially.

[23] In the overall analysis, the officer acknowledged that it was in the best interests of the Canadian children to reside with both parents and that their interests were better served in Canada. However, noting that the BIOC is only one of many important factors to be considered in an H&C decision, the officer found that the weight accorded to the BIOC was not enough to justify an exemption because of the insufficient evidence demonstrating a negative impact on the children if the application were refused. Additionally, it was in the fourth child's best interests that Ms. Jackson return to St. Vincent. Considering these factors with the small amount of positive weight the officer ascribed to Ms. Jackson's establishment and their conclusion that there was insufficient evidence of adverse country conditions that would personally affect her in St. Vincent, the officer was not satisfied that the H&C considerations before them justified an exemption under subsection 25(1) of the *IRPA*.

IV. Analysis

A. *The officer's BIOC analysis was not reasonable*

[24] As set out above, the officer concluded that the best interests of the Canadian children were better served by remaining with both parents in Canada. The officer then undertook an assessment of the impact on those best interests of Ms. Jackson's removal, addressing the two potential scenarios: the children remaining in Canada, and the children travelling to St. Vincent with Ms. Jackson. To this extent, and despite Ms. Jackson's submissions to the contrary, I

consider the officer's analysis consistent with the approach described by the Federal Court of Appeal in *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at paras 4–6.

[25] However, in my view, there are two significant flaws in the officer's BIOC analysis that lead me to conclude it does not have the qualities of a reasonable decision. First and foremost, the officer's assessment of the impact on the children's best interests of travelling to St. Vincent failed to address one of the central arguments raised by Ms. Jackson, namely the impact on the children of being cared for by a mother who was returning to the site of her prior trauma, with resulting impacts on her mental health.

[26] This concern was raised on a number of occasions in Ms. Jackson's submissions to the H&C officer on the BIOC and in Dr. Agarwal's report. After citing the applicable law and guidelines, Ms. Jackson's first substantive submission cited Dr. Agarwal's finding that Ms. Jackson would either have to leave her Canadian children in Canada or "bring them with her to St. Vincent and raise them single handedly while also coping with all her traumatic cues," neither of which were in her or her children's best interests. The submission goes on to note that taking the children "to an unfamiliar country where their mother will constantly be triggered due to the trauma of her attack certainly cannot be said to be in their best interests." Later in the submission, the point is repeated, noting that the children would "unfortunately bear witness to their mother's emotional scars from her life in St. Vincent" and, again quoting Dr. Agarwal, that they would be "looked after by an already traumatized mother, who would be coping with traumatic cues" [emphasis added throughout].

[27] The officer's BIOC analysis considered the children's education in St. Vincent, the availability of health care in St. Vincent (not an issue raised with respect to the BIOC by Ms. Jackson), the loss of friends and family, and potential discrimination that would be faced by the daughter. However, the officer did not consider the submission and evidence of the impact on the children of being raised by a mother who was returning to face trauma that had led or contributed to her PTSD and MDD.

[28] The Supreme Court of Canada in *Vavilov* held that the "principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties": *Vavilov* at para 127. While administrative decisions need not respond to every argument or line of possible analysis, however subordinate, a failure to "meaningfully grapple with key issues or central arguments raised by the parties" may undermine the decision: *Vavilov* at para 128.

[29] In the present case, the impact on the children of being cared for by a mother who was returning to the site of her prior trauma was one of a number of factors raised in respect of the BIOC. However, having reviewed the H&C application submissions and Dr. Agarwal's report, I conclude it must be characterized as a central argument that required consideration, rather than simply a subordinate one. I reach this conclusion in light of the multiple references to the concern in the application, their location in the BIOC submissions, and the importance of the BIOC as a factor in an H&C assessment: *IRPA*, s 25(1); *Kanthisamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 34–41.

[30] The officer's discussion of the BIOC as a factor is not to be read in isolation. Rather, the reasons are to be read holistically, for the purpose of understanding the basis on which the decision was made: *Vavilov* at para 97. Even reading the BIOC analysis in the context of the officer's earlier discussion of the mental health evidence, however, I am unable to conclude that the officer meaningfully grappled with this important aspect of Ms. Jackson's BIOC submissions.

[31] It is clear that the officer had concerns about Dr. Agarwal's report given the discussion set out at paragraph [16] above. I note, as an aside, that the language in that paragraph is nearly identical to the analysis found unreasonable by Justice Boswell in *Skinner v Canada (Citizenship and Immigration)*, 2019 FC 3 at paras 16, 53–57. However, despite the officer's concerns, I cannot read their reasons as discounting the report to an extent that would explain the lack of discussion of the issue in the BIOC analysis. To the contrary, the officer accepted that Ms. Jackson "has mental health issues," yet did not address the impact of those issues on her children if they were required to return to St. Vincent with her.

[32] I note that it is difficult to determine from the reference to accepting "mental health issues" whether the officer accepted Dr. Agarwal's diagnoses of PTSD and MDD. Given that these are the mental health issues identified in the report, the officer presumably accepts the diagnosis. It is also difficult to understand what "other conclusions" contained in Dr. Agarwal's report were assigned "only some value." Indeed, it is difficult to tell from the reasons whether the officer accepted Ms. Jackson's narrative of having been attacked by her former partner in St. Vincent. The officer refers to Dr. Agarwal not having witnessed the events in St. Vincent, a

peculiar observation, as Dr. Agarwal was not put forward as an eyewitness but as a medical professional. She did not have to be an eyewitness for her assessment of Ms. Jackson to have value: *Kanthisamy* at para 49. I agree with the Minister that the officer clearly expressed concerns generally about the lack of supporting evidence in Ms. Jackson's H&C application. However, if the officer did not accept the narrative account of the attack in St. Vincent, a central element of the H&C application, it was incumbent upon them to say so. A review of the officer's discussion of the psychiatric report therefore provides no explanation as to why they did not address the impact on the children of their mother returning to the site of her earlier trauma.

[33] The second significant flaw in the officer's reasons regarding the BIOC is in their inconsistent approach to the interests of a child having their mother physically present in the alternate scenario in which Ms. Jackson returned to St. Vincent alone while the three Canadian children remained in Canada with their father. In addressing Ms. Jackson's fourth child in St. Vincent, the officer noted that if Ms. Jackson returned there, "she could provide in-person support to her now adult child," such that it was overall in that child's best interests that his mother return to St. Vincent.

[34] However, in addressing the interests of the three Canadian children in having Ms. Jackson in Canada, the officer was much quicker to discount the importance of her physical presence. The officer disagreed with the assessment that "the children's wellbeing or development would be greatly impacted for the negative as a result of their mother's physical absence." While accepting, somewhat inconsistently, that the children would be "negatively impacted emotionally by the applicant's lack of physical presence," the officer considered the

harms would be mitigated by the children being in contact with their mother through the internet or telephone, having access to Canadian education, housing, and health care, and having a father who is able to provide for them emotionally and financially.

[35] I do not accept Ms. Jackson’s argument that the officer decided that the best interests of the fourth child in St. Vincent “trumped” those of the three younger Canadian children. I also appreciate the officer’s observation regarding the lack of information about the level of care provided by Ms. Jackson, although it was also clear that Ms. Jackson had no ongoing role in the care of her fourth child in St. Vincent. Nonetheless, even in the absence of particular information, the officer appears to have adopted, without explanation, an approach to the importance of Ms. Jackson’s physical presence that accepted its value to her fourth child, while discounting it in relation to her younger children. Given the importance of the BIOC in the H&C analysis, I conclude that this internal incoherence, combined with the failure to address a significant BIOC factor raised in the H&C application, renders the decision unreasonable: *Vavilov* at paras 85, 102–104.

[36] Since I have concluded that the officer’s BIOC analysis is such that the decision must be set aside, I need not address Ms. Jackson’s other grounds of argument.

V. Conclusion

[37] The application for judicial review is granted. The decision of the officer dated December 24, 2019 refusing Ms. Jackson’s H&C application is set aside, and the application is remitted for redetermination by another officer.

[38] Neither party proposed a question for certification, and I agree that none arises in the matter.

JUDGMENT IN IMM-390-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted. The refusal of Fay-Ann Vedan Jackson's application for relief on humanitarian and compassionate grounds, dated December 24, 2019, is set aside and the application is remitted for redetermination by another officer.

“Nicholas McHaffie”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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