Federal Court  Cour fédérale

Date: 20220831

Docket: IMM-1904-20

Citation: 2022 FC 662

Ottawa, Ontario, August 31, 2022

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

RAIHAN HALIMI
POORAN HALIMI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AMENDED JUDGMENT AND REASONS

I. Overview

[1] The Applicants are sisters and citizens of Afghanistan. They fear gender-based persecution and seek permanent residence in Canada on the basis of humanitarian and compassionate [H&C] considerations. A Migration Officer [Officer] rejected their claims. They now seek judicial review of the Officer's decisions.

[2] There is no dispute that the overarching issue for determination in this matter is whether the Officer's decisions were reasonable. The presumptive standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10. I find that none of the situations rebutting such presumption is present here.

[3] To avoid judicial intervention, the decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility: *Vavilov*, at para 99. A decision may be unreasonable if the decision maker misapprehended the evidence before it or did not meaningfully account for or grapple with central or key issues and arguments raised by the parties: *Vavilov*, at paras 125-127. The party challenging a decision has the onus of demonstrating that the decision is unreasonable: *Vavilov*, at para 100.

[4] I find that the Applicants have satisfied their onus in the circumstances. For the reasons that follow, I therefore grant this application for judicial review.

II. Background

[5] The Applicants studied medicine in Russia but they now reside in Afghanistan.

[6] The Applicants' father is the founder and operator of a non-governmental organization [NGO] and a construction company that worked with several international organisations on various foreign-funded projects. The projects were all conceived by NATO, its affiliates, foreign aid organisations or the Afghan government.

[7] In March 2014, the Applicants' father began to receive threats from the Taliban. Starting June 2015, the Taliban demanded significant monetary payments as a fine. The Applicants' father also received several other threat letters in which he was accused of assisting foreigners and working against Islam principles. Unable to secure any long-term support from the police, the Applicants' father left the country in December 2015.

[8] In January 2016, the Applicants' father learned that armed men forced their way into the family home in Afghanistan. They were looking for him, and threatened to kill his family should he not be apprehended. Following this event, the Applicants' father asked his family to relocate to another city.

[9] The Applicants' father eventually arrived in Toronto in February 2016. He subsequently filed for refugee protection and was granted refugee status in January 2017. He also submitted an application for permanent resident [PR] status for him and his dependents outside Canada, namely his spouse and seven children including the Applicants.

[10] At the time of their father's application, the Applicants were in their mid-twenties and still studying in Russia. They graduated in June 2018 and attended classes to prepare for entrance examinations in Afghanistan. Their parents covered all educational and other expenses. The Applicants also actively volunteered in support of the rights of women and children in Afghanistan through a local organization called Voice of Women Organization.

[11] In February 2019, the Officer issued a procedural fairness letter [PFL] alerting the Applicants' father that the Applicants were not eligible as dependent children because they were above the dependency age of 19 years in effect when the PR application was filed (i.e. between August 1, 2014 and October 24, 2017).

[12] In April 2019, the Applicants' counsel responded to the PFL with written submissions and documents supporting a request for H&C relief in their case pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. (See Annex "A" below for relevant provisions.) The Officer's nearly identical decisions issued on January 15, 2020 [Decisions] and concluded that H&C considerations do not justify granting them an exemption from any applicable criteria or obligation of the *IRPA*.

III. Analysis

[13] I find the determinative issue in this matter is the unreasonableness of the Officer's decision to reject the Applicants' H&C application based on a failure to analyze the risk these Applicants would face in Afghanistan as a result of separation from their family.

[14] The Applicants recognize in their submissions that they are not eligible as dependent children within the meaning of "family member," as defined in subsection 1(3) and referred to in section 176, of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ~~pursuant to section 116 and paragraph 117(1)(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, and subsection 12(1) of the *IRPA*~~. They filed an H&C application to be exempted from the requirements of these sections.

[15] I find that the Applicants' attempt at the hearing of this matter to revisit the issue of whether they are "dependent children" (as defined in the *IRPA* s 2) by relying on the Court's decision in *Mukilankoy v Canada (Citizenship and Immigration)*, 2017 FC 161 [*Mukilankoy*] is misplaced. The Court's comment (at para 43) that "[a]ny evidence proving that the applicant for a permanent residence visa is not independent even though he or she is over 19 years of age thus deserves special attention," must be viewed in context.

[16] In the previous sentence of that same paragraph 43 of the *Mukilankoy* decision, the Court specifically draws attention to the exemption to the age exclusion of the definition, namely, that the person, even though older than 19, is not independent because of a financial dependency related to a physical or mental condition. In the very next paragraph, the Court finds the decision maker failed to consider the reason why the applicants in that case were not entirely autonomous, that is the socioemotional scars of their unstable childhood.

[17] Although the Applicants' evidence points to continued financial dependence on their parents, I find there is no evidence here that the Applicants themselves suffer from a physical or mental condition (as opposed to societal norms or constraints) that prevents them from being financially autonomous. More to the point, I am not persuaded the Officer's conclusion that the Applicants did not establish dependency on their family, apart from potential financial dependency, in itself, was unreasonable in the circumstances.

[18] That said, I am of the view that the Officer failed to analyze the risk to the sisters of remaining in Afghanistan alone, if the rest of the family immigrates to Canada. The Applicants

explained in their submissions in response to the PFL that, pursuant to the evidence submitted, the "life, liberty and security of the two sisters would be at serious risk, should they be left behind as unprotected young unmarried women in Afghanistan." The Officer failed to analyse or even mention this in the Decisions.

[19] I am mindful that while country conditions in Afghanistan have changed with the overthrow of the Afghan government in August 2021 by the Taliban who have resumed control of the country, the Court must review the reasonableness of the Decisions through the lens of the conditions in evidence at the time the Decisions issued on January 15, 2020.

[20] As of the date of the Decisions, the Officer recognizes at the outset "that Afghanistan is a country with systemic violations of human rights and a lack of gender equality." In addition, the objective documentation submitted by the Applicants emphasizes the risk faced by women in Afghanistan without male support. Women who are perceived as transgressing social norms experience social stigma, general discrimination and threats to safety. Although the Applicants studied in medicine and continue to pursue qualifications in their chosen field, the objective evidence indicates that working could pose a danger if the Applicants were living alone. The Decisions do not address this.

[21] Instead, notwithstanding the Officer's recognition of human rights violations and lack of gender equality in Afghanistan, the Officer refers to the fact that the Applicants were able to live abroad apart of their family for extended periods, that is without the direct protection of their father. The fact that they did so successfully outside Afghanistan, is not indicative in my view of

whether they could do so inside the country. I find the Officer unduly focusses and relies on the Applicants' past lived experiences abroad, rather than taking into account the objective documentation, to analyze their future, potentially vulnerable situation should they be separated from their family. In short, comparing their future situation as women alone without support in Afghanistan to their situation while studying in Russia is unreasonable and warrants the Court's intervention.

IV. Conclusion

[22] For the above reasons, I therefore grant the Applicants' judicial review application. The Decisions are set aside and the matter will be remitted for redetermination by a different officer or decision maker.

[23] Neither the Applicants nor the Respondent proposed a question for certification, and I find that none arises in the circumstances.

JUDGMENT in IMM-1904-20

THIS COURT'S JUDGMENT is that:

1. The Applicants' application for judicial review is granted.
2. The Decisions dated January 15, 2020 are set aside and the matter is to be remitted to a different migration officer or decision maker for redetermination.
3. There is no question for certification.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**
***Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27**
Version of document from/Version du document du 2015-07-01 to 2017-06-18

Selection of Permanent Residents **Family reunification**	**Sélection des résidents permanents** **Regroupement familial**
12 (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.	**12 (1)** La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.
Status and Authorization to Enter **Humanitarian and compassionate considerations — request of foreign national**	**Statut et autorisation d'entrer** **Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	**25 (1)** Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

***Immigration and Refugee Protection Regulations,* SOR/2002-227**
***Règlement sur l'immigration et la protection des réfugiés,* DORS/2002-227**
Version of document from/Version du document du 2016-12-16 to 2017-03-09

Definitions **Definition of *family member*** **1 (3)** For the purposes of the Act, other than section 12 and paragraph 38(2)(d), and for the purposes of these Regulations, other than paragraph 7.1(3)(a) and sections 159.1 and 159.5, ***family member*** in respect of a person means **(a)** the spouse or common-law partner of the person; **(b)** a dependent child of the person or of the person's spouse or common-law partner; and **(c)** a dependent child of a dependent child referred to in paragraph (b).	**Définitions** **Définition de *membre de la famille*** **1 (3)** Pour l'application de la Loi — exception faite de l'article 12 et de l'alinéa 38(2)d) — et du présent règlement — exception faite de l'alinéa 7.1(3)a) et des articles 159.1 et 159.5 —, ***membre de la famille***, à l'égard d'une personne, s'entend de : **a)** son époux ou conjoint de fait; **b)** tout enfant qui est à sa charge ou à la charge de son époux ou conjoint de fait; **c)** l'enfant à charge d'un enfant à charge visé à l'alinéa b).
Interpretation and Application **Interpretation** **2** The definitions in this section apply in these Regulations. **dependent child**, in respect of a parent, means a child who **(a)** has one of the following relationships with the parent, namely, **(i)** is the biological child of the parent, if the child has not been adopted by a person other than the spouse or common-law partner of the parent, or **(ii)** is the adopted child of the parent; and **(b)** is in one of the following situations of dependency, namely, **(i)** is less than 19 years of age and is not a spouse or common-law partner, or **(ii)** is 19 years of age or older and has depended substantially on the financial support of the parent since before the age of 19 and is unable to be	**Définitions et champ d'application** **Définitions et interprétation** **2** Les définitions qui suivent s'appliquent au présent règlement. **enfant à charge** L'enfant qui : **a)** d'une part, par rapport à l'un de ses parents : **(i)** soit en est l'enfant biologique et n'a pas été adopté par une personne autre que son époux ou conjoint de fait, **(ii)** soit en est l'enfant adoptif; **b)** d'autre part, remplit l'une des conditions suivantes : **(i)** il est âgé de moins de dix-neuf ans et n'est pas un époux ou conjoint de fait, **(ii)** il est âgé de dix-neuf ans ou plus et n'a pas cessé de dépendre, pour l'essentiel, du soutien financier de l'un ou l'autre de ses parents depuis le

financially self-supporting due to a physical or mental condition. (enfant à charge)	moment où il a atteint l'âge de dix-neuf ans, et ne peut subvenir à ses besoins du fait de son état physique ou mental. (dependant child)
Protected Persons — Permanent Residence **Family members** **176 (1)** An applicant may include in their application to remain in Canada as a permanent resident any of their family members.	**Personne protégée : résidence permanente** **Membre de la famille** **176 (1)** La demande de séjour au Canada à titre de résident permanent peut viser, outre le demandeur, tout membre de sa famille.
~~**Family Classes**~~ ~~**Family class**~~ ~~**116** For the purposes of subsection 12(1) of the Act, the family class is hereby prescribed as a class of persons who may become permanent residents on the basis of the requirements of this Division.~~ ~~**Member**~~ ~~**117 (1)** A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is~~ ~~…~~ ~~**(b)** a dependent child of the sponsor;~~ ~~…~~	~~**Regroupements familiaux**~~ ~~**Catégorie**~~ ~~**116** Pour l'application du paragraphe 12(1) de la Loi, la catégorie du regroupement familial est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents sur le fondement des exigences prévues à la présente section.~~ ~~**Regroupement familial**~~ ~~**117 (1)** Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants :~~ ~~…~~ ~~**b)** ses enfants à charge;~~ ~~…~~

FEDERAL COURT

SOLICITORS OF RECORD

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