Federal Court  Cour fédérale

Date: 20220607

Docket: IMM-892-21

Citation: 2022 FC 839

Ottawa, Ontario, June 7, 2022

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

SARATH BABU MARADANI,
SARAH SUCHARITHA MARADANI AND
SHALLOM SOLOMON MARADANI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The Applicants seek judicial review of a January 26, 2021 decision of a senior immigration officer [Officer] denying Sarath Babu Maradani's application for permanent residence on humanitarian and compassionate [H&C] grounds [Decision]. Mr. Maradani is the principal applicant in this application [Principal Applicant or PA]. The other Applicants are the

PA's wife, Sarah, and their minor son [Minor Applicant], who were included as dependents on the PA's H&C application. Pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], the Officer concluded that there were insufficient H&C grounds to warrant an exemption from the normal permanent residency requirements.

[2] The application for judicial review is dismissed.

II. Background

[3] The Applicants are citizens of India. By the time the PA was 23 years-old, both of his parents had passed away. He was financially and emotionally dependent on his older sister, Suneetha, who immigrated to Canada and eventually became a Canadian citizen. While in Canada, Suneetha continued to support the PA. The PA had no other immediate family members in India. Suneetha and her husband are teachers in Toronto and they have an adult son.

[4] The Applicants came to Canada for the first time to visit Suneetha on May 27, 2015. When the Applicants left India, the Minor Applicant was 4 years-old. He is being home schooled by Suneetha and her husband because he cannot enroll in elementary school. The Minor Applicant only speaks English. Sarah's son from a previous marriage also came with the Applicants to Canada but he returned to India to live with his biological father on June 24, 2017.

[5] The PA returned to India alone and re-entered Canada on December 24, 2015. The Applicants have continuously been in Canada since that time and have maintained their status as visitors. At the time of the Decision, the Applicants were authorized to stay in Canada until July

16, 2021. The PA applied three times for a study permit but was refused on December 17, 2015, April 6, 2016, and June 5, 2017.

[6] The Applicants have always stayed with Suneetha and her husband. The Applicants work various jobs to make petty cash and when such jobs are unavailable, they help with housekeeping and cooking for Suneetha's family. The Applicants also rely on rental income from properties they own in India.

[7] The Applicants submitted their first H&C application on February 15, 2018, which was refused on May 29, 2019. They submitted their second H&C application [Application] on September 10, 2019, which is the subject of this judicial review.

[8] In their Application, the Applicants raised three H&C factors: establishment, the best interests of the child [BIOC], and adverse country conditions. The Application set out the following: the PA required an H&C exemption because his English test scores were not high enough to immigrate to Canada through different means; the Applicants have a high degree of establishment in Canada because they regularly attend church and are involved in the community and because Suneetha resides in Toronto; the BIOC weigh in favour of granting the application because the Minor Applicant has lived in Canada most of his life, only understands English, is attached to Suneetha and her family, and would have difficulty adjusting to the weather in India; and the Applicants would face adverse country conditions in India as Christians.

III. The Decision

[9] The Officer gave some weight to the Applicants' establishment, noting their family and friends in Canada and their attendance at church. However, the Officer found that the Applicants failed to demonstrate a sufficient level of establishment in Canada to justify granting H&C relief. The Officer noted that all the Applicants were born in India. Further, the adult Applicants resided there most of their lives, were educated there, and speak one of the country's native languages. Sarah also has immediate family in India, including an adult son and sister, and there was little information that they would be unwilling to offer support. Ultimately, the Officer concluded that the Applicants would most likely be able to re-establish themselves in India.

[10] The Officer also concluded that the Applicants failed to demonstrate that they may personally experience discrimination and persecution in India based on their Christian religion. The Officer noted that the US Department of State 2019 Report on International Religious Freedom for India [2019 Report] states that India is a democracy and that religious minorities have various legal rights. The Officer recognized that the same report also reported 527 incidents of Christian persecution that year. Another report noted that societal violence based on religion continue to be of serious concern, especially for Muslims and lower castes. The Officer found that there was "insufficient evidence to establish a serious possibility of suffering discrimination and/or personal hardships of returning to India based on their religious beliefs and practices."

[11] Finally, the Officer found that if returned to India, the Minor Applicant may face some emotional hardship, but overall the Minor Applicant's best interests would not be negatively impacted because:

a) He can maintain his relationship with Suneetha's family through phone, mail, internet, or visits;
b) There was no evidence that he would be unable to continue his education in India;
c) Although there will be an initial period of discomfort, he will likely reacquire his native language, Hindi, and re-integrate into India successfully;
d) He was not familiar with the language, culture, and societal norms of Canada when he first arrived. Accordingly, he has demonstrated that he will adapt, adjust, and thrive in India;
e) The adult Applicants have provided a loving, secure, and healthy environment for him and he will continue to have their support and encouragement in India;
f) His best interests and basic needs will be met regardless of what country he is in because he will be with his parents, enjoying their love and guidance.

[12] After assessing the H&C Application globally, the Officer concluded that there were insufficient H&C factors to justify an exemption.

IV. Issues and Standard of Review

[13] The parties agree that the sole issue in this matter is whether the Decision is reasonable. The sub-issues are:

1. Did the Officer reasonably assess hardship based on religious identity?
2. Did the Officer reasonably assess the BIOC?

[14] I agree with the parties that the appropriate standard of review for both sub-issues is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16-17, 23-25 [*Vavilov*]). None of the exceptions set out in *Vavilov* are engaged in this matter. H&C exemption decisions are "exceptional and highly discretionary, warranting significant deference to the deciding officer" (*Alghanem v Canada (Citizenship and Immigration)*, 2021 FC 1137 at para 20 citing *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).

[15] In assessing the reasonableness of a decision, the Court must consider both the outcome and the underlying rationale to assess whether the "decision as a whole is transparent, intelligible and justified" (*Vavilov* at para 15). For a decision to be reasonable, a decision-maker must adequately account for the evidence before it and be responsive to the Applicant's submissions (*Vavilov* at paras 89-96, 125-128). A decision will be unreasonable if it contains flaws that are sufficiently central or significant (*Vavilov* at para 100). A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125).

V. Analysis

A. *Did the Officer reasonably assess hardship based on religious identity?*

(1) Applicants' Position

[16] The Officer erred by requiring personalized evidence that the Applicants have previously suffered hardship in India due to their religion. Hardship may arise from generalized country conditions if such conditions have a direct negative impact on the applicant (*Caliskan v Canada (Citizenship and Immigration)*, 2012 FC 1190 at para 26 [*Caliskan*]). The general country condition evidence establishes that in India, the Applicants will experience a direct negative impact as Christians despite not having personal evidence of past hardship (*Aboubacar v Canada (Citizenship and Immigration)*, 2014 FC 714 at paras 10-12).

(2) Respondent's Position

[17] The Officer reasonably found the Applicants' assertions general and unsupported by evidence. The Applicants simply failed to show that the country conditions "have a direct negative impact on the applicant[s]", as required by *Caliskan* (at para 39. See also *Lee v Canada (Citizenship and Immigration)*, 2020 FC 504 at paras 17, 78-79, 82 [*Lee*]; *Paramanayagam v Canada (Citizenship and Immigration)*, 2015 FC 1417 at paras 19-21; *Vuktilaj v Canada (Citizenship and Immigration)*, 2014 FC 188 at para 36). It was open to the Officer to require something beyond general adverse conditions to show "a direct negative impact."

[18] The objective evidence supports the Officer's decision to give the Applicants' submission about religious hardship little weight. The Applicants failed to show that they were similarly situated to the persons referred to in the evidence.

(3) Conclusion

[19] It is helpful to begin by briefly outlining some of the general principles applicable to H&C exemptions.

[20] Under subsection 25(1) of the *IRPA* "there will sometimes be humanitarian or compassionate reasons for admitting people who, under the general rule, are inadmissible" (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 12-13 [*Kanthasamy*]). Subsection 25(1) is not intended to be an alternative immigration scheme nor is it intended to duplicate refugee proceedings (*Kanthasamy* at paras 23-24).

[21] What warrants relief depends on the facts and context of each case. In every case, the Applicant has the onus of establishing that an H&C exemption is warranted (*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 45). Whether there are "sufficient grounds to justify granting [an H&C] application under s. 25(1), is done by an assessment of hardship" (*Kanthasamy* at para 22). The Ministerial Guidelines set out a non-exhaustive list of factors that may be relevant in assessing whether applicants will face hardship. The factors relevant to this matter include the "the best interests of any children affected by their application" and "adverse country conditions that have a direct negative impact on the applicant" (*Kanthasamy* at paras 27, 55). The BIOC assessment calls for a unique analysis that is distinguishable from the "unusual and undeserved or disproportionate hardship" analysis. The proper approach to assessing the BIOC is discussed in more detail below.

[22] With these principles in mind, I will now turn to the Officer's hardship analysis.

[23] I find that the Officer's analysis in respect of the Applicants' religious identity is reasonable. In *Kanthasamy*, the Supreme Court of Canada held that applicants must show that they will "likely be affected by adverse conditions." At paragraph 56 of *Kanthasamy*, the Supreme Court stated:

> As the [Guidelines] suggest, applicants need only show that they would likely be affected by adverse conditions such as discrimination. Evidence of discrimination experienced by others who share the applicant's identity is therefore clearly relevant under s. 25(1), whether or not the applicant has evidence of being personally targeted, and reasonable inferences can be drawn from those experiences.
>
> [Emphasis added.]

[24] Thus, the Officer was entitled to consider the experiences of other people who share the Applicants' identity when engaging in a hardship analysis. With respect to this point, the Supreme Court cited *Aboubacar* with approval (*Kanthasamy* at para 56), where Justice Rennie stated at paragraph 12:

> While claims for humanitarian and compassionate relief under section 25 must be supported by evidence, there are circumstances where the conditions in the country of origin are such that they support a reasoned inference as to the challenges a particular applicant would face on return .... This is not speculation, rather it is a reasoned inference, of a non-speculative nature, as to the hardship an individual would face, and thus provides an evidentiary foundation for a meaningful, individualized analysis ....

[25] In sum, an officer cannot demand direct evidence that an applicant has or would face discrimination (*Kanthasamy* at para 54). Therefore, an officer may look to experiences of other people who share an applicant's identity and make a "reasoned" inference that the Applicant will likely face discrimination as well. However, an applicant still has the burden of providing the

foundation for this inference. In other words, as directed by the Supreme Court, an applicant must still provide evidence that they themselves are likely to face discrimination.

[26] In *Aboubacar*, Justice Rennie took issue with the fact that an officer considered multiple facts adversely affecting the general population of Niger and then concluded that those conditions would not likely affect the applicant:

> Here, the officer noted that Niger was the poorest country on earth, had the second highest global infant mortality rate, that 8% of its population is enslaved, and that internal war had displaced 200,000 people. The officer noted that Niger was in the grip of a longstanding drought that was endangering the livelihood of the 80% of the population that was entirely dependent on agriculture. After reciting these facts, the officer concluded: "I find there is insufficient evidence before me that the applicant would be personally affected by these country conditions. Although I recognize that the conditions in Niger are not favourable, they are a common harm that affects the general population" (at para 10).

[27] In *Aboubacar*, there was sufficient grounds to make a reasoned inference that the applicant himself would likely face discrimination. I agree with the Respondent that the facts in the present matter are distinguishable from *Aboubacar*. In this matter, the Officer reviewed the country condition evidence and noted that religious minorities are guaranteed various legal protections in India. The Officer found that religiously motivated violence is a “serious concern” but that “Muslims and lower-caste Dalit groups [are] most vulnerable.” The Officer also acknowledged that in one year there were 527 incidents of persecution against Christians. In light of the population size of India, it was reasonable for the Officer to require more evidence before making a “reasonable” or “reasoned” inference (*Aboubacar* at para 12) that the Applicants would likely be affected by discrimination on account of their Christianity. The Officer’s hardship analysis begins by reviewing the general country condition evidence. After

reviewing the general evidence, the Officer concludes that the Applicants' assertions that they "may personally experience discrimination" are "general and unsupported by the evidence." This is not an error. As already explained above, the discrimination that applicants allege they will face must likely affect them personally.

[28] Only after assessing the general evidence does the Officer state: "[l]ittle information or details are in the submissions to indicate that the Applicant and his family experienced threats, harassment and/or violence while they were in India based on their Christian beliefs and practices." Later, the Officer similarly writes, "the Applicant has provided little information and objective documentation to describe specific experiences or examples of persecution or discrimination that he, his family or someone in a similar circumstance as them, have endured in India." If the Officer had reached these conclusions without first considering the general country condition evidence, the decision would be unreasonable. However, when read in their proper contexts, neither of these statements reveal that the Officer required personalized evidence. The Officer first asked whether there was sufficient general evidence to establish that the Applicants would likely be affected by discrimination. After finding that there was insufficient general evidence the Officer then considered if there was any personalized evidence of past discrimination. In my view, such an approach does not demonstrate that the Officer required personalized evidence. The Officer was merely conducting a fulsome analysis.

B. *Did the Officer reasonably assess the BIOC?*

(1) Applicants' Position

[29] The Officer's BIOC assessment is unreasonable for at least three reasons. First, the Officer failed to truly engage with the Minor Applicant's best interests by concluding that his best interests would be served if he remained with his parents regardless of what country they are in. The Officer erred because they failed to state a conclusion about whether it is in the Minor Applicant's best interests to stay in or leave Canada depending upon the removal of his parents, which is the essence of the BIOC test (*Joseph v Canada (Citizenship and Immigration)*, 2013 FC 993 at paras 15, 17, 20 [*Joseph*]).

[30] Second, the Officer acknowledged that the Minor Applicant would face hardship but discounted this hardship because he previously demonstrated adaptability when he first came to Canada. Undertaking an analysis within this framework renders the BIOC analysis devoid of any substance (*Bautista v Canada (Citizenship and Immigration)*, 2014 FC 1008 at paras 23, 28 [*Bautista*]). The Applicants in this matter explained that the Minor Applicant would face various hardships, including having to relearn Hindi.

[31] Finally, the Officer erred in taking a 'basic needs' approach when assessing the Minor Applicant's best interests (*Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 at paras 64-65 [*Williams*]). The Officer acknowledged that the Minor Applicant's studies in Canada would be disrupted and that he would experience hardship as a result. The Officer went on to discount this BIOC factor because there was no information that the Minor Applicant could not continue studying in India. The Officer effectively finds that the BIOC will be addressed as long as the Minor Applicant can attend school and is not denied rights – regardless of the nature, quality, and extent of such protection. In doing so, the Officer imposed a very high threshold,

which is reminiscent of the “disproportionate hardship” or “basic needs” test that this Court has rejected.

(2) Respondent’s Position

[32] The Officer’s BIOC analysis was reasonable. The Officer did not assess the Minor Applicant’s best interests solely on the basis that he would remain with his parents. Rather, the Officer considered this fact alongside other findings, including the Minor Applicant’s adaptability, ability to study in India, and his ability to reacquire language skills.

[33] It was reasonable for the Officer to rely on these findings, particularly in light of the limited submissions made by the Applicants on this issue (*De Sousa v Canada (Citizenship and Immigration)*, 2019 FC 818 at para 38; *Edo-Osagie v Canada (Citizenship and Immigration)*, 2017 FC 1084 at para 29 [*Edo-Osagie*]). A minor applicant’s ability to readapt does not render the BIOC analysis devoid of substance (*Edo-Osagie* at paras 27-28). Likewise, “the fact that the children have the benefit of loving and involved parents is a relevant consideration” and is “not merely ‘stating the obvious’” (*Ahmed v Canada (Citizenship and Immigration)*, 2020 FC 777 at para 26 [*Ahmed*]).

[34] The Officer also did not restrict their analysis to whether the Minor Applicant’s “basic needs” would be met. The Officer did not solely focus on whether the Minor Applicant could attend school. Rather, the Officer considered relevant factors such as the opportunity to continue his education, readapt to the culture and language in the country where he had been born, and remain in the care and protection of his parents. When considered as a whole, the Officer

reasonably found that the Minor Applicant's best interests would be met in India (*Ahmed* at para 28; *Lee* at paras 50-51).

(3) Conclusion

[35] The BIOC principle is highly contextual and should be applied in a manner responsive to the particular child and their circumstances (*Kanthasamy* at para 35). Although the BIOC is a significant factor and should be afforded substantial weight, it is not necessarily determinative (*Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at paras 2, 8 [*Hawthorne*]).

[36] I find the Officer's BIOC assessment reasonable for the following reasons. First, I agree with the Respondent that the Officer did not assess the BIOC on the sole basis that the Minor Applicant would remain with his parents. Provided that it is not the extent of the analysis, an H&C decision is not unreasonable simply because the officer expressly states that it is in a child's best interest to remain with their parents (*Mebrahtom v Canada (Citizenship and Immigration)*, 2020 FC 821 at para 16 [*Mebrahtom*]. In comparison, in *Joseph*, the Officer simply concluded:

> While I am alive, alert and sensitive to the best interest of the children, I believe that the best interest for the children is to remain with their primary caregiver. We do have many social mediums available with today's technology for the children to continue their contact and relationship with their family and friends. I am not satisfied than an exemption is justified in this case.
>
> [Emphasis added by the Court in *Joseph* at para 16.]

[37] In *Joseph*, the Officer departed from the implicit presumption that it is in a child's best interest to stay with their parents in Canada without any analysis (*Joseph* at paras 21-22 citing *Hawthorne* at paras 5-6). The Officer failed to differentiate between the outcomes the child would experience if they were removed or remained in Canada (at para 20). This is unlike the present matter.

[38] Here, the Officer did not explicitly identify the Minor Applicant's best interest (see *Williams* at para 63). However, the reasons make it clear that the Officer accepted that it was in the Minor Applicants best interests to stay in Canada with his parents. The Federal Court of Appeal has referred to this as an "implicit premise" "which need not be stated in the reasons" (*Hawthorne* at para 5).

[39] The Officer then proceeded to assess "the situation the [Minor Applicant] would face in [India], how that would compare to the family remaining in Canada, and the resulting impact on the [Minor Applicant]" (*Mebrahtom* at para 16). The Officer considered and weighed the negative impacts the Minor Applicant would face due to separation from his Canadian relatives, disruption to his education, and the fact that he only speaks English. The Officer took into account that the Minor Applicant could maintain contact with his relatives, continue his education in India, re-learn Hindi, and continue to have the love and support of his parents in India. This is unlike *Joseph*, where no analysis took place and the officer failed to differentiate between the outcomes the child would face if removed from Canada or not.

[40] Second, I disagree with the Applicants that the Decision is unreasonable because the Officer noted the Minor Applicant's resiliency and adaptability. I disagree that the Officer started from or based their entire analysis on this point. The Officer noted the Minor Applicant's adaptability in the context of responding to the Applicants' submissions about language barriers.

[41] Furthermore, in noting that the Minor Applicant is adaptable, the Officer relied on the fact that, at the time of the application, the Minor Applicant had lived in India for half his life and when he came to Canada, he successfully learned a new language and culture. This is unlike the facts in *Bautista* where the child was born in Canada; had spent her entire life (12 years) in Canada; and had only ever attended school in Canada. Furthermore, the Court in *Bautista* noted that the child's mother had no ties or income stream in her home country, which is unlike the present matter (at para 21).

[42] Most importantly, in *Bautista*, there was "significant evidence upon which the Officer could and should have focused in considering BIOC" (at para 19). Here, the Officer noted that "there are few details in the submissions regarding [the Minor Applicant's] current circumstances." Regarding education, the Officer noted that there was no "[d]ocumentation with regards to [the Minor Applicant's] education" and that there was little in the Applicants' submissions about education in India. The Applicants' BIOC submissions consisted of passages from relevant case law and a bullet point list that can be boiled down to the following facts: the Minor Applicant has lived in Canada most of his life; only understands English; is attached to his aunt, uncle, and cousin; and would have difficulty adjusting to the weather in India.

[43] I find this case more analogous to *Edo-Osagie*. As recognized by the Applicants, the Court in that case emphasized that the applicants did not provide evidence on the "difficulties the children might face in adapting to a new culture" (at para 29). The Court went on to say that the record "contains little information about the family's background, language and cultural skills, knowledge of Nigeria or time spent in Italy" (at para 29). The Applicants submit that in comparison, they explained that the Minor Applicant could not speak Hindi. For the reasons already discussed above, I find that the Officer was "alert, alive and sensitive" to this submission (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75, 174 DLR (4th) 193). The Officer was required to consider "the real-life impact of the decision on the best interests of the children" (*Ahmed* at para 27). The Officer did so and reasonably concluded that the Minor Applicant would be able to relearn Hindi.

[44] Finally, I disagree with the Applicants that the Officer took a 'basic needs' approach when assessing the BIOC. In *Williams*, Justice Russell explained this error at paragraphs 64 and 65:

> There is no basic needs minimum which if "met" satisfies the best interest test. Furthermore, there is no hardship threshold, such that if the circumstances of the child reach a certain point on that hardship scale only *then* will a child's best interests be so significantly "negatively impacted" as to warrant positive consideration. The question is <u>*not*</u>: "is the child suffering enough that his "best interests" are not being "met"? The question at the initial stage of the assessment is: "what is in the child's best interests?"
>
> For example, officers should not discontinue their consideration of what is in a child's best interests after determining that the child is not being beaten or malnourished, or, as in the present decision, is not being outright denied medical care. In order to be properly "alert, alive and sensitive to" a child's best interest, the task that is specifically before an officer is to have regard to the child's

> circumstances, from the child's perspective, and then determined what is in his best interest.
>
> [Emphasis in original.]

[45] In the present matter, the Officer did not find that an education in India would satisfy the Minor Applicant's basic needs. Nor did the Officer discontinue the BIOC analysis having found that the Minor Applicant would likely be able to pursue an education in India. The Officer considered the educational opportunities in India because the Applicants raised the fact that the Minor Applicant was being home-schooled by his aunt and uncle. Furthermore, while the Officer uses the language "best interests and basic needs" towards the end of the Decision, it is not in relation to the Minor Applicant's education, which the Officer analyzes earlier. Despite the use of this language, the substance of the Decision reveals that the Officer undertook the appropriate BIOC analysis (*Lee* at paras 50-51). The Officer assessed other factors in addition to the Minor Applicant's education, including his separation to his Canadian relatives, ability to readapt to the culture and language in his country of origin, and the fact that he would remain in the care and protection of his parents. Contrary to the Applicants' submission, this was a fulsome BIOC analysis and the principles articulated in *Ahmed* are applicable. That is, the fact that the Minor Applicant may access education in India is relevant to the BIOC analysis and does not necessarily mean that the Officer took a 'basic needs approach' (*Ahmed* at para 28).

[46] For all of these reasons, I find that the Officer's BIOC analysis was reasonable.

VI. Conclusion

[47] The application for judicial review is dismissed. The parties do not propose a question for certification and I agree that none arises.

JUDGMENT in IMM-892-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question of general importance for certification.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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