Federal Court  Cour fédérale

Date: 20220627

Docket: IMM-4206-20

Citation: 2022 FC 961

Ottawa, Ontario, June 27, 2022

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

HEERA LAL KASHYAP

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant seeks judicial review of a decision dated August 27, 2020 [Decision] rendered by a Senior Immigration Officer with Citizenship and Immigration Canada [Officer], denying his application for permanent residency on humanitarian and compassionate [H&C] grounds, pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001 c

27 [*Act*]. I agree that the Decision was unreasonable, and as a result, I will grant the application and return the matter to a new decision-maker for reconsideration.

II. Background

[2] The Applicant is a 41-year-old male citizen of India. He entered Canada on September 1, 2018 on a visitor visa to visit his ailing father and subsequently extended his visitor status. He subsequently sought to relocate permanently after finding that his father's medical condition had worsened. The evidence on record indicates his father is severely ill and has been diagnosed with chronic conditions affecting both his physical health – including kidney disease necessitating triweekly hemodialysis, care with respect to his colostomy, and general assistance resulting from a recent heart attack – along with mental health concerns for which he is under the care of a psychiatrist, who has him taking various prescriptions to manage his depression and related mental health conditions.

[3] In January 2019, several months after the Applicant's entry in Canada, his father suffered a severe heart attack, which exacerbated his already poor overall health condition. The Applicant dedicated himself to taking care of his father, who requires considerable assistance throughout the day and night particularly after the heart attack, including getting him to his medical appointments, and assisting with basic daily care like getting him dressed and changing his colostomy bag.

[4] Now 66 years of age (64 at the time of the Decision), the Applicant's father is a Canadian citizen who left India in 1993, was granted refugee protection in 1994, and Canadian citizenship

in 1999. At the time of his refugee claim and permanent residence application, he made the decision, which he now regrets, to not disclose that he was married or had children, allegedly having acted on improper advice. Subsequently, he made three unsuccessful applications to sponsor his spouse and children, including the Applicant, for permanent residence. The latter of these applications was refused on appeal in 2005, as the Applicant, his siblings and his mother were excluded from the family class pursuant to para 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [R117(9)(d)]. The relevant provisions of the *Act* and the *Regulations* are listed in Annex A to these reasons. In 2007, the Applicant's mother also unsuccessfully applied for permanent residence on H&C grounds from outside of Canada on behalf of herself, the Applicant, and his brother.

[5] On February 26, 2019, the Applicant applied for permanent residence on H&C grounds. His application, the refusal of which forms the basis of the present judicial review, was based primarily on the hardship to him and his father should he have to return and make an application from India. He asked the Officer to take the exceedingly harsh consequences of the operation of R117(9)(d) into consideration, given the many years since the failure to disclose, and given that the function of the regulatory provision had been served. According to the Applicant, preventing him from caring for the daily needs of his father would do little to serve that provision's objective of encouraging full disclosure. The Applicant also addressed establishment and best interests of the child [BIOC].

III. Decision Under Review

[6] In the Decision, the Officer held that there were insufficient H&C considerations to justify an exemption under s 25(1) of the *Act*.

[7] The Officer gave weight neither to BIOC nor to establishment factors. On the latter, the Officer found that the Applicant's six months of residence in Canada was a brief period of time, with little evidence to demonstrate any establishment. The Officer noted that the support letters were vague in nature, and gave them low probative value. A "very small" amount of positive weight was attributed to the facts that the Applicant does not have a criminal record, possesses a driver's licence, takes efforts to maintain his temporary resident status, and had never applied for social assistance, as well as to the Applicant's Canada-based associations, which the Officer observed were substantiated with little information regarding their depth.

[8] The bulk of the Decision addressed hardship. The Officer was satisfied that the Applicant primarily spends his time caring for his father and accompanying him to appointments, church, and community services. The Officer was also satisfied that the Applicant spends time visiting his father in hospital, but found that the extent of his efforts was largely unknown and afforded them only some positive weight, stating that letters provided by medical professionals attesting to the caregiver support required by the Applicant's father did not specifically explain how the Applicant attends to his father's needs.

[9] The Officer considered hardship to the Applicant should he have to return to India, noting it would be limited given a previous return to the country from his time residing in the United Kingdom, and familiarity with and ties to his home country, education, and a café that he owns there.

[10] The Officer similarly found insufficient evidence of hardship vis-à-vis the Applicant's father, noting an inability to establish, on a balance of probabilities, (i) his current health status after March 2019, given the dated and insufficiently specific documents provided; (ii) his social and/or medical needs; and, (iii) the level of assistance provided by the Applicant as compared to other social services providers or community members, as certain evidence suggested that assistance from the community had been and would continue to be available. The Officer concluded by noting that the Applicant would be able to preserve his relationship with his father remotely through technological communication tools.

[11] The Officer further found that the October 2018 letter from the father's psychiatrist has low probative value in determining his mental health or treatment subsequent to the date of the letter. While the Officer found the father's long-lasting relationship with the psychiatrist to be a positive consideration, the Officer determined that the following issues significantly lower the letter's probative value: the letter does not indicate how often he has met his psychiatrist since 2004; it does not indicate what the therapeutic relationship entailed; it does not indicate the name of the doctor who made the referral; it does not indicate the date of his Global Assessment of Functioning test; and it does not indicate what the assessment of 2018 consisted of, how long it took, or whether a translator was present.

[12] Moreover, the Officer noted that the psychiatrist's letter lists diagnoses concerning both mental and physical health, even though the psychiatrist does not have authority to make medical diagnoses and does not explain how or when he came to the psychiatric diagnoses. The Officer further noted that the letter appears to be inaccurate as to the social support available to the father, as it indicates that no social support exists. As for the treatment plan indicated in the letter, the Officer found that it is vague and unclear as to whether the list consisted of current treatments or recommendations, and that there is no evidence as to whether the father has started or continued any of the indicated treatments since the letter was issued.

[13] Ultimately, however, the Officer gave some positive consideration to the Applicant's family's previous issues with permanent residency applications, but found that he owed deference to Canadian immigration laws, noting the Applicant could return to Canada as a visitor given his current temporary resident status, or reapply for H&C.

IV. Issues and Analysis

[14] The parties agree that the Officer's refusal is reviewed under the reasonableness standard. A reasonable decision is "based on an internally coherent and rational chain of analysis" and "justified in relation to the facts and law that constrain the decision maker" (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para 85 [*Vavilov*]). It must encompass the characteristics of a reasonable decision, namely, justification, transparency and intelligibility (*Vavilov* at para 99).

[15] First the Applicant submits that the Officer's Decision was unreasonable due to errors made in the assessment of hardship, and the unusually harsh consequences deriving from the operation of R117(9)(d).

[16] Second, the Applicant argues that the Officer's assessment of relevant evidence was unreasonable in several ways, including that (i) the Officer discounted evidence on the ground that it did not come from disinterested parties; (ii) the Officer improperly assigned low probative value to the letter from the father's psychiatrist; (iii) the Officer ignored sworn evidence to the contrary when he concluded that the extent of the Applicant's efforts to care for his father was largely unknown; and, (iv) the Officer disregarded social science evidence regarding the importance of familial support the elderly.

[17] The Respondent submits that the Officer's Decision was reasonable, since no error was made in assessing the evidence of hardship, treatment of past immigration decisions, or weighing of social science evidence and the sworn affidavits. The Respondent submits that the Officer may properly ascribe little probative value to sworn affidavits tendered by a witness with a personal interest in the outcome. Ultimately, according to the Respondent, this Court should not reweigh that evidence.

[18] While the Respondent is correct that the role of this Court is not to reweigh the evidence, the Decision was fatally flawed for failing to address both the key argument concerning the impact of R117(9)(d), along with the treatment of the evidence, as explained next.

(i) The Officer failed to engage with the arguments relating to R117(9)(d)

[19] First, I agree with the Applicant that the Officer's reasons fail to meaningfully engage with the Applicant's submissions regarding R117(9)(d). In *Vavilov*, the Supreme Court emphasized (at paras 127-128) that the principles of justification and transparency require that an administrative decision maker's reasons meaningfully grapple with the central issues and concerns raised by the parties, as a failure to do so may cast doubt as to "whether the decision maker was actually alert and sensitive to the matter before it."

[20] Here, the hardship ensuing from the operation of R117(9)(d), as outlined above, was one of the core issues raised by the Applicant in his H&C submissions to the Officer, in that the Applicant provided evidence of and deposed to:

(i) his family having been separated since the 1990s,
(ii) the grossly disproportionate consequences for the Applicant and his father, due to the latter's failure to disclose his family ties in the 1990s;
(iii) the ongoing impact to the Applicant despite the fact that he was a minor at the time and was not responsible for the failure to disclose;
(iv) the function of R117(9)(d) para 117(9)(d) of the *Regulations* having been served, given the many years of separation from his family, and that continuing this family separation would do little to serve its objective of encouraging full disclosure.

[21] Rather than engaging with the lengthy and substantive submissions on these points from counsel, which were central to the Applicant's application, the Officer simply stated that he gave "deference to the law and statutes of Canada."

[22] The special circumstances outlined – apart from the litany of worsening health issues for the father such as diabetes, end-stage kidney disease, a major heart attack, thrice-weekly dialysis,

a colostomy and mental health concerns – included an unduly long period of separation from the family. The father had been alone in Canada for nearly three decades after having spent this time away from his recently deceased wife, two other children and their families in India. The Applicant, the only non-married and childless sibling, was therefore the only direct family member who could remain in Canada to take care of his father in the latter stage of his life

[23] Thus, the Officer's stating simply that he owed deference to the law and statutes of Canada fails to provide any meaningful response to the hardship caused by the ongoing bar created by R117(9)(d), and the key plank upon which the H&C application was based. As noted in *Subar v Canada (Citizenship and Immigration)*, 2022 FC 340 at para 11, where elements are overlooked, particularly central compassionate planks, the balancing will necessarily be deficient because those gaps in the reasons prevent the Court from knowing whether, if properly considered, the officer would have assigned positive, negative or neutral weight to the argument (see also *Lin v Canada (Citizenship and Immigration)*, 2022 FC 341 at para 14).

[24] Furthermore, the remark about paying deference to the law and statutes of Canada suggests a significant misapprehension of the Officer's role in evaluating a s 25(1) application, which is not to simply pay deference to the ordinary operation of the law, but to weigh and consider whether H&C considerations warrant a flexible and responsive exception thereto (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, at para 19 [*Kanthasamy*]).

[25] First and foremost, the raison d'être of the H&C exemption is to overcome non-compliance or other obstacles posed by immigration rules, by offering equitable relief in

circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another" (*Kanthasamy* at para 21, citing *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338 at p 350).

[26] There were compassionate circumstances here that the Applicant submitted but the Officer simply did not address, instead reciting a need to be deferential to the law – which, again, includes an exception contained in s 25(1) of the *Act.* The Officer is owed significant deference in making this highly discretionary determination, but not to the point of failing to weigh all the relevant facts and factors before them (*Kanthasamy* at para 25).

[27] In short, having failed to engage at all with the disproportionately harsh consequences that had and would continue to be suffered by the Applicant and his ailing father as a result of the operation of the *Regulations,* the Officer's reasoning does not exhibit the requisite degree of justification, intelligibility and transparency under reasonableness review. The Officer did not "meaningfully grapple" with the central issue of disproportionate hardship derived from the operation of R117(9)(d), which calls into question whether the decision maker was actually alert to the issue (*Vavilov* at paras 100 and 128).

(ii) The Officer's assessment of the evidence was unreasonable

[28] I further agree with the Applicant that the Officer's assessment of the evidence was unreasonable in several respects with respect to the father's needs and nature of care provided.

[29] First, it was unreasonable for the Officer to conclude that the extent of the Applicant's efforts to care for his father was largely unknown. The Officer justifies this conclusion by relying solely on the medical letters on record.

[30] The Medical letters, as might be expected, contain details regarding his father's medical condition, including diagnoses and prognoses, along with his treatment. However, the Officer does not explain why or how, particularly in the absence of any attending doctor, the letters would have been expected to also provide details of efforts made by a family member to care for an elderly parent, especially in the privacy of their own home.

[31] More importantly, the Officer's conclusion disregarded the details provided in sworn statements of the Applicant and his father regarding the extent of the care provided by the Applicant to his father. No justification was provided for doubting or disregarding this sworn evidence and instead solely relying on the letters from the doctors – which the Officer used as a double-edged knife, to further subvert the Applicant's position.

[32] If the Officer found the sworn evidence of the Applicant and his father detailing the Applicant's efforts to care for his father and the father's requirements for that assistance, to be lacking in probative value, that should have been explained. They could have then been given an opportunity to explain any credibility or other concerns that the Officer might have had – whether in writing, or in person. However, the Officer did not question the credibility of those sworn statements. Rather, the Officer did not address the contents of those documents. Simply put, the Decision was devoid of any such explanation or justification as regards those statements.

[33] Instead, the Officer noted that the sworn statement provided by the Applicant and the supporting evidence from his father were “insufficient given the ease in which to obtain supporting evidence from professionals who are disinterested parties.” That finding in itself, as I explain further below, is unreasonable. However, it is doubly unreasonable in that the sworn, corroborated evidence provided precisely the details that the Officer criticized the medical professionals for omitting. In other words, the Officer used one unreasonable conclusion to justify another.

[34] Second, the Officer unreasonably faulted the psychiatrist’s letter for listing diagnoses concerning both mental and physical health. This conclusion was based on the Officer’s unsubstantiated belief that a psychiatrist does not have authority to make medical diagnoses. This is an incoherent justification for assigning low probative value to the letter. There is no evidence that the father’s psychiatrist dating back to 2004 is not a licensed medical specialist with full access to his patient’s medical history. As such, the psychiatrist is perfectly qualified to enumerate the father’s diagnoses relating to both his mental and physical health. Indeed, presumably these would be highly relevant to the psychiatrist’s decisions regarding prescription of medicine and his broader treatment plan. The psychiatrist listed, with precision, the various mental health diagnoses for which he had treated the father for a lengthy period of time, as well as all the medications that he had been prescribed.

[35] The Officer also established an arbitrary threshold for assigning positive probative weight to a medical letter by taking issue with the fact that it does not explain in detail how the diagnoses were reached, how often the patient has met his psychiatrist since 2004, what the

therapeutic relationship entailed, the name of the referring doctor nearly 20 years before, the date of the father's Global Assessment of Functioning test, or how the 2018 assessment was conducted with respect to methods, time duration, and language. The Officer failed to provide any explanation for why such extraneous information could reasonably have been expected in the letter, or why their omission rendered the remainder of the letter vague or unclear or somehow reduced the probative value of the information that it did contain.

[36] Without justifying why a particular detail was important or necessary and should have been included, the Officer was not free to cherry pick information they would have preferred to see in the letter and then qualify it as vague in their absence. In so doing, the Officer unreasonably discounted the weight of evidence, which corroborated significant aspects of the Applicant's narrative, on the basis that it did not include certain details the Officer would have liked to see. Such an approach has been repeatedly criticized by this Court (see *Mohammadpour v Canada (Citizenship and Immigration)*, 2022 FC 759 at para 40, citing *Belek v Canada (Citizenship and Immigration)*, 2016 FC 205 at paras 21-22 and *Sitnikova v Canada (Citizenship and Immigration)*, 2017 FC 1082 at para 27). Absent the requisite justification, the Officer's treatment of the psychiatrist's letter is unreasonable.

[37] Third, I agree with the Applicant that it was unreasonable for the Officer to attribute low probative weight to the sworn affidavits of the Applicant and his father on the basis that such evidence does not come from disinterested parties. This Court has held, in different contexts, that it is unreasonable for an Officer to discount evidence solely on the ground that it comes from a

non-neutral source such as a family member (see, for instance, *Sitnikova v Canada (Citizenship and Immigration)*, 2017 FC 1081 at para 18).

[38] The Officer's finding is only rendered more unreasonable because the sworn statements of the Applicant and his father *were* corroborated in part by exactly the kind of disinterested professional the Officer referred to, namely, the father's psychiatrist, along with numerous other letters from members of the community further removed from the situation (such as members of the their church, including two letters from the church's Pastor). I note that there is also a letter from a nephrologist from Sunnybrook after his heart attack in March 2019, stating that his "medical condition continues to be extremely complex", supporting the Applicant's H&C application in order to provide ongoing care to his father.

[39] Finally, on the point of letters from the community members who have supported the Applicant in the past and who corroborated the doctors' comments regarding the needs of the father and lack of family in Canada, the Officer failed to address social science evidence that the Applicant submitted speaking to the salutary impact of family care as opposed to care from strangers or non-family members, or as the Officer put it, the father's "network of support, including the unnamed family with whom he and the applicant reside." That statement alone is not transparent, in that the evidence is that the Applicant lives in an apartment with his son. As far as the broader question of the social science evidence is concerned, as with any evidence, the Officer could have rejected this evidence and given it no weight, or discounted its relevance, but failing to mention the evidence entirely was unreasonable (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1999] 1 FC 53 at para 17).

[40] In my view, and taking all of the above into account, the Officer's assessment of the evidence was unreasonable in several respects. Having failed by a considerable margin to meet the threshold for reasonableness as it lacked the requisite transparency, justification, and intelligibility, I find that the Decision cannot withstand judicial review.

V. Conclusion

[41] In light of the Officer's failure to engage with the main thrust of the Applicant's H&C application, and the repeated instances of unreasonable assessment of evidence, the Decision cannot be sustained as reasonable in light of the facts or the law. As such, it will be returned for reconsideration by a different Officer.

JUDGMENT in IMM-4206-20

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is granted and the matter is remitted to a new Officer for redetermination.
2. No question for certification was submitted and I agree that none arises.
3. No costs will issue.

"Alan S. Diner"
Judge

Annex A – Relevant Provisions

***Immigration and Refugee Protection Act,* SC 2001 c 27**
Loi sur l'immigration et la protection des réfugiés (L.C. 2001, ch. 27)

Humanitarian and compassionate considerations — request of foreign national	**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)**

Family Class	**Regroupement familial**
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.	**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.
117 (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is	**117 (1)** Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants :

[…] **(b)** a dependent child of the sponsor; […]	[…] **b)** ses enfants à charge; […]
Excluded relationships **117(9)** A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if: […] **(d)** subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.	**Restrictions** **117(9)** Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes : […] **d)** sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Steven Blakey	FOR THE APPLICANT
Ada Mok	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Steven Blakey Waldman & Associates Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT