Federal Court  Cour fédérale

Date: 20220929

Docket: IMM-1303-20

Citation: 2022 FC 1365

Toronto, Ontario, September 29, 2022

PRESENT: Justice Andrew D. Little

BETWEEN:

MUHAMMAD AFZAL
RIFFAT BIBI
MUHAMMAD WAQAS AFZAL

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants, Muhammad Afzal and Riffat Bibi, are married and are the parents of the applicant, Muhammad Waqas Afzal ("Waqas").

[2] Mr Afzal is a protected person in Canada. He resides here. He applied for permanent residence in Canada and listed Ms Bibi and their six children as overseas dependants. They all reside in Pakistan.

[3] Ms Bibi and five of the six children were granted permanent resident status in Canada. However, one child – Waqas – was not because he did not fall within the definition of a "dependant child" in section 2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the *"IRPR*"), owing to his age. Mr Afzal requested an exemption for Waqas from the *IRPR* definition on humanitarian and compassionate ("H&C") grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "*IRPA*").

[4] The request for H&C relief was unsuccessful. In this application for judicial review, the applicants challenged the decision as unreasonable under the principles described in *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019] 4 SCR 653, 2019 SCC 65. They submitted that the decision was unreasonable on a wide variety of grounds.

[5] For the reasons below, I conclude that the cumulative effect of certain errors in the decision rendered it unreasonable. The application must be allowed.

I. Essential Facts

[6] Mr Afzal was born into a Sunni Muslim family. In 2014, he converted to the Shia Muslim faith. As a result, members of the Sepa Sahaba and Tehrik-e-Taliban threatened him and called him an infidel. They threatened his family and ordered them to sever relations with him. The threats escalated to violence. The person who converted him was shot and killed. Mr Afzal's family home was attacked and the police were unable to help. In 2015, a fatwah was issued calling for Mr Afzal to be killed. The following month, someone shot at him.

[7] Mr Afzal fled Pakistan and arrived in Canada on October 20, 2015. He claimed refugee protection in Canada under the *IRPA* on the basis of his fear of persecution in Pakistan due to his religious beliefs and as a convert to the Shia Muslim faith. The Refugee Protection Division recognized him as a Convention refugee on March 3, 2016.

[8] In May 2016, Mr Afzal filed an application for permanent residence. He included his spouse and their six children as overseas dependents. Immigration, Refugees and Citizenship Canada ("IRCC") returned the application as incomplete in early 2017. Unfortunately, due to an address error, Mr Afzal did not immediately learn about it.

[9] Mr Afzal resubmitted the application in July 2017. This time it was complete. By this time, all of the family had also converted to the Shia Muslim faith. Waqas was 23 years old.

[10] Effective on October 24, 2017, the definition in *IRPR* section 2 of a "dependent child" was changed (in material part) from children "less than 19 years of age" to children "less than 22 years of age": see SOR/2017-60, section 1.

[11] On January 15, 2019, IRCC sent Mr Afzal a "procedural fairness" letter, informing him that Waqas did not meet the definition of a "dependent child" due to his age.

[12] In response, by letter dated May 15, 2019, Mr Afzal requested that Waqas be included in the application for permanent residence with an exemption on H&C grounds from the age requirements for a dependent child in the *IRPR*.

[13] The H&C submissions highlighted the consequences of family separation if the entire family were to come to Canada to join Mr Afzal but Waqas had to stay behind in Pakistan; the best interests of the children; country conditions in Pakistan related to converts to the Shia Muslim faith; and the hardship Waqas would suffer if he remained there.

[14] By letter dated February 5, 2020, a migration officer at the High Commission in London, UK, advised that Waqas did not meet the definition of an overseas dependant in his father's application for permanent residence and declined to refer the decision to an officer for positive consideration under *IRPA* subsection 25(1). The migration officer's letter stated that the officer had considered evidence about the effects of separating Waqas from the family on the children and on Waqas himself. The letter also advised that the officer had considered the situation Waqas would face if left alone in Pakistan; the likelihood that the family would face permanent separation if Waqas did not join them in Canada; how the hardships they face relate to the principle of family reunification; and their situation "relative to others who face separation from adult family members." The officer also noted in the letter that the officer considered the dates of the respective applications and lock-in dates relative to policies on dependents and their ages.

[15] The officer also made lengthy and detailed entries in the Global Case Management System ("GCMS") related to the officer's consideration of the definition of a "dependent child" in the *IRPR* and the officer's assessment of the H&C factors. I will refer to these entries as the "GCMS notes".

II. Standard of Review

[16] The standard of review of the officer's substantive H&C decision is reasonableness: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909, at para 44.

[17] A reasonable decision is internally coherent, contains a rational chain of analysis and is justified in relation to the facts and law that constrained the decision maker: *Vavilov*, esp. at paras 85, 99, 101, 105-106 and 194.

[18] The Supreme Court has identified two types of fundamental flaws in administrative decisions that may justify intervention by a reviewing court: a failure of rationality internal to the reasoning process; and, when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it: *Vavilov*, at para 101; *Canada Post Corp. v Canadian Union of Postal Workers*, [2019] 4 SCR 900, 2019 SCC 67, at paras 32, 35 and 39.

[19] Not all errors or concerns about a decision will warrant intervention by a reviewing court. To intervene, the court must find an error in the decision that is sufficiently central or significant to render the decision unreasonable: *Vavilov*, at para 100; *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*, 2022 SCC 30, at para 146 (Karakatsanis and Martin JJ); *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156, at para 36 (leave to appeal to the Supreme Court granted: SCC File No. 39855 (March 3, 2022)).

[20] This Court's role is not to agree or disagree with the decision under review, to reassess the merits or to reweigh the evidence: *Vavilov*, at para 126; *Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50, at paras 53-54; *Canada (Public Safety and Emergency Preparedness) v Gaytan*, 2021 FCA 163, at para 118; *Mason*, at para 12. The Court's task is to determine whether the decision maker made one or more of the kinds of errors described in the appellate cases above and if so, whether the decision should be set aside as unreasonable.

[21] The onus is on the applicant to demonstrate that the decision is unreasonable: *Vavilov*, at paras 75 and 100.

III. Analysis

[22] The applicants challenged many aspects of the factual and legal assessment of the officer's reasons, focusing on the "Analysis" portion of the officer's GCMS notes. They challenged the decision as unreasonable on the following grounds:

a) The officer erred in law by not following the legal test set out by the Supreme Court in *Kanthasamy*. The applicants argued that the officer failed to apply the proper *Chirwa* standard to the facts, erroneously used a comparative analysis, failed to carry out an individual assessment of the circumstances and made unfounded generalizations. The applicants relied heavily on the Court's recent decision in *Zhang v Canada (Citizenship and Immigration)*, 2021 FC 1482, esp. at paras 19-29;

b) according to the applicant, the officer's reasons showed a "gross unappreciation of the facts" and "no appreciation or sensitivity to the circumstances" that the family was separated from their husband and father when he fled Pakistan. The applicants argued that the officer ignored the evidence in the family members' affidavits, failed to apply the required *Chirwa* approach to the evidence of family separation and reached unintelligible conclusions. The applicants argued that there was ample evidence of the strong bonds within the family and, in particular, with Waqas because he had assumed a significant role as father figure to his siblings and a constant support to his mother while his father has been in Canada since 2015. The applicant argued that the facts were very similar to *Reducto*, in which the Court found that the officer failed to view the harm to an overage "dependent child" who would be alone in another country through a humane and compassionate lens under subsection 25(1): *Reducto v Canada (Citizenship and Immigration)*, 2020 FC 511, esp. at paras 50-52;

c) the officer erred in law when considering hardships arising from country conditions, by applying a higher legal standard for personal risks used in the context of a pre-removal risk assessment instead of a hardship standard applicable to H&C applications (citing *Ramirez v Canada (Citizenship and Immigration)*, 2006 FC 1404 and *Dharamraj v Canada (Citizenship and Immigration)*, 2006 FC 674);

d) the officer erred in considering the evidence of hardship, by making inconsistent findings and ignoring evidence;

e) the officer erred in assessing the best interests of the children, by erroneously finding an insufficiency of evidence and by failing to appreciate Waqas's role with his younger siblings and Waqas's own best interests; and

f) the officer erred by failing to consider in the H&C assessment that Waqas's age at the time of application was in close proximity to the maximum age of a "dependent child."

[23] I will focus on the applicants' arguments that are material to the outcome of this application.

[24] The applicants argued that the officer erred in law by failing to apply the principles in *Kanthasamy* and *Zhang*, by failing to apply an empathetic and compassionate, *Chirwa*-based approach to the specific circumstances, and by using a comparative analysis in the letter and in the GCMS notes (see *Zhang*, at paras 22-24). On the latter, in the GCMS notes, the officer found limited evidence that the bond between family members was "different or more significant than other families facing separation from their overage dependent children, as is the case with many families subject to restrictions on their children's eligibility" under the *IRPR* definition. The officer also found insufficient evidence that permanent separation would occur and that contact over video appeared "equitable to the situation faced by many families whose adult children are no longer living close to them".

[25] As noted, the applicants relied heavily on this Court's decision in *Zhang*. In that case, an officer's reasoning used language of exceptionality, implying that the officer expected the

applicant to show exceptional establishment and exceptional hardship: *Zhang*, at paras 6, 11 and 27-28. Zinn J. stated that the correct question to ask on an H&C application was: "[u]nderstanding that relief from the rigidity of the law is exceptional, do the particular circumstances of the applicant excite in a reasonable person in a civilized community a desire to relieve their misfortunes?": *Zhang*, at para 19. Justice Zinn then stated:

> [20] **There are decisions of this Court that frame this question and the test differently and, in particular, decisions that require that an applicant's circumstances be compared to those of others…**
>
> […]
> [22] In my view, **the stated comparison requirement is not one supported by *Kanthasamy***. It appears to be based on the observation by Ms. Scott in the passage quoted earlier that this exceptional relief "recognized that deportation might fall with much more force on some persons . . . than on others, because of their particular circumstances:" …
>
> [23] There is a significant difference between observing that this exceptional relief is provided for <u>because</u> the personal circumstances of some are such that deportation falls with more force on them than others, and stating that the relief is available <u>only to those who demonstrate</u> the existence of misfortunes or other **circumstances that are <u>exceptional relative to others</u>**. The first explains why the exemption is there, while the second purports to identify those who may benefit from the exemption. The second imports a condition into the exception that is not there.
>
> [24] Once the exception is established in law, as it is in subsection 25(1), it is available to all but will only be granted to those whose **particular circumstances** excite in a reasonable person in a civilized community a desire to relieve their misfortunes. It requires only **an examination of the personal circumstances of an applicant. It does not require that a comparative analysis be done**.
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> [Original underlining; bolding added.]

[26] After considering the reasoning about exceptionality in *Damian v. Canada (Citizenship and Immigration)*, 2019 FC 1158, [2020] 1 FCR 658, Justice Zinn held in *Zhang* that there is no requirement that any individual factor in an H&C assessment, such as establishment or hardship, be exceptional. He stated at paragraph 28:

> Nor is there a requirement that an applicant's circumstances as a whole meet the threshold of being exceptional when compared to others. What is required is that an applicant's personal circumstances warrant humanitarian and compassionate relief.

[27] Justice Zinn concluded that the officer's reasoning was unreasonable because it demonstrated that he was not focused on the proper question, namely, whether the applicant's circumstances would excite a reasonable person in civilized community a desire to relieve the applicant's misfortunes: *Zhang*, at para 29.

[28] As may be seen, the reasoning in *Zhang* identified several closely interrelated points relating to the judicial review of an H&C decision under *IRPA* subsection 25(1), including exceptionality, the comparison of the applicants' circumstances relative to others, and the need to consider particular circumstances of the applicant(s) according to the legal requirements for H&C relief: *Zhang*, at paras 14, 19, 24, 25 and 28-29; see also *IRPA* subsection 25(1) (H&C considerations "relating to the foreign national") and *Kanthasamy*, esp. at paras 15, 21, 22, 31, 33 and 45.

[29] The reasoning in the present case is different from the decision in *Zhang*. As *Zhang* recognized, requiring proof of exceptionality, such as "exceptional hardship", may impose a higher legal standard than *Kanthasamy* established for H&C relief and may constitute a

reviewable error: *Kanthasamy*, at paras 33 and 45; *Damian*, at para 21. In this case, however, it is not clear from the reasons that the officer did so. The officer did not use the word "exceptional" or its kin, and such a higher legal standard is not implicit in the officer's analysis.

[30] The officer in this case did compare the applicants' circumstances relative to others, during the assessment of family separation. *Zhang* concerned (in part) the use of a comparative assessment, with which Justice Zinn disagreed based on *Kanthasamy*. However, for my part, I do not read Justice Zinn's decision in *Zhang* to hold that the mere use of a comparison, without more, inevitably constitutes a reviewable error. See also *Peter v Canada (Citizenship and Immigration)*, 2022 FC 208, at paras 20 and 48-51.

[31] The officer's comparison of the applicants' circumstances relative to other families was a material part of the assessment, as family separation and its impact were key issues on the H&C application. This aspect of the officer's reasoning raises a concern about transparency, one of the three hallmarks of reasonable administrative decision-making. Comparing the applicants' circumstances with a set of "other" or "many" families who are (perceived to be) in similar circumstances can present challenges for a reviewing court – and the applicants – to understand what benchmark was used to assess the circumstances for H&C purposes: see the comments about transparency in *Vancouver International Airport Authority v Public Service Alliance of Canada*, 2010 FCA 158, [2011] 4 FCR 425, at para 16(d); and in *Romania v Boros*, 2020 ONCA 216, at paras 29-30. See also *Vuu v Canada (Citizenship and Immigration)*, 2022 FC 128, in which the Court set aside a decision in part because the officer erred by evaluating the applicant's establishment against an unspecified and undefined standard of a "common" level of

establishment rather than conducting an individualized assessment: *Vuu*, at paras 11 and 25-28, citing *Zhang*, at paras 23-24. In addition, because one officer's experience with such applications may well be different from another officer's, using a comparative assessment may raise the prospect of inconsistency in decision-making. Here, the comparison appears to be tied to the officer's experience with previous applications involving an assessment of the bonds between family members and how families are affected by separation from overage dependent children.

[32] These concerns are intertwined with another point from *Zhang*, that the H&C assessment focus on the application of the required H&C legal standard to the particular circumstances of the individual applicant(s). As already noted, the applicants argued their position that the officer did not follow *Kanthasamy*. The applicants offered detailed submissions arguing that the officer failed to apply a compassionate, *Chirwa*-based standard to the particular circumstances and did not properly appreciate and assess the evidence of hardship faced by the family and by Waqas. The respondent disagreed, referring to the factors considered in the officer's lengthy and detailed GCMS notes.

[33] Much of the applicants' submissions amounted to a re-argument of the merits of the H&C application. However, it is not necessary to consider the applicants' position, analyzed through a *Vavilov* lens, alongside the transparency concerns arising from the officer's use of comparisons. The applicants' submissions also identified a second area of legal concern that also negatively affects the reasonableness of the decision.

[34] The officer's GCMS notes stated:

> Representative equates factors included in refugee protection reviews as grounds for threats to Waqas in Pakistan. Waqas has not fled Pakistan as a refugee. The father states that it is not safe for his family to be in Pakistan, however, I also know they have not left Pakistan. They do not appear to have family ties or employment that requires them to stay in Pakistan, based on the statement that family members have abandoned them or are unable to support them since their conversion. It is stated that Waqas was a victim of an attempted kidnapping in January 9, 2019. Details are not given. No evidence is apparent of this attempted kidnapping. The family is stated to have sought out internal relocation to avoid further incidences. They, including Waqas, later returned to their home in Faisalabad. The internal situation in Pakistan where Shia Muslims are a religious minority challenged by a state of inequality is noted. There is limited evidence of how this directly equates to Waqas's situation in the country. Significant documentary evidence of the status of Shia along with statements to the challenges faced by the family as a result of their father's conversion followed by their conversion reflects alienation from family and community as a result of conversion and being ostracized and targeted by their former religious community.
>
> [Emphasis added.]

[35] The officer later reasoned:

> I do not consider use of grounds for refugee protection as the basis for assessment of Waqas's situation functional as he has not left Pakistan, has sought internal solutions for his safety, reflecting that the situation of a person who has fled a country due to an inability to seek protection there can be significantly different from one who has not. While it is evident from information provided that as a Shia and convert he will face challenges that are not faced by the general Sunni population, there is insufficient evidence to establish that Waqas cannot stay in Pakistan for this reason. The lack of information on the kidnapping and decision to relocate to another town before returning to Faisalabad diminishes the evidence of risks to Waqas for his religion or because of his father's persecution. This information further diminishing the overall apparent risk of attacks against Waqas as a Shia Muslim.

[Emphasis added.]

[36] The officer's GCMS notes later found it notable that "as Shia converts", the applicants "all face challenges not faced by the majority population."

[37] I agree with the applicants that in these passages, the officer's reasons erroneously applied a more onerous and risk-based legal standard to the assessment of the impact of country conditions on Waqas, instead of assessing that evidence with a view to H&C considerations including the hardships Waqas would face as a Shia convert alone without family in Pakistan: *Kanthasamy*, at para 51; *Rannatshe v Canada (Citizenship and Immigration)*, 2021 FC 1377, at para 21; *Miyir v Canada (Citizenship and Immigration)*, 2018 FC 73, at para 22; *Ramirez*, at paras 41-50; *Dharamraj*, at paras 22-25. The officer considered only whether Waqas could not stay in Pakistan as a Shia and a religious convert, and whether he risked being "attacked" as a Shia Muslim if he remained. The officer did not consider whether he would suffer hardship, short of having to leave the country or being attacked if he remained there, as a result of the acknowledged country conditions.

[38] Similarly, the officer's reasoning also accepted that the family's religious conversion would cause them to be alienated from their family and community, ostracized, and targeted by their former religious community (as the applicants argued), yet did not consider whether Waqas would suffer undue hardship as a result of the alienation, and from being ostracized and targeted.

[39] The cumulative effect of these errors and concerns leads to the conclusion that the decision must be set aside as unreasonable. The decision failed to follow binding legal authority

on an important issue and failed to provide transparent and properly justified reasons as required by *Vavilov*. These errors were sufficiently material to the decision, in light of the applicants' evidence and position and the impact on Waqas, so as to constitute a reviewable error.

[40] In the circumstances, I will not consider the applicants' detailed submissions about whether the officer properly assessed the evidence. The officer making the decision on redetermination should be unencumbered by this Court's reasons with respect to an assessment of the evidence.

IV. Conclusion

[41] The application is therefore allowed. The decision is set aside and the matter remitted to a different officer with authority to make H&C decisions for redetermination. No questions were proposed for certification.

JUDGMENT in IMM-1303-20

THIS COURT'S JUDGMENT is that:

1. The application is allowed. The decision made on February 5, 2020, is set aside and the matter remitted for redetermination by another officer with authority to make decisions under subsection 25(1) of the *Immigration and Refugee Protection Act.*
2. No question is certified for appeal under paragraph 74(*d*) of the *Immigration and Refugee Protection Act.*

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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