Federal Court

Cour fédérale

Date: 20221031

Docket: IMM-3796-21

Citation: 2022 FC 1483

Ottawa, Ontario, October 31, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

SATNAM KAUR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by a Senior Immigration Official, dated May 28, 2021 [Decision], denying the Applicant's request for permanent residence within Canada on humanitarian and compassionate [H&C] grounds. The Officer found the Applicant's particular circumstances did not warrant an exemption from the requirement of presenting her permanent residency application from outside Canada.

II. Facts

[2] The Applicant is a 52-year-old widow from India who arrived in Canada for the first time in October 2017, a month after the death of her husband. The Applicant has resided since then with her son, his wife and their three children, all of whom are either Canadian Citizens or permanent residents. She plays a central role in the lives of the three young grandchildren, ages 6 years, 3 years and five months. The Applicant's daughter, who has temporary resident status in Canada, also resides with this family in London Ontario.

[3] The Applicant's widowed mother lives in an elder's care home in India. The Applicant has no material connection with India, having sold her possessions and lacking real family ties.

[4] Since the Applicant's arrival in 2017, she has applied and received several Visitor Record [VR] extensions, most recently as March 18, 2021. The Applicant is currently residing in Canada under implied status and has always maintained valid immigration status during her visits.

III. Decision under review

[5] The Officer was not satisfied this case warranted an exemption for humanitarian and compassionate grounds.

A. *Risk of discrimination against widows in India*

[6] The Officer acknowledges there is “some stigma and discrimination” faced by widows in India, but notes that this is a general country condition. There was little evidence submitted, in the Officer’s view, to demonstrate that the Applicant has specifically experienced discrimination. There is also little evidence submitted to suggest how the Applicant herself cannot live a normal life as a widow in India.

[7] As such, the Officer placed some positive weight on the potential stigma and discrimination the Applicant may face in India.

B. *Best interests of the child*

[8] Before engaging in an analysis of the best interests of the children [BIOC] conditions, the Officer provided an overview of the Applicant’s role in the life of her grandchildren. The Officer accepted that the Applicant takes care of her grandchildren and is in loving relationships with them, but noted that the Applicant could likely still reside in Canada until a decision was reached on her visitor record application. The Officer also suggested that two parents taking care of three children was not highly unusual. In this regard, the Officer found that there was little evidence submitted to suggest that the Applicant’s son and daughter-in-law were incapable of taking care of their own children. Nor would the children be deprived on medical, education or social systems if the Applicant were to leave Canada. Despite these findings, the Officer acknowledged it was “difficult to suggest it is in the best interests of the children to remove their capable, loving grandmother from their lives.”

[9] Given these considerations, the Officer found that the BIOC analysis favours a positively decision. However, the Officer notes explicitly that the BIOC was not a determinative factor in this case because the Applicant's presence is not necessary for the wellbeing of the children.

[10] On balance, her H&C was dismissed.

IV. Issues

[11] The only issue is whether the Officer's decision is reasonable.

V. Standard of Review

[12] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will

> always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
>
> [Emphasis added]

[13] I note as well that an H&C decision is "exceptional and highly discretionary; thus deserving of considerable deference by the Court": *Qureshi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 335, per Zinn J at para 30.

VI. Analysis

A. *Assessment of hardship – evidence of discrimination against widows in India*

[14] The Applicant submits the Officer failed to address the evidence of conditions in India in a reasonable manner. In the Applicant's view, the Officer's decision was flawed for several reasons in that they lacked justification, transparency and intelligibility as follows.

[15] Regarding the particular hardship faced by the Applicant, the Applicant cites the Supreme Court of Canada's decision in *Kanthasamy v Canada (Citizenship and Immigration)*,

2015 SCC 61 [*Kanthasamy*], for the proposition that direct evidence is not necessary to establish potential discrimination and related hardship. In *Kanthasamy*, the majority per Justice Abella states:

> [52] The Officer agreed to consider the hardship Jeyakannan Kanthasamy would likely endure as discrimination in Sri Lanka against young Tamil men. She also accepted evidence that there was discrimination against Tamils in Sri Lanka, particularly against young Tamil men from the north, who are routinely targeted by police. In her view, however, young Tamils are targeted only where there is suspicion of ties to the Liberation Tigers of Tamil Eelam, and the government had been making efforts to improve the situation for Tamils. She concluded that "the onus remains on the applicant to demonstrate that these country conditions would affect him personally".
>
> [53] This effectively resulted in the Officer concluding that, in the absence of evidence that Jeyakannan Kanthasamy would be personally targeted by discriminatory action, there was no evidence of discrimination. With respect, the Officer's approach failed to account for the fact that discrimination can be inferred where an applicant shows that he or she is a member of a group that is discriminated against. Discrimination for the purpose of humanitarian and compassionate applications "could manifest in isolated incidents or permeate systemically", and even "[a] series of discriminatory events that do not give rise to persecution must be considered cumulatively": Jamie Chai Yun Liew and Donald Galloway, Immigration Law (2nd ed. 2015), at p. 413, citing *Divakaran v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 633.
>
> [54] Here, however, the Officer required Jeyakannan Kanthasamy to present direct evidence that he would face such a risk of discrimination if deported. This not only undermines the humanitarian purpose of s. 25(1), it reflects an anemic view of discrimination that this Court largely eschewed decades ago: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at pp. 173-74; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3; *Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61, at paras. 318-19 and 321-38.
>
> [55] Even the Guidelines, expressly relying on this Court's decision in Andrews, encourage an approach to discrimination that

does not require evidence that the applicant will be personally targeted:

> 5.16. [Humanitarian and compassionate] and hardship: Factors in the country of origin to be considered
>
> While [ss. 96 and 97] factors may not be considered, the decision-maker must take into account elements related to the hardships that affect the foreign national. Some examples of what those “hardships” may include are: […]
>
> • discrimination which does not amount to persecution; […]
>
> • adverse country conditions that have a direct negative impact on the applicant. […]
>
> **Discrimination**
>
> Discrimination is: A distinction based on the personal characteristics of an individual that results in some disadvantage to that individual.
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> In *Andrews*, [the] Court wrote:
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> “Discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed.”
>
> (*Inland Processing*, s. 5.16)

[56] As these passages 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. Rennie J. persuasively explained the reasons for permitting reasonable inferences in such circumstances in *Aboubacar v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 714:
>
> > 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 […] [para. 12 (CanLII)]
>
> [Emphasis added]

[16] Given these principles, the Applicant submits and I agree it was unreasonable for the Officer to require direct evidence concerning discrimination against the Applicant as a widow in India. This, however, is what the Officer did in this case. I point to the following passages from the H&C Decision:

> The [Applicant's, ed.] representative stated:
>
> > "When she went back to India, Mrs. Kaur felt no connection to a place where she once called home and only counted days until she can be reunited with her family in Canada once again. She had previously disposed of the property she once owned in India and sent the money to her children in Canada, and as a result she had no home to return to. In addition, her father recently passed and her widowed mother resides in an old age home in India and she has no relationship with her one brother who has a family of his own. She has two step-children from her late-husband's previous marriage, however she does not have a relationship with them whatsoever. She in fact has no support from

> extended family members in India, as everyone has cut ties with her after the passing of her late husband.
>
> The grief and pain a person undergoes when they lose a life partner cannot be expressed through words. Only the person knows how to deal with it – and when they are subjected to rituals and customs following widowhood, it can become a very daunting experience. From social ostracization to giving up things she loves, Mrs. Kaur as a widow in India is expected to follow the customs without any complaints. Widowhood in India is said to be a state of 'social death' Another custom, which is still prevalent in India, restricts a widow from leading a normal life with her family. After her husband's death, a woman is expected to live in an ashram (shelter home). Unfortunately while this is an ancient ritual, widows throughout the country still travel to the ashrams because their custom demons so." [*sic* throughout]

I acknowledge there are some stigma and discrimination against widows in India. However, I note that is a general country conditions, and there is little corroborative evidence submitted to suggest how Ms. Kaur had experienced the discrimination. For example, there is little evidence submitted to explain what the things were that Ms. Kaur loves that she had to give up. There is little evidence submitted to explain how Ms. Kaur cannot live a normal life. It is unclear if there were any authority or people forcing Ms. Kaur to live in an ashram. I note Ms. Kaur's mother is also a widow and she is living in an old age home instead of an ashram. While I acknowledge there are some stigma and discrimination against widows in India, there is little corroborative evidence submitted to demonstrate how that has affected Ms. Kaur. As a result, I place only some positive weight to the potential stigma and discrimination widow faces in India consideration.

[Emphasis added]

[17] With respect, it was contrary to *Kanthasamy* to require, as the Officer did, "corroborative evidence to suggest who Ms. Kaur had experienced the discrimination." Not only was that doctrinally unsound, it is worth recalling the Applicant left India within a month of her

husband's death, i.e., when she became a widow. Unanswered by the Officer is how she could have had obtained such evidence in India given she left. In my view, it was unreasonable to expect "evidence submitted to explain what the things were that Ms. Kaur loves that she had to give up." It was not reasonable for her to submit "evidence" to explain how Ms. Kaur cannot live a normal life. And it was unreasonable to require "corroborative evidence" to "demonstrate how that has affected Ms. Kaur."

[18] Respectfully, the law is that "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." In this respect, the Supreme Court in *Kanthasamy* at para 56 relied on Rennie J. (as then then was) who in the Supreme Court's words "persuasively" explained the reasons for permitting reasonable inferences in such circumstances in *Aboubacar v Canada (Minister of Citizenship and Immigration)*, 2014 FC 714:

> 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 […] [para. 12 (CanLII)]

[19] Respectfully, I cannot agree with the Respondent's position otherwise. The jurisprudence is clear an individual need not show that they have been specifically targeted or been a victim of discrimination in order to establish hardship in these circumstances. The Officer failed to

consider or apply the doctrine of reasonable inferences in this case. Such inferences were certainly open to the Officer given the uncontroverted evidence filed by the Applicant (see footnotes 4 and 5 on page 43 of the Certified Tribunal Record).

[20] In my respectful view, and in the circumstances of this case, the Applicant's classification as a widow was enough to place her as a member of a discriminated group, and consequently, to demonstrate on a reasonable inference that she may face discriminatory action if returned to India.

[21] I further note that while the officer acknowledges "some stigma and discrimination against widows in India", the Officer cites a lack of evidence demonstrating "how this has affected [the Applicant]." With respect, this is further reasons to grant judicial review.

[22] A number of other issues were argued before me. However, these are matters to be decided at the redetermination. I make no ruling on them.

VII. Conclusion

[23] In my respectful view, the Applicant has established the Officer's decision was unreasonable in its assessment of hardship as towards members of the group with which the Applicant identifies. This is sufficiently central and material to the Decision that judicial review will be granted.

VIII. Certified Question

[24] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-3796-21

THIS COURT'S JUDGMENT is that judicial review is granted, the Decision is set aside to be redetermined by a different decision maker, no question of general importance is certified, and there is no order as to costs.

"Henry S. Brown"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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