Federal Court  Cour fédérale

Date: 20230411

Docket: IMM-2666-22

Citation: 2023 FC 504

Ottawa, Ontario, April 11, 2023

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

KAWALJEET KAUR SIDHU

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 an immigration officer, dated March 10, 2022, which found that the Applicant's humanitarian and compassionate [H&C] considerations did not warrant an exemption under section 25(1) of the *Immigration and Refugee Protection Act* , SC 2001, c 27 [IRPA].

II. Facts

[2] The Applicant is a 42-year-old female citizen of India who currently resides in Canada with her minor son.

[3] The Applicant's son is a Canadian citizen.

[4] The Applicant landed in Canada as a permanent resident after being sponsored by her first husband. The couple got divorced after 1.5 years. Six months later, the Applicant remarried. Following these events, an A44 report was written against the Applicant because her marriage was not genuine but was entered into in order to obtain permanent residence status. The Applicant lost her permanent residence through the resulting exclusion order that came into force on July 28, 2009. The Applicant left Canada with her son in November 2009.

[5] On April 24, 2018, the Applicant filed an application for a permanent resident travel document on humanitarian and compassionate grounds. She outlined her previous history as set out above. In error, on July 18, 2018, she was issued a permanent resident travel document on the basis of which she returned to Canada, where she and her son have lived since August 1, 2018.

[6] The error was eventually discovered and on June 19, 2019, the Applicant received a letter informing her that her permanent residence travel document was issued in error and that she was no longer a permanent resident of Canada. She remained without status and eventually made an

application for permanent residence status, and in the alternative and relying on the same submissions as with the H&C claim, for a temporary residence permit.

III. Decision under review

A. *Legitimate expectation*

[7] The Applicant submitted her application for permanent residence should have been permitted pursuant to the doctrine of legitimate expectations. The Officer recognized the Applicant's travel document was issued in error and that she was disappointed when it was rescinded; however, the Officer pointed out that the administrative error does not supersede the fact that the Applicant lost her permanent resident status due to her false marriage to her first husband. Moreover, the Officer found that the Applicant's disregard for Canadian immigration laws does not reflect positively on her.

[8] Finally, the Officer also pointed out that in order to maintain permanent residence in Canada, an applicant must have been living in the country for at least 730 days within a 5-year period, but the Applicant in this case was away from Canada for over 8 years. Given these concerns, the Officer found the error did not warrant an exemption under section 25.1 of the IRPA.

B. *Establishment in Canada and family ties*

[9] The Officer recognized the Applicant has maintained a good civil record, maintained economic stability and has participated in her community, assigning these factors positive, but

modest weight. The Officer also acknowledged the Applicant has close relationships with extended family members in Canada. However, the Officer found little information to the contrary to conclude that she does not have a close relationship with her husband, mother, father and siblings, who still reside in India. On balance, the Officer found the Applicant's family in India could help her resettle. Moreover, the Officer found insufficient evidence the Applicant would not be able to find employment should she look for it in order to keep supporting her son.

[10] The Officer also noted that the relationships the Applicant has in Canada do not have to end as a result of a return to India. In the Officer's view, she may communicate with family and friends though various communication technologies, much like many other families that live apart. The Applicant also spent a majority of her life in India where she knows the local language, has close family members, was educated, and has worked. The Officer assigned the totality of the above factors moderate weight.

C. *Adverse country conditions*

(1) Mental health

[11] The Officer began their assessment on this point by outlining the materials generally required from applicants to establish they would suffer hardship if returned to their country of origin as found in the Operational Manual for Humanitarian and Compassionate Consideration, and are comprised of:

i. Documentary evidence from the applicant's doctor(s) confirming the applicant has been diagnosed with the condition, the appropriate treatment, and that the treatment

for the condition is vital to the applicant's physical or mental wellbeing

ii. Confirmation from the relevant health authorities in the country of origin attesting to the fact that an acceptable treatment is unavailable in the applicant's country of origin

[12] The Officer accepted there would be a level of hardship if the Applicant were to leave Canada with her son; however, the Officer also noted the Applicant's doctor did not diagnose the Applicant or indicate whether she has received any form of treatment for mental health concerns. Moreover, the Officer found little evidence, outside of the general news articles submitted, that the applicant would be unable to access mental health services should she require them. The Officer assigned the above considerations only a small amount of weight.

(2) COVID-19

[13] The Officer accepted that the Applicant has felt uncertainty throughout the pandemic and that her extended family has provided support, but noted again that the application is silent on the relationships the applicant has in her home country. Moreover, the Officer found little objective evidence that the Applicant is more affected than others are by the pandemic. As such, the Officer did not assign significant weight to this factor.

D. *Best interests of the child*

(1) Establishment and separation from family

[14] The Officer recognized the Applicant's minor son has formed close relationships with his family members in Canada, made friends, and received a Canadian education. The Officer

assigned these factors positive weight. However, the Officer went on to find it is in the best interest of the son to remain with his mother since she is his main source of support. Moreover, the Officer noted the Applicant's son's father remains in India. In the Officer's view, it was in the son's best interest to be with both his mother and father. There was also little objective evidence that the Applicant's son would not have access to adequate education in India or that medical care would be unavailable if he should require it.

[15] Finally, the Officer also noted that the Applicant's son has spent a substantial amount of time in India, where he knows the local language and during which time he likely attended school. In the Officer's view, the totality of the above considerations will help mitigate some of the hardship associated with a return to India.

(2) Mental health

[16] The Officer assessed the evidence concerning the Applicant's mental health including a report based on two visits with a psychiatrist lasting a little over an hour, in which the psychiatrist found a:

> … most likely diagnosis of a Persistent Depressive Disorder. She has a past history of major depression. This most recent episode has been induced by the concern about needing to leave Canada again. Additionally, she has significant anxiety symptoms, in keeping with a Chronic Adjustment Disorder with anxiety. This is in keeping again with her fear of being deported and her son not having access to his friends and studies and life in Canada. Mrs. Sidhu agreed that a copy of this report be sent to her family doctor, Dr. Caron. She may benefit from being on an antidepressant, such as Mirtazapine, which would help with her mood as well as her sleep and appetite. Additionally, it may benefit her to see a therapist at some point to discuss her anxieties and feelings of guilt around her son.

> It would be extremely difficult for Mrs. Sidhu and her son to leave Canada once again. I am concerned that Mrs. Sidhu would once again experience a major depression, which would make it hard for her to care for herself and for her son.

[17] This however was based on two brief visits totalling one hour and ten minutes. The evidence relied on by the psychiatrist was of self reported.

[18] The Officer also acknowledged there will be an amount of difficulty for the Applicant's son when leaving Canada; however, no mental health assessment was conducted on the Applicant's son by her doctor. The doctor did mention the Applicant's son in his mother's report, noting that it was "certain that her son would go with her as she cannot imagine that he would be able to live without her." In the Officer's view, the Applicant's son would remain with his mother whether in Canada or in India. Without evidence to the contrary, the Officer found it could only be beneficial for the son be with both his parents in India to support his emotional wellbeing.

[19] Ultimately, the Officer found the weight accorded to the best interest of the child [BIOC] analysis is not enough to justify an exemption under section 25 of the IRPA.

E. *Request for temporary resident permit*

[20] Similarly, the Officer found the request for a temporary resident permit [TRP] was based on the same factors considered in the H&C. Given this, the Officer found no compelling reason to issue a TRP to the Applicant.

IV. Issues

[21] The Applicant submits the following issues:

1) Did the Officer err in law or breach procedural fairness by not properly considering the Applicant's request for Temporary Resident Permits?

2) Did the Officer err in their assessment of the psychological evidence with respect to the Applicant?

3) Did the Officer err in their assessment of the best interests of the Applicant's child?

4) Did the Officer err by failing to consider the Applicant's legitimate expectations?

[22] The Respondent submits no error on the part of the Officer, and a misapplication by the Applicant on the doctrine of legitimate expectations.

[23] The issue is whether the Officer's decision was reasonable.

V. Standard of Review

A. *Reasonableness*

[24] 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).
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> [Emphasis added]

[25] That said, the Supreme Court of Canada in *Vavilov* makes it clear the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances". No such circumstances exist in the case at bar. The Supreme Court of Canada instructs as follows:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55;

> see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
>
> [Emphasis added]

[26] In addition, the Federal Court of Appeal recently held in *Doyle v Canada (Attorney General)*, 2021 FCA 237 [*Doyle*] that the role of this Court is not to reweigh and reassess the evidence:

> [3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director's decision, the reviewing court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is no part of its role. Sticking to its role, the Federal Court did not find any fundamental errors.
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> [4] On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation.
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> [Emphasis added]

VI. Analysis

A. *Best interests of the child*

[27] Counsel for the Applicant prefaced her oral submissions with a general observation that the Decision was excessively focussed on hardship. If that was the case, it would of course contravene the teachings of the Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*].

[28] However, there are two reasons why I am not persuaded on this point. First, there are in fact relatively few references to or assessments of hardship in the Decision.

[29] Secondly, decisions such as this are not made in a vacuum but respond to the submissions of the party concerned. In my view, this factor is relevant because the Applicant's H&C submissions addressed hardship, actually putting it in block capitals: HARDSHIP. I also note the Officer found the BIOC was "the most compelling factor" in the entire H&C assessment.

[30] In any event, there is no rule excluding consideration of hardship on an H&C given *Kathansamy* and its insistence "*all*" factors be considered: see *Kargbo v. Canada (Citizenship and Immigration)* 2022 FC 1376 at paragraph 33:

> [33] In *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, when discussing section 25 of the *IRPA* generally, the Supreme Court of Canada tells us that there will inevitably be some hardship associated with being required to leave Canada. However, the Supreme Court adds that alone will generally be insufficient to warrant relief on H&C grounds (*Kanthasamy* at para 23). As to the requirement under subsection 25(1) to take into

> account the best interests of a child directly affected, the Supreme Court states the best interests principle is highly contextual because of the multitude of factors that may impinge on the child's best interests. The decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them (*Kanthasamy* at para 38). A decision under subsection 25(1) of *IRPA* will be unreasonable if the interests of children affected by the decision are not sufficiently considered. This means that decision-makers must do more than simply state that the interests of a child have been taken into account: the BIOC must be examined with a great deal of attention in light of all the evidence [the Supreme Court itself italicizes the word "*all*"].

[31] While it was submitted the Officer misstated the importance of a BIOC analysis, I am not persuaded it materially differed from that the words of the Supreme Court of Canada in *Kanthasamy* at paragraph 38:

> [38] Even before it was expressly included in s. 25(1), this Court in *Baker* identified the "best interests" principle as an "important" part of the evaluation of humanitarian and compassionate grounds. As this Court said in *Baker*:
>
> > . . . attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for [a humanitarian and compassionate] decision to be made in a reasonable manner. . . .
> >
> > . . . for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying [a humanitarian and compassionate] claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's

> guidelines, the decision will be unreasonable.
> [paras. 74-75]

[32] I was invited to read letters from the Applicant's son, but note the Officer not only referred to them but quoted from them. Other points were made, but and with respect, having found no reviewable error in setting out constraining law, I respectfully decline counsel's invitation, which I consider it to have been, to reweigh and reassess the BIOC evidence and inferences therefrom, per *Vavilov* and *Doyle* cited above.

B. *Psychological evidence*

[33] I set out above the medical evidence, that of a psychiatrist, filed in support of the Applicant's claim, and which is in my view the material evidence. I see nothing unreasonable with its assessment by the Officer. The psychiatrist (a medical doctor fully licenced and well qualified) met the Applicant only twice and then for a total of only an hour and ten minutes. Self-reporting is expected and occurred in such circumstances. I find it notable the doctor declined to provide a diagnosis, but only a likely diagnosis. I have little doubt that was based on the limited time for observations. The Officer was entitled to discount it accordingly. Otherwise I decline to reweigh and reassess the evidence in this respect.

C. *Legitimate expectations*

[34] The Applicant in written submissions argued the Officer's error in giving the Applicant permanent residence travel documents could ground a claim for breach of legitimate expectations. There is no authority for that proposition, nor in my view does it meet any of the

well-settled criteria for finding such a breach. The submission has no merit; if it were otherwise, I am unsure what bounds would be put on it. Notably, counsel for the Applicant herself said this was not a true instance of legitimate expectations. I agree.

D. *Temporary residence permit*

[35] The Applicant in her counsel's H&C submissions asked for a temporary residence permit in the alternative, and did so "for the same H&C reasons outlined above." Having reasonably dismissed the H&C I am not persuaded it was unreasonable for the Officer to dismiss the temporary residence permit for the same reasons, given the H&C and TRP submissions were made on the same grounds. Moreover, the decision rejecting this aspect of the submissions was obviously based on the reasons H&C was rejected. Notably, the Officer used the agreed test for such permits noting they require "compelling reasons". This was not a case where there was no assessment; rather this is a case where there was what I consider a reasonable and thorough analysis, consideration, assessment but ultimate rejection of the claim.

VII. Conclusion

[36] There being no unreasonableness or breach legitimate expectations, this application will be dismissed.

VIII. Certified Question

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

JUDGMENT in IMM-2666-22

THIS COURT'S JUDGMENT is that this application is dismissed, no question is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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