Federal Court  Cour fédérale

Date: 20240819

Docket: IMM-4694-23

Citation: 2024 FC 1285

Ottawa, Ontario, August 19, 2024

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

Thusyanthan Suthakar

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Thusyanthan Suthakar, is a citizen of Sri Lanka who became a permanent resident in Canada as a dependent of his mother. He lost his permanent resident status because of several convictions for serious criminal offences in Canada and now seeks permanent residence on humanitarian and compassionate [H&C] grounds.

[2] On reconsideration of his H&C application, following a judicial review of an earlier refusal that was settled, a senior immigration officer [Officer] again refused Mr. Suthakar's application, resulting in the judicial review proceeding currently before the Court.

[3] Mr. Suthakar argues that the Officer unreasonably relied on withdrawn criminal charges, unreasonably discounted his medical history and other evidence, and conducted a segmented analysis without the requisite level of compassion.

[4] The Respondent disagrees and submits that the Officer's reasons do not contain any obvious, fatal flaws in their overarching logic, any erroneous findings of fact, or other errors in the inference making process.

[5] I am persuaded that Mr. Suthakar has met his onus of showing that the Officer's decision to refuse his H&C application [Decision] is unreasonable. For the reasons below, this judicial review application will be granted.

II. Analysis

[6] The parties agree, as do I, that the presumptive reasonableness standard of review applies to this matter. Stated another way, the Court must consider whether the challenged administrative decision is intelligible, transparent, and justified: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 25, 99. I find that it is not.

[7] The determinative issues, in my view, are the Officer's: (1) reliance on withdrawn criminal charges, (2) treatment of Mr. Suthakar's medical history, and (3) approach to the global assessment of Mr. Suthakar's circumstances. I address each issue in turn. I add that, although the first issue alone is a sufficient basis to dispose of the judicial review, I consider the other two issues because the matter will be sent back for another redetermination. I decline, however, to address Mr. Suthakar's other arguments.

(1) The Officer unreasonably relies on withdrawn criminal charges

[8] The Respondent argues that there is no basis in law proscribing the consideration of criminal charges when analyzing someone's past crimes, and current behaviour, in an H&C context. I disagree.

[9] There is a subtle but important distinction between considering the evidence underlying withdrawn or dismissed charges (which evidence can be considered) versus charges in question which, in themselves, cannot be considered as evidence of an individual's criminality: *Thuraisingam v Canada (Minister of Citizenship and Immigration), 2004 FC 607 at para 35; Sittampalam v Canada (Minister of Citizenship and Immigration),* 2006 FCA 326 [*Sittampalam*] at para 50. Inferences about a person's behaviour drawn from the fact that they have been charged, without reference to the evidence surrounding those charges, is a reversible error, in my view, and one which the Officer here made.

[10] The Officer reproduces three times a bullet point list of police interactions and outcomes pertaining to Mr. Suthakar, including arrests, charges, convictions, and withdrawals. The Officer

uses this list to find that the Applicant has continued to engage in criminal activity, "is a recidivist," and has "an extensive arrest record and court dates in Canada spanning many years from 2013 to 2021." The Officer places great weight on "the applicant's criminal history of aggressive behaviour, arrests, convictions, peace bonds, as well as a risk for recidivism." I infer that the Officer's reference to "great weight" means "negative weight" in the circumstances.

[11] In reaching these conclusions, the Officer unreasonably relies on withdrawn charges, including the existence of peace bonds, without any details or context for the charges (with the exception of an arrest for public intoxication where the Applicant was found intoxicated and asleep in a stranger's unlocked car in a mall parking lot). This approach, in my view, is contrary to the jurisprudence: *Abdi v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 950 [*Abdi*] at para 38; *Hutchinson v Canada (Citizenship and Immigration)*, 2018 FC 441 at paras 26-27.

[12] The Respondent argues that principles concerning the treatment of withdrawn and dismissed charges arising in the contexts other than H&C, such as inadmissibility under sections 36 and 37 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], are not applicable to H&C considerations under section 25. I disagree. See Annex "A" for the latter provision, the others not being relevant here.

[13] This Court previously has held that, in an H&C context, the Court can rely on the reasoning behind the general principle espoused in *Sittampalam* to the effect that an officer can use the evidence about charges against an applicant but cannot use it as evidence of the

applicant's criminality: *Kharrat v Canada (Citizenship and Immigration)*, 2007 FC 842 at paras 20-21.

[14] The serious offences for which Mr. Suthakar was convicted and sentenced to imprisonment in 2014 (i.e. assault, assault with a weapon, and sexual assault) were significant factors in the Officer's conclusions. That said, when the Decision is read holistically, the finding of recidivism and the great weight placed on Mr. Suthakar's criminal history also were influenced materially, in my view, by the withdrawn charges and the peace bonds: *Abdi*, above at para 38.

[15] I find that the matter before me is not a case where the officer notes that the withdrawn charges are not part of an applicant's criminal record by reason of their withdrawal (see, for example, *Daniels v Canada (Citizenship and Immigration)*, 2018 FC 463 at para 49). To the contrary, the Officer here places great weight on Mr. Suthakar's "criminal history" which includes the withdrawn charges. Absent any surrounding evidence about these charges and the peace bonds, however, such a finding is unreasonable, in my view, and warrants the Court's intervention.

(2) The Officer unreasonably discounts the Applicant's medical history

[16] Mr. Suthakar argues that the Officer unreasonably discounted his traumatic brain injury [TBI]. The Respondent counters that it is a matter of insufficiency of the Applicant's evidence in this regard. I disagree and find that the Officer's treatment of Mr. Suthakar's evidence about his TBI was unreasonable in several respects.

[17] Mr. Suthakar's evidence is that he suffered a TBI following a bicycle accident that hospitalized him for three days in 2014 and subsequently impacted his ability to work. When considering his unemployment, however, the Officer does not account for this evidence and places great weight (again, I infer negative weight) on the Applicant's sporadic and low level of employment. Given the stakes at issue for Mr. Suthakar, I find that the Officer's lack of reference to his TBI in the employment analysis does not represent responsive justification further to the Supreme Court of Canada's guidance in *Vavilov*, above at paras 127-128 and 133, and more recently in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 74 and 76 (citing extensively from *Vavilov*).

[18] Further, the Officer expresses skepticism about the TBI, or the extent of its after-effects, because Mr. Suthakar's evidence does not include any medical certificates or doctor's notes from the period following the "alleged Traumatic Brain Injury" he "apparently suffered" in 2014. Contrary to the Respondent's submission that the Officer did not doubt the existence of the TBI, I find the Officer's treatment of the 2022 letter from Mr. Suthakar's family doctor is rooted in doubt or skepticism about the TBI. This is captured in the Officer's statement that, "it is unclear how the doctor in 2022 could possibly render a diagnosis of 'traumatic brain injury' for an event that occurred in May of 2014."

[19] The Officer describes what the doctor's letter does not contain (i.e. the frequency or dates and times of medical appointments, details about why the doctor believes Mr. Suthakar's condition relates to the bicycle accident in 2014, the linkage of Mr. Suthakar's conditions to the

injuries sustained in 2014 or the diagnosis, the details of any objective testing regarding Mr. Suthakar's pain or any prescriptions).

[20] In my view, the Officer's litany of the letter's shortcomings impermissibly focuses on what the letter does not say (or what the Officer would have preferred that the doctor's letter contain), rather than what it does. I find such focus unreasonable: *Botros v Canada (Citizenship and Immigration)*, 2013 FC 1046 at paras 32-33; *Mui v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1020 at para 28. I include in this finding the Officer's discounting of the diagnosis because Mr. Suthakar's current family doctor was not the treating physician in 2014.

(3) The Officer's global assessment is unreasonable

[21] I am unable to conclude that the Officer applied a *Chirwa* lens to the global assessment they conducted regarding Mr. Suthakar's H&C factors.

[22] The Supreme Court of Canada emphasizes that H&C considerations under subsection 25(1) of the *IRPA* mean circumstances "which would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another": *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 13 and 21, citing *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338 [*Chirwa*].

[23] Applying the *Chirwa* principle to the assessment of an H&C application involves a factually infused or fact-driven exercise (i.e. the Minister may examine the circumstances concerning a foreign national seeking permanent residence under subsection 25(1) of the *IRPA*).

[24] Further, an officer must weigh all relevant compassionate factors separately, even those factors that do not result in hardship or apply directly to establishment, family reunification, or other H&C considerations: *Dayal v Canada (Citizenship and Immigration)*, 2019 FC 1188 [*Dayal*] at para 31, citing *Salde v Canada (Citizenship and Immigration)*, 2019 FC 386 at paras 23-24. As part of the global assessment, the officer then must balance the positive considerations against the negative ones cumulatively but, foremost, compassionately: *Dayal*, above at para 32; *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at para 33; *Liu v Canada (Citizenship and Immigration)*, 2023 FC 474 at para 34.

[25] Mr. Suthakar argues that the Officer took a segmented, checklist approach to the global analysis, rather than considering his circumstances cumulatively.

[26] The Respondent disagrees that the Officer's reasons were segmented, lacked the necessary compassionate lens, and failed to capture all factors in the global assessment.

[27] Even reading the Officer's "H&C Global Analysis and Conclusion" generously and holistically, I cannot agree with the Respondent.

[28] I find that the Officer does not consider meaningfully Mr. Suthakar's complete dependency on his family in Canada, the lack of a community in Sri Lanka, and the fact his past trauma makes him vulnerable in Sri Lanka, among other factors. Without diminishing the seriousness of Mr. Suthakar's criminal convictions and imprisonment in Canada, in my view, the Decision does not convey the compassion required in an H&C decision.

[29] The Officer's global analysis focuses heavily on Mr. Suthakar's criminal history; it is one of the three times, mentioned above, that the Officer reproduces a bullet point list of Mr. Suthakar's interactions with police and outcomes, including arrests, charges, convictions, and withdrawals. While the Decision acknowledges the Applicant's statement that he experienced traumatic events in Sri Lanka as a Tamil child during the civil war, the Officer does not describe his past in Sri Lanka in any detail.

[30] For example, the Decision does not respond to Mr. Suthakar's evidence that he was exposed to trauma, including the civil war and his father's abuse, more than his younger siblings for whom he cared before they joined their mother in Canada. Rather, the Officer dismisses his trauma because he did not obtain a psychological assessment for many years and his family did not react to the traumatic events in the same destructive way.

[31] Further, the Officer responds minimally to Mr. Suthakar's evidence regarding his past, his capacity to work, and his dependency on his family and their dependency on him. It is not unreasonable necessarily to say that the psychological effect of past traumatic events cannot justify the commission of violent crimes. The Officer, however, does not consider how Mr. Suthakar's traumatic experiences would affect his reintegration into Sri Lanka, particularly as he would be separated from his family in Canada on whom he is dependent and who in turn depend on him, given his previous caretaking role.

[32] In other words, I agree with Mr. Suthakar that the Officer focused unduly on his circumstances in Canada in a silo dominated by the segment of his criminal convictions,

imprisonment, and other interactions with police without considering and weighing the underlying compassionate considerations cumulatively. Given my determination that the Officer unreasonably considered Mr. Suthakar's withdrawn charges, I also find that this unreasonably influenced the global assessment. That is to say, I cannot determine how their absence from the assessment would impact it and, thus, the Decision must be set aside.

III. Conclusion

[33] I conclude that the Officer considered withdrawn charges unreasonably, assessed the Applicant's medical evidence unreasonably, and generally did not utilize an approach characterized by compassion, as required by the jurisprudence. While the first issue alone is sufficient to dispose of the judicial review, these errors cumulatively reinforce my conclusion that the Decision is unreasonable.

[34] The Decision thus will be set aside, with the matter remitted to a different officer for redetermination.

[35] There is no proposed question for certification.

JUDGMENT in IMM-4694-23

THIS COURT'S JUDGMENT is that:

1. The judicial review application is granted.
2. The March 27, 2023 decision of a senior immigration officer refusing the Applicant's application for permanent residence on humanitarian and compassionate [H&C] grounds, is set aside, along with the reasons dated March 24, 2023.
3. The H&C application will be remitted to a different officer for reconsideration.
4. There is no question for certification.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27.**
***Loi sur l'immigration et la protection des réfugiés*, LC 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, 35.1 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, 35.1 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, 35.1 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, 35.1 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.

FEDERAL COURT

SOLICITORS OF RECORD

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