Federal Court  Cour fédérale

Date: 20210812

Docket: IMM-2909-20

Citation: 2021 FC 757

Ottawa, Ontario, August 12, 2021

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

THI THU THUY PHAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Thi Thu Thuy Pham, seeks judicial review of the decision of a Senior Immigration Officer (the "Officer"), refusing the Applicant's request for permanent resident status on humanitarian and compassionate ("H&C") grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "*IRPA*"). The Officer found that

H&C relief was not warranted by the Applicant's return to Vietnam or the best interests of the child (the "BIOC") with respect to the Applicant's granddaughter, Crystal Fung.

[2] The Applicant submits that the Officer committed two reviewable errors. First, the Officer erred by determining there was insufficient evidence to establish that the Applicant's family in Vietnam would not support her. Second, the Officer erred by not giving more weight to the BIOC.

[3] I find that the Officer's decision is reasonable, as it is both internally coherent and justified in relation to the relevant evidence. The Applicant essentially asks this Court to reweigh the evidence before the Officer and reach a different outcome, which is not the purpose of judicial review. This application is therefore dismissed.

II. Facts

A. *The Applicant*

[4] The Applicant is a 65-year-old woman from Vietnam. Since her first visit in 2011, the Applicant has spent the majority of her time in Canada with her daughter, son-in-law, and their 10-year-old daughter, Crystal. The Applicant has resided in Canada since her most recent entry on October 14, 2017.

[5] The Applicant cooks, cleans, and cares for Crystal while Crystal's parents work. Crystal's mother works full-time as a nail technician. Crystal's father works full-time as an automobile dismantler. Their family income is approximately $65,000 per year.

[6] The Applicant's family in Vietnam consists of her ex-husband, four sons, and four siblings. The Applicant and her ex-husband began their relationship in 1973. They co-owned a motorcycle repair and parts business, which they operated out of their house in Ho Chi Minh City.

[7] Upon returning to Vietnam after her first visit to Canada in 2011, the Applicant discovered her husband was seeing another woman. The Applicant continued to live in the same house as her husband, but they ceased communication. Eventually, the Applicant's husband stopped supporting the Applicant financially and prevented her from operating their business.

[8] In 2017, the Applicant briefly returned to Vietnam to visit her sons. The Applicant felt uncomfortable and unwelcome staying with her sons, as the sons work for the Applicant's ex-husband and did not want to offend him by discussing the dissolution of their marriage.

[9] The Applicant claims she has little support in Vietnam, as she can no longer live with her sons for fear of causing conflict in the family. Further, the Applicant claims she no longer has an independent source of income in Vietnam because her ex-husband ousted her from their business.

[10] On June 20, 2018, the Applicant submitted an application for permanent resident status on H&C grounds. The Applicant's H&C application was based primarily on the following factors:

1. the Applicant is supported by Crystal's parents in Canada;
2. the Applicant supports Crystal's parents by caring for Crystal while they work;
3. the Applicant has been a primary caretaker for Crystal since her birth in 2011; and
4. the Applicant lacks familial support in Vietnam.

B. *Decision Under Review*

[11] In a decision dated June 10, 2020, the Officer refused the Applicant's H&C application. The Officer found that there was insufficient evidence to establish that the Applicant would suffer financial or emotional hardship in Vietnam due to the dissolution of the Applicant's marriage. Additionally, the Officer held that the BIOC did not warrant H&C relief. The Officer determined Crystal's parents could care for Crystal in the Applicant's absence, and the Applicant could visit Crystal by travelling between Vietnam and Canada.

III. Issues and Standard of Review

[12] This application for judicial review raises the following issues:

A. *Did the Officer err in determining that the Applicant's personal circumstances in Vietnam did not warrant H&C relief?*

B. *Did the Officer err in determining that the BIOC did not warrant H&C relief?*

[13] It is common ground between the parties that reasonableness is the applicable standard of review for the above issues.

[14] I agree. H&C decisions under subsection 25(1) of the *IRPA* are reviewed on the reasonableness standard (*Rainholz v Canada (Citizenship and Immigration)*, 2021 FC 121 ("*Rainholz*") at para 23, citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*")).

[15] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). 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). Whether a decision is reasonable depends on the relevant administrative setting, the record

before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[16] For a decision to be unreasonable, an applicant must establish that the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). A reviewing court must refrain from reweighing the evidence that was before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125).

IV. Legislative Scheme

[17] Under subsection 25(1) of the *IRPA*, the Minister may grant discretionary relief from the requirements of the *IRPA* to certain foreign nationals on H&C grounds:

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	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

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.	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.

[18] Citing *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 ("*Kanthasamy*"), among other cases, Justice Little described the purpose of H&C applications and the relevant considerations in *Rainholz*:

> [14] Humanitarian and compassionate considerations refer to "those facts, established by the evidence, which would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the [*IRPA*]". The purpose of the H&C provision is provide equitable relief in those circumstances.
>
> [15] Subsection 25(1) has been interpreted to require that the officer assess the hardship that the applicant(s) will experience on leaving Canada. Although not used in the statute itself, appellate case law has confirmed that the words "unusual", "undeserved" and "disproportionate" describe the hardship contemplated by the provision that will give rise to an exemption. Those words to describe hardship are instructive but not determinative, allowing subs. 25(1) to respond flexibly to the equitable goals of the provision.
>
> [16] An applicant may raise a wide variety of factors to show hardship on an application for H&C relief. Commonly raised factors include establishment in Canada; ties to Canada; health considerations; consequences of separation of relatives; and the BIOC. The H&C determination under sub. 25(1) is a global one, and relevant considerations are to be weighed cumulatively as part

> of the determination of whether relief is justified in the circumstances.
>
> [17] The discretion in subs. 25(1) must be exercised reasonably. Officers making humanitarian and compassionate determinations must substantively consider and weigh all the relevant facts and factors before them.
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> [18] The onus of establishing that an H&C exemption is warranted lies with the applicants. Lack of evidence or failure to adduce relevant information in support of an H&C application is at the peril of the applicant.
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> [citations omitted]

V. Analysis

A. *Did the Officer err in determining that the Applicant's personal circumstances in Vietnam did not warrant H&C relief?*

[19] The Officer held that there was insufficient evidence to establish that the Applicant's personal circumstances in Vietnam warranted H&C relief. In particular, the Officer found that the Applicant had not established that the dissolution of her marriage would cause conflict in the Applicant's family upon her return, or that the Applicant would face financial hardship:

> The Applicant and Counsel provide little information and/or evidence explaining what this conflict and friction is and how the Applicant's return to Vietnam will cause it. It is also unclear how the Applicant and her family will be adversely affected by this conflict and friction. There is little in the submissions to explain how the Applicant's life will be difficult without an independent source of income. It is unknown whether the Applicant has savings, investments or property of her own in Vietnam or whether she can be financially supported by other family members other than her ex-spouse.
>
> […]

> Overall, I find the Applicant provides very little information and details to describe specific experiences or examples of the conflict she would cause her family in the event she returns to Vietnam. I also find the Applicant presents insufficient evidence to establish the serious possibility of suffering financial or emotional hardships in Vietnam based on her marital situation. As a result, I grant little weight to the Applicant's cited hardships of returning to Vietnam due to the breakdown of her marriage.

[20] The Applicant asserts that the Officer's decision is unreasonable in light of the relevant evidence. The Applicant submitted evidence explaining that she faces hardship in Vietnam because her husband ended their relationship and ousted her from their business, causing a rift between the Applicant and her sons.

[21] The bulk of the Applicant's evidence regarding her sons is contained in her May 17, 2018 letter, which states:

> I returned briefly to Vietnam to see my sons from September 14 to October 15th, 2017. During that trip I stayed with my sons that lived away from my husband, but the situation was a serious problem because my sons didn't want to offend my husband, so they could not talk about their relationship with me, while they worked entirely for their father. I did not feel useful or welcome in their households while I stayed in their homes. During the entire month that I was in Vietnam, all I wanted to do was to return back to Canada to be with my daughter, my son-in-law, and my granddaughter Crystal.

[22] In my view, the Applicant provided sparse information regarding the identities of her four sons and why they could not support her in Vietnam. As noted by the Respondent, the Applicant did not even provide the names of her sons to the Officer.

[23] Given this minimal evidence, I find that the Officer determined, in a manner that is justified, intelligible, and transparent, that the Applicant's cited hardships of returning to Vietnam did not warrant H&C relief (*Vavilov* at para 99). The Officer reasonably held that there is little evidence to indicate that the dissolution of the Applicant's marriage has resulted in the Applicant becoming estranged from her sons, as the Applicant's evidence only establishes that the Applicant did not feel welcome in her sons' homes when she visited in 2017. Likewise, the Officer reasonably noted that there is no evidence to establish that the Applicant's four siblings in Vietnam are unable to support her.

[24] The Applicant, in arguing the Officer's decision is unreasonable, asserts that the Officer required her to prove a negative, as there is no evidence that the Applicant could tender to establish her lack of support in Vietnam aside from her testimony.

[25] I find that this argument misconstrues the Officer's decision. The Officer did not determine it was insufficient for the Applicant to submit only testimony as evidence of hardship, but rather held that the testimony submitted by the Applicant, on its merits, did not establish the hardship claimed. It is the Applicant's burden to establish that H&C relief is warranted. Given the lack of detail in the Applicant's submissions, as discussed above, I find that it was reasonable for the Officer to determine that such relief is not warranted.

[26] I am also not convinced by the Applicant's argument that the Officer unreasonably utilized a "hardship-centric approach." In support of this argument, the Applicant relies upon *Bhalla v Canada (Citizenship and Immigration)*, 2019 FC 1638 ("*Bhalla*") at para 17, wherein

Justice Diner held that it was unreasonable to elevate hardship above all other factors in an H&C application, including key compassionate elements. This principle flows from the notion that officers making H&C determinations must consider all relevant factors and not limit their analysis to hardship alone (*Kanthasamy* at para 25).

[27] In my view, *Bhalla* is distinguishable from the case at hand. The officer in *Bhalla* failed to adequately address compassionate factors that arose from the evidence, thus overlooking central elements of the application that uniquely invoked compassion rather than hardship (*Bhalla* at para 24; see also *Salde v Canada (Citizenship and Immigration)*, 2019 FC 386 at paras 22-23). In this case, the Officer accounted for all the relevant factors regarding the Applicant's life in Vietnam, whether based on hardship or compassionate elements, and reasonably held that they were insufficient to warrant H&C relief.

B. *Did the Officer err in determining that the BIOC did not warrant H&C relief?*

[28] The BIOC is not necessarily determinative of an H&C application, but it is an important factor deserving of substantial weight and to which immigration officers should be "alert, alive, and sensitive" (*Kanthasamy* at para 38, citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 74-75). Justice Abella elucidated what a reasonable consideration of the BIOC generally requires in *Kanthasamy*:

> [39] A decision under s. 25(1) will therefore be found to 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. Those interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence.

> [citations omitted, emphasis in original]

[29] In the case at hand, the Officer determined that the best interests of Crystal, the Applicant's granddaughter, did not warrant H&C relief. The Officer found that Crystal's parents could support Crystal in the Applicant's absence, and that the Applicant could continue to travel to Canada to see Crystal:

> The Applicant's daughter and son-in-law are silent about who assists with Crystal's care when the Applicant is not in Canada; little information from these times of separation has been provided for consideration. Therefore, I can reasonably assume that the Applicant's daughter and son-in-law were able to work and either find care or care for Crystal themselves, for several periods of time during the Applicant's absence from Canada. There is little in the submissions indicating that the Applicant's daughter and son-in-law are unable to obtain other child care options for Crystal.
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> […]
>
> I acknowledge that in the event the Applicant returns to Vietnam, it may cause some emotional hardship for Crystal. However, she will have the support of both her parents to assist her through this difficulty. I note that the Applicant presently continues to reside in Canada as a temporary resident visitor and may continue supporting Crystal. In the event the Applicant leaves Canada, she may still be able to provide Crystal with additional emotional support by remaining in contact using similar means in which she remained in contact during previous periods in which she left Canada. There is little evidence in the submission to indicate that the Applicant is unable to travel to and from Canada and Vietnam to visit Crystal in the future as she has done in past years.

[30] The evidence indicates that the quality of Crystal's care is improved by the Applicant's presence. Both Crystal's parents work long hours to procure limited means. They often get home from work after 7pm and earn $65,000 per year collectively. The Applicant provided care for Crystal upon arriving in Canada, including feeding Crystal, transiting her to and from school,

and cooking and cleaning for the family. According to Crystal's father, the family's house "would be a disaster" without the Applicant's assistance. The parents of Crystal's father also submitted a letter stating that they are unable to care for Crystal because they too work full-time.

[31] Despite the Applicant's role in Crystal's life, I find that the Officer's decision is internally coherent and justified in relation to the relevant evidence (*Vavilov* at para 85). The Officer acknowledged the bond between the Applicant and Crystal; that the Applicant provides Crystal with care; and that the Applicant provides Crystal's family with assistance. The Officer gave "substantial weight" to the BIOC in light of this evidence, but concluded it was not determinative of H&C relief.

[32] Ultimately, this issue concerns an insufficiency of evidence. While the improvement to Crystal's life brought by the Applicant's presence in Canada is significant, the evidence is not so compelling that the Officer's decision is unjustified in relation to the Applicant's return to Vietnam. As noted by the Officer, Crystal could receive care from her family in the Applicant's absence, as she did in the past, and the Applicant could continue to visit Crystal. In arguing the Officer's decision is unreasonable, the Applicant essentially asks this Court to reweigh the evidence before the Officer and reach a different outcome, which is not the purpose of judicial review (*Dhesi v Canada (Attorney General)*, 2018 FC 283 at para 24, citing *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 61).

VI. Conclusion

[33] I find that the Officer reasonably determined that H&C relief was not warranted by the Applicant's circumstances in Vietnam and the BIOC. I therefore dismiss this application for judicial review.

[34] The parties have not proposed a question for certification, and I agree that none arises.

JUDGMENT in IMM-2909-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no question for certification.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2909-20
STYLE OF CAUSE:	THI THU THUY PHAM v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	JUNE 10, 2021
JUDGMENT AND REASONS:	AHMED J.
DATED:	AUGUST 12, 2021

APPEARANCES:

Rekha McNutt	FOR THE APPLICANT
Emera Nguyen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Caron & Partners LLP Barristers and Solicitors Calgary, Alberta	FOR THE APPLICANT
Attorney General of Canada Calgary, Alberta	FOR THE RESPONDENT