Federal Court Cour fédérale

Date: 20211103

Docket: IMM-1797-21

Citation: 2021 FC 1178

Ottawa, Ontario, November 3, 2021

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

JULEKHABIBI MUSA PATEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Julekhabibi Musa Patel, seeks to judicially review the decision of a senior immigration officer (the "Officer") of Immigration, Refugees and Citizenship Canada to refuse her application for permanent residence on humanitarian and compassionate ("H&C") grounds pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act,* SC 2001, c 27 ("*IRPA*").

[2] The Applicant submits that the Officer's decision to refuse her application was unreasonable on the grounds that the Officer failed to adequately assess the best interest of the Applicant's grandchildren and the hardship the Applicant would face if she returned to India.

[3] For the reasons that follow, I find that the Officer's decision is reasonable. This application for judicial review is dismissed.

II. **Facts**

A. *The Applicant*

[4] The Applicant is a 73-year-old citizen of India. She is a widow and has three sons, two of whom live in Canada. Her eldest son is a Canadian citizen who lives in British Columbia with his wife and two young children. The Applicant also has three brothers and three sisters residing in Canada, and one brother residing in India.

[5] According to the Applicant, she has been a homemaker her entire life, has never been employed, and has received little formal education.

[6] From October 2015 to October 2017, the Applicant resided with her eldest son in Canada, and again from January 2019 to the present day. The Applicant holds a visitor's visa, valid until 2027.

[7] On December 4, 2020, the Applicant applied for a permanent residence in Canada on H&C grounds.

B. *Decision Under Review*

[8] By way of letter dated March 12, 2021, the Officer refused the Applicant's application, determining that there were insufficient reasons to grant an exemption on H&C grounds.

[9] The Officer considered the Applicant's establishment in Canada, the best interest of the children ("BIOC") with respect to the Applicant's grandchildren, and the adverse country conditions in India. The Officer found that the Applicant demonstrated minimal establishment in Canada apart from her familial relationships, that her separation from her grandchildren would not compromise their best interest, and that the Applicant did not demonstrate that she would be personally negatively affected by the country conditions in India. The Officer concluded that the H&C considerations did not justify an exemption under subsection 25(1) of the *IRPA*.

III. **Issue and Standard of Review**

[10] The sole issue is whether the Officer's decision is reasonable.

[11] The appropriate standard of review is reasonableness (*Zhang v Canada (Citizenship and Immigration)*, 2019 FC 764 at para 12; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paras 16-17).

[12] 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).

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

IV. **Analysis**

[14] Under subsection 25(1) of the *IRPA,* the Minister may grant permanent residency to a foreign national who does not meet the requirements of the *IRPA* if the Minister is of the opinion that the circumstances are justified under H&C considerations, including BIOC considerations.

[15] An H&C exemption is a discretionary remedy. What warrants relief will vary depending on the facts and context of the case. In *Kanthasamy v Canada (Citizenship and Immigration),* 2015 SCC 61 ("*Kanthasamy*"), the Supreme Court defines H&C considerations as being "those facts, established by the evidence, which would excite in the reasonable [person] in a civilized

community a desire to relieve the misfortune of another" (at para 21, citing *Chirwa v Canada (Minister of Manpower and Immigration)* (1970), 4 IAC 338 (Imm App Bd) at 350)).

[16] This means that the decision maker must "substantively consider and weigh all the relevant facts and factors before them" (*Kanthasamy* at para 25, citing *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras 74-75) and that "there will sometimes be humanitarian or compassionate reasons for admitting people who, under the general rule, are inadmissible" (*Kanthasamy,* at paras 12-13). The Applicant bears the onus of establishing that an H&C exemption is warranted (*Kisana v Canada (Citizenship and Immigration),* 2009 FCA 189 at para 45).

A. *Best Interest of the Children*

[17] When reviewing the submissions regarding the best interests of the Applicant's grandchildren, the Officer acknowledged that any family separation creates some impact on the children involved. However, the Officer found insufficient evidence to establish that the Applicant's separation from her family would compromise the best interests of her grandchildren and that the Applicant had submitted little evidence to demonstrate her relationship with her grandchildren.

[18] The Officer also found that the Applicant had not established that she would be unable to continue to be a part of the lives of her family in Canada through modern communication and travel, noting that the Applicant holds a multiple-entry visa that is valid until 2027.

[19] The Applicant submits that the Officer's analysis of the BIOC was flawed and simplistic, as the Officer failed to fully account for the role the Applicant plays in her grandchildren's lives.

[20] The Applicant currently resides with her son, her daughter-in-law and her two young grandchildren in Canada. While living with her son's family, the Applicant helps care for her grandchildren. The Applicant submits that her presence in the home greatly enriches her grandchildren's lives. In an affidavit submitted as part of the Applicant's evidence, she notes:

> I have developed an extremely strong relationship with not only my children but moreover my grandchildren, they adore my presence just as much as I adore theirs.

[21] The Applicant contends that her relationship relies on physical presence, and is not simply a matter of communication. The Applicant submits that in *Akyol v Canada (Citizenship and Immigration),* 2014 FC 1252 ("*Akyol*") at paragraph 24, this Court notes that the BIOC assessment does not require evidence of severe harm or hardship to a child, or whether a child could adapt to other circumstances, but rather consideration of the question: "what is in the child's best interest?"

[22] The Respondent relies on this Court's decision in *Garcia Garcia v Canada (Citizenship and Immigration)* 2020 FC 300 ("*Garcia Garcia*") to argue that it was reasonable for the Officer to find that the best interest of the grandchildren did not warrant exceptional relief.

[23] In *Garcia Garcia,* the BIOC assessment also involved the best interest of the applicants' grandchildren. At paragraph 59, my colleague Justice Pamel writes:

> The decision in *Kanthasamy* outlines a number of factors that should be considered in relation to the best interests of the child analysis. However, it is important to keep in mind that the situation in this case is not one where the children are at risk of being removed from the only environment they have known. It is not their parents who are applying to remain in Canada, but rather their grandparents. That is not to say that the connection and dependency that the children have with and on the Applicants is not to be taken into consideration, but rather, the factors going into that analysis are different from those in a situation where the children themselves are at risk of being removed from their environment.

[24] The Respondent submits that the Court's reasoning in *Garcia Garcia* distinguishes the BIOC test outlined in *Akyol,* in which this Court found that it is incorrect to import a hardship test into the BIOC analysis. The Respondent also contends that unlike in the present case, the children in *Akyol* were at risk of leaving Canada and facing a foreign environment, and the applicants had provided information on the specific ways the children would be impacted by a relocation (*Akyol,* at paras 7-11; 14-21).

[25] I agree with the Respondent that in this case, like in *Garcia Garcia,* the children implicated do not risk relocation, and while they may find the separation from their grandmother difficult, it was reasonable for the Officer to conclude that family separation was not necessarily enough to justify the exercise of discretion in this case (*Khan v Canada (Citizenship and Immigration),* 2020 FC 202 at para 12). I find that the Officer weighed all the factors and evidence presented and came to a reasonable conclusion with respect to the best interests of the Applicant's grandchildren.

B. *Hardship & Country Conditions in India*

[26] The Applicant submits that the Officer failed to take into account the country conditions in India that she would face as an aging widow with limited education, notably: poor healthcare provision, very limited residential care for the elderly, and deteriorating religious freedom.

[27] In the reasons for their decision, the Officer considered the documents submitted by the Applicant that spoke to limits on religious freedom in India and concluded that the Applicant had not demonstrated how she would be personally affected by the adverse conditions. The Officer also found that the Applicant had submitted insufficient evidence to demonstrate that she has serious health issues that would result in hardship if she returns to India and determined that the Applicant had not demonstrated that she would be economically vulnerable in India. The Officer further noted that the Applicant lived the majority of her life in India and had not submitted any evidence to demonstrate that she faced hardship when she returned to India between October 2017 and January 2019.

[28] While I accept that the Applicant is an aging widow with limited education, I find that it was reasonable for the Officer to conclude that there was insufficient evidence to establish that the Applicant would be personally negatively impacted by the adverse country conditions in India, notably the lack of religious tolerance and the poor healthcare in India. I also find it was reasonable for the Officer to determine that the Applicant's documentation of her financial assets failed to demonstrate economic vulnerability, and that the Applicant submitted insufficient evidence of serious health issues that would result in hardship if she returned to India.

[29] The Applicant also submits that she would face undue hardship if separated from her family in Canada. In discussing the impacts of family separation, the Officer stated:

> However, I note that family separation is an inevitable reality when a family member makes the decision to immigrate abroad. In this particular case, the applicant's children made the decision to leave India to come to Canada.

[30] The Applicant argues that the Officer's statement is unduly harsh and does not align with the objectives of family reunification set out in paragraph 3(1)(d) of the *IRPA*.

[31] In reviewing the decision, I note that the Officer accounted for the importance of family reunification as well as the fact that family separation can result in some distress, but ultimately concluded that there was insufficient evidence that undue hardship would result from the Applicant's return to India:

> While any separation is bound to result in some distress, I find that the applicant submitted insufficient evidence to demonstrate that she is heavily reliant on her children, and that she and her family would face significant hardship if she was separated from them and returned to India.

[32] I therefore find that it was reasonable for the Officer to determine that having family ties in Canada is not in itself sufficient to warrant special relief pursuant to subsection 25(1) of the *IRPA*. I also note that the Applicant holds a multiple-entry visitor visa that is valid until 2027 and that it was thus reasonable for the Officer to find that there is little indication that the Applicant would be unable to travel to visit family in Canada in the future.

V. **Conclusion**

[33] I find that the Officer weighed all the relevant facts and factors before them and came to a reasonable conclusion. I therefore dismiss this application for judicial review.

[34] No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-1797-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. No questions are certified.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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