Federal Court  Cour fédérale

Date: 20220218

Docket: IMM-2434-21

Citation: 2022 FC 220

Ottawa, Ontario, February 18, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

GURMAIL KAUR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of the March 29, 2021 decision of a Senior Immigration Officer (the "Officer") of Immigration, Refugees and Citizenship Canada denying the Applicant's application for permanent residence from within Canada based on humanitarian and compassionate ("H&C") grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] The Applicant argues that the Officer failed to compassionately consider the Applicant's establishment and hardship factors, or take into account the ways in which the Applicant has attempted to obtain permanent residence through a traditional pathway.

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

II. **Facts**

A. *The Applicant*

[4] The Applicant, Ms. Gurmail Kaur, is a 25-year-old citizen of India. She was born and raised in Bahrain and has never lived in India. The Applicant currently resides in Edmonton, Alberta with her mother and her three siblings. The Applicant's eldest sister is a permanent resident of Canada. The Applicant's father resides in Surrey, British Columbia.

[5] The Applicant came to Canada in 2014 on a study permit. After completing her studies at MacEwan University, she obtained a Post-Graduate Work Permit valid until August 2020. The Applicant worked towards becoming eligible to apply for permanent residence under the Alberta Immigrant Nominee Program ("AINP").

[6] After graduation, the Applicant worked as a sales associate at Brooks Brothers for six months. The Applicant then applied for permanent residence under the AINP. Unfortunately, the Brooks Brothers store closed down and she was laid off. Three months later, she found work

as a sales associate at 7-Eleven; however, this was an ineligible occupation under the AINP. The Applicant eventually got a promotion at 7-Eleven, in fulfillment of the AINP requirements, and reapplied in June 2019.

[7] Shortly afterwards, the Applicant fell ill and was hospitalized in September 2019. She was diagnosed with Wilson's disease, a rare genetic liver disorder, and suffered from acute liver failure. The Applicant remained in the hospital until January 2020, after undergoing two liver transplants. Following the procedures, the Applicant underwent intense physiotherapy as she continued to suffer from neuropathic limitations in both her feet. The Applicant remains on immunosuppressant medication.

[8] The Applicant's illness prevented her from being able to go back to work in order to complete her AINP application, and her AINP file was closed.

[9] In March 2020, the Applicant was ready to return to work. However, her doctors cautioned her against doing so due to the COVID-19 pandemic and her compromised immunity.

[10] In June 2020, the Applicant submitted an application for permanent residence based on H&C grounds.

B. *The H&C Decision*

[11] In a decision dated March 29, 2021, the Officer refused the Applicant's H&C application, concluding that the Applicant's identified establishment and hardship factors were insufficient to justify an H&C exemption.

[12] The Officer found that the Applicant was still eligible to apply as an economic immigrant through the AINP, and that she did not adequately explain why she could not extend her temporary resident status, or how she would suffer significant hardship if she were to return to India.

(1) Establishment

[13] The Officer considered the Applicant's financial, social, and familial establishment in Canada, and assigned modest weight to each sub-factor. In reviewing the support letters from the Applicant's friends, the Officer found that while the letters were supportive and positive in nature, this was to be expected. The Officer found the support letters did not illustrate social ties in Canada characterized by a degree of interdependency or reliance warranting special consideration.

[14] The Officer also considered the fact that the Applicant's immediate family are all in Canada and noted that the Applicant does not have substantive familial ties to India. The Officer considered the positive factor of family unity in relation to the fact that all the family members, except one sibling, do not have permanent residency in Canada. Based on the primarily

temporary nature of the family's establishment in Canada, the Officer assigned modest weight to this sub-factor.

(2) Hardship

[15] The Officer considered the Applicant's submissions with respect to her health considerations, violence against women and socioeconomic gender inequity in India, and her lack of ties to India. The Officer assigned a low-to-modest weight to each sub-factor.

[16] The Officer considered the Applicant's Wilson's disease diagnosis, hospitalization, and documented medical treatments. The Officer noted the Applicant's submissions regarding the difficulty she would face accessing adequate medical treatment if forced to apply for permanent residence from abroad, and acknowledged that Canada may have better healthcare infrastructure than India. However, the Officer found that the Applicant did not provide sufficient evidence to demonstrate that she would not be able to receive treatment for Wilson's disease or the immunosuppressant medication she requires in India.

[17] While the Officer accepted that the Applicant did not have strong ties to India having never lived there, the Officer found the Applicant was likely familiar with Indian culture and customs as the daughter of two Indian nationals, and that the Applicant did not provide evidence showing otherwise.

III. **Issue and Standard of Review**

[18] The sole issue in this case is whether the Officer's decision is reasonable.

[19] The parties concur, and I agree, that the applicable standard of review of the Officer's decision is reasonableness (*Rannatshe v Canada (Citizenship and Immigration)*, 2021 FC 1377 at para 4; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 ("*Kanthasamy*") at paras 8, 44-45; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paras 16-17).

[20] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13; 75; 85). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at paras 15; 99). 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).

[21] 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**

A. *Applicant's Position*

[22] The Applicant relies on Justice Brown's articulation of the *Chirwa* test (*Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338 ("*Chirwa"*)) in *Lobjanidze v Canada (Immigration, Refugees and Citizenship),* 2017 FC 1098, in support of the proposition that the Officer did not appropriately consider the factors "that would excite, in a reasonable person, in a civilized society, a desire to relieve the misfortunes of another" (at para 12; see also *Kanthasamy* at para 21, citing *Chirwa* at p 350).

[23] The Applicant asserts that while the Officer may have acknowledged her previous attempts to obtain permanent residence through a traditional pathway, the Officer unreasonably dismissed how the Applicant's attempts were blocked by circumstances beyond her control. The Applicant argues that the Officer was required to compassionately consider the Applicant's sympathetic circumstance, including her medical situation and her establishment in Canada, to mitigate against rigid laws (*Salde v Canada (Citizenship and Immigration),* 2019 FC 386 ("*Salde*") at para 21).

[24] The Applicant submits that the Officer failed to apply a compassionate lens to their analysis of the hardship she would face in India, including how a return to India (a country where she has never lived) would separate her from her family, who are all in Canada, and would disrupt her health care needs.

[25] The Applicant further submits that it was unreasonable for the Officer to conclude that her education and professional experiences would prevent her from experiencing hardship related to unemployment or gender-based discrimination in India. The Applicant relies on this Court's finding in *Henson v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 1218 ("*Henson*") that it was unreasonable for an officer to conclude that the applicant's background and previous employment would mitigate the hardship she would face returning to the Philippines due to discrimination and high unemployment. The Applicant notes that while the applicant in *Henson* grew up in the Philippines and had family there, she has no such ties to India.

[26] Furthermore, the Applicant submits that the Officer's conclusion is unintelligible as it fails to recognize that the very reason the Applicant submitted an H&C application was because she was unable to fulfill the AINP requirements due to unexpected illness and the COVID-19 pandemic.

B. *Respondent's Position*

[27] The Respondent submits that the Officer appropriately weighed the Applicant's evidence related to the establishment and hardship factors, and arrived at a transparent and intelligible conclusion within their discretionary authority, as in *Animodi v Canada (Citizenship and Immigration)*, 2015 FC 929 at para 76.

[28] The Respondent submits that the Officer did not overlook the Applicant's establishment evidence, and that the Applicant is inappropriately seeking to have this Court re-weigh her

evidence. The Respondent relies on *Irimie v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16640 (FC) at paragraph 12, to argue that being forced to leave friends, employment, community, and personal residence does not necessarily constitute hardship warranting an H&C exemption and that it was reasonable for the Officer to find that the level of interdependence between the Applicant and her friends was not significant. The Respondent also notes that since there was insufficient evidence on the record that the Applicant's family members would be remaining in Canada, it was reasonable of the Officer to put little weight on her familial establishment, given that her family might not remain in Canada.

[29] The Respondent submits that the onus was on the Applicant to establish that her case warrants the exceptional relief under section 25 of the *IRPA* (*Huang v Canada (Citizenship and Immigration)*, 2019 FC 265 at paras 17-22). The Respondent argues that the Officer is presumed to have considered the entirety of the Applicant's evidence (*Senat v Canada (Public Safety and Emergency Protection)*, 2020 FC 353 at para 34), and asserts that the Officer did not commit a reviewable error by refusing the Applicant's H&C application as the Officer based their decision on the Applicant's insufficient evidence (*Jeffrey v Canada (Minister of Citizenship and Immigration)*, 2006 FC 605 at paras 27-28).

C. *Analysis*

[30] I find the Officer's decision to be unreasonable in light of the significant evidence outlining the Applicant's unique circumstances and challenges beyond her control. While the Officer did consider all of the H&C factors raised by the Applicant in her submissions, I agree with the Applicant that the Officer's analysis is not reflective of the *Chirwa* test adopted by the

Supreme Court of Canada in *Kanthasamy* (at para 21), and lacks the flexibility or compassion required of a decision maker when assessing an H&C application (*Salde* at para 23).

[31] I find that the Officer reached an unintelligible conclusion when they found that the Applicant failed to demonstrate how she would be unable to obtain permanent residence through a traditional immigration pathway. The Officer found that the Applicant can either apply for permanent residence from India or re-apply to the AINP without excessive hardship, but I do not find either option consistent with the Applicant's situation.

[32] While the Officer considered the Applicant's medical history and past attempts to obtain permanent residence through the AINP pathway, the Officer failed to adequately connect the two or recognize how the Applicant may still be limited in applying through the AINP. The Officer found that the Applicant did not demonstrate that she would be unable to seek permanent residence by re-applying for the AINP. At the same time, the Officer recognized that the Applicant is on permanent immunosuppressant therapy due to her liver transplant. With the COVID-19 pandemic still raging on, it is understandable how an immunocompromised person like the Applicant may struggle to continue with an AINP application – especially when her work history has only included in-person, retail jobs. The Officer's conclusion on this front is inconsistent with the Applicant's medical reality and the fact that her chronic compromised immunity limited her ability to work in Canada.

[33] I also agree with the Applicant that it was unreasonable of the Officer to conclude that the Applicant's education and professional experiences would mitigate hardship related to unemployment or gender-based discrimination in India. The Officer's decision states:

> I accept that women in India experience economic marginalization. However, I note that the client is a university-educated woman with many years of professional experience, including more than one year in a managerial role.
>
> [Emphasis added.]

[34] At the time this H&C application was considered, the Applicant was 24 years old and only in the early stages of her career. After she graduated from University, she worked as a sales associate for six months at Brooks Brothers until the store closed, and then found work at 7 Eleven before she became ill. This to me is not indicative of "many years of professional experience." I find that the Officer mischaracterized the evidence before them in order to mitigate the socioeconomic hardship the Applicant would face in India.

[35] Additionally, as the Applicant's counsel brought to my attention during the hearing, the Officer's analysis of the Applicant's letters of support is concerning. In reviewing five letters of support from the Applicant's friends, the Officer noted:

> While the letters from friends speak highly of the applicant's character, it is expected that letters endorsing the clients would be supportive and positive in nature. However, the letters do not persuasively exhibit social ties that reflect deep, permanent, and inflexible roots put down into the Canadian milieu. Rather, they recapitulate the client's personal circumstances and are advocative in nature.

[36] The very purpose of a letter of support is to help advocate for an applicant's position that they should be permitted to stay in Canada. To give letters of support less weight because of their "advocative" nature is unintelligible. These letters of support speak highly of the Applicant's character, her friendships and her efforts to establish herself in Canada, which are key elements in the assessment of the degree of establishment (*Orosz v Canada (Citizenship and Immigration)*, 2017 FC 1189 at para 11). I find it was an error for the Officer to dismiss the letters of support in such a way.

[37] I am also particularly troubled by the Officer's consideration of the Applicant's lack of ties to India. The Officer acknowledged that the Applicant has essentially no ties to India given that she was born and raised in Bahrain and her family currently resides in Canada. However, the Officer only awarded this factor modest weight, presuming that, as the daughter of two Indian nationals, the Applicant is familiar with Indian culture and customs. The Officer wrote:

> […] it is reasonably expected that the daughter of Indian nationals would have a degree of familiarity with Indian culture and customs. The client does not persuasively evidence that such cultural knowledge was not effectively transferred from one generation to the next.

[38] There is no evidence of this sort of familiarity with Indian culture and customs in the Applicant's materials. Instead, the Applicant provided submissions regarding the importance that many Indian people place on collectivism and living with their families.

[39] The expectation that a child of immigrant parents has developed a cultural familiarity or connection with her parents' country of nationality is presumptuous, baseless and plays into

harmful stereotypes. In finding that the Applicant's lack of ties to India would not cause unreasonable hardship, the Officer relied on an unsubstantiated assumption that contrasted with the Applicant's own articulation of her traditional values. I find this highly problematic and inconsistent with the teachings of *Vavilov.*

[40] Furthermore, the Officer only gave modest weight to family unity and the Applicant's familial establishment because they found:

> […] with the exception of one sibling who has obtained permanent residence status, there is little evidence on file that the status of the other family members is more than temporary, nor that her parents and two other siblings have taken concrete steps to remain in Canada permanently.

[41] The Officer's reliance on the "temporary" nature of the Applicant's family's residency in Canada conflicts with the statements of the Applicant and her family members regarding what they view as a more permanent situation.

[42] The Applicant's entire family lives in Canada – mostly all under the same roof in Edmonton. The Applicant stated in her H&C application that her parents and siblings have been living, studying, and working in Canada since 2019. In her mother's letter of support, she confirms that she and her husband moved to Canada with their two children and obtained work permits in order to be with their two eldest daughters. Each family member has a presumable pathway to remaining in Canada, and wishes for the Applicant to stay with them. Given this evidence, I find that the Officer's conclusion with respect to the Applicant's familial establishment is also unjustified and shows a lack of compassion for family unity.

[43] Subsection 25(1) of the *IRPA* exists to ensure that the Minister has the flexibility to mitigate against the rigidity of immigration laws (*Salde* at para 21; *Kanthasamy* at para 33). As my colleague Justice Campbell affirmed in *Dowers v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 593: "[…] the approach requires that a decision maker have the ability to empathize with an applicant for relief by placing her or himself in the applicant's shoes to clearly understand and be sensitive to the applicant's circumstances" (at para 3).

[44] Overall, I find that the Officer's decision severely lacks the compassion required of an H&C approach. The above issues, considered individually or as a whole, clearly demonstrate how the Applicant's unique circumstances are consistent with the exceptional and flexible nature of H&C relief.

[45] The Applicant's history in Canada shows a record of someone who had everything on track to obtain permanent residency under the economic class through the AINP. The Applicant's significant efforts were disrupted by a *force majeure*, consisting of economic and health factors far beyond her control. The Officer's failure to review the Applicant's unique situation through a compassionate lens is compounded by problematic reasoning regarding the Applicant's ability to return to India – a country where she has never lived – based on a stereotypical assumption about her knowledge of Indian culture and customs.

[46] Finally, forcing the Applicant to separate from her family and return to an entirely foreign country where she has no supports is inconsistent with subsection 25(1) of the *IRPA* and

the framework upheld in *Kanthasamy*, particularly given the Applicant's unique medical situation.

V. **Conclusion**

[47] Based on the above analysis, I find the Officer's decision to be unreasonable. This application for judicial review is allowed.

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

JUDGMENT in IMM-2434-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed. The decision under review is set aside and the matter is referred back for redetermination by a different officer.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2434-21
STYLE OF CAUSE:	GURMAIL KAUR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	JANUARY 19, 2022
JUDGMENT AND REASONS:	AHMED J.
DATED:	FEBRUARY 18, 2022

APPEARANCES:

Raj Sharma	FOR THE APPLICANT
Camille N. Audain	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barrister and Solicitor Calgary, Alberta	FOR THE APPLICANT
Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT