Federal Court  Cour fédérale

Date: 20220727

Docket: IMM-2990-21

Citation: 2022 FC 1120

Ottawa, Ontario, July 27, 2022

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

DIMA AL-JIBORI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Ms. Dima Al-Jibori, the Applicant, sought the assistance of section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act or IRPA] in order to make her application for permanent residence from within Canada. As is well known, section 11 of the Act requires that these types of applications be made from outside Canada.

[2] In cases where there are humanitarian and compassionate (H&C) considerations that justify granting permanent resident status, the Minister may provide an exemption from the applicable obligation of the Act. In the case at bar, the Minister's delegate did not grant the application. The Applicant seeks before this Court the judicial review of that decision in accordance with section 72 of the Act.

I. The facts

[3] The Applicant was born in Iraq in October 1995. There were four children in the family, the Applicant being the youngest. At the time she made her application based on H&C considerations in September 2019, she was turning 24 years of age. Her parents are both permanent residents. One sister born in 1984 is a Canadian citizen, while her brother, born in 1987, resides in Jordan. Another brother passed away in 2018.

[4] The Applicant's family left Iraq for Jordan in 1998 when the war in Iraq was burgeoning. They remained in Jordan for the following 9 years. There was an application made by the Applicant's father for permanent residence (investor program) in Canada. It was granted. The family arrived on July 23, 2007. They all benefited from being granted permanent residence in Canada, in Montréal.

[5] However, while the father and the three eldest siblings stayed in Canada, the mother and the Applicant returned to Jordan shortly thereafter. It appears that the Applicant was in need of orthodontic treatment commenced in Jordan; furthermore, adaptation in Canada was difficult and a sense of stability favoured staying in Jordan. We learn from the application that gave rise to the

decision under review that the Applicant's father was diagnosed with a cervical disc herniation. Given the wait-time in Canada, he chose to seek treatment in Switzerland. The Applicant's mother visited her husband in Switzerland during his treatment, but returned frequently to Jordan, while the grandparents are said to have come to Jordan from Iraq to take care of the Applicant in Jordan while both parents were in Switzerland.

[6] The mother and her daughter came back to Canada in 2011. By then, both the mother and daughter had lost their permanent resident status in this country (section 28 of the Act). According to the H&C application, a number of mishaps to regain status in Canada followed.

[7] Having retained the services of an immigration consultant an appeal against the revocation of the permanent residency was launched. The appeal failed as the consultant did not appear at the hearing.

[8] For a reason that was not explained in the application, the same consultant is said to have made an H&C application which was incorrect and is said to have been lacking, going so far as submitting another person's application under the Applicant's name. The application failed.

[9] Next, the Applicant's father sought to sponsor his wife and his daughter in September 2015, with the assistance of counsel. We are told that the lawyer had to leave the country and was thus incapable of submitting the supplementary documentation requested by the immigration officer within the prescribed period of time: the sponsorship application was rejected.

[10] A new sponsorship application had to be submitted. We are told that “by this time, the Applicant had turned 23 and was no longer eligible to be included with her mother in their sponsorship application” (submissions for H&C application, September 27, 2019, p 4/12).

[11] In the end, the Applicant is the only one in her family who does not have any immigration status in Canada. Hence, she made an application for permanent residence from within Canada. That application was rejected and the Applicant challenges that decision before this Court on judicial review.

II. The decision under review

[12] In a decision which runs for three pages, the decision maker asserts that the H&C application is based on the Applicant’s establishment and the hardship associated with the conditions in Iraq.

[13] The fact that the Applicant has been in Canada for 10 years, that she completed her high school education as well as a four-year program in fashion design (followed by a six-month further study in order to gain a certificate in interior decoration) in Montréal was given positive weight. The decision maker notes that she “has developed a supportive network and has maintained good civil records to which I have attributed positive weight”. Nevertheless, the length of time is given positive but minimum weight.

[14] The decision maker proceeds then to consider the Applicant’s work history. While acknowledging that the Applicant has taken steps to acquire skills through education to

strengthen her employment prospects, it remains that her jewelry design business was not successful; the immigration officer complains about the lack of details concerning why “she was forced to stop due to the depression caused by her immigration issues”, as claimed by counsel in the H&C application. The decision maker notes that the Applicant did not supply details about why she had not found permanent employment and continues to rely on her father for financial support.

[15] A third element under “establishment” which is the subject of comments concerns the Applicant’s ties in her community which are said to deserve positive weight.

[16] The decision maker addresses the hardship the Applicant would face if she had to leave Canada for Iraq or Jordan. The decision maker seems to accept “the emotional connection to Canada” and notes that the Applicant left Iraq at the age of 3, with no immediate family ties left in her country of origin. However, without explanation, it is inferred that “it is reasonable to believe that the applicant has a degree of knowledge and has been exposed to the Iraqi language and culture”. In what appears to me to be quite equivocal, it is stated that, in view of the temporary stay of removal (TSR) affecting Iraq, the refusal of the H&C application will not result, at this stage, into the Applicant’s deportation.

[17] For some unexplained reason, the decision maker considers Jordan to be an option for a possible destination if the Applicant is removed from Canada. Instead of establishing that the Applicant has retained some status in Jordan, in spite of the fact that she has been in Canada for 10 years and states in her H&C application that any permanent resident status in Jordan has been

lost, the immigration officer simply declares that there is “no evidence to show that she has lost her permanent residence in that country or will not be able to return in case of removal”. Moreover, the decision maker speculates that the brother in Jordan at the time, whose status was unknown, could be willing and able to assist her in her reestablishment and resettlement in Jordan. The decision maker even states that “the presence of a sibling in Jordan is proof of a familial tie to that country”.

[18] Finally, the immigration officer concedes that the Applicant would face in Iraq a “degree of hardship because of her gender, status and lack of family ties”. But again, the decision maker notes the presence of the TSR, as if issues around gender, status and lack of family ties disappear in view of the TSR. As observed by the officer, the Applicant could stay in Canada, but only until the TSR is lifted.

[19] I reproduce in its entirety the paragraph which constitutes the decision, at the bottom of the decision’s page 5:

> Having considered all of the circumstances of the applicant and having examined the submitted documentation, I find that the positive considerations in this assessment (namely the applicant’s ties to the community, the lack of sufficient ties in her country of origin) are insufficient to justify granting an exemption. As such, I am not satisfied that the humanitarian and compassionate considerations before me justify an exemption under section 25(1) of the Immigration and Refugee Protection Act.

III. Arguments and analysis

[20] Contrary to what is asserted in the decision under review, the Applicant did not limit herself to establishment in Canada and lack of ties with her country of origin in her application. She lists the following in her application:

> - Establishment in Canada
> - An inability to leave Canada that has led to establishment
> - Ties to Canada
> - Consequences of separation from relative (sic)
> - Factors in your country of origin (not related to seeking protection)
> - Any other relevant factors you wish to have considered that are not related to seeking protection

More importantly, the document articulates compassionate considerations, including the efforts made to regularize the immigration status in Canada since the Applicant's return, as well as the fact that her whole immediate family has status in this country. The Applicant refers specifically to the test to be applied to H&C applications since the Supreme Court of Canada decision in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 [*Kanthasamy*]:

> [21] But as the legislative history suggests, the successive series of broadly worded "humanitarian and compassionate" provisions in various immigration statutes had a common purpose, namely, to offer equitable relief in circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another": *Chirwa*, at p. 350.

As is by now well known, hardship is not the only factor that is to be considered in H&C applications.

[21] In this Court, the Applicant argues that the decision under review lacks the intelligibility required for a decision to be reasonable (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*]). She complains about the lack of engagement with the evidence brought before the decision maker. Indeed, she reminds the Court that *Vavilov* seeks to develop and strengthen a culture of justification in administrative decision-making.

[22] For his part, the Respondent puts his emphasis on the need for the Court to show deference toward an administrative tribunal, as confirmed in *Vavilov*, in assessing the reasonableness of a decision. H&C relief being exceptional, the Respondent submits that the Applicant disagrees with the decision on its merits, thus seeking from the Court to reweigh the evidence. That is not the role to be played by a reviewing court.

[23] I agree with the Respondent that a reviewing court must adopt a posture of respect towards administrative decision makers in recognition of their legitimacy and authority (*Vavilov*, at para 14). That derives from the principle of judicial restraint out of respect for the distinct role of administrative decision makers (*Vavilov*, at para 13). I also agree with the Respondent that, by definition, section 25 of the IRPA is meant to be the exception rather than the rule. It provides for an exemption from the applicable criteria or obligations of the IRPA. Section 25 reads:

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	**25 (1)** Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un

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 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.	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 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.

As the Supreme Court found in *Kanthasamy*, section 25 was never intended to be an alternative immigration scheme (at para 23). The section does not destroy the essential exclusionary nature of the Act and its regulations (at para 14). As put at paragraph 19, "The humanitarian and compassionate discretion in s. 25(1) was, therefore, like its predecessors, seen as being a flexible and responsive exception to the ordinary operation of the Act, or, in the words of Janet Scott, a discretion 'to mitigate the rigidity of the law in an appropriate case'."

[24] However, that is not the issue in the case at hand. *Vavilov* stands also for another principle. Judicial restraint and a posture of respect are one half of the equation. The other half is the acknowledgement that "reasoned decision-making is the lynchpin of institutional legitimacy" (as reproduced at para 74, *Vavilov*).

[25] I have no doubt that an H&C decision must be made with reasons to justify it. In *Vavilov*, one reads that "Cases in which written reasons tend to be required include those in which the decision-making process gives the parties participatory rights, an adverse decision would have a significant impact on an individual or there is a right of appeal" (at para 77). This is clearly applicable here. Not only is the decision to be made of significant, indeed critical, importance for an applicant, but the request is based on considerable information offered in support of the application. It is said that reasons explain how and why a decision was made and shield against arbitrariness. The reasons "are the primary mechanism by which administrative decision makers show that their decisions are reasonable" (*Vavilov*, at para 81). A reviewing court is not only concerned with the outcome reached by an administrative tribunal, but also with the decision-making process and the reasons offered as a justification for the outcome reached.

[26] No one doubts that an H&C decision is subjected to the reasonableness standard of review. It follows that the decision will require 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) for the decision to be seen as reasonable. With respect, the decision under review lacks transparency and intelligibility to allow the Court to conclude as to

its reasonableness, and it must therefore be returned to a different decision maker for the purpose of conducting a new determination.

[27] As instructed by the Supreme Court, a reviewing court must gain an understanding of the decision maker's reasoning process with a view to assessing the decision's reasonableness. If reasons are meant to explain how and why a decision was made, these reasons under review are lacking. It is not that the Court seeks to review the merits of this H&C application, but rather that it needs to understand the rationale so that the reasons will truly shield from arbitrariness.

[28] I agree with the Applicant that the decision maker did not engage at all with her particular circumstances as it appears that numerous attempts were made to regularize her immigration status in Canada. These proved unsuccessful for reasons that are outside of the control of this Applicant. The lack of diligence by the persons retained by the Applicant's father for the purpose of seeking a remedy, and for that matter the course of action followed by the father himself, are not even alluded to by the decision maker. The point of the matter is not whether or not there was "establishment" in the presentation of these episodes of the Applicant's immigration history. We do not know. Rather, what is dearly missing is for the decision maker to engage with this evidence. Through what appears to be no fault of her own, this Applicant ended up without any status in this country, contrary to the other members of her family who have become citizens of Canada or hold the permanent resident status. That would appear to a reasonable person in a civilized community as peculiar circumstances leading to unusual misfortunes.

[29] The decision maker does not allude either to the test applicable in this case in spite of the fact that the Applicant's submissions for the H&C application refer specifically to it. This is not insignificant. The test is the measuring stick against which the circumstances of the Applicant will be measured. As found in *Kanthasamy*, it is not only hardship that must be considered, but rather "*all* relevant humanitarian and compassionate considerations in a particular case" (*Kanthasamy*, at para 33). I refer to paragraph 13 of *Kanthasamy* as being the most elaborate about the test:

> [13] The meaning of the phrase "humanitarian and compassionate considerations" was first discussed by the Immigration Appeal Board in the case of *Chirwa v. Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338. The first Chair of the Board, Janet Scott, held that humanitarian and compassionate considerations refer to "those facts, established by the evidence, which would excite in a reasonable man [*sic*] 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 Immigration Act": p. 350. This definition was inspired by the dictionary definition of the term "compassion", which covers "sorrow or pity excited by the distress or misfortunes of another, sympathy": *Chirwa*, at p. 350. The Board acknowledged that "this definition implies an element of subjectivity", but said there also had to be objective evidence upon which special relief ought to be granted: *Chirwa*, at p. 350.

[30] As raised by the Applicant, her misfortunes go beyond criteria of establishment and conditions in Iraq. If she has to invoke section 25, it is because other attempts to regularize her status in Canada, as was achieved for the other members of the family, have failed. Whether previous attempts at regularizing her situation are enough on their own, or with other factors, to mitigate the rigidity of the law in appropriate cases is not for this Court to say. They may or may not be. But they must be considered. Are these misfortunes that would excite the desire to relieve them?

[31] In my estimation, the decision is also deficient in that it is neither transparent nor intelligible as to what role in the decision is to be played by the TSR in place concerning Iraq. The administrative decision notes the existence of the TSR. It is presented as a shield of some sort, without even engaging on the obvious misfortune of a young woman who left Iraq at the age of 3 and would be without support if she were to be removed to the country of her birth, but about which she most probably has no recollection. Surely the existence of a TSR which, according to the decision maker, will allow the Applicant to "remain in Canada until the TSR is lifted" does not address the misfortune to be removed to a place the Applicant does not know and where, for all intents and purposes, she has never lived. To put it differently, the fact that the Applicant cannot for now be returned to Iraq does not alter the situation that, when the TSR is lifted, this Applicant would be returned to a place she does not know while her family will continue to live in Canada. A decision maker must address the issue in the current circumstances. Given the peculiar set of facts, the existence of a TSR is to a large extent irrelevant to the issue raised.

[32] Similarly, the possibility of being removed to Jordan, since the Applicant lived for a period of time in that country, is not explained. The Applicant left Jordan ten years earlier and she asserts that the permanent resident status has been lost. We do not know why the decision maker does not accept the Applicant's statement to that effect and relies instead on the "no evidence to show" reason, without any explanation. What is more, the decision maker speculates about the presence of the Applicant's brother in Jordan and his capacity to give assistance, assuming of course that the Applicant could find refuge in Jordan. It is surprising to read that "there is insufficient evidence to suggest that the applicant's brother (currently established in

Jordan) would be unwilling and unable to assist her in her reestablishment and resettlement in Jordan".

[33] The same kind of generic and vague statement is used in the conclusion of the decision. The conclusion is reproduced at paragraph 19 of these reasons. It merely says that the positive considerations "are insufficient to justify granting an exemption". As I have tried to show, there are considerations that were discounted, some considerations that are simply ignored and the decision maker never engages in an assessment that would measure all these considerations against the test of "relieving the misfortunes of another".

IV. Conclusion

[34] It follows that the reasons for the decision maker to refuse the application for allowing to seek permanent residence from within Canada for humanitarian and compassionate grounds are unreasonable as lacking transparency and intelligibility. As a result, the matter is referred to a different immigration officer for a new determination. Given the passage of time, the Applicant is allowed to update her application.

[35] There is no question to be certified.

JUDGMENT in IMM-2990-21

THIS COURT'S JUDGMENT is:

1. The judicial review application is granted.

2. The case is referred to a different immigration officer for a new determination.

3. The Applicant is granted an opportunity to update her file.

4. There is no serious question of general importance to be certified.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2990-21
STYLE OF CAUSE:	DIMA AL-JIBORI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	MAY 11, 2022
JUDGMENT AND REASONS:	ROY J.
DATED:	JULY 27, 2022

APPEARANCES:

Angela Potvin	FOR THE APPLICANT
Thi My Dung Tran	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Servimm Inc. Montréal, Quebec	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT