Federal Court  Cour fédérale

Date: 20221214

Docket: IMM-5723-21

Citation: 2022 FC 1722

Ottawa, Ontario, December 14, 2022

PRESENT: Mr. Justice McHaffie

BETWEEN:

BALDEV SINGH MUTI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Baldev Singh Muti asks the Court to set aside the refusal of his application for permanent residence on humanitarian and compassionate [H&C] grounds. He argues the senior immigration officer who considered his application did not apply the proper approach to an H&C application, based their decision on speculation, and undertook a flawed analysis of relevant factors, including the best interests of his grandchildren.

[2] This Court can only set aside the refusal of an H&C application if the decision, read as a whole and in its administrative context, is unreasonable. Applying this standard, I conclude that the officer's decision with respect to Mr. Muti's application was reasonable. In particular, I am not persuaded that the officer's reasons show a lack of compassion that indicates they applied the wrong approach to the application. While I agree with Mr. Muti that the officer's assumption that he could benefit from a teacher's pension in India was improper speculation, this error does not undermine the reasonableness of the decision as a whole, taking into account the nature of the application and the officer's reasons. Nor was the officer's finding that the best interests of Mr. Muti's grandchildren would not be negatively affected by the refusal unreasonable based on the evidence presented.

[3] The application for judicial review will therefore be dismissed.

II. Issues and Standard of Review

[4] Mr. Muti's application for judicial review raises the following issues:

A. Did the officer apply the correct test in assessing the H&C application?

B. Is the officer's decision rooted in speculation?

C. Did the officer unreasonably analyze Mr. Muti's establishment in Canada?

D. Did the officer unreasonably analyze the best interests of Mr. Muti's grandchildren?

[5] I agree with the parties that the reasonableness standard applies to these issues, which each go to the merits of the officer's decision: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25. When this standard of review applies, the Court will only interfere with an administrative decision if it is unreasonable, that is, if it is internally incoherent or fails to show the requisite hallmarks of justification, transparency and intelligibility, considered in relation to the relevant factual and legal constraints that bear on the decision: *Vavilov* at paras 99–107. An assessment of the reasonableness of a decision also recognizes that the justification given by a decision maker in their reasons must reflect the impact of the decision on the individual affected by it: *Vavilov* at para 133.

III. Analysis

A. *The officer did not apply an incorrect test*

(1) The H&C application

[6] Mr. Muti's application for humanitarian and compassionate relief was driven by his personal and family circumstances. At the time of his application, he was 76 years old. His wife, the mother of his two sons, died in 2008. The two sons now live in Canada with their families, each with two children. Mr. Muti's younger son came to Canada first and is a Canadian citizen. Mr. Muti's elder son and his daughter-in-law supported him in India, but then they also moved to Canada. As a result, in Mr. Muti's words, there was no one in his home country who could take care of him, and he wanted to spend the remainder of his life with his family in Canada.

[7] Mr. Muti was issued a temporary resident visa [TRV] in 2015 that is currently valid until April 2023. When he retired from his position as a school headmaster in 2018, he came to Canada and has stayed with his sons and their families here since then, obtaining extensions of his visitor status. In February 2021, he applied for permanent residence from within Canada, seeking an exemption from the requirement to apply from outside Canada on H&C grounds. His application highlighted the presence of his family here; the absence of family or support in India; the personal hardship he would face if he had to leave his family in Canada and return to India; his tight bond with his four grandchildren; and his establishment in Canada since arriving in September 2018, including his local friends and involvement with the Sikh community.

(2) The officer's decision

[8] A senior immigration officer reviewed Mr. Muti's application and concluded he had not established that circumstances exist to justify an exemption on H&C grounds. As discussed in further detail below, the officer considered Mr. Muti's family situation; his history in Canada; his establishment; the best interests of his grandchildren; the difficulty of separating from his family members; his ability to return to and reside in India; and the possibility of continuing to visit his family on his current TRV, potential future TRVs, or through a sponsorship application. Having considered these factors, the officer noted Mr. Muti had the onus to satisfy them that sufficient H&C factors exist to warrant an exemption. Assessing the various factors globally, the officer concluded Mr. Muti had not met that onus.

(3) The nature of H&C relief and the applicable test

[9] As Mr. Muti submits, the Supreme Court of Canada has described the purpose of the discretion to provide H&C relief under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], as being 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": *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 13–21, citing *Chirwa v Canada (Minister of Citizenship and Immigration)*, [1970] IABD No 1 at para 27; *Zhang v Canada (Citizenship and Immigration)*, 2021 FC 1482 at para 19; *Gregory v Canada (Citizenship and Immigration)*, 2022 FC 277 at paras 28–29. In applying the *Chirwa* approach, an officer must consider and weigh all relevant facts and factors to determine whether such equitable relief is justified: *Kanthasamy* at para 25; *Gregory* at para 31. At the same time, the approach is a balanced one, recognizing that the availability of H&C relief is not designed to be applied so widely as to destroy the essentially exclusionary nature of the *IRPA*, or to create an alternative immigration scheme: *Kanthasamy* at paras 14, 23.

[10] This Court is often called upon to assess whether an immigration officer who has refused an H&C application has appropriately applied the approach or test for H&C relief as outlined in *Kanthasamy*. This Court has set aside H&C decisions on grounds, among others, that they fail to demonstrate a compassionate approach; unduly focus on hardship rather than conducting an assessment of all relevant factors; fail to grapple with the applicant's particular circumstances; or engage in a segmented analysis rather than a holistic one: *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at paras 33–35; *Zhang* at paras 1–3, 14; *Gregory* at paras 36–37; *Reducto v Canada (Citizenship and Immigration)*, 2020 FC 511 at paras 50–51.

[11] At the same time, there is no requirement that an officer reviewing an H&C application use particular words, or cite the test in *Chirwa* verbatim. There is no "magic formula" or special terms officers are obliged to use: *Marshall* at para 33; *Braud v Canada (Citizenship and Immigration)*, 2020 FC 132 at para 47. Nor does applying the *Chirwa* approach mean that an officer will invariably find in favour of granting H&C relief or prevent them from considering negative factors: *Gutierrez v Canada (Citizenship and Immigration)*, 2021 FC 1111 at para 20; *Mebrahtom v Canada (Citizenship and Immigration)*, 2020 FC 821 at para 3. This means that assessing whether an H&C officer has adopted a "compassionate" approach requires a consideration of the reasons as a whole, read in the context of the purpose and limitations of H&C relief. I agree with the submission of counsel for the Minister that an appropriate approach is for the Court to assess whether, read in this way, the reasons for decision "reasonably capture the spirit" of the *Chirwa* approach to H&C relief. The applicant bears the onus to show that they do not: *Vavilov* at paras 75, 100.

(4) The decision reasonably applies the correct approach

[12] In the present case, Mr. Muti argues the officer reviewing his application did not show the necessary compassion reflected in the *Chirwa* approach. He points to a series of passages in the officer's reasons in support of this contention. However, on my review, these passages simply show the officer considering the facts and factors put forward by Mr. Muti, and assessing the extent to which they spoke in favour of H&C relief. While not free from error, as discussed below, the officer's reasons consider the facts put forward in Mr. Muti's H&C application, and assess the various factors relevant to the H&C determination, assigning more or less weight to

them based on that assessment, and reach an overall conclusion on whether the H&C factors warrant an exemption from the provisions of the *IRPA*.

[13] Mr. Muti points to the decision of Justice LeBlanc, then of this Court, in *Epstein v Canada (Citizenship and Immigration)*, 2015 FC 1201. That case, like this one, involved an H&C decision in respect of an elderly applicant whose two children had immigrated to Canada: *Epstein* at para 3. Justice LeBlanc set aside the decision because the officer failed to address the applicant's age and dependence on her family in Canada: *Epstein* at paras 11–12. The officer in that case, as in the present case, had referred to the fact that separation was the expected result of the children's decisions to immigrate: *Epstein* at para 14. Mr. Muti suggests that the officer's decision in his case should similarly be found unreasonable. However, on my reading of Justice LeBlanc's reasons, the concern was the officer's failure to consider the applicant's personal circumstances, including her emotional and physical dependency on her family, on which the evidence was clear: *Epstein* at paras 4, 6, 8, 11–15. In the present case, the officer expressly considered these issues, noting the lack of evidence that Mr. Muti was reliant on his sons financially before coming to Canada, or that he would be unable to reside at his usual residence or continue to travel.

[14] As discussed above, a compassionate approach does not mean that an officer is precluded from finding that certain factors only merit limited weight in the overall H&C assessment, or noting the lack of evidence to support a stronger finding. Considered as a whole and in the context of the H&C application, I am satisfied that the officer's reasons reasonably capture the spirit of the *Chirwa* approach to H&C relief.

B. *The officer's speculation does not render the decision as a whole unreasonable*

[15] Mr. Muti says the officer's reasons are "rooted in speculation," pointing to three aspects of the decision: (i) the officer's assumption that Mr. Muti has property and a pension; (ii) the officer's reference to personal connections in India; and (iii) the officer's reference to other potential avenues of immigration to Canada. While I agree that the first of these amounts to unsubstantiated speculation, I do not consider that it affects the reasonableness of the decision as a whole.

[16] In assessing the potential impact of a refusal, the officer considered Mr. Muti's ability to return to live in India. As part of this assessment, the officer found that since Mr. Muti was a retired teacher, "it can be assumed, in absence of evidence to the contrary, that the applicant is in receipt of a pension and owns property; thus providing the means to support himself in India." While the officer was entitled to draw conclusions from the evidence, including inferences from the lack of evidence, such inferences must have a factual foundation: *Ayalogu v Canada (Citizenship and Immigration)*, 2017 FC 1055 at paras 19–21. In my view, the officer crossed the line from reasoned inference to unsupported speculation by presuming the existence of a pension or other assets from the absence of contrary evidence, without any reference to or apparent knowledge of the prevalence of such pensions in the education sector in India.

[17] A similar criticism may be made of the officer's observation that in India, Mr. Muti "assumedly [has] a circle of friends, which may be to his benefit." The personalized nature of an H&C assessment requires an officer to consider what the evidence says about the applicant's

circumstances, rather than assuming the existence of social structures such as friends. That said, I view this assumption as less problematic, both because of the limited nature of the conclusion ("may be to his benefit") and because the evidence indicates that even in his short time in Canada Mr. Muti has become a "vital member of the community where he lives," being active with charity works and involved with his temple. Contrary to Mr. Muti's submissions, I do not believe that the assumption or expectation that Mr. Muti has a circle of friends in India is inconsistent with his evidence that he has no-one to "support" or "take care of" him, as friends would not necessarily take on such a role.

[18] In any event, I do not find either the unreasonable conclusion with respect to the existence of a pension or the questionable one with respect to friends, even when considered jointly, to render the decision as a whole unreasonable. The officer's analysis on this point was essentially looking at Mr. Muti's ability to return to India. They reasonably concluded Mr. Muti had not presented significant evidence that he would be unable to do so. On several occasions, the officer notes the lack of evidence to explain any difficulty in returning, or of financial inability to return or remain in India. While I agree that it is speculative to assume the existence of a pension without evidence, the core of the officer's analysis was that Mr. Muti had not filed evidence to show he would face hardship upon his return beyond the separation from his family, which the officer considered separately.

[19] In this regard, Mr. Muti concedes that there is little evidence on this issue on the record, as the driving force of the application was the issue of family connections and emotional support rather than the need for financial support. Although Mr. Muti stated that his sons were

financially supporting him in Canada, this does not provide evidence of his overall financial position or his ability to live in India. Nor, in my view, does the single statement in his immigration consultant's submission letter—made without any detail, supporting documents, or support from Mr. Muti's evidence—that he "is not financially independent and will not be able to support himself in India" constitute material evidence of his financial position. To the extent that Mr. Muti put forward a lack of financial independence in India as an H&C factor, he had the onus to provide evidence to substantiate that ground. It was reasonable for the officer to conclude that he had not done so.

[20] Recognizing that reasonableness review is not a "treasure hunt for error," I view the officer's speculation about the existence of a pension to be a "minor misstep" that is not sufficiently central or significant to render the decision unreasonable: *Vavilov* at paras 100, 102.

[21] With respect to the officer's discussion of other potential avenues for return or immigration to Canada, Mr. Muti argues it was inaccurate for the officer to state that "his sons may be eligible to submit an application under the Family Class to sponsor the applicant" and unreasonable to note that there was no evidence they had taken any steps to that end.
Mr. Muti notes the *IRPA* and its associated regulations provide that such an application cannot be made since there is a lottery system that applies, leaving such an application up to chance. He relies on *Sidhu*, in which Justice Brown criticized an officer for concluding that an applicant "can obtain permanent resident status through normal means from overseas" when the ability to do so depended on the chance of the lottery system: *Sidhu v Canada (Citizenship and Immigration)*, 2020 FC 133 at paras 7–9.

[22] In my view, it was not unreasonable in the context of this application for the officer to refer to the nature of available avenues to remain in Canada as one factor in their assessment, given that Mr. Muti was, in essence, seeking an exemption from having to follow those avenues. Given the principle, noted by the officer, that H&C applications are not intended to be an "alternative immigration scheme," and given that Mr. Muti's application underscored the personal hardship he would face if his H&C application were refused since he would be separated from his grandchildren, it was reasonable for the officer to consider the complete context in their assessment, including any regulatory pathways that would mean Mr. Muti would not in fact be separated from his grandchildren. Indeed, the officer's observations regarding sponsorship may be viewed as directly responsive to Mr. Muti's submission letter, which requested an exemption "as the process to sponsor is not […] straight forward as the applicant's son may not get the invitation to sponsor." The officer's observation that there was no evidence the sons had taken any steps in this direction was not unreasonable.

[23] Nor do I consider the officer's simple observation that the sons "may be eligible to submit an application" to be an inaccurate or unreasonable overstatement of the availability of sponsorship, even if the overall process requires an expression of interest and invitation to apply. This situation is therefore distinguishable from cases where an officer has placed significant reliance on the availability of immigration pathways that are simply unavailable to an applicant: see *Syed v Canada (Citizenship and Immigration)*, 2022 FC 398 at para 38, distinguishing *Bernabe v Canada (Citizenship and Immigration)*, 2022 FC 295 at paras 27–30; see also *Kaur v Canada (Citizenship and Immigration)*, 2022 FC 686 at paras 21, 25 and *Gonzalez De Barragan*

v Canada (Citizenship and Immigration), 2022 FC 902 at paras 21, 24, each declining to find that reference to other avenues of immigration was unreasonable.

C. *The officer reasonably analyzed Mr. Muti's establishment*

[24] Mr. Muti alleges the officer's assessment of his establishment was flawed. He suggests it was peculiar for the officer to start with an assessment of his establishment given that this was not the driving force of his application, and that in any case, the officer did not set out what evidence they required to support Mr. Muti's establishment in Canada given his age. He also contends that the officer did not engage with the evidence of his involvement in the Sikh community.

[25] I disagree. I begin by noting that the consultant's letter refers to "establishment in Canada" as the first of the factors identified to support Mr. Muti's application, such that it is not surprising to see it addressed first in the officer's analysis. In any event, the reasonableness of an H&C decision cannot be materially affected by the order in which the factors are addressed.

[26] Nor do I consider the substance of the officer's establishment analysis unreasonable. The officer concluded that Mr. Muti would have "achieved some establishment and integration into the Canadian culture" in the three years that he was here. At the same time, based on the evidence, the officer found the level of establishment achieved was relatively minimal and not completely determinative of the assessment. The officer referred to the evidence of him being with family and attending and volunteering at temple, but reasonably noted that beyond this, the evidence did not clearly support Mr. Muti's establishment efforts. Conversely, the officer noted

that the evidence did not show Mr. Muti would be unable to re-establish himself in India. The officer was not obliged to set out what, if any, other evidence Mr. Muti might have presented to demonstrate a greater degree of establishment. Overall, the officer gave Mr. Muti's establishment "some weight" in the H&C analysis. In my view, this is a reasonable analysis that considered the evidence Mr. Muti presented on the issue.

D. *The officer reasonably assessed the best interests of the children*

[27] Mr. Muti argues the officer's analysis of the best interests of his grandchildren ignored the evidence of his involvement in their lives and their strong bond. He cites the supporting evidence he filed from one of the children's soccer club; his own evidence that he had a close bond with his grandchildren and that they wanted him to remain with them; and evidence that he attends temple with them.

[28] I conclude the officer's analysis of the children's best interests was reasonable. The officer was not obliged to refer specifically to each aspect of the evidence regarding Mr. Muti's relationship with his grandchildren to render a reasonable decision. It is to be recalled that the best interests analysis is focused on the children and how their interests would be affected, rather than on the applicant's wishes to maintain a relationship with them: see *Yang v Canada (Citizenship and Immigration)*, 2019 FC 1237 at para 20. The officer acknowledged Mr. Muti wanted to remain part of his grandchildren's lives and would miss them, but reasonably concluded there was insufficient evidence to demonstrate that Mr. Muti's departure from Canada would negatively affect the children's best interests. I agree with the Minister that it is not

unreasonable for an officer to consider the parents' role as primary caregivers as part of the analysis: *Syed* at paras 27–29.

[29] The officer's conclusion must be considered in the context of the limited evidence on the issue, and the brief submissions on best interests made in support of the application: *Vavilov* at paras 127–128. Those submissions were limited to two short paragraphs in the consultant's letter noting that the grandchildren loved and were attached to Mr. Muti and wanted him to remain, in addition to indicating that photographs with the grandchildren were included in the application. The officer's analysis was responsive to this submission. As in *Syed*, the officer's reasoning reflected the submissions and evidence before them: *Syed* at para 29.

[30] Nor do I accept Mr. Muti's submission that it was unreasonable for the officer to assess whether the children's best interests were "negatively affected." Indeed, the best interests analysis inherently involves an assessment of what is in the child's best interests, and whether, how, and to what extent, those best interests will be adversely affected in the event the application is refused. As the Court of Appeal noted in *Hawthorne,* the relevant inquiry relates to the "effect on [the child's] best interests" and the "damage to [their] present best interests": *Hawthorne v Canada (Minister of Citizenship and Immigration),* 2002 FCA 475 at paras 43–44.

[31] Having reviewed Mr. Muti's brief submissions to the officer on the best interests of his grandchildren, the limited evidence speaking to this issue, and the officer's decision, I conclude the officer's best interests analysis was reasonable in the circumstances.

IV. Conclusion

[32] I thank both counsel for their helpful and thoughtful submissions. Having considered those submissions, and for the foregoing reasons, I am not persuaded Mr. Muti has met his onus to demonstrate that the refusal of his application for H&C relief was unreasonable. The application for judicial review must therefore be dismissed.

[33] Neither party proposed a question for certification and I agree that none arises in the matter.

JUDGMENT IN IMM-5723-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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