Federal Court  Cour fédérale

Date: 20230131

Docket: IMM-2090-21

Citation: 2023 FC 146

Ottawa, Ontario, January 31, 2023

PRESENT: Mr. Justice McHaffie

BETWEEN:

SYED KHALID AHSAN,
SAMINA KHALID,
SYED HASSAN ALI AHSAN,
SYED ASAD AHSAN, AND
SYED HAMZA AHSAN,
BY HIS LITIGATION GUARDIAN,
SYED KHALID AHSAN

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants seek judicial review of the refusal of their application for permanent residence on humanitarian and compassionate (H&C) grounds. For the reasons that follow, I conclude that the senior immigration officer who refused the application made effectively the

same errors in reviewing the psychological evidence submitted that were found to be unreasonable by the Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61. The decision must therefore be set aside and sent back for redetermination.

II. Issues and Standard of Review

[2] The decisions of immigration officers on H&C applications are reviewed on the reasonableness standard: *Kanthasamy* at para 44; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25. The reasonableness standard requires the Court to read the decision as a whole with respectful attention, in light of the submissions of the parties and the record, to assess whether it shows the requisite elements of justification, transparency, and intelligibility and whether it is justified in relation to the relevant factual and legal constraints that bear on it: *Vavilov* at paras 84–86, 99–101, 103, 125–128. The burden is on the party challenging the decision to show that there are sufficiently serious shortcomings in it to render it unreasonable: *Vavilov* at para 100.

[3] The applicants raise a number of challenges to the reasonableness of the officer's decision, alleging that the officer did not apply the appropriate approach to their review, and erred in assessing the hardship they would face in Pakistan, their establishment in Canada, and the best interests of the children.

[4] In my view, the officer's treatment of the psychological evidence submitted is determinative of this application. I therefore need not address the other issues raised.

III. Analysis

A. *The applicants' H&C application*

[5] The applicants are a family of Pakistani citizens who sought refugee protection in 2018, facing threats and violence from Islamists in Karachi as Barelvi Muslims and for financially supporting the Barelvi Muslim community. The Refugee Protection Division [RPD] accepted the applicants' allegations, but concluded that they had an internal flight alternative [IFA] in Islamabad or Lahore. Their refugee claim was therefore refused. An appeal to the Refugee Appeal Division was dismissed for lack of jurisdiction and an application for leave and judicial review to this Court was dismissed.

[6] In February 2020, the applicants applied for permanent residence on H&C grounds pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The application was supported by a submission letter from an immigration consultant and considerable documentary evidence. A further submission and supporting documents were filed in February 2021. The application put forward a number of facts and factors for consideration, including the hardship they would face in Pakistan, particularly as Barelvi Muslims; their establishment in Canada; the best interests of the children; and the current medical condition of three of the family members: Syed Khalid Ahsan; his wife, Samina Khalid; and their eldest son.

[7] In support of the latter point, the applicants filed reports from a psychotherapist, a psychologist, and the family's doctor.

[8] The psychotherapist's report indicated that Mr. Ahsan suffers from post-traumatic stress symptoms and severe depressive mood based on his fear of return to Pakistan and the possibility of having to leave Canada. The psychotherapist indicated that his condition would continue to improve if allowed to remain in Canada without fear of return to Pakistan, and that he would benefit from psychotherapy and clinical counselling. Mr. Ahsan's family doctor also provided a brief report stating that he was suffering from severe anxiety and post-traumatic stress disorder, similarly recommending counseling and group therapy.

[9] The same family doctor wrote a similar report with respect to Ms. Khalid, again indicating that she is suffering from severe anxiety and post-traumatic stress disorder, and recommending counseling and group therapy.

[10] The psychologist's report pertained to the son. It opined that he suffered from "a Major Depressive Disorder of Moderate to Severe Severity," arising from his uncertain immigration status and fear for his safety in Pakistan. The psychologist indicated that the son's depressive condition was of clinical concern and that his psychological functioning would deteriorate in Pakistan.

[11] The applicants' first submission letter referred to these reports, noting that the three were suffering from a number of psychological conditions, linked to the "stressful circumstances of their immigration as well as the removal from Canada." The letter also highlighted that based on the reports, returning to Pakistan would expose their mental health to degeneration. The applicants' further submission in February 2021 provided no additional medical reports, but did

attach medication histories for Mr. Ahsan and Ms. Khalid, together with submissions about the unavailability of their medications in Pakistan.

B. *The officer's decision*

[12] The officer made note of the RPD's decision and the finding that the applicants had an IFA, giving considerable weight to the RPD's findings. They considered the various factors put forward by the applicants, ultimately finding that they had not presented sufficient H&C grounds to warrant an exemption from the requirement to apply for permanent residence from abroad.

[13] With respect to the concern raised about the mental health of three of the applicants, the officer summarized the submission and then stated the following:

> While I do accept that the above family members are suffering from insomnia, depression, anxiety and PTSD, I am not persuaded that treatment of these conditions would not be available in Pakistan should they choose to seek it. The medical reports all state that the symptoms the applicants are suffering is due to the uncertainty of the applicants being able to remain in Canada. In the medical letter dated 30 September 2019 from Dr. Asma Manzar it states that the applicant's spouse needs counselling and group therapy. In the medical report dated 09 January 2020 from Tahir Iqbal Malik, Registered Psychotherapist, he recommends that the principal applicant would benefit from psychotherapy and clinical counselling. I note that the recommendation for the applicant's issues is that they attend counselling and group therapy, however Counsel has not adduced any objective evidence confirming the unavailability of this care in Pakistan. Moreover, I have insufficient evidence before me that the applicants are currently undergoing any form of treatment in Canada.
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> [Emphasis added.]

[14] The officer then went on to address the submission that medications were not available in Pakistan, finding that the evidence did not support this submission. The applicants do not challenge the officer's conclusion on this point.

C. *The officer's treatment of the psychological evidence was unreasonable*

[15] In *Kanthasamy*, the Supreme Court of Canada set out the appropriate approach to applications for relief on H&C grounds under subsection 25(1) of the *IRPA*. Justice Abella, for the majority, adopted the language of the then Immigration Appeal Board in *Chirwa*, noting that the purpose of subsection 25(1) is 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* at paras 13–21, citing *Chirwa v Canada (Minister of Citizenship and Immigration)*, [1970] IABD No 1 at para 27. What warrants relief will vary depending on the facts and context of the case, but in applying the *Chirwa* approach, an officer must consider and weigh all relevant facts and factors: *Kanthasamy* at para 25.

[16] In finding that the officer who reviewed Mr. Kanthasamy's application had failed to apply this approach, Justice Abella held that the officer had unreasonably treated the psychological evidence before her. In support of his H&C application, Mr. Kanthasamy had filed a psychological report that concluded he suffered from post-traumatic stress disorder and adjustment disorder with mixed anxiety and depressed mood, and that his condition would deteriorate if he were removed from Canada: *Kanthasamy* at para 46. Although the officer accepted the diagnoses, she discounted the report since Mr. Kanthasamy had provided insufficient evidence that (i) he had been or is currently in treatment for the issues; (ii) he could

not obtain treatment if required in Sri Lanka, his country of citizenship; or (iii) doing so would amount to unusual, undeserved, or disproportionate hardship: *Kanthasamy* at para 46.

[17] Justice Abella found this analysis unreasonable, particularly criticizing the officer's desire for evidence that Mr. Kanthasamy was undergoing treatment or whether treatment was available in Sri Lanka:

> Having accepted the psychological diagnosis, it is unclear why the Officer would nonetheless have required Jeyakannan Kanthasamy to adduce *additional* evidence about whether he did or did not seek treatment, whether any was even available, or what treatment was or was not available in Sri Lanka. Once she accepted that he had post-traumatic stress disorder, adjustment disorder, and depression based on his experiences in Sri Lanka, requiring further evidence of the availability of treatment, either in Canada or in Sri Lanka, undermined the diagnosis and had the problematic effect of making it a conditional rather than a significant factor.
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> [Italics in original; underline added; *Kanthasamy* at para 47.]

[18] In Justice Abella's view, the fact that Mr. Kanthasamy's mental health would likely worsen if he were removed was a relevant consideration to be weighed, regardless of whether there was treatment available in Sri Lanka: *Kanthasamy* at para 48.

[19] Justice Abella also found the officer had erred in her analysis of whether Mr. Kanthasamy would face discrimination, in her consideration of the best interests of the child, and in failing to consider whether the evidence as a whole justified relief: *Kanthasamy* at paras 50–60. While Justice Abella did not state whether each of these errors was sufficient to render the decision as a whole unreasonable, she did clearly state that the approach to the psychological report was unreasonable: *Kanthasamy* at para 60.

[20] In the present case, the applicants argue that the officer similarly adopted the wrong approach to their H&C application. They point particularly to the officer's treatment of the psychological evidence, comparing it to that in *Kanthasamy*.

[21] I agree with the applicants that the officer's analysis of the psychological evidence is effectively the same as that found to be unreasonable in *Kanthasamy*. As set out in paragraph [13] above, the officer's substantive analysis of the psychological evidence amounted to accepting the clinical diagnoses, but noting that (i) treatment would be available in Pakistan; (ii) the reports all state that the symptoms arise due to the uncertainty of being unable to remain in Canada; and (iii) there was no evidence that the recommended counselling or therapy was unavailable in Pakistan or that the applicants were undergoing treatment in Canada.

[22] The first and third of these points, relating to the availability of treatment in Pakistan and whether the applicants were pursuing treatment in Canada, are identical to the reasoning criticized in *Kanthasamy*. This is not to say that these may not be relevant considerations, but they cannot be the only considerations: *Akhtar v Canada (Citizenship and Immigration)*, 2022 FC 856 at paras 25–26; *Tutic v Canada (Citizenship and Immigration)*, 2022 FC 800 at paras 23–26, citing *Esahak-Shammas v Canada (Citizenship and Immigration)*, 2018 FC 461 at para 26 and *Jaramillo Zaragoza v Canada (Citizenship and Immigration)*, 2020 FC 879 at para 54.

[23] Here, the only additional consideration given by the officer is that the reports state that the symptoms arise due to the uncertainty of being unable to remain in Canada. I cannot accept

that this creates a distinction from *Kanthasamy* or makes the analysis reasonable. While the cause of an applicant's psychological condition may be relevant, it is ultimately the impact of removal on the applicants' mental health that is most important: *Kanthasamy* at para 48. As the Minister suggests, it appears the officer may be implicitly concluding that returning to Pakistan would remove the "uncertainty" and thus the source of anxiety and other psychological difficulties. However, even to the extent such an inference is a reasonable one in the absence of medical evidence to this effect, the psychological reports are clear that their uncertain immigration status was not the only source of their condition. Rather, the reports point equally to the applicants' experiences and their fear of returning to Pakistan as a source of their condition. This was not considered by the officer, and it cannot be dismissed simply by referring to the concern about uncertainty.

[24] I therefore conclude that the officer's evaluation of the psychological evidence suffered from the same analytical shortcomings that were found unreasonable in *Kanthasamy*.

[25] As noted, Justice Abella in *Kanthasamy* did not clearly state that the unreasonable analysis of the psychological report was alone sufficient to render the decision as a whole unreasonable. However, this Court has on a number of occasions concluded that an unreasonable analysis of mental health evidence requires an H&C decision to be redetermined, particularly where mental health issues are a central issue in the H&C application: see, *e.g.*, *Sutherland v Canada (Citizenship and Immigration)*, 2016 FC 1212 at paras 6, 32–34; *Akhtar* at paras 13, 27; *Kadiravelupillai v Canada (Citizenship and Immigration)*, 2022 FC 962 at paras 17, 30–34. This is consistent with the Supreme Court's guidance in *Vavilov* that a shortcoming or flaw in the

decision must be more than merely superficial, but rather “sufficiently central or significant to render the decision unreasonable”: *Vavilov* at para 100.

[26] In the present case, the mental health concerns of Mr. Ahsan, Ms. Khalid, and their son were a material part of the applicants’ H&C application, supported by submissions and professional reports. As a result, I cannot conclude that the officer would necessarily have reached the same assessment of the application if they had conducted an analysis of the psychological evidence that complied with *Kanthasamy*. The applicants’ H&C application must therefore be remitted for redetermination.

[27] As a result, I do not need to address the applicants’ other arguments related to the officer’s assessment of hardship, establishment, and the best interests of the child. I do note, without deciding, that there are certainly aspects of the officer’s reasoning on these issues that raise concerns. This includes the officer’s reliance on those claiming refugee status being “afforded the tools such as employment and education which would allow them to be self-sufficient and to integrate into [the] Canadian community”; their conclusion that returning to Pakistan would not deprive the minor son “of the basic necessities of life”; and their observation that the applicants’ establishment was “[no] more than what would be expected of similarly situated individuals who come to Canada and are accorded the opportunity to integrate while waiting for determination of their refugee claims.” However, as stated, I need not determine whether these statements, read in the context of the officer’s broader discussion of these issues, show the analysis on these points to be unreasonable.

IV. Conclusion

[28] The application for judicial review is therefore allowed and the applicants' application for permanent residence on H&C grounds is remitted for redetermination by another officer.

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

JUDGMENT IN IMM-2090-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed. The refusal of the applicants' application for permanent residence on humanitarian and compassionate grounds, dated March 12, 2021, is set aside and the application is remitted for redetermination by different officer.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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