Federal Court Cour fédérale

Date: 20210826

Docket: IMM-2706-20

Citation: 2021 FC 884

Ottawa, Ontario, August 26, 2021

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

ADEOLU SAMUEL DANIYAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Adeolu Samuel Daniyan is a citizen of Nigeria. He seeks judicial review of a decision by an officer [Officer] with Immigration, Refugees and Citizenship Canada [IRCC] to refuse his request to apply for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds.

[2] Mr. Daniyan was found to be inadmissible to Canada pursuant to s 42(1)(a) of the *Immigration and Refugee Protection Act,* S.C. 2001, c.27 [IRPA]. He sought an exemption from inadmissibility on H&C grounds under s 25(1) of the IRPA. The Officer held that H&C considerations were insufficient to overcome Mr. Daniyan's inadmissibility.

[3] The Officer was required to conduct a nuanced assessment of Mr. Daniyan's request that took into account both the nature of his inadmissibility and how this should be balanced against H&C factors. The Officer's failure to consider the reasons for Mr. Daniyan's inadmissibility in the overall context of the H&C assessment renders the decision unreasonable. The application for judicial review is therefore allowed.

II. Background

[4] Mr. Daniyan came to Canada as a student in January 2014. He obtained an Advanced Diploma in Sustainable Agriculture from Memorial University of Newfoundland in August 2016. He received Post Graduate Work Permits from 2016 to 2019.

[5] In July 2015, Mr. Daniyan married Zainab Omobolanle Ayinde in Nigeria. He returned to Canada without his wife. They planned to enjoy a honeymoon in Hawaii, USA. Ms. Ayinde twice applied for a visitor's visa to enter the USA, but was refused both times.

[6] Ms. Ayinde subsequently applied for a temporary resident visa and work permit to join Mr. Daniyan in Canada. One of the questions on the application was: "have you ever been

refused a visa or permit, denied entry or ordered to leave Canada or any other country?" Ms. Ayinde answered "no". In February 2017, she was found to be inadmissible to Canada for misrepresentation pursuant to s 40(1)(a) of the IRPA.

[7] Were it not for the inadmissibility of Mr. Daniyan's wife, he would potentially be eligible for permanent residence as a member of the Express Entry: Canada Experience Class. However, pursuant to s 42(1)(a) of the IRPA, his wife's inadmissibility also renders him inadmissible to Canada until February 2022.

[8] Ms. Ayinde resides in Nigeria with the couple's three-year-old daughter. Mr. Daniyan currently has no immigration status in Canada.

[9] Mr. Daniyan submitted his H&C application in June 2018. It was refused in May 2020.

III. Issue

[10] Mr. Daniyan challenges the Officer's decision on numerous grounds. One of these is determinative: whether the Officer's failure to consider the reasons for Mr. Daniyan's inadmissibility in the overall context of the H&C assessment renders the decision unreasonable.

IV. Analysis

[11] The Officer's decision is subject to review by this Court against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10). The Court will intervene only if "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). These criteria are met if the reasons allow the Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[12] There is no dispute that the Officer omitted any consideration of the reasons for Mr. Daniyan's inadmissibility from the assessment of whether H&C factors justified discretionary relief. The Officer considered only the degree to which Mr. Daniyan had become established in Canada; adverse country conditions in Nigeria, including health considerations; and the best interests of the child.

[13] Nor is there any dispute that Mr. Daniyan included the circumstances leading to his inadmissibility in his submissions to the Officer:

> Following Mr. Daniyan and Ms. Ayinde's marriage, they made plans to meet one another in Honolulu, USA, where Mr. Daniyan's sister lives. As such, they each applied for visitor visas to the United States. Ms. Ayinde's visa was refused. She made a second application which was also refused.

> Later, when Ms. Ayinde applied for a temporary resident visa and work permit for Canada, she incorrectly answered "no" to the question "have you ever been refused a visa or permit, denied entry or ordered to leave Canada or any other country?" Ms. Ayinde's incorrect response to this question was an innocent mistake. When responding to this question, Ms. Ayinde incorrectly believed these visa refusals were not relevant to the application and as such omitted to include them.

[14] Both parties rely on the policy document titled "Humanitarian and compassionate: Dealing with inadmissibility" published on the IRCC website [IRCC Policy]. The relevant portion of this document reads as follows:

> Inadmissibilities should be considered at the stage at which they are known by the decision maker and in the overall context of the H&C considerations put forward by the applicant. In other words, the officer should determine whether the H&C considerations of the case are sufficient to warrant a waiver of the inadmissibility.

[15] Policy documents do not constitute law (*Bahar v Canada (Citizenship and Immigration)*, 2019 FC 1640 at para 18, citing *Krasniqi v Canada (Citizenship and Immigration)*, 2018 FC 743 at paras 19-10). They may nevertheless be useful in indicating what constitutes a reasonable interpretation of a given provision of the IRPA (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 32).

[16] According to the Respondent, the IRCC Policy contemplates that the decision maker should first determine whether H&C considerations warrant a waiver of inadmissibility, and should address the nature of the inadmissibility only if the H&C considerations are sufficiently compelling. I disagree.

[17] The IRCC Policy states explicitly that inadmissibilities should be considered “in the overall context of the considerations put forward by the applicant”. It is difficult to envisage how a decision maker can determine whether H&C considerations are sufficient to warrant a waiver of inadmissibility without examining the nature of the inadmissibility in question.

[18] In *Ainab v Canada (Citizenship and Immigration)*, 2014 FC 630, Justice James Russell upheld a decision where the officer determined that H&C factors did not outweigh the applicant’s criminal inadmissibility, such that the inadmissibility could be waived. The officer’s assessment of whether or not the applicant was rehabilitated necessarily required a consideration of the severity of the criminal conduct that gave rise to the inadmissibility.

[19] By the same token, in *Mirza v Canada (Citizenship and Immigration)*, 2016 FC 510 [*Mirza*], Justice Catherine Kane overturned a decision to refuse H&C relief because the officer “ignored or misconstrued the relevant evidence and failed to conduct the nuanced consideration of the **nature** of the applicant’s membership in a terrorist group and how this should be **balanced** against the relevant H&C factors” [emphasis added] (at para 50).

[20] The Respondent relies on two earlier authorities of this Court: *Mujiri v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 121 [*Mujiri*] and *Wong v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1410. Both applications for judicial review were allowed because the officers placed undue emphasis on the applicants’ medical inadmissibility. However, the cases do not stand for the proposition that the reasons for inadmissibility should be excluded from the H&C analysis altogether. On the contrary, Justice John O’Keefe explicitly stated in

Mujiri that “[t]here is no doubt that the officer can consider medical conditions as one of the factors to be considered along with the other factors which are relevant on the H&C application” (at para 22).

[21] It is clear from *Mirza* that the Officer in this case was required to conduct a nuanced assessment of Mr. Daniyan’s request that took into account both the nature of his inadmissibility, and how this should be balanced against H&C factors. The Officer’s failure to consider the reasons for Mr. Daniyan’s inadmissibility in the overall context of the H&C assessment renders the decision unreasonable.

V. Certified Question

[22] According to this Court’s *Practice Guidelines for Citizenship, Refugee and Immigration Proceedings* dated November 28, 2018, “[w]here a party intends to propose a certified question, opposing counsel shall be notified at least five [5] days prior to the hearing, with a view to reaching a consensus regarding the language of the proposed question”.

[23] When asked by the Court whether the parties wished to propose a certified question in this proceeding, counsel for the Respondent answered “no”. Counsel for Mr. Daniyan acknowledged that, depending on this Court’s reasons, a certified question might arise. Ultimately, however, no party proposed that a question be certified for appeal.

[24] In my view, these reasons do not represent a departure from the previous jurisprudence of the Court respecting decisions that concern exemptions from inadmissibility on H&C grounds under s 25(1) of the IRPA. Accordingly, no serious question of general importance arises in this case.

VI. Conclusion

[25] The application for judicial review is allowed, and the matter is remitted to a different decision maker for redetermination in accordance with these reasons. No question is certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, and the matter is remitted to a different decision maker for redetermination in accordance with the Court's reasons.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2706-20
STYLE OF CAUSE:	ADEOLU SAMUEL DANIYAN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDECONFERENCE BETWEEN SASKATOON, SASKATCHEWAN AND OTTAWA, ONTARIO
DATE OF HEARING:	JULY 22, 2021
JUDGMENT AND REASONS:	FOTHERGILL J.
DATED:	AUGUST 26, 2021

APPEARANCES:

Christopher Veeman	FOR THE APPLICANT
Judith Boer	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Veeman Law Barristers and Solicitors Saskatoon, Saskatchewan	FOR THE APPLICANT
Attorney General of Canada Saskatoon, Saskatchewan	FOR THE RESPONDENT