Federal Court  Cour fédérale

Date: 20211202

Docket: IMM-333-20

Citation: 2021 FC 1343

Toronto, Ontario, December 2, 2021

PRESENT: Madam Justice Go

BETWEEN:

ABDULRAHMAN BAWAZIR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Abdulrahman Bawazir [Applicant], a citizen of Yemen, brought an application for leave and for judicial review of a reconsideration decision of a Senior Immigration Officer [Officer], denying the Applicant's application for permanent residency status pursuant to Humanitarian and Compassionate [H&C] considerations [Decision] under s. 25 of the *Immigration and Refugee Protection Act* [*IRPA*].

[2] The Officer noted that the Applicant had voluntarily visited Yemen and that he had obtained a temporary visa in Saudi Arabia. The Officer concluded that there was little evidence demonstrating the hardships that the Applicant faced upon return to Yemen.

[3] I find the Decision unreasonable and I will set it aside.

II. **Background**

A. ***Factual Context***

[4] The Applicant fled Yemen in 2008 after witnessing his brother's death resulting from a tribal dispute. He made a refugee claim in Canada, which was refused in 2010.

[5] The Applicant has made three unsuccessful H&C applications, in 2012, 2015, and 2016 respectively. The 2016 H&C was refused on the grounds that an administrative deferral of removals [ADR] to Yemen made country conditions in Yemen irrelevant. The Applicant filed for judicial review. His case was argued before the Federal Court in October 2018.

[6] While awaiting the Court's decision, the Applicant travelled to Yemen in January 2019. At the time, he was struggling psychologically after not being able to say goodbye to his father and sister-in-law, who had passed away in Saudi Arabia. In addition, the Applicant had reached a point where he had lost hope of ever securing his immigration status and moving forward with his life in Canada. Life started to feel like it had no meaning and he missed his family greatly.

The Applicant decided to visit his elderly mother in Saudi Arabia. He stayed in Yemen for 6 weeks, in order to obtain a temporary visa to enter Saudi Arabia.

[7] On May 8, 2019, Justice Norris allowed the Applicant's application for judicial review, finding that the Officer erred by dismissing country conditions on the grounds that there was an ADR to Yemen: *Bawazir v Canada (Citizenship and Immigration)*, 2019 FC 623.

[8] After this Court remitted his H&C application to be re-determined by Immigration, Refugees and Citizenship Canada, the Applicant was given the opportunity to provide additional submissions. His counsel requested an extension of time but never ended up providing additional submissions, due to the Applicant's difficulties in finding a trustworthy translator abroad and counsel's miscalculation of how soon an H&C application would be processed after being returned by the Federal Court.

[9] On September 24, 2019, the Officer denied the remanded H&C application without receiving any further submissions. The Officer accepted the Applicant's evidence of establishment in Canada and country conditions in Yemen, placing weight on both factors. However, the Officer also placed much weight on the fact that the Applicant returned to Yemen voluntarily. The Officer found that due to a lack of updated submissions, he was unable to assess the Applicant's hardships upon return to Yemen.

[10] On December 18, 2019, the Applicant requested a reconsideration of this decision, explaining his difficulties communicating with counsel while overseas. He also provided

substantial evidence and submissions on the reasons for leaving Canada, the hardship he faced when he returned to Yemen, and his precarious immigration status in Saudi Arabia.

B. *Decision under Review*

[11] On December 23, 2019, the Officer upheld the original decision to deny the H&C application. In a short cover letter with brief reasons attached, the Officer concluded that the Applicant had obtained temporary status in Saudi Arabia with little evidence about how the visa was secured, and that he had provided little evidence demonstrating the hardships he would face upon his return to Yemen.

III. **Issues**

[12] The Applicant raises two issues: (1) whether the Officer unjustifiably ignored evidence and (2) whether the decision was unreasonably bereft of compassion.

IV. **Standard of Review**

[13] The presumptive standard of review of the merits of an administrative decision is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 25. The parties agree that the standard of review for the substance of an H&C decision is reasonableness (see e.g. *Choi v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 494 at para 10, citing *Vavilov*).

[14] 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). The onus is on the Applicant to demonstrate that the decision is unreasonable.

[15] The Applicant notes *Vavilov*'s requirement that if a decision has harsh consequences on an individual, "the reasons provided to that individual must reflect the stakes" (at para 133).

V. **Analysis**

(1) **Did the Officer unjustifiably ignore evidence?**

[16] The Applicant contends that the Officer ignored crucial evidence about the temporariness of his status in Saudi Arabia and the hardship he faced in Yemen.

(a) *Status in Saudi Arabia*

[17] The Decision stated: "While I note the applicant describes the hardships he faced upon his return to Yemen, he was also able to secure a visa for Saudi Arabia and left Yemen soon after his arrival to be with his family in Saudi Arabia". The Officer acknowledged that the Applicant's sister secured the visa through her connections with a staffing agency, but stated that "there was little documentary evidence provided indicating who the applicant is presently working for or how that visa was secured".

[18] The Applicant argues that there was ample evidence documenting his residency status in Saudi Arabia, contrary to the Officer's finding that "little documentary evidence" was provided.

In addition to affidavit evidence explaining that his sister had connections with a staffing agency and got him a visa as her private driver, the Applicant provided a copy of his Saudi Arabian work visa permitting him to work for his sister for only 90 days. The visa states his sister's name.

[19] The evidence before the Officer also included the Applicant's statement that his sister would face trouble with the Ministry of Labour if she were audited. He stated that the staffing agency told him he needed to search elsewhere for a job, but that a government policy of "Saudization" of the workforce means that employers are unlikely to receive authorization to hire foreign nationals. He provided an article from early 2018 showing that certain categories of work in Saudi Arabia were limited to "nationals only". None of the evidence noted above was mentioned in the Decision.

[20] The Applicant submits that the silence on evidence that contradicted the Officer's finding of fact means the Decision should be overturned on the basis that the Officer did not consider all the evidence: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC); *Guzman de la Cruz v Canada (Citizenship and Immigration)*, 2019 FC 937; *Gamboa Saenz v Canada (Citizenship and Immigration)*, 2019 FC 713; *Niculescu v Canada (Citizenship and Immigration)*, 2017 FC 733.

[21] The Respondent submits that the Officer did not ignore evidence, but rather refused the application because the Applicant did not demonstrate he would face hardship in Yemen. The Respondent further argues that the Applicant's current status in Saudi Arabia is irrelevant to the Officer's reasons for refusal.

[22] I will address the issue of hardship in Yemen in the section below. But I disagree with the Respondent's position that the Applicant's current status in Saudi Arabia is irrelevant to the refusal. It is clear from the brief reasoning that the opposite is true, as the Officer devoted much of his short decision and reasons to the Applicant's visa and work in Saudi Arabia, as opposed to the hardship he faced in Yemen. The Officer made this a relevant issue by stating:

> While I note the applicant describes the hardships he faced upon his return to Yemen, he was also able to secure a visa for Saudi Arabia and left Yemen soon after his arrival to be with his family in Saudi Arabia.

[23] The above line of reasoning appears to suggest that the Officer used the Applicant's ability to secure a visa in Saudi Arabia to offset the Applicant's hardship in Yemen. Having made that link, the Officer should have considered all the evidence that pointed to a contrary conclusion about the Applicant's ability to maintain his employment and his visa in Saudi Arabia going forward. The Officer's failure to mention, let alone assess, the contradictory evidence before him rendered his consideration of this issue unreasonable.

(b) *Hardship in Yemen*

[24] The Applicant submits the Officer ignored evidence as it related to his hardship in Yemen. The Applicant points to a letter from his cousin, stating that when the Applicant returned to Yemen in 2019 he was aggressively interrogated by airport officials for 5 hours, he hid inside from fear of tribal reprisals, he only went outside when accompanied by his cousin, he was unemployed, he witnessed many people begging on the street, he encountered several checkpoints while travelling, and many terrains were unsafe due to landmines. The Applicant submits the Officer unreasonably failed to consider the aforementioned evidence.

[25] The Applicant also submits that the Officer's analysis was retroactive as opposed to forward-looking, as it only addressed the hardship he faced while visiting Yemen. The Applicant's affidavit stated that if he were to be deported to Yemen from Saudi Arabia, he would face retribution from members of an opposing tribe, as well as recruitment from groups including Houthi militias and Al-Qaeda. He also stated that he would also face a humanitarian crisis and civil war, as supported by numerous articles before the Officer. Furthermore, the Applicant argues that Canada's ADR to Yemen is sufficient evidence, in and of itself, to confirm that he would face significant hardships if returned to Yemen.

[26] In denying the request for reconsideration, I note the Officer devoted just one line to the issue of Applicant's alleged hardship in Yemen, stating that there was "little evidence on file demonstrating the hardships the applicant faced upon his return to Yemen, per his declaration". Instead, the Officer focused more on the Applicant's voluntary return to Yemen:

> In the applicant's H&C application, one of the factors for consideration was that the applicant voluntarily returned to Yemen even though there is an Administrative Deferral of Removal to that country. I have read the applicant's declaration dated December 1, 2019 and I find that the new information provided by the applicant does not change my original decision.

[27] The Officer did not comment on the cousin's letter, or for that matter, any of the evidence provided by the Applicant with regard to the country conditions in Yemen. Thus, I cannot accept the Respondent's written submission that because this information from his cousin came only in a letter as opposed to an affidavit, it was therefore reasonable for the Officer to conclude that there was little evidence. As the Decision did not even refer to the cousin's letter, the Respondent cannot use this argument to bootstrap the sparsely worded Decision and the lack of reasons therein.

[28] The Respondent further argues that the Court needs to consider the Officer's initial decision of September 24, 2019, which is not subject to the current judicial review, and if that decision was reasonable, then the Court should not intervene. I reject this argument given the initial decision was made without the benefit of the Applicant's additional submissions on reconsideration, including his reasons for leaving Canada, and assumed that the Applicant was still in Yemen.

[29] As noted above, the Officer's reconsideration decision appears to be driven by the Applicant's voluntary return to Yemen. However, just because the Applicant has voluntarily returned to Yemen for a temporary visit – in order to obtain a visa to travel to Saudi Arabia to visit family – does not mean he would not face hardship if he were to return to Yemen on a permanent or longer term basis. The Applicant's current situation, compared to the one he was in when Justice Norris' 2019 decision came down, is even more precarious. If he were still in Canada, the Applicant would be protected by the operation of the ADR and would not face imminent removal to Yemen. Now that he is in Saudi Arabia with an uncertain status and even more uncertain future, he is not afforded protection from removal and could be returned to Yemen.

[30] As to the country conditions in Yemen, Justice Norris' decision in 2019 succinctly sets out the legal authority behind an ADR and the dire conditions in Yemen that gave rise to Canada's decision to issue an ADR with respect to that country. The ADR is still in place today. It thus begs the question as to what further evidence the Officer needed in order to consider the hardship that the Applicant would face, particularly after the Federal Court had already returned

the H&C application for redetermination on the grounds that the analysis of country conditions had been unreasonable, particularly in view of the ADR.

[31] It was thus unreasonable for the Officer to effectively ignore the evidence and submissions on hardship as provided by the Applicant.

(2) **Is the Officer's decision unreasonably bereft of compassion?**

[32] The leading case on H&C decisions is *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, which states that s. 25 of the *IRPA* is intended to offer equitable relief where there are "facts, established by the evidence, which would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes 'warrant the granting of special relief'" (at paras 13, 21, citing *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338).

[33] The Applicant argues that the Officer's decision is bereft of compassion, and therefore unreasonable in light of the statutory language in s. 25 mandating humanitarian and compassionate considerations. The Applicant submits that the Officer's decision was devoid of considerations in the *Kanthasamy/Chirwa* test, analogously to *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 in which Justice Brown found the following at para 33:

> … the reviewing courts should have some reason to believe that the Officers have done their job, that is, that H&C Officers have considered not just hardship but humanitarian and compassionate factors in the broader sense.

[34] The Applicant also argues that the decision maker must "empathize with the applicant" according to Justice Campbell in *Dowers v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 593 [*Dowers*] at para 3.

[35] The Applicant submits that the Officer in this case lacked compassion in considering his reasons for returning to Yemen and Saudi Arabia. He submitted that the stress of living without permanent status and without seeing his family took its toll, and he developed depression and irritable bowel syndrome. After a decade of hoping to regularize his status in Canada, he felt he could not wait any longer to see his mother and the rest of his family, who he had not seen in over a decade. His mother was in her eighties and begged him to come visit.

[36] The Respondent's response to these arguments is that the Officer is owed deference.

[37] I noted that in the initial H&C decision, prior to the reconsideration, the Officer did acknowledge and "gave weight" to evidence of the Applicant's establishment, and placed "much weight" on the documentary evidence of the crisis in Yemen. While the Officer may not have to reiterate all his previous findings in the Decision, I do find it unreasonable for the Officer not to address any of the reasons why the Applicant has "voluntarily" returned to Yemen.

[38] Quoting from *Tigist Damte v Canada (Citizenship and Immigration)*, 2011 FC 1212 at para 34, Justice Campbell in *Dowers* noted at para 6: "Applying compassion requires an empathetic approach. This approach is achieved by a decision-maker stepping into the shoes of

an applicant and asking the question: how would I feel if I were her or him? In coming to the answer, the decision-maker's heart, as well as analytical mind, must be engaged."

[39] The Officer in this case, in my view, failed to step into the shoes of the Applicant in order to appreciate why, in his condition of depression, isolation, feelings of guilt for not seeing his family members before they passed, and losing hope of securing a future in Canada, he would feel compelled to seek the comfort of his remaining family in Saudi Arabia, despite the dire consequences he would face in travelling through Yemen. The Officer's apparent lack of empathy for someone in the Applicant's situation and the reasons for leaving Canada is contrary to the purpose of s. 25 of the *IRPA* and inconsistent with Parliament's intent to make available an equitable relief through the H&C process.

[40] Based on all of the above, I find the decision unreasonable.

VI. **Certification**

[41] Counsel for both parties were asked if there were questions requiring certification. They each stated that there were no questions arising for certification and I concur.

VII. **Conclusion**

[42] The application for judicial review is allowed.

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The decision under review is set aside and the matter referred back for redetermination by a different decision-maker.
3. There is no question to certify.

JUDGMENT in IMM-333-20

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is allowed.

2. The decision under review is set aside and the matter referred back for redetermination by a different decision-maker.

3. There is no question to certify.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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