Federal Court  Cour fédérale

Date: 20220624

Docket: IMM-2685-20

Citation: 2022 FC 959

Ottawa, Ontario, June 24, 2022

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

HECTOR RAUL GONZALEZ DONOSO

Applicant

and

THE MINISTER OF IMMIGRATION REFUGEES AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Hector Raul Gonzalez Donoso [Applicant] seeks judicial review of a May 13, 2020 decision [Decision] by a senior immigration officer [Officer] refusing his application for permanent residence on humanitarian and compassionate [H&C] grounds. The Officer found that the Applicant did not have sufficient H&C considerations to grant an exemption under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The application for judicial review is dismissed.

II. Background

[3] The Applicant is an 87-year-old citizen of Chile. After his wife passed away in December 2015, he entered Canada on May 8, 2016 on a valid visitor's visa to visit his daughter and adult grandchildren. The Applicant extended his visa until June 29, 2019 and continued to remain in Canada beyond his authorized stay. The Applicant currently lives with his daughter and grandchildren. He has one son residing in Chile.

III. The Decision

[4] The Officer acknowledged that the Applicant relies on his daughter and grandchildren for "emotional support, financial assistance, accommodation, meals, medical care and other essentials of daily living." However, the Officer noted the Applicant's son resides in Chile and there was no evidence indicating that his son would be unable to provide care and support for the Applicant if required to do so. Moreover, the Officer found it reasonable to expect that the Applicant has property remaining in Chile given the initial temporary nature of his visit.

[5] The Officer acknowledged that the Applicant, his daughter, and grandchildren are close and that they rely on each other for emotional support. The Officer also acknowledged that family reunification is desirable in this case, particularly in light of the Applicant's age. However, the Officer found that the daughter made a choice to immigrate to Canada in 1992 and thus, she was cognizant that long-term separation from the Applicant could ensue.

[6] The Officer found the Applicant's return to Chile would inevitably cause some emotional upset but found that familial separation "is an inherent rather than an unusual consequence of being required to leave Canada after the expiration of his legal status." As a result, the Officer found that the physical separation of the Applicant from his family members in Canada would not "result in hardship warranting an exceptional remedy offered by an application of this nature."

IV. Issue and Standard of Review

[7] The only issue is whether the Decision is reasonable.

[8] The appropriate standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16-17, 23-25 [*Vavilov*]; *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 at para 44 [*Kanthasamy*]). None of the exceptions set out in *Vavilov* are engaged in this matter. H&C exemption decisions are "exceptional and highly discretionary, warranting significant deference to the deciding officer" (*Alghanem v Canada (Citizenship and Immigration)*, 2021 FC 1137 at para 20 citing *Miyir v Canada (Citizenship and Immigration)*, 2018 FC 73 at para 12; *Li v Canada (Citizenship and Immigration)*, 2017 FC 841 at para 15; *Nguyen v Canada (Citizenship and Immigration)*, 2017 FC 27 at paras 28-29).

[9] In assessing the reasonableness of a decision, the Court must consider both the outcome and the underlying rationale to assess whether the "decision as a whole is transparent, intelligible and justified" (*Vavilov* at para 15). For a decision to be reasonable, a decision-maker must

adequately account for the evidence before it and be responsive to the Applicant's submissions (*Vavilov* at paras 89-96, 125-128). A decision will be unreasonable if it contains flaws that are sufficiently central or significant (*Vavilov* at para 100). A reviewing court must refrain from reweighing evidence before the decision-maker and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125).

V. Analysis

A. *Is the Decision reasonable?*

(1) Applicant's Position

[10] The Officer's finding that the Applicant's return would cause "some emotional upset" does not take into consideration the Applicant's age, his emotional dependence on his family in Canada, and the importance of their proximity to care for his needs. It was unreasonable for the Officer to rely on the assumption that his son would be willing or able to provide support if he is returned to Chile. As a result, the Officer made an unreasonable plausibility finding (*Sanchez v Canada (Citizenship and Immigration),* 2018 FC 665).

[11] The Officer also makes incompatible findings. On one hand, the Officer found that separation from family in Canada would not "result in hardship warranting an exceptional remedy offered by an application of this nature." On the other hand, the Officer found that the Applicant is emotionally dependent on his family in Canada and noted the importance of their proximity to care for his needs.

[12] Decision-makers are required to empathize with an applicant by placing themselves in an applicant's shoes to clearly understand and be sensitive to an applicant's circumstances (*Dowers v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 593). In the present case, the Officer failed to do so.

[13] Finally, the Officer erred by assessing the Applicant's circumstances exclusively against a standard of hardship (*Marshall v Canada (Citizenship and Immigration),* 2017 FC 72).

(2) Respondent's Position

[14] H&C officers have broad discretion to decide whether there are sufficient considerations that warrant relief based on a global assessment (*Kanthasamy* at para 28). The H&C decision-making process is a discretionary one that considers whether a special grant of an exemption is warranted (*Canada (Minister of Citizenship & Immigration) v Legault*, 2002 FCA 125 at para 15).

[15] It was open to the Officer to consider that the Applicant has been residing illegally in Canada (*Madera v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 108 at para 9). It was also open to the Officer to find that the Applicant's separation from his family in Canada would not warrant exceptional relief (*Patel v Canada (Citizenship and Immigration)*, 2021 FC 1178 at paras 29-32).

[16] The Officer fully considered the Applicant's personal circumstances and demonstrated empathy. The Officer considered all the evidence provided about the Applicant's family

relationships and made reasonable findings based on this evidence. Moreover, in *Hussain v Canada (Citizenship and Immigration),* 2020 FC 599 [*Hussain*] this Court found a negative H&C decision to be reasonable for an applicant who was elderly, lived in Canada since 2016, and had to live alone after his wife passed away in 2007. While the Applicant's circumstances may be challenging, they are not unusual and do not justify an exemption.

[17] The Officer applied the proper test and based the Decision on the evidence. The Officer did not assess the Applicant's circumstances exclusively on an analysis of hardship. Rather, the Officer considered the entirety of the Applicant's circumstances, as well as hardship because the Applicant alleged hardship upon return.

[18] The Applicant has the burden of explaining why neither his daughter in Canada, nor his son in Chile, can provide adequate support if the Applicant returns to Chile. The Officer did not assume that the son would provide support. Rather, the Officer noted that the Applicant had not demonstrated otherwise.

(3) Conclusion

[19] I am satisfied that the Officer addressed all of the evidence and the H&C factors raised by the Applicant (*Shah v Canada (Immigration, Refugees and Citizenship),* 2019 FC 1153 at para 31). As noted by the Officer, there was little evidence to support the H&C grounds raised, namely establishment through family relationships. The evidence before the Officer included 11 letters of support, 5 photos, and financial/employment documents of his family in Canada. There was no evidence directly from the Applicant in the form of an affidavit. Deference is owed to

H&C decision-makers and a reviewing Court is not able to re-weigh the evidence that was before an officer (*Lalee v Canada (Immigration, Refugees and Citizenship),* 2020 FC 460 at para 22 [*Lalee*]; *Vavilov* at para 125). The Decision is justified, transparent, and intelligible.

[20] The Applicant submits it was unreasonable for the Officer to assume that his son would be willing or able to provide support if he is returned to Chile. The Applicant points out that there were letters of support indicating that he did not have anyone to support him in Chile. However, the letters make no mention of the son or his inability or unwillingness to care for the Applicant. The H&C submissions themselves only contained statements about a lack of a close or healthy relationship between the Applicant and his son.

[21] The Applicant's allegations relating to the Officer's "assumption" do not produce a reviewable error because the "assumption" was due to the lack of evidence before the Officer (*Lalee* at para 24). I agree with the Respondent that the Officer did not assume that the son would provide support. Instead, the Officer reasonably noted that the Applicant had not demonstrated otherwise.

[22] I agree with the Respondent that the circumstances of this case are similar to *Hussain* and *Meniuk v Canada (Citizenship and Immigration),* 2021 FC 1374 [*Meniuk*]. Both of the H&C decisions in those cases involved widowed and elderly Applicants. I acknowledge that while the Applicant's circumstances may be challenging, these challenging circumstances alone do not justify an exemption.

[23] I disagree with the Applicant that the Officer assessed his circumstances exclusively against a standard of hardship. The Officer considered the entirety of the Applicant's circumstances, as well as hardship, because the Applicant alleged hardship upon return. As held by Justice Bell in *Meniuk*, at paragraphs 22-23:

> [22] *Kanthasamy* does not eliminate the notion of hardship from H&C assessments; it remains a relevant and important factor to consider (*Kanthasamy* at paras 23 and 33; *Cezair* at para 16; *Shackleford v. Canada (Citizenship and Immigration)*, 2019 FC 1313 at para 11). I am unable to conclude that the Officer, by considering the degree of hardship that Ms. Meniuk would face on her return to Ukraine, fell into reviewable error. This issue of hardship is impossible to avoid given the arguments advanced by Ms. Meniuk.
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> [23] When applying the reasonableness standard, the reviewing court must be cognizant of the fact that judicial review does not compel one specific result (*Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 SCR 247 at para 56). The role of this Court is not to determine whether the decision-maker made the correct decision, but rather, to determine whether the decision bears the hallmarks of reasonableness (*Vavilov* at paras 96 and 99). Different decision-makers might assess the same facts and the same evidence, apply the same legal test, and still reasonably come to different conclusions (*Li v. Canada (Citizenship and Immigration)*, 2020 FC 754 at para 68).

[24] I sympathize with the Applicant's situation, however, the onus was on the Applicant to put his best foot forward and establish the existence of sufficient H&C factors justifying an exemption from normal legal requirements of the *IRPA* (*Cantalejo v Canada (Citizenship and Immigration)*, 2019 FC 828 at para 17, citing to *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 5; *Bacha v Canada (Citizenship and Immigration)*, 2008 FC 1382 at para 11; *Singh v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1356 at para 32). The Decision as a whole demonstrates the Officer did not assess the Applicant's H&C considerations solely through a hardship lens.

[25] I find that the Officer did not commit a reviewable error in denying the Applicant's H&C application.

VI. Conclusion

[26] The Decision is intelligible, transparent, and justified. The application is dismissed.

[27] There is no question of general importance to be certified.

JUDGMENT in IMM-2685-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question of general importance to certify.

3. There is no order as to costs.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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