Federal Court  Cour fédérale

Date: 20230321

Docket: IMM-6584-21

Citation: 2023 FC 390

Ottawa, Ontario, March 21, 2023

PRESENT: Mr. Justice Norris

BETWEEN:

ANIS ABU GOSH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant is a Palestinian citizen of Israel. After entering Canada as a visitor, he submitted a claim for refugee protection in January 2002. In September 2002, the Refugee Protection Division ("RPD") of the Immigration and Refugee Board of Canada accepted the claim and found the applicant to be a Convention refugee. The applicant became a permanent resident of Canada in March 2004.

[2] In June 2006, the applicant was convicted of three counts of assault with a weapon and one count of dangerous operation of a motor vehicle. He received concurrent sentences of two-and-one-half years in prison for the assault with a weapon charges and a concurrent sentence of two years in prison for the dangerous driving charge.

[3] In December 2007, the applicant was determined to be inadmissible to Canada due to serious criminality as a result of these convictions. The applicant therefore lost his permanent resident status and a removal order was issued. However, the Canada Border Services Agency elected not to seek a danger opinion under subsection 115(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). As a result, as a protected person, the applicant has been permitted to remain in Canada.

[4] In November 2020, the applicant submitted an application for permanent residence in Canada on humanitarian and compassionate ("H&C") grounds under subsection 25(1) of the *IRPA*. As a protected person in Canada, he is not precluded from submitting an application for permanent residence from within Canada. However, any such application would be doomed to fail unless the applicant can overcome his criminal inadmissibility. Since the applicant was convicted of more than three offences prosecuted by way of indictment and for each of which he received a sentence of two years or more, under paragraph 4(2)(b) of the *Criminal Records Act*, RSC 1985, c C-47, he is ineligible to apply for a record suspension. Consequently, the only way the applicant can overcome his inadmissibility due to serious criminality and restore his permanent resident status is through being granted an exemption on H&C grounds under subsection 25(1) of the *IRPA*.

[5] The applicant's request for H&C relief was based on his rehabilitation since he committed the criminal offences, his establishment in Canada, the hardship of having to live without permanent status in Canada, and the best interests of four children who would be directly affected by the decision (his niece and nephew and his girlfriend's two children).

[6] A Senior Immigration Officer refused the application in a decision dated September 1, 2021.

[7] The applicant now applies for judicial review of this decision under subsection 72(1) of the *IRPA*. He contends that the decision is unreasonable in a number of respects. While I am not persuaded that the decision is flawed in all the ways alleged by the applicant, I am satisfied that the officer's assessment of the issue of criminal rehabilitation, a key factor in this case, is unreasonable. This application for judicial review must, therefore, be allowed and the matter remitted for redetermination.

II. BACKGROUND

[8] The applicant was born in Israel in September 1982.

[9] On July 17, 2005, when he was 22 years of age, the applicant became involved in a conflict between his brother (who also lives in Canada) and a group of other individuals. According to the applicant, his brother had been attacked by three people (two men and a woman). Seeking to defend his brother, in an impulsive rage the applicant drove his vehicle at the three individuals with the intention of running them over.

[10] The applicant was arrested and charged with a number of criminal offences arising from this incident. On March 14, 2006, he pled guilty to three counts of assault with a weapon (presumably the vehicle) and one count of dangerous operation of a motor vehicle. The balance of the charges were withdrawn by the Crown. On June 22, 2006, the applicant received concurrent sentences of two-and-one-half years in prison for the assault with a weapon charges and a concurrent sentence of two years in prison for the dangerous driving charge. After being credited for the equivalent of 30 days of pre-trial custody, a net sentence of 29 months was imposed. The applicant was released on parole after serving 11 months in prison.

[11] On the basis of these criminal convictions (the only ones on his record), the applicant was found to be inadmissible to Canada due to serious criminality. As a result of this determination, the applicant lost his permanent resident status in Canada.

[12] In his application for H&C relief to overcome his inadmissibility due to serious criminality and restore his permanent resident status, the applicant relied on the following considerations:

- His criminal offences were committed over 15 years ago. At the time, he was still suffering from the effects of the trauma he had experienced as a young Palestinian man growing up in Israel. He is deeply remorseful for his actions, which were inexcusable.

- As demonstrated by his life since then, his actions were entirely out of character and he is fully rehabilitated.

- He has become well-established in Canada. He has operated his own successful business since 2008 and is in a stable, long-term romantic relationship. He is financially self-sufficient; he supports not only himself but also his girlfriend and her children.

- His lack of permanent status in Canada is a source of anxiety for him and for those around him.

- He is close to his niece and his nephew (his brother's children) and to his girlfriend's two children. It would be in the best interests of all of these children for him to be a permanent resident.

III. DECISION UNDER REVIEW

[13] In concluding that the applicant had not established that an H&C exemption was warranted in the applicant's case, the officer made the following determinations:

- The applicant has lived in Canada for 20 years, which constitutes a large portion of his life. He has demonstrated some establishment through his familial connection to Canada, friendships, and employment. However, "although there are mitigating factors, the applicant's criminality has a negative weight on his establishment." Consequently, the officer "assign[ed] little positive weight on the grounds of establishment."

- As a protected person, the applicant is not at risk of removal, he would not have to return to Israel, or to leave his family, girlfriend or employment in Canada. Although the applicant "would like to regain permanent resident status," "as he is able to remain in Canada without risk of removal, there is only very little hardship towards the applicant."

- It would be in the children's best interests for the applicant to regain permanent residency. However, since the applicant "will be able to continue his relationships with the children as he always has, and the children will not be separated from the applicant," the best interests of the children considerations "are not sufficient to warrant a positive decision."

[14] In summary, having considered the applicant's circumstances and the documentation submitted, the officer was not satisfied that the H&C considerations presented justified an exemption under subsection 25(1) of the *IRPA*. Accordingly, the officer refused the application.

IV. STANDARD OF REVIEW

[15] It is well-established that the merits of an H&C decision should be reviewed on a reasonableness standard (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44). That this is the appropriate standard has been reinforced by *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10.

[16] 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). A decision that displays these qualities is entitled to deference from the reviewing court (*ibid.*). On the other hand, "where reasons are provided but they fail to provide a transparent and intelligible justification [. . .], the decision will be unreasonable" (*Vavilov* at para 136).

[17] When applying the reasonableness standard, it is not the role of the reviewing court to reweigh or reassess the evidence considered by the decision maker or to interfere with factual findings unless there are exceptional circumstances (*Vavilov* at para 125). As well, since H&C decisions are highly discretionary, decision makers will be accorded a considerable degree of deference (*Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4). Nevertheless, the reasonableness of a decision may be jeopardized where the decision maker "has fundamentally misapprehended or failed to account for the evidence before it" (*Vavilov* at para 126) or where the decision maker has failed "to meaningfully grapple with key issues or central arguments raised by the parties" (*Vavilov* at para 128).

[18] The onus is on the applicant to demonstrate that the officer's decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied that "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).

V. ANALYSIS

A. *Introduction*

[19] Subsection 25(1) of the *IRPA* authorizes the Minister to grant relief to a foreign national seeking permanent resident status who is inadmissible or otherwise does not meet the requirements of the Act. The Minister may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations under the Act only if the Minister "is of the opinion that it is justified by humanitarian and compassionate considerations relating to

the foreign national." Subsection 25(1) expressly requires a decision maker to take into account the best interests of a child directly affected by a decision made under this provision.

[20] This discretion to make an exception provides flexibility to mitigate the effects of a rigid application of the law in appropriate cases (*Kanthasamy* at para 19; *Damian v Canada (Citizenship and Immigration)*, 2019 FC 1158 at paras 16-22). It should be exercised in light of the equitable underlying purpose of the provision (*Kanthasamy* at para 31). Thus, decision makers should understand that H&C considerations refer to "those 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' from the effect of the provisions of the Immigration Act" (*Kanthasamy* at para 13, adopting the approach articulated in *Chirwa v Canada (Minister of Manpower & Immigration)* (1970), 4 IAC 338). Decision makers should therefore interpret and apply subsection 25(1) to allow it "to respond flexibly to the equitable goals of the provision" (*Kanthasamy* at para 33). At the same time, it is not intended to be an alternative immigration scheme (*Kanthasamy* at para 23).

[21] Whether relief is warranted in a given case will depend on the specific circumstances of that case (*Kanthasamy* at para 25). The onus is on an applicant to present sufficient evidence to warrant the granting of relief in his or her case, including information regarding the best interests of the children (*Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 45; *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 5; *Ahmad v*

Canada (Minister of Citizenship and Immigration), 2008 FC 646 at para 31; *Zlotosz v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 724 at para 22).

[22] When, as in the present case, an H&C exemption from criminal inadmissibility is sought, the decision maker must weigh the public policy reflected in subsection 36(1) of the *IRPA* against the individual circumstances of the case. The decision maker must determine whether, in light of the equitable underlying purpose of subsection 25(1) of the *IRPA*, the individual circumstances outweigh the general public policy so as to warrant making an exception to the usual rule that serious criminality disentitles one from obtaining permanent resident status.

[23] The applicant challenges the reasonableness of the officer's assessment of hardship, best interests of the children, and criminal rehabilitation. As I will explain, while I am not persuaded that the officer's analysis of hardship and best interests of the children is unreasonable, I agree with the applicant that the analysis of criminal rehabilitation does not withstand scrutiny.

B. *Hardship*

[24] The applicant argues that the officer took an unreasonably narrow view of the hardship he has experienced and would continue to experience as a protected person who is unable to obtain permanent residence. He submits that living in Canada as a protected person is "akin to living with perpetual temporary status." Protected persons "must indefinitely continue to obtain temporary work or study permits." They face barriers to employment, "including reluctance from employers to hire or invest in their training due to the uncertainty of their status." They also face "marginalization from mainstream society, which takes a social and economic toll on

those directly affected." The applicant submits that being a refugee "often carries with it a negative social stigma of uncertainty" and that protected persons are likely to be discriminated against by employers, organizations, and other members of society. Finally, the applicant submits that his situation is analogous to that of a stateless person (as discussed in *Abeleira v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1008 at para 54). According to the applicant, the officer failed to take these considerations into account and this calls the reasonableness of the hardship assessment into question.

[25] With the possible exception of the analogy to a stateless person (on which I express no opinion), I agree with the applicant that these are all potentially important considerations in an H&C application by a protected person who, unless they are granted H&C relief, cannot obtain permanent resident status. The difficulty for the applicant, however, is that the considerations he highlights now were hardly developed at all in the submissions and evidence presented to the officer. Moreover, while the applicant did discuss the challenges he has faced in his life in Canada in his H&C application, he failed to distinguish between the challenges stemming from his lack of permanent status and those stemming from his criminal record. Instead, he often conflated the two. Once they are disentangled, it is apparent that most of the hardships the applicant pointed to in his H&C application (for example, in employment and not being able to volunteer in the community) are primarily if not entirely due to his criminal record and not his immigration status.

[26] The applicant also submits that the officer erred in failing to consider the hardship he would suffer if he was required to leave Canada. I do not agree. The officer understood that, in

the absence of an adverse determination under subsection 115(2)(a) of the *IRPA*, the applicant would not be removed from Canada. The officer also understood that, apart from the issue of his criminal inadmissibility, the applicant was entitled to apply for permanent residence from within Canada. In the particular circumstances of this case, the whole issue of hardship stemming from having to leave Canada is a red herring. It is therefore difficult to understand why, in submissions in support of the H&C application, the applicant's counsel cited hardships such as being separated from his family in Canada, losing his employment here, and the treatment of Palestinians in Israel. The officer reasonably gave these factors no weight in the overall balancing because they are simply irrelevant.

[27] My conclusion in this regard is unaffected by how the officer framed the overall conclusion in the decision. As we often see in H&C decisions, the opening paragraph of the concluding part of the decision states that there will "inevitably be some hardship associated with being required to leave Canada" and that this alone "will not generally be sufficient to warrant relief on humanitarian and compassionate grounds." These propositions are indisputable; indeed, they are taken directly from *Kanthasamy* (at para 23). However, as the officer explained earlier in the decision, the issue of hardship stemming from removal is irrelevant in the present case. I am satisfied that, despite this inapposite wording in the conclusion, the officer reasonably (and correctly, for that matter) understood that hardship on leaving Canada had no bearing on the merits of the applicant's H&C application. Any language in the decision that suggests otherwise must be considered an unfortunate but minor misstep.

[28] In summary, in assessing the hardship stemming from the applicant's lack of permanent status in Canada, the officer focused on the applicant's anxiety about this state of affairs. This was a reasonable approach given how the applicant's submissions were framed. Moreover, given the evidence presented to the officer on this point, it was not unreasonable for the officer to conclude that this factor should be accorded only little weight in the overall balancing.

C. *Best Interests of the Children*

[29] In his written submissions on this application for judicial review, the applicant argues that the officer's analysis of the best interests of the children is unreasonable. He contends that the officer's approach is "overly simplistic" and that it failed to consider how the mental hardship and immigration difficulties he will continue to face unless he can become a permanent resident will affect his ability to commit to and care for his niece and nephew as well as his girlfriend's children.

[30] I do not agree.

[31] As just noted, the applicant relied on the best interests of four children in support of his H&C application: his niece and nephew and his girlfriend's two children. At the time of the decision, the applicant's niece was 11 years of age and his nephew was five. There was no evidence before the officer of the ages of the applicant's girlfriend's children. (A letter from the applicant's girlfriend mentioned and quoted in part in counsel's submissions in support of the H&C application appears to have been omitted from the package of materials submitted with the application.)

[32] The officer accepted that the applicant played an important role in the lives of all four children. The officer also found that it would be in the best interests of all the children for the applicant to obtain permanent status in Canada. However, the officer found that this factor was entitled to only "very little" weight.

[33] In challenging the reasonableness of how the officer weighed this factor, once again, the main difficulty for the applicant is that the potential impacts on the children cited above were not developed at all in the submissions and evidence presented to the officer. At its highest, the applicant's submission was that his lack of permanent residence "weighs heavily for his entire family" and that granting the application would "provide some certainty" to the applicant's niece and nephew as well as to his girlfriend's two children. Notably, and perhaps unsurprisingly, there was no evidence that the children had any understanding at all of the applicant's lack of permanent status in Canada. Nor was there any evidence that the applicant's lack of permanent status had impeded his ability to be a loving and caring figure for all of the children.

[34] The officer concluded that this factor was entitled to little weight in the overall analysis because, whether the applicant obtained permanent resident status or not, his relationship with the children and his role in their lives would not change. On the evidence before the officer, this was a reasonable determination.

D. *Criminal Rehabilitation*

[35] The applicant submits that the officer failed to assess the evidence of his rehabilitation reasonably and, because this was a central factor in the application, this calls into question the reasonableness of the decision as a whole.

[36] I agree.

[37] The officer weighed the applicant's criminality primarily in relation to his establishment in Canada. The officer recognized that the applicant "has some positive attributes that contribute to his establishment." However, the officer found that the applicant's serious criminality "has a negative impact on his establishment." The officer acknowledged that the applicant had expressed remorse for his conduct. The officer also noted that the offences took place over 16 years ago and that "the applicant has maintained a clean civil record ever since." The officer then stated: "While this is a positive factor, I note that it is something that is expected of all Canadian residents." The officer concluded that, despite the positive factors, "the convictions are serious and merit some negative weight towards the applicant's establishment."

[38] In my view, the officer failed to understand the relevance of the applicant's clean civil record and the other indicia of rehabilitation since the applicant committed the offences and, as a result, failed to engage with that evidence reasonably.

[39] In seeking an H&C exemption from his criminal inadmissibility, the applicant sought to demonstrate that his criminal conduct was out of character, that it was an isolated event and not part of a pattern of criminality, and that, in the time since he committed the offences, he had rehabilitated himself. These considerations all have a direct bearing on the central issue of whether the fact of the applicant's inadmissibility due to serious criminality should outweigh the H&C factors in his case, including his establishment in Canada (*Kambasaya v Canada (Citizenship and Immigration)*, 2022 FC 31 at paras 39-48).

[40] In arguing that these considerations relating to his criminality weighed in his favour, the applicant pointed to all that had happened since he committed the offences in 2005, including the fact that he had not committed any further criminal offences. By treating this simply as something that is to be expected of everyone in Canada, the officer failed to understand and consider how this evidence related to a key argument advanced by the applicant. The applicant's argument was not that, standing on its own, his clean civil record since 2005 should be considered a positive factor. Rather, he agued that, viewed against the backdrop of his criminal offences in 2005, the fact that he had not re-offended (and had demonstrated in other ways that he was fully rehabilitated) supported his contention that his criminal inadmissibility should be given less weight in the overall balancing and, more particularly, that it should not outweigh the positive H&C factors in his case. Instead, without the necessary analysis, the officer simply concludes that the applicant's criminality "has a negative weight on his establishment" and, on this basis, assigned "little positive weight on the grounds of establishment." The officer's failure to "meaningfully grapple" with a key argument advanced by the applicant calls into question

whether the officer was “actually alert and sensitive” to the central issues in the application for H&C relief (*c.f. Vavilov* at para 128).

[41] The officer’s erroneous weighing of the applicant’s inadmissibility due to serious criminality against the H&C factors in his case is not a minor misstep or peripheral to the merits of the decision (*c.f. Vavilov* at para 100). On the contrary, I am satisfied that, given the centrality of this issue to the H&C decision, the officer’s unreasonable analysis of this factor is sufficiently significant to render the decision as a whole unreasonable.

VI. CONCLUSION

[42] For these reasons, this application for judicial review must be allowed. The decision of the Senior Immigration Officer dated September 1, 2021, is set aside and the matter is remitted for redetermination by a different decision maker.

[43] The parties did not suggest any serious question of general importance for certification under paragraph 74(d) of the *IRPA.* I agree that no question arises.

JUDGMENT IN IMM-6584-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Senior Immigration Officer dated September 1, 2021, is set aside and the matter is remitted for redetermination by a different decision maker.
3. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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