Federal Court  Cour fédérale

Date: 20230802

Docket: IMM-8343-22

Citation: 2023 FC 1057

Ottawa, Ontario, August 2, 2023

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

ZAHRA HAMZEI
MOHAMMAD SINA ESFAHANIAN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a June 14, 2022 decision [Decision] of an Immigration Officer [Officer], refusing the Applicants' application for permanent residence from within Canada under the *Temporary Public Policy to Facilitate Permanent Residence for In-*

Canada Families of Canadian Victims of Recent Air Disasters [Policy], established under section 25.2 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The Applicants assert that their submissions outlined compelling humanitarian and compassionate [H&C] grounds and that the Officer erred by not using their discretion to consider whether to grant the Applicants' permanent residence on those grounds.

[3] In my view, the Applicants have not demonstrated a reviewable error in the Decision and accordingly the application is dismissed.

II. Relevant statutory scheme

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an	25 (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et

exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.
Public policy considerations	**Séjour dans l'intérêt public**
25.2 (1) The Minister may, in examining the circumstances concerning a foreign national who is inadmissible or who does not meet the requirements of this Act, grant that person permanent resident status or an exemption from any applicable criteria or obligations of this Act if the foreign national complies with any conditions imposed by the Minister and the Minister is of the opinion that it is justified by public policy considerations.	25.2 (1) Le ministre peut étudier le cas de l'étranger qui est interdit de territoire ou qui ne se conforme pas à la présente loi et lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, si l'étranger remplit toute condition fixée par le ministre et que celui-ci estime que l'intérêt public le justifie.

III. Background Facts

[4] On January 8, 2020, Sara Hamzei, the Principal Applicant's sister, and the Co-Applicant's aunt, perished on Ukraine International Airlines flight 752 as she was returning to Canada from a holiday in Iran. The plane was shot down by an Iranian missile after takeoff from Tehran. Sara Hamzei was a permanent resident of Canada.

[5] Following this incident and another Ethiopian Airlines flight crash that occurred from Addis Abada on March 10, 2019, a Policy was introduced by the Canadian government under subsection 25.2(1) of the IRPA on May 12, 2021, to support families of the victims of those two airplane crashes. This Policy potentially granted permanent residence to eligible family members of victims of either crash who were Canadian citizens, permanent residents, or individuals who had been found eligible for permanent residence at the time of their death. In other words, as Sarah Hamzei was a permanent resident of Canada at the time of the crash, her family members could apply for permanent residence in Canada if they met a condition provided under the Policy.

[6] On April 19, 2022, the Applicants applied for permanent residence under the Policy. The Applicants' counsel submitted their application with a one-page cover letter outlining Ms. Hamzei's difficulties after losing her relatives and that she was receiving counselling.

IV. The Decision

[7] On June 14, 2022, the Officer issued the Decision. The Officer was satisfied that the Applicants had established an eligible relationship to a victim of one of the crashes. However, the Officer was not satisfied that the Applicants were in Canada with an eligible immigration status under the Policy, which requires that the claimant:

> A. Was in Canada with valid temporary resident status when the member of their family passed away on either flight ET302 or PS752; or
>
> B. Was granted temporary resident status or was issued a temporary resident permit after the member of their family passed away on either flight ET302 or PS752, if they applied for

> temporary resident status in Canada prior to the date of signature of this public policy; or
>
> C. Made a refugee claim in Canada on or after the date that the member of their family passed away on either flight ET302 or PS752; or,
>
> D. Benefitted from the 2020 or the 2021 temporary residence public policies for families of victims of PS752;

[8] Accordingly, and the Applicants do not contest this conclusion, they were not eligible under the Policy and the Officer refused their application.

[9] On June 17, 2022, counsel for the Applicants sent an email to Immigration, Refugees and Citizenship Canada requesting that the Applicants' application be reconsidered. On August 10, 2022, having not received a reply, the Applicants' counsel again sent a reconsideration request. This subsequent request included the following paragraph:

> I would appreciate your advice regarding this matter if there are any steps that our clients can take. The family have undergone unspeakable pain and grief and if there is a way to reconsider the decision and give them some good news, it will be of great significance.

[10] On August 12, 2022, the Officer responded noting that they had assessed the application materials and reconsideration request against the Policy criteria and stood by their prior decision.

[11] Three other members of the victims' family also applied under the Policy. Their refusals were challenged in two applications for leave and judicial review that were refused (IMM-8336-22 and IMM-8344-22).

[12] At the hearing, the Applicants conceded that they do not qualify under the eligibility requirements of the Policy. However, the Applicants argue that in their request for reconsideration for permanent residence under the Policy, they also submitted a request for an exemption from the Policy under section 25 of the IRPA because of compelling circumstances, and on H&C grounds.

V. Issues

[13] The main issue is:

1. Whether the Officer erred in failing to consider the Applicants' request for H&C considerations under section 25 of the IRPA to overcome their ineligibility under the Policy?

VI. Standard of Review

[14] The Decision is reviewable on the standard of reasonableness.

[15] 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." Therefore, the Court should only intervene if the decision does not meet the standard of transparency, intelligibility, and justification (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 15-17, 25, 85-86, 99).

[16] In conducting a reasonableness review, the Court must look to both the outcome of the decision and the justification of the result (*Vavilov* at para 87). A reasonable decision must be "justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). However, a reviewing court must refrain from reweighing and reassessing the evidence considered by the decision maker (*Vavilov* at para 125). If the reasons of the decision maker allow a reviewing 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, the decision will be reasonable (*Vavilov* at paras 85-86).

VII. Parties' Positions

A. *Applicants' Position*

[17] The Applicants assert that in their application under the Policy, they also requested in the alternative to be allowed to remain in Canada on H&C grounds. In their submissions to the Officer, the Applicants explained that their relatives had been visiting them in Iran prior to the crash and that the Applicants were suffering from emotional trauma as a result.

[18] The Applicants submit that an officer assessing any application has discretion to exempt an applicant from the requirements of any provision of the IRPA or its regulations pursuant to section 25 of the IRPA. The Applicants submit that they requested that the Officer consider the Applicants personal circumstances and that the Officer erred by not considering whether to grant an exemption on H&C grounds.

[19] In their memorandum in reply, the Applicants argue that the following request constituted a request for consideration on H&C grounds :

> I would appreciate your advice regarding this matter if there are any steps that our clients can take. The family have undergone unspeakable pain and grief and if there is a way to reconsider the decision and give them some good news, it will be of great significance.

[20] This was the sole paragraph relied upon by the Applicants to justify their alleged H&C request. No evidence or argument was presented to the Officer to bolster that statement.

[21] The Applicants rely on *Khandaker v Canada (Citizenship and Immigration)*, 2020 FC 985 [*Khandaker*], which they assert is an authority for the principle that the Officer had discretion to consider H&C grounds in the application and grant an exemption for the immigration status criteria in the Policy.

B. *Respondent's Position*

[22] The Respondent submits that the Officer reasonably determined that the Applicants failed to meet the eligibility criteria of the Policy.

[23] The Respondent argues that the Applicants did not request H&C relief in their submissions to the Officer or in their reconsideration request. He submits that absent such a specific request, the Applicants' submissions cannot amount to a *de facto* request as this is contrary to case law establishing that it is an applicant's burden to demonstrate that H&C relief is warranted (*Alrebeh v Canada (Citizenship and Immigration)*, 2022 FC 1389 at para 36).

Moreover, there is no burden on the officer to infer a request that is not clearly made and substantiated, and an officer cannot be faulted for not considering a request that was never made.

[24] Further, the Respondent submits that the Applicants' argument is contrary to the language of subsection 25.2(1) of the IRPA, which provides that a foreign national must comply with any conditions imposed by the Minister when introducing a public policy. The Respondent also submits that subsection 25.2(1) gives the Minister discretion to grant individuals "an exemption from any applicable criteria or obligations of this Act [...]" [emphasis added]. Subsection 2(2) defines "this Act" as the IRPA, the regulations, and any instructions given under subsection 14.1(1). The Respondent asserts that the Policy is not adopted under any of those items and therefore section 25 of the IRPA does not give authority to an officer to grant an exemption from the Policy's criteria, even if an H&C Application had been made.

VIII. Analysis

[25] The Applicants rely on *Khandaker* and argue that section 25 of the IRPA was available to them. In *Khandaker*, the applicant applied for permanent residence but his spouse was unable to sponsor him under the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations]. In his application, the applicant had expressly requested an exemption under H&C grounds pursuant to section 25 of the IRPA, from the ineligibility provision (*Khandaker* at paras 6-7). The Court determined that the scope of section 25 was such that it enabled the applicant to seek an exemption from the relevant provision on H&C grounds and that the officer had erred in failing to consider the request (*Khandaker* at paras 73-76).

[26] The Applicants therefore assert that based on *Khandaker*, the Officer had a discretion to consider an exemption from the immigration status criteria of the Policy and the Officer's failure to do so was a reviewable error.

[27] The Respondent distinguished *Khandaker* on the ground that in that case, the H&C request under section 25 of the IRPA was from a requirement under the Regulations (an eligible sponsor), and therefore section 25 applied because it gave the officer the authority to grant an exemption of the application of a regulation, which is within the definition for the term "this Act" under subsection 2(2) of the IRPA. In this case, the Respondent asserts that the request is for an exemption of a policy, and the term "policy" is not found within the definition of the term "this Act" under subsection 2(2) of the IRPA.

[28] I do not need to rule on the issue as to whether the Officer had the authority to grant an exemption under section 25 of a policy requirement under subsection 25.2(1) and whether the requirements of a policy is included within the meaning of the term "this Act" under subsection 2(2) of the IRPA. If that was the case, the Officer would have the authority under section 25 of the IRPA to grant an exemption of a policy requirement on H&C grounds.

[29] In this case, I am satisfied that, as the Respondent points out, no request for an exemption based on H&C grounds was made either in the Applicants' initial application for judicial review or in their reconsideration request. The Applicants only provided brief submissions on Ms. Hamzei's grief in their application. In their reconsideration request, the Applicants' counsel asked for advice and noted the importance that a positive *reconsideration* would have for the

Applicants. It is to be noted that, in *Khandaker*, the case on which the Applicants rely, the applicant had made an express request for an exemption under section 25 of the IRPA. That is not the case here.

[30] The Applicants have provided no authority suggesting that an officer must consider exempting an applicant from unmet criteria even without a request to do so. Indeed, under Guide 5291 – Humanitarian and Compassionate Considerations, an applicant for H&C must submit a "proper" application along with evidence. It is the applicant's burden to demonstrate that H&C grounds exist (see for example, *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 5).

[31] In my view, the Applicants have not established a reviewable error in the Decision. The Decision cannot be said to be unreasonable for failing to consider an exemption on H&C grounds that was not properly requested.

IX. Conclusion

[32] For these reasons, this application for judicial review is dismissed. The parties have not proposed a question for certification and I agree that none arises.

JUDGMENT in IMM-8343-22

THIS COURT'S JUDGMENT is that:

1. The Applicants' application for judicial review is dismissed.

2. There is no question for certification.

"Guy Régimbald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	ZAHRA HAMZEI, MOHAMMAD SINA ESFAHANIAN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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