Federal Court  Cour fédérale

Date: 20231018

Docket: IMM-3263-21

Citation: 2023 FC 1390

Ottawa, Ontario, October 18, 2023

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

VIKTOR KALABA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Viktor Kalaba, seeks judicial review of a decision made by a Senior Immigration Officer (SIO) of Immigration, Refugees and Citizenship Canada (IRCC) made on April 28, 2021, denying the Applicant an exemption for permanent resident status in Canada on Humanitarian and Compassionate (H&C) grounds pursuant to Subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c27 [*IRPA*].

[2] For the reasons set out below, I am allowing this application.

II. **Background**

[3] The Applicant is an ethnic Albanian born in 1965 in a refugee camp in the former Yugoslavia.

[4] At 10 months old, the Applicant and his parents fled a blood feud and the communist regime and found refuge in the United States (USA).

[5] The Applicant and his family were granted permanent residence status in the USA on the basis of statelessness. His family, including his elderly mother, two brothers, sister and three daughters, all reside in the USA with valid permanent residence status.

[6] The Applicant has had a difficult immigration history that has been complicated by his criminal record in the USA. The Applicant was convicted by the New York County Criminal Court for driving while intoxicated twice in 1990, once in 2000 and finally in 2005. The offenses resulted in fines and ultimately, the revocation of his licence.

[7] Relevant to this application is the Applicant's conviction in 2006 of conspiracy to commit access device fraud, which resulted in a sentence of 46 months imprisonment. The Applicant served his time and was subsequently removed from the USA to Kosovo on May 27, 2010. The Applicant describes in his application that his lawyer at the time failed to inform him

of the repercussions to his status in the USA so his immediate removal following his release from prison was a shock to him and his family.

[8] The Applicant was returned to a country with which he had minimal ties. He described in his application, travelling town to town to remain safe in hiding, as a result of his family's blood feud and the discrimination he may face as a Roman Catholic.

[9] The Applicant entered Canada on December 12, 2011, using a fraudulent passport under the alias Christopher Robinson, and made a refugee claim. By a decision dated January 14, 2015, it was determined that the Applicant was excluded from refugee protection under Article 1F(b) for his serious non-political crimes. Therefore, the merits of his claim were not considered.

[10] The Applicant remained in Canada and filed an H&C application in 2019. His application is largely based on the hardship upon his return to Kosovo, his establishment in Canada and his desire to be geographically closer to his family in the USA. Several letters of support from his friends, colleagues at Sotto Sotto restaurant, and members of his close-knit family in the USA were provided in support of his application. Amongst the factors raised was also a request for best interest of the child (BIOC) consideration for his first grandchild, who, at the time of the application, had not then born.

[11] In a decision dated April 28, 2021, the H&C application was refused.

III. **Decision under Review**

[12] The IRCC Officer reviewed the documents submitted, including factors relating to criminal history, establishment in Canada, hardships and adverse country conditions.

Criminal History

[13] The Officer took into consideration the Applicant's criminality noting that it spanned a period of 15 years; from 1990 to 2005 with offences ranging from driving while ability impaired by consumption of alcohol to possession of stolen property to conspiracy to commit access device fraud.

[14] The Officer weighed the Applicant's lengthy criminal history against his feelings of remorse and any steps he had taken toward rehabilitation. The Officer acknowledged the Applicant’s expression of remorse for his actions, and that he successfully completed the Day Withdrawal Program at St. Michael's. However, the Officer ascribed significant negative weight to the Applicant's criminality as they were not satisfied that these factors outweighed the Applicant's criminal history.

IV. **Issue and Standard of Review**

[15] As I have determined the Officer’s analysis of the Applicant’s criminal history was unreasonable, it is not necessary to address the Officer’s analysis of establishment, psychological issues and family separation, medical care in Kosovo, the blood feud, or the global assessment.

[16] The Applicant submits that the Officer based the Decision on one or more erroneous findings of fact, and/or misconstruing evidence and material facts, made in a perverse or capricious manner or without regard to the evidence before them.

[17] The parties agree, as do I, that the standard of review is reasonableness. The Supreme Court of Canada has established that when conducting judicial review of the merits of an administrative decision, other than a review related to a breach of natural justice and/or the duty of procedural fairness, the presumptive standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]. While this presumption is rebuttable, no exception to the presumption is present here.

[18] A reasonable decision is one that displays justification, transparency and intelligibility with a focus on the decision actually made, including the justification for it: *Vavilov* at para 15. Overall, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85.

V. **Analysis**

Criminal History

[19] The Applicant submits that the Officer's chain of analysis is unclear. The Applicant's criminal history in the USA is summarized, his efforts at rehabilitation are noted and we are left with a conclusion that the latter does not outweigh the former.

[20] To illustrate this error, I find it helpful to draw a comparison with the reasons given by an officer in another H&C matter involving criminality in the USA: *Khokhar v Canada (Citizenship and Immigration)*, 2018 FC 555 at paras 32-34 [*Khokhar*]:

> [32] Mr. Khokar also argues that it was unreasonable for the Officer to focus upon the Applicant's criminal history without considering aspects of that history which mitigated its severity, such as remorsefulness, rehabilitation, the unlikelihood of recidivism, and the fact that no custodial sentence was imposed for the offence committed in Canada.
>
> [33] In the Decision, the Officer provides a list of Mr. Khokar's inadmissibilities, including having been found to have engaged in misrepresentation, having been convicted of aggravated discharge of a firearm in the United States with a sentence of imprisonment of four years, and having been convicted in Canada in November 2009 of assault with a weapon resulting in a suspended sentence, 32 days pre-sentence custody, 2 years concurrent probation, and a 19-year order of prohibition. In considering Mr. Khokar's submissions, the Officer states as follows:
>
> > Counsel states that the applicant's criminal convictions in the USA occurred over 20 years ago and he is remorseful for misrepresenting his life in the USA and in failing to tell the truth about his convictions. Counsel further notes that the applicant's only other conviction was as a result of a domestic dispute with his wife in 2009 and he pled guilty to a number of domestic assault charges arising out of a single altercation with his wife. I sympathize with the applicant with his remorsefulness and also acknowledge counsel's reference to many couples having their "ups and downs". However, I find that such factors cannot excuse the applicant of responsibility for his offending and further note the gravity of the offences. I observe that as a result of the crimes incarceration sentences were imposed, namely a four year imprisonment in the USA which reflects the severity of the crimes.
>
> [34] These portions of the Decision demonstrate an understanding of Mr. Khokar's arguments surrounding remorse and rehabilitation, as well as the custodial and non-custodial sentences that were imposed, respectively, in the United States and

> Canada. I find no basis to conclude that the Officer treated Mr. Khokar's criminal history and misrepresentation unreasonably in arriving at the decision to refuse the H&C application.

[21] As stated by Mr. Justice Southcott, the reasons demonstrate an understanding of the Applicant's arguments *beyond* a reiteration of the criminal history. In *Khokar*, the Applicant was also incarcerated in the USA because of convictions over 20 years ago. While the offences differ greatly in nature, I draw these parallels to show how an officer might demonstrate a level of transparency and justification for their conclusion. The gravity of the offences of assault with a weapon and a domestic assault was explicitly identified. A four-year sentence involving incarceration was reasoned to be indicative of the severity of crimes. The length of time that has elapsed since the offences was considered. In tandem, the reasons form a rational chain of logic that led to the officer's conclusion as now required by *Vavilov*.

[22] In stark contrast, the Officer in the case at bar, canvasses the various factors and states a conclusion. The Officer summarizes the Applicant's past convictions and concludes "[a]lthough the Applicant expresses remorse for his actions, and has successfully completed the Day Withdrawal Program at St. Michael's, I am not satisfied that these factors outweigh the Applicant's criminal history." There is no analysis. There are virtually no reasons to demonstrate how the Officer arrived at such a conclusion. Put simply, there is a "what", but no "why". This error was best described by Justice Mactavish in *Adu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 565 at paragraph 14:

> [14] In my view, these 'reasons' are not really reasons at all, essentially consisting of a review of the facts and the statement of a conclusion, without any analysis to back it up. That is, the officer simply reviewed the positive factors militating in favour of granting the application, concluding that, in her view, these factors

> were not sufficient to justify the granting of an exemption, without any explanation as to why that is. This is not sufficient, as it leaves the applicants in the unenviable position of not knowing why their application was rejected.

[23] The Officer listed the Applicant's six criminal convictions in the United States accumulated between February of 1990 and January 2005. I note that 4 of the convictions were related to driving while impaired by alcohol, 1 was for possession of a stolen credit card and the sixth was for conspiracy to commit Access Device Fraud which was a Class D Felony. The Applicant received a sentence of 46 months concurrent, supervised release for 3 years and an order not to possess a firearm. He was also assessed $200 and ordered to pay restitution of $206,484.03.

[24] The Applicant was removed to Kosovo on May 27, 2010.

[25] The Officer concluded that "I am not satisfied that these factors outweigh the Applicant's criminal history. I find his criminality does not weigh favourably in his current circumstances. In fact, I ascribe significant negative weight to the Applicant's criminality."

[26] Once again, no reason is given for the conclusion to ascribe significant negative weight to the Applicant's criminality.

VI. **Conclusion**

[27] For the reasons set out above, this application for judicial review is allowed.

JUDGMENT in IMM-3263-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed, and the matter is set aside to be remitted to a different immigration officer for redetermination.
2. There is no serious question of general importance for certification.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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