Federal Court  Cour fédérale

Date: 20180523

Docket: IMM-4443-17

Citation: 2018 FC 533

Ottawa, Ontario May 23, 2018

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

MARYAM EMAMIAN AND
SEYYED ABBAS SEYYED HASHEMY RIZI

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Maryam Emamian and Seyyed Abbas Seyyed Hashemy Rizi are Austrian citizens of Iranian descent who have made frequent visits with Ms. Emamian's family in Canada. They eventually applied for permanent residence status based on humanitarian and compassionate grounds from within Canada.

[2] Senior Immigration Officer G. Lanthier refused to grant the Applicants' H&C application on September 29, 2017 and maintained that decision on October 16, 2017 after review of supplemental information received after the Decision but before it was relayed to the Applicants.

[3] The Applicants seek judicial review of the Officer's refusal of the H&C application. For the reasons that follow, I am granting this judicial review application and remitting the matter for redetermination.

I. **Background**

[4] Ms. Emamian is 37 years old and Mr. Rizi is 41 years old; they were married December 29, 2006. The Applicants were born in Iran and it appears that Mr. Rizi moved to Austria in 2003/2004 and Ms. Emamian joined him in 2007.

[5] Mr. Rizi converted from Islam to Christianity and states he is at risk in Iran as a Christian because he could be sentenced to death as an apostate. He was granted refugee status in Austria and both Applicants have received Austrian citizenship.

[6] Ms. Emamian's mother and her four brothers all live in Canada. Her sister lives in Iran. Mr. Rizi's parents, his two brothers, and his sister, all reside in Iran. The Applicants have a two year old son who was born in Canada and has Canadian citizenship.

[7] The Applicants have made a number of trips to Canada to visit Ms. Emamian's family. During one of the visits Ms. Emamian acted as caregiver for her mother who had been ill at that time. During a 2013/2014 trip to Canada Mr. Rizi obtained a temporary work permit and worked as a manager at a grocery store, 33 Pol Inc (Ava Foods), owned by Ms. Emamian's brother. Ms.

Emamian also obtained a temporary work permit and worked at the grocery. The Applicants requested to extend their work permits however this was denied and they returned to Austria.

[8] Ms. Emamian returned to Canada as a visitor on November 6, 2014 and Mr. Rizi also entered Canada as a visitor on January 17, 2015. The Applicants have remained in Canada and requested an extension of their visitor status which was initially refused. The Applicants filed their H&C application on June 1, 2016 and on October 13, 2016 their visitor status extension was reconsidered and approved until July 31, 2017.

[9] The Applicants are concerned with the growing anti-immigrant sentiment in Austria and wish to make Canada their new home. They express that the discriminatory and racist behaviour in Austria towards immigrants has negatively affected them. They hope to join family in Canada and maintain their close bond with Ms. Emamian's mother, brothers, nieces and nephews. They note that there is a well-established Persian community in Toronto in which they can form friendships whereas there are few Iranian families in Graz, Austria. Ms. Emamian also refers to her mother's poor health and that she wishes to be present to assist in her mother's care.

[10] The Applicants have also purchased a portion of 33 Pol Inc ($43,000 CAD) and wish to continue to make this company successful with Ms. Emamian's brother. They note that their employment prospects in Canada are better than in Austria as they have family to assist them in succeeding with financial endeavours.

[11] The Applicants claim that family reunification in Canada, their establishment in Canada, and the discrimination and isolation they experience in Austria, were grounds that warranted the granting of their H&C application.

II. **The H&C Decision**

[12] The Officer made the H&C Decision on September 29, 2017 which was received by the Applicants on October 6, 2017. The Decision was written in French with a certified translation accompanying it.

[13] The H&C decision is on a standard form which sets out the specifics about the Applicants and their prior immigration history in Canada. The Officer summarised Ms. Emamian's [Female Applicant or FA] and Mr. Rizi's [Male Applicant or MA] claims prior to conducting the analysis.

[14] The Officer notes that although the Applicants' reference adverse conditions in Iran, they have Austrian citizenship and as such would be able to return to Austria. For this reason the adverse conditions in Iran were not part the H&C consideration.

A. *Establishment and Family Ties to Canada*

[15] The Officer states that the Applicants' establishment in Canada, apart from their family ties, is fairly weak. The Officer accepts that the FA's strong family ties in Canada weigh in favour of the Applicants' request.

B. *Adverse Country Conditions in Austria*

[16] The Officer notes material provided by the Applicants that reports a far right presidential candidate received 35% of the recent electoral first round vote (which implies an anti-immigrant attitude). The Officer does acknowledge that this is evidence of a significant portion of Austrians supporting far right politics. However, the Officer then states that the Applicants have failed to show that the existence of those with far right political views is different than elsewhere in the

western world or Canada. The Officer states that the evidence related to caps on asylum seekers and an increase in racism and xenophobic incidents was in response to the wave of migrants crossing Europe in 2015. The Officer then states this evidence relates to illegal migrants and it does not relate to current Austrian citizens who were born in another country. The Officer likewise notes that evidence suggesting a continuation of this trend since the 2015/2016 migrant surge has not been provided.

[17] The Officer notes that no further information was provided by the Applicants about a June 2015 incident in Graz that the FA says lead to the death of 45 people. The Officer states that the only June 2015 incident in Graz he found was one where three people were killed by an individual driving into pedestrians. The Officer notes that this incident does not appear to be tied to violence against foreigners (noting that the driver was a previous refugee) and states that such incidents of violence have become “all too common nowadays”.

[18] The Officer states that although it is possible that intolerance against those of a foreign background may be rising in Austria the Applicants have not provided sufficient evidence to support the FA’s statements that she frequently hears anti-foreigner insults when out in public. The Officer asserts that it is public knowledge that there has been an increase in intolerance of foreigners in many parts of the world and the Applicants have not demonstrated that the situation in Austria is different than Canada given the incidents that have occurred here against minorities and foreigners.

[19] The Officer concludes by noting that the allegations about Austria, based on insufficient evidence, do not demonstrate any substantial hardship. The Officer notes that the Applicants, as

European Union [EU] citizens, are also free to move elsewhere in the EU should they no longer want to live in Austria.

C. *Best Interest of the Child [BIOC]*

[20] The Officer states that there is no evidence that the child will be better off growing up in Canada than Austria. The Officer found that the child will be with his parents who can teach him their culture, and that "there is no evidence on the record that there is more significant anti-immigrant sentiment in Austria than in Canada, nor that the overall public attitude in this respect would be prejudicial to the child."

[21] The Officer concludes that other than the FA's family being in Canada there is nothing else weighing in favour of the child remaining in Canada. For this reason the Officer says the BIOC is only slightly in favour of granting the overall H&C.

D. *Additional Considerations*

[22] Having taken these factors into account, the Officer decided the Applicants had not demonstrated sufficient H&C factors to justify granting the H&C application.

[23] The Officer received supplemental submissions October 4, 2017 after the September 29, 2017 Decision was made but had not yet reached the Applicants. The Officer found that the update added nothing to the facts previously established and maintained his initial Decision.

III. **Issues**

[24] The Applicants raise two issues:

1) the Officer's decision was unreasonable as he took too narrow a review, did not appreciate the substance of their submissions, and did not demonstrate compassion; and
2) the Officer failed to follow *Kanthasamy*.

[25] The Respondent states that the issue is whether the Decision was reasonable and contends that the Applicants have been unable to show otherwise.

[26] I would agree with the Respondent that the issue is whether or not the Decision was reasonable.

IV. **Standard of Review**

[27] In conducting a reasonableness review the Court should concern itself with whether the decision was justified, transparent, intelligible and within the range of possible acceptable outcomes defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]. On an H&C application the overall standard of review is reasonableness: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 42-44, [2015] 3 SCR 909 [*Kanthasamy*]. Further, the Supreme Court in *Kanthasamy* stated:

> [21] But as the legislative history suggests, the successive series of broadly worded "humanitarian and compassionate" provisions in various immigration statutes had a common purpose, namely, to offer equitable relief in circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another": *Chirwa*, at p. 350.
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> [22] That purpose was furthered in Ministerial Guidelines designed to assist officers in determining whether humanitarian

and compassionate considerations warrant relief under s. 25(1). They state that the determination of whether there are sufficient grounds to justify granting a humanitarian and compassionate application under s. 25(1), is done by an "assessment of hardship".

[emphasis added]

V. **Legislation**

[28] The *Immigration and Refugee Protection Act*, SC 2001, c 27 provides:

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 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.	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 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.
[emphasis added]	[Je souligne]

VI. **Parties' Submissions**

A. *The Applicants*

[29] The Applicants submit that the Officer "misses the point" of their application and failed to use compassion.

[30] The Applicants state that the Officer failed to heed the declining situation in Austria and Europe for immigrants, especially those who are Muslim. The Applicants say the Officer paid "lip service" to this concern and to the existence of family ties to Canada but failed to consider the H&C application as a whole. The Applicants continue on to state that the Officer by dealing with each issue one at a time was unsympathetic and too simplistic in their analysis.

[31] The Applicants argue the Officer's dismissal of their establishment in Canada as being no greater than that in Austria was not proper. They state they are not coming to Canada simply due to establishment but due to feeling unwelcome in Austria, and they did provide evidence of family ties along with economic roots and future potential (the purchase of shares in the company of the FA's brother). The Applicants state that this establishment should be looked at on its own and not weighed against establishment in Austria and the conditions there, other than with regard to it being less diverse and accepting vis-à-vis Canada.

[32] The Applicants also submit that the Officer's findings with respect to anti-immigrant and anti-Muslim sentiment in Austria were unreasonable. They state that this is clearly shown by the Officer stating that they "find that the [FA] has not demonstrated that the attitude towards foreigners is any better or worse in Austria than it is in Canada."

[33] The Applicant's also argue that the Officer failed to follow the principles of *Kanthasamy* and say the Officer has done what they say this case said not to do by separating out all the individual parts and answering each in a reasonable fashion instead of addressing the problem as a whole.

B. *The Respondent*

[34] The Respondent says that the weighing of the various considerations is the role of the Officer. The Respondent submits that as the Officer looked at all the factors as a collective and weighed them in the conclusion of the Decision it was not an error for him to first deal with them consecutively. The Respondent states that the concern of the Applicants is merely the weight given to their evidence and that intervening with weight is not the role of this Court.

[35] On the topic of establishment the Respondent states the findings were reasonable as there were a number of factors at play such as their limited evidence of actual establishment in Canada and that they are capable of freely traveling to visit their family members in Canada. The Respondent states that the Officer in referencing Austria in the establishment section was conducting a permissible comparison between their establishment in Canada and whether they would face hardship adapting back to Austria.

[36] The Respondent states the anti-immigrant sentiment is tied to the influx of refugees at that time, while incidents of increased extremist attacks in response to migrants occurred in upper Austria (not where the Applicants were living) and Austrian citizens had not been attacked. The Respondent states the evidence in the file was sparse and that the finding of the Officer was not erroneous.

[37] Finally, the Respondent states that in reading the Decision it is clear that after denoting each of the factors the Officer then considered these factors as a whole prior to determining that H&C relief was not justified. The Respondent asserts that this conclusion was reasonable.

C *Reconfirmation of the Decision*

[38] Neither Party has dealt with in any detail the Officer's reconfirmation of the Decision after having received the additional submissions on October 4, 2017.

VII. **Analysis**

[39] I agree with the Respondent that the Officer does clearly assess the H&C factors cumulatively in the conclusion. Consideration of each element prior to considering the whole of the matter cumulatively is beneficial for transparency, intelligibility, and justification.

[40] A difficulty in this case arises in the Officer's assessment of adverse conditions in Austria. The Officer concludes that the evidence of discrimination put forward by the Applicants was inapplicable to them as they are citizens of Austria and not recent migrants. In my view, it is unreasonable to assume that those who participate in such discriminatory acts would necessarily differentiate between whether a person has become a legal citizen in their country versus a recent or illegal migrant. I should think it is reasonable to assume such people focus on differences in appearance and behaviour and instigate their discriminatory/racist treatment based on these perceived visual differences without regard to whether someone has a citizenship document or speaks the local language in addition to their native language. To some extent, the Officer corrects his view by including reference to whether there was a demonstration of hardship to all "foreign-born Austrians" in his conclusion, although still maintaining that there was insufficient evidence.

[41] Of more significance is the Officer's comparison of conditions in Canada with adverse conditions is Austria. In his analysis of the claimed adverse conditions in Austria, the Officer wrote:

> It is quite possible that there has been a certain rise in intolerance against persons of foreign backgrounds in Austria, but the evidence is insufficient to demonstrate the female applicant's allegations to the effect that she frequently heard insults against foreigners in public places. Furthermore, I believe I can assert that it is public knowledge that, currently, there has been increased intolerance against foreigners in many regions of the world. In that context, even notwithstanding this situation, I find that the female applicant has not demonstrated that the attitude towards foreigners is any better or worse in Austria that it is in Canada. There have also been unfortunate incidents in Canada against foreigners and minorities. In summary, while I note the female applicant's statement to the effect that she prefers a social climate in Canada and the fact that she has heard fewer insults against foreigners here, the evidence is insufficient to demonstrate that the Austrian situation might cause substantial hardship for the female applicant.
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> [emphasis added]

[42] The Officer repeats this view in his overall summary of factors leading to his refusal of the H&C application. The problem with this perspective is that it can support an assumption that where untoward events happen in Canada, such events cannot ever support a finding of hardship elsewhere.

[43] Certainly an immigration officer may refer to parallel conditions in Canada in response to it being raised by applicants but the officer must take care not to use conditions in Canada to discount or disallow a claim of hardship in the originating country.

[44] Justice Sébastien Grammond has recently stated his concern with immigration decision makers (the Refugee Appeal Division in that case) drawing parallels between Canada and the

circumstances in other countries on the basis that if it has happened here it cannot ground a concern in the country of origin worthy of relief, especially when a decision maker does so without having any evidence before them about the conditions in Canada: *AB v Canada (Citizenship and Immigration)*, 2018 FC 237, 289 ACWS (3d) 792 [*AB*].

[45] In *AB*, Justice Grammond wrote:

> [33] Before leaving this issue, I want to discuss a particularly troublesome aspect of the RAD's decision. In support of its assertion that state protection need not be perfect, the RAD mentioned a number of incidents where police officers in Canada allegedly employed excessive force (para 38), and compared the situation of Roma in Hungary with that of Canada's First Nations:
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> […]
>
> [34] I have serious concerns with this line of reasoning. The RAD apparently started from the assumption that events taking place in Canada can never give rise to a valid refugee claim in another country. Thus, according to that logic, events taking place in a foreign country cannot give rise to a refugee claim if similar events occur in Canada.

[46] This use of drawing parallels, without limitation or evidence to clarify the relevant issue addressed, obscures the reasoning in the hardship analysis. I would expect, in line with Justice Grammond's concerns in *AB*, that caution be used when drawing similarities between Canada and other countries to avoid potentially trivializing discrimination and anti-immigrant sentiment, and preclude the improper suggestion that it could never be worthy of relief if the same conduct occurs here.

[47] The Officer failed to do so and this factor obscures the hardship analysis conducted by the Officer and renders the decision unreasonable.

VIII. **Conclusion**

[48] For the reasons above I find the Officer's inclusion of an improper comparative, without evidence, in the analysis of conditions in Austria was unreasonable and warrants the matter being sent for redetermination.

[49] I grant the application and refer the matter back for redetermination by another immigration officer.

[50] The Parties have not proposed a serious question of general importance for certification and I do not certify any question.

JUDGMENT IN IMM-4443-17

THIS COURT'S JUDGMENT is that:

1. The application is granted and the matter is to be referred back for redetermination by another immigration officer.
2. No serious question of general importance is certified.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Ms. Wennie Lee	FOR THE APPLICANTS
Mr. David Knapp	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lee & Company Immigration Advocacy, Counsel & Litigation Toronto, Ontario	FOR THE APPLICANTS
Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT