Federal Court  Cour fédérale

Date: 20210803

Docket: IMM-4207-19

Citation: 2021 FC 816

Ottawa, Ontario, August 3, 2021

PRESENT: Mr. Justice Norris

BETWEEN:

NOORAHIM SAFI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant was born in Afghanistan in 1978. He and his family fled to Pakistan in the 1980's during the Afghan civil war and he has lived there ever since. The applicant and his wife married in 2000 and they had five children. The applicant's wife died suddenly in March 2015.

[2] Until at least 2009, Pakistan recognized the applicant as a refugee. Fearing that he may be required to return to Afghanistan, the applicant submitted a Group of Five application for

refugee sponsorship for himself, his wife, and their children. The applicant was sponsored by his brother-in-law, who lives in Canada. The application was refused in March 2015.

[3] In January 2017, the applicant applied for permanent residence on humanitarian and compassionate ("H&C") grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). In March 2017, the application was returned to the applicant because he had not applied for permanent residence under a specific class. The letter explained that, since he was a foreign national outside Canada, he had to apply for permanent residence under one of the prescribed classes (i.e. family class, economic class, Convention Refugee abroad class, or country of asylum class: see subsection 70(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("*IRPR*")). The letter concluded by noting that, if the applicant re-applied and wanted an officer to consider H&C grounds in the processing of the application, these submissions had to be included with the application.

[4] The applicant re-submitted his application in December 2017. This time he submitted the application as a member of the family class under the sponsorship of his sister, who is a Canadian citizen. However, the applicant expressly acknowledged that his sister was not eligible to sponsor him because she has a spouse in Canada who is a Canadian citizen: see paragraph 117(1)(h) of the *IRPR*. He therefore requested on H&C grounds that he be exempted from the usual requirements of family class membership and that his application for permanent residence be processed accordingly. In support of his application, the applicant placed particular emphasis on his family ties in Canada, risks in Afghanistan, hardships in Pakistan, and the best

interests of his children. (When the application was submitted, the children ranged in age from almost 3 to 15.)

[5] In a decision dated May 8, 2019, a Migration Officer at the Canadian High Commission in London refused the application. The applicant now applies for judicial review of this decision under subsection 72(1) of the *IRPA.*

[6] The parties agree, as do I, that the Officer's decision should be reviewed on a reasonableness standard. This is well-established with respect to H&C decisions: see *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44; *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 18; *Taylor v Canada (Citizenship and Immigration)*, 2016 FC 21 at para 16. That this is the appropriate standard has been reinforced by *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10.

[7] 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). 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). The court "must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable" (*ibid.*).

[8] As I will explain, I am satisfied that there is a significant flaw in the Officer's reasons for refusing the H&C application. Consequently, the decision must be set aside and the matter remitted for reconsideration.

[9] The key legal constraint on the Officer is subsection 25(1) of the *IRPA.* This provision 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. Relief of this nature will only be granted if the Minister "is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national." These considerations include matters such as children's rights, needs and best interests; maintaining connections between family members; and averting the hardship a person would suffer on being sent to a place where he or she has no connections (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 41).

[10] The fundamental question under subsection 25(1) is whether an exception ought to be made in a given case to the usual operation of the law (*Damian v Canada (Citizenship and Immigration)*, 2019 FC 1158 at paras 16-22). 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). Whether relief is warranted in a given case depends on the specific circumstances of that case (*Kanthasamy* at para 25).

[11] *Kanthasamy* adopted an approach to subsection 25(1) that is grounded in its equitable underlying purpose. Writing for the majority, Justice Abella approved of the approach taken in *Chirwa v Canada (Minister of Manpower & Immigration)* (1970), 4 IAC 338, where it was held 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). Subsection 25(1) should therefore be interpreted by decision makers 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).

[12] The decision letter sets out the substance of the Officer's decision as follows (*sic* throughout):

> As previously communicated to you by the Case Processing Centre Mississauga, your sponsor has been found ineligible to sponsor you because you are not considered a member of the family class as per Regulation 117(1)(h) however you elected to continue with the processing of your application.
>
> Upon further review of your application and the documentation submitted, I am also satisfied that you are not a member of the family class and do not meet the required definition as above given that your sponsor has a spouse in Canada who is a Canadian Citizen.
>
> At your legal representatives request, I have also given due consideration to any Humanitarian and Compassionate grounds that may exist to allow an exemption from the requirements of the Act. However, having fully considered the submissions raised by your representative, I am not satisfied that there are sufficient humanitarian and compassionate considerations to allow an exemption in this case.

[13] Some additional insight into the Officer's reasoning may be gained by considering the Officer's Global Case Management System ("GCMS") notes.

[14] Even though it was not in dispute, as with the decision letter, the Officer begins by confirming that the applicant is not a member of the family class because his sister is ineligible to sponsor him. The Officer then writes: "In summary, this application stands to be refused on the basis that the PA [Principal Applicant, namely Mr. Safi] does not meet the required definition of a member of the family class – specifically R117(1)(h)." The Officer then notes: "Indeed the clients representatives in their submissions state they are aware the PA is not a member of the family class. They have requested an exemption from the Act under H&C grounds."

[15] After summarizing the grounds on which the applicant based his request for an H&C exemption, the Officer writes:

> I have fully reviewed all of these submissions and the associated documentary evidence included, however I am not satisfied that there are sufficient humanitarian and compassionate grounds to overcome an exemption from the Act [*sic*] in this case. The PA clearly does not meet the definition of a member of the family class. The PA has therefore not applied under the right class of category or in the correct manner. As per IRCC guidance, invoking sections A25 and A25.1 is an exceptional measure and not simply an alternate means of applying for permanent resident status in Canada. I also note that the applicant has previously been sponsored as a refugee by family members in Canada and this application was refused in 2015. This application therefore appears to be an H&C application rather than a family class application.
>
> (Emphasis added)

[16] The Officer then turns to a detailed assessment of the circumstances on which the applicant relied in advancing his case for an H&C exemption. The Officer concludes as follows:

> After careful consideration, and balancing both negative and positive factors, I am not satisfied that the grounds raised are compelling enough to warrant an exemption in this case. Specifically, I am not satisfied that there are sufficiently significant H&C factors to overcome the requirements of the Act in this case, especially when given that the PA has applied under a category of the Act under which they are clearly not eligible to apply.
>
> (Emphasis added)

[17] The Officer cannot be faulted for framing the determinative question as whether the applicant should be granted an exemption from the usual requirements of the *IRPR* regarding membership in the family class. Not only is this correct, it is exactly how the applicant framed his application. However, as the excerpts from the decision letter and the GCMS notes set out above demonstrate, the Officer was clearly troubled by the nature of the application. While this alone does not necessarily entail that the decision is unreasonable, I am satisfied that the Officer erred in treating the applicant's ineligibility under the family class as a factor weighing against the H&C application. In a case such as this, the very purpose of an H&C application is to overcome some form of ineligibility. The fact that one is ineligible under the usual requirements of the *IRPR* is what makes it necessary to seek H&C relief in the first place. To treat this as a reason not to grant that relief is to fundamentally misunderstand the purpose of subsection 25(1) of the *IRPA*.

[18] The Supreme Court of Canada has stressed that reasonableness review is not a "line-by-line treasure hunt for error" (*Vavilov* at para 102, quoting *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, [2013] 2 SCR 458, at

para 54). As well, since decisions under subsection 25(1) of the *IRPA* are highly discretionary, generally a decision maker's determination will be accorded a considerable degree of deference by a reviewing court (*Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4; *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 15).

[19] Bearing these words of caution in mind, I am nevertheless satisfied that the Officer's ultimate conclusion, read in the context of the decision as a whole, demonstrates that the Officer erroneously considered an irrelevant factor as weighing against the H&C application (i.e. that the applicant was "clearly not eligible to apply" for permanent residence as a member of the family class). This resulted in a decision that is not justified in light of the legal constraints that bear on it: see *Vavilov* at paras 105-110. As the Supreme Court of Canada has also stressed, "Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome" (*Vavilov* at para 96).

[20] For these reasons, the application for judicial review must be allowed, the decision of the Migration Officer dated May 8, 2019, set aside, and the matter remitted for redetermination by a different decision maker.

[21] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-4207-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Migration Officer dated May 8, 2019, is set aside and the matter is remitted for reconsideration 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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