Federal Court  Cour fédérale

Date: 20220203

Docket: IMM-4336-20

Citation: 2022 FC 130

Toronto, Ontario, February 3, 2022

PRESENT: Madam Justice Go

BETWEEN:

RICARDO ANTONIO LOPEZ ALVAREZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Ricardo Antonio Lopez Alvarez [Applicant] applied for permanent residence on humanitarian and compassionate grounds [H&C application] under s. 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. He seeks judicial review of the refusal of this application [the Decision] by a Senior Officer of Immigration, Refugees and Citizenship Canada [Officer].

[2] The Applicant argues that the Decision is unreasonable due to several factual and legal errors in its analysis of establishment in Canada, the best interests of the Applicant's children, and adverse conditions in Honduras. The Applicant also argues that the Officer breached procedural fairness by relying on their own research without giving him an opportunity to respond. The Respondent maintains that the Decision reasonably considered and weighed all relevant factors, and that procedural fairness was not breached because the research was from readily available public sources.

[3] I find the Decision unreasonable and I allow the application.

II. Background

A. *Factual Context*

[4] The Applicant was born in 1987 in Honduras. He received a business administration degree and worked for the municipality of San Lorenzo. After the mayor of San Lorenzo was accused of corruption, the Applicant, who worked in the financial department, was targeted. He received threats, his car was damaged, and he was followed. His mother was worried and helped him get a temporary foreign worker position in Canada.

[5] The Applicant first came to Canada in August 2011, and he worked seasonally for a farm in Leamington, Ontario. His last entry into Canada was in August 2012.

[6] On April 3, 2013, the Applicant had surgery for an umbilical hernia, making him unable to work until May 15, 2013. The Applicant's employer reported him to the Canada Border Services Agency [CBSA] as "AWOL" in June 2013. He then worked for another farm. He was issued an exclusion order on August 15, 2013, as his work authorization had only been valid until July 15, 2013. He reported to CBSA as requested.

[7] The Applicant married Mirta de Los Angeles Quintanilla Salamanca, a Canadian citizen, in June 2013. They had their first son in August 2013 and their second son in June 2016. Ms. Quintanilla Salamanca submitted an application to sponsor the Applicant in August 2013.

[8] The Applicant also has two children in Honduras from a previous relationship, who were born in 2004 and 2007 respectively.

[9] On April 2, 2015, the Applicant was notified that he would be called in for an interview for the finalization of the sponsorship application. On April 25, 2015, the Applicant was charged with driving with blood alcohol over eighty milligrams of alcohol in one hundred millilitres of blood, pursuant to what was then s. 253(1)(b) of the *Criminal Code of Canada* [*Code*], as well as failure to comply with conditions of an undertaking under what was then s. 145(5.1) of the Code. In June 2017, he was sentenced to a fine of $1,950 and prohibited from driving for a year.

[10] In July 2017, the spousal sponsorship application was rejected because of the Applicant's criminal record. Ms. Quintanilla Salamanca appealed to the Immigration Appeal Division, which

did not have jurisdiction to hear the appeal. She then applied for judicial review at the Federal Court but leave was refused.

[11] The Applicant filed a Pre-Removal Risk Assessment [PRRA] in December 2017. The PRRA was denied in April 2018. His removal was scheduled for August 2018, but the Federal Court granted his motion for a stay of removal: *Lopez Alvarez v Canada (Public Safety and Emergency Preparedness)*, 2018 CanLII 95597 (FC). In April 2020, the Federal Court dismissed his application for judicial review of the PRRA decision: *Alvarez v Canada (Citizenship and Immigration)*, 2020 FC 573.

[12] In August 2018, the Applicant received a Temporary Resident Permit [TRP] to overcome his criminal inadmissibility, as well as a work permit. At the hearing before the Court, counsel advised that the Applicant's TRP and work permit have been extended to June 2022.

[13] In July 2018, the Applicant submitted the present H&C application, which was refused in September 2020.

B. *Decision under Review*

[14] The Officer made a number of findings before refusing to grant the Applicant an exemption on H&C grounds. Among other things, the Officer found insufficient basis to conclude the Applicant's departure for Honduras would have a significant impact on his partner; that the Applicant has presented minimal evidence to demonstrate his spouse "will not be able to secure another form of childcare" should the Applicant depart Canada; and that the Applicant's

sons can visit him in Honduras and have the option of relocating to Honduras where they will have access to education and health care. The Officer also noted the Applicant has a criminal history in Canada and found he has submitted insufficient evidence to demonstrate that he has made significant steps towards rehabilitation.

[15] In terms of adverse country conditions, the Officer found that the Applicant has presented little to no evidence to establish that he is personally at risk, and the Applicant has adduced no evidence to demonstrate that his family in Honduras "continue to face threats or that [they have] ever sought help from the Honduran authorities."

III. Issues and Standard of Review

[16] The Applicant alleges that the Decision was unreasonable as the Officer: (1) identified different years for his entry to Canada, (2) considered his past criminality and inadmissibility after he had been granted a TRP, (3) considered his letters of support too narrowly, (4) gave too little weight to the possibility of being physically separated from his spouse, (5) failed to consider the impact of separation on his Canadian-born sons, and (6) failed to apply a hardship perspective to adverse conditions in Honduras.

[17] The Applicant further argues that the Officer breached procedural fairness by conducting independent research regarding the education and health care available in Honduras without giving him an opportunity to respond. As I find the Decision to be unreasonable, I will not be addressing the procedural fairness argument raised by the Applicant. In any event, I note that the

documentary evidence relied on by the Officer is readily available and accessible information from public sources that are not novel.

[18] Reasonableness is the standard of review for the merits of the decision, in accordance with *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. 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 decision is unreasonable: *Vavilov,* at para 100.

IV. Analysis

[19] Not all of the Applicant's arguments are equally persuasive. The Applicant's argument that the Officer erred by identifying three different years for his entry to Canada is of no consequence. Also, as the Respondent points out, counsel's own submission for the H&C application referred to different years of the Applicant's residence and work in Canada.

[20] I will address the other issues raised by the Applicant more fully.

A. *Did the Officer unreasonably consider the Applicant's past criminality and inadmissibility after he had been granted a TRP?*

[21] The Applicant submits that the Officer did not mention or consider his TRP, which overcomes the criminal inadmissibility issue, citing sections 22(1) and 24(1) of *IRPA* in support. The Applicant also argues that the Officer erred in not considering evidence of criminal

rehabilitation included with the H&C application before concluding that the Applicant had "submitted insufficient evidence to demonstrate that he has made significant steps towards rehabilitation."

[22] The Respondent submits that just because a different decision-maker chose to grant the Applicant a TRP despite his inadmissibility does not make his past criminality irrelevant in the context of his H&C application. According to the Respondent, TRPs and H&C applications have different contexts and considerations: a TRP grants temporary status that can be cancelled at any time, whereas a successful H&C application grants permanent resident status that cannot be revoked on a discretionary basis.

[23] The Respondent's position is well supported by Justice Norris' decision in *Williams v Canada (Citizenship and Immigration)*, 2020 FC 8 [*Williams*], which I find applicable to the case at hand. The applicant in *Williams* had a long history of criminality in Canada. He submitted an H&C application and an application for a TRP and both applications were dismissed by an immigration officer. In allowing the judicial review of the TRP decision – but not the H&C decision – Justice Norris noted at para 64:

> [64] The discretion bestowed on an officer by sections 25(1) and 24(1) of the *IRPA*, respectively, are similar in that each allows for relief from a strict or rigid application of the law. However, section 24(1) is more narrowly framed. It does not embody the broad equitable discretion to make exceptions based on humanitarian and compassionate considerations that section 25(1) does. Rather, a TRP is a time-limited privilege available in specific circumstances. It is expressly provided for by Canadian immigration law and policy to permit flexibility when other aspects of that law and policy (e.g. the requirement that one not be inadmissible) would lead to an individual's exclusion from Canada (cf. *Alabi v Canada (Citizenship and Immigration)*, 2018 FC 1163 at para 20).

[24] The Applicant submits that *Williams* can be distinguished on the facts because the applicant in that case was refused a TRP. The Applicant's argument misapprehends *Williams* and overlooks the distinction that Justice Norris has made between the risk assessment in the context of a "time-limited" TRP under section 24(1) versus a decision to grant someone permanent residence status: *Williams*, para 65. The Applicant also has not pointed to any other case law to support his argument.

[25] I agree with the Respondent that the Officer cannot be faulted for not connecting the letters of support to the issue of rehabilitation when no such connection was made in the Applicant's H&C submissions. I nonetheless note, as I am returning this application for reconsideration on other grounds, that when assessing establishment, evidence concerning the Applicant's criminal record must be weighed against any evidence of rehabilitation including the Applicant's expressions of remorse*: Kambasaya v Canada (Citizenship and Immigration)*, 2022 FC 31 at para 48.

B. *Did the Officer unreasonably give too little weight to the possibility of being physically separated from his spouse?*

[26] The Officer found that "from the very limited information before me, I am unable to conclude that the applicant's departure for Honduras would have a significant negative impact on his partner, the couple's relationship, or the applicant's friends in the community."

[27] There are two aspects of this finding that I find unreasonable: first, the finding that the information before the Officer is “very limited”, and second, the conclusion that there would not be a significant negative impact on the Applicant’s partner.

[28] Included in the H&C application was an affidavit from the Applicant’s wife, which explained that because the Applicant had lost his work permit, she became the sole bread winner. Her shift starts from 2:30 in the afternoon until late into the night, and she often works until 2:00 a.m.

[29] As the Applicant’s wife further explained in her affidavit:

> Ricardo is my husband and my companion. I took vows of marriage with him and I want and need him in my life…There are times when I need Ricardo just to go over the things that happen in any given day to know that I have support by my side and to know he is there with me. I can cry, I can get upset and I know he will understand.

[30] As I will elaborate further below, the affidavit from the Applicant’s wife also detailed the role played by the Applicant in caring for their two young sons.

[31] In short, there is ample evidence confirming that the Applicant and his wife provide each other with emotional and other forms of support. Together, they strive to make their family work while providing the best care their children need and deserve. The Officer’s claim that there is “little evidence” about the impact of separation on the Applicant’s wife is not justified.

[32] Although the Officer placed weight on the Applicant’s long term relationship with his wife, the Officer concluded that the physical separation could be offset to a degree by phone and

virtual communications. The Applicant argues that there is a lack of acknowledgement of the need for physical closeness, which cannot be overcome by Skype or Zoom. I agree.

[33] The Respondent submits the Officer need not do more than acknowledging that physical separation is an important factor to consider, and that it is not the role of the Court to reweigh the evidence. This is not a matter of reweighing evidence when nowhere in the Decision did the Officer acknowledge the affidavit evidence provided by the Applicant's wife detailing the interdependence as well as the emotional bond between her and her husband. Instead, the Officer focused on the financial aspect of their partnership when the Officer noted under the heading "Ties to Canada":

> The applicant previously applied for permanent residence status from within Canada. The applicant indicates that he married his spouse on 15 June 2013. The applicant's spouse submitted an application under the family class category on 08 August 2013. Submitted with this application are tax records and pay stubs indicating that the applicant's spouse is employed and financially supports the applicant and their young family. I note that the applicant submits evidence of a joint bank loan and a business licences under his spouse's name, indicating that she is the sole proprietor for La Taberna. Little to no evidence has been submitted that the applicant actively runs with business with his spouse or that the applicant's departure from Canada will negatively impact his spouse's business.
>
> [Emphasis added]

[34] When an H&C officer diminishes the impact of separation between a couple by reducing their relationship from an intimate human relationship to that of a business partnership, that Officer, in my view, has drifted far away from the core purpose of the H&C provisions under IRPA, 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": *Kanthasamy v*

Canada (Citizenship and Immigration), 2015 SCC 61 at para 21, citing *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338 at 350. As such, the Officer's conclusion on this issue is unreasonable.

C. *Did the Officer fail to consider the impact of separation on the Applicant's Canadian-born sons?*

[35] The Officer found that there was little evidence that the Applicant's spouse would be unable to secure another form of childcare should the Applicant depart Canada. The Officer acknowledged that there would be some disruption for the children, but found that the children would continue to have access to an emotional support system in their mother and extended family in Canada.

[36] The Applicant argues that the Officer erred in their consideration of the best interests of the Applicant's two Canadian-born sons.

[37] The Respondent counters that the Officer considered the Applicant's submissions regarding the impact of his removal on his Canadian-born sons, but reasonably concluded after a global assessment of all the factors that there was insufficient evidence to warrant an exemption. The Officer considered that the Applicant's Canadian-born sons would remain in the care of their mother, that her extended family in Canada provides the boys with emotional support, and that they have the option of visiting their father in Honduras or moving to Honduras with their mother to live with him there.

[38] I find the Officer conducted an inadequate Best Interests of the Child [BIOC] assessment when they concluded that the family – including the Applicant's two young children – could maintain their relationship by phone, internet, skype, email, etc. I have explained in *Chamas v Canada (Citizenship and Immigration)*, 2021 FC 1352 at para 43, quoting Justice Sadrehashemi in *Yu v Canada (Citizenship and Immigration)*, 2021 FC 1236 at para 30, my reasons for rejecting immigration officers' use of "boilerplate" language to assess BIOC by stating the child would be able to stay connected with their caregiver through technology, without considering the specific facts of the case.

[39] The facts in this case are compelling. The evidence shows that the Applicant cares for his two sons while his wife is at work. Daycare is too expensive, and no daycares in the region provide care until early morning hours. The Applicant spends about three hours per day with his older son (who was in Grade 2 at the time of the H&C application) working on reading, writing, counting, and painting. His son is getting good grades and has won an award for being a good student. The younger son was in junior kindergarten at the time of the application.

[40] The Applicant also reads to his sons in Spanish so that they do not lose their heritage, and he provides guidance and direction on their behaviours as they are young and energetic boys. The Applicant's H&C submissions also highlighted that the boys are of Honduran and El Salvadorian heritage, and will grow up in a predominantly white community, meaning that they will need a context for their appearance as well as language acquisition in Spanish and knowledge of their Honduran heritage, all of which their father can provide.

[41] In addition, the Applicant's wife stated that the Applicant is a very loving father and that their sons would be devastated if he were not with them. She also stated that the boys would be impacted if the Applicant were not there for school trips, school plays, sporting activities, and parent-teacher interviews.

[42] Given the irregular working hours of the Applicant's wife, I agree with the Applicant that it was speculative on the Officer's part to assume the wife's extended family would step in to cover her childcare need in the Applicant's absence.

[43] In addition, the H&C application included scholarly studies showing that children whose fathers were involved are more likely to grow up to be tolerant and understanding, be well socialized and successful adults, have supportive social networks and long-term friendships, receive higher scores on measures of internal moral judgement, moral values and conformity to rules, and avoid behaviour problems in school. In this case, the role played by the Applicant as a caregiver is even more important as his wife is the main income earner in the family.

[44] Yet almost none of the evidence cited above was mentioned, let alone addressed, in the Decision.

[45] Even if the Officer is presumed to have reviewed all evidence, the Decision still unreasonably fails to grapple with the statutory language of subsection 25(1) of *IRPA*, namely the children's best interests. Other than acknowledging "the potential negative impact and disruption of daily routines upon the lives of the applicant's sons", the Officer did not interrogate

what would be in the best interests of these two children, and how such interests would be affected by the Applicant's removal from Canada. The Officer's analysis, or the lack thereof, demonstrates that they were not alert, alive and sensitive to the children's best interests.

[46] The Respondent submits that the Officer has considered the best interests of the Applicant's 16-year-old son and 13-year-old daughter who live in Honduras, and argues that the Officer reasonably concluded that his return to Honduras would benefit these children who have been separated from him at least since he came to Canada in August 2012.

[47] Leaving aside whether there is evidence supporting the Officer's BIOC analysis regarding the two children in Honduras, just because the Officer may have considered the best interests of these two children does not make up for the inadequacy of the Officer's BIOC analysis with respect to the Applicant's two Canadian born young sons.

D. *Did the Officer fail to apply a hardship perspective to adverse conditions in Honduras and was the analysis unreasonable?*

[48] The Applicant argues that the Officer applied the wrong test in stating that there was insufficient evidence to overcome the findings of the PRRA decision. Rather, the Officer was required to assess hardship, harassment and discrimination in the past and future under s. 25 of the *IRPA*. The Applicant submits the Officer has conducted a state protection analysis from ss. 96 and 97 of IRPA, rather than a hardship analysis.

[49] I note that the Officer did, at one point, reference that the Applicant has no evidence that he is "personally at risk." However, when the Decision is read as a whole, it supports the Respondent's position that the Officer was conducting a hardship analysis appropriate to an H&C application.

[50] Having said that, I agree with the Applicant that the Officer's conclusion on adverse country conditions was unreasonable as it ignored evidence that contradicted their finding, for example, the evidence regarding violence facing returnees. The Applicant has provided substantial evidence in this regard, the key one being the report of the Research Directorate of the Immigration and Refugee Board, Honduras: Information Gathering Mission Report (February 2018) [IRB Mission Report]. The IRB Mission Report confirms that Honduras is considered "one of the poorest countries in the world" and also "one of the most violent countries that is not at war." It shows that gangs, both local and transnational, were "significant perpetrators of violent crimes and committed acts of murder, extortion, kidnapping, torture", along with drug trafficking throughout the country. The IRB Mission Report – and other reports on record – also show that measures to address these violent crimes (including police, witness protection program and assistance for returnees, among others) have not proven effective due to corruption and a multitude of other systemic problems.

[51] Significantly, the IRB Mission Report describes the violent consequences of territorial control by gangs, as follows:

> …gang territories are defined by invisible lines or invisible borders and…gangs are well-informed about the people crossing into their territories. Crossing these borders, on purpose or inadvertently, can lead to the person being killed. Even in the presence of police patrols

> alongside these invisible borders, people who cross without permission are at risk of being killed.

[52] I agree with the Applicant that he would not know where these invisible borders lie, having been away from Honduras for almost a decade, thereby putting him and his wife and children at risk should they relocate to that country with him.

[53] In light of the findings of the IRB Mission Report alone, the Officer's conclusion that "the option of redress is available to the applicant, should he experience any serious problems from any criminal elements on return to Honduras" is overwhelmingly contradicted by the evidence in the H&C application, rendering the Officer's analysis regarding the Applicant's hardship upon return to Honduras unreasonable.

V. Conclusion

[54] The application for judicial review is granted and the matter is returned for redetermination by a different officer.

[55] There is no question for certification.

JUDGMENT in IMM-4336-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The matter is returned for redetermination by a different officer.
3. There is no question for certification.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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