Federal Court  Cour fédérale

Date: 20220328

Docket: IMM-248-21

Citation: 2022 FC 423

Ottawa, Ontario, March 28, 2022

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

AHMED SALIM HERRERA RAMIREZ
CLAUDIA MILENA SANCHEZ SALGADO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Herrera Ramirez, and his wife, Mrs. Sanchez Salgado, seek judicial review of the decision of a senior immigration officer [Officer], dated January 5, 2021, refusing to grant them an exemption, based on humanitarian and compassionate [H&C] considerations, from the requirement of having to apply for permanent residence from outside Canada.

[2] The Applicants are citizens of Colombia. They came to Canada in June 2012 and claimed refugee protection. The Refugee Protection Division dismissed their claim for protection in November 2017. Their application for leave and judicial review was dismissed for failure to file their record.

[3] The Applicants subsequently submitted applications for permanent residence from within Canada based on H&C considerations, pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Their applications were based on their establishment and ties to Canada, the best interests of their two (2) Canadian-born children, and the adverse country conditions in Colombia.

[4] In the meantime, the Applicants also individually applied for a pre-removal risk assessment [PRRA]. Their PRRA applications were rejected in February and March 2020. The same Officer refused their applications for permanent residence on January 5, 2021 after determining that the H&C considerations submitted were insufficient to justify the exemption requested.

[5] The Applicants seek judicial review of the Officer's decision. They submit that: (1) the Officer did not properly assess the degree of the Applicants' establishment; (2) the Officer failed to give sufficient consideration to the best interests of the children; and (3) the Officer erroneously conflated the adverse country conditions evidence with issues of persecution and risk to life, contrary to subsection 25(1.3) of the IRPA.

II. Analysis

[6] The decision to grant or refuse an exemption on H&C considerations is reviewable on a standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 16, 17 [*Vavilov*]; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 10, 44). When conducting a reasonableness review, the Court's focus is on "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83). It must ask itself "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). The burden is on the party challenging the decision to show that it is unreasonable (*Vavilov* at para 100).

[7] After reviewing the record and considering the submissions of the parties, I find that the determinative issue in this application is the reasonableness of the Officer's analysis regarding the Applicants' establishment.

[8] The Applicants argue that the Officer erred in concluding that they did not demonstrate an exceptional degree of establishment in their eight-year stay in Canada. They rely on the jurisprudence of this Court, which has held that it is unreasonable to require such a degree of establishment without providing an explanation on what an officer considers to be extraordinary or exceptional establishment (*Zhang v Canada (Citizenship and Immigration)*, 2021 FC 1482 at paras 20-24; *Sivalingam v Canada (Citizenship and Immigration)*, 2017 FC 1185 at para 13; *Ndlovu v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 878 at para 14; *Chandidas v Canada (Citizenship and Immigration)*, 2013 FC 258 at para 80).

[9] The Court's jurisprudence on this issue is divided, as others have held that it is reasonable for an officer to consider whether an applicant has established the existence of H&C considerations that are greater than those typically faced by others who seek to obtain permanent residence from within Canada (*Lin v Canada (Citizenship and Immigration)*, 2021 FC 1452 at para 41; *Al-Abayechi v Canada (Citizenship and Immigration)*, 2021 FC 1280 at para 14; *Huang v Canada (Citizenship and Immigration)*, 2019 FC 265 at paras 19-20).

[10] In the circumstances of this case, I am not satisfied that the Officer's use of the term "exceptional" was merely descriptive, or that the Officer was not operating with the understanding that an exceptional level of establishment was the legal threshold to be met for the application to succeed.

[11] The Officer uses the word "exceptional" twice in the decision. The Officer first uses the term when assessing the Applicants' establishment. The Officer states:

> Overall, I find that the applicants have taken steps toward establishment in Canada. However, having carefully assessed all the evidence before me, I am unable to conclude that the applicants have demonstrated an exceptional degree of establishment during their eight-year stay ….
>
> [Emphasis added.]

[12] Then, when concluding, the Officer writes:

> In summary, I acknowledge that the applicants have resided in Canada for eight years and have demonstrated some integration into Canadian society, as evidenced by their history of employment, ESL training and some community involvement, as well as letters of support on file. However, having examined the applicant's [*sic*] establishment in Canada as a whole, I am unable to conclude that the applicants have achieved an exceptional degree of establishment in Canada.
>
> [Emphasis added.]

[13] It is unclear from the reasons why the Officer is unimpressed with the Applicants' establishment.

[14] If the basis for deciding lack of exceptionality is the Officer's statement that there was little information concerning the family's source of income between 2012 and 2016, then the Officer discounted without a reasonable explanation the records of employment submitted by the male Applicant, which indicate that he was employed at different times in 2013, 2014 and 2015. The Officer does not appear to have considered either the fact that the male Applicant completed a four-year bachelor's degree in business administration during the same period, or that the female Applicant gave birth to their eldest daughter in 2013. The Officer also failed to explain whether, and if so how, the lack of information concerning the family's source of income between 2012 and 2016 impacted the overall assessment of the Applicants' establishment in the face of the Officer's recognition that the family was self-sufficient as of 2016.

[15] If, on the other hand, the Officer's finding is based on the statement that the letter from Alianza, a Hispanic-Canadian organization in Ontario, did not indicate that the Applicants volunteered or contributed to the organization, then the Officer's finding is contrary to the evidence. The letter indeed states that the "organization is solely run by volunteers such as [the Applicants]".

[16] Finally, if the Officer's finding is based on the statement that the disruption of the Applicants' volunteer work would not cause disruption or have a negative impact on the church or other organizations for which the Applicants are doing volunteer work, I am not persuaded that the damage or inconvenience to these organizations is a reasonable basis to support a finding that the Applicants have failed to reach an exceptional degree of establishment.

[17] The failure to explain why the Applicants' establishment is not "exceptional", despite the positive establishment factors, leads me to believe the Officer understood that the Applicants were required to demonstrate "exceptional" establishment to succeed in their applications. I am not persuaded that the term "exceptional" was used merely in a descriptive sense.

[18] I recognize that a decision maker is presumed to have weighed and considered all of the evidence presented to it (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA)), and that it is not expected to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (*Vavilov* at para 128; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). However, in the circumstances of this case, I find that the conclusion regarding the Applicants' establishment is not sufficiently justified and transparent to convince me that the Officer did not import into the analysis, as the legal threshold, the requirement that the Applicants' level of establishment be exceptional. It may be that, in the end, the Applicants' establishment would not be determinative in the Officer's overall assessment of all the H&C considerations. However, it is not open to me to make that determination.

[19] Accordingly, for the reasons stated above, I find the Officer's decision does not meet the reasonableness standard as set out in *Vavilov*.

[20] It is not necessary for me to address the other issues raised by the Applicants.

[21] As a result, the application for judicial review is allowed. The decision is set aside and the matter is referred back for redetermination by a different officer.

[22] No questions of general importance were proposed for certification, and I agree that none arise.

JUDGMENT in IMM-248-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;

2. The decision is set aside and the matter is referred back for redetermination by a different officer; and

3. No question of general importance is certified.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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