Federal Court  Cour fédérale

Date: 20220608

Docket: IMM-2139-20

Citation: 2022 FC 858

Toronto, Ontario, June 8, 2022

PRESENT: Madam Justice Go

BETWEEN:

RECO OSHANE STEWART

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Reco Oshane Stewart, a citizen of Jamaica, applied for permanent residence on humanitarian and compassionate grounds [H&C application] pursuant to s. 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Applicant seeks judicial review of the decision dated January 30, 2021 of a Senior Immigration Officer [Officer] to refuse

the H&C application [the Decision]. The Officer also refused the Applicant's alternative request for a Temporary Resident Permit [TRP].

[2] The Applicant entered Canada as a permanent resident in 2005, at the age of 11, under his father's sponsorship. After arriving in Canada, the Applicant's parents experienced marital problems and financial difficulties. The Applicant struggled with school and experienced serious cognitive delays, which were not recognized by his parents until he was much older.

[3] The Applicant was convicted of several serious charges arising out of a shooting that occurred in 2012 when he was 17 years old, including manslaughter, aggravated assault, careless use of a firearm and possession of a firearm without a licence or registration. All of the charges, except for the illegal possession of a firearm, were overturned by the Ontario Court of Appeal on October 22, 2019, and the Applicant was acquitted of the charges.

[4] The Applicant is married to a Canadian citizen. His entire family, including two younger siblings, are either Canadian citizens or permanent residents and he does not have any family residing outside of Canada.

[5] Back in 2015, the Applicant was also convicted of possession for the purpose of trafficking and possession of property obtained by crime, and he received a two-year sentence. As a result, on May 1, 2017, the Applicant was issued a deportation order due to his criminal convictions and he also lost his permanent resident status, per paragraph 36(1)(a) of the *IRPA*.

[6] In his H&C application, submitted on June 27, 2017, the Applicant requested that he be granted a TRP to overcome his criminal inadmissibility in the alternative.

[7] I find the Decision unreasonable as it failed to adequately consider the circumstances surrounding the Applicant's criminal conviction and rehabilitation. I also find the Officer erred by failing to meaningfully engage with the Applicant's submissions when refusing his TRP request. I therefore grant the application.

II. Issues and Standard of Review

[8] The Applicant raises the following issues:

a) Was the Officer's assessment of the Applicant's H&C application unreasonable; and

b) Was the Officer's assessment of the Applicant's request for a TRP unreasonable.

[9] The parties agree that the decision is reviewable on a reasonableness standard, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[10] 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. 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.

III. Analysis

A. *Did the Officer fail to consider the circumstances surrounding the Applicant's criminal conviction and rehabilitation?*

[11] The Applicant submits that the Officer failed to consider the circumstances surrounding the Applicant's criminal convictions, including the factors outlined in the H&C manual, and that an assessment void of such factors cannot be construed as a holistic assessment of the application, which is required by *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 at para 45 [*Kanthasamy*].

[12] The Respondent submits that the Officer was not required to refer to every issue raised by the Applicant. Decision-makers are only expected to account for central or key issues raised by a party. While the Applicant provided several pages of submissions on the circumstances that led to his criminality, the Respondent argues this does not reflect their significance.

[13] I reject the Respondent's argument, as it is simply absurd to suggest that an applicant would make substantial submissions on an issue that is not significant to their application. Indeed, the Applicant's criminal convictions were at the very center of his H&C application—they were the source of his inadmissibility and the reasons he lost his permanent resident status in the first place.

[14] I am equally unpersuaded by the Respondent's assertion that the Officer's silence on the Applicant's rehabilitation and potential for recidivism were an indication that the Officer was convinced that they had no worry of him reoffending or being a risk to Canadians.

[15] There are two fundamental problems with this assertion. First, it is contradicted by the Decision which indicates that the Applicant's criminal history was a key factor leading to the Officer's rejection of the H&C application. The Officer stated towards the conclusion of the Decision:

> I find that the cumulative balance of the factors raised in this application do not favour the applicant. Given the seriousness of his criminal history in Canada, I give more weight in this application to the immigration laws as they exist in Canada and do not find that the applicant's personal circumstances justify an exemption from the law.
>
> [Emphasis added]

[16] It is also unreasonable for the Officer to take into account the "serious" criminal history of the Applicant on the one hand, without considering the substantial evidence and submissions with regard to the circumstances leading to the Applicant's criminal past, as well as his ongoing efforts to rehabilitate himself on the other.

[17] As the Applicant submits, and I agree, the H&C guidelines from Immigration Refugees and Citizenship Canada [IRCC] explicitly direct decision-makers to assess whether a criminal conviction outweighs positive H&C factors. This includes a consideration of the circumstances surrounding the offence. While IRCC guidelines are not, in themselves, binding, they are useful aids in determining how to apply discretionary powers to particular situations: *Kanthasamy* at para 32. The Officer's failure to assess the Applicant's substantial evidence about the context of his criminal past was contrary to the H&C guidelines.

[18] In reaching a conclusion that the Applicant's serious criminal history and personal circumstances did not justify an exemption on H&C grounds, without once considering those circumstances, the Officer has rendered a decision that lacks an internally coherent and rational chain of analysis and that is not justified in relation to the facts and law that constrain the decision-maker: *Vavilov*, at para 85.

B. *Was the TRP Decision Improperly Before this Court?*

[19] In their Further Memorandum of Argument, the Respondent argues, for the first time, that the Applicant's pleadings on the TRP refusal are improper because this application for judicial review involves the refusal of the Applicant's H&C application, and not his TRP, citing Rule 302 of the *Federal Court Rules*, SOR/98-106 [*FC Rules*] indicating applicants may not seek to impugn more than one order or decision by a federal official within a single application without permission of the Court.

[20] The Applicant made substantial rebuttal arguments at the hearing, which was their first opportunity to do so, and asked the Court not to allow the Respondent to raise this new issue, citing *Al Mansuri v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 22 [*Al Mansuri*] at paras 12-16.

[21] In reply, the Respondent asserted that it would be prejudiced if the Court allows the Applicant to pursue his arguments with respect to the TRP decision because the Respondent has not been given an opportunity to respond to these arguments. I reject this argument outright as it flies in the face of the fact that the Respondent did respond to the Applicant's arguments in their

initial Memorandum of Argument, and was further given the opportunity to do so during the hearing, but chose not to. The Respondent's submission that the Applicant could have written a letter to the Court before the hearing to raise his concern, or bring an application to ask for permission to amend the Notice of Application for Leave for Judicial Review, was equally without merits.

[22] However, as the Applicant did have the opportunity to make fulsome submissions about the Respondent's 11th hour argument, I find there is no prejudice to the Applicant if I consider this new issue, and doing so has not caused any delay to the proceedings: *Al Mansuri* at para 12.

[23] Rule 302 of the *FC Rules* states that "[u]nless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought." This Court thus retains discretion to hear applications seeking to review more than one order.

[24] Further, it is not uncommon for this Court to review decisions involving an H&C application that is accompanied by a request for a TRP: *Williams v Canada (Minister of Citizenship and Immigration)*, 2020 FC 8 [*Williams*], and *Cumberbatch v Canada (Minister of Citizenship and Immigration)*, 2019 FC 717 [*Cumberbatch*]. Contrary to the Respondent's argument at the hearing, the Court can exercise its discretion to consider both H&C and TRP matters simultaneously without requiring an applicant to file an application seeking the Court's permission before considering both decisions within a single judicial review.

[25] I find the cases cited by the Respondent distinguishable on the facts: *Zhang v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1381; *Potdar v Canada (Citizenship and Immigration)*, 2019 FC 842.

[26] As the Applicant's submissions with regard to his TRP application were largely similar to the factors raised in his submissions in support of his H&C application, and given that, until after leave was granted, the parties had acted upon the assumption that both decisions be dealt at once, I find no reason not to issue an order addressing both the H&C application and TRP application at the same time, pursuant to rule 302 of the *FC Rules*.

C. *Was the Officer's assessment of the TRP application unreasonable?*

[27] The Officer's reasons with regards to the TRP application were briefly contained in one paragraph and can be boiled down to one sentence, namely, the Applicant has not provided evidence to demonstrate there were compelling grounds to warrant the issuance of a TRP and that he could apply in the "regular fashion" from his home country.

[28] The Applicant submits that the Officer's assessment of the TRP application was unreasonable because they failed to conduct the required analysis prescribed by the IRCC manual and endorsed by this Court, and by fixating on the Applicant's ability to make an application for a TRP abroad in reaching their decision. Despite the wide degree of discretion afforded to an officer in assessing a TRP, the Applicant submits such an assessment must include meaningful consideration of the compelling circumstances an applicant presents and the Officer failed to do so here.

[29] I agree.

[30] While an officer's duty to provide reasons when evaluating a TRP is minimal, a failure to meaningfully engage or analyze the compelling reasons presented rendered the decision unreasonable: *Osmani v Canada (Minister of Citizenship and Immigration)*, 2019 FC 872 at paras 20-21; *Mousa v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1358 [*Mousa*] at para 20.

[31] While the Officer's assessment of the TRP often flows from their findings on the H&C application, this Court has found that it is not sufficient to simply adopt the earlier analysis of the applicant's criminal history in relation to the H&C application: *Cumberbatch* at paras 13-14; *Williams* at paras 61-63.

[32] In this case, the Officer did not even adopt their earlier analysis of the Applicant's criminal history in relation to the H&C application. As noted above, the Decision included little analysis of the Applicant's criminal past, other than stating that it was serious. When reviewing the Applicant's request for a TRP, the Officer referred only to the Applicant's "[need] to remain in Canada to be with his family", even though the Applicant's submissions with regard to his TRP application were largely similar to the factors raised in his submissions in support of his H&C application, and contained many details about the circumstances giving rise to his criminal convictions in addition to his rehabilitative efforts.

[33] A TRP is a means by which an individual who is otherwise inadmissible can remain in or enter Canada if they are able to satisfy the officer that the need for their presence in Canada outweighs any risk to Canadians or Canadian society (s. 24(1) of the *IRPA*; TRP operational instructions and guidelines; *Shabdeen v Canada (Minister of Citizenship and Immigration)*, 2014 FC 303 at para 17). As the Applicant asserts, the TRP guidelines outline a list of non-exhaustive factors to consider in the assessment of a TRP application, including the reasons for the applicant's presence in Canada, the intention of the legislation, the type of application and family composition, and the benefits to the person concerned and to others. This Court has found that a fulsome analysis of whether the applicant has a compelling need to remain in or enter Canada goes to the heart of the TRP analysis: *Mousa* at para 9.

[34] Further, in *Cojuhari v Canada (Minister of Citizenship and Immigration)*, 2018 FC 1009 [*Cojuhari*], Justice Harrington found that in assessing criminal inadmissibility under s. 24(1) of the *IRPA*, the officer should consider several factors, including:

> [21] …the time elapsed since the sentence was served, whether the applicant is eligible for rehabilitation or is deemed rehabilitated, assess the odds if further offences will be committed, whether the influence of alcohol was a factor in the commission of the offence, whether there is a pattern of criminal behaviour, whether the sentence has been completed and fines paid and <u>eligibility for record suspension.</u>
>
> [Emphasis in original]

[35] Here, there was nothing to suggest that the Officer conducted an assessment of the factors, as outlined by Justice Harrington in *Cojuhari*, regarding the Applicant's past criminal history and rehabilitative efforts with respect to the TRP application. The Officer's reasons were

simply not indicative of the required weighing exercise under s. 24(1) and fell short of the requirement for justifiable, transparent and intelligible reasons: *Williams* at paras 61-63.

IV. Conclusion

[36] The application for judicial review is allowed.

[37] The decisions to deny the H&C application and a temporary resident permit are quashed and the matter is referred back to another Officer for a fresh redetermination.

[38] There is no question to certify.

JUDGMENT in IMM-2139-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The decisions to deny the H&C application and a temporary resident permit are quashed and the matter is referred back to another Officer for a fresh redetermination.
3. There is no question to certify.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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