Federal Court  Cour fédérale

Date: 20220608

Docket: IMM-6507-20

Citation: 2022 FC 854

Ottawa, Ontario, June 8, 2022

PRESENT: Madam Justice Pallotta

BETWEEN:

FERNANDO MANUEL DE FARIA PENICHE
MARIA ANTONIETA FERNANDES ALVES PENICHE
MARGARIDA ALVES PENICHE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Fernando Manuel De Faria Peniche, his spouse, and minor daughter, seek judicial review of a Senior Immigration Officer's (Officer) decision denying their application for permanent residence from within Canada based on humanitarian and compassionate (H&C) grounds, under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The applicants are citizens of Portugal who entered Canada in 2013 on a six-month work permit issued to Mr. Peniche. Mr. Peniche's application to extend the work permit was denied in February 2014. The applicants obtained visitor visas that authorized them to remain in Canada until the end of 2014; since then, they have remained in Canada without status.

[3] The applicants filed a first application for permanent residence based on H&C grounds in October 2018, which was denied in September 2019. They filed a second H&C application in November 2019. The decision at issue in this proceeding is the refusal of the second H&C application.

[4] The applicants submit the Officer's decision is unreasonable. They allege the Officer committed reviewable errors when analyzing their establishment in Canada and the adverse country conditions in Portugal. Also, they allege the Officer erred by imposing a serious hardship threshold, including by assessing the best interests of the minor daughter through a serious hardship lens that was not sufficiently alert, alive and sensitive to her best interests.

[5] For the reasons below, the applicants have not established that the Officer committed a reviewable error in considering whether the H&C factors in the applicants' case warranted section 25 relief, so as to render the decision unreasonable. Accordingly, this application for judicial review is dismissed.

II. **Issue and Standard of Review**

[6] The issue on this application for judicial review is whether the Officer's decision was unreasonable, based on the following alleged errors:

1. Did the Officer err in analyzing the applicants' establishment in Canada?
2. Did the Officer err in analyzing adverse country conditions in Portugal?
3. Did the Officer err by imposing a serious hardship threshold and failing to properly consider the best interests of the child (BIOC)?

[7] The Supreme Court of Canada set out the guiding principles for reasonableness review in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. In applying the reasonableness standard of review, the Court must ask whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility: *Vavilov* at para 99. A reasonable decision is based on an internally coherent and rational chain of analysis, and it is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85. The party challenging the decision bears the onus of demonstrating that it is unreasonable: *Vavilov* at para 100.

III. **Analysis**

A. *Did the Officer err in analyzing the applicants' establishment in Canada?*

[8] The applicants submit the Officer's assessment of their establishment in Canada was unreasonable, and this is sufficient to set aside the decision because their establishment was an important consideration in their H&C application. They submit the Officer concluded that they had not demonstrated "strong establishment in Canada" without explaining what would

constitute strong establishment or why the applicants' level of establishment did not weigh in favour of granting an exemption under subsection 25(1) of the *IRPA*: *Stuurman v Canada (Minister of Citizenship and Immigration)*, 2018 FC 194 at paras 21-24; *Ndlovu v Canada (Minister of Citizenship and Immigration)*, 2017 FC 878 at para 15 [*Ndlovu*]; *Kachi v Canada (Minister of Citizenship and Immigration)*, 2015 FC 871 at paras 12-16. The applicants submit that their H&C application demonstrated their establishment in Canada with evidence of employment and income (including evidence that they are financially self-sufficient), education and academic achievements, and letters of community support. They state the Officer erred by finding their income was not substantial, as a significant income is not a requirement under section 25 of the *IRPA*.

[9] Furthermore, the applicants submit the Officer unreasonably discounted their establishment in Canada because they stayed and worked in Canada without authorization. According to the applicants, the Officer dwelled on their non-compliance and discounted positive factors because of it, so as to defeat the purpose of section 25 of the *IRPA*: *Samuel v Canada (Minister of Citizenship and Immigration)*, 2019 FC 227 at paras 17, 19 [*Samuel*]; *Kobita v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1479 at paras 28-30, 35-36 [*Kobita*]. They contend the Officer failed to apply the principles set out in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] to assess their circumstances with empathy and compassion, and in accordance with the equitable underpinnings of section 25 of the *IRPA*.

[10] The respondent submits that *Kanthasamy* does not change the nature of the H&C exemption. H&C exemptions are discretionary, and it is an officer's responsibility to assess the relevant factors and determine the weight to be given to each factor in the circumstances of the case: *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at paras 11, 15. The Officer in this case determined the evidence to be insufficient to warrant an exemption under subsection 25(1) of the *IRPA*, and according to the respondent, the applicants impermissibly seek to have this Court reweigh the evidence, which is not the Court's role on judicial review.

[11] The respondent submits the Officer's establishment analysis considered five factors: length of time in Canada, employment history, financial self-sufficiency, familial relationships, and ties to the community. The Officer acknowledged a degree of establishment, and explained why they did not consider the applicants' establishment to be strong. The respondent submits the Officer reasonably considered the incongruence between the applicants' stated income and the needs of a family in Canada to conclude that the applicants had not established financial independence. It is not unreasonable for an officer to find ordinary levels of establishment in Canada to be insufficient to warrant a section 25 exemption: *De Sousa v Canada (Minister of Citizenship and Immigration)*, 2019 FC 818 at para 28 [*De Sousa*].

[12] The respondent submits the Officer appropriately considered the applicants' non-compliance with the *IRPA* in considering their length of time and employment history in Canada: *Santos v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1332 at para 28 [*Santos*];

Daniel v Canada (Minister of Citizenship and Immigration), 2019 FC 248 at para 38. The applicants' non-compliance with the *IRPA* was not the primary factor in the Officer's decision.

[13] In my view, the Officer did not state a conclusion on establishment without providing sufficient reasons, as the applicants contend. The Officer reasonably analyzed the applicants' establishment in Canada by considering multiple factors. The Officer provided intelligible reasoning to justify how they weighed each factor to conclude that the applicants' level of establishment was not strong. I agree with the respondent that it is not unreasonable for an officer to find ordinary levels of establishment in Canada to be insufficient to warrant the relief provided by section 25 of the *IRPA*: *De Sousa* at para 28.

[14] Failure to adhere to immigration laws is one factor that may be assessed in an H&C application; if it were otherwise, someone who remains and works illegally in Canada might be in a better position than someone who has done so legally: *Nguyen v Canada (Minister of Citizenship and Immigration)*, 2017 FC 27 at paras 32-33. Section 25 operates within the parameters of the *IRPA*, and is not an alternative immigration scheme: *ibid* at para 33. When an officer takes an applicant's lack of status into consideration, which they are entitled to do, the officer must balance the need to respect Canada's immigration laws with the fact that section 25 of the *IRPA* will frequently involve applicants who are without status: *Samuel* at para 17; *Kobita* at paras 28-30. In my view, the Officer did so in this case.

[15] It was not unreasonable for the Officer to attribute little weight to the applicants' length of time and employment in Canada in view of the fact that their stay and work were

unauthorized. An immigration officer is permitted to consider whether an applicant's unauthorized stay or work was beyond the applicants' control (*Santos* at para 28), and I disagree with the applicants that the Officer dwelled on their non-compliance, or unreasonably discounted the positive factors related to establishment because of it. In addition, length of time and employment in Canada were two factors that the Officer considered in assessing the applicants' establishment. The Officer also considered the applicants' financial self-sufficiency, familial relationships, and ties to the community.

[16] With respect to financial self-sufficiency, I am not persuaded that the Officer required a certain level of income. Rather, the Officer considered the income alleged to support the family, and noted a lack of evidence regarding family expenses, or financial assistance from members of the applicants' extended family. Based on the available evidence, the Officer reasonably assigned little weight to financial self-sufficiency as a component of establishment. With respect to the remaining factors, the Officer assigned some weight to the applicants' familial relationships and ties to the community as components of their establishment in Canada.

[17] In summary, the applicants have not established a reviewable error in the Officer's analysis of establishment. The applicants disagree with how the Officer weighed the establishment factors; however, it is not the Court's role on judicial review to reweigh and reassess the evidence: *Vavilov* at paras 125-126.

B. *Did the Officer err in analyzing adverse country conditions in Portugal?*

[18] The applicants submit that the Officer failed to properly consider the consequences of a return to Portugal, in light of adverse country conditions. The applicants submit the Officer was obliged to consider the adverse country conditions, even without evidence of actual, personal hardship, as they were only required to show that they would likely be affected by the adverse conditions in Portugal: *Shrestha v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1370 at paras 11, 13-15 [*Shrestha*]. The presence of adverse conditions were enough to obligate the Officer to analyze how the applicants' re-establishment in Portugal would be affected.

[19] The applicants submit the Officer's finding that they would be able to re-establish themselves in Portugal was based on speculation and conjecture, as there was no evidence showing that their acquired skills and experience would increase their chances of obtaining well-paying and stable employment in Portugal. They rely on *Ndlovu* at paragraphs 19, 21 and *Sosi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1300 at paragraph 18 [*Sosi*]. According to the applicants, the Officer discounted their establishment in Canada but used the same evidence to conclude they would be able to re-establish themselves in Portugal, which they contend to be perverse: *Sosi* at para 18.

[20] The respondent submits that it was the applicants who were speculating they will struggle to find stable employment, and it was open to the Officer to not accept this speculation. The Officer reasonably noted that the applicants are skilled workers who are familiar with the language and customs in Portugal. Furthermore, the Officer did not use the applicants' establishment against them; rather, the Officer reasonably found the applicants had acquired

working skills and can find work using such skills. The respondent contends that the applicants are re-arguing the points made in their H&C application without pointing to a reviewable error.

[21] I agree with the respondent that the applicants have not established a reviewable error in the Officer's reasons on adverse country conditions.

[22] The Officer considered the consequences of a return to Portugal in accordance with the applicants' submissions, including: (i) the prospects of employment, (ii) support from family members, (iii) COVID-19 restrictions, and (iv) the impact of a return on the applicants' mental health. I disagree that the Officer engaged in speculation or conjecture. In response to the applicants' submission that it would be difficult for Mr. Peniche and his spouse to find employment in Portugal due to their age and a difficult job market, the Officer noted that they have years of work experience and employable skills. I agree with the respondent that the Officer did not use the applicants' establishment against them, but rather, reasonably found the applicants had acquired skills which would assist them to find work in Portugal. With respect to support from family members, the Officer found that, aside from Mr. Peniche's statement, there was no other evidence showing that family members in Portugal would be unable to offer assistance, if needed. Ultimately, the Officer was not satisfied that the applicants would be unable to find stable work, or that members of their extended family would be unable to assist them.

[23] In my view, the applicants have not established a similar error as in *Shrestha*. In that case, there was significant evidence before the officer that described the devastating impact of

earthquakes in Nepal in 2015, yet the officer dismissed that evidence on the basis that it failed to demonstrate personal hardship to the applicant. The Court held that the officer erred in doing so. In an H&C context, hardship must be personal but it need not be unique, and although the evidence was general in nature, it would allow one to reasonably infer that any individual living in or returning to Nepal (particularly to the most severely impacted regions of the country) would suffer some hardship: *Shrestha* at para 11. In this case, the Officer considered the alleged hardships of financial instability and poor employment opportunities in view of the job market in Portugal. The Officer was not satisfied that the applicants would only be able to secure minimum wage or short-term contract employment. These findings were open to the Officer.

[24] In summary, the applicants have not established a reviewable error in the Officer's analysis of adverse country conditions in Portugal.

C. *Did the Officer err by imposing a serious hardship threshold and failing to properly consider the BIOC?*

[25] The applicants submit the Officer imposed a high standard of "serious hardship" to evaluate their application for permanent residence, and failed to consider the full H&C circumstances they put forward. The applicants point out that the H&C assessment is fundamentally one of empathy, but the Officer did not demonstrate empathy and instead assessed their application through a lens of serious hardship. The Officer imposed this high, "serious hardship" standard to assess establishment, adverse country conditions, and BIOC.

[26] According to the applicants, the Officer's approach is particularly problematic regarding BIOC as it is contrary to the principle that a child will rarely, if ever, be deserving of any level of

hardship. They contend the Officer erred by assessing the BIOC with a focus on whether there was a sufficient level of hardship for the BIOC to warrant positive consideration: *Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166 at paras 63-67 [*Williams*]. A threshold test of hardship does not adequately determine what is in the child's best interests in a way that is "alert, alive and sensitive" to those interests: *Ibid*.

[27] The applicants submit that the Officer was not alert, alive and sensitive to the BIOC. The Officer failed to identify the best interests of the minor daughter, who has been in Canada for 7 formative years—since she was 9 years old. Despite her friendships and connections to the community in Canada, the Officer found the minor daughter had strong family connections in Portugal to support her return, and found there was no evidence to suggest that she would be unable to remain in contact with her friends in Canada. The Officer also dismissed the applicants' concerns that the daughter would have difficulty reintegrating in Portugal because of the loss of her Portuguese language skills, finding that she had been continuously exposed to the Portuguese language in Canada because her parents are not fluent in English.

[28] The respondent submits that the Officer used the term "serious hardship" once in the decision, and it was specifically directed toward the applicants' return to Portugal. In describing a level of hardship that does not warrant granting an application, the use of the word "serious" is not proof of error. Hardship is a relevant consideration: *Kanthasamy* at para 33; *Shackleford v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1313 at para 27.

[29] The respondent argues that the Officer was not obliged to follow the approach in *Williams*, as that case did not create a formal test for BIOC assessments: *Semana v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1082 at paras 23 [*Semana*]. The respondent submits there is no specific formula or rigid test for assessing BIOC, and form should not be elevated over substance. The presence of children does not call for a certain result, and BIOC is but one factor to be weighed along with the others in assessing the merits of H&C exemptions: *Semana* at paras 23-28. In this case, the Officer gave positive weight to the BIOC, but little weight to establishment in Canada and adverse country conditions in Portugal. The respondent submits it was open to the Officer to weigh these factors globally, and reject the application.

[30] I am not persuaded of a reviewable error in the Officer's approach.

[31] For the reasons discussed under the previous headings, the applicants have not established a reviewable error in the Officer's assessment of their establishment in Canada or the consequences of a return to Portugal, in light of adverse country conditions.

[32] With respect to the BIOC in particular, I agree with the respondent that *Williams* does not impose a formal test, and in any event, the Officer did not require a level of hardship for the BIOC to warrant positive consideration. To the contrary, the Officer found that the BIOC considerations should be accorded moderate weight.

[33] The Officer's reasons note that the minor daughter has spent her formative years in Canada and that she has forged friendships and community ties. The Officer acknowledged that

she will face distress upon return, but also noted her family support in Portugal and the ability to keep in touch with her friends in Canada. The Officer's inference that the daughter has been continuously exposed to the Portuguese language during her time in Canada was a reasonable inference and not, as the applicants contend, a bald assertion.

[34] As the respondent correctly notes, BIOC is one factor to be weighed along with the others in assessing the merits of H&C exemptions: *Semana* at paras 23-28. The Officer recognized the daughter's integration into Canada and afforded positive weight to the BIOC, but ultimately, after taking all of the factors into consideration, the Officer was not satisfied that those factors justified an exemption under subsection 25(1) of the *IRPA*.

IV. **Conclusion**

[35] The applicants have not established that the Officer's decision is unreasonable. This application for judicial review is dismissed.

[36] Neither party proposed a question for certification. In my view, there is no question of general importance to certify.

JUDGMENT in IMM-6507-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no question to certify.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6507-20
STYLE OF CAUSE:	FERNANDO MANUEL DE FARIA PENICHE, MARIA ANTONIETA FERNANDES ALVES PENICHE, MARGARIDA ALVES PENICHE v MINISTER OF CITIZENSHIP AND IMMIGRATION
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