Federal Court Cour fédérale

Date: 20221125

Docket: IMM-6762-21

Citation: 2022 FC 1621

Ottawa, Ontario, November 25, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

AB

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by a Senior Immigration Officer, dated July 22, 2021 [Decision]. The officer rejected the Applicant's request for permanent residence from within Canada on Humanitarian and Compassionate [H&C] grounds. The Officer found that the Applicant did no establish sufficient H&C considerations to justify an exemption under section 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [*IRPA*].

II. Facts

[1] The Applicant is a 50-year-old South African national. He arrived in Canada in October 2017 and made a claim for refugee protection. The claim was based on alleged discrimination and violence the Applicant experienced in South Africa due to his perceived status as a foreigner, and HIV-related stigma and discrimination. The Applicant also identified a fear of retaliation from a hitman that he states was hired by the family of a work associate due to a dispute over the ownership of a taxicab.

[2] The Applicant's refugee claim was denied in 2018. Subsequently, the Applicant's appeal to the RAD was dismissed for lack of perfection in 2019. The Applicant applied to reopen his appeal and filed an application for leave and for judicial review. The application to reopen was refused in 2019. The Applicant filed another application for leave and judicial review of the RAD's refusal to reopen his appeal. Both applications for leave were joined. Leave was granted, but the Applicant's judicial reviews were dismissed in 2020.

[3] The present application for this exceptional relief is based on the alleged hardships the Applicant would face returning to South Africa, his personal ties to Canada, and the best interests of his children.

[4] The Applicant also submitted a request for a PRRA that was dismissed at the same time and by the same officer, which decision is the subject of IMM-6761-21 in respect of which

Judgment and Reasons are also delivered today. The two applications were heard on the same day, one after the other.

III. Decision under review

A. *Establishment in Canada*

(1) Financial establishment

[5] The Officer assigned modest weight to the Applicant’s employment and savings. Specifically, the Officer considered documentation submitted by the Applicant outlining his employment as a driver for Uber, bank statements and tax information. While the Officer acknowledged that the Applicant maintained a consistent positive balance in his accounts, it was not considered indicative of all the Applicant’s daily expenses. Regardless, the Officer assigned these factors moderate weight.

(2) Social establishment

[6] The Officer limited the weight assigned to the Applicant’s social relationships to a modest amount. The Officer considered the Applicant’s membership with the Seventh Day Adventist Church in Brampton and his status as the apparent co-founder of the Kintampo Association of Toronto. However, took issue with the lack of corroboration of the Applicant’s stated position as co-founder. Similarly, the Officer found little evidence from which to conclude that the social relationships the Applicant has forged could not continue in a meaningful way via

written communication. Neither would anything prevent the Applicant from continuing his religious practice in South Africa.

B. *Best interest of the child*

[7] The Applicant's seven children reside in South Africa. Of this group, four are eligible to be considered under the best interest of the child [BIOC] analysis. The Officer acknowledges the Applicant supports his minor children with income earned in Canada, but finds "little evidence" to conclude that the Applicant could not find similar employment in South Africa to provide for his family. The Officer therefore assigns this factor no more than modest weight. Similarly, the Officer noted insufficient evidence from which to conclude that the children's health, education, safety, security, or dignity would be adversely affected were the Applicant to leave Canada. Given these considerations, the Officer found little basis to assign the noted factors more than a modest amount of weight.

C. *Risk and adverse conditions in country of removal*

(1) Perception as a foreigner in South Africa

[8] The Applicant's claim in this regard was based on his allegedly being arrested on three separate occasions for various issues surrounding his perceived foreign identity and citizenship. The Officer noted the Applicant did not advance corroborating documentation such as affidavits from individuals indicated to have been implicated in his detainments. As such, the Officer considered there to be little persuasive evidence from which to conclude that that Applicant would likely face mistreatment from authorities on the basis of being perceived as a foreigner.

Similarly, as it relates to the presumption of state protection, the Officer found the Applicant provided little evidence that he would not have had an avenue for redress were he to face discrimination and mistreatment on the basis of his perceived identity.

(2) Dispute with taxi drivers

[9] The Applicant indicated previously that he had worked as a taxi driver in South Africa and was involved in a dispute with other drivers due to the larger size of his vehicle, which allowed him to carry a greater number of passengers. The Applicant's taxi was destroyed by arson in retaliation. Thereafter, the Applicant registered his vehicle under the name of an individual of whom he states everyone was "afraid". That individual was then shot and killed in May 2017. Following this, the slain individual's family threatened to kill the Applicant and his family, allegedly hiring a hitman to complete the task. These events prompted the Applicant to relocate to a city approximately 1200 kilometres away. The Applicant was later informed by his wife that armed men entered his hair salon on October 28, 2017.

[10] The Officer noted there was "little evidence" to find that any individual has any interest in hurting the Applicant in the present day, nearly four years after the last reported altercation. Therefore, this factor was assigned no more than a modest degree of weight.

(3) Social unrest

[11] While the Officer acknowledged that South Africa is going through a period of social unrest, the Applicant does not provide persuasive evidence that he would likely be personally

and directly affected by the rioting taking place were he was required to return to South Africa. As such, this consideration was assigned little weight by the Officer.

D. *Other factors for considerations*

(1) Education in Canada

[12] The Applicant draws his argument in this regard from the educational training he received to qualify as a truck driver, noting that he was unable to complete the required testing to get licensed due to the COVID-19 pandemic. The Officer takes issue with the Applicant's lack of documentation pertaining to his education or the credentials he has earned. Neither did the Applicant submit persuasive evidence that from which to conclude that his credentials would be invalid in South Africa or that retraining would be tine consuming or expensive. The Officer also pointed out that the Applicant had been employed as a truck driver in South Africa for approximately seven years. Given these considerations, the Officer assigned little weight to these factors.

(1) Health considerations

[13] The Applicant's submission on this point suggested that an interruption in the Applicant's treatment, even for as little as 5 per cent missed anti HIV vital doses could result in adverse impacts. The Officer acknowledged this finding by the Applicant's physician. However, the Officer found insufficient persuasive evidence from which to conclude that the client would not be able to exit Canada without an interruption to his medication regime nor that his medication is not available to him in South Africa. The Applicant also forwarded arguments that the COVID-

19 pandemic resulted in a shortage of medical resources. Much like the issue above, the officer found insufficient evidence to conclude that these healthcare pressures would negatively impact the Applicant's ability to seek and obtain the treatment he requires. In this way, the Officer found that there was insufficient evidence to suggest that the management of the Applicant's condition was predicated on his ability to remain in Canada. As such, the weight assigned to these factors was limited to a modest amount.

(2) HIV & COVID-19

[14] The Officer accepted the Applicant's argument that individuals with HIV would have particular health considerations relating to COVID-19. The evidence of the virus's spread in South Africa was insufficient for the Officer to conclude that South Africa specifically is experiencing or would experience a rise in cases that will directly and personally affect the Applicant. The Officer found neither did the Applicant provide persuasive evidence on his ability (or lack thereof) to get vaccinated in a timely manner given his HIV status. As such, the weight assigned to these factors was limited to a modest amount.

(3) HIV stigma

[15] The Applicant's allegation of social ostracization due to his HIV status is drawn from experiences where friends and other community members began avoiding him entirely. While the Officer acknowledges the social exclusion faced by people with HIV status, the Officer's stigma toward individuals with HIV is a problem around the world, including in Canada. The Officer notes that the Applicant does not advance a basis upon which the Applicant would not

face such stigma in Canada. Nor does the Applicant explain how one's medical use becomes known beyond one's doctor and pharmacist in South Africa. The Officer was therefore unable to conclude that the Applicant's HIV status would likely become public knowledge. Similarly, the Officer found there was insufficient evidence from which to conclude that the Applicant had been denied employment, housing, or other services, and/or would face physical abuse or systematic denials of his rights if he were to return to return to South Africa. As such, the weight assigned to these factors was limited to a modest amount.

(4) Support to adult children

[16] The Officer acknowledged that the Applicant sends money to his adult children to assist them with the cost of education and living. However, the Officer notes that many young adults in South Africa are able to manage the costs of school and living without relying on income from parents working abroad. Furthermore, the Officer found little evidence to conclude that the adult children would be unable to find employment to obtain the necessities for life and finance their educational pursuits. Neither did the Officer find that the Applicant could not support his adult children with income earned from within South Africa. As such, these factors were assigned little weight.

IV. Issues

[17] The only issue is whether the Officer's decision was reasonable. I granted an unopposed anonymity order prior to the hearing which is formalized in the following judgment.

V. Standard of Review

[18] Both parties agree, as do I, the applicable standard of review in this matter is reasonableness. In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 [*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] 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). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "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, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).

> [Emphasis added]

[19] Furthermore, *Vavilov* makes it abundantly clear the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances". The Supreme Court of Canada instructs:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, <u>a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker"</u>: *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
>
> [Emphasis added]

[20] The Federal Court of Appeal recently held in *Doyle v Canada (Attorney General),* 2021 FCA 237 that the role of this Court is not to reweigh and reassess the evidence:

> [3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director's decision, the reviewing court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is no part of its role. Sticking to its role, the Federal Court did not find any fundamental errors.
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> [4] On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation.

VI. Analysis

A. *Nature of H&C relief*

[21] In *Huang v Canada (Citizenship and Immigration)*, 2019 FC 265 Chief Justice Crampton addressed what is required to warrant an H&C exemption, noting at para 19:

> Section 25 was enacted to address situations in which the consequences of deportation "might fall *with much more force on some persons … than on others*, because of their particular circumstances …": *Kanthasamy,* above, at para 15 (emphasis added), quoting the *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on Immigration Policy*, Issue No. 49, 1st Sess., 30th Parl., September 23, 1975, at p. 12. Accordingly, an applicant for the exceptional H&C relief provided by the IRPA must demonstrate the existence or likely existence of misfortunes or other H&C considerations *that are greater than those typically faced by others who apply for permanent residence in Canada.*
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> [Emphasis in the original]

[22] Likewise in *Shackleford v Canada (Citizenship and Immigration)*, 2019 FC 1313 at para 16, Justice Roy noted:

> Nothing in *Kanthasamy* suggests that H&C applications are anything other than exceptional: the *Chirwa* description itself, the fact that it is not meant to be an alternative immigration scheme, the fact that the hardship associated with leaving Canada does not suffice are all clear signals that H&C considerations must be of sufficient magnitude to invoke section 25(1). It takes more than a sympathetic case.

B. *Central concerns of the Applicant*

[23] The Applicant submits the Officer erred by failing to consider and address the evidence and submissions put forward by the Applicant regarding his essential work as an Uber driver in Toronto during the COVID-19 pandemic, as well as his ability to financially support his children should the Applicant have to return to South Africa. The Applicant submits the Officer's failures constituted reviewable error. I am not persuaded by these submissions.

[24] As to employment, I agree the Applicant worked as an Uber driver during the pandemic and that his work was of assistance to his community. I note the Government of Canada established a special program to give some who worked during the pandemic a pathway to permanent resident status. However, the Applicant's work was not included by the Government in its assessment in this regard.

[25] The Applicant asks that his work in this regard be recognized as a positive factor in support of his H&C application. In fact the Officer did give that work some weight. The Applicant disagrees and says it should have been given more weight. With respect in doing so the Applicant invites the Court to engage in the reweighing and reassessing of evidence which, exceptional circumstances and with respect, is specifically withheld from this Court on judicial review not only by the Federal Court of Appeal in *Doyle*, cited above, but also by the Supreme Court of Canada in *Vavilov* at para 125, also cited above. Therefore and with respect I decline to engage in such analysis. That said, I have considered this submission and concluded the Officer's assessment was reasonable in this respect.

[26] Turning to the best interests of the children [BIOC], in my view the Officer was alert, alive and sensitive to the best interests of the children. This factor was outlined and considered in some detail by the Officer. In fact, the Officer concluded his remittances ($13,000 over three years) "attracts a degree of weight". However, the Applicant disagrees and says it should have counted for more. He emphasized the value of his support as set out in evidence from his daughter in terms of paying for school fees. The Officer considered relevant matters and indeed gave BIOC modest positive weight in the final analysis.

[27] In my view the Applicant asks the Court to engage in a what I consider a thorough reweighing and reassessment of the BIOC evidence in this case, which again absent exceptional circumstances falls outside the scope of judicial review given *Vavilov* at para 125 and *Doyle*, both cited above. I decline to engage in such reweighing and reassessment of the evidence. That said as with the case of his work during the pandemic as a Uber driver, I have considered the BIOC submission have determined the Officer's considerations are reasonable.

[28] The Applicant made further submissions both to the Officer and the Court regarding hardship if returned to South Africa, both in terms of HIV related stigma and risk of discrimination. In my view, both of these, as were his establishment and BIOC, are factually suffused matters in respect of which the Applicant impermissibly asks this Court to engage absent exceptional circumstances in a reweighing and reassessment of the evidence before the H&C Officer. I decline to engage in the reassessment and reweighing requested, noting the determinations of in *Vavilov* and *Doyle* as cited above. While I will not go through a detailed assessment, I have considered these submissions and am not persuaded by them.

C. *Anonymity order*

[29] An order for confidentiality is governed by rule 151(2) of the *Federal Courts Rules*, SOR/98-106, which states:

> **Demonstrated need for confidentiality**
>
> (2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

[30] The Applicant requested an order be made due to concerns that he and/or his family could be subject to HIV-related stigma and discrimination should the Applicant's status become widely known. Given this submission and that the Respondent does oppose such an order, I granted this Order prior to the hearing, which is formalized in this Judgment.

VII. Conclusion

[31] In my respectful view, the Applicant has not established the Officer's decision was unreasonable. Therefore, the Application for judicial review will be dismissed.

VIII. Certified Question

[32] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-6762-21

THIS COURT'S JUDGMENT is that this application is anonymized, the application is dismissed, no question of general importance is certified and there is no Order as to costs.

"Henry S. Brown"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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