Federal Court  Cour fédérale

Date: 20240924

Docket: IMM-9927-23

Citation: 2024 FC 1497

Ottawa, Ontario, September 24, 2024

PRESENT: Madam Justice Azmudeh

BETWEEN:

SIMPHIWE BONGA MATSE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant is seeking a Judicial Review under section 72(1) of the *Immigration and Refugee Protection Act* [IRPA] concerning the rejection of his permanent resident application on humanitarian and compassionate grounds (H&C). The Judicial Review is dismissed for the following reasons.

[2] The Applicant is a citizen of Eswatini (previously known as Swaziland) who sought an exemption from the ordinary requirements of IRPA on H&C grounds. This was after his refugee

claim and subsequent Pre-Removal Risk Assessment were rejected, and the Applicant's removal was suspended because of the restriction of the Covid-19 pandemic. The Applicant largely based his H&C application on the following grounds:

a. Establishment in Canada;
b. Family ties as it would relate to both his establishment in Canada and the Best Interest of two of his four Canadian born Children (BIOC); and
c. Hardship with regards to his return to Eswatini, both for reasons of his political affiliations and mental health.

[3] A Senior Immigration Officer (the "Officer") refused the Applicant's application on June 2, 2023. This decision is now being judicially reviewed.

II. Issues and Standard of Review

[4] The only issue before me is whether the Officer's decision was reasonable.

[5] Reasonableness review is a deferential and disciplined evaluation of whether an administrative decision is transparent, intelligible and justified: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at paras 12-13 and 15 [*Vavilov*]; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21, at paras 8, 63 [*Mason*].

[6] I have started by reading the reasons of the decision-maker in conjunction with the record that was before them holistically and contextually. As guided by *Vavilov*, at paras 83, 84 and 87, as the judge in reviewing court, I have focused on the reasoning process used by the decision-maker. I have not considered whether the decision-maker's decision was correct, or what I would

do if I were deciding the matter itself: *Vavilov*, at para 83; *Canada (Justice) v D.V.*, 2022 FCA 181, at paras 15 and 23. It is not this Court's role to reweigh the evidence.

[7] A reasonable decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrained the decision-maker: *Vavilov*, esp. at paras 85, 91-97, 103, 105-106 and 194; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 SCR 900, at paras 2, 28-33 and 61; *Mason*, at paras 8, 59-61 and 66. For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention.

III. Legislative Overview

[8] The following section of the IRPA is relevant:

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35, 35.1 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35, 35.1 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified	25 (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35, 35.1 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35, 35.1 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le

by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

IV. Analysis

A. *Was the Officer's decision reasonable?*

[9] H&C applications are exceptional in the sense that an applicant requests the Minister to exercise Ministerial discretion to relieve them from requirements in the IRPA. The Supreme Court of Canada in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], citing *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338, confirmed that the purpose of this humanitarian and compassionate discretion is "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* at para 21).

[10] I agree with my colleague, Madam Justice Sadrehashemi in *Tuyebekova v Canada (Citizenship and Immigration)*, 2022 FC 1677 at para 11 that the purpose of humanitarian and compassionate discretion is to "mitigate the rigidity of the law in an appropriate case," and there is no limited set of factors that warrants relief (*Kanthasamy* at para 19):

> The factors warranting relief will vary depending on the circumstances, but 'officers making humanitarian and compassionate determinations must substantively consider and weigh *all* the relevant facts and factors before them" (*Kanthasamy* at para 25 citing *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at paras 74-75 [*Baker*]).

[11] In this case, alike other H&C cases that turn on the facts, context matters. As part of the context, here are the undisputed facts before the Officer:

- the Applicant's entire immigration history was before the Officer, and the Officer knew of the Applicant's failed refugee and Pre-Removal Risk Assessment ["PRRA"] cases;
- On Establishment: The Applicant had stated that he was working for two employers in Canada from October 2014 to July 2017, and that he was a student from December 2012 to June 2013.
- On Hardship regarding mental health issues: The Applicant had provided evidence of mental health treatment from February 28 to March 14, 2016. This was because he was suffering from depression and suicidal ideation. The suicidal ideation subsided within four days of admission into the treatment facility and the Applicant was discharged approximately two weeks later. The Applicant had also submitted prescription receipts for 7 capsules of PMS-Duloxetine 30 mg, with the pharmacy's information sheet that this was an antidepressant medication, dated March 5, 2020, 100 capsules of Cymbalta 60 mg and 30 tablets of Tecta 40 mg dated March 7, 2022. There was also evidence of a very low availability of mental health treatment options in Eswatini.
- On BIOC/hardship: The Applicant had six children, two of whom were in Eswatini and four were born in Canada. Of the Canadian born children, the Applicant had provided evidence pertaining to the two eldest children, who continued to live in Ontario after the Applicant moved to BC following his separation from the children's mother. These two children were placed in foster care after the authorities seized them from their mother's home. The foster parents, in addition to other friends, provided letters of support. The foster parents had stated that after "a months long struggle" [*sic*], they tracked the father

by themselves and arranged for meetings with the children. The Children's Aid Society of Toronto provided a letter advocating for a deferral in the Applicant's removal in Canada. In that letter, the Children's Aid Society stated that they were leading an open child protection investigation due to the mental state of the children's mother and that the Applicant was the only alternative caregiver for the children. The Organisation hoped that the Applicant could return to Toronto to be an active part of a safety plan for the children. The Applicant did not provide evidence or arguments regarding the other two Canadian born children. With respect to the children in Eswatini, the Applicant stated that he would be targeted for having a child with a former Chief's concubine, but no other details were provided.

- On hardship regarding political affiliations: the Applicant had provided a letter from the "Office of the Secretary General" of Eswatini's Peoples United Democratic Movement (PUDEMO), stating that the Applicant was appointed as PUDEMO's representative in "South America, and the Caribbean Region respectively whilst based in Canada".

[12] It is well established that it is not for this Court to reweigh the evidence. In this particular case, I find that the Officer reasonably engaged with the relevant evidence and provided a clear chain of reasoning on how they viewed and weighed them. The Officer opened their reason with the following statement:

> The factors considered in this H&C decision included: degree of establishment in Canada, hardship in Eswatini, best interests of the children, and return to country of nationality. It is to be noted that the burden of proof rests with the applicant; that is, the onus is on the applicant to provide evidence to substantiate all of the grounds in his H&C application. The H&C decision-maker is not required to elicit information on H&C factors and is not required to satisfy

> applicants that such grounds do not exist. The applicant must put forth any H&C factors that they believe are relevant to his H&C application.

(1) Establishment

[13] On establishment, the Officer states the following:

> In support of the applicant's establishment efforts in Canada, the applicant states that he was employed by two employers in Ontario from October 2014 to July 2017 and was a student from December 2012 to June 2013.
>
> While not determinative, it is noted that evidence corroborating such employment or educational efforts has not been provided. Similarly, the applicant has not submitted evidence of their fiscal management nor have they submitted evidence that they have filed income taxes in Canada or similar evidence demonstrating their fiscal establishment while in the country.
>
> In recognizing the limited establishment in Canada, counsel submits that the applicant is "*willing and able to work and should not be put in a disadvantaged position because he abided by the immigration laws to cease working after his status expired*". However, it is noted that the applicant's most recent work permit expired on 14 July 2016, while indicating that he continued to be employed until July 2017. Accordingly, I do not find that the lack of status was necessarily an impediment to the applicant's establishment efforts.

[14] I find that the Officer was alert and alive to the Applicant's employment history and looked at relevant factors to weigh them.

(2) Family ties as it relates to both establishment and BIOC

[15] On Judicial Review, the Applicant is only arguing that the Officer's assessment of the best interests of his two eldest Canadian citizen children was unreasonable. The Officer provides the following reasons in assessing the relationship of the Applicant to his children (I have omitted the children's names to protect their privacy):

The applicant has submitted two undated letters of support from friends in Canada speaking to his positive nature and relation with his children.

While not entirely determinative, in weighing the submitted evidence I find that it does not sufficiently support establishment in Canada, the severing of which would be negatively impacted as to warrant relief.
In the assessment of an H&C application, officers have a statutory obligation to be alert, alive and sensitive to the best interests of any children directly affected by the decision. However, the onus is on the applicant to submit evidence that the application relies in whole, or at least in part on this factor. It is further noted that the legislative codification of this obligation does not mean that these interests will outweigh all other factors in the decision. While the factors affecting children should be given substantial weight, the best interests of a child is only one of many important factors in the consideration of an H&C decision which directly affects a child.

In this regard, the applicant submits that he has four Canadian born children: 11 year old […], 10 year old […], 5 year old […] and 4 year old […]. It is noted that the applicant indicates he has two Eswatini -born minor children currently residing in South Africa, however apart from their names and birthdates, submissions are absent in this regard.

Submissions indicate that the applicant married [the 11 year old and 10 year old's] mother on 07 Oct 2012 and separated in or around January 2016. Submissions include an Order from the Ontario Court of Justice dated 12 May 2020 regarding access the applicant has to [these children], indicating that he has access every second weekend. The order acknowledges that the applicant does not have permanent status in Canada but does not indicate alterations to the order in the event of the applicant's removal from the country.

Submissions include a letter from an intake worker at the Children's Aid Society of Toronto ("CAS") dated 05 May 2022. The letter indicates that there is an "*open child protection investigation with The Children's Aid Society of Toronto*" regarding [the 11 year old and 10 year old's mother] "*mental health and the implications of this concern on her ability to care for the children*". While the applicant states that "*recently* (the mother) *has severe fear for the safety of herself and that of [the children]*", I find that submissions are vague regarding the situation.

Submissions include an undated letter stating that the author was asked by CAS to be [the children's] foster parent for 6 months in 2016 when "*they were seized by the police from their mom*" and that the applicant visited them to provide emotional support during this time. It is noted that neither the court documents nor CAS comments on this incident.
It is recognized that this situation potentially affects the best interests of [these children] and it is given serious consideration. However, despite the letter from CAS dated over a year ago, further evidence since that time from CAS or others involved in [the children's] care has not been submitted, including the results of the CAS investigation, that the situation required [the two children] to be taken into the custody of CAS or other authorities, or that such issues continue to affect the best interests of [the 11 year old child and 10 year old child].

In regards to [the 5 year old child], submissions indicate that the applicant married [the child's] mother on 13 May 2021 and separated on 01 Jul 2021. Submissions include two screenshots of undated video chats between the applicant and [the 5 year old], and a screenshot of an undated text conversation between the applicant and [the child's] mother stating that [the child] was crying about the applicant and the applicant being asked to call [the child]. Evidence from [the five year old's] mother has not been submitted, nor has custody agreements or documentary evidence indicating frequency of contact the applicant had with [this child] or other roles he played in her life after the separation from her mother.

In examining the submitted evidence, apart from the applicant's statement that all of his children "*are devastated that I have to leave Canada*", this is essentially the extent of the evidence regarding [the 5 year old child]. While acknowledging that [this child] misses the applicant, I find that the submitted evidence is insufficient to demonstrate the impact the applicant's removal has had on [the 5 year old's] best interests.

In regards to [the 4 year old], I find that apart from stating that the applicant had a relationship with his mother and that "*currently they are not romantically involved*", submissions are essentially absent regarding the nature of [the 4 year old's] or his mother's relationship with the applicant. Accordingly I find submissions to be insufficient to attribute notable weight to his best interests.

In noting court documents stating that the applicant is to have regular telephone access to [the 11 and 10 year olds], as well as evidence of video chats with [the 5 year old child], the applicant's evidence does not indicate that he has been unable to maintain

> contact from Eswatini through traditional or modern communication technology or that it would be contrary to the best interests of the children to do so.
>
> Submissions do not indicate if or what financial support the applicant has provided to his children in Canada before or since his departure from the country. Similarly, submissions do not include Child support agreements or other financial obligations the applicant has in regards to these children, evidence of such financial support, or implications his removal have had on same regarding the children's best interests.
>
> It is noted that evidence has not been submitted from the mothers of these Canadian born children. Similarly, while noting the letter of the CAS caseworker, it is observed that the applicant has not submitted evidence from the children's teachers, doctors, or other professional sources in Canada indicating that the applicant's removal from the country would, or has been contrary to their best interests.
>
> The positive relationship and emotional support the applicant provided to [the 11 year old, 10 year old and 5 year old] during his time in Canada is recognized and is positively weighed. In doing so, I also find that the lack of submissions regarding the affect the applicant's departure from Canada over a year ago has had on the children does not support how their best interests have been impacted by same.
>
> The codification of the principle of "best interests of a child" in the IRPA requires that it be given substantial weight in the assessment of an application; however, it is only one of many important factors that must be considered. Based on the totality of evidence provided in this H&C application, I am satisfied that the best interests of [the Canadian born children] have been considered, and while continuing to be weighed in the global assessment, this factor in and of itself does not warrant an exemption for the applicant.

[16] I find that the Officer thoroughly assessed the Applicant's evidence and arguments. They gave positive weight to the Applicant's relationship and emotional support and called him on where they though the evidence was insufficient, dated or lacking. Assessing and weighing the relevant evidence is the very essence of the Officer's reasonable exercise of their discretion.

[17] The Applicant is arguing that the Officer ignored some of the relevant evidence, including the oldest Canadian-born children's handwritten notes or the submitted pictures with their father. I disagree with the Applicant's characterization that the Officer had in effect neglected to consider the role of the Applicant towards his kids. The Officer was not obligated to explicitly refer to every piece of evidence (See *Singh v Canada (Citizenship and Immigration)*, 2023 FC 1554 at para 35; *Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 (CanLII) at para 36). The Officer's assessment clearly shows that they did not have concerns over credibility and that the Officer understood a positive relationship existed. The Officer also understood that the Children's Aid Society hoped the Applicant would become more involved in the lives' of the eldest Canadian children. Despite this, the totality of the evidence was insufficient to overcome the Applicant's burden in the context of H&C application. Officers are expected to take the context of the evidence before them into account while exercising their discretion, and this is what the Officer did in assessing this application (*Dargan v Canada (Citizenship and Immigration)* 2024 FC 332 at para 14). The Applicant is in effect wanting this Court to reweigh the evidence.

[18] The Best Interest of the Child analysis requires a "great deal of attention… in light of all the evidence" (*Kanthasamy* at para 39). The Officer thoroughly considered the relevant evidence and provided a clear of chain of analysis.

(3) Hardship: Mental health

[19] The Officer states the following in assessing the relationship of the Applicant to his children:

> The applicant has submitted documentation from the William Osler Health System (WOHS) in Brampton, ON indicating he was admitted at same from 28 Feb 2016 to 14 Mar 2016. This documentation indicates that the applicant was admitted for depression and suicidal ideation, but that such ideation subsided within four days of voluntary admission to the facility, and was discharged after approximately two weeks.
>
> Submissions also include documentation from WOHS dated 29 Aug 2017 indicating the applicant was examined due to depression and anxiety relating to his divorce from his first spouse in Canada. The documentation from WOHS indicates an assessment of Major Depressive Disorder, with the most recent examination suggesting medications including Cymbalta, Seroqiel and Zopiclone.
>
> This most recent document from WOHS mentions a follow-up with the applicant "*in about 4 to 5 weeks*". However, while it has been five years since this most recent incident, evidence regarding such appointments or evidence of further issues regarding his mental health since that time has not been submitted.
>
> While noting submitted Country Condition Evidence ("CCE") from 2020 indicating limited mental health support in Eswatini, evidence has not been submitted indicating that the applicant has required, sought or has been unable to obtain mental health support since his return to his home country over a year ago. Similarly, evidence has not been submitted which demonstrates that the aforementioned recommended medication is unavailable or inaccessible in Eswatini.
>
> While factors concerning the applicant's mental health is given consideration to the extent of the submitted evidence, upon weighing same, I find that it is insufficient to warrant notable weight in the global analysis.

[20] Again, context matters here and the Officer was alert and alive to the fact that the Applicant had a history of mental health struggles and that his treatment took place over a two

week period around seven years prior to the application. The evidence of ongoing need for mental health treatment was scant at best, with a few prescription receipts in 2020 and 2022. In this context, it was reasonable for the Officer to not speculate as to the significance, if any, of those receipts. The Officer engaged with the mental health conditions in Eswatini and analysed the Applicant's situation in a reasonable context. There is no basis for this Court to interfere with the Officer's decision.

(4) Hardship: Political Affiliation

[21] The Officer fully engaged with the Applicant's political affiliation:

> The applicant has submitted an undated letter from the "Office of the Secretary General" of PUDEMO (Peoples United Democratic Movement), stating that the applicant was "*appointed to be the PUDEMO representative in South America, and the Caribbean Region respectively whilst based in Canada*". Evidence from PUDEMO has not been submitted pertaining to the applicant's involvement with the organization prior to this appointment.
>
> While considerations under A96 and A97 of IRPA are excluded in the assessment of this application, I have considered the factors raised by the applicant in the context of hardship upon a return to their home country. In this regard, it is noted that the submitted letter indicates that the above appointment is applicable during the applicant's time in Canada, and the he is also not appointed as a representative to the African region. Neither the letter nor evidence from the applicant indicates intentions or obligations regarding affiliated activities upon returning to Eswatini, nor that the applicant has engaged in or faced hardship relating to such activities a year after returning to the country.

[22] The Applicant argued that the Officer had ignored the objective documentary evidence, namely a document from IRB's National Documentation Package dated 2012, on the persecutory treatment of PUDEMO's members. Again, the Officer was not obligated to explicitly reference every piece of evidence. They provided a rationale for not wanting to speculate on the

Applicant's ongoing activities given the Applicant's silence on the issue. The Applicant had also not provided any evidence on whether the authorities are aware of his affiliation, and the Officer knew of the history of the Applicant's failed refugee claim and PRRA. They offered a clear chain of reasoning in justifying why the Applicant's affiliation was insufficient to overcome the legal burden established by section 25 of IRPA.

V. Conclusion

[23] The Officer's decision engages with the relevant evidence and arguments raised by the Applicant and exhibits the requisite degree of justification, intelligibility, and transparency. The application for judicial review is therefore dismissed.

[24] Neither party proposed a question for certification and I agree that none arises in this matter.

JUDGMENT IN IMM-9927-23

THIS COURT'S JUDGMENT is that

1. The Judicial Review is dismissed.

2. There is no question to be certified.

"Negar Azmudeh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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