Federal Court Cour fédérale

Date: 20241008

Docket: IMM-7339-22

Citation: 2024 FC 1581

Toronto, Ontario, October 8, 2024

PRESENT: Mr. Justice Diner

BETWEEN:

AKIVA BUCHBERG
DOMINIQUE EMMANUELLE ANNE
MARIE DOLO BUCHBERG

Applicants

and

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

Respondent

JUDGMENT AND REASONS

(AS DELIVERED FROM THE BENCH AT TORONTO, ONTARIO
ON OCTOBER 1, 2024)

[1] The Applicants seek judicial review of a decision made by an immigration officer [Officer] refusing their permanent residence [PR] application on humanitarian and compassionate grounds [Decision]. I pronounced my judgment from the bench, granting judicial

review based on the Officer's unreasonable analysis of exceptionality, as well as comments made about alternate immigration routes. I promised written reasons, which follow.

[2] The Applicants are citizens of France and Israel. Their only son is a Canadian citizen and resides in Canada with his spouse and stepdaughter.

[3] The Applicants came to Canada in 2009 and have remained in Canada since, with work permits and/or visitor status for much of that time. However, they never acquired PR and fell out of status. Based on the record provided to the Officer, they have established various successful businesses here and have been heavily involved with their community. They therefore filed an application for PR on humanitarian and compassionate grounds [H&C] based on their ties and establishment in Canada, the consequences they would face if they were to be separated from their relatives, and the hardship they would face should they be forced to return to France. That H&C application was refused, against which Decision they brought this judicial review.

[4] The sole issue before the Court in this application for judicial review is whether the Officer's Decision to refuse their PR application on H&C grounds was reasonable (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 99 [*Vavilov*].

[5] The Applicants focused their case on the basis that that the Officer erred (i) by applying an incorrect standard, stating that an H&C application is an "exceptional measure," and (ii) by erroneously assuming that the Applicants could obtain their PR status through parental sponsorship or could extend their temporary resident status in order to remain in Canada.

[6] I agree with the Applicants that the Officer applied an incorrect standard in stating that an H&C application is an "exceptional measure." As recently held by my colleague Justice Ahmed in *Henry-Okoisama v Canada (Citizenship and Immigration)*, 2024 FC 1160 [*Henry-Okoisama*], in evaluating H&C applications, officers must exercise their discretion by taking into account both the humanitarian and the compassionate considerations and "requiring a person to demonstrate that their circumstances are 'exceptional' does not accord with this approach" (at paras 44–45). Justice Ahmed further notes:

> [45] […] The implication of this position is that the failure to meet this requirement is a designation of one's circumstances as not exceptional—as unexceptional. Aside from the subjectivity bound up in the word "exceptional," no one—including an immigration officer, this Court, or others—can meaningfully commit to another's humanity and act with compassion when they view others' circumstances through the lens of "exceptional" or "unexceptional," "extraordinary" or "expected," " "remarkable" or "banal". This approach amounts to evaluating an H&C application through a test that is disjunctive, analytically unsound, and antithetical to the very words of the exemption prescribed by section 25(1) of the statute.

[7] As Justice Battista wrote, following *Henry-Okoisama*, "aside from its disconnection from section 25's H&C criteria, the threshold of "exceptional or unusual" is highly vague and subjective to the point of unintelligibility" (*Ganeshalingam v Canada (Citizenship and Immigration)*, 2024 FC 1437 at para 54 [*Ganeshalingam*]).

[8] Here, the Officer stated that "H&C is an exceptional measure", that the "applicants' situation is similar to a lot of other aging parents who have children living in Canada" and that they "did not find that this is an exceptional situation to the applicant and his spouse." This reasoning falls into the error Justices Ahmed and Battista warned against in *Henry-Okoisama*

and *Ganeshalingam* respectively, in that it equates to unreasonable finding that the Applicants have to prove that their circumstances are "exceptional" in order to warrant an H&C finding.

[9] While this error is in and of itself fatal to the Decision, I note in addition that this Court has found that it is an error for an officer to suggest that any kind of temporary residency or a parental sponsorship application are appropriate as a substitute to permanent residency, without at minimum addressing an applicant's submissions regarding the limitations and uncertainty of these streams, which the Applicants provided in this case (see for instance *Rocha v Canada (Minister of Citizenship and Immigration)*, 2022 FC 84 at para 36; and more recently, *Farooq v Canada (Citizenship and Immigration)*, 2023 FC 1391 at para 16; and *Tramosljanin v Canada (Citizenship and Immigration)*, 2022 FC 1378 at para 18,).

[10] Here, the Officer stated that while "I understand that Family Class applications may be unpredictable, I note that this has not separated the applicants and their families so far. As mentioned previously, the applicants have the option of renewing their work permits or visitor statuses while waiting for their sponsorship application, if they wished to do so. Furthermore, the applicants have successfully obtained visas to come to Canada throughout the years."

[11] However, in support of their H&C, both counsel, and the Applicants in their respective Affidavits, made it clear that the Applicants were at the time of their application 68 and 72 respectively and acquiring such status was thus a challenge. Indeed, the whole basis for their H&C application was the fact that their status had been uncertain and/or non-existent for parts of their stay in Canada, and the sponsorship route was not open to them under the lottery system at

the time (Application Record at p. 29). At page 11 of their extensive submissions, counsel explained at length why the Applicants would "not qualify under any other immigration program."

[12] For these Reasons, the Decision is unreasonable and will be returned for reassessment by another officer.

JUDGMENT in IMM-7339-22

THIS COURT'S JUDGMENT is that:

1. The judicial review is granted.

2. The matter will be remitted to a different officer for redetermination.

3. There is no question to certify.

4. No costs will issue.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7339-22
STYLE OF CAUSE:	AKIVA BUCHBERG ET AL v MCI
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 1, 2024
JUDGMENT AND REASONS:	DINER J.
DATED:	OCTOBER 8, 2024

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