Federal Court Cour fédérale

Date: 20241024

Docket: IMM-9625-23

Citation: 2024 FC 1698

Ottawa, Ontario, October 24, 2024

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

TIBOR SALLAI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Tibor Sallai, seeks judicial review of a decision of a Senior Immigration Officer (the "Officer") of Immigration, Refugees and Citizenship Canada ("IRCC") dated July 13, 2023 refusing his application for permanent residence on humanitarian and compassionate ("H&C") grounds pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] The Applicant submits that the Officer's decision is unreasonable. According to the Applicant, the Officer erred by conducting a refugee analysis rather than an H&C analysis. The Officer's assessment of potential hardship upon the Applicant's return to Hungary and the best interests of the child ("BIOC") were therefore fundamentally flawed.

[3] I agree with the Applicant. The Officer's decision is unreasonable. This application for judicial review is granted.

II. **Facts**

A. *Background*

[4] The Applicant is citizen of Hungary. He is visibly Roma. Throughout his years in Hungary, he experienced anti-Roma discrimination.

[5] In 2011, the Applicant travelled to Canada and submitted a refugee claim. His claim was refused in 2015.

[6] In 2019, the Applicant was detained by the Canada Border Services Agency.

[7] The Applicant applied for a Pre-Removal Risk Assessment, which was refused in 2020. He then applied for permanent residence on H&C grounds. This application was refused in 2022.

[8] The Applicant successfully challenged the refusal of his permanent residence application, resulting in the matter being returned to IRCC in 2023.

[9] During this time, the Applicant worked, attended church, and formed relationships with friends and family in Canada.

[10] In 2023, the Applicant's nephew was deported from Canada, causing severe emotional distress for his nephew's son, FS. Since then, the Applicant has provided emotional support for FS, his grandnephew.

B. *Decision under Review*

[11] In a decision dated July 13, 2023, the Officer refused the Applicant's application for permanent residence on H&C grounds.

[12] With respect to hardship upon return to Hungary, the Officer determined that, although "there is a widespread racist anti-Roma sentiment and discrimination against the Romani population in Hungary," the Applicant "has not established a link between the general situation faced by the Roma community and his personal circumstances." The Officer also found that there was insufficient evidence of employment discrimination, housing discrimination, or a lack of healthcare options in Hungary for the Applicant.

[13] With respect to the BIOC analysis for FS, the Officer was "satisfied that the [A]pplicant helps provide emotional support to [FS] in Canada" and "[t]he submissions indicate that [the

A]pplicant has created a deep emotional bond" with FS following the deportation of FS' father. However, the Officer found that "there has been insufficient objective evidence…to demonstrate that alternative arrangements cannot be arranged," concluding that "it has not been established that the relationship between [A]pplicant and child…warrants more than modest consideration for this factor."

[14] For these reasons, the Officer refused the Applicant's permanent residence application pursuant to subsection 25(1) of the *IRPA*.

III. **Issue and Standard of Review**

[15] The sole issue in this application is whether the Officer's decision is reasonable.

[16] The parties submit that the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paras 16–17, 23–25). I agree.

[17] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13; 75; 85). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A decision that is reasonable as a whole 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). Whether a decision is reasonable depends on the relevant

administrative setting, the record before the decision maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[18] 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. A reviewing court must refrain from reweighing evidence before the decision maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100).

IV. **Analysis**

[19] The Applicant submits that the Officer erred by undertaking a refugee analysis pursuant to sections 96 and 97 of *IRPA* rather than an H&C analysis pursuant to section 25. The Applicant further submits that the Officer mischaracterized the evidence before them. Lastly, the Applicant submits that the Officer applied an inappropriately high threshold in the BIOC analysis for FS, focusing on hardship and negative impacts rather than which outcome would be in FS's best interests.

[20] The Respondent submits that the Applicant has failed to demonstrate that the decision is unreasonable. The Respondent submits that the Applicant seeks an indefinite stay in Canada and that his submissions amount to a request to reweigh the evidence in order to obtain the outcome that he desires.

[21] I agree with the Applicant.

[22] The Applicant rightly notes that the Officer undertook a refugee analysis rather than an H&C analysis. As held by Justice Gleason, then of this Court:

> The officer's role in an H&C analysis is to assess whether an individual would face "unusual and undeserved or disproportionate hardship" if required to apply for permanent residence outside of Canada. It is both incorrect and unreasonable to require, as part of that analysis, that an applicant establish that the circumstances he or she will face are not generally faced by others in their country of origin. Rather, the frame of analysis for H&C consideration has to be that of the individual him or herself, which involves consideration of whether the hardship of leaving Canada and returning to the country of origin would be undue, undeserved or disproportionate. (*Diabete v Canada (Citizenship and Immigration)*, 2013 FC 129 ("*Diabete*") at para 36).

[23] The Officer commits the error identified in this passage. The decision states that the Applicant's permanent residence application was refused because he failed to establish that he would "face personalized risk of persecution" or that his "circumstances are unusual in comparison to the situation of others." Despite the Respondent's submissions to the contrary, it is evident that the Officer refused the Applicant's request for H&C relief under the comparative analytical framework reserved for refugee claims pursuant to section 96 of *IRPA*. This is a reviewable error (*Shah v Canada (Citizenship and Immigration)*, 2011 FC 1269 at paras 70-73; *Diabete* at para 36; *Miyir v Canada (Citizenship and Immigration)*, 2018 FC 73 at paras 21-22). It is also an error to require the Applicant to prove his circumstances were unusual, as "[a]scribing neutral or negative weight to factors in an H&C application because an individual's circumstances are comparable to others necessitates that an individual's circumstances must be unlike others to have positive weight ascribed. The individual's circumstances must therefore be

"exceptional" to be granted positive weight. This is an incorrect threshold" (*Cheng v Canada (Citizenship and Immigration)*, 2024 FC 560 at para 21).

[24] Moreover, I agree with the Applicant that the Respondent misapprehended the evidence before them. Despite clear evidence of the hardship the Applicant has faced as a Roma man in Hungary, the Respondent describes the Applicant's submissions as "self-serving pessimistic speculation" amounting to little more than his own "say-so." These disparaging comments are unintelligible in light of the evidentiary record. I am unpersuaded by them.

[25] I am similarly unconvinced that the Officer's analysis of hardship upon return is justified in light of the facts (*Vavilov* at para 99). The evidence before the Officer was that the Applicant has experienced pervasive anti-Roma discrimination throughout his time in Hungary, including at school, at work, and in his social life. The Officer's statement that these experiences are not connected to "the general situation faced by the Roma community" is tenuous, particularly in light of the Officer's own concession that "there is a widespread racist anti-Roma sentiment and discrimination against the Romani population." The Officer's failure to account for the entirety of the evidence and address material that directly contradicts their conclusions demonstrates a fundamental mischaracterization of the record (*Orosz v Canada (Citizenship and Immigration)*, 2017 FC 1189 at para 10; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC) at para 17; *Vavilov* at para 126).

[26] Furthermore, I find that the Officer committed several errors in the BIOC assessment for FS. The Officer effectively concludes that FS's best interests would not be jeopardized since he would continue to "receive the minimum requirements of care," an approach that is antithetical

to the purpose of the BIOC analysis (*Bozik v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 69 at para 14). Moreover, FS himself stated that he and his mother are in considerable emotional pain and that the Applicant is the only relative he has in Canada. The Officer's analysis is not justified in light of this factual constraint (*Vavilov* at para 99). Finally, the Officer's conclusion that there was insufficient evidence that FS's best interests would be jeopardized if the Applicant were to be removed from his life is insufficiently responsive to the considerable evidence on the record of the severe consequences that such a removal would have on FS. The Officer was obliged "examine the interests of the child directly impacted "with a great deal of attention"" (*Yu v Canada (Citizenship and Immigration)*, 2021 FC 1236 at para 34; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 39, citing *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 31). The decision demonstrates that the Officer failed to uphold this obligation.

V. **Conclusion**

[27] The Officer's decision is unreasonable. It is not justified in light of its legal and factual constraints or its consequences upon the Applicant (*Vavilov* at paras 85, 105, 135). I grant this application for judicial review and quash the Officer's decision. Given the procedural history of this case, I am directing that the matter be redetermined in accordance with these reasons on an expedited basis.

[28] No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-9625-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.

2. The decision is quashed and the matter remitted to a different decision-maker for redetermination in accordance with these reasons on an expedited basis.

3. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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