Federal Court  Cour fédérale

Date: 20200407

Docket: IMM-4533-19

Citation: 2020 FC 494

Ottawa, Ontario, April 7, 2020

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

SHINHEE CHOI

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a June 25th 2019 decision in which the Officer declined the Applicant's request for permanent residence on humanitarian and compassionate [H&C] grounds and for a temporary resident [TR] permit pursuant to s 24(1) and s 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] For the reasons that follow, the application is dismissed.

II. **Background**

[3] The Applicant, Mr. Choi, is a citizen of South Korea who at the age of 30 came to Canada in 2007 on a student visa. He obtained a 2-year Diploma as an Aviation Technician and was granted a Work Permit which expired in March 2014. From May 2011 to November 2013 he worked as an electronic technician and from January 2014 to February 2014 as a kitchen helper. Since March 2014 or October 2015, depending on his submissions in his H&C application and in an application for criminal rehabilitation, he has worked as a self-employed contractor or handyman.

[4] The Applicant married a Canadian citizen in 2012 who sponsored him for permanent residency in 2014. The application was approved in principle in 2015. However, the Applicant had failed to disclose in his several applications to enter or remain in Canada that he had been convicted twice for drunk driving in South Korea, once in 2004 and then again in 2006. These convictions were discovered during the second stage processing of his spousal application via a South Korean police certificate. As a result, the Applicant was found to be criminally inadmissible. His marriage came to an end shortly thereafter and he was required to leave the home of his spouse and her family.

[5] On October 6th 2016, the Minister of Citizenship and Immigration refused the spousal sponsorship. The Applicant was given 60 days to depart Canada but did not leave as required. He was then found to be inadmissible for non-compliance per section 41(a) of the IRPA and was

issued an exclusion order on November 29th 2017. In the meantime, the Applicant filed an H&C application on November 23rd 2017. A Pre-Removal Risk Assessment was negative.

[6] While the Spousal application for permanent residency was being processed, the Applicant applied for criminal rehabilitation. That application was refused due to missing documentation. On November 22nd 2017, the Applicant provided a second application for criminal rehabilitation. On May 29th 2018, the second application for criminal rehabilitation was granted. As a result, the Applicant was no longer criminally inadmissible for his drunk-driving convictions. However, he remained inadmissible for his non-compliance with IRPA.

[7] At the time of his H&C application the Applicant had been living in Canada for 12 years. He has family in both Canada and South Korea. In Canada, the Applicant is close to his younger sister who has two children, who were respectively 19 and 21 at the time of the H&C Application. The father of these children lives in South Korea, and the Applicant has been a fatherly figure to them. At the time of the H&C application, the Applicant lived with his sister and his nephew. His niece was studying in the United States.

III. **Decision under review**

[8] On June 25th 2019, an Officer declined the Applicant's application for permanent and temporary residency on H&C grounds. In reviewing the H&C application, the Officer assessed the Applicants' personal circumstances and establishment in Canada, and the best interests [BIOC] of his sister's children. As such, the Officer considered that since the Applicant's niece and nephew were now adults and that no link of interdependency had been established, the

assessment of the BIOC was not applicable. Moreover, the Officer gave little weight to the psychological assessments adduced on behalf of the Applicant and concluded that he would face limited hardship from his re-establishment in South Korea since he had family ties and a lengthy prior residence in South Korea (to the age of 30). Finally, the Officer considered the adverse immigration history of the Applicant. Although the Officer considered as a positive factor the Applicant's establishment in Canada, the Officer concluded that the circumstances did not justify a humanitarian and compassionate exemption under s 25 of IRPA. The Officer also refused the temporary resident permit request under s 24 of IRPA.

IV. **Issues**

[9] The parties are in agreement and I accept that there are three issues to be determined. I have rephrased them as follows:

a) Did the Officer fail to take into account the BIOC of the adult niece and nephew of the Applicant?

b) Did the Officer fail to take into account the psychological impact of the removal from Canada?

c) Did the Officer err by taking into account the Applicant's immigration history as a negative factor?

V. **Analysis**

A. *Standard of review*

[10] As determined by the prior jurisprudence and confirmed by *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the H&C Decision is

reviewable on a standard of reasonableness. None of the situations set out in *Vavilov* for departing from the presumption of reasonableness review apply here: the legislature has not statutorily prescribed a standard of review or provided for an appeal from the administrative decision to a court and the question on review does not fall into one of the categories of questions that the rule of law requires to be reviewed on a standard of correctness.

[11] As stated by the Supreme Court in *Vavilov*, at para 84, 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", seeking to understand the reasoning process followed by the Officer to arrive at a conclusion. 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.

B. *The Best Interests of the Children*

[12] As mentioned, the niece and nephew were 19 and 21 years of age at the time of the H&C application. The Applicant argues that the Officer erred in concluding that the BIOC analysis did not apply, noting, among other points, that the Respondent's own website stated that BIOC considerations may be relevant for adult children.

[13] Generally speaking, the BIOC analysis applies to children under the age of 18 years: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*]. There may be circumstances where a BIOC analysis is appropriate for an adult child but these would be cases of special needs or other significant dependency on the applicant: *Chaudhary v Canada*

(Immigration, Refugees and Citizenship), 2018 FC 128 [*Chaudhary*] at paras 32-34; *Gesite v Canada (Citizenship and Immigration)*, 2017 FC 1025 at paras 15-19.

[14] In such cases, the onus is on the applicant to establish the dependency. Here, the Applicant failed to demonstrate that his niece and nephew depended on him in a way that they ought to be considered as underage children. Nothing in the record implies such a relationship of dependency. The niece and nephew are to be commended for their achievements in their studies but there is nothing to indicate that they will be unable to continue their successes without his presence and support in Canada.

[15] There is no doubt that the Applicant has had an important and close relationship with his sister's children but no evidence has been adduced to the effect that they are financially or otherwise dependent on the Applicant. The Officer made no error in concluding that their interests was not a consideration to be given significant weight.

C. *The Assessment of the Psychological Reports*

[16] In support of his H&C application, the Applicant submitted two reports; one by a clinical psychologist and psychoanalyst and another by a registered psychotherapist. The Applicant submits that the Officer erred in assessing these reports by ignoring the evidence of significant distress, depressive affect and hyper-vigilance associated with the possibility of being forced to leave Canada. The Applicant submits that the Officer should have appreciated the implications of a medical professional's opinion in analysing the hardship the Applicant would suffer from being forced to leave the country.

[17] I agree with the Respondent that the Officer's analysis of the psychological assessments is reasonable, transparent, intelligible and justified. The Officer did reasonably accept that the Applicant exhibits symptoms of depression, anxiety and stress. However, the Officer also reasonably concluded that he could only ascribe little weight to the assessments because of the methodology employed and the lack of a diagnosis, unlike in *Kanthasamy*, above.

[18] As acknowledged by the psychologist in his report, the context of how the assessments were conducted and the limits on the information provided diminished their significance. The Officer noted that both assessments were based on only one interview and at the behest of counsel, and the psychologist did not have access to previous medical or psychological records.

[19] This Court has expressed concern about psychological reports that lack sufficient background and methodology and veer into advocacy. See for example: *Chehade v Canada (Citizenship and Immigration)*, 2017 FC 293 at paras 14-15; *Su v Canada (Citizenship and Immigration)*, 2019 FC 1052 at para 34; *Molefe v Canada (Citizenship and Immigration)*, 2015 FC 317 at para 31; *Egbesola v Canada (Citizenship and Immigration)*, 2016 FC 204 at paras 12-15.

[20] The clinical observations of symptoms associated with depression and anxiety were consistent with the inevitable hardships associated with leaving Canada. This alone will not generally be sufficient to warrant relief on H&C grounds: *Kanthasamy* at para 23. The Officer reasonably assessed the evidence adduced, appropriately considered its value and assigned

weight according to the lack of sufficient methodology. I see no reason to interfere with that finding.

D. *The Immigration History of the Applicant*

[21] The Applicant submits that the Officer discounted all of the Applicant's positive H&C factors due to his negative immigration history and lack of compliance with IRPA. The purpose of s 25(1) of IRPA, the Applicant argues, is to enable foreign nationals who are inadmissible or who do not meet the requirements of the Act or its Regulations to apply for permanent residence. By drawing negative inferences from his immigration history and his lack of compliance with IRPA, the Applicant asserts the Officer defeated that purpose.

[22] In my view, it was reasonable for the Officer to consider the Applicant's negative immigration history. The Applicant provided inaccurate declarations on his multiple visa applications relating to his criminal history and did not leave Canada when instructed to do so. His repeated expressions of remorse appear to relate to that criminal history rather than his failure to comply with the Act and Regulations. The Officer did not discount the Applicant's positive factors, but arrived at the reasonable conclusion that they did not warrant a positive outcome for the Applicant.

[23] As the Federal Court of Appeal stated in *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125at para 19:

> [19]In short, the Immigration Act and the Canadian immigration policy are founded on the idea that whoever comes to Canada with the intention of settling must be of good faith and comply to the

> letter with the requirements both in form and substance of the Act. Whoever enters Canada illegally contributes to falsifying the immigration plan and policy and gives himself priority over those who do respect the requirements of the Act. **The Minister, who is responsible for the application of the policy and the Act, is definitely authorized to refuse the exception requested by a person who has established the existence of humanitarian and compassionate grounds, if he believes, for example, that the circumstances surrounding his entry and stay in Canada discredit him or create a precedent susceptible of encouraging illegal entry in Canada**. In this sense, the Minister is at liberty to take into consideration the fact that the humanitarian and compassionate grounds that a person claims are the result of his own actions.
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> [Emphasis added]

[24] See also *Shackleford v Canada (Citizenship and Immigration)*, 2019 FC 1313 at paras 23-25; *Nguyen v Canada (Citizenship and Immigration)*, 2017 FC 27 at paras 32-33; *Madera v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 108 at para 9; *Cortorreal De Leon v Canada (Immigration, Refugees and Citizenship)*, 2016 FC 1178 at para 31.

VI. **Conclusion**

[25] The Officer's analysis was transparent and intelligible and the reasoning justified throughout. The Applicant's negative immigration history was considered in light of all of the positive factors. The psychological assessments and the interests of the Applicant's niece and nephew were given appropriate consideration. In light of the record that was in front of the Officer, the Officer could reasonably reject the Applicant's H&C application.

[26] No serious questions of general importance for certification were proposed.

JUDGMENT IN IMM-4533-19

THIS COURT'S JUDGMENT is that the application is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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