Federal Court  Cour fédérale

Date: 20211125

Docket: IMM-4594-20

Citation: 2021 FC 1301

Ottawa, Ontario, November 25, 2021

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

EDUARDO PALENCIA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Eduardo Palencia [Mr. Palencia], seeks judicial review of the August 28, 2020 decision of a Senior Immigration Officer [the Officer]. The Officer refused Mr. Palencia's application for permanent residence which he sought based on humanitarian and compassionate [H&C] grounds pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] For the reasons that follow, the Application is dismissed. The Court does not find any error in the Officer's assessment of the evidence or the exercise of discretion that would render the decision unreasonable.

I. Background

[3] Mr. Palencia is a citizen of Guatemala. He first arrived in Canada with his family in 1990 at the age of two, but returned to Guatemala following the rejection of his family's refugee claim. He remained in Guatemala until the age of approximately ten, when he arrived in Canada to join his parents. The family was granted permanent resident status in 2000.

[4] Mr. Palencia recounts some difficulty adapting in Canada, attributed in part to his previous separation from his parents. In 2006, Mr. Palencia was charged with aggravated assault, based on his participation with others in an assault on a store clerk. He pled guilty and received a conditional sentence of six months followed by eighteen months' probation. Mr. Palencia recounts that while in pretrial custody he pursued his education and participated in rehabilitation programs.

[5] In March 2008, Mr. Palencia was found to be inadmissible to Canada on grounds of serious criminality, pursuant to paragraph 36(1)(a) of the Act. In March 2009, a deportation order was issued. Mr. Palencia appealed the deportation order.

[6] In June 2012, the Immigration Appeal Division of the Immigration and Refugee Board [IAD] granted Mr. Palencia a three-year stay of his deportation based on humanitarian and compassionate grounds and imposed conditions.

[7] In December 2013, Mr. Palencia was found in possession of marijuana and fled police custody during his arrest. He recounts that he panicked because he feared the immigration consequences of his arrest.

[8] On May 1, 2014, the IAD cancelled Mr. Palencia's stay of deportation due to several breaches of the conditions of his stay, including his failure to report changes of address and to appear at interviews and at his hearing. The IAD also noted the pending charges from December 2013. Mr. Palencia was ultimately arrested by the Canada Border Services Agency over four years later, on May 10, 2018.

[9] Mr. Palencia's pre-removal risk assessment was refused on July 18, 2018. He then applied for permanent residence based on H&C grounds on July 24, 2018.

[10] Mr. Palencia was deported to Guatemala on August 30, 2018.

II. The Decision

[11] Mr. Palencia sought an H&C exemption to overcome his inadmissibility to Canada based on his establishment, family ties and the best interests of his daughter.

[12] The Officer noted Mr. Palencia's immigration history, including that he is inadmissible to Canada for serious criminality and had been deported.

[13] The Officer commented that in the two years since Mr. Palencia's deportation, he had not submitted any new evidence or updates indicating that his fears about returning to Guatemala were justified or that he was experiencing hardship in Guatemala.

[14] The Officer also noted that Mr. Palencia had breached the conditions of his stay of deportation and had evaded the immigration authorities until his arrest in 2018. The Officer concluded that despite the chances Mr. Palencia had been given, he continued to disregard court orders.

[15] The Officer accepted that most of Mr. Palencia's family—including his parents, siblings, daughter and common law spouse—reside in Canada and that their family ties were strong. The Officer noted that, while not ideal, it was possible to maintain contact with family via technological means and periodic visits. The Officer found that there was little evidence provided to indicate that the family ties or Mr. Palencia's common law relationship had been severed, or that the family was no longer supporting him since his removal. The Officer added that Mr. Palencia's common law spouse could sponsor him from abroad under the Family Class if he obtained an Authorization to Return to Canada.

[16] The Officer accepted that Mr. Palencia was well established in Canada. The Officer acknowledged the many positive letters of support from family and friends, but found that

several supporters were poor influences on Mr. Palencia's conduct in evading the authorities and breaching his conditions.

[17] With respect to the best interests of the child [BIOC], the Officer noted that Mr. Palencia's daughter was ten years old, and lives with her mother. The Officer acknowledged that Mr. Palencia's daughter misses him but added that there was no evidence about how his daughter had been affected since his deportation. The Officer also acknowledged that while it is not the same as having her father present, Mr. Palencia's family in Canada could provide his daughter with love, care, and support in coping with the separation and assisting her in keeping in touch with her father. The Officer found that, considering that Mr. Palencia's daughter had always lived primarily with her mother, from whom Mr. Palencia had been separated since his daughter was two years old, she would not be severely affected by the refusal of the H&C application. The Officer concluded that it was in the best interests of Mr. Palencia's daughter to remain in the care of her mother.

[18] After consideration of all the circumstances, the Officer found that the exemption based on H&C grounds was not justified.

III. The Applicant's Submissions

[19] Mr. Palencia argues that the decision is unreasonable because the Officer focussed on his inadmissibility to Canada rather than the positive factors to support an H&C exemption to overcome this inadmissibility. The Officer failed to meaningfully consider his establishment in Canada, including the many letters of support attesting to his positive attributes; the Officer erred

in the assessment of the BIOC; and the Officer's reasons do not show a compassionate approach or a chain of analysis to explain why the H&C factors do not justify the exemption.

[20] Mr. Palencia submits that the Officer erred by focussing on his inadmissibility and his mistakes, which are the very reasons why the H&C exemption is needed (*Sivalingam v Canada (Citizenship and Immigration)*, 2017 FC 1185 [*Sivalingam*]). He argues that the Officer failed to consider the totality of the evidence, including that the IAD stayed his removal based on H&C considerations—notably his establishment, rehabilitation, and the best interests of his daughter. He submits that he respected many of the conditions of his stay of deportation, until he faced additional charges in 2013.

[21] With respect to his establishment, Mr. Palencia submits that the Officer failed to consider his 18 years in Canada, the impact of separation from his family and the many letters of support for him. Mr. Palencia further submits that in failing to consider this evidence, the Officer failed to adopt a compassionate perspective (*Salde v Canada (Minister of Citizenship and Immigration)*, 2019 FC 386; *Nagamany v Canada (Minister of Citizenship and Immigration)*, 2019 FC 187 [*Nagamany*]).

[22] Mr. Palencia further submits that the Officer's assessment of the best interests of his daughter was flawed because it discounted the strong bond between them and focussed on the availability of alternative caregivers, contrary to this Court's guidance in *Sivalingam*.

[23] More generally, Mr. Palencia argues that the Officer's reasons does not reflect the hallmarks of a reasonable decision because the Officer merely recites information without any analysis. Mr. Palencia submits that the Officer's "noting" of the evidence does not explain why the H&C factors were not sufficient to warrant the exemption.

IV. The Respondent's Submissions

[24] The Respondent submits that the Officer's reasons are transparent and intelligible. The Respondent notes that the reasons are not held to a standard of perfection, and the Officer is presumed to have considered all of the evidence absent indications to the contrary. The Respondent argues that Mr. Palencia essentially takes issue with the weighing of the evidence.

[25] The Respondent argues that the Officer assessed the evidence of establishment but was not convinced that this outweighed Mr. Palencia's criminal history and evasion of the immigration authorities. The Respondent submits that the Officer was entitled to consider criminal history (*Williams v Canada (Citizenship and Immigration)*, 2020 FC 8 [*Williams*]) but did not unduly focus on this and considered the positive features of Mr. Palencia's establishment.

[26] The Respondent further submits that the Officer was alert, alive, and sensitive to the best interests of Mr. Palencia's daughter but was not convinced that the BIOC warranted the H&C exemption. The Respondent argues that the Officer considered the relevant evidence and focused on how Mr. Palencia could maintain his relationship with his daughter, not on alternate caregivers.

V. The Issues

[27] The issue is whether the Officer's decision is reasonable. This entails consideration of the issues raised by Mr. Palencia: whether the Officer's assessment of his establishment was reasonable; whether the Officer erred in the analysis of the BIOC; and whether the Officer's decision meets the *Vavilov* standard of reasonableness—i.e., whether the reasons are transparent, justified and intelligible.

VI. The Standard of Review

[28] H&C decisions, which are discretionary decisions, are reviewed on the reasonableness standard (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 57–62, 174 DLR (4th) 193 [*Baker*]; *Kanthasamy v Canada (Citizenship and Immigration*), 2015 SCC 61 at para 44 [*Kanthasamy*]).

[29] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16, 23 [*Vavilov*], the Supreme Court of Canada confirmed that reasonableness is the applicable standard of review for discretionary decisions. The Supreme Court provided extensive guidance to the courts in reviewing a decision for reasonableness.

[30] 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 paras 85, 102, 105–07). The court does not assess the reasons against a standard of perfection (*Vavilov* at para 91).

[31] In *Vavilov*, at para 100, the Supreme Court of Canada noted that decisions should not be set aside unless there are "sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" and that "[t]he court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable".

VII. The Decision Is Reasonable

A. *H&C Decisions are Discretionary and Exceptional*

[32] For context, it is important to note the purpose of an H&C exemption and the jurisprudence regarding what constitutes a reasonable decision, i.e., one that is rational and coherent, transparent, intelligible, and justified by the facts and the law.

[33] Section 25 of the Act provides that an exemption from some findings of inadmissibility and from other criteria or obligations of the Act may be granted on the basis of H&C considerations. This discretionary relief provides an exemption from the otherwise applicable legal requirements and is commonly referred to as "exceptional". In the present case, the exemption, if granted, would overcome Mr. Palencia's inadmissibility to Canada.

[34] In *Kanthasamy*, the Supreme Court of Canada explained that what warrants relief under section 25 varies depending on the facts and context of each case.

[35] The onus is at all times on an applicant to establish with sufficient evidence that the exemption should be granted. Officers assessing H&C applications must consider and weigh all the relevant factors and be satisfied that the relief is justified in the particular circumstances (*Kanthasamy* at para 25).

[36] The determination of whether an H&C exemption is justified is based on a global assessment of all relevant factors. An Officer could find several positive factors yet still conclude that the exemption is not warranted. There is no rigid formula or score assigned to each factor. The weight given to each factor or consideration is within the Officer's discretion and it is not the role of the Court to reweigh.

[37] The jurisprudence post-*Kanthasamy* is consistent in finding that the H&C exemption is discretionary and exceptional relief, that some hardship is the normal consequence of removal and, on its own, does not support the exemption, and that more than a sympathetic case is required to justify the exemption (see for example *Shackleford v Canada (Citizenship and Immigration)*, 2019 FC 1313 at paras 11–12, 16 [*Shackleford*]; *Huang v Canada (Citizenship and Immigration)*, 2019 FC 265 at paras 17–19 [*Huang*]).

[38] In *Huang*, the Chief Justice noted at para 19 that "[a]ccordingly, 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 <u>that are greater than those typically faced by others who apply for permanent residence in Canada</u>" [emphasis in the original].

B. *No Updated Information Was Provided*

[39] The Officer noted that there was no updated information provided in support of Mr. Palencia's H&C application since 2018. The Officer did not make any negative findings based on the lack of updated information, but rather noted this as a fact in the assessment of the available evidence. The Court has assessed the reasonableness of the decision based on the evidence on the record before the Officer.

C. *The Officer Reasonably Assessed Mr. Palencia's Establishment*

[40] The Officer assessed all the evidence related to Mr. Palencia's establishment.

[41] With respect to Mr. Palencia's serious criminality—which is the reason he was found inadmissible and the reason he now seeks an H&C exemption—I do not agree that this consideration was paramount or that Mr. Palencia would never have been able to overcome his inadmissibility based on the Officer's approach.

[42] The jurisprudence has established that the reason for inadmissibility to Canada cannot be the determinative factor in an H&C application as that would render the exemption pointless. However, the underlying reason the exemption is necessary is a relevant consideration and the weight attached to it is for the officer to determine.

[43] In *Lopez Bidart v Canada (Citizenship and Immigration)*, 2020 FC 307, the Court noted this principle at para 32:

> It is important to recall that the very reason an applicant is seeking H&C relief is that they are inadmissible to Canada or do not meet the requirements of the law for some reason. The reason why the person finds themselves in this situation is obviously a relevant consideration, and it must be given due weight in the analysis. It must not, however, eclipse adequate consideration of the nature and extent of the legal obstacles to admissibility (per *Jugpall and Patel v Canada (Citizenship and Immigration)*, 2019 FC 394 at para 12), as well as the considerations which weigh in favour of granting relief.

[44] In *Williams*, the Court also found that officers are entitled to consider a disregard for Canadian law and court-imposed obligations as a relevant factor in H&C applications.

[45] In the present case, the Officer did not dwell on the reason for Mr. Palencia's inadmissibility to Canada, which was his aggravated assault conviction in 2007; rather, the Officer considered Mr. Palencia's conduct following his stay of deportation and the breach of his conditions, including his evasion of arrest following the December 2013 charges.

[46] Although Mr. Palencia submits that *Sivalingam* is analogous, the role of the Court is to determine if the Officer's decision with respect to Mr. Palencia is reasonable. Each set of facts is unique. Moreover, unlike in *Sivalingam*, the Officer did not find that Mr. Palencia had not shown significant establishment nor focus on the reason for his inadmissibility to the exclusion of the other considerations.

[47] The Officer accepted that Mr. Palencia was established in Canada, had lived in the country for a significant period of time (although the Officer misstated the number of years), and

had very close ties with his family in Canada. The Officer also considered the letters of support from friends and family.

[48] Although Mr. Palencia submits that the Officer did not consider the evidence of his rehabilitation, this evidence consists only of his efforts to upgrade his education in 2007 while in pretrial custody and in 2013 when he obtained the results of his GED tests and completed an anger management course. The Officer is presumed to have considered all of the evidence absent indications to the contrary and was not required to refer expressly to each piece of evidence they took into account (*Anand v Canada (Citizenship and Immigration)*, 2007 FC 234 at para 21). In addition, the Officer reasonably found that Mr. Palencia showed a disregard for lawful orders given his conduct since that time, which is supported by the IAD's decision to cancel his stay of deportation based on several breaches of conditions.

[49] The Officer's comment that Mr. Palencia's family and friends were a poor influence on his decision to remain in hiding from the immigration authorities was not a central finding in the analysis of establishment. However, this comment is supported by the evidence as several letters from friends, who described Mr. Palencia in a favourable way, also sought to justify why he evaded the authorities and demonstrate that his friends and family were aware of his status.

D. *The Officer Reasonably Assessed the BIOC*

[50] The Officer's assessment of the best interests of Mr. Palencia's daughter is reasonable based on the evidence before the Officer and the Officer's application of the law.

[51] The principles established in *Baker* continue to guide the assessment of the BIOC (*Kanthasamy* at paras 38–39).

[52] In *Baker* at para 75, the Supreme Court of Canada noted:

> . . . for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.

[53] The Officer repeatedly noted that there was little evidence regarding the BIOC, including that there was no updated evidence about the impact of Mr. Palencia's deportation on his daughter. The Court's review of the record reveals that the BIOC evidence consisted of Mr. Palencia's 2018 affidavit, several letters from family and friends describing Mr. Palencia's close relationship with his daughter, the cards and drawings from his daughter, and photographs. The Officer accepted that Mr. Palencia had a close relationship with his daughter and that the presence of other family in Canada was not a substitute for his presence.

[54] In *Kanthasamy,* the Supreme Court of Canada reiterated that officers must be alert, alive and sensitive to the best interests of a child. In the present case, the Officer's approach to the BIOC analysis reflects the guidance of the Court: to consider what is in the child's best interests; to determine the degree to which those interests would be compromised by one decision over the

other; and, finally, to determine the weight that should be attached to the BIOC in the overall H&C application.

[55] Based on the evidence, the Officer reasonably concluded that the best interests of Mr. Palencia's daughter were to remain with her mother, who had been her primary caregiver since the age of two. The Officer noted the lack of any evidence to the contrary. The Officer concluded Mr. Palencia's daughter's best interests would not be negatively affected by the refusal of the H&C. The weight attached to the BIOC in the overall H&C determination is within the Officer's discretion.

E. *The Officer's Decision Does Not Lack Analysis*

[56] Mr. Palencia submits that the Officer's assessment of his H&C application, and in particular the assessment of his establishment, does not show a compassionate approach, contrary to the guidance in *Kanthasamy* and as more recently noted by this Court in *Nagamany.* I disagree. As noted in *Shackleford*, more than a sympathetic case is required to justify an H&C exemption. In addition, as noted above, each set of facts is unique, H&C decisions are discretionary and the Court's role is not to reweigh the evidence or the factors.

[57] In *Kanthasamy*, at para 13, the Supreme Court of Canada noted the approach previously set out in *Chirwa v Canada (Minister of Manpower and Immigration)* (1970), 4 IAC 338 (IAB) [*Chirwa*], which described H&C considerations as "those facts, established by the evidence, which would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another."

[58] In *Nagamany*, the Court found, on the facts of that case, that the approach set out in *Kanthasamy* was not followed by the Officer, noting at para 32:

> I find that, in the case of Mr. Nagamany, the H&C Decision does not allow me to draw that conclusion. The Officer's reasons and his discussion of the H&C considerations are well wide of the mark and do not reflect, in my view, the attitude of a person sensitive and responsive to the misfortunes of others or animated by a desire to relieve them. I agree that being desirous to relieve the misfortunes of an applicant does not mean that officers have to automatically find that an H&C relief is merited.
> The *Chirwa/Kanthasamy* language certainly does not call for a given result. But the approach necessitates a certain mindset and disposition on the part of immigration officers, and it dictates a certain path to be followed in their analysis of the evidence in order to echo the overarching purpose of H&C provisions like subsection 25(1) of the IRPA. Immigration officers of course retain their discretion to assess the evidence, equipped as they are with their specialized expertise in handling immigration matters, and the *Chirwa/Kanthasamy* approach to H&C applications therefore does not impose the destination to be ultimately reached by the decision-makers. But it certainly defines a road to be taken in the analysis (*Kaur* at para 36).

[59] In the present case, the Officer acknowledged Mr. Palencia's family ties, all the evidence of his establishment in Canada, including the letters of support, and his close relationship with his daughter, noting several times that the impact of his removal was not ideal. There is nothing in the decision that suggests that the Officer was not aware of the goal of an H&C application or displayed an uncompassionate attitude toward Mr. Palencia.

[60] As noted in *Nagamany*, H&C officers exercise their discretion and the *Kanthasamy/ Chirwa* language does not dictate a particular result.

[61] I also disagree with Mr. Palencia that the Officer's reasons lack analysis and logical reasoning or fail to explain why the H&C exemption was found not to be justified.

[62] The Officer's reasons convey that all the relevant H&C factors were considered with reference to the available evidence. The Officer considered each factor raised by Mr. Palencia in support of his application individually—establishment, family ties and the BIOC—and then cumulatively assessed all the factors to determine whether the exemption was warranted in the circumstances.

[63] It is apparent from a holistic reading of the reasons that the Officer found that Mr. Palencia was established in Canada, had strong family ties and had a close relationship with his daughter—all positive factors. However, the Officer also found that Mr. Palencia showed a disregard for the conditions of his stay of deportation—a negative factor. The Officer was not required to assign a points value to each factor considered. The Officer made a global assessment and concluded that in the circumstances, the H&C exemption was not justified. The Officer's conclusion was simply that the positive factors in Mr. Palencia's application were not sufficient to overcome his inadmissibility.

[64] I acknowledge Mr. Palencia's submissions that compassionate considerations should support that he be given another chance. However, the Court does not make the determination. The Court determines if the Officer's decision is reasonable—justified, transparent and intelligible. I find that the decision is reasonable. There are no flaws or shortcomings in the Officer's assessment of the evidence or findings.

JUDGMENT in file IMM-4594-20

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is dismissed.

2. There is no question for certification.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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