Federal Court  Cour fédérale

Date: 20220208

Docket: IMM-235-21

Citation: 2022 FC 154

Toronto, Ontario, February 8, 2022

PRESENT: Madam Justice Go

BETWEEN:

NAUMCHE PESHLIKOSKI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Naumche Peshlikoski [Applicant] is a citizen of Macedonia. He brought an application for leave and for judicial review of a decision of an Immigration Officer [Officer] which denied his application for permanent residency status pursuant to Humanitarian and Compassionate [H&C] considerations [Decision] under s. 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The Applicant argues that the Officer failed to adopt an empathetic approach, failed to assess the factors globally, and erroneously used establishment in Canada to conclude that re-establishment in Macedonia was possible.

[3] For reasons set out below, I find the Decision reasonable and dismiss the application.

II. Background

A. *Factual Context*

[4] The Applicant, now in his late thirties, trained and worked as a power line technician in Macedonia, until he was approached by a recruiter about a job in Calgary for PROMEC Electric Inc. [PROMEC]. The recruiter successfully prepared a work permit application, however Immigration Refugees and Citizenship Canada [IRCC] sent the Port of Entry introduction letter that was required for entry to the wrong email address and the Applicant did not receive it. Without the introduction letter, when the Applicant arrived in Canada on October 30, 2014, he was only allowed to enter as a visitor without a work permit. He later contacted PROMEC and was told that they no longer had work for him. His visitor status expired on October 30, 2015.

[5] Since arriving in Canada, the Applicant started his own business in the construction field and has been supporting himself financially. He has been close with his sister and her family, who are Canadian citizens, including his two nieces. His H&C application included letters of support from his family members in Canada, as well as several friends and fellow church

members. His nieces described how he used to babysit them when they were younger and how he volunteers helping elderly individuals with grocery shopping and household tasks.

[6] In May 2019, the Applicant submitted his H&C application. IRCC refused the application on January 26, 2021.

B. *Decision under Review*

[7] The Officer noted in the Decision that they have "considered all the circumstances of the applicant, examined all of the submitted documentation, and have considered a global assessment of all the evidence." Having considered the personal circumstances of the Applicant—including his establishment and his family ties in Canada, as well as his family in Macedonia—the Officer was "not satisfied that the applicant has established that a positive exemption is warranted on H&C grounds."

III. Issues and Standard of Review

[8] The central issue is whether the Decision was reasonable. More specifically, the Applicant raises the issues of whether the Officer erred by: (1) failing to adopt an empathetic approach, (2) failing to assess the factors globally, and (3) erroneously using establishment in Canada to conclude that re-establishment in Macedonia was possible.

[9] The parties agree that the standard of review is reasonableness, in accordance with *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[10] However, the Respondent makes additional submissions on the meaning of this standard, arguing that when looking at individual factual or logical inferences that make up the chain of analysis, the Court must search for "palpable and overriding errors."

[11] The Applicant objects to the Respondent's reasoning, arguing that it is an attempt to side step *Vavilov* and return to the pre-*Vavilov* regime. I agree.

[12] Citing *Xiao v Canada (Citizenship and Immigration)*, 2021 FC 386 [*Xiao*] at paras 7-9, the Respondent urges this Court to "look for palpable and overriding errors when running through the tribunal's inferences but to use the reasonableness language at the finish line." The Respondent argues that adopting this approach provides a "better aiming tool to help judges find unreasonable decisions as opposed to decisions that they – with an amplitude of compassion and time to scrutinize to the smallest degree – may ultimately disagree with." I find this position untenable.

[13] My reading of *Xiao* does not support the Respondent's position. Rather, after considering Justice Annis' pre-*Vavilov* statement urging strict review of the RAD's factual findings in *Aldarwish v Canada (Citizenship and Immigration)*, 2019 FC 1265 at paras 21-30, Justice McHaffie in *Xiao* found that the concerns of Justice Annis had been subsumed within reasonableness review per *Vavilov*.

[14] At the hearing, the Respondent modified their submission by suggesting that it does not matter whether the Court uses the phrase "palpable and overriding errors", or terms like

"untenable" or "not rationale", because they all amount to the same thing. I disagree. As the Applicant points out, words matter. What the Respondent is attempting to do, in my view, is to try to impose a higher, more deferential, standard of review than the one established in case law when assessing factual findings made by decision makers.

[15] I would further note that the same argument made by the same counsel in this application and in *Xiao*, has recently been rejected by Justice Pallotta in *Gurung v Canada (Minister of Citizenship and Immigration)*, 2021 FC 1472 at paras 7-9.

[16] I will thus apply the reasonableness standard to my review and the onus is on the Applicant to demonstrate that the decision is unreasonable: *Vavilov*, at para 100.

[17] Reasonableness is a deferential, but robust, standard of review: Vavilov, at paras 12-13. 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 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 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

A. *Did the Officer unreasonably fail to adopt an empathetic approach and fail to consider the matter globally?*

[19] The Applicant argues that according to *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 28, an H&C assessment must consider factors globally. The Applicant also submits that an officer must apply an empathetic approach: *Damte v Canada (Citizenship and Immigration)*, [*Damte*] 2011 FC 1212 at para 34; *Paul v Canada (Citizenship and Immigration)*, 2013 FC 1081 [*Paul*] at para 8; *Kaur v Canada (Citizenship and Immigration)*, 2012 FC 964.

[20] According to the Applicant, the Officer minimized the obstacles he would face in returning to Macedonia, rather than applying an empathetic approach globally to all factors. The Applicant calls the Officer's analysis superficial and generic, quoting in particular the analysis of his establishment and the conclusion that his establishment was not uncommon.

[21] The Applicant further argues that the Officer missed the core reason for the application, challenging, in his factum, the Officer's finding that returning to Macedonia would not prevent the Applicant from maintaining a bond with his sister and her family, contrary to *Paul* at para 5.

At the hearing, however, the Applicant appeared to have altered what he described as the "core reason" for the application. Instead, he pointed to the circumstances that gave rise to his reason for entering Canada in the first place, including the job offer he received from PROMEC, the missing introduction letter, and finally PROMEC's claim that they no longer had work for the Applicant. I note that such information was included in the H&C submission by his former counsel under the heading "[h]ow the applicant found himself in Canada" without tying it to the reasons why the Applicant is now seeking to stay in Canada on a permanent basis.

[22] Be that as it may, contrary to the Applicant's assertion that the Officer has "missed the point of the H&C", the Officer did address, at the start of the reasons, the Applicant's prior job offer, his efforts to apply for work permit, and the changing circumstances that led to his entry to Canada as a visitor. The Officer did not refer to this background again in their final concluding paragraph. But as the Applicant acknowledges, the Decision and its reasons must be read as a whole. Having done so, I find no basis to conclude that the Officer has not taken these facts into consideration, when they were specifically mentioned in the reasons.

[23] I further agree with the Respondent that cases like *Damte* and *Paul* can be distinguished on facts. The Respondent submits that the lack of compassion in *Damte* was based on the Officer's speculation about the effect of separation on the applicant's marriage, downplaying of psychiatric evidence, conducting independent research without notice, improperly evaluating subjective fear, and inaccurately portraying objective evidence. *Paul* dealt with a couple coping with the tragic death of their son and urgent need for support from family. Here, apart from

asserting that the Officer "failed to adopt an empathetic approach to assess the application", the Applicant has not pointed to any specific evidence to support his argument in this respect.

[24] I also agree with the Respondent that portions of the Officer's reasons do exhibit empathy. For example, the Officer looked for evidence of the best interests of the Applicant's nieces (whose ages were never provided by the Applicant), despite the lack of an explicit argument about best interests of the child.

[25] Further, contrary to the Applicant's argument, the Officer did acknowledge the ties between the Applicant and his sister and nieces, and did consider the impact of family separation when finding that "the hardship of being physically separated from his sister and nieces here in Canada will cause some dislocation."

[26] The Officer's conclusion that "insufficient evidence has been put forth to support the aforementioned relationships are characterized by a degree of interdependency and reliance to such an extent that if separation were to occur would justify granted an exemption under humanitarian and compassionate considerations" was reasonable in light of the evidence. For instance, I note that the H&C submission prepared by the Applicant's then counsel did not put any emphasis on the Applicant's family ties in Canada. Rather, it focused on the Applicant's economic establishment.

[27] While I agree that officers should adopt an empathetic approach to assessing H&C applications, ultimately the burden falls on the individual applicant to provide compelling reasons to support a positive decision.

B. *Did the Officer unreasonably use establishment in Canada to find that the Applicant could re-establish himself in Macedonia?*

[28] The Applicant submits that the Officer erred by using establishment factors to analyze whether the Applicant could be established in his home country, and not vis-à-vis Canada, contrary to *Sebbe v The* Minister *of Citizenship and Immigration*, 2012 FC 813 [*Sebbe*] at para 21, and *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 [*Lauture*] at paras 19-26.

[29] The Respondent submits that, unlike *Sebbe* and *Lauture*, the Officer correctly assessed the Applicant's in-Canada achievements as evidence of in-Canada establishment and gave them positive weight, rather than bypassing establishment and applying in-Canada achievements to the analysis of hardship in the home country. According to the Respondent, *Lauture* does not forbid the Officer from looking at the Applicant's in-Canada successes (e.g. ability to adapt to a culture and to find a job in a new language) when drawing inferences from the record about any hardship to be expected in Macedonia. As for *Sebbe*, the Respondent argues that it merely stands for the proposition that the degree of establishment must be explicitly analyzed and a weight assigned to it.

[30] The Respondent relies on *Latif v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 104 at paras 37 and 68, in which the Court noted Justice Rennie's objection in *Lauture*,

but ultimately found it acceptable for in-Canada evidence to be considered in analysing the applicant's readjustment to Macedonia, particularly in light of the "lack of evidence on hardship" from the applicant.

[31] In my view, the case law cited by the Applicant does not assist his argument for two reasons. First, the Officer here did assess the Applicant's establishment and gave it "favourable consideration." The Officer in this case also acknowledged that the Applicant is financially established in Canada, and that he has family ties in Canada. This is to be contrasted with *Lauture*, where Justice Rennie faulted the officer for failing to assess "the applicants' evidence of employment, volunteer work, and integration in their community *in Canada*": at para 23 [emphasis in original].

[32] Second, the Officer's finding that the Applicant could re-establish himself in Macedonia was not based on the Applicant's establishment in Canada alone. As noted in the Decision:

> The applicant states that Macedonia has a weak economy and there is no future for him there. To this effect, the applicant has submitted an article titled "Macedonia Economic Outlook" from Focus Economics, dated 2019-04-02. I have reviewed this document and note that the unemployment rate in Macedonia has steadily decreased from 2013 to 2017. While I recognize the unemployment rate is higher than Canada's, I note the applicant was able to find and maintain employment in a skilled trade prior to moving to Canada. While in Canada, the applicant started his own company and has demonstrated he is resourceful and mastered a transferrable skill. Based on the evidence before me, the applicant hasn't established he could not return to his previous employment or use his entrepreneurial skills to gain new employment, if he were to return to Macedonia.
>
> The applicant has spent the majority of his life outside of Canada. While I accept that he may face some difficulties in readjusting to his life, he has not persuaded me that it would justify an exemption under humanitarian and compassionate considerations. If this application was to be refused, the applicant would not be returning to an unfamiliar place, language, culture or place devoid of a familial network that would render re-integration unfeasible. Additionally, the applicant

> had to make similar adjustments when he came to Canada and has to learn the language, secure employment and build relationships.

[33] From the above passages, it is clear that the Officer based their conclusion about the Applicant's ability to re-integrate in his home country on multiple factors including his length of time outside of Canada, the changing economic conditions in Macedonia, the Applicant's prior work history, as well as his language, culture and familial ties in his home country. Such consideration also distinguishes this case from *Sosi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1300, where the Court found that there was no way of knowing whether the personal abilities the applicants used to create their establishment in Canada could be used in their home country to accomplish the same thing: at para 18.

[34] As the Officer specifically acknowledged the difficulties the Applicant may face in readjusting to his life after reviewing the Applicant's business achievement in Canada, I also cannot conclude, as the Applicant submits, that the Officer has failed to examine "whether the disruption of [the Applicant's] establishment weighs in favour of granting the exemption": *Sebbe*, para 21.

[35] At the hearing, the Applicant advanced a further argument that the Officer discounted the Applicant's establishment by noting that it is "not uncommon for individuals who reside in Canada to be employed" and "to become integrated." I do not read the Officer's comment as discounting the Applicant's establishment. As noted above, the Officer did give the Applicant's establishment "favourable consideration", and did recognize his financial establishment and family ties.

[36] Despite counsel's able submission, I agree with the Respondent that in effect, the Applicant is asking this Court to reweigh the evidence, which is not a role that this Court can play. While I may not have reached the same conclusion as the Officer, I find no errors in the Officer's analysis and no reasons to interfere with their findings.

V. Conclusion

[37] The application for judicial review is dismissed.

[38] There is no question for certification.

JUDGMENT in IMM-235-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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