Federal Court  Cour fédérale

Date: 20220223

Docket: IMM-3453-20

Citation: 2022 FC 251

Ottawa, Ontario, February 23, 2022

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

DINO BRDAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an unusual judicial review of a failed humanitarian and compassionate [H&C] application. The Applicant who is asking for H&C relief – a highly discretionary relief – is in Germany despite having been ordered removed from Canada to his home country. Instead of returning to Croatia, he escaped his deportation by terminating his trip in Germany and proceeding to his mother's home there.

[2] As the Court has found in this decision, whatever the deficiencies in the H&C decision, the Applicant is now in the European Union where he can seek relief. The Court will not exercise its discretion to grant judicial review.

II. Background

A. *Refugee Claim*

[3] The Applicant is a 45 year old dual citizen of Croatia and Bosnia-Herzegovina [Bosnia]. He entered Canada in September 2012 and made a refugee claim based on his sexual orientation and his mixed ethnic and religious background (Croatian Catholic, Bosnian Muslim).

[4] His refugee claim was dismissed by the Refugee Protection Division [RPD] and by the Refugee Appeal Division [RAD]. He then filed an H&C application – the subject of this judicial review. He was ordered deported, his deferral request denied, and his stay application denied. He left as ordered, but apparently did not go where directed.

[5] The Applicant was accepted by the RPD as an overall credible witness and a gay man of mixed ethnicity. His refugee claim failed because there was not clear and convincing evidence that Croatia was unwilling and unable to protect him. The RPD did not have to consider the Bosnian aspect of the claim.

[6] The RPD clearly accepted that homophobia is deeply embedded in Croatian society but found that there was insufficient evidence to show a broader pattern of Croatian police and

government being unable or unwilling to protect sexual minorities. Other aspects of the claim were also dismissed.

B. *H&C Decision*

[7] The Officer considered the H&C claim including establishment in Canada, best interests of the child (children of a friend and extended family) and adverse country conditions. The Officer clearly assumed that the Applicant had complied with his deportation order and relied on that fact in commenting that the Applicant had produced no evidence that he was subjected to any hardship upon his return to Croatia. Considering the H&C factors globally, the Officer denied the application.

[8] There is little utility in outlining the consideration of the H&C factors. It is sufficient to note from the Officer's perspective that there was nothing unique about the Applicant's establishment and that little weight was put on the BIOC factors.

[9] The Officer put considerable weight on the RPD's findings of adverse country conditions based upon the RPD's expertise in risk assessments. The Officer went on to consider not only conditions in Croatia but also Bosnia.

[10] The principal criticism of the Officer's decision is that he overstepped his authority by engaging significantly in assessing s 96-97 factors not permitted under s 25(1.3) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

Non-application of certain factors	**Non-application de certains facteurs**
25 (1.3) In examining the request of a foreign national in Canada, the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national.	**25 (1.3)** Le ministre, dans l'étude de la demande faite au titre du paragraphe (1) d'un étranger se trouvant au Canada, ne tient compte d'aucun des facteurs servant à établir la qualité de réfugié — au sens de la Convention — aux termes de l'article 96 ou de personne à protéger au titre du paragraphe 97(1); il tient compte, toutefois, des difficultés auxquelles l'étranger fait face.

III. Analysis

A. *Standard of Review*

[11] In this case, there are two matters related to the standard of review – the prohibition in s 25(1.3) and the merits of the decision.

[12] Section 25(1.3) creates a prohibition against considering factors that are taken into account in s 96 and s 97 but must consider elements of hardship. The Applicant has argued that the Officer conducted a s 96/97 analysis by taking into consideration s 96/97 factors.

[13] In a manner similar to the question of whether there is a breach of procedural fairness, the first question is whether there has been a breach of s 25(1.3). In my view, for the same principles applied by Justice de Montigny in *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35, the issue of breach of s 25(1.3) is a question of the manner in which a decision is made rather than the substance of the decision.

> [35] Neither *Vavilov* nor, for that matter, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, have addressed the standard for determining whether the decision-maker complied with the duty of procedural fairness. In those circumstances, I prefer to rely on the long line of jurisprudence, both from the Supreme Court and from this Court, according to which the standard of review with respect to procedural fairness remains correctness: [citations omitted] **In fact, it is not at all clear to me why we keep assessing procedural fairness within the framework of judicial review, considering that it goes to the manner in which a decision is made rather than to the substance of the decision, as Justice Binnie aptly observed in *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 102. What matters, at the end of the day, is whether or not procedural fairness has been met.**
>
> [Court's Emphasis]

[14] What matters at the end of the day in the present case is whether s 25(1.3) was breached. There is no issue that one can engage in a "reasonable breach". Therefore, the issue is not subject to the standard of review analysis. For reasons outlined, I find no such breach.

[15] I concur with Justice McHaffie in *Rannatshe v Canada (Citizenship and Immigration)*, 2021 FC 1377 at para 21, that the standard of review of the merit of an H&C decision is reasonableness and that it can be reasonable for an officer to view hardship through the lens of s 96-97 factors where a party puts those factors in issue – as is the case here.

[16] There may be aspects of the Officer's analysis which are troubling from the perspective of s 25(1.3). The Officer conducted his own independent research of sexual discrimination. He also engaged in considerations of state protection and Internal Flight Alternative in response to the Applicant's issues about whether he could be protected from discrimination and whether he could live elsewhere in Croatia or Bosnia

[17] However, the Officer's considerations must be viewed in context. He recognized in the context of a hardship analysis the problem of mixed ethnicity and homophobia in such areas as housing and education. Measures, both negative and positive, to address the hardship alleged are relevant. The Applicant put them in play. To have ignored them would be to open the Officer's decision to allegations of failing to properly consider matters raised.

[18] The Officer was clearly influenced by the paucity of substance on hardship in this record. It was reasonable for the Officer to be influenced by the RPD.

[19] Given the circumstances, it was reasonable for the Officer to wonder why the Applicant had not put in further evidence of hardship upon his return home.

[20] While the Officer's decision tended toward s 96-97 analysis, viewed in context, it did not cross the line into offending the restrictions in s 25(1.3).

[21] Therefore, I would first conclude that the Officer's decision is reasonable in all the circumstances.

[22] Secondly, and to the extent that the decision strayed into prohibited territory, I am not prepared to exercise my discretion to grant judicial review. The Applicant has had all the protections Canadian immigration procedures can offer. He flouted those laws by failing to return to his home as directed. He is not entitled to sympathetic discretion from this Court.

[23] Lastly, it is not just that the Applicant has thumbed his nose at Canadian law. Any hardship is addressed by having chosen to stay in a country where he can take his chances with the German immigration system which is consistent with international protections.

IV. Conclusion

[24] For all these reasons, this judicial review will be dismissed.

[25] There is no question for certification.

JUDGMENT in IMM-3453-20

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There is no question for certification.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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