Federal Court  Cour fédérale

Date: 20220404

Docket: IMM-4443-21

Citation: 2022 FC 468

Ottawa, Ontario, April 4, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

AHMED IBRAHIM ABDALLA ELBEIBAS

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a negative decision by a Senior Immigration Officer [the Officer] of the Immigration, Refugee and Citizenship Canada, dated June 17, 2021, rejecting the Applicant's application for permanent residence on humanitarian and compassionate [H&C] grounds, pursuant to section 25(1) of *Immigration and Refugee Protection Act*, SC 2001, c. 27 [*IRPA*].

II. Facts

[2] The Applicant is a 31-year-old citizen of Libya. His immediate family – mother, father and eight siblings – live in Libya. In 2014, he graduated with a bachelor's degree in Business Administration. After he acquired his degree, he began working for his family's business – a hardware store. He then applied to study in the United States where he intended to obtain a second degree.

[3] In 2011, a protest began in Libya against Muammar Gaddafi's dictatorship. Eventually, innocent people were targeted through the introduction of violent militias. The Applicant and his family lived in what was considered a pro-Gaddafi area in Libya, although they never supported the regime themselves. Members of the Applicant's family participated in the Libyan revolution, and some were kidnapped and murdered.

[4] Days before he was set to leave for the United States [US] in September 2015, the Applicant was kidnapped by an armed militia in Alnjila. His brother paid the ransom demanded by the militia and the Applicant was released. A few days later he left for the US.

[5] As the situation in Libya deteriorated, the Applicant felt unsafe to return to his country and therefore filed a refugee claim in the US in December 2016. However, after the so-called "Muslim-ban", which denied entry to the US to Libyan nationals among other Muslim-majority countries, the Applicant decided to leave the US for Canada. Upon his arrival to Canada in April 2019, he filed a refugee claim, but he was ineligible because he had already made a claim for

refugee protection in the US. Despite being ineligible, the Applicant was not removed from Canada, because Libya was and still is subject to an administrative deferral of removal [ADR].

[6] While in Canada, the Applicant obtained multiple work permits, the most recent being valid until January 27, 2022. He also attended school in Canada to improve his French language.

[7] In March 2021, the Applicant applied for permanent residence in Canada on H&C grounds. The application was based on the Applicant's establishment in Canada and the hardship arising from his removal to Libya.

III. Decision under review

[8] On June 17, 2021, the Officer rejected the application. The Officer was not satisfied the Applicant has provided sufficient evidence to establish an exemption was warranted on H&C grounds namely adverse country conditions and establishment.

IV. Issues

[9] The issue is whether the decision is reasonable.

V. Standard of Review

[10] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, which was issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the majority explains what is

required for a reasonable decision, and importantly for present purposes, what is required of a court reviewing on the reasonableness standard:

> [31] 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). Accordingly, 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' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
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> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
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> [Emphasis added]

[11] The Supreme Court of Canada in *Vavilov* at para 86 states, "it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision-maker to those to whom the

decision applies," and provides guidance that the reviewing court review decide based on the record before them:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.
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> [Emphasis added]

[12] Moreover, *Vavilov* requires the reviewing court to assess whether the decision meaningfully grapples with the key issues:

> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

VI. Analysis

[13] The Officer accorded some weight to the negative country conditions. While acknowledging the conditions in Libya "may not be favourable", such as the different economical and financial aspects compared to Canada, the Officer did not find this to be an exceptional circumstance to justify a positive exemption. The Officer held that although different standard of living exists between countries, and not all countries have "fortunate conditions" as Canada, Parliament did not intend section 25 of *IRPA* to make up the difference.

[14] The Applicant submits the Officer erred in his conclusion by failing to acknowledge the dire situation to Libya, a country subject to an ADR, and thus, did not consider a key piece of evidence in assessing hardship and has misunderstood the purpose of the Applicant's H&C application. I agree.

[15] The Applicant relies on *Milad v Canada (Citizenship and Immigration)*, 2019 FC 1409 at paras 36–37, a decision of Justice Kane, who held the existence of an ADR imposed by the Government of Canada is a relevant consideration in the context of the country conditions and the assessment of hardship that may not be ignored, as was the case both in this case and the one before Justice Kane:

> [36] In the present case, the Officer does not acknowledge the updated submissions which, among other information, noted that there was a moratorium on removals to Libya. While the moratorium would not automatically lead to a positive H&C finding, the moratorium is a relevant consideration in the context of the country conditions and the assessment of hardship. The Officer did not even acknowledge that a moratorium was in effect or that Mr. Milad would not be returned due to the moratorium

> (although this is noted in the cover letter which attaches the decision of the Officer).
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> [37] As guided by *Kanthasamy*, the Officer assessing an H&C application must consider all the evidence presented. In this case, the Officer was required to consider the extensive country condition documents, including the existence of the moratorium on removals, which is relevant to the country conditions and the assessment of the hardship Mr. Milad would face if he could be returned to Libya. The Officer's decision does not convey that all the relevant evidence was considered in assessing the hardship considerations. Moreover, the evidence that the Officer clearly considered and summarized does not appear to have been fully taken into account in assessing the hardship claimed by Mr. Milad.
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> [Emphasis in original]

[16] In terms of the Officer's failure to consider the ADR respecting Libya, the Applicant also relies on *Bawazir v Canada (Citizenship and Immigration)*, 2019 FC 623 [per Norris J] [*Bawazir*] as additional authority for the proposition that H&C officers must consider the existence of an ADR.

[17] In my view, *Bawazir* involves a very similar set of circumstances: the Applicant was a national of Yemen, a country subject to an ADR. The officer applied limited weight to country conditions in the hardship analysis because the ADR prevented the Applicant from being returned immediately, making the conditions "far less relevant to the applicant's personal circumstances."

[18] In granting judicial review, this Court concluded the officer erred in refusing to consider the fact that the Applicant would need to return to a war zone to apply for permanent residence without an exemption. Justice Norris states:

> [17] One can certainly understand why Mr. Bawazir would like to secure his status in Canada by obtaining permanent residence here. In my view, a reasonable and fair-minded person would judge the requirement that he leave Canada and go to a war zone where a dire humanitarian crisis prevails so that he could apply for permanent residence as a misfortune potentially deserving of amelioration. The existence of the ADR demonstrates that Canada views the conditions in Yemen as a result of the civil war to "pose a generalized risk to the entire civilian population." The conditions are so dire there that, with a few exceptions, Canada will not remove nationals to that country. Applying the usual requirements of the law in such circumstances clearly engages the equitable underlying purpose of section 25(1) of the *IRPA* (cf. *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 at para 43) yet the officer finds that the conditions prevailing in Yemen and the "extreme hardship" Mr. Bawazir would face there deserve "little weight" in the analysis. This was because Mr. Bawazir is not facing the threat of imminent, involuntary removal. However, the officer did not consider that Mr. Bawazir has no choice but to leave Canada for Yemen if he wishes to apply for permanent residence unless an exception is made for him. The officer erred in effectively dismissing a factor which is clearly relevant to the equitable underlying purpose of section 25(1) of the *IRPA*.
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> [Emphasis added]

[19] In my view, *Bawazir* applies with the same force in the case at bar because in the case at bar the existence of the ADR was not considered at all. Adopting what Justice Norris held, the Officer did not consider the Applicant has no choice but to leave Canada for Libya if he wishes to apply for permanent residence unless an exception is made for him under section 25. The Officer erred in dismissing a factor clearly relevant to the underlying purposes of section 25.

[20] I also note Justice Roussel held in *Khaled Nazem El Husseini v Canada (Minister of Citizenship and Immigration)*, 2016 FC 106 that the IAD's failure to assess the applicant's alleged particular circumstances of hardship constitutes a reviewable error. This case involved Syria in respect of which an ADR was (and is) in place:

> [14] In my view, the IAD had the obligation to consider the potential hardship that would be faced by the Applicant if removed to Syria despite the presence of an administrative deferral of removals to Syria. The case law has clearly established that the mere presence of a temporary suspension of removals does not mean that an application on H&C considerations will automatically lead to a particular outcome, whether positive or negative (*Alcin v Canada (Citizenship and Immigration)*, 2013 FC 1242 at para 55; *Likale v Canada (Citizenship and Immigration)* 2015 FC 43 at par 40). Given the similar nature of an administrative deferral of removals and a temporary suspension of removals, it is my view that the same principle can be applied to this case and that the IAD's failure to assess the Applicant's alleged particular circumstances of hardship constitutes a reviewable error. In testimony, the Applicant stated that he has not lived in Syria and that there is no one in his immediate family still residing in Egypt. He also described the situation in Syria and indicated that there is no place for him to live and no chance of finding employment in his field of expertise. All of his relatives have fled Syria and with respect to the family homes in Syria, one house was levelled by bombing and the other is occupied by other Syrian families (CTR at 1007, 1008). Throughout the Applicant's testimony on this issue, both the IAD and the Minister's counsel repeatedly stated that it was not necessary to go into details regarding the situation in Syria because of the existence of the stay. Counsel for the Applicant had to insist with the IAD that the Applicant wanted to speak of his personal situation of foreign hardship for the purpose of establishing that he had sufficient H&C considerations to warrant remaining in Canada. In the absence of any analysis by the IAD regarding the Applicant's personal circumstances of hardship, it is not possible to determine whether the IAD fettered its discretion by unduly relying on the existence of the administrative deferral of removals to Syria in denying the Applicant his request for H&C considerations.
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> [Emphasis added]

[21] I come to the same conclusion in this case where the Officer appears to have either ignored or erroneously relied on the existence of an ADR to Libya in denying the Applicant his request for H&C consideration. I appreciate officers need not deal with every issue submitted, but mindful of these three binding authorities and the fact that ADRs are Government decisions

that directly relate to dire hardship, I find the Officeer's failure to consider ADR constituted reviewable error.

[22] In failing to consider the existence of the ADR to Libya, I note the Officer also failed to consider and weigh *all* relevant factors, thereby rendering their assessment of hardship upon return unreasonable as per the Supreme Court of Canada in *Kanthasamy (Citizenship and Immigration)*, 2015 SCC 61:

> [25] What *does* warrant relief will clearly vary depending on the facts and context of the case, but officers making humanitarian and compassionate determinations must substantively consider and weigh *all* the relevant facts and factors before them: *Baker*, at paras. 74-75.
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> [Emphasis by the Supreme Court of Canada]

[23] While there may be force to the Respondent's submission that the presence of a moratorium by itself does not necessarily lead to a specific outcome, whether positive or negative (*Ndikumana v Canada (Citizenship and Immigration)*, 2017 FC 328 at para 18; *Likale v Canada (Citizenship and Immigration)*, 2015 FC 43 at para 40; *Alcin v Canada (Citizenship and Immigration)*, 2013 FC 1242 at para 55), this is an academic point in that the ADR was not considered at all.

VII. Conclusion

[24] As a whole, the Decision fails to comply with constraining law and overlooks critical evidence such that it is not justified based on the record and law as required by *Vavilov* at para 85, 90, and 99. Therefore, this application must be granted.

VIII. Certified Question

[25] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-4443-21

THIS COURT'S JUDGMENT is that judicial review is granted, the Decision is set aside, the matter is remanded for redetermination by a different decision maker, no question of general importance is certified and there is no Order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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