Federal Court  Cour fédérale

Date: 20220407

Docket: IMM-1857-21

Citation: 2022 FC 509

Ottawa, Ontario, April 7, 2022

PRESENT: Madam Justice McDonald

BETWEEN:

WILFRED USIAYO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review of an Immigration Officer's decision refusing the Applicant's permanent residence application on humanitarian and compassionate (H&C) grounds, dated March 16, 2021.

[2] The Applicant argues the Officer erred by failing to consider the compassionate factors in the application, and unreasonably required the Applicant to demonstrate an exceptional level of

establishment. For the reasons that follow, this judicial review is dismissed, as the decision of the Officer is reasonable.

I. Background

[3] The Applicant is a 52-year-old man from Nigeria who fled to Canada in 2005 and claimed refugee protection. He was granted refugee protection and became a permanent resident in 2009. However, in 2011, he lost his permanent resident status as a result of criminal convictions. He applied for permanent resident status on H&C grounds on May 13, 2020.

[4] The Applicant lives and works in Alberta. He has one son who was 12 years old at the time of the H&C decision.

II. H&C Decision

[5] The Officer considered the Applicant's establishment in Canada, the best interests of the child (BIOC), and that the Applicant was inadmissible for serious criminality. The Officer also considered that the Applicant is HIV positive.

[6] The Officer noted that the Applicant has been in Canada for 15 years, which they described as a "significant period of time". The Officer also stated that the Applicant maintained stable employment, had paid taxes, and been self-supporting. The Officer found these factors, as well as the Applicant's efforts to improve himself by regularly taking training courses, to be commendable.

[7] The Officer observed that the Applicant is a member of a church and had a letter of support from the Pastor. The Officer also noted his community involvement with organizations that support those living with HIV and AIDS in Alberta.

[8] The Officer concluded the establishment analysis by stating "I do not find the applicant's degree of establishment to be exceptional in relation to similarly situated individuals who have been in Canada for a comparable amount of time."

[9] With respect to BIOC, the Officer considered the impact of the decision on the Applicant's son. However, the Officer noted that the Applicant did not have contact with his son, but hoped to develop a relationship with his son in the future. Given the lack of evidence that the Applicant had attempted to contact his son or form a relationship, the Officer held any future relationship to be speculative, and did not grant this factor significant weight.

[10] With respect to the Applicant's criminal history, the Officer stated that the Applicant received a 12-month conditional sentence. The Officer noted the Applicant's remorse, in addition he will be eligible to begin the process to regain his permanent resident status in May 2024 – being 10 years after the expiry of his criminal sentence. Overall, the Officer found the Applicant's criminal history to be a significant negative factor.

[11] Finally, with respect to the Applicant's medical condition and submission that he would face persecution in Nigeria as a result of his HIV positive status, the Officer stated that he was

unlikely to return to Nigeria as he was a Convention Refugee. In addition, the Officer reasoned that the Applicant would be able to access healthcare in Canada.

III. Issue and Standard of review

[12] The only issue is whether the Officer's refusal of the H&C application is reasonable.

[13] The parties agree that the standard of review is reasonableness as articulated in *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 [*Vavilov*]. In assessing the reasonableness of a decision the court "[asks] 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). "[W]here reasons are provided but they fail to provide a transparent and intelligible justification […] the decision will be unreasonable." (*Vavilov* at para 136).

IV. Relevant Legislation

[14] Subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 provides:

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other	25 (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui

than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

V. Analysis

Was the Officer's Refusal of the H&C Application Reasonable?

[15] The Applicant argues that the Officer only considered his H&C application through a hardship lens, rather than applying a compassionate approach as required by *Kanthasamy v Canada (Citizenship and Immigration),* 2015 SCC 61, where the court states:

> 23 There will inevitably be some hardship associated with being required to leave Canada. This alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under s. 25(1) […] Nor was s. 25(1) intended to be an alternative immigration scheme…
>
> …

> 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 [Citations omitted; emphasis in original].

[16] The Applicant argues that the Officer did not properly consider the H&C factors in his case and unreasonably applied an "exceptional level of establishment" test.

[17] The Applicant relies upon *Apura v Canada (Citizenship and Immigration)*, 2018 FC 762, where Justice Ahmed states:

> I accept my colleagues' views, subject to one important caveat which I do not think to be contradictory. When a decision-maker's H&C analysis suggests that absence of "exceptional" or "extraordinary" circumstance forms the basis of the decision to deny relief, it is to impose the incorrect legal standard (at para 23).

[18] The Applicant also relies upon a number of other cases to support the proposition that it was unreasonable for the Officer to apply an "exceptional" test to the consideration of the establishment factors, including: *Baco v Canada (Citizenship and Immigration)*, 2017 FC 694; *Chandidas v Canada (Citizenship and Immigration)*, 2013 FC 258; and, *Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813.

[19] The use of the word "exceptional" by decision makers and whether it imposes an unreasonable test in the H&C context was discussed by Justice Zinn in *Zhang v Canada (Citizenship and Immigration)*, 2021 FC 1482 [*Zhang*], where he notes that there are decisions from the Federal Court that support an interpretation that the test can be framed as a comparison

of the applicant's circumstances to others in order to assess if it is "exceptional". On this, Justice Zinn states as follows at paragraph 23:

> There is a significant difference between observing that this exceptional relief is provided for because the personal circumstances of some are such that deportation falls with more force on them than others, and stating that the relief is available only to those who demonstrate the existence of misfortunes or other circumstances that are exceptional relative to others. The first explains why the exemption is there, while the second purports to identify those who may benefit from the exemption. The second imports a condition into the exception that is not there. [Emphasis in original]

[20] This builds on Justice McHaffie's decision in *Damian v Canada (Citizenship and Immigration)*, 2019 FC 1158 at para 21 [*Damian*] where Justice McHaffie states:

> Thus, to the extent that words such as "exceptional" or "extraordinary" are used simply descriptively, their use appears to be in keeping with the majority in *Kanthasamy*, although such use may not add much to the analysis. However, to the extent that they are intended to import a legal standard into the H&C analysis that is different than the *Chirwa/Kanthasamy* standard of "exciting in a reasonable person in a civilized community a desire to relieve the misfortunes of another, provided those misfortunes justify the granting of relief," this would appear to be contrary to the reasons of the majority. Given the potential for words such as "exceptional" and "extraordinary" to be taken beyond the merely descriptive to invoke a more stringent legal standard, it may be more helpful to simply focus on the *Kanthasamy* approach, rather than adding further descriptors.

[21] In *Zhang*, Justice Zinn held the Officer committed the error identified in *Damian*, stating:

> These passages demonstrate that the Officer was operating with an understanding that the Applicant was required to demonstrate "exceptional" establishment or hardship. This is not the test for a humanitarian and compassionate decision. As set out by Justice McHaffie in *Damian*, humanitarian and compassionate exemptions are "exceptional" in the sense that they operate as exceptions to the general rule. There is no requirement that any

> individual factor, such as establishment or hardship, be exceptional. Nor is there a requirement that an applicant's circumstances as a whole meet the threshold of being exceptional when compared to others. What is required is that an applicant's personal circumstances warrant humanitarian and compassionate relief.
>
> The Officer's reasoning demonstrates that he was not focused on the proper question, namely, whether the Applicant's circumstances would excite a reasonable person in civilized community a desire to relieve the Applicant of his misfortunes. Therefore, I find it to be unreasonable (at paras 28-29).

[22] In my view *Zhang* and *Damian* outline the proper approach to the consideration of the reasonableness of the Officer's decision with respect to the establishment factor. When this approach is applied to the Officer's decision here, I would characterize the Officer's use of the word "exceptional" as being used in the descriptive sense and not as being used to identify a threshold test that the Applicant had to meet. The Officer considered all of the establishment factors raised by the Applicant but was not satisfied that they were sufficient to grant the relief sought.

[23] The Applicant also argues that the Officer failed to consider the contextual circumstances that led to his criminal charges, including: that the criminality arose during a time when his father died, he discovered he was HIV positive, and was falsely accused of a crime. The Applicant says that the Officer failed to consider that the offences occurred over a short period of time; that he showed remorse; and that he has not received any further convictions. These factors were considered by the Officer, but the impact of the criminal offences were outweighed by the mitigating factors. In any event, it is not the role of this Court to reweigh the factors which were properly considered by the Officer.

[24] Finally, it was reasonable for the Officer to note that the Applicant – who cannot be removed from Canada because of his Convention Refugee status – will be eligible to apply for permanent resident status in May 2024.

[25] Overall, the Officer's decision is justified, transparent, and intelligible; the Officer considered and weighed all of the relevant factors. This judicial review is, therefore, dismissed.

[26] Neither party proposed a certified question and no question is certified.

JUDGMENT IN IMM-1857-21

THIS COURT'S JUDGMENT is that this judicial review is dismissed. There is no question for certification.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Nicholas Woodward	FOR THE APPLICANT
Matthew Siddall	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Battista Smith Migration Law Group Toronto, ON	FOR THE APPLICANT
Attorney General of Canada Toronto, ON	FOR THE RESPONDENT