Federal Court  Cour fédérale

Date: 20220601

Docket: IMM-365-21

Citation: 2022 FC 800

Ottawa, Ontario, June 1, 2022

PRESENT: Madam Justice McDonald

BETWEEN:

ROBERT TUTIC

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks judicial review of a decision of a Senior Immigration Officer (Officer), dated January 6, 2021, refusing his application for permanent residence on humanitarian and compassionate (H&C) grounds.

[2] For the reasons that follow, this judicial review is granted as I have concluded that the decision of the Officer is unreasonable.

I. Background

[3] The Applicant is a 27-year-old citizen of Croatia who came to Canada when he was 11 years old, fleeing from his abusive father. His mother fled the abusive relationship when the Applicant was 2 years old.

[4] The Applicant's family members in Canada are all Canadian citizens. The Applicant's mother tried to sponsor him for permanent residence; but as she made an error and did not list the Applicant as her dependent on her own application, he was not eligible to be sponsored.

[5] The Applicant and his mother submitted an H&C application in 2008, when he was 13 years old. The application was refused in 2012. The Applicant states he was too young to understand the law, was self-represented at the time, and did not know he could judicially review the decision. Fearing returning to Croatia because of his father, the Applicant then filed a refugee claim. He withdrew the refugee claim in 2018, and filed a second H&C application in January 2019.

[6] On June 20, 2019, and before his H&C application was determined, the Applicant left for Croatia after receiving a Notice of Removal. In Croatia, the Applicant was homeless for a time, and slept in bus stations. He struggled to communicate as he lost a lot of his native language. The Applicant found work in construction and housing was provided by his employer. However, the floor in the house had fallen through, and his employer was abusive and did not pay him. Another worker in the house gave the Applicant money to help out.

[7] While in Croatia, the Applicant began receiving anonymous phone calls. The callers stated they knew the Applicant had returned to Croatia and knew where he lived. The Applicant believed it was someone connected to his father.

[8] When the Applicant was laid off from work, he went to Germany to work in construction. Shortly after, he suffered a hernia and was off work without support. He states that he relied on a friend lending him money so that he could eat.

II. H&C Decision

[9] In considering the application, the Officer gave positive weight to the Applicant's establishment and some weight to the emotional hardship of separating from his family and friends in Canada. However, the Officer found it likely that the Applicant could continue to have a close relationship with his family and friends in Canada while in Croatia.

[10] The Officer acknowledged that the Applicant was ineligible under the Family Sponsorship program because his mother did not declare him as her dependent. However, the Officer found there were "other options available to the Applicant to facilitate family reunification and limit the Applicant's separation from his family in Canada".

[11] The Officer further acknowledged that the Applicant was enduring "some hardships with employment"; however, he found that "the Applicant has been able to effectively obtain employment and housing and independently manage his own financial and personal affairs in both Croatia and Germany."

[12] With respect to the Applicant's mental health issues, the Officer found there was little evidence to indicate that the Applicant was receiving ongoing treatment and support while he was in Canada – with the exception of a hospital admission in March 2019 for mental health issues – and there was little evidence that he sought assistance afterwards. The Officer reasoned that assistance was available to the Applicant in Croatia, and that, in Germany, free counselling is available in English through telephone hotlines.

[13] Overall, with respect to hardship, the Officer wrote: "I acknowledge the challenges the Applicant is facing following his departure from Canada. However, I find it is inevitable that some hardships are associated with being required to leave Canada; this alone is not exceptional to warrant an exemption under the Act." The Officer gave little weight to this factor.

[14] With respect to the best interests of the children, the Officer considered the Applicant's two youngest step-siblings in Canada, but held the Applicant can continue to be part of their lives regardless of being in Canada or not.

III. Issue and Standard of Review

[15] The only issue is the reasonableness of the Officer's decision.

[16] As stated in *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 [*Vavilov*] at paragraph 99, "A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing 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."

[17] I disagree with the Respondent's submission that a different standard of review should apply to this Court's consideration of the Officer's factual inferences. I echo Justice Zinn's statement in *Mohamed v Canada (Citizenship and Immigration),* 2022 FC 637 where he states: "In my opinion, the Respondent's submissions run contrary to *Vavilov* and would serve to needlessly complicate reasonableness review" (at para 16).

IV. Analysis

A. *Psychological Impact of Removal*

[18] The Applicant argues the Officer erred in the assessment of the psychological hardship he would suffer by focusing on whether treatment was available in Croatia or Germany, rather than considering the impact of removal on the Applicant's psychological health.

[19] The following statements from the Applicant clearly articulate the impact of removal:

- "All my nightmares as a child are coming back";
- "Just the thought of getting off that plane makes me panic and I struggle to breathe";
- "There hadn't passed a day where I didn't think about throwing myself of [sic] the huge cliffs in Makarska";
- "I just wish to be dead already. I don't even want to waste anyone's time on this earth. I still don't see the reason why I was even put on this earth if it was just to constantly suffer. I still think about committing suicide like throwing

> myself on train track. If I had a bullet to put inside in my head I would've probably done it already";
>
> • "I remember walking around and going to school with bruises and bumps on my head from the beatings I received from my biological father. I remember he would sometimes tell me he would rather just kill me and 'get rid of the problem'. I grew up scared for my life because I did not know what my biological father would do from one day to the next. I remember as a boy not knowing if each day would be my last";

[20] The Applicant provided a report from Dr. Devins, a Consulting and Clinical Psychologist, who conducted an independent psychological assessment of the Applicant on January 24, 2019. Dr. Devins diagnosed the Applicant with post traumatic stress disorder and in his report states:

> Mr. Tutic was exposed to traumatic events in Croatia. Deleterious psychological effects persist. Difficulties in securing permission to remain in Canada and the prolonged duration over which he has been exposed to these exacerbated his distress significantly. Mr. Tutic's distress intensified substantially after he received a deportation order in December 2018 […] **His condition will undoubtedly deteriorate should he be refused permission to stay in Canada. Suicide risk will increase substantially** (emphasis added).

[21] In considering this evidence, the Officer notes the diagnosis of "major depressive disorder of moderate severity" and "posttraumatic stress disorder", and the Applicant's hospitalization for mental health issues. The Officer expresses sympathy but notes that there is "little evidence" to indicate that the Applicant was receiving ongoing treatment in Canada. The Officer concludes his assessment of this factor by noting that any necessary mental health assistance will be available to the Applicant in either Croatia or Germany.

[22] The Officer does not directly address the impact removal had on the Applicant or the fact that removal puts the Applicant at a "substantial" increased risk of suicide. The Respondent argues the Court can infer that the Officer considered these factors because the Officer states "I accept that the Applicant continues to suffer emotional and psychological effects of this abuse", and "I accept the Applicant's physical presence in Croatia may have caused him some anxiety due to the fact that his biological father lives in the country".

[23] However, I disagree with the Respondent that the use of these words by the Officer is sufficient or transparent enough to demonstrate the issue was properly considered. In my view, in limiting the consideration of this issue to the availability of mental health services, the Officer fell into the error identified by Justice Strickland in *Esahak-Shammas v Canada (Citizenship and Immigration)*, 2018 FC 461 where she states at paragraph 26:

> Thus, the Officer acknowledged the psychiatric report without taking issue with its diagnosis, content, finding of required treatment or otherwise. Accordingly, and as the Applicants submit, if the Officer accepted the psychiatric report and if it spoke to the effect of removal from Canada on the Principal Applicant's mental health, then the Officer was obligated to consider this in his or her analysis (*Kanthasamy* at paras 47-48). This Court has held that when psychological reports are available and indicate that the mental health of applicants would worsen if they were to be removed from Canada, then an officer must analyze the hardship that applicants would face if they were to return to their country of origin. In that circumstance, an officer cannot limit the analysis to a determination of whether mental health care is available in the country of removal […].

[24] This was endorsed by Justice Pamel in *Jaramillo Zaragoza v Canada (Citizenship and Immigration)*, 2020 FC 879 where he states:

> […] I find that the officer had an "exclusive focus on whether treatment was available" in the country of removal, and "ignored

> what the effect of removal from Canada would be on his mental health": *Kanthasamy* at paragraph 48. The Court in *Kanthasamy* concluded that the possible deterioration of mental health is a relevant consideration regardless of whether treatment is available in the country of removal: *Kanthasamy* at paragraph 48 (at paras 54-55).

[25] In this case, the Officer's decision does not demonstrate that the medical evidence was properly considered. How the Officer analyzed or considered the suicide risk is not obvious in the Officer's reasons. Furthermore, the Officer's reference to the Applicant's "anxiety" is not a proper consideration of "suicide risk" as identified by Dr. Devins.

[26] Here, the Officer's assessment of this hardship factor was confined to a focus on the availability of mental health services. In my view, this displays a profound lack of attention to the compassionate factors present in this case, and ultimately fails to assess whether the Applicant's circumstances would "excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another" (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 21).

[27] The Officer's consideration of the psychological impact of removal on the Applicant is therefore unreasonable.

B. *Evidence of Hardship*

[28] The Applicant argues the Officer misapprehended the evidence when the Officer finds that the Applicant has been able "to successfully manage" in Croatia and "independently manage his own financial and personal affairs in both Croatia and Germany". The Applicant states this is

a mischaracterization of his experiences of homelessness and hardship so severe it led to suicidal thoughts.

[29] In this case, the Officer is not assessing potential or possible future hardships. Rather, as the Applicant had returned to Croatia, the Officer had direct evidence of the Applicant's experiences in his country of origin. That evidence was that the Applicant was, at times, homeless, struggled to find work, struggled with the language, and relied on a co-worker for money to be able to eat.

[30] In light of the evidence, the Officer's conclusions that the Applicant has "effectively" managed his own financial and personal affairs or has done so "independently" trivializes his true experience and is unreasonable.

V. Conclusion

[31] In light of my findings above, it is not necessary for me to address the other issues raised by the Applicant. However, that should not be taken as an endorsement of the Officer's other findings.

[32] This judicial review is granted.

JUDGMENT IN IMM-365-21

THIS COURT'S JUDGMENT is that:

1. This judicial review is granted.

2. There is no question for certification.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-365-21
STYLE OF CAUSE:	ROBERT TUTIC v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	APRIL 14, 2022
JUDGMENT AND REASONS:	MCDONALD J.
DATED:	JUNE 1, 2022

APPEARANCES:

Samuel Plett	FOR THE APPLICANT
Stephen Jarvis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Desloges Law Group Professional Corporation Toronto, ON	FOR THE APPLICANT
Attorney General of Canada Toronto, ON	FOR THE RESPONDENT