Federal Court Cour fédérale

**Date: 20220822**

**Docket: IMM-6981-19**

**Citation: 2022 FC 1219**

**Ottawa, Ontario, August 22, 2022**

**PRESENT: Mr. Justice Norris**

**BETWEEN:**

**MUSTAFA SAMMANI**

**Applicant**

**and**

**MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. OVERVIEW

[1] The applicant is a 52 year-old citizen of Syria who has been residing in Canada since 2012. In December 2015, he submitted an application for permanent residence in Canada under the spouse or common-law partner in Canada class. The application faced a significant hurdle, however, because the applicant is inadmissible to Canada due to serious criminality. The applicant sought to overcome this hurdle by seeking relief on humanitarian and compassionate

("H&C") grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] The application was reviewed by Immigration, Refugees and Citizenship Canada ("IRCC") in two stages. When the first stage was completed, IRCC informed the applicant in a letter dated December 14, 2018, that he was eligible for sponsorship under the spouse or common-law partner in Canada class but that further review was required to determine whether H&C relief should be granted. Following that further review, however, the earlier determination was reversed and the application for permanent residence was refused. As set out in the decision letter dated November 7, 2019, a second IRCC Officer had concluded that, contrary to the earlier determination, the applicant was ineligible as a member of the spouse or common-law partner in Canada class because he did not have temporary status in Canada. The Officer also concluded that H&C considerations were insufficient to overcome this ineligibility.

[3] The applicant now applies for judicial review of this decision under subsection 72(1) of the *IRPA*. He contends that the decision is unreasonable and that it was made in breach of the requirements of procedural fairness. For the reasons that follow, I agree with the applicant that the decision is unreasonable. Since this is sufficient to require that the matter be reconsidered, it is not necessary to address the applicant's procedural fairness arguments.

## II. BACKGROUND

[4] The applicant's immigration history is complicated.

[5] The applicant was born in Beirut, Lebanon, in March 1970. He is a citizen of Syria but also has permanent resident status in Lebanon. Despite being born in Lebanon, the applicant does not have Lebanese citizenship because his father is Syrian, not Lebanese.

[6] The applicant first entered Canada as a permanent resident under the Skilled Worker class in October 1994. Subsequently, he was convicted of several criminal offences in Canada. On December 9, 1999, the applicant was convicted of assault with a weapon and sentenced to 60 days in jail followed by probation for 18 months. In 2004, the applicant pled guilty to charges relating to the fraudulent use of credit cards. He received a sentence of imprisonment for eight months (having been given credit for two months of pre-sentence custody) and probation for two years. The applicant was also ordered to pay restitution in the amount of $44,036.56. As well, in June 2006 the applicant was charged with breach of probation for having been found in possession of yet more fraudulent credit cards and credit card applications. It is not clear on the record before me what happened to this charge.

[7] In October 2007, the applicant was found to be inadmissible to Canada due to serious criminality under subsection 36(1) of the *IRPA*. He was removed from Canada to Syria shortly thereafter.

[8] In 2002, the applicant had applied to sponsor his first wife, Marwa Bahri, a Lebanese citizen. The application was refused following the applicant's 2004 arrest on the fraud charges. The genuineness of his relationship with Ms. Bahri was also called into question because the

applicant was living with a common-law partner, Bojana Vujnovic, at the time of his arrest in 2004.

[9] After the applicant left Canada, his second spouse, Katarina Kljajic, applied to sponsor him for permanent residence in August 2008. This application was refused because the relationship was found not to be genuine and because the applicant was inadmissible to Canada. The applicant and Ms. Kljajic were married from January 2008 until September 2013.

[10] The applicant returned to Canada in March 2012. He did so without an Authorization to Return to Canada (“ARC”), as required by subsection 52(1) of the *IRPA*.

[11] The applicant made a claim for refugee protection in April 2012 but it was refused in October 2012. Leave for judicial review of the decision was denied in February 2014.

[12] In September 2014, mutual friends introduced the applicant to Claudine Dufresne, a Canadian citizen who was living in Montreal at the time. The two were married in a small religious ceremony in Montreal on November 11, 2014. They have lived together in British Columbia since then.

[13] In December 2015, Ms. Dufresne applied to sponsor the applicant for permanent residence under the spouse or common-law partner in Canada class.

[14] An IRCC Officer interviewed the applicant and Ms. Dufresne on October 16, 2018. As recorded in the Officer's Global Case Management System ("GCMS") notes, following the interview, the Officer was satisfied that their relationship was genuine and on that basis concluded that the applicant met the requirements of section 124 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("*IRPR*") for membership in the spouse or common-law partner in Canada class – i.e. that the applicant is the spouse or common-law partner of the sponsor and cohabits with the sponsor; that he has temporary resident status in Canada; and that he is the subject of a sponsorship application. (Had the Officer concluded that the relationship was not genuine or that it had been entered into for the purpose of acquiring a status or privilege under the *IRPA*, the applicant would have been excluded from the definition of "spouse or common-law partner": see *IRPR*, subsection 4(1).) However, the Officer also noted that she continued to have a concern with respect to the applicant's credibility regarding his relationship with Ms. Bahri (his first wife) because of apparent discrepancies in some of the information he had provided. The Officer therefore gave the applicant 30 days to see if he could clarify the situation. Subsequently, the applicant provided a copy of a document from the Sunni Legal Courts in Lebanon indicating that he and Ms. Bahri had divorced in February 2008, as he had maintained.

[15] The Officer communicated her determination that the applicant met the requirements of section 124 of the *IRPR* in a letter dated December 14, 2018. The Officer then went on to state the following:

> With regards to your inadmissibility for your criminal convictions related to assault with a weapon and fraud, as you have raised Risk in your submissions, I have decided to refer your application to a Senior Immigration Officer for assessment of both your requests

> on Humanitarian and Compassionate grounds and Risk together. If further information is required, you will be notified.

[16] Also on December 14, 2018, the Officer completed a Reasons for Decision form, presumably for the assistance of the Officer to whom the matter was being referred. In this document, the first Officer states the following (referring to the applicant as "PA" for "Primary Applicant"):

> While I am satisfied that his current relationship to the sponsor is legal and that their relationship is genuine, I have serious credibility concerns given the information the PA has submitted. I do not feel I have enough information to make a recommendation to waive the PA's criminal inadmissibility on H&C grounds – while he has a seemingly successful business in operation in Canada and is married to a Canadian citizen, he returned to Canada without authorization, the criminal convictions he has are very serious – assault with a weapon and fraud, and he has made conflicting representations regarding his relationships to IRCC in his applications. As the PA has also made submissions referring to risk, I will not refuse the application on the basis of criminal inadmissibility, however, I will recommend that this application be referred to a Senior Immigration Officer for assessment of the H&Cs [*sic*] and Risk issues raised together.

[17] At no point prior to the final decision were these residual "serious credibility concerns" communicated to the applicant. The applicant's unchallenged evidence on the present application is that, as he understood matters, at the conclusion of the October 16, 2018, interview, the only outstanding issue was clarification of the date of his divorce from Ms. Bahri, something he believed he had addressed satisfactorily with the document from the Sunni Legal Courts.

[18] As noted by the first Officer, the applicant relied on H&C considerations in support of his application for permanent residence to overcome his inadmissibility due to serious criminality. The covering letter from his counsel dated December 24, 2015, that had accompanied the initial application stated the following:

> Mr. Sammani, who originally immigrated to Canada as a skilled worker in October 1994, lost his permanent residence status and was removed in October 2007 due to criminal convictions in Canada, which included assault in 1999 and fraud in 2004. Mr. Sammani, a Syrian national, fled to Canada to claim refugee protection in March 2012, but his claim was denied in October 2013. We are preparing detailed submissions and evidence, that shed light on Mr. Sammani's immigration history and criminal record, in support of a request to grant him an exemption to overcome his inadmissibility on humanitarian and compassionate grounds, pursuant to s. 25(1) of the *Immigration and Refugee Protection Act*.

[19] These submissions and supporting information were eventually provided to IRCC in December 2017. In summary, the applicant submitted as follows:

- While his criminal convictions were serious, they arose from a dysfunctional and troubled common-law relationship at the time and they are now quite dated.

- The applicant has made genuine and sustained efforts to rehabilitate himself and is committed to leading a law-abiding life, as demonstrated by his recent conduct.

- The applicant is not currently eligible to apply for a record suspension under the *Criminal Records Act*, RSC, 1985, c C-47, so H&C relief is the only way to address his criminal inadmissibility.

- The applicant is well-established in Canada, including being steadily and gainfully employed and being in a stable relationship with Ms. Dufresne.

- While the applicant does not currently face a risk of removal to Syria due to an administrative deferral of removals to that country (something that has been in place since March 2012), his lack of status and stability in Canada is an ongoing source of stress and anxiety for him and his spouse.

- In the event that the applicant were required to return to Syria, he would face significant risks to his life, liberty and security of the person.

[20] The applicant's H&C submissions were cast solely in terms of the need for relief from the requirement that he not be inadmissible to Canada. The fact that he did not have temporary resident status in Canada – something that will be discussed further below – is not addressed.

## III. DECISION UNDER REVIEW

[21] As set out above, the first IRCC Officer was satisfied that the applicant met the requirements of section 124 of the *IRPR* but was also of the view that a Senior IRCC Officer should review the application to determine whether H&C considerations warranted granting relief from the requirement that the applicant not be inadmissible to Canada due to serious criminality. It is the second IRCC Officer's determination that is the decision now under review.

[22] As reflected in the second Officer's decision letter, that Officer concluded that the first Officer had erred in finding that the applicant was eligible to be considered as a member of

the spouse or common-law partner in Canada class. This was because, contrary to what is required by paragraph 124(b) of the *IRPR*, the applicant did not have temporary status in Canada. The second Officer recognized that, under a public policy adopted by the Minister under subsection 25(1) of the *IRPA*, an exemption from this requirement will be granted in certain circumstances to applicants for permanent residence under the spouse or common-law partner in Canada class who lack temporary status in Canada. However, the applicant could not benefit from this general exemption because the public policy expressly states that it does not apply to someone like the applicant who lacks status in Canada because they returned to Canada without first obtaining the requisite ARC.

[23] The second Officer then turned to the question of whether the individual H&C considerations advanced by the applicant were sufficient to overcome his ineligibility as a member of the spouse or common-law partner in Canada class. The Officer concluded that they were not, simply stating the following in the decision letter: "I have also reviewed all the information on file for H&C consideration, and I do not find sufficient H&C grounds in this case to exempt the requirements pursuant to 124(b) of the IRPR." The Officer's GCMS notes do not provide any further elaboration on the basis for this conclusion. The Officer's ultimate determination is stated as follows in the decision letter: "Your application for permanent residence is therefore refused as you are ineligible to apply for permanent residence under the Spouse or Common-Law Partner in Canada Class" (emphasis omitted).

[24] The Officer also states in the decision letter that the applicant continues to be inadmissible to Canada on the same serious criminality grounds that led to his removal from

Canada in October 2007; however, the decision letter does not address in any way the applicant's request for H&C relief from his inadmissibility for serious criminality. On the other hand, the Officer's GCMS notes do address this request, at least in passing, stating the following:

> While I understand that Syria is a country currently undergoing turmoil in some parts, reviewing the totality of PA's criminal behaviour in Canada, and his past disregard for Canada's immigration rules I find that there are no sufficient H&C grounds in Mustafa SAMMANI's establishment to Canada to overcome the fact that PA is inadmissible to Canada for serious criminality and the fact that he has returned to Canada without obtaining authorization to do so after being deported. PA has also raised credibility issues by withholding information about his previous common-law partners and also with his previous suspected marriage of convenience. The previous convictions for fraud further raise overall credibility issues regarding the PA.

## IV. STANDARD OF REVIEW

[25] It is well-established that the substance of an H&C decision should be reviewed on a reasonableness standard: see *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44. That this is the appropriate standard has been reinforced by *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10.

[26] 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). A decision that displays these qualities is entitled to deference from the reviewing court (*ibid.*). When applying the reasonableness standard, it is not the role of the reviewing court to reweigh or reassess the evidence considered by the decision maker or to interfere with factual findings unless there are exceptional circumstances: see *Vavilov* at

para 125. At the same time, reasonableness review is not a rubber-stamping process; it remains a robust form of review: see *Vavilov* at para 13.

[27] The onus is on the applicant to demonstrate that the Officer's decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). The court "must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable" (*ibid.*).

## V. ANALYSIS

[28] The applicant framed his application for permanent residence as a member of the spouse or common-law partner in Canada class on the understanding that he had to satisfy IRCC that his marriage to Ms. Dufresne was genuine and had not been entered into for an immigration purpose and that he required H&C relief to overcome his inadmissibility due to serious criminality. The first Officer approached the application with the same understanding. As a result, once that Officer was satisfied that the relationship was genuine and had not been entered into for an immigration purpose, she concluded that the applicant met the requirements of section 124 of the *IRPR* and, consequently, that the only outstanding issue was whether H&C relief should be granted in relation to the applicant's inadmissibility. Neither the applicant nor the first Officer appreciated that in fact the applicant did not meet the requirements of section 124 because he did not have temporary resident status in Canada. This proved to be the determinative issue for the second Officer.

[29] The applicant challenges both the reasonableness of the second Officer's decision and the fairness of the process by which it was made. While the decision-making process in this case was far from perfect, as I have stated, it is not necessary to determine whether it met the requirements of procedural fairness. This is because I am persuaded that the decision is unreasonable, albeit on a narrower basis than the applicant advances.

[30] Many of the applicant's arguments challenge the reasonableness of the Officer's finding that H&C considerations did not warrant relief from the usual consequences of his inadmissibility due to serious criminality. That finding is set out in the Officer's GCMS notes (see paragraph 24, above). It is not, however, mentioned anywhere in the decision letter. Instead, the decision letter deals solely with the applicant's ineligibility as a member of the spouse or common-law partner in Canada class under paragraph 124(b) of the *IRPR* – that is, the requirement that the applicant have temporary resident status in Canada, something the applicant lacked (see paragraphs 22-23, above).

[31] In my view, the decision letter reflects the Officer's reasonable – indeed, correct – view that an adverse finding with respect to the request for H&C relief from the requirement under paragraph 124(b) of the *IRPR* would be determinative of the application for permanent residence. In other words, if, as the Officer determined, there were insufficient grounds to exempt the applicant from this requirement, the application for permanent residence must be refused and there would be no need to consider the *additional* hurdle of criminal inadmissibility. Thus, if the determination with respect to paragraph 124(b) of the *IRPR* is reasonable, any flaws in the

Officer's assessment of the request for H&C relief from criminal inadmissibility (as found in the GCMS notes) would be immaterial.

[32] The critical question, then, is whether the Officer's determination that H&C relief would not be granted with respect to paragraph 124(b) of the *IRPR* is reasonable. In my view, it is not.

[33] There is no suggestion that the Officer erred in determining that the applicant could not benefit from the general public policy exempting certain applicants for permanent residence as members of the spouse or common-law in Canada class from the requirements of paragraph 124(b) of the *IRPR*. Consequently, the request for H&C relief turned on whether the applicant had established his entitlement to relief on the basis of the individual facts of his case. There is, however, no analysis whatsoever of this in the decision letter or the file notes. Instead, one finds only the Officer's bald, conclusory statement in the decision letter that they "do not find sufficient H&C grounds in this case to exempt the requirements pursuant to 124(b) of the IRPR." The Officer's GCMS notes are equally conclusory with respect to this determinative finding, shedding no light at all on the Officer's reasoning process. In my view, the decision falls well short of justifying the result in a transparent and intelligible way, as *Vavilov* requires.

[34] As noted above, there is some analysis of the H&C claim in the second Officer's GCMS notes but it relates only to the H&C claim in relation to inadmissibility due to serious criminality – an issue the Officer did not need to consider given the determination regarding paragraph 124(b) of the *IRPR*. Even if this analysis should be considered as part of the decision as a whole (c.f. *Vavilov* at para 84), it is of little if any assistance for understanding why the

Officer did not grant relief with respect to paragraph 124(b). This is because the balancing of interests that must be conducted to determine whether H&C relief should be granted for inadmissibility due to serious criminality is quite different from that required to determine whether to permit an application for permanent residence as a member of the spouse or common-law partner in Canada class to proceed despite the lack of temporary status in Canada.

[35] For example, in determining whether the applicant ought to be relieved of the requirement that he have temporary status in Canada despite the fact that he returned to Canada without an ARC, a reasonable and fair-minded person would consider, among other things, the circumstances under which the applicant returned to Canada, including why he did not obtain an ARC. It will be recalled that the applicant sought refugee protection upon his return to Canada in 2012 (albeit unsuccessfully). This circumstance is not addressed anywhere in the Officer's assessment of the applicant's inadmissibility due to serious criminality. Consequently, that assessment leaves a critical question unanswered when it comes to the need for H&C relief in relation to paragraph 124(b) of the *IRPR*.

[36] Furthermore, it is apparent from the second Officer's GCMS notes that the Officer had serious concerns about the applicant's credibility. The applicant contends that the Officer's reliance on these concerns breached the requirements of procedural fairness because he was never alerted to those concerns or given an opportunity to attempt to meet them. Separate and apart from this issue (which, as I have already stated, it is not necessary for me to resolve), the Officer simply raises these credibility concerns as a free-floating consideration and fails to link

them to the particular issues that must be determined in the H&C decision. This, too, undermines the reasonableness of the decision.

[37] In short, even reading the decision letter and file notes together, one cannot understand why the Officer determined that H&C relief from the requirement of paragraph 124(b) of the *IRPR* was not warranted. As the Supreme Court of Canada emphasized in *Vavilov*, it is through its reasons that an administrative decision maker provides the rationale for its decision to affected parties. Further, the decision must be justified by those reasons. The Officer's reasons in this case fail to meet this requirement.

## VI. CONCLUSION

[38] For these reasons, the application for judicial review is allowed. The decision of the IRCC Officer dated November 7, 2019, is set aside and the matter is remitted for redetermination by a different decision maker.

[39] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

**<u>JUDGMENT IN IMM-6981-19</u>**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is allowed.
2. The decision of the IRCC Officer dated November 7, 2019, is set aside and the matter is remitted for redetermination by a different decision maker.
3. No question of general importance is stated.

"John Norris"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-6981-19 |
| **STYLE OF CAUSE:** | MUSTAFA SAMMANI v MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | HELD BY VIDEOCONFERENCE |
| **DATE OF HEARING:** | NOVEMBER 8, 2021 |
| **JUDGMENT AND REASONS:** | NORRIS J. |
| **DATED:** | AUGUST 22, 2022 |

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