Federal Court  Cour fédérale

Date: 20230111

Docket: IMM-9334-21

Citation: 2023 FC 45

Ottawa, Ontario, January 11, 2023

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

BRANKO SUKAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review of a Senior Immigration Officer's [the Officer] decision [the Decision], to refuse his application for permanent residence made on Humanitarian and Compassionate [H&C] grounds.

[2] For the reasons that follow, I find the Decision is unreasonable and will grant this application for judicial review.

II. Background

[3] The Applicant is a 54-year old ethnic Croat, born in Bosnia and Herzegovina. He also has Croatian citizenship.

[4] He first entered Canada in March 2012 seeking refugee protection. In July 2018, he withdrew his refugee claim to pursue permanent residence through an H&C application.

[5] In August 2018, the Applicant submitted an application for permanent residence on H&C grounds based on his establishment in Canada and hardship in both Bosnia and Croatia.

[6] On October 29, 2020, the Officer refused the application.

III. Decision under Review

[7] The Officer assigned little weight to the Applicant's establishment in Canada. Acknowledging his work history, friendships, community involvement, and positive contributions to Canadian society, the Officer found it was an "insufficient amount of establishment".

[8] In terms of hardship, the Officer found that country conditions in Croatia "do not present exceptional difficulty", given that the applicant was unable to establish he was previously discriminated against due to Bosnian origins, that he had savings which could be used during his transition period to Croatia, and that the Applicant has mechanisms in place to refute the discrimination that he might experience.

IV. **Issues and Standard of Review**

[9] The Applicant raises two issues: (1) the Officer applied the wrong legal test for the use of their discretion pursuant to section 25 of the *Immigration and Refugee Protection Act* (*IRPA*) and erred in failing to adopt an empathetic approach or a global assessment in deciding the application and, (2) the Officer failed to consider submissions and evidence that was properly before them.

[10] The presumptive standard of review of an administrative decision, other than a review related to a breach of natural justice and/or the duty of procedural fairness, is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2015 SCC 65 [*Vavilov*] at para 23.

[11] The onus is on the Applicant to demonstrate that the decision is unreasonable: *Vavilov*, at paras 75 and 100.

[12] 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. The

reasonableness standard requires that a reviewing court defer to such a decision: *Vavilov* at para 85.

V. **Analysis**

A. *Establishment*

[13] A review of the reasons, read holistically, fails to reveal a rational chain of analysis with respect to the Applicant's establishment in Canada.

[14] The Officer begins the analysis by noting the Applicant's work history as a window installer since his arrival in Canada in 2012, and assigns that factor, without any explanation as to why, "a small amount of positive weight".

[15] The Officer similarly assigns a small amount of positive weight to the Applicant's English language proficiency, relationships in Canada, and his clean civil record. Aside from a comment about a lack of information "speaking to the breadth of the applicant's relationships", the Officer provides very little insight into their reasoning.

[16] I note that the Applicant provided eight letters from ten individuals in support of his application, many of which directly spoke to the breadth and depth of their relationships with the Applicant. The Officer failed to explain why this evidence was insufficient to establish the significance of those relationships when assigning the Applicant's friendships little weight.

[17] In the analysis section of the Decision, the Officer concludes, “I find that there is an insufficient amount of establishment due to the reasons previously discussed”. However, the reasons “previously discussed” failed to reveal any negative factors and repeatedly assigned a small amount of weight to positive factors with minimal and in some instances, no explanation at all.

[18] The Respondent submits that the issue is one of weighing of evidence and it was open to the Officer to assign limited weight to the various establishment factors raised by the Applicant. I disagree. While it was open to the Officer to find “insufficient establishment”, it was incumbent upon them to provide intelligible, transparent, and justified reasons for that conclusion: *Vavilov* at para 100.

[19] The reasons provided for the establishment analysis do not make it possible to trace the Officer’s reasoning process. It is not possible to determine how or why the Officer arrived at their conclusions and what would have been required to show “sufficient establishment”. This error renders the Decision unreasonable.

B. *Hardship and Adverse Country Conditions*

[20] I also find that the Officer erred in the hardship analysis when they focussed on whether the Applicant’s circumstances met the threshold of being “exceptional” rather than considering whether the circumstances as a whole justified humanitarian and compassionate relief.

[21] Recently, in *Zhang v Canada (Citizenship and Immigration)*, 2021 FC 1482 [*Zhang*] at paragraphs 1 – 2, Justice Zinn explained as follows:

> [1] There is a fundamental and significant difference when making decisions on humanitarian and compassionate grounds between, on the one hand, observing that the relief is exceptional and, on the other hand, requiring an applicant seeking relief on humanitarian and compassionate grounds to show exceptional circumstances warranting the relief.
>
> [2] The second is not the proper test. The officer reviewing Mr. Zhang's application for permanent residence on humanitarian and compassionate grounds [the Officer] used that improper test. The Officer required Mr. Zhang to demonstrate that his circumstances were "exceptional" and this is not the legal threshold required in humanitarian and compassionate decisions. The decision is therefore unreasonable.

[22] The Applicant points to the Officer's conclusion on hardship which states: "I find that the country conditions in Croatia do not present an exceptional difficulty given the following…". [my emphasis].

[23] The Applicant contends that it is clear from the Officer's comment that they asked the wrong question in assessing the application and imported a non-existent condition into the H&C analysis, instead searching for exceptional hardship: *Zhang* at paras 20, 23, 28.

[24] The Respondent states that the Officer asked and answered the appropriate question in accordance with *Zhang* at paragraphs 15-25 and cites *Arsu v Canada (Citizenship and Immigration)*, 2020 FC 617 for the proposition that an Officer can validly consider how an applicant's particular circumstances relate to the broader country conditions evidence.

[25] I agree with the Applicant that *Arsu* is distinguishable on the facts. The issue here is not that the Officer compared the Applicant's situation to others in the context of the country conditions evidence. It is the conclusion drawn from that analysis, that the Applicant's hardship does not meet the threshold of being "exceptional", which violates an important legal constraint that bears on the Decision.

[26] The Officer's language echoes that of the Officer in *Zhang* which imports a higher legal standard for H&C relief. As was the case in *Zhang* at paragraph 28, it suggests that the Officer was "operating with an understanding that the Applicant was required to demonstrate "exceptional" establishment or hardship". This is a reviewable error.

[27] Although the Officer's Decision is a highly discretionary one, and entitled to significant deference, this particular error makes it impossible to know whether, if hardship had been properly considered, the Officer would have come to the same conclusion.

[28] Having found both the establishment and hardship analysis to be unreasonable, I need not address the final issue of whether the Officer disregarded the additional submissions submitted by the Applicant.

VI. **Conclusion**

[29] The Officer conducted a flawed analysis of both the Applicant's establishment in Canada and the hardship he would face upon return to Croatia. Accordingly, the Decision is unreasonable and this application for judicial review is allowed.

[30] The Decision will be set aside and remitted to a new Officer for redetermination.

[31] No question was posed for certification nor does one exist on these facts.

JUDGMENT in IMM-9334-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The matter will be returned for redetermination by a different Officer.

3. There is no question to certify.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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