Federal Court Cour fédérale

Date: 20230127

Docket: IMM-477-21

Citation: 2023 FC 128

Ottawa, Ontario, January 27, 2023

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

AMERICO RUI MARTINS ARAUJO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Americo Rui Martins Araujo, is a citizen of Portugal. His application for permanent residence on Humanitarian and Compassionate [H&C] grounds, made pursuant to section 25 of the *Immigration and Refugee Protection Act,* SC 2001 c 27 [IRPA], was refused. He seeks judicial review of the senior immigration officer's [Officer] January 6, 2021 decision.

[2] The Applicant argues the Officer's decision is unreasonable because the Officer, (1) failed to adopt an equitable approach and consider his circumstances holistically; and (2) unreasonably assessed and weighed the H&C factors identified in support of the Application.

[3] The Respondent argues the Officer's decision was reasonable, particularly in light of the Applicant's history of non-compliance with immigration laws.

[4] For the reasons that follow, the Application is granted. I am persuaded that the Officer unreasonably assessed and weighed the applicable H&C factors. This issue is determinative and I have therefore not considered the Applicant's argument that the Officer failed to adopt an equitable approach in considering the Application.

II. Background

[5] As a young child, the Applicant was involved in a serious accident, which left him with a number of physical, cognitive and psychological disabilities. The evidence states that, as a result, it is difficult for him to follow instructions; new concepts or ideas must be explained to him repeatedly, and it takes time for him to understand. He often forgets what he was told and he works best when he has only one or two tasks to do repeatedly. It is difficult for him to communicate what he is thinking, and he often cannot find the words he needs, leading to frustration and at times a lost temper. The evidence also indicates he experiences symptoms of anxiety and depression.

[6] The Applicant's father passed away in 2002. His mother continues to reside in Portugal. The Applicant's elder brother left Portugal for Canada in 2004 and is a Canadian permanent resident. The Applicant's mother reportedly became unwilling and unable to provide care for the Applicant. In 2011, the Applicant came to Canada as a visitor and, upon the expiry of his visitor's status, he remained in Canada living with his elder brother.

[7] The Applicant came to the attention of the Canada Border Services Agency [CBSA] after he was charged with theft, a charge that was subsequently withdrawn. A report pursuant to section 44 of the IRPA found the Applicant to be inadmissible to Canada for having overstayed his visa. An exclusion order issued. After receiving a negative pre-removal risk assessment and a negative H&C decision, the Applicant failed to appear for a CBSA interview. He was subsequently arrested and, after his release, he submitted a second H&C application.

[8] The Applicant's second application for H&C relief was refused. He was scheduled to be removed from Canada on May 14, 2021, but removal was judicially stayed pending determination of this Application for Leave and for Judicial Review of the second negative H&C decision.

III. Decision under Review

[9] The Officer first summarized the Applicant's immigration history and noted the Applicant bears the onus of satisfying the Officer that H&C relief is justified. The Officer then addressed the Applicant's request that despite his age he should be given the benefit of a best interests of the child [BIOC] analysis, citing his disabilities and dependency on his brother. The

Officer refused, noting that BIOC is considered where a child is under the age of 18. The Officer noted the Applicant was already 18 when he arrived in Canada in 2011; he was not an individual who had recently become an adult. The Officer therefore concluded this was not a BIOC case.

[10] The Officer "acknowledge[d] the applicant's brother, David, who is a permanent resident, is a major source of support for the applicant" and accepted "the applicant is dependent on his brother and that he has provided the applicant with a meaningful life for himself in Canada." The Officer attributed considerable weight to the Applicant's familial ties in Canada. On the other hand, the Officer found the Applicant's level of establishment was not significant or extraordinary but rather expected and gave this factor modest weight.

[11] The Officer considered two psychological assessments of the Applicant, noting the more recent assessment stated the Applicant exhibited symptoms consistent with generalized anxiety and depression due to past trauma, and that a removal from Canada could result in re-traumatization and cause significant emotional and psychological suffering. The Officer accepted that the Applicant had exhibited symptoms consistent with generalized anxiety and depression but assigned the assessments modest weight. The Officer concluded the assessments provided clinical impressions, not a formal diagnosis, and strayed from an expression of expert opinion into immigration advocacy on behalf of the Applicant.

[12] In considering hardship, the Officer again acknowledged the Applicant's physical and cognitive disabilities, the fact that his mother was unable and unwilling to care for him and that he "depends on his brother in Canada to manage his everyday needs." The Officer acknowledged

there may be some initial difficulties in re-establishing in Portugal but also noted some hardship is inevitable when leaving Canada. The Officer found that the Applicant might be able to obtain support through a church in Portugal as he has in Canada, that the evidence indicates social support services are available in Portugal, and that his brother may continue to support him in Portugal. The Officer assigned some weight to the hardship the Applicant will experience if returned.

[13] The Officer addressed the Applicant's failure to comply with Canada's immigration laws by overstaying his temporary resident visa, working without authorization, failing to voluntarily present himself to CBSA after a warrant was issued for his arrest, and the fact that he only sought to regularize his status in Canada after he came to the attention of the CBSA. The Officer attributed significant negative weight to these circumstances.

IV. Standard of Review

[14] The Parties agree that the Officer's decision is to be reviewed against the presumptive standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). Reasonableness review entails a sensitive and respectful, but robust evaluation while also recognizing that perfection is not the standard (*Vavilov* at paras 12 and 13).

[15] In conducting a reasonableness review, 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). A reasonable decision is one that is internally coherent, and displays a rational chain of analysis (*Vavilov* at para 85).

[16] The party challenging a decision has the burden of demonstrating the decision is unreasonable. Alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision, or reflective of a minor misstep in the reasoning process. Instead, the court must be satisfied any shortcomings or flaws relied upon by the party challenging the decision are sufficiently central or significant so as to render the decision unreasonable (*Vavilov* at para 100).

V. Analysis

[17] The Respondent argues that the Application can be dismissed on a single issue, the Applicant's non-compliance with Canada's immigration laws. The Respondent submits, relying on *Shackleford v Canada (Citizenship and Immigration)*, 2019 FC 1313 [*Shackleford*] and *Ylanan v Canada (Citizenship and Immigration)*, 2019 FC 1063, that this Court has consistently upheld the reasonableness of a decision maker finding that applicants should not be rewarded for time spent unlawfully in Canada.

[18] I take no issue with the principle underlying the Respondent's position. However, as was noted in *Shackleford*, where the Court was considering the Officer's analysis of establishment, "[t]here may well be other considerations" in addition to the amount of time unlawfully spent in the country (at paragraph 23).

[19] In this case, there are other circumstances. They are described in an affidavit sworn by the Applicant's brother that was before the Officer (Certified Tribunal Record [CTR] at page 82). The affidavit details the Applicant's circumstances, including his physical, cognitive and behavioural issues as well as the impact of these issues on the Applicant's ability to learn, perform tasks, communicate his thoughts and develop social circles. The affidavit also details the challenges encountered by the Applicant's mother in caring for him alone as he matured, the support provided to the Applicant by his brother in Canada, and, in turn, the Applicant's role in his brother's family and business in Canada. The affidavit then states:

> 16. It would be impossible for him to live a similar life in Portugal. His current lifestyle is completely dependent on me continuing to be able to support him. Given my support and his tenacity he has achieved amazing accomplishments despite his disability. All it takes is an understanding and supportive family member to raise him from being dependent and depressed to being self-sufficient and confident. I am lucky to have the financial and economic capability to employ and support him. So many other people I know who live with similar disabilities are unable to work and are dependent on others to support them.

[20] The Officer does not take issue with any of this evidence. Yet the Respondent argues that there is a lack of evidence to establish the Applicant suffered from a level of cognitive impairment sufficient to excuse the Applicant's non-compliance. The Respondent further notes the absence of probative evidence from the Applicant's mother, despite her importance to the H&C application.

[21] I am not persuaded by the Respondent's arguments in this regard. It was for the Officer, not counsel, to take issue with the sufficiency of the evidence. The Officer did not do so, but instead acknowledged and accepted much of the evidence without reservation. The Respondent's

argument, in effect, asks this Court to engage in a reconsideration, reassessment and reweighing of the evidence. This is not the role of the Court on judicial review.

[22] Not having taken issue with either the sufficiency or probity of the evidence relating to the Applicant's disabilities and dependency, the Officer was required to engage and grapple with that evidence in assessing the Applicant's H&C factors. The Officer did not do so in considering the issue of non-compliance.

[23] In considering the issue of hardship, the Officer acknowledged that the Applicant relies on his brother to "manage his everyday needs" but then proceeded to conclude that the hardship resulting from the Applicant's return to Portugal would be nothing more than the inevitable hardship associated with having to leave Canada. Similarly, the Officer found there to be little information or evidence indicating the Applicant's brother would be unable or unwilling to travel to Portugal to assist the Applicant in re-establishing himself in that country. In so finding, the Officer did not address or consider the time and commitment this might entail, despite the acknowledged degree of dependency and the brother's responsibilities and obligations to his family and the business he owns and operates in Canada. The Officer's hardship findings are not supported by a rational chain of analysis.

[24] The Officer's failure to meaningfully grapple with the evidence of disability and dependency undermines the intelligibility of the Officer's consideration of the identified H&C factors and, in turn, the weight assigned to those factors for the purposes of the global assessment the Officer ultimately undertook.

[25] Similarly, the Officer's failure to address the Applicant's accepted dependency on his brother in considering the request for a BIOC analysis renders that aspect of the Officer's decision unreasonable. A reasonable decision is one that is responsive to the issues raised by an applicant. The BIOC analysis was requested because of the Applicant's dependency, not his age. In limiting the analysis to simply the issue of age, the reasons were not responsive to one of the Applicant's main submissions.

VI. Conclusion

[26] For the above reasons, the Application is granted. The parties have not identified a question for certification and none arises.

JUDGMENT in IMM-477-21

THIS COURT'S JUDGMENT is that:

1. The Application is granted.

2. The matter is returned for redetermination by a different decision maker.

3. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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