Federal Court Cour fédérale

Date: 20240126

Docket: IMM-6794-22

Citation: 2024 FC 135

Ottawa, Ontario, January 26, 2024

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

ABDULSALAM SALEH HUSSEIN SALEH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Abdulsalam Saleh Hussein Saleh, applied for permanent residence from within Canada based on humanitarian and compassionate grounds ("H & C Application"). He is a citizen of Yemen. Canada currently lists Yemen as a country to which an Administrative Deferral of Removals [ADR] applies, meaning that the Minister has recognized under subsection 230(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*] that "the circumstances [in Yemen] pose a generalized risk to the entire civilian population."

[2] Mr. Saleh's H & C Application was refused by an officer at Immigration, Refugees and Citizenship Canada [IRCC]. Mr. Saleh challenges the merits of this refusal on judicial review. The parties agree, as do I, that I should review the Officer's decision on a reasonableness standard. Mr. Saleh raises a number of arguments on judicial review. I find that the determinative issue is the Officer's evaluation of the hardship Mr. Saleh would face if he were to return to Yemen. In particular, similar to this Court's finding in *Bawazir v Canada (Citizenship and Immigration)*, 2019 FC 623 [*Bawazir*], I find the Officer's narrow consideration of the impact of an ADR in place for Yemen to be unreasonable.

[3] Foreign nationals applying for permanent residence in Canada can ask the Minister to exercise Ministerial discretion to relieve them from requirements in the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] because of humanitarian and compassionate factors (*IRPA*, s 25(1)). The Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], citing *Chirwa v Canada (Minister of Citizenship and Immigration) (1970)*, 4 IAC 338, [1970] IABD No 1, confirmed that the purpose of this humanitarian and compassionate discretion is "to offer equitable relief in circumstances that 'would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another'" (*Kanthasamy* at para 21).

[4] Given that the purpose of humanitarian and compassionate discretion is to "mitigate the rigidity of the law in an appropriate case," there is no limited set of factors that warrants relief (*Kanthasamy* at para 19). The factors warranting relief will vary depending on the circumstances, but "officers making humanitarian and compassionate determinations must substantively

consider and weigh all the relevant facts and factors before them" (*Kanthasamy* at para 25, citing *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at paras 74–75).

[5] In my view, the Officer did not substantively consider and weigh the hardship factor. The Officer found that the presence of an ADR for Yemen meant that Mr. Saleh would not have to return at this time to face the conditions he described in his application, and therefore the Officer gave the adverse conditions in Yemen little weight, stating: "I find that the adverse conditions in Yemen are mitigated by the existence of the ADR, and accordingly this factor is afforded little weight in this H & C application."

[6] The problem with this analysis is that it ignores that section 11(1) of *IRPA* ordinarily requires an applicant to apply for permanent residence from abroad; an H & C application filed in Canada is a request for relief from this requirement. Like Justice Norris found in *Bawazir*, "the officer did not consider that [the applicant] had no choice but to leave Canada for Yemen if he wishes to apply for permanent residence unless an exception is made for him" (para 17). A number of subsequent cases have addressed this same problem, including *Elshafi v Canada (Citizenship and Immigration)*, 2023 FC 266 at paragraphs 27-31, *Younan v Canada (Citizenship and Immigration)*, 2022 FC 484 at paragraphs 12-15, *Alajnf v Canada (Citizenship and Immigration)*, 2023 FC 151 at paragraph 16, *Al-Abayechi v Canada (Citizenship and Immigration)*, 2022 FC 873 at paragraphs 13-15, and *Ibrahim v Canada (Citizenship and Immigration)*, 2022 FC 1194 at paragraphs 32-35.

[7] The Respondent does not argue that the Officer considered Mr. Saleh's hardship in applying for permanent residence from Yemen. The Respondent's position is that it is not for the Court to consider this argument on judicial review because Mr. Saleh never raised this issue in his submissions to the Officer. Mr. Saleh's former counsel did not raise the presence of an ADR in their submissions.

[8] I do not agree with the Respondent that Mr. Saleh had to explicitly raise this issue in submissions to the Officer. The Officer raised the ADR and relied on it to find that the poor country conditions described in Mr. Saleh's application were mitigated given the ADR in place. Mr. Saleh did not have to specifically state that the country conditions in Yemen would cause hardship because he would have to apply for permanent residence from abroad. This is an inherent part of what an officer is considering on an H & C Application—it is an exemption from section 11(1) of *IRPA* that ordinarily requires an application for permanent residence be filed outside of Canada. Indeed, this Officer clearly understood that this was the nature of the inquiry they were conducting, stating at the outset of their reasons: "This H & C decision considered the extent to which the applicant, given his particular circumstances, would face hardship if he had to leave Canada in order to apply for permanent residence abroad."

[9] The Respondent also relies on the jurisprudence of this Court that finds that the presence of an ADR is not a determinative factor, namely that there is no guarantee that an H & C Application will be granted to the national of a country where an ADR is in place (see *Alzoubei v Canada (Citizenship and Immigration)*, 2021 FC 1418 at para 12). This is certainly true, but the impact of an ADR is clearly an important and relevant factor that an officer's analysis must fully

weigh, and not simply narrowly consider. This was not done here and therefore the matter must be redetermined.

JUDGMENT in IMM-6794-22

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended with immediate effect to correct the name of the Respondent to the Minister of Citizenship and Immigration;
2. The application for judicial review is allowed;
3. The June 30, 2022 decision is set aside and the matter is sent to a different decision-maker for redetermination; and
4. No serious question of general importance is certified.

"Lobat Sadrehashemi"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6794-22
STYLE OF CAUSE:	ABDULSALAM SALEH HUSSEIN SALEH v MIRCC
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 9, 2024
JUDGMENT AND REASONS:	SADREHASHEMI J.
DATED:	JANUARY 26, 2024

APPEARANCES:

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