Federal Court Cour fédérale

Date: 20240216

Docket: IMM-13668-22

Citation: 2024 FC 250

Ottawa, Ontario, February 16, 2024

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

LEONARDO ANDINO JIMENEZ, MEGGUY TATIANA MOREIRA MACIAS, IKER LEONARDO ANDINO MOREIRIA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants applied for permanent residence on humanitarian and compassionate [H&C] grounds pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. A senior immigration officer [Officer] determined that the Applicants' circumstances did not warrant an H&C exemption. The application was denied.

[2] The Applicants seek judicial review of the Officer's December 13, 2022 decision under subsection 72(1) of the IRPA, arguing the decision is unreasonable and that the process was unfair. For the reasons that follow, the Application is granted.

II. Background

[3] The Principal Applicant [PA], Leonardo Andino Jimenez, and his common-law spouse, Megguy Tatiana Moreira Macias, the Secondary Applicant [SA], entered Canada in December 2015 to visit an aunt and cousin of the SA. Their son, Iker, now in his mid teens, arrived in Canada in April 2016.

[4] The PA was born in, and is a citizen of, the Dominican Republic. He moved to Spain in December 2006. The SA was born in, and is a citizen of, Ecuador. The SA lived in Spain prior to arriving in Canada. Iker was born in Spain. All three applicants are citizens of Spain. The PA and SA are also parents of a second child, born in Canada in 2021.

[5] The PA has worked in construction as a carpenter since he arrived in Canada. The SA worked as a cleaner, but was on maternity leave at the time the H&C application was submitted. Both the PA and the SA have been active members of a softball league.

III. Decision under review

[6] In denying the application, the Officer first noted that relief on H&C grounds is an exceptional measure and that the Applicants bear the onus to emphasize the factors to be

considered and to provide evidence corroborating these factors. In reviewing the application, the Officer considered the following factors: the hardship the Applicants would face if returned to their countries of origin (Dominican Republic and Ecuador), the Applicants' establishment in Canada, and the best interests of the children.

[7] In considering hardship, the Officer acknowledged the documentary evidence relating to crime rates, violence, gender discrimination, and child abuse in the Dominican Republic and Ecuador, but noted that the evidence does not demonstrate how these conditions affected the Applicants in the past or will impact them in the future. The Officer reasoned that these are general conditions that similarly situated people in those countries face.

[8] The Officer then noted that all of the Applicants are nationals of Spain but reported they do not wish to return to that country because of the influence the PA's father, who resides in Spain, exercises over the PA. In considering this factor, the Officer highlighted that, in counsel's submissions, it was argued the PA cannot deny his father's commands under any conditions, yet the PA's affidavit did outline instances where the PA had been able to defy his father's commands. The Officer acknowledged the desire not to live close to the PA's father but noted the Applicants had the flexibility to reside anywhere within the European Union. The Officer gave this factor little weight and held it to be "insufficient to grant the applicants an exemption" under s 25 of IRPA.

[9] With respect to establishment, the Officer took account of the time the Applicants had been in Canada (7 years), their employment, their savings, and the training and certifications that

the PA had completed. However, the Officer balanced these positive factors against the fact that the Applicants had resided and worked in Canada without authorization, finding that this reflected a disregard for Canadian immigration law. Consequently, the Officer assigned little weight to the Applicants' establishment.

[10] The Officer recognized the Applicants had dedicated time and support to their church and a softball league but also noted the evidence failed to demonstrate the Applicants to be "pivotal to the operations of these organizations." The Officer also considered the letters of support from friends and a family member, and acknowledged the friendships, but concluded these relationships could be maintained from afar.

[11] In considering the best interests of the two children, the Officer acknowledged this factor was to be given significant weight but noted it was only one of the many factors to be taken into account. The Officer acknowledged the oldest child was fourteen years old and the youngest was one year of age. The Officer noted the Applicants' position that it would be in the children's best interests to remain in Canada and acknowledged that returning to Spain would result in some adjustments for the children. The Officer found the youngest child could legally reside in Spain. The Officer ascribed significant weight to this factor but ultimately held that the evidence did not establish that returning to Spain would compromise the best interests of the children.

[12] After assessing the evidence cumulatively and considering the degree of hardship the Applicants would face in leaving Canada, the Officer concluded H&C relief was not warranted.

IV. Issues and standard of review

[13] The Application raises the following issues:

A. Did the Officer err in considering the issue of the PA's father's influence by failing to provide the Applicants with an opportunity to respond to the identified inconsistency between the PA's evidence and counsel submissions?

B. Did the Officer reasonably conclude that the Applicants' personal circumstances did not justify the granting of H&C relief?

[14] Questions of fairness are to be assessed with a focus on the nature of the substantive rights involved and by asking whether the procedure was fair having regard to all of the circumstances. While no standard of review applies *per se*, correctness best reflects the Court's approach (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54, citing *Eagle's Nest Youth Ranch Inc v Corman Park (Rural Municipality #344),* 2016 SKCA 20 at para 20).

[15] The Officer's H&C analysis and its outcome are to be reviewed against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 17 [*Vavilov*], *Okohue v Canada (Citizenship and Immigration)*, 2020 FC 100 at paras 24 to 25). In considering whether a decision is reasonable, the Court should focus on whether the decision, when read holistically, reflects the attributes of justification, transparency and intelligibility. The decision must be "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). It is not for the Court to reweigh the evidence, or engage in a line-by-line hunt for errors (*Vavilov* at para 102).

V. Analysis

A. *No breach of fairness*

[16] The Applicants argue the Officer faulted them for not explaining an identified discrepancy between the PA's affidavit evidence and the submissions of counsel without giving the PA an opportunity to address the discrepancy. The Applicants submit this was a breach of procedural fairness. I disagree.

[17] Having noted counsel's submissions to the effect that the PA "is unable to deny his father's commands in any condition," the Officer subsequently highlighted the PA's evidence indicating that, on two occasions, the PA had demonstrated he was capable of declining his father's command. This observation was consistent with the PA's evidence. There was no breach of fairness.

B. *The Officer's decision is unreasonable*

[18] The Applicants rely on *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] to argue the Officer erred by failing to adopt an empathetic and global approach to the application, and instead, segmented, minimized and isolated the identified H&C factors (*Kanthasamy* at para 28). The Applicants submit the jurisprudence requires a compassionate global and cumulative assessment of the circumstances from the Applicants'

perspective, and argue the mere statement that the decision is "based on a cumulative assessment" of the evidence is not sufficient to make it so. The Applicants also take issue with several specific elements of the Officer's analysis, including the Officer's failure to explain why little weight was given to the Applicants' desire not to return to Spain.

[19] The Respondent submits the Officer carefully considered the evidence and the decision should be given significant deference. The Respondent relies on *He v Canada (Citizenship and Immigration),* 2018 FC 278 and *Peshlikoski v Canada (Citizenship and Immigration),* 2022 FC 154 to argue it is not sufficient for an applicant to assert a failure to adopt an empathetic approach without pointing to specific evidence to support that argument.

[20] I take no issue with the principles the Respondent has identified and agree that the mere assertion that an H&C Officer failed to adopt an empathetic approach to an H&C application is insufficient to render a decision unreasonable. Nor am I persuaded the Officer profoundly misunderstood the case or failed to undertake a global assessment of the H&C factors. However, the Applicants have argued the Officer erred in respect of the treatment of the PA's evidence detailing a troubled and abusive relationship with his father. In this regard, I agree, the Officer did fail to meaningfully grapple with and address the PA's evidence justifying his desire not to return to Spain.

[21] In asserting that returning to Spain would create hardship for the PA and his family, the PA relies upon his eighteen paragraph affidavit provided in support of the H&C application. That affidavit described the PA's relationship with his father and the influence the father exerted on

the PA. The affidavit portrays the father as being violent, and criminally and politically connected. It describes incidents where the father inflicted physical and emotional abuse on family members, including the PA. The affidavit evidence asserts the father exercised control over the PA as a child and as an adult – the father dictated the PA's career choices, attempted to engage the PA in unethical and criminal conduct, compelled the PA to immigrate to Spain with him and forced the PA to marry the PA's cousin for his financial benefit. Finally, the PA asserts the father's efforts to seek out and interfere with him continued after the PA established himself in Spain and had entered into a relationship with his current spouse – the father located the PA after he had served a five-year prison sentence, sought money from the PA and "wherever [the PA] would move, he would find the address."

[22] Although the Officer acknowledged the PA's affidavit, the Officer's engagement with its contents was largely limited to a consideration of the narrow issue of whether the PA's evidence was consistent with counsel's assertion that the PA was unable to deny his father's commands. Having concluded the PA's evidence did not support counsel's assertion, the Officer then concluded, without further analysis, that the Applicants did not need to live near the father as they could live anywhere in Spain or elsewhere in the EU. This conclusion failed to account for the PA's evidence that the father had actively tracked and located the PA and his family in the past, evidence the Officer takes no issue with.

[23] Although the Applicants have framed the Officer's failure to address the above evidence as an issue of fairness, I am of the view the Officer's failure to address the evidence – evidence that was central to the H&C application – undermined the reasonableness of the Officer's

hardship analysis as it related to Spain. This in turn also undermined the reasonableness of the global assessment of the H&C factors undertaken by the Officer. As noted in *Vavilov,* a reasonable decision is one where the decision-maker meaningfully accounts for the central issues and concerns raised by the parties (para 127).

VI. Conclusion

[24] Accordingly, the Application for Judicial Review is granted. Neither party has proposed a question for certification and none arises.

JUDGMENT IN IMM-13668-22

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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