Federal Court  Cour fédérale

Date: 20240308

Docket: IMM-7019-22

Citation: 2024 FC 393

Ottawa, Ontario, March 8, 2024

PRESENT: The Honourable Madam Justice Turley

BETWEEN:

PRZEMYSLAW JAWORSKI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS FOR JUDGMENT

I. Overview

[1] The Applicant seeks judicial review of a decision of a Senior Immigration Officer [Officer], dated July 8, 2022, refusing the Applicant's request to reopen his application for permanent residence on humanitarian and compassionate [H&C] grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] I am dismissing the application. I do not agree that the Officer ventured beyond the first stage of a request for reconsideration and effectively reopened the initial H&C decision. Furthermore, the Officer's decision refusing to reopen the H&C decision is reasonable. The Officer provided intelligible, justified, and transparent reasons to explain their decision.

II. Background

[3] The Applicant, a citizen of Poland, arrived in Canada in 2004 on a visitor's visa that expired in March 2005. The Applicant has remained in Canada since then, but did not make any additional applications for temporary or permanent residence until August 2017.

[4] The Applicant's first H&C application was refused in 2020. He applied again in February 2022, claiming that he has been in poor health since 2015 and that he would face hardship based on a lack of medical care if he were to return to Poland.

[5] After cumulatively assessing the relevant factors, an H&C officer refused the Applicant's application because they were not satisfied an exemption was justified under subsection 25(1) of the *IRPA*. While the officer acknowledged the Applicant's physical health challenges, the officer found "little evidence" that he would be unable to access medical treatment in Poland and thus only assigned modest consideration to this factor: Humanitarian and Compassionate Grounds Reasons for Decision dated May 25, 2022 at p 4 [H&C Reasons]. The officer further assigned positive consideration to the Applicant's mental health challenges, but found that "the reasonable expectation to leave Canada at the end of his unauthorized stay" minimized this factor: H&C Reasons at p 5.

[6] The Applicant did not seek judicial review but rather requested reconsideration of the negative H&C decision. In support of his request for reconsideration, the Applicant submitted additional evidence and submissions detailing a decline in his mental health based on the H&C refusal as well as the impact of the Russia-Ukraine war on Poland.

[7] By decision dated July 8, 2022, the Officer refused to reconsider the Applicant's H&C application. With respect to the country conditions in Poland, the Officer determined that the Applicant had failed "to draw a clear nexus between his personal circumstances and the new evidence": Reconsideration Reasons dated July 8, 2022. The Officer also found that the additional evidence about health concerns did not fall "outside of context from the original decision" and noted that the Applicant did not submit updated reports from a licensed physician.

III. Analysis

[8] There are two issues for determination. The first issue is whether the Officer decided the Applicant's request for reconsideration at the first or second stage of the reconsideration process. As aptly stated by Justice Walker (as she then was), this issue "is critical to the Court's review of the reconsideration decision because the scope of an officer's assessment of a reconsideration request and the substance of the reasons they must provide to an applicant differ at each stage": *Katumbus v Canada (Citizenship and Immigration)*, 2022 FC 428 at para 12 [*Katumbus*].

[9] The second issue is whether the Officer's decision is reasonable. Applying the reasonableness standard of review, a reviewing court must take a deferential approach and intervene only "where it is truly necessary to do so in order to safeguard the legality, rationality

and fairness of the administrative process": *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 13 [*Vavilov*]. The Court must determine whether the Officer's decision exhibits the requisite attributes of "justification, intelligibility and transparency": *Vavilov* at para 100.

A. *The Officer decided the reconsideration request at the first stage*

[10] It is well established that immigration officers have the jurisdiction to reconsider their decisions based on new evidence and/or further submissions: *Canada (Citizenship and Immigration) v Kurukkal*, 2010 FCA 230 at paras 3-4.

[11] The reconsideration process consists of two stages. At the first stage, the officer must decide whether to exercise their discretion and "open the door to reconsideration": *A.B. v Canada (Citizenship and Immigration)*, 2021 FC 1206 at paras 21, 30 [*A.B.*]. The onus is on the applicant to show that reconsideration is warranted in the interests of justice or because of the unusual circumstances of the case: *Katumbus* at para 11; *A.B.* at para 22.

[12] If the officer decides to reopen the case they must then, at the second stage, engage in a reconsideration of the decision on its merits: *Katumbus* at para 11; *A.B.* at para 21.

[13] I do not agree with the Applicant that the Officer ventured into the second stage of the reconsideration process. In my view, the Officer's reasons clearly demonstrate an engagement with the first stage only. With reference to the Applicant's two reasons for requesting a reconsideration – changing country conditions in Poland and additional health concerns – and the evidence

submitted in support, the Officer explained why they refused to exercise their discretion to reopen the Applicant's H&C decision.

[14] In deciding whether to reopen a decision and move to the second stage, it is "inevitable that an officer will need to examine the reasons put forward to re-open a decision": *A.B.* at para 31. Furthermore, simply mentioning or describing the new evidence does not, in and of itself, indicate that the Officer made a decision at the second stage: *Katumbus* at para 18. Indeed, if an officer failed to engage to a certain degree with the new evidence and submissions at the first stage, this would raise a valid concern about the reasonableness of an officer's refusal to reopen a decision.

[15] I do not accept the Applicant's argument that the Officer "clearly engaged with the evidence to such a degree that he has in fact reopened the application": Applicant's Memorandum of Fact and Law at para 40. The Applicant's reliance on *Katumbus* to support that the Officer decided this case at the second stage is misplaced. Contrary to the Applicant's submissions, I find that this case is distinguishable from *Katumbus*.

[16] In *Katumbus*, the Court found that the officer had strayed beyond the first stage because they referred to the Applicant's new evidence in respect of each of the three H&C factors at play and analyzed the nature and import of the new evidence for two of the three factors. The following passage in *Katumbus* highlights the differences between the officers' engagement of the new evidence and submissions in that case and the case at hand:

> [18] The Reconsideration Decision differs from the decision under review in *A.B.* Here, the officer referred to the Applicant's new

> evidence in respect of each of the three H&C factors at play. For two of those factors, the officer set out a short analysis of the nature and import of the new evidence. In my opinion, the mere mention of new evidence in a reconsideration decision does not necessarily indicate a second stage decision. Such mention or description may reasonably form part of an officer's explanation for refusing to reopen a decision. For example, the officer's reference in the Reconsideration Decision to the letter submitted by the Applicant's daughter is not problematic. It is the officer's evaluation of the new evidence about the Applicant's establishment in Canada and her family in the DRC, and the officer's conclusions regarding the impact of that evidence on the H&C Decision, that suggest a second stage review.
>
> [Emphasis added]

[17] The Court concluded in *Katumbus* that the type of analysis undertaken by the officer was "properly reserved to a full reconsideration of the H&C decision and should not form part of the initial, first stage": *Katumbus* at para 19. In contrast, in this case, the Officer did not refer to any of the H&C factors raised by the Applicant or assess the new evidence as it related to any of the H&C factors.

[18] In light of the above, I find that the Officer made a decision at the first stage of the reconsideration process not to reopen the Applicant's H&C application and did not stray into the second stage.

B. *The Officer's decision is reasonable*

[19] Given my determination that the Officer decided the Applicant's request for reconsideration at the first stage, I must now decide whether that decision is reasonable. An assessment of the intelligibility and justification of an officer's refusal to reopen should consider

the nature of the material submitted and the specific context of the case: *A.B.* at para 43. As Justice Pentney further noted in *A.B.*, "the requirements to justify a refusal to reopen a decision is not at the high end of the scale, and much depends on the actual circumstances of the case and the nature of the request": *A.B.* at para 44.

[20] In my view, the Officer's decision is reasonable. The Officer explained, in an intelligible, justified, and transparent manner, why they refused to reopen the Applicant's H&C decision.

[21] The Applicant requested a reconsideration based on the deteriorating security situation in Poland due to the war in Ukraine. In support, the Applicant submitted new evidence about the security risk caused by an increase in displaced people entering Poland from Ukraine and Belarus and the announcement of a state of emergency in Podlaskie and Lubelskie: Letter dated June 23, 2022 at pp 2-3.

[22] While the Officer found that this evidence was "reliable in nature", they determined that the Applicant had failed to show a nexus between this evidence and his personal circumstances. This was an entirely reasonable finding to make particularly given the generic nature of the evidence submitted about Poland's security situation, and the fact that the Applicant had not demonstrated that he had or will be residing in either Podlaskie or Lubelskie, such that he may be negatively affected.

[23] In oral argument, the Applicant's counsel submitted that the Officer erred in refusing to reopen the H&C decision based on the impact of the security situation on the Applicant's access

to medical services. This, however, was not an argument raised in the Applicant's reconsideration submissions, nor did the Applicant submit any evidence about this issue. This issue cannot now be raised for the first time on judicial review: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22-26.

[24] In his reconsideration request, the Applicant also submitted that the Officer should reconsider the H&C decision because the Applicant's medical condition had further deteriorated and that he had developed a new illness (a hoarseness in his voice). The Applicant submitted an updated letter from a nurse practitioner who had also provided evidence in support of his original H&C application.

[25] The Officer concluded that this new medical evidence "[did] not fall outside of context from the original decision" and that the Applicant had not indicated that he could not obtain treatment in Poland for the new illness. In the circumstances, this is a reasonable explanation for refusing to reopen the H&C application. It was open to the Officer to refuse to exercise their discretion and reopen the Applicant's case where the evidence did not depart materially from the original evidence. I am satisfied that this conclusion falls within "the range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *Vavilov* at para 86.

[26] The Officer also noted that the Applicant had not provided "updated or investigative health reports from licensed physicians". I do not accept the Applicant's argument that this is an unreasonable finding because "nurse practitioners are equivalent to licensed physicians": Applicant's Memorandum of Fact and Law at para 30. As explained in the nurse practitioner's

letter, filed in support of the Applicant's reconsideration request, a nurse practitioner is "a Registered Nurse with advanced education and experience to provide primary care to holistically meet the complex health and social needs of clients": Letter dated June 20, 2022.

[27] The Officer did not make an adverse credibility finding, or discount the nurse practitioner's updated evidence, but simply observed that the Applicant had not filed any updated reports from medical doctors. This was a reasonable observation given that the Applicant had submitted numerous medical reports from physicians – including a psychiatrist, a cardiologist, and an urologist, in addition to letters from the same nurse practitioner – in support of his H&C application.

[28] Based on the foregoing, I dismiss this application for judicial review as I find that the Officer reasonably exercised their discretion to refuse to reopen the H&C decision.

[29] The parties did not raise a question for certification and I agree that none arises in this case.

JUDGMENT in IMM-7019-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Anne M. Turley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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