Federal Court  Cour fédérale

Date: 20240718

Docket: IMM-8638-23

Citation: 2024 FC 1129

Vancouver, British Columbia, July 18, 2024

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

MIGUEL EDUARDO LOPEZ ESCOBAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Miguel Eduardo Lopez Escobar, the Applicant, brings this application for judicial review of a decision of a senior immigration officer [Officer], dated May 29, 2023, refusing the Applicant's permanent residence application which was based on humanitarian and compassionate [H&C] grounds under s 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

Background

[2] The Applicant is a citizen of Honduras. He entered Canada in August 2008 and filed a claim for refugee status, which he later abandoned. He remained in Canada without status. On October 12, 2022 he was arrested and detained for removal.. He was released from detention on October 13, 2022. He married Cinthia Maricela Madrid Argueta [Spouse] on October 14, 2022. The Applicant submitted a pre-risk removal assessment on October 24, 2022. He submitted an H&C application on December 4, 2022 which application was based on his establishment in Canada, family ties and adverse country conditions in Honduras.

Decision under review

[3] In considering establishment, the Officer found that it was reasonable to expect that someone who has been in Canada since 2008 would have achieved some level of establishment and integration into Canadian culture. The Officer reviewed the letters of support filed by friends of the Applicant and found that these established that he has created some personal ties in Canada. However, there was insufficient evidence to indicate whether or what negative impact the Applicant's departure from Canada may have on those persons. The friendships could also be maintained by remote communications. The Officer found, while returning to Honduras may pose some difficulties and there would be a period of adjustment, that the Applicant would likely be able to re-establish himself in Honduras. Further, as to his 15 year stay in Canada, the Officer acknowledged the Applicant's explanation that he had had abandoned his refugee claim and had not otherwise sought to regularise his status because he was afraid his claim would be rejected. However, the Officer found that immigration programs are effected by Parliament to ensure program integrity and a fair and consistent process for all applicants. Section 25(1) of the *IRPA*

is not an alternate means of applying for permanent residence in Canada. The Officer placed little weight on the hardship of returning to Honduras and applying for permanent residence in the normal manner simply because the Applicant believes that he would not qualify under other immigration streams. Overall, the Officer found that while the Applicant has spent 15 years in Canada his establishment was minimal and that his failure to comply with the *IRPA* was a negative consideration. However, that establishment alone was not a determinative factor; a global assessment of all of the factors was also required.

[4] As to family ties, the Officer considered the affidavit of the Applicant's Spouse indicating that she and the Applicant had met in 2013 and married in October 2022 as well as a note from his Spouse's family doctor indicating that she has a permanent medical disability having been diagnosed with Chiari 1 malformation with craniotomy surgeries and had pseudomeningocele chronic pain and headaches, depressive disorder, adjustment disorder, single functioning kidney and hypertension. The Officer noted that, the supporting affidavit of the Spouse indicated that the Applicant was by her side during the darkest days of her life and cared for, and continues to care for, her and her children. The Officer observed that the Spouse and her three sons all hold Canadian permanent residence status. The Officer also noted that the Applicant's three stepsons, who are all over 18 years of age, had also provided supporting affidavits. The Officer found that there was little objective documentary evidence before them suggesting that the Canadian medical and social services are inadequate to provide the care that the Spouse requires or indicating the level of the Spouse's dependence on the Applicant. Nonetheless, the Officer accepted that the Applicant assists his Spouse with her daily care and afforded this some positive weight and also afforded some weight to the Applicant's family ties.

However, the Officer found the evidence did not support that the family would not be able to adjust to the Applicant's departure from Canada and that the separation could be offset, to a degree, by maintaining the relationship by remote means, still placing some weight on the emotional hardship the Applicant may endure due to separation from his family in Canada. The Officer also acknowledged that the Applicant is estranged from his family in Honduras and afforded this some weight.

[5] The Officer then addressed country conditions in Honduras. The Officer acknowledged that the country condition reports indicate high levels of generalized violence, impunity and corruption but found that there was little objective evidence to demonstrate that these general conditions would, on a balance of probabilities, directly affect the Applicant causing him hardship. Further, that H& C discretion is not intended to make up for the differences in standards of living between Canada and other countries.

[6] Having considered the H&C factors raised by the Applicant and his information and circumstances as part of a global assessment, the Officer found that sufficient H&C considerations did not exist to justify an exemption under s 25(1) of the *IRPA*.

Issue and standard of review

[7] The sole issue in this matter is whether the H&C decision is reasonable. The parties submit and I agree that in assessing the merits of the Officer's decision, the reasonableness standard of review applies (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 23, 25). On judicial review, the reviewing 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).

Analysis

[8] In his written submissions the Applicant makes a number of arguments in support of his view that the decision was unreasonable, which I will address below.

[9] First, however, to provide context I note that Subsection 25(1) of the *IRPA* gives the Minister discretion to exempt foreign nationals from the ordinary requirements of the *IRPA* if the Minister is of the opinion that such relief is justified by H&C considerations relating to the foreign national, taking into account the best interests of any children directly affected. In this case, if warranted, an H&C exemption would permit the Applicant to obtain permanent resident status without having to leave Canada to apply, which is the normal route when an applicant is seeking to obtain this status (*Titova v Canada (Citizenship and Immigration)*, 2021 FC 654 at paras 20-21).

[10] In that regard, the jurisprudence establishes that an H&C exemption is an exceptional and discretionary remedy, which is intended to provide a flexible and responsive exception to the ordinary operation of the *IRPA*, or, a discretion to mitigate the rigidity of the law in an appropriate case. There will inevitably be some hardship associated with being required to leave Canada, but this alone will not generally be sufficient to warrant relief on H&C grounds under s 25(1). Nor is s 25 an alternative immigration scheme. Rather, s 25 is intended 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 v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909 (*Kanthasamy*) at paras 13, 19, 21, 23; *Shackleford v Canada (Citizenship and Immigration)* [*Shackleford*], 2019 FC 1313 at paras 12, 15, 16; *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 [*Marshall*] at para 31; *Del Pilar Capetillo Mendez v Canada (Citizenship and Immigration)*, 2022 FC 559 at para 49).

[11] The onus of establishing that an H&C exemption is warranted lies with the applicant (*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 45). This means that the applicant must provide sufficient evidence to convince the officer to grant this exceptional remedy. What warrants relief will vary depending on the facts and context of each case, but officers making H&C determinations must substantively consider and weigh all relevant facts and factors before them (*Kanthasamy* at para 25).

[12] Against this backdrop, I will now address the Applicant's submissions. At the hearing, counsel for the Applicant submitted that although a number of issues were raised in the written submissions the most significant of these is the question of the dependency of the Spouse on the Applicant. I agree.

i. Hardship Lens

[13] The Applicant submits that the Officer assesses the case through the limited lens of hardship instead of adopting the holistic approach set out in *Kanthasamy*. Rather than focusing on all of the circumstances, the Officer dwelled on the hardship the Applicant and his friends and

family would face if he had to leave Canada. The Applicant notes that the Officer used the word hardship 14 times in their reasons.

[14] In my view, there is no merit to this argument. As the Respondent submits, *Kanthasamy* stands for the proposition that officers are not to impose a threshold of unusual, undeserved or disproportionate hardships. It held that "what officers should not do, is look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds, and use the language of "unusual and undeserved or disproportionate hardship" in a way that limits their ability to consider and give weight to all relevant humanitarian and compassionate considerations in a particular case. The three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision" (*Kanthasamy* at para 33). The Supreme Court also recognized that "there will inevitably be some hardship associated with being required to leave Canada. This alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under s. 25(1)" (*Kanthasamy* at para 23). I agree with the Respondent that the notion of hardship continues to be an important consideration in the review of H&C applications (*Evans v Canada (MCI)*, 2021 FC 733 at paras 45, 47; *Shackleford* at para 11).

[15] Here the Officer considered all of the H&C factors put forward by the Applicant and his personal circumstances and did not err in his consideration of hardship in the context of s 25(1).

ii. Officer turns positive factors into justification in denying the application

[16] The Applicant submits that, while including consideration of establishment in Canada when assessing an applicant's hardship upon return does not, by itself, render a decision unreasonable, comingling becomes more problematic when an officer ascribes positive weight to an applicant's establishment on one hand but, on the other, uses the positive establishment attributes (resiliency, drive and determination) to attenuate future hardship (citing *Singh v Canada (Citizenship and Immigration)*, 2019 FC 2633 and *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 226 [*Lauture*]. The Applicant submits that the Officer erred by applauding the Applicant's successful ability to adapt to Canadian society but then using those positive skills to his detriment by asserting that ability to adapt will assist him to assimilate to the Honduran milieu.

[17] The Respondent submits that in this case the Officer did not use a positive to deny the application because the Officer did not find the Applicant's establishment to be a positive factor as he entered Canada though irregular means, abandoned his refugee claim then continued to stay in Canada without authorization for 15 years. The Respondent submits that the Officer properly weighed the Applicant's establishment and reasonably found it to be minimal.

[18] I note that the Officer acknowledged that the Applicant has been living away from Honduras from almost 15 years and that returning may pose some difficulties and that there will be a period of adjustment. However, the Officer noted that Applicant had resettled in a different country, Canada, thereby demonstrating an ability to adapt to new locations, differing cultures and life changes. Further, that Applicant was born in Honduras, lived there for a majority of his

life, and speaks the native language. The Officer found that the Applicant is most likely still familiar with the societal norms, customs, and culture of Honduras and is likely able to re-establish himself in Honduras successfully after the initial period of readjustment. The Officer found that, overall, while the Applicant has been in Canada for an extended period of time, his establishment was minimal and that his decision to remain here without authorization attracted negative consideration.

[19] While the Applicant relies on *Lauture*, there the officer found that the engagement in society of the applicant in that case was remarkable and that the relations they had formed with their community were significant. However, the officer failed to weigh that positive factor in the applicant's favour and instead dismissed it on the basis that community involvement could also occur in Haiti. In the present matter, the Officer found that the Applicant's establishment was minimal. The Officer did not find that establishment was a positive factor. On this basis, *Lauture* is distinguishable.

[20] Further, even if adaptability to a new place was considered as a positive factor within the hardship analysis, also considered was the additional fact that the Applicant has spent most of his life in Honduras and, because of this, was likely to be able to re-establish himself there. This latter point was not a positive establishment factor being used to attenuate future hardship. Further, it was open to the Officer to discount the Applicant's minimal establishment based on his decision to abandon his refugee claim and to remain in Canada for 15 years without attempting to regularize that status (*Sinnette v Canada (Citizenship and Immigrations)*, 2022 FC

685 at para 16; *Castro Quiel v. Canada (Citizenship and Immigration)*, 2023 FC 1218 at para 32; *Tan v. Canada (Citizenship and Immigration)*, 2023 FC 604 at para 44).

[21] Viewed in whole, I do not find the Officer's establishment determination to be unreasonable.

iii. Canadian medical services can replace the Applicant's support of his spouse

[22] The Applicant submits the Officer's finding that there is little objective documentary evidence to suggest that the Canadian medical and social services are inadequate to provide the care that the Spouse requires was unreasonable. This is because the Officer did not justify why evidence pointing out that the Canadian medical and social services are inadequate to provide the care necessary for the Spouse to the Applicant's claim was deficient. Further, the Officer failed to appreciate the Spouse's medical condition and presumed the Canadian medical system can "replace" the care provided by the Applicant.

[23] The Respondent submits that the Applicant failed to provide sufficient evidence to support his position.

[24] First, it is beyond dispute, and the Applicant acknowledges, that the onus was on him to provide sufficient evidence to support his H&C claim. Second, the Officer did not suggest that the Applicant should have provided evidence as to the inadequacy of Canadian medical and social services, however, if that was the Applicant's position, then the onus was on him to provide evidence to demonstrate that this is so. I do not agree that Officer erred by not specifying

why it was not sufficient or that the Officer was obliged to specify what would have been "adequate corroborative evidence" as the Applicant submits (citing *Ayeni v. Canada (Citizenship and Immigration)*, 2019 FC 1202 at para 28).

[25] The Officer also found that there was little documentary evidence submitted to indicate the level of dependency that the Applicant's Spouse has on the Applicant.

[26] In his H&C narrative the Applicant submitted that his Spouse had two brain surgeries, one in July 2020 and a second one in February 2022, and that she had been declared permanently disabled by her family doctor. He stated that his Spouse cannot fend for herself and that he looks after her medication, food, personal care, and visits to the doctors. He states that he fears that if he had to leave Canada, his Spouse would have no one to look after her. Although her children are in Canada, they are growing older and soon will have their own lives. He states that he has supported his Spouse for almost a decade and losing him would be a "very impacting event" and would cause much hardship in the family. Further, that his Spouse needs his assistance every day as they do not have the means to hire a nurse; the children work to financially support the family to the extent that they can.

[27] The affidavit of his Spouse states that she was diagnosed in 2020 with a severe brain illness. As a result, she had two surgeries that rendered her incapable of working or doing simple tasks. She states that the Applicant was by her side during the darkest days of her life. During that time, he cared for her and her children and still does so.

[28] The medical evidence in the record is limited. There is a letter to "whom it may concern" dated October 18, 2022 from Dr. Luis Acevedo, Prime Medical Clinic. The letter states only that the Spouse has been a patient of Dr. Acevedo's since 2018 and that it is his professional opinion that she has a permanent medical disability which restricts her ability to perform daily activities necessary to pursue gainful employment and then simply lists the following:

> IDx: Chiari 1 malformation with craniectomy surgeries and had pseudomeningocele Chronic pain and headaches.
>
> Depressive disorder
>
> Adjustment Disorder
>
> Single functioning kidney
>
> HTN

[29] The Officer refers to the Spouse's affidavit, the letter from Dr. Acevedo and the fact of the step-children's affidavits in their reasons.

[30] Upon review of the record, and although the Applicant refers to the 21 pages of other medical evidence, I note that the other medical documents found in the record add little information as to the Spouse's ability to function on a day to day basis, any need for day to day living assistance or her dependence on the Applicant for her personal care. For example, a February 2022 discharge summary indicates that the Spouse is a 42-year-old woman with a history of Chiari 1 malformation who underwent a suboccipital craniectomy with duraplasty and C1 laminectomy in June 2020. Since then, she had an interval development of a pseudomeningocele. She presented for a scheduled revision suboccipital craniectomy and duraplasty on February 1, 2022. Her post-op was uncomplicated and she was discharged in stable condition. Discharge follow up was to remove staples and there was to be follow up with a

doctor in 6-8 weeks. She was to resume home medications with one noted change (addition of Tylenol 3). A March 24, 2022, follow up indicates that she was then 1-1/2 months post-op and there were no signs of any recollection of the pseudomeningocele. She had some pain around the surgical site, which was progressively getting better. Otherwise, she seemed much better and the physician stated they were quite satisfied with the results so far. There would be a follow up by phone in 2-3 months. None of this objective medical evidence speaks to any care the Spouse may need on an ongoing basis.

[31] And while in his H&C narrative the Applicant states that after the first surgery in 2020 all seemed well but after a while the pain came back and her doctor decided to do a second surgery, "with no positive results, there was not improvement on her health, she became more dependent of assistant, daily things as taking a shower, or sometimes she needs aid even to eat. Unfortunately, this year, the doctor concluded that her condition will not get better", this would not seem to be supported by the medical records submitted.

[32] The Applicant faults the Officer for not explicitly referring to his supplemental narrative where he states that his Spouse cannot fend for herself and that he looks after her medication, her food, her personal care, and her visits to the doctors. But, the Officer accepted that the Applicant assists his Spouse with her daily care and assigned this some positive weight. While the Applicant submits that the Officer erred in not considering the level of the Spouse's dependency on the Applicant, I agree with the Respondent that the Applicant is essentially challenging the weight the Officer afforded to this factor.

[33] The Applicant also asserts that the Officer failed to appreciate his Spouse's medical condition and presumes that the Canadian medical system can "replace" the care he provides. However, the Officer set out the evidence as to the Spouse's medical condition - which only indicates that she has permanent medical disability which restricts her ability to perform daily activities necessary to pursue gainful employment – and does not speak to any level of day to day living support that she might need. In my view, the Officer appreciated the evidence submitted to the extent that it spoke to the Spouse's medical condition. However, the medical evidence did not indicate what, if any, day to day care she might need on an ongoing basis. Nor did the Officer suggest that the Canadian medical and support system could "replace" the care provided by the Applicant. Rather, that there was little documentary evidence to support that such services would be inadequate to provide the care that she needs. As to the Applicant's argument that it is unreasonable that the cost of his wife's needs should be borne by the Canadian taxpayer when he is in a position to provide same, this is not a valid H&C ground.

[34] In short, the Officer's conclusion that insufficient evidence had been provided to support the level of care that the Spouse requires, her dependency upon the Applicant for same, and that such care could not be provided by others was reasonable based on the record before the Officer. The Applicant therefore failed to provide sufficient evidence that his role in his Spouse's care was such a necessity that it would justify the granting of H&C relief.

iv. Failure to grapple with the evidence supporting the Spouse's level of dependency on the Applicant

[35] The Officer accepted that the Applicant assists his wife with her daily care and afforded this some positive weight. Given this, and as discussed above, while the Officer did not explicitly

recite the content of the Applicant's H&C narrative, I am not persuaded that the Officer ignored his evidence.

Conclusion

[36] In conclusion, the Officer considered all of the factors presented by the Applicant and reasonably concluded, based on the record before them, that sufficient H&C considerations did not exist to justify an exemption under s 25 of the *IRPA*.

JUDGMENT IN IMM-8638-23

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. There shall be no order as to costs; and

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8638-23
STYLE OF CAUSE:	MIGUEL EDUARDO LOPEZ ESCOBAR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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