Federal Court  Cour fédérale

Date: 20211006

Docket: IMM-3195-20

Citation: 2021 FC 1042

Ottawa, Ontario, October 6, 2021

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

SAMUEL VILCHIS BOLLAS
MARIA LIDIA HERNANDEZ CALDERON

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants, Samuel Vilchis Bollas and Maria Lidia Hernandez Calderon, are citizens of Mexico who came to Canada in 2008. They planned to submit an application for permanent residence within Canada. When they subsequently learned they could not do so, they nonetheless remained, worked and volunteered in Canada without status, sending home money to support family members with medical needs. In May 2018, the Applicants submitted an 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*]. More than two years later, a senior immigration officer [Officer] refused their H&C application on July 9, 2020.

[2] The Applicants seek judicial review of the refusal, with the sole issue being the reasonableness of the Officer's decision in two respects, namely, the Officer's treatment of establishment based on the Applicants' evidence of community involvement, and financial support for family members. There is no dispute that the presumptive review standard of reasonableness is applicable to the matter before me: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10. I find that none of the situations rebutting such presumption is present in this matter.

[3] To avoid judicial intervention, the decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility: *Vavilov*, at para 99. A decision may be unreasonable if the decision maker misapprehended the evidence before it: *Vavilov*, at paras 125-126. The party challenging the decision has the onus of demonstrating that the decision is unreasonable: *Vavilov*, at para 100.

[4] Contrary to the Respondent's submission, I find that the Applicants have satisfied their onus in this case, and thus, I grant their judicial review application for several reasons. I am persuaded that the Officer erred by impermissibly considering the Applicants' establishment in Canada, in the context of community involvement, through an adaptability lens, and by failing to consider a core consideration of their claim for H&C relief – their financial support of family

members in Mexico. I agree that both errors occurred and that, consequently, the decision does not bear the hallmarks of reasonableness.

[5] I start with the premise that, while situations warranting relief are fact dependent and contextual, H&C decision makers not only must consider, but they also must weigh, all relevant facts and factors before them: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at para 25.

[6] The Respondent argues that the Applicants ask this Court to reweigh the evidence. The Applicants, however, ask this Court to recognize there is no indication that crucial evidence was considered, and to send the matter back to have another Officer properly weigh the evidence, which is within this Court's jurisdiction*: Cerrato v. Canada (Citizenship and Immigration)*, 2019 FC 1574 at para 38-44.

[7] On the issue of establishment, I am not persuaded that the Officer weighed the Applicants' community and volunteer involvement in Canada in terms of their establishment in Canada. Nor did the Officer examine whether the disruption of that establishment weighed in favour of granting the exemption under the *IRPA* s 25: *Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813 [*Sebbe*] at para 21.

[8] The Officer was required to consider establishment and adaptability separately. Neither party disputes that the Officer conducted a separate adaptability analysis. I find, however, that the Officer's establishment analysis in the context of their community and volunteer activities also focussed impermissibly on the Applicants' adaptability. In other words, the Officer fixated

on how the Applicants' efforts to establish themselves in Canada would assist with their transition to Mexico (i.e. "there is little evidence provided to indicate that they are unable to participate in the [volunteer activities] in their home country in a similar way"). In doing so, the Officer used the hardship lens to assess the Applicant's positive H&C factors, contrary to the Supreme Court's guidance in *Kanthasamy*, at para 33.

[9] I find this was not reasonable, in light of the evidence and submissions before the Officer*: Sebbe*, above at para 21; *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 at para 26; *Bhalla v Canada (Citizenship and Immigration)*, 2019 FC 1638 [*Bhalla*] at para 29; *Lopez Bidart v Canada (Citizenship and Immigration)*, 2020 FC 307 at para 34. As Justice Diner concluded in *Bhalla*, "[f]ailing to weigh key compassionate factors, and placing undue weight on a lack of hardship, tends to tip the balance to a refusal."

[10] Next, I find the Officer's reasons do not demonstrate the Officer considered the Applicants' claim that diminished income would prevent them from paying for necessary medical treatment for family members. The Officer acknowledges evidence that showed Mexicans earn a much lower average wage but also states that the Applicants would continue supporting their family. In my view, the Officer treats the wage earning issue only as a reflection of the difference in the standard of living between the two countries (which the *IRPA* s 25 was not meant to address). Although this is not a reviewable error in itself, it does not account for the consequences for the Applicants and their families of the loss of wage earning capacity in Canada: *Juan v. Canada (Citizenship and Immigration)*, 2020 FC 988 at para 22.

[11] I conclude the issues of establishment (in respect of community and volunteer involvement) and financial support of family members lie at the heart of the Applicants' claim for H&C relief, and therefore the failure to explain how they were considered and weighed renders the decision unreasonable. Under the *Vavilov* framework, one of the hallmarks of a reasonable decision is that it is responsive to the evidence and arguments advanced by the party seeking review: *Vavilov,* above at paras 127-28. In my view, the Officer's analysis falls short in these regards, and thus, the Officer's decision must be set aside, with the matter referred to a different decision maker for redetermination.

[12] Neither party proposes a serious question of general importance for certification, and I find that none arises in the circumstances.

JUDGMENT in IMM-3195-20

THIS COURT'S JUDGMENT is that:

1. The Applicants' application for judicial review is granted.
2. The July 9, 2020 decision of the senior immigration officer is set aside, and the matter is to be redetermined by a different decision maker.
3. There is no question for certification.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**
***Loi sur l'immigration et la protection des réfugiés* (L.C. 2001, ch. 27)**

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	**25 (1)** Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

FEDERAL COURT

SOLICITORS OF RECORD

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