Federal Court Cour fédérale

Date: 20211214

Docket: IMM-5350-20

Citation: 2021 FC 1412

Toronto, Ontario, December 14, 2021

PRESENT: Madam Justice Go

BETWEEN:

CANDER QUIROS QUIROS
JOANNA PAULINA ROMERO RODRIGUEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, Ms. Joanna Paulina Romero Rodriguez [Ms. Rodriguez] and Mr. Cander Quiros Quiros [Mr. Quiros] are a married couple. Together, they brought an application for leave and for judicial review of a decision of a Senior Immigration Officer [Officer], dated October 19, 2020, denying their application for permanent residency status pursuant to Humanitarian and

Compassionate [H&C] considerations [Decision], under s. 25 of the *Immigration and Refugee Protection Act* [*IRPA*].

[2] The Applicants argue that the Decision was unreasonable because the Officer discounted their level of establishment in Canada and imported the test under s.97 of the *IRPA* into the Officer's analysis of post removal hardship due to adverse country conditions.

[3] I find the Decision unreasonable and return it for redetermination.

II. **Background**

A. ***Factual Context***

[4] Mr. Quiros and Ms. Rodriguez are citizens of Costa Rica and Mexico, respectively. Mr. Quiros entered Canada in 2002 and made a refugee claim, which he abandoned in 2003. He failed to appear for his removal interview with the Canada Border Services Agency [CBSA] in 2005. On September 19, 2005 a warrant was issued by CBSA against Mr. Quiros for his failure to appear. He finally surrendered himself to the CBSA on September 23, 2020 and had his warrant executed. Ms. Rodriguez arrived in Canada in 2008 to study English and has stayed in this country since.

[5] The couple married in 2016. Mr. Quiros has a daughter in Costa Rica to whom he sends money. He has worked steadily in Canada. At the time of their H&C application, he had worked for the same construction company as a framer for five years. Mr. Quiros has also been a part of the Labourers International Union of North America since April 2013. Ms. Rodriguez obtained a

business licence in 2009, and has maintained consistent employment as a cleaner and caregiver since. Both Applicants volunteer at their church and pay taxes. Their H&C application, which was submitted in April 2019, was supported by numerous reference letters from friends, church members and employers, along with evidence of adverse conditions in Costa Rica and Mexico.

B. *Decision Under Review*

[6] In the Decision, the Officer found there were insufficient H&C factors to exempt the Applicants from the requirement of applying for permanent residence outside of Canada. The Officer found that the Applicants' level of establishment was what one would expect given the length of their time in Canada, approximately 18 ½ and 12 years respectively, and that the Applicants did not show that their employment, volunteer or personal friendships in Canada were characterized by such a high degree of interdependence that separation would cause irreparable harm. The Officer gave some weight to their financial independence but maintained it was not exceptional as it was expected of foreign nationals.

[7] With respect to the best interests of the child, the Officer found little information about the support Mr. Quiros provides for his daughter and concluded that she would benefit from reuniting with him in Costa Rica.

[8] The Officer found that returning to Costa Rica or Mexico would involve some level of hardship for the Applicants, since they are citizens of different countries and standards of living are lower than in Canada. However, the Officer found that the purpose of s.25 of *IRPA* was not to compensate for differences in living standards between countries. The Officer also found that

there was no evidence the Applicants would be unable to sponsor each other and remain together, that they both spoke Spanish, and that they had family in both countries. The Officer noted that given the Applicants' adaptability, resiliency and self-sufficiency, they would be able to adapt in their home countries as they had in Canada.

[9] Noting that the majority of the Applicants' time in Canada was without status, the Officer weighed this as a serious negative factor. The Officer also noted Mr. Quiros waited 15 years after his warrant was issued to turn himself in, while Ms. Rodriguez had been without status for 10 years before filing the H&C application. The Officer gave a substantial negative weight to the fact that the majority of the Applicants' work was done without authorization and their lack of compliance with the immigration laws.

[10] Overall, the Officer found the positive factors favouring the H&C relief did not outweigh the Applicants' adverse immigration history.

III. **Issues**

[11] The Applicants raise the following two issues:

a) *Did the Officer unreasonably discount the Applicants' level of establishment for being "expected" and because the Applicants lacked proper status in Canada?*

b) *Was the Officer's hardship analysis unreasonable as the Officer imported the test under s.97 of the IRPA to their analysis of post removal hardship due to adverse country conditions?*

IV. **Standard of Review**

[12] The presumptive standard of review of the merits of an administrative decision is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 25. A reasonable decision "is 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). The onus is on the Applicants to demonstrate that the decision is unreasonable (*Vavilov* at para 100).

[13] The parties agree that decisions on H&C applications are reviewed on a standard of reasonableness. To set aside a decision on this basis, "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

V. **Analysis**

A. *Did the Officer unreasonably discount the Applicants' level of establishment for being "expected" and because the Applicants lacked proper status in Canada?*

[14] The Applicants submit that the Officer concluded their level of establishment is not significant or extraordinary but failed to provide any explanation as to what he would consider to be significant or extraordinary, which is an error: *Chandidas v Canada (Citizenship and Immigration)* 2013 FC 258, para 80 [*Chandidas*]; *Osun v Canada (Citizenship and Immigration)* 2020 FC 295, para 17; *Henson v Canada (Citizenship and Immigration)* 2018 FC 1218, paras 28-31; *Stuurman v Canada (Citizenship and Immigration)* 2018 FC 194, paras 22-24 [*Stuurman*];

Cojuhari v Canada (Citizenship and Immigration) 2018 FC 1009, para 19; *Ndlovu v Canada (Citizenship and Immigration)* 2017 FC 878, paras 12-15; *Sivalingam v Canada (Citizenship and Immigration)* 2917 FC 1185, para 13; *Kachi v Canada (Citizenship and Immigration)* 2015 FC 871, paras 15-16.

[15] The Respondent counters that the Officer is not required to define a particular standard for extraordinary or exceptional establishment in their assessment. Citing Justice Diner's decision in *Regalado v Canada (Citizenship and Immigration)*, 2017 FC 540 [*Regalado*] the Respondent submits that such an obligation would result in little more than an arbitrary standard being set, since what would be exceptional would be different in each case depending on the facts. The Respondent also distinguishes *Chandidas* as the officer in that case failed to provide any explanation for why the applicants' establishment evidence was insufficient, while in this case, the Officer's explanation was sufficient for the decision as a whole.

[16] I do not read *Regalado* to stand for the proposition that H&C officers do not have to provide explanation for their findings on establishment. Instead, *Regalado* confirms that the analysis of the degree of establishment "will vary depending on the facts of each case."

[17] In this case, the Officer began his analysis regarding the Applicants' establishment in Canada by acknowledging that they are "self-sufficient, financially independent, and have been gainfully employed in Canada". The Officer also noted the Applicants "have developed valuable friendships and have volunteered during their time in Canada". But then the Officer continued:

> However, I find it is the norm for individuals to have a certain degree of establishment after residing in Canada for over a decade,

> whether it is through new friendships, work, church, and/or other activities. I further note it is expected for foreign nationals in Canada to be financially independent. Overall, based on the information and evidence before me, I find the applicants have demonstrated an expected level of establishment for individuals in Canada as long as they have. I do not find the level of establishment exhibited by the applicants to be significant or extraordinary. Nevertheless, given their lengthy residence in the country, I have given the applicants' establishment in Canada some weight in this application. (emphasis added)

[18] Effectively, the Officer jumped from listing the Applicants' establishment factors to concluding that their establishment is not significant or extraordinary because of a certain "norm" or "expectation", without stating what these norms or expectations look like. In that regard, this case is no different from the situation in *Chandidas*, where Justice Kane noted at para 80:

> **80**… [I]n the present case, the officer fails to provide any explanation as to *why* the establishment evidence is insufficient. The officer reviewed the family's degree of establishment in detail, and referred to their work, income, family ties, courses taken, schools attended, and community involvement in various passages of the decision. The officer does not indicate what he would consider to be extraordinary or exceptional establishment; he simply states that this is what he would expect and that it would not cause unusual and undeserved or disproportionate hardship if the family were forced to apply for a visa from outside Canada. While this could be argued to be a reason, it is barely informative.

[19] A similar error was noted by Justice Diner in *Henson v Canada (Citizenship and Immigration)*, 2018 FC 1218, at para 29.

[20] I find instructive Justice Boswell's analysis in *Stuurman*. After noting the Officer in that case followed "the same objectionable and troublesome path as in *Chandidas*", Justice Boswell

found unreasonable the Officer’s discounting of the Applicants' degree of establishment as it was "not above what would be expected after almost 2 years in Canada." Justice Boswell went on:

> **24** The Officer in this case unreasonably assessed the Applicants' length of time or establishment in Canada because, in my view, the Officer focused on the "expected" level of establishment and, consequently, failed to provide any explanation as to what would be an acceptable or adequate level of establishment. The Officer's assessment of the Applicants' level of establishment is perfunctory at best and, thus, unreasonable because it was considered through the lens of "unusual and undeserved or disproportionate hardship" and not, as *Kanthasamy* dictates, more broadly through the lens of an humanitarian and compassionate perspective that considers and gives weight "to all relevant humanitarian and compassionate considerations".

[21] The same conclusion, in my view, can be drawn in this case, as we are dealing with two individuals who have established their lives in Canada for over 18 ½ years in one case and 12 years in another. Both Applicants have not only been working and filing income taxes consistently throughout, but have also been involved in the community by volunteering with seniors and newcomers, and in Mr. Quiros’ case, by becoming a part of a union.

[22] I also agree with the Applicants that the Officer’s unreasonable preoccupation with the Applicants’ lack of status inhibited a proper assessment of the Applicants’ establishment level. The Officer devoted several passages, albeit justifiably so, on Mr. Quiros’ negative immigration history, including the fact that he did not surrender himself until 15 years after the CBSA issued a warrant against him. I note that nowhere in the H&C application did the Applicants provide any explanation for their past conduct. The Officer thus reasonably gave their past immigration history “significant negative weight”.

[23] What became unreasonable, however, was the Officer's decision to discount the Applicants' establishment based on their past immigration history, after the Officer had already given the latter factor negative weight. The discounting was made apparent in the following passage:

> I note the male applicant states he has worked in Canada in construction and as a framer. I further note the male applicant only had a Work Permit that was valid from 2002/08/09 to 2003/08/19. I note there is little evidence indicating that the male applicant had a valid Work Permit after 2003/08/19. The female applicant states she has been self-employed in childcare and house cleaning. With the exception of very specific circumstances, I note foreign nationals are prohibited from working in Canada. Given the information before me, I find the type of work performed by the applicants would, in fact, require a Work Permit. As a result, aside from the approximately one-year period from 2002/08/09 to 2003/08/19 for male applicant, I find the applicant's employment in Canada, spanning over a decade, occurred when they did not have authorization to work in the country. Therefore, I find these are significant negative considerations of the applicant as it further demonstrates the applicants' failure to adhere to immigration laws of Canada. As such, I have given these considerations substantial negative weight.

[24] As noted above, the Officer had initially given the Applicants' establishment – including their employment history in Canada – some weight. Here, the Officer used the Applicants' past immigration history to cancel the positive weight that the Officer had assigned to the very same employment record.

[25] I agree with Justice Campbell when he said: "Section 25 has no purpose if that person is easily condemned for her or his immigration history. The history must be viewed as a fact which is to be taken into consideration, but within a serious holistic and empathetic exploration of the

totality of the evidence, to discover whether good reason exists to be compassionate and humanitarian.”: *Dowers v Canada (Citizenship and Immigration)* 2017 FC 593, para 6.

[26] In this case, I find the Officer allowed the Applicants’ immigration history to unduly influence the assessment of the Applicants’ establishment by assigning negative weight to their employment because it was conducted without a valid work permit.

[27] Based on the above, I find the Officer’s analysis on establishment was unreasonable.

B. *Was the Officer’s hardship analysis unreasonable by importing the test under s.97 of the IRPA to their analysis of post removal hardship due to adverse country conditions?*

[28] The Applicants submit that the Officer imported a s.97 test in assessing the adverse country conditions in Mexico and Costa Rica by noting that the conditions cited, such as crime and poverty, are conditions that affect the general population in those countries at large. The Applicants cited a number of decisions from this Court which have found erroneous officers importing the requirement of personalized targeting found in s.97 into a hardship analysis under s.25: *Diabate v Canada (Citizenship and Immigration)*, 2013 FC 129, para 36; *Alameddine v Canada (Citizenship and Immigration)* 2019 FC 1285, para 44; *Damian v Canada (Citizenship and Immigration)* 2019 FC 1158, para 31; *Zingoula v Canada (Citizenship and Immigration)* 2019 FC 201, para 10; *Miyir v Canada (Citizenship and Immigration)* 2018 FC 73, paras 29-31.

[29] The Respondent, on the other hand, cites decisions from this Court which suggest that an applicant carries the burden of proving their fear is well-founded in light of their personal

situation: *Bakenge v Canada (Citizenship and Immigration)* 2017 FC 517 at paras 32-34. I will also note that one of the cases cited by the Applicants also support the Respondent's position: *Joseph v Canada (Citizenship and Immigration)* 2015 FC 661, paras 53-54.

[30] In *Marafa v Canada (Citizenship and Immigration)* 2018 FC 571 [*Marafa*], Justice Grammond addressed the apparent tension between two different lines of jurisprudence. At paragraph 4, Justice Grammond noted: "Many decisions of our Court emphasize that, for an H&C application, officers must not limit their assessment of the hardship the claimants would face in their home country to hardship connected to a personal characteristic of the claimant." He went on to address cases that offer a different perspective:

> **5** The respondent cites three decisions by this Court that seem to put forward a different approach (*Lalane v Canada (Citizenship and Immigration)* [*Lalane*], 2009 FC 6; *Joseph v Canada (Citizenship and Immigration)* [*Joseph*], 2015 FC 661; *Ibabu v Canada (Citizenship and Immigration)* [*Ibabu*], 2015 FC 1068). The reasoning behind these three decisions is succinctly expressed in *Lalane* (at para 1):
>
> > The allegation of risks made in an application for permanent residence on humanitarian and compassionate grounds (H&C) must relate to a particular risk that is personal to the applicant. The applicant has the burden of establishing a link between that evidence and his personal situation. Otherwise, every H&C application made by a national of a country with problems would have to be assessed positively. . .
>
> **6** With respect for my colleagues, I find that this reasoning exaggerates the scope of the dominant line of cases mentioned above and neglects the discretionary nature of a decision on an H&C application. Considering a factor does not necessarily mean that the decision will be favourable to the applicant. Therefore, considering the general conditions in the country of removal does not result in the prohibition of any removal to certain countries where living conditions are particularly difficult.

> **7** The reasoning in *Lalane, Joseph* and *Ibabu* is difficult to reconcile with the Supreme Court of Canada's decision in *Kanthasamy*. In fairness to my colleagues, I note that *Kanthasamy* was rendered after their decisions. In that decision, the Supreme Court rejected a silo approach to the factors relevant to an H&C application and affirmed that officers must "consider and give weight to all relevant humanitarian and compassionate considerations" (paragraph 33, italics in the original). In reality, refusing to consider the living conditions in the country of removal is tantamount to saying that the applicant is being sent to an imaginary country. Such a detached approach is contrary to the spirit of *Kanthasamy*.

[31] I adopt Justice Grammond's reasons and thus, on the point of law, I agree with the Applicants that it would be improper for immigration officers to import the s.97 test into the s.25 analysis by rejecting evidence regarding adverse country conditions. The question before me is whether the Officer committed this error in this case.

[32] In my view, the Decision, read as a whole, does not support the Applicants' position. While the Officer began by noting that the adverse conditions "affect the general population" of the Applicants' home countries, the Officer did go on to note the "different standards of living" between these countries and Canada, and the lack of "social supports, including economic, security and human rights supports that can be found in Canada", before concluding they would give the country conditions little weight.

[33] This is not a case where the Officer simply ignored the adverse country conditions. Rather, the Officer considered the adverse country conditions, together with evidence about the personal circumstances of the Applicants, including their language ability (Spanish), their family ties in their respective country, and their skills, before reaching a conclusion about the hardship

they would face if removed. The Officer did acknowledge there would be some hardship, but in the end found it was not significant in the face of the evidence before them. I cannot say the Officer's decision in this regard was unreasonable.

[34] With respect to the Officer referencing the Applicants' adaptability in assessing hardship of removal, I agree with the Respondent that adaptability can be a valid consideration. If it were the only reason upon which the application was rejected, then it would have been perverse. Here, it was one of several factors considered by the Officer.

[35] Further, I agree with the Respondent that the Officer's analysis on country conditions was responsive to the Applicants' H&C submission, which contained little more than a few generalized statements about the country conditions, without linking them to their specific circumstances. At the hearing, the Applicants specifically highlighted the Officer's failure to engage the gendered aspect of the adverse country conditions, namely the prevailing violence against women as well as the social-economic disadvantages faced by women in Mexico. However, I note that the Applicants' written H&C submission as well as their joint affidavit did not even mention gender-based violence in any way, nor did they explain how it would create hardship for Ms. Rodriguez. I therefore cannot find error in the Decision for not addressing this particular issue.

[36] Based on the above, I will grant the application solely because of the Officer's erroneous analysis of the Applicants' establishment.

VI. **Certification**

[37] Counsel for both parties were asked if there were questions requiring certification. They each stated that there were no questions arising for certification and I concur.

VII. **Conclusion**

[38] The application for judicial review is allowed.

JUDGMENT in IMM-5350-20

THIS COURT'S JUDGMENT is that:

1. The Applicant's judicial review application is granted.

2. The decision under review is set aside and the matter referred back for redetermination by a different decision-maker.

3. There is no question for certification.

"Avvy Yao-Yao Go"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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