Federal Court  Cour fédérale

Date: 20220126

Docket: IMM-533-21

Citation: 2022 FC 84

Ottawa, Ontario, January 26, 2022

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

NELSON ADRIAN SALABERRY ROCHA
FACUNDO SALABERRY RAMIREZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Nelson Salaberry Rocha [the Primary Applicant] and his adult son, Facundo Salaberry Ramirez, are citizens of Uruguay. This is an application for judicial review of a January 4, 2021, decision of a Senior Immigration Officer refusing their request to apply for permanent residence from within Canada on humanitarian and compassionate grounds.

Background

[2] Both Applicants have been in Canada since May 2017. The Primary Applicant was issued a multiple entry visa in 2014 and a work permit on May 31, 2017.

[3] The Primary Applicant first came to Canada in 1989 and made a refugee claim. His claim was rejected and he left Canada in 1992. While he was in Canada, he fathered a son, Ryan Granahan, although the Primary Applicant was not aware of his existence until around 2013. Ryan is a Canadian citizen and resides in Toronto.

[4] After returning to Uruguay, the Primary Applicant married and had two children: Facundo, and a daughter, Camila. The Primary Applicant is now divorced.

[5] In 2015, Camila was issued a study permit to study criminology in North Bay, Ontario, and has been living in Canada since then. The Applicants travelled with her to help her settle and on that trip the Primary Applicant was approached by a Canadian friend who suggested that the two of them should start a business together. The Primary Applicant agreed before returning to Uruguay.

[6] The Applicants came to Canada in May 2017. The Primary Applicant was granted a visitor visa with a work permit to work as a manager of a business he co-owned with his Canadian friend. His son was granted a temporary resident visa. The Primary Applicant invested approximately $30,000 into the business.

[7] The Primary Applicant was given a short term Labour Market Impact Assessment [LMIA] allowing him to work and his plan was to apply for permanent residence once the business was fully operating. However, there were delays in setting up the business. The Primary Applicant was granted a short extension to his work permit, but ultimately did not apply for a longer term LMIA. He believed that any application would be unsuccessful, as his business would not be able to demonstrate that it had created enough jobs. The Primary Applicant's work permit expired on November 26, 2018.

[8] On April 17, 2019, the Applicants applied for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds.

The Decision

[9] The Officer lists three factors that were considered, based on the Applicants' submissions: (1) establishment in Canada, (2) family ties in Canada, and (3) the Primary Applicant's investment in a Canadian business. Under the heading of establishment, the Officer also considered the availability of other immigration pathways.

Establishment in Canada

[10] The Officer noted that the Applicants had been in Canada for about three and a half years and stated that "this is a fairly short period of time to be considered significantly established." The Officer also noted the Primary Applicant's past visits to Canada and his longstanding social ties in the country.

[11] The Officer accepted that the Primary Applicant has a history of sound financial management and that neither Applicant had relied on social services in Canada. The Officer noted, however, that it was unclear whether the income from the Primary Applicant's business had been sufficient to support the Applicants and noted that there was a letter of support from a friend indicating that the Applicants had been living in his home rent-free since September 2018. The Officer indicated that there was little evidence that the Applicants had since found their own accommodation and concluded, on the balance of probabilities, that the Applicants did not currently possess the funds to support their long term stay in Canada.

[12] The Officer found that there was no evidence of "community involvement in Canada such as volunteerism, social clubs, or membership with a religious affiliation." However, the Officer noted the letters of support accompanying the application and indicated that they corroborated the Primary Applicant's claim that he has more than 30 years of connections and relationships in Canada. The Officer indicated that these letters spoke to his good character and assigned the letters "some positive weight." However, the Officer also noted that the Primary Applicant previously had little difficulty travelling between Canada and Uruguay to maintain his social ties and would be able to continue these relationships if he returned to Uruguay.

[13] The Officer noted that the Applicants, if returned to Uruguay, would be returning to a country in which they had resided for most of their lives, which would assist in reintegration. The Officer found that while Facundo attended his final years of high school in Canada and had made friends, he was also likely to have significant ties to Uruguay. It was noted that his mother still lived in Uruguay.

[14] The Officer considered alternative immigration pathways that existed for both Applicants. For Facundo, the Officer noted little evidence had been provided to indicate his performance in high school or whether he had applied for post-secondary education. The Officer found that if the application was refused, it was likely that he would be able to apply for a study permit to study in Canada, as his sister had done. For the Primary Applicant, the Officer accepted the Applicant's submission that he would not have a high enough score to be invited to apply through express entry. However, the Officer found it "reasonable that he would be eligible for family sponsorship by his son Ryan." The officer acknowledged that "this may not be an easy process", but that "neither the principal applicant nor counsel have demonstrated that it would not be possible."

[15] Overall, the Officer gave positive consideration to the Primary Applicant's longstanding ties to Canada, but found that the existence of alternative immigration pathways, lack of self-sufficiency, and remaining ties to Uruguay did not warrant that establishment be given "more than little positive consideration" in the global assessment.

Family Ties in Canada

[16] The Officer indicated that the Applicants have significant family ties with Camila and Ryan. However, it was found that it was unlikely that removal would significantly impact the remaining family members.

[17] The Officer accepted that Camila was fairly established and would be working in Canada after her studies. However, the Officer noted that while "having family nearby may provide

some emotional support, as an international student this is not exceptional in relation to similarly situated individuals" and that it was likely that she has developed her own social ties in Canada. The Officer noted that she would be free to return to Uruguay at any time to reunite with her family.

[18] The Officer also accepted that the Primary Applicant had committed significant emotional and financial resources into developing his relationship with his long-lost son Ryan. However, the Officer noted that Ryan has visited his father in Uruguay, there were strong ties between them, and "as a result of these strong ties, it is likely that they would be able to continue to maintain and grow their relationship through visits or alternative forms of communication if the applicants were to leave Canada."

[19] Finally, the Officer indicated that the Applicants and Ryan live in Toronto, while Camila lives in North Bay (although Facundo has expressed a desire to move to North Bay) and that "[t]he application states that the entire family is only able to be together on special occasions since they are still separated by distance in Canada." The Officer acknowledged that their time together in Canada was more than they would see each other if they lived in different countries. However, the Officer found that their relationship was not emotionally or financially interdependent, and there was insufficient evidence to suggest that their relationships couldn't be maintained from a distance.

[20] Overall, the Officer did not give the Applicants' family ties "more than a minimal degree of positive consideration."

Investment in a Canadian Business

[21] The Officer accepted that the Primary Applicant's business was legitimate and that he had made a financial investment into it. It was also accepted that, had the initial business been successful, the Primary Applicant would have continued to have been eligible for work permits in Canada. However, the Officer was not satisfied that this would have ultimately led to a path for permanent residence, as the Applicants had not shown that the business had the required letter of support for a start-up visa, nor that the Primary Applicant would be able to meet the language or percentage voting rights requirements.

[22] The Officer did not accept the submission that the Primary Applicant's business required him to remain in Canada. The Officer indicated that he had been out of status since March 2019 and, therefore, it was likely that "the business is no longer running or the Canadian co-owner has found someone else to manage the business in the place of the principal applicant."

[23] The Officer noted that the Primary Applicant was previously an entrepreneur in Uruguay. The Officer indicated that there was little evidence of the state of his previous business in Uruguay, but that "it is likely that the [primary] applicant still has significant financial and social ties to Uruguay that would support him in either continuing his transportation business or starting a new entrepreneurial pursuit."

[24] Overall the Officer found that the hardship in leaving the Canadian business was not sufficient to warrant a positive decision. The Officer did acknowledge that the situation was "unfavourable" and gave it "some weight."

Issues

[25] The Applicants raise five issues in this application:

1. Did the Officer err by failing to consider the Applicants' circumstances using a compassionate approach?
2. Is the Officer's assessment of the Applicants' establishment unreasonable?
3. Did the Officer err by focusing on the Applicants' potential eligibility for other programs rather than conducting an H&C analysis?
4. Did the Officer err by dismissing the Applicants' relationships with their family members in Canada?
5. Did the Officer err by using positive establishment factors as grounds to deny the application?

Analysis

[26] It is agreed that the standard of review is reasonableness. As set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], at para 85, "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." A decision will be unreasonable where it fails to reveal a rational chain of analysis or where it exhibits clear logical fallacies (see *Vavilov* at paras 103-104) or where the decision maker "has fundamentally misapprehended or failed to account for the evidence before it." (*Vavilov* at para 126). Decision makers are also constrained by statutory or common law principles, and a decision may be

unreasonable where there is an unjustified departure from binding precedent (see *Vavilov* at para 112).

[27] I am not persuaded that the Officer failed to consider the Applicants' circumstances using a compassionate approach or that the assessment of the Applicants' establishment is unreasonable. However, I find that the remaining grounds of review are made out and this application must be granted.

Other Potential Immigration Routes

[28] The Applicants submit that the Officer erred by emphasizing the possibility of other immigration routes and by failing to explain why these routes would be viable options for them. The Applicants point to two judgments of this Court where this was found to be a reviewable error.

[29] In *Torres v Canada (Minister of Citizenship and Immigration)*, 2017 FC 715, Justice Martineau held that an officer erred in suggesting alternative immigration paths without any legal or factual knowledge of their requirements. In *Warldaw v Canada (Minister of Citizenship and Immigration)*, 2019 FC 262 [*Warldaw*], Justice Favel found than an officer erred by treating apparent eligibility under a different avenue as a bar to relief and failing to explain how this eligibility outweighed the other factors that weighed in favour of an exemption.

[30] The Applicants submit that with respect to family sponsorship, while the Officer acknowledged that "this may not be any easy process," she failed to explain why it would be reasonable to attempt this alternative route.

[31] They submit that with respect to a study permit for Facundo, the Officer erred by suggesting temporary residency as a suitable alternative to permanent residency. The Applicants point to Justice Roy's decision in *Greene v Canada (Minister of Citizenship and Immigration)*, 2014 FC 18 [*Greene*] at para 10, where it was held that "[i]n choosing to rely on a temporary remedy, the officer did not exercise the jurisdiction given by law." The Applicants submit that the same error was made here, as the Officer unreasonably emphasized the possibility of temporary relief rather than weighing the reasons to potentially grant H&C relief.

[32] The Respondent submits that it was reasonable for the Officer to point to other avenues for immigration, as the Primary Applicant has a Canadian-born son and Facundo has expressed an interest in continuing his studies in Canada. It is submitted that that the Officer did not draw a negative inference from failing to apply for parental sponsorship or a study permit, and that the Applicants misquote the decision in that the statement "this may not be an easy process" references express entry and not family sponsorship.

[33] I agree with the submissions of the Applicants.

[34] First, the Respondent's claim that the Applicants have misquoted the decision is inaccurate. It is clear that the statement that "this may not be an easy process" is in reference to

the Primary Applicant being sponsored by his Canadian son Ryan, and not the express entry program as the Respondent claims. By this point in the decision, the Officer has already accepted that the Primary Applicant would be unable to apply for the express entry program at all.

[35] With respect to family sponsorship, the Officer failed to explain why this would be a real and viable option. The Officer acknowledged the challenges a family sponsorship application would face, including that the Primary Applicant's relationship to Ryan is not noted on his birth certificate. The Officer also failed to consider whether there were other barriers, such as sponsor income requirements that could present a barrier to applying through this program. The Officer merely stated that "neither the principal applicant nor counsel have demonstrated that it would not be possible" for Ryan to sponsor the Primary Applicant. The Officer did not explain why it would be possible, nor why it was a viable alternative. Unlike in *Warldaw*, the Officer here did not consider the availability to family sponsorship to be a bar to relief; however, the Officer did not adequately explain why the potential availability of an avenue that was described as "not an easy process" should be weighed significantly against the other H&C factors.

[36] With respect to a study permit for Facundo, I agree with the Applicants and the reasoning in *Greene* that it is unreasonable to suggest a study permit, a temporary remedy, as a suitable alternative for permanent residence in Canada. The question before the Officer was whether the Applicants should be allowed to apply for permanent residence from within Canada, not whether they should be allowed to remain in Canada temporarily.

[37] The availability of these pathways was cited as a factor weighing against the Applicants' establishment in Canada. The Officer unreasonably relied on these avenues in granting only "little positive consideration" to the Applicants' long standing ties with Canada. I note that this is just one element of the Officer's analysis, however, when viewed together with the additional errors outlined below, the decision as a whole is unreasonable.

Family Relationships in Canada

[38] The Applicants submit that the Officer mischaracterized the evidence and failed to consider the significance of the relationship between the Applicants and Camila. The Applicants submit that the application was clear that the family sees each other more often than on special occasions and that Camila feels comforted knowing that if anything happens, family is close by.

[39] The Respondent submits that the Applicants' submissions on family ties is a request to reweigh the evidence and that there was insufficient evidence on the record to indicate that the family connections cannot continue if the Applicants return to Uruguay.

[40] In my view, the Applicants' concerns are made out. They are not asking that the evidence be reweighed; rather, they ask that the evidence be properly characterized before it is weighed.

[41] In the decision, the Officer inaccurately claims that Camila's letter states that "the entire family is only able to be together on special occasions since they are still separated by distance in Canada."

[42] Camila's letter does not say that the family is only together for special occasions. In her letter, Camila writes the following:

> Moving here has given me the opportunity to build a relationship with my brother [Ryan]. I am able to visit him on weekends and spend time with him.
>
> […]
>
> Since my dad and my brother moved to Toronto last year, I have been able to frequently visit them. The three hour travel has been truly a blessing. I do not feel lonely anymore, and it is so comforting to know that if anything happens, I have my family so close to me. Last year, for the first time in my whole life, I got to spend Christmas and New Years with my dad and brothers. . . . In addition, I was able to spend my last two summers with both my dad and my brothers in Toronto.
>
> [emphasis added]

[43] The evidence before the Officer was that Camila frequently visits her family, visits her brother Ryan on weekends, and spent two summers living with her family in Toronto. This is not visiting only on "special occasions" and to say so is a mischaracterization of the evidence. It was unreasonable to rely on this mischaracterization in finding that the family relationship was not "emotionally or financially interdependent."

[44] Moreover, while the Officer acknowledged that Camila would be able to see her family more often if they lived in Toronto than if they lived in Uruguay, the Officer failed to consider the benefit of simply being close to one's family and knowing that they are there if needed. Camila's letter speaks to the comfort of knowing that "if anything happens, I have my family so close to me." If the Applicants wish to see Camila, she is only a three-hour drive away, rather than a long and expensive international flight to Uruguay.

[45] The Officer's assessment of the increased distance did not meaningfully engage with this aspect of family reunification. If this were the only error, the decision may have been found reasonable; however, it further compounds the error arising from the Officer's mischaracterization of the evidence on the family relationship in Canada.

Using Positive Factors as Grounds to Deny the Application

[46] The Respondent made no written submission on the Applicants' assertion that the Officer erred throughout by taking positive establishment factors and using them as grounds to deny their application. The Applicants, citing *Lauture v Canada (Minister of Citizenship and Immigration)*, 2015 FC 336 [*Lauture*], submit that this is a reviewable error.

[47] The Applicants point to the following examples of positive factors being used as justification to deny relief. The Officer acknowledged the Primary Applicant's entrepreneurial abilities, but then used these abilities to explain that he would be able to reintegrate in Uruguay. The Officer noted the Primary Applicant's efforts to reconnect with his son Ryan, but then held that as a result of these strong ties, they would be able to maintain and grow their relationship from a distance. The Applicants demonstrated that they have strong social ties in Canada, as a close friend was willing to let them live in his home rent free, but the Officer used this as evidence that the Applicants were not financially self-sufficient.

[48] I agree with the Applicants that all three of the factors cited ought to have weighed in their favour, but were unused improperly by the Officer to deny them the relief sought. As in *Lauture*, this is a reviewable error.

Conclusion

[49] For the reasons given, the application will be granted. No question was posed for certification.

JUDGMENT IN IMM-533-21

THIS COURT'S JUDGMENT is that the application is granted, the decision under review is set aside, the Applicants' application to be able to apply for permanent residence from within Canada on humanitarian and compassionate grounds is to be reconsidered by a different officer, and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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