Federal Court  Cour fédérale

Date: 20220506

Docket: IMM-5608-20

Citation: 2022 FC 661

Toronto, Ontario, May 6, 2022

PRESENT: Mr. Justice Diner

BETWEEN:

GILBERT OBI ASU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks judicial review of a senior immigration officer's [the "Officer"] decision [the "Decision"] to refuse his application for permanent residence on the basis of humanitarian and compassionate ["H&C"] concerns. For the reasons that follow, I find the Decision to be unreasonable and will grant the application, beginning with a brief background.

I. Background

[2] The Applicant is a 46-year-old citizen of Cameroon who has been living in Canada since December 2012, after having spent several years working and studying in the United States. The Applicant failed in his 2013 asylum claim. Between May 2013 and May 2018, the Applicant was issued four work permit extensions in addition to a study permit, which was extended twice. The Applicant's 2019 pre-removal risk assessment was refused. The Applicant's removal was set for March 2020 but suspended due to the pandemic. He thereafter submitted the H&C application under s 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, based primarily on establishment and hardship.

[3] On October 23, 2020, the Officer refused the application, and on establishment, noted the Applicant was employed, had included tax returns and bank statements demonstrating self-sufficiency, had completed a degree while in Canada, and demonstrated support from friends, roommates, and community members attesting to his good character. The Officer gave the establishment factor positive consideration. On hardship, the Officer noted potential risks in Cameroon due to political violence, difficulties faced by Anglophones, and support of family there, along with the skills with which he would be returning.

II. Analysis

[4] The only issue in this judicial review is whether the Decision was reasonable, in terms of its justification, transparency, and intelligibility (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 99 [*Vavilov*]). Any flaws or shortcomings must be more than superficial or peripheral to the merits of the decision and the court must be satisfied

that they are sufficiently central or significant to render the decision unreasonable (*Vavilov* at para 100).

[5] While H&C decisions are exceptional and highly discretionary, warranting significant deference (*Miyir v. Canada (Citizenship and Immigration)*, 2018 FC 73, at para 12), officers must "substantively consider and weigh all the relevant facts and factors before them" (*Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 25, emphasis in original). Where elements are overlooked or tainted by error, particularly central compassionate planks, the Court's balancing exercise will necessarily be deficient because the Court cannot know whether, if properly considered, the officer would have assigned positive, negative, or neutral weight (*Bhalla v. Canada (Citizenship and Immigration)*, 2019 FC 1638 [*Bhalla*] at paras 21 and 28).

[6] The Applicant argues that the Decision was unreasonable in three ways. First, he argues the Officer's assessment of his establishment was unintelligible because it failed to articulate why, despite being weighed positively, the Applicant's establishment was not exceptional or sufficient. Second, he submits the Officer did not properly consider the hardship the Applicant would suffer on return to Cameroon. Third, he submits the Officer misapprehended evidence in the consideration of the best interests of the child.

[7] I find the Officer's establishment findings to be determinative of the Application. It is clear, as summarized above, that the Officer considered the Applicant's establishment findings positively. The Officer mentions that factor twice, first after mentioning the Applicant's

employment, financial self-sufficiency, education, and supporting evidence of good character. In the conclusion, after again observing the positive community support, the Officer again noted positive establishment, yet goes on to state "I give this [establishment] positive consideration. However, this is not, in my mind, considered an exceptional level of establishment to justify a waiver for regulatory requirements."

[8] The Applicant challenges this remark on the basis that the Officer failed to explain why his establishment was insufficient to warrant relief, citing *Ndlovu v. Canada (Immigration, Refugees and Citizenship)*, 2017 FC 878 at paras 10-14. The Applicant submits that to the extent the Officer does not explain the yardstick that is being applied to the Decision, it is unintelligible.

[9] The Respondent counters that the Officer reviewed the evidence, considered it and gave positive consideration to the Applicant's establishment and that there is nothing wrong with an Officer providing a comment to the effect that an applicant's level of establishment is regular or ordinary. In support, the Respondent cites *Al-Abayechi v. Canada (Citizenship and Immigration)*, 2021 FC 1280 [*Al-Abayechi*] at paras 12-15, where Justice Mosley considered a similar argument to the one made by the Applicant. He wrote at para 13 that "while the Officer noted that the Applicant's acquired skills of resiliency, drive and determination would potentially facilitate his return to Iraq, he found that the Applicant's establishment was not uncommon for individuals who reside in Canada." He then concluded at para 15:

> I don't read the Officer's reasons in this case as setting a higher threshold but as simply noting that the Applicant's establishment did not stand out. The Officer noted that the Applicant had done what is reasonably expected in a common level of establishment - working, volunteering, learning the language and making friends…

[10] The central flaw here is that the Officer's remark was not simply meant to temper the positive establishment finding with a descriptive observation that the Applicant's establishment was positive but not particularly impressive, but rather "a common level of establishment." Such a descriptive observation, without more, would not pose a problem – as pointed out in *Al-Abayechi*. The problem, however, is that the Officer's comment clearly implies that an exceptional level of establishment is a prerequisite to obtaining H&C relief, and that without it, a section 25(1) waiver would not be justified.

[11] More recently, in *Zhang v. Canada (Citizenship and Immigration)*, 2021 FC 1482 at paras 1-2 [*Zhang*], Justice Zinn effectively explained as follows:

> [1] There is a fundamental and significant difference when making decisions on humanitarian and compassionate grounds between, on the one hand, observing that the relief is exceptional and, on the other hand, requiring an applicant seeking relief on humanitarian and compassionate grounds to show exceptional circumstances warranting the relief.
>
> [2] The second is not the proper test. The officer reviewing Mr. Zhang's application for permanent residence on humanitarian and compassionate grounds [the Officer] used that improper test. The Officer required Mr. Zhang to demonstrate that his circumstances were "exceptional" and this is not the legal threshold required in humanitarian and compassionate decisions. The decision is therefore unreasonable.

[12] Justice Zinn framed the appropriate question to be asked in a s 25(1) decision as follows: "Understanding that relief from the rigidity of the law is exceptional, do the particular circumstances of the applicant excite in a reasonable person in a civilized community a desire to relieve their misfortunes?" (*Zhang*, at para 19).

[13] In the present case, the Officer's concluding remark on establishment betrays a misapprehension of an important legal constraint that bears on the Decision (see *Subar v. Canada (Citizenship and Immigration)*, 2022 FC 340 at para 28). In short, the Officer misunderstood the threshold to be met by an H&C applicant. Although the Officer's Decision is a highly discretionary one, and entitled to significant deference as pointed out above, the error makes it impossible to know whether, if establishment had been properly considered, the Officer would have come to the same conclusion (*Bhalla*, at para 21 and 28).

[14] Having found the first issue to be determinative, I need not consider the Applicants hardship or BIOC arguments. However, I do note that the Applicant has raised significant concerns with respect to the evidence that the Officer did and did not consider in the assessment of hardship, concerns which are worthy of consideration on redetermination.

[15] The Decision is unreasonable and will be remitted to a new Officer for redetermination.

JUDGMENT in IMM-5608-20

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is granted.

2. The Applicant's H&C application is remitted to a new officer for redetermination.

3. No question for certification was submitted and I agree that none arise.

4. No costs will issue.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5608-20
STYLE OF CAUSE:	GILBERT OBI ASU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	MAY 4, 2022
JUDGMENT AND REASONS:	DINER J.
DATED:	MAY 6, 2022

APPEARANCES:

Faraz Bawa	FOR THE APPLICANT
Meenu Alhluwalia	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Faraz Bawa Stewart Sharma Harsanyi Calgary, Alberta	FOR THE APPLICANT
Attorney General of Canada Calgary, Alberta	FOR THE RESPONDENT