Federal Court  Cour fédérale

**Date: 20220713**

**Docket: IMM-1482-21**

**Citation: 2022 FC 1040**

**Ottawa, Ontario, July 13, 2022**

**PRESENT: The Honourable Mr. Justice Ahmed**

**BETWEEN:**

**DAVOOD HELALIFAR**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] Mr. Davood Helalifar ("Helalifar") seeks judicial review of the decision of a Senior Immigration Officer of Immigration, Refugees and Citizenship Canada ("Officer"), dated February 3, 2021, refusing his application for permanent residence within Canada on humanitarian and compassionate ("H&C") grounds pursuant to subsection 25(1) of the

*Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). Mr. Helalifar also made an accompanying request for a Temporary Resident Permit ("TRP"), which the Officer refused.

[2] Mr. Helalifar submits that the Officer's decision is unreasonable. In particular, he argues that the Officer failed to adequately weigh the H&C factors, failed to address the hardship flowing from his stateless status, and ignored material evidence of the hardship he would face upon removal to Iran. Mr. Helalifar further submits that the Officer unreasonably rejected his request for a TRP.

[3] In my view, the Officer placed an undue focus on Mr. Helalifar's criminal convictions and failed to assess the nature and relevance of his criminality vis-à-vis the other H&C factors. I also find that the Officer's analysis failed to grapple with the overall hardship that flows from Mr. Helalifar's *de facto* statelessness. I therefore find the Officer's decision to be unreasonable. Accordingly, this application for judicial review is allowed.

## II. **Facts**

### A. *The Applicant*

[4] Mr. Helalifar is a 54-year-old citizen of Iran. In 1998, Mr. Helalifar came to Canada with his son and made a refugee claim, which was unsuccessful. A subsequent Pre-Removal Risk Assessment was also refused.

[5] In 2004, Mr. Helalifar was convicted of assault with a weapon under subsection 267(a) of the *Criminal Code*, R.S.C., 1985, c. C-46 ("*Criminal Code*"), and assault under section 266 of the *Criminal Code*. For each charge, Mr. Helalifar was sentenced to one day and 58 days of pre-sentenced custody. The subsection 267(a) conviction falls under "serious criminality" pursuant to subsection 36(1) of the *IRPA*, while the section 266 conviction does not.

[6] As a result of his criminal charges, Mr. Helalifar lost custody of his son in 2006. Since then, they have been estranged. Mr. Helalifar states that he wishes to rebuild his relationship with his son and his grandchildren. He states that he has no surviving family in Iran.

[7] Mr. Helalifar suffers from schizophrenia, auditory hallucinations and an opioid dependency. Due to his mental health condition, he has been deemed disabled by the Ontario Disability Program ("ODSP"). He supports himself financially with the ODSP benefits he receives.

[8] On July 23, 2007, Mr. Helalifar was placed in immigration detention, pending a travel document from Iran for his removal from Canada. He was released on December 14, 2007. On April 15, 2008, he was again arrested and detained. Mr. Helalifar was released on May 5, 2008 when the Canada Border Services Agency ("CBSA") was unable to obtain a travel document from the Iranian authorities. Notes from the CBSA indicate that Mr. Helalifar was cooperative in the removal process but that the Iranian consular office refused to issue him a travel document because he does not possess an original birth certificate. To date, the CBSA has not received a travel document to remove Mr. Helalifar to Iran.

[9] On September 13, 2019, Mr. Helalifar submitted an H&C application, which included a request for a TRP.

B. *Decision Under Review*

[10] By letter dated February 3, 2021, the Officer refused Mr. Helalifar's H&C application and request for a TRP. The Officer considered Mr. Helalifar's submissions with respect to his establishment in Canada, his criminal convictions, his medical issues, the hardship he would face in Iran, the issue of his statelessness, and the best interest of the child ("BIOC") with respect to Mr. Helalifar's grandchildren.

[11] In considering Mr. Helalifar's establishment, the Officer noted the lengthy period of time spent in Canada and Mr. Helalifar's failed attempts to regularize his status in Canada. The Officer also noted that Mr. Helalifar is in receipt of ODSP benefits, and found little evidence of his community involvement, or that he has friends or acquaintances in Canada. The Officer further noted that Mr. Helalifar is presently estranged from his son and grandchildren and there was no evidence that he has taken steps to form relationships with them. As such, the Officer found that his grandchildren would not be negatively affected if he were to return to Iran. Overall, the Officer found 'some' level of establishment in Canada. The Officer gave significant negative weight to Mr. Helalifar's criminal convictions from 2004. The Officer acknowledged that Mr. Helalifar has not re-offended since 2004, yet found the convictions to be of a very serious nature.

[12] Regarding the hardship Mr. Helalifar would face in Iran, the Officer acknowledged the objective country conditions evidence of government corruption, impunity in security forces, a poor economy, and restrictions of freedoms in Iran, and found that it is possible that Mr. Helalifar would be negatively affected by the conditions in Iran. Nonetheless, the Officer found this to be only one factor for consideration in the H&C assessment.

[13] In considering Mr. Helalifar's medical issues, the Officer acknowledged that he lives with schizophrenia, suffers from an opioid dependency, and is currently enrolled in a methadone program. The Officer found that Mr. Helalifar's H&C submissions do not demonstrate that he would be unable to continue to access a methadone program in Iran. The Officer concluded that the evidence does not indicate that the Mr. Helalifar would be unable to access adequate mental health care in Iran, or that he would be unable to access "some type of financial and/or social support in Iran, similar to what he currently accesses in Canada, if he was deemed to be disabled in Iran due to his mental health".

[14] Mr. Helalifar's H&C submissions stated that he has become a *de facto* stateless individual because CBSA has been unable to obtain a travel document for him to return to Iran, and his lack of immigration status in Canada has caused him to live in a shelter for over 10 years. The Officer acknowledged Mr. Helalifar's difficult situation, and gave positive consideration to his *de facto* statelessness. Nonetheless, the Officer found that when weighed alongside his criminality it "might not be enough to result in a positive H&C decision overall".

[15] In considering Mr. Helalifar's request for a TRP, the Officer found insufficient reasons to justify the issuance of a TRP: Mr. Helalifar's need to remain in Canada to pursue a record suspension application concerning his criminal convictions does not outweigh the risk that Mr. Helalifar would overstay the time he was authorized to remain in Canada.

## III. **Issue and Standard of Review**

[16] The sole issue in this application for judicial review is whether the Officer's decision is reasonable.

[17] Both parties concur that the issue is to be reviewed on the reasonableness standard. I agree that the appropriate standard of review for H&C decisions is reasonableness (*Qureshi v Canada (Citizenship and Immigration)*, 2020 FC 88 at paras 5-8; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 ("*Kanthasamy*") at paras 8, 44-45; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paras 16-17).

[18] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). 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). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[19] For a decision to be unreasonable, an applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36).

## IV. **Analysis**

[20] Under subsection 25(1) of the *IRPA*, the Minister may grant permanent residency to a foreign national who does not meet the requirements of the *IRPA* if the Minister is of the opinion that the circumstances are justified under H&C considerations, including the BIOC directly affected.

[21] An H&C exemption is a discretionary remedy. What warrants relief will vary depending on the facts and context of the case. In *Kanthasamy*, the Supreme Court defines H&C considerations as being "those facts, established by the evidence, which would excite in the reasonable [person] in a civilized community a desire to relieve the misfortune of another" (at para 21, citing *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338 at p 350). This means that the decision maker must "substantively consider and weigh *all* the relevant facts and factors before them" (*Kanthasamy* at para 25, citing *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras 74-75, emphasis in original), and that "there will sometimes be humanitarian or compassionate reasons for admitting

people who, under the general rule, are inadmissible" (*Kanthasamy*, at paras 12-13). As recently noted by my colleague Justice Zinn in *Zhang v Canada (Citizenship and Immigration)*, 2021 FC 1482 at paragraphs 1-2, it is unreasonable for an officer to require an H&C applicant to show "exceptional" circumstances when seeking relief:

> [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.

[22] In finding that Mr. Helalifar's H&C considerations do not justify an exemption under subsection 25(1) of the *IRPA*, the Officer concluded:

> While I have given positive consideration to aspects of the applicant's establishment, to the adverse country conditions that are present in Iran, and to the applicant's statement that he has become a defacto stateless individual, I find that the applicant's criminal convictions, in particular, the severity of those convictions, outweighs the other factors on this H&C application.

[23] Mr. Helalifar submits that, aside from describing his previous convictions as severe, the Officer does not offer any other explanation as to how the alleged seriousness of the convictions outweighs the other positive factors. The fact that an individual is criminally inadmissible does

not automatically negate all other H&C factors, as doing so would defeat the purpose of section 25 of the *IRPA,* which is intended to mitigate "the rigidity of the law in an appropriate case" (*Sivalingam v Canada (Citizenship and Immigration),* 2017 FC 1185 ("*Sivalingam*") at para 9, citing *Kanthasamy* at para 19). Mr. Helalifar argues that the Officer failed to assess the factors related to the conviction itself, as required by IRCC's guidelines. These factors include: a) the type of criminal conviction, b) the sentence imposed, c) the length of time since the conviction, d) whether the conviction is an isolated incident or part of a pattern of criminality, e) any other pertinent information about the circumstances of the crime.

[24] This Court's recent decision in *Kambasaya v Canada (Citizenship and Immigration),* 2022 FC 31 ("*Kambasaya*") emphasizes that criminality must be assessed against all H&C factors – particularly when, similar to this matter, the criminal history is a decade in the past (at paras 46, 49-51). Mr. Helalifar maintains that the Officer overlooked the fact that his sentence was light: one day and 58 days of pre-sentence custody for each charge. Additionally, in the 17 years since these convictions, Mr. Helalifar has not been convicted of any other offence. The Officer failed to consider these factors before concluding that the convictions are so severe that H&C relief cannot be granted (*Williams v Canada (Citizenship and Immigration),* 2017 FC 1027 at para 24).

[25] Mr. Helalifar further submits that the Officer failed to address the hardship flowing from his statelessness. Since 2007, the CBSA has not been able to remove him to Iran because Iran refuses to issue him a travel document. He lives with serious mental health issues, yet his lack of status in Canada hinders his ability to access services to alleviate his struggles. This precarious

situation has placed him in a ‘legal limbo’ for the last 14 years (*Abeleira v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1008 (“*Abeleira*”) at para 54). In their decision, the Officer accepted Mr. Helalifar’s *de facto* stateless status, but at no point did they address the hardship concerns that flow from a lack of status.

[26] The Respondent contends that Mr. Helalifar’s convictions and criminal inadmissibility were not the sole reason for refusing the H&C application. The Officer also found that the BIOC of Mr. Helalifar’s grandchildren would not be negatively affected, that Mr. Helalifar would not be at risk of harm from authorities in Iran, and that he would have access to medical care in Iran. Additionally, the Officer gave positive weight to Mr. Helalifar’s *de facto* statelessness. Overall, the Officer considered all the factors raised in Mr. Helalifar’s H&C submissions and gave positive weight to some factors, and negative weight to others. Notwithstanding the length of Mr. Helalifar’s sentences for the crimes he committed, the convictions are still severe crimes under the *Criminal Code.* The Respondent maintains that Mr. Helalifar’s arguments amount to a request for this Court to re-weigh the evidence.

[27] I disagree. I do not find that Mr. Helalifar’s submissions amount to a mere disagreement with the Officer’s weighing of the evidence, but rather how the evidence was assessed. In my view, the Officer’s assessment of the H&C factors lacks transparency and places an undue focus on Mr. Helalifar’s criminality, which defeats the purpose of section 25 of the *IRPA.* I agree with the statement made by Mr. Helalifar’s counsel during the hearing: while the Officer was entitled to consider Mr. Helalifar’s criminality, the Officer was unreasonably preoccupied by it, and its

mere existence defeated the entire application. This is unreasonable. As noted by my colleague Justice Grammond at paragraph 9 of *Sivalingam:*

> An interpretation of section 25 that focuses unduly on the reason that made the applicant inadmissible under a provision of IRPA reinforces, rather than mitigates, the rigidity of the law and defeats the purpose of section 25 (*Kobita v Canada (Citizenship and Immigration),* 2012 FC 1479 at para. 29).

[28] The jurisprudence of this Court affirms that non-compliance in and of itself cannot be invoked as a barrier to H&C relief (*Lopez v Canada (Citizenship and Immigration),* 2019 FC 349 at para 11). The Officer was required to assess the nature and relevance of the non-compliance, and weigh it in the context of the other H&C factors (*Garcia Balarezo v Canada (Citizenship and Immigration),* 2020 FC 841 at para 47; *Mitchell v Canada (Citizenship and Immigration),* 2019 FC 190 at para 23). I am not convinced that the Officer in this case adequately examined Mr. Helalifar's criminal record – including the circumstances of the offence, and whether there has been a pattern of criminal conduct (*Kambayasa* at paras 46, 51) – and weighed this against the other H&C considerations. While the Officer's decision does acknowledge that Mr. Helalifar has not re-offended since 2004 and lists Mr. Helalifar convictions, the Officer simply states that the convictions are "of a very serious nature" and gives "significant, negative weight" to Mr. Helalifar's criminality. Without a more thorough assessment of why such significant weight is attributed to Mr. Helalifar's criminality, the Officer's conclusion lacks justification, transparency and intelligibility (*Vavilov* at para 99).

[29] I also agree with Mr. Helalifar's submission that the Officer failed to grapple with the hardship that flows from Mr. Helalifar's long-standing *de facto* stateless status, particularly in light of his mental health struggles and opioid dependency. The Officer's decision states:

> I acknowledge that the applicant is in a difficult situation and that his lack of immigration status has caused him to have issues with housing and health care. However, I note that the applicant's lack of immigration status was initially caused by the applicant's own actions of choosing to come to Canada and of subsequently not being successful in his claims for refugee protection and Pre-Removal Risk Assessment (PRRA). I also note that the applicant's lack of immigration status in Canada has to be weighed on this H&C application against the other factors that have been brought forward for consideration, including the applicant's serious criminal convictions. I note that even though I have given positive consideration to the applicant's defacto statelessness on this H&C application, when weighed alongside the applicant's criminality, it might not be enough to result in a positive H&C decision overall.

[30] While the Officer acknowledged that Mr. Helalifar's immigration status has affected his ability to access housing and healthcare, I find the Officer failed to assess the overall effect of the Mr. Helalifar's statelessness through a compassionate lens. This error is similar to the one discussed in *Abeleira* at paragraph 40:

> […] What makes the decision unreasonable is that the Officer never analyzed this problem. While he looked at individual aspects of statelessness such as health care and employment, he failed to see the big picture and did not consider the effect of Mr. Abeleira's statelessness at a global level, particularly whether he can be removed from Canada and, if not, whether it is humane or compassionate to leave him in an indefinite state of limbo in this country.

[31] What more, I am not convinced that the Officer truly grasped the meaning of statelessness and how Mr. Helalifar's lack of status affects the H&C factors raised in his application. In the decision, the Officer accepts Mr. Helalifar's stateless status, but then concludes: "I am sympathetic to the applicant's situation that he faces […] possibly having to return to Iran for a period of time in order to apply for permanent residence." This shows a lack of understanding of Mr. Helalifar's situation: despite his cooperation with the CBSA, Mr. Helalifar is unable to leave Canada because Iran refuses to issue him a travel document. Being stateless is not merely a state of mind, or a choice. Without status, Mr. Helalifar's ability to leave Canada is affected just as much as his ability to have his basic human rights met in Canada. The challenges Mr. Helalifar faces as a stateless person were clearly outlined in his affidavit:

> […] Immigration cannot deport me due to the situation in Iran, but I have no immigration status, as a result I cannot secure housing, as a result I have been forced to live in a shelter for over 10 years. I have no health card, as a result little access to health care, as a result my health has deteriorated over the years. I have no identification documents as well.

[32] Mr. Helalifar is stuck in a state of limbo that prevents him from accessing necessary social and health services – the impact of which is exacerbated by his multiple mental health issues. In my view, the Officer's preoccupation with Mr. Helalifar's criminality and failure to grasp the overall effect of his statelessness reveal an analysis that is devoid of the compassion required of an H&C assessment pursuant to *Kanthasamy* (at para 21). In fact, when reading the Officer's decision, one wonders if the Officer was in fact reviewing a different set of facts than those in this H&C application. In no way do I find the Officer's decision reflective of the approach that "[…] requires that a decision-maker have the ability to empathize with an

applicant for relief by placing her or himself in the applicant's shoes to clearly understand and be sensitive to the applicant's circumstances." (*Dowers v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 593 at para 3).

[33] Having found that the decision is unreasonable based on the Officer's flawed assessment of Mr. Helalifar's criminality and statelessness, I do not find it necessary to address the remainder of Mr. Helalifar's arguments with respect to the hardship he would face upon return to Iran and the Officer's refusal of the TRP.

## V. **Conclusion**

[34] For the reasons above, I find that the Officer's decision is unreasonable as it lacks all three elements of the *Vavilov* framework: justification, transparency and intelligibility (at para 99). Accordingly, this application for judicial review is allowed. No questions for certification were raised, and I agree that none arise.

**JUDGMENT in IMM-1482-21**

**THIS COURT'S JUDGMENT is that**:

1. This application for judicial review is allowed. The decision under review is set aside and the matter is referred back for redetermination by a different decision-maker, in accordance with the reasons provided.

2. There is no question to certify.

"Shirzad A."

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-1482-21 |
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