Federal Court  Cour fédérale

Date: 20220714

Docket: IMM-6270-21

Citation: 2022 FC 1044

Ottawa, Ontario, July 14, 2022

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

ANDRAS HORVATH

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant applies for judicial review of a decision by a Senior Immigration Officer ("Officer") rejecting his application for permanent residence from within Canada on Humanitarian and Compassionate ("H&C") grounds dated July 28, 2021 and the reconsideration dated August 26, 2021.

II. Background

[2] The Applicant is 28 years old, ethnically Roma and a citizen of Hungary. He claims he faced discrimination at school from administrators and other students because of his ethnicity. He states this discrimination had consequences that limited his career prospects; for instance, the Applicant believes he was rejected from certain high schools due to his Roma identity.

[3] During high school, the Applicant claims the abuse and harassment began to escalate. The Applicant states a group of strangers on a train attacked him in September 2008. The windows of his family home were smashed in a later incident and a dead cat was thrown into their yard. In May 2009, the Applicant had a physical confrontation with a young man after being taunted about his ethnicity. This man and three of his family members then showed up at the Applicant's home and beat the Applicant and his parents. The Applicant claims his mother contacted the police and the attackers were charged with trespassing and assault.

[4] In 2009, the Applicant met the woman who would become his common law partner. This woman, who is also Roma and experienced abuse stemming from her identity, gave birth to a son in December 2010.

[5] As they no longer felt safe in Hungary, the young family fled to Canada in September 2011. Their refugee claim was refused in December 2012. The Applicant's partner gave birth to a daughter in February 2013. Their application for leave to seek judicial review of the refugee claim rejection was refused in May 2013.

[6] Canada Border Services Agency ("CBSA") began removal proceedings against the family in March 2014, but the Applicant claims the family could not leave at this time because they had difficulty obtaining their daughter's birth certificate. In the summer of 2014, the Applicant's mother informed him she had received an anonymous letter that threatened the Applicant's death should he return to Hungary. His mother later told him that racists had vandalized his father's gravestone. Thereafter, the Applicant claims he was too afraid to report for removal.

[7] The Applicant's partner was involved in a shoplifting incident in June 2017 that resulted in her detention in an Immigration Holding Centre for roughly six months. The Applicant reports his relationship with his partner was not the same after her time in detention and the couple separated in 2019. Subsequently, the Applicant's ex-partner and her son became permanent residents after their H&C application was granted (her daughter, having been born in Canada, was already a citizen).

[8] The Applicant was arrested in September 2019 for driving a vehicle without proper registration. The Applicant filed a pre-removal risk assessment ("PRRA") that was rejected in September 2020 but has been remitted for redetermination. He received a work permit in October 2020, and filed an H&C application in November 2020.

III. Issues

[9] The issues are:

A. Whether the Officer's initial decision and reconsideration were both made in a procedurally fair manner; and
B. Whether the Officer's initial decision and reconsideration were reasonable.

IV. Standard of Review

[10] As set out by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], at paragraph 23, "where a court reviews the merits of an administrative decision … the starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness." I see no reason in this case to deviate from this general presumption. As such, the standard of review in this case is that of reasonableness.

[11] In conducting reasonableness review, a court is to begin with the principle of judicial restraint and respect for the distinct role of administrative decision-makers (*Vavilov* at para 13). When conducting reasonableness review, the Court does not conduct a *de novo* analysis or attempt to decide the issue itself (*Vavilov* at para 83). Rather, it starts with the reasons of the administrative decision-maker and assesses whether the decision is reasonable in outcome and process, considered in relation to the factual and legal constraints that bear on the decision (*Vavilov* at paras 81, 83, 87, 99).

[12] A reasonable decision is one that is justified, transparent, and intelligible to the individuals subject to it, reflecting "an internally coherent and rational chain of analysis" when

read as a whole and taking into account the administrative setting, the record before the decision-maker, and the submissions of the parties (*Vavilov* at paras 81, 85, 91, 94-96, 99, 127-128).

[13] As for the standard of review for procedural fairness, the standard of review is, essentially, correctness, though that is not a perfect way to phrase it. As Justice Little succinctly summarized in *Garcia Diaz v Canada (Citizenship and Immigration)*, 2021 FC 321:

> On issues of procedural fairness, the standard of review is correctness. More precisely, whether described as a correctness standard of review or as this Court's obligation to ensure that the process was procedurally fair, judicial review of procedural fairness involves no margin of appreciation or deference by a reviewing court. **The ultimate question is whether the party affected knew the case to meet and had a full and fair, or meaningful, opportunity to respond**… In *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196, de Montigny JA said "[w]hat matters, at the end of the day, is whether or not procedural fairness has been met" (at para 35).
>
> [Emphasis added]

V. Analysis

[14] The Applicant claims the decision is procedurally unfair and unreasonable because the initial reasons do not reflect the new submissions and the reasons given in the addendum do not adequately account for these submissions.

[15] I will grant this Application.

[16] The Applicant stated that the new submissions included evidence relating to issues material to the Officer's original decision, such as evidence to establish the Applicant's

paternity, evidence of his employment and corroboration of the threats against him. The new submissions also included a legal argument. The Applicant submits the Officer's statement that she had reviewed this evidence was insufficient because the evidence required her to revisit some of her initial findings of fact. The Officer's failure to do so violates the principle, affirmed in *Vavilov* at paragraph 128, that a decision-maker should address key issues and central arguments raised by the parties.

[17] The Respondent submits the Officer's decision was reasonable. An H&C application is meant to be reopened only in unusual circumstances or where it would serve the interests of justice, not merely to allow an applicant to provide better evidence than they originally submitted. An applicant bears the onus of providing adequate evidence to support their claims in their initial H&C application. While the Applicant's additional submissions may not have been filed because of his counsel's oversight, the Officer cannot be faulted for this; as the Officer noted, Applicant's counsel had nine months to provide the additional submissions, many of which were dated prior to the initial application.

[18] The jurisprudence supports the proposition that an immigration officer is not obligated to reconsider a decision except in circumstances of bad faith (*Malik v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1283 at para 44; *Pierre Paul v Canada (Citizenship and Immigration)*, 2018 FC 523 at para 27). The Officer in this instance may have been entitled to decline to reconsider her original decision.

[19] However, the Officer elected to reconsider the decision. The Officer, in the reconsideration decision, set out the circumstances that arose causing the Applicant to ask for a reconsideration and what the new evidence was. These paragraphs, when read, would lead one to believe the Officer was not prepared to do a reconsideration; however, following them, the Officer proceeds to vaguely do so. The sum total of the Officer's actual analysis and decision of the reconsideration attached as an addendum is: "**Following a thorough review of the new submissions, it is determined that the initial decision to refuse the [A]pplicant's H&C application remains unchanged**" (emphasis added). At the end of the addendum, the decision reads: "The H & C application was considered on its substantive merits and was refused a decision was rendered on 28 July 2021 thereby concluding the application. … Reconsideration decision date: 26 AUG 2021."

[20] In a recent case by Justice Pentney, *AB v MCI*, 2021 FC 1206 at paragraph 22, citing the Federal Court of Appeal ("FCA") (*CIC v Kurukkal*, 2010 FCA 230 at para 5), he set out a test an officer is to follow if they decide to do a reconsideration: "…The process consists of two steps; first, the officer must decide whether to "open the door to a reconsideration", if the officer decides to re-open the case, thee second stage involves an actual reconsideration of the decision on its merits (*Hussein* at para 55, citing *Ghaddar v Canada (Citizenship and Immigration)*, 2014 FC 727 at para 19 [*Gill*])."

[21] In this case, step 1 is met. Then, in step 2, the Officer must conduct an actual reconsideration of the merits.

[22] The Applicant's new submissions directly address some of the most important concerns raised by the Officer in the initial decision, particularly his paternity and involvement with his ex-partner's children. The failure of a decision-maker to account for key issues or central arguments raised by a party is an error that often (if not always) amounts to unreasonableness (*Vavilov* at paras 126-127).

[23] The Officer had little information about the children during the time of the original decision, and decided that the Applicant failed to establish his paternity or the existence of an ongoing relationship with the children. These findings formed the crux of the Best Interests of a Child ("BIOC") analysis and resulted in the Officer's conclusion that the best interests of the children would not be negatively affected by the Applicant's return to Hungary. However, the new submissions contained evidence to establish the Applicant is the father of the children and is involved in their lives. Having agreed to reconsider her decision, it was unreasonable for the Officer to not consider and explain how the new evidence fits for instance in the BIOC analysis. There must be some engagement with the new evidence, and here there was none. For this reason, the application is granted, as this issue is determinative of the matter. Granting this application is in no way a validation of any of the submissions regarding the merits.

[24] No certified questions were presented.

JUDGMENT IN IMM-6270-21

THIS COURT'S JUDGMENT is that:

1. The Application is granted and is sent back to be reconsidered by a different decision maker.

2. No question is certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6270-21
STYLE OF CAUSE:	ANDRAS HORVATH v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	JULY 6, 2022
JUDGMENT AND REASONS:	MCVEIGH J.
DATED:	JULY 14, 2022

APPEARANCES:

Adrienne Lei Amani Rauff	FOR THE APPLICANT
Leanne Briscoe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Dewart Gleason LLP Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT