Federal Court Cour fédérale

Date: 20220812

Docket: IMM-7580-21
IMM-7584-21

Citation: 2022 FC 1194

Ottawa, Ontario, August 12, 2022

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

MARIWAN KHALEEL IBRAHIM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

<u>JUDGMENT AND REASONS</u>

[1] This is the judicial review of a decision of a Senior Immigration Officer [Officer] refusing the Applicant's application for permanent residence. The application was based on humanitarian and compassionate [H&C] grounds pursuant to s 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The Officer also denied the Applicant's alternative request that a temporary resident permit [TRP] be granted.

Background

[2] The Applicant, Mariwan Khaleel Ibrahim, is Kurdish and a citizen of Iraq. In January 2014, Mr. Ibrahim received a scholarship to study in the United States [US], which he did, receiving a Masters of Science degree in statistics in 2016.

[3] The Applicant claims that while he was studying in the US, he entered into a romantic relationship with a Peruvian woman. In March 2015, when his conservative Muslim family learned of this relationship, his father and brother threatened to kill him. In April 2016, the Applicant's uncle in Kurdistan murdered his sixteen-year-old daughter because she had a boyfriend. Given this, the Applicant feared that his father and brother would carry out their threats to his life.

[4] As his student status in the US was about to end, and given the Trump administration's policies pertaining to Muslim countries, on February 14, 2017 the Applicant entered Canada and made a refugee claim. The Refugee Protection Division [RPD] refused his claim on September 28, 2018. The Refugee Appeal Division [RAD] refused his appeal on January 23, 2019.

[5] The Applicant's H&C application was denied on April 27, 2021. However, the Applicant was not notified of the decision due to a clerical error. Not knowing that his application had already been refused, the Applicant submitted an update with respect to his H&C application on August 13, 2021. The Applicant was notified of the negative decision by letter dated October 7,

2021. The decision included an addendum stating that the submitted updated documents had been considered.

[6] The Applicant commenced two applications for judicial review, one pertaining to the April 27, 2021 decision (IMM-7580-21) and a second pertaining to the October 7, 2021 decision (IMM-7584-21) but subsequently sought to have the matters consolidated and heard together as both are concerned with his H&C application and he was advancing the same argument in both proceedings. An Order consolidating the matters was issued on February 16, 2022.

Decision under review

[7] With respect to establishment in Canada, the Officer noted that the Applicant had been living in Canada for over 4 years and had developed a strong social network. The Officer considered the numerous letters of support provided by the Applicant's colleagues and friends, which state that he is a good person, a hard worker, and has had a positive impact in his community. While the Applicant did not provide a letter of support from his girlfriend, the Officer accepted that the Applicant had established meaningful friendships and connections since coming to Canada and that this, along with his volunteer work and church attendance, positively contributed to his establishment.

[8] As to hardship, the Officer found that country conditions documentation demonstrated that conditions in Kurdistan are "not perfect", that Christians face mistreatment there, and that Iraq faces a precarious security situation. However, it had also been reported that the situation for Christians in Erbil was very stable. Further, the Applicant had not presented sufficient evidence

to show that his family is powerful and would be able to locate him if he returned to Iraq, that they are actively seeking to harm him, or that they even knew that he had been exploring practicing Catholicism in Canada. Further, there was little evidence to suggest that Kurds face widespread discrimination outside Kurdistan and the Applicant had not indicated that he would relocate anywhere other than Kurdistan if he were to return.

[9] The Officer accepted that Iraq has been plagued with violence and has a volatile security situation and, therefore, the Applicant would experience some hardship upon return. However, because Iraq currently has a temporary stay of removal [TSR], the Officer concluded that a refusal of his H&C application would not result in his removal from Canada.

[10] The Officer also considered the hardship the Applicant would face if he were severed from his strong Canadian social network. The Officer stated that it had not been suggested that the Applicant could not build a new social network upon return to Iraq and he could utilise social media and other forms of communication to minimize the hardship of physical separation from his Canadian friends.

[11] The Officer assigned little positive weight on the grounds of hardship and concluded that the H&C considerations before them did not justify an exemption under s 25(1) of the IRPA.

[12] The Officer also did not grant the Applicant a TRP as they found that there was not an urgent need for the Applicant’s presence in Canada and that he had not provided a compelling

reason to be granted one. Due to the “mitigating factors” as set out in the Officer’s H&C decision, this was not an exceptional circumstance that warranted the issuance of a TRP.

Issue and standard of review

[13] The issues identified by the Applicant all fall within the broader question of whether the Officer’s decision was reasonable. These are whether the Officer: erred in relying on the TSR as a basis to afford little positive weight to the hardship factors; applied the H&C test correctly; and, reasonably assessed the Applicant’s establishment in Canada and the country conditions in Iraq.

[14] The parties submit and I agree that the standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 25 [*Vavilov*]). On judicial review, the Court “asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov* at para 99).

Impact of TSR on hardship analysis

[15] The Applicant submits that the Officer erred in their hardship analysis by affording little positive weight to hardship grounds on the basis that the Applicant is not facing imminent removal due to the TSR in place for Iraq, referencing jurisprudence including *Bawazir v Canada (Citizenship and Immigration)*, 2019 FC 623 [*Bawazir*] and *Omar v Canada (Citizenship and Immigration)*, 2021 FC 1201 [*Omar*]. Moreover, the Applicant submits that Immigration,

Refugees and Citizenship Canada's [IRCC] own Program Delivery Instruction on H&C applications indicates that TSR's should be viewed as a positive factor warranting relief. He also submits that while a TSR or Administrative Deferral of Removal [ADR] may prevent the imminent removal of the Applicant, it does not waive the requirement for foreign nationals without status in Canada to apply for permanent residence from abroad. In effect, this means that the Applicant would have to return to Iraq, a war zone, to make an application for permanent residence. The Applicant submits that the Officer effectively dismissed two important factors – the dire country conditions in Iraq and the legal requirement that the Applicant return there to apply for permanent residence. The Applicant also submits that the Officer failed to consider the profound difficulties that the Applicant would experience by virtue of being from a country subject to a TSR in that it leaves him in a position with unknown and precarious status for an indeterminate period.

[16] Conversely, the Respondent submits that the Officer did not dismiss the Applicant's H&C application solely on the existence of the TSR, rather, the TSR was simply an additional consideration. The Respondent submits that while an officer cannot ignore the existence of a TSR, an H&C application may still be denied notwithstanding the TSR, references cited in support of this include *Piard v Canada (Citizenship and Immigration)*, 2013 FC 170 at para 19 [*Piard*]). Further, that officers are entitled to give difficult conditions in an applicant's home country little weight when there is a TSR in effect (references cited in support of this include *Ndikumana v Canada (Citizenship and Immigration)*, 2017 FC 328 at paras 17-21 [*Ndikumana*], and *Leteyi v Canda (Citizenship and Immigration)*, 2022 FC 572 at paras 25-26 [*Leteyi*]). Finally, the Respondent submits that the Applicant raises for the first time on judicial review the

new argument that the precariousness of his status in Canada might justify an H&C exemption. Since this argument was not made before the Officer the Respondent submits that it cannot be considered by this Court.

Analysis

[17] Section 230(1) of the *Immigration and Refugee Protection Regulations,* SOR/2002-227, provides that the Minister may impose a stay on removal orders with respect to a country or a place if the circumstances in that country or place pose a generalized risk to the entire civilian population as a result of an armed conflict within the country or place; an environmental disaster resulting in a substantial temporary disruption of living conditions; or, any situation that is temporary and generalized. Section 230(2) provides that the Minister may cancel the stay if those circumstances no longer pose a generalized risk to the entire civilian population and s 230(3) outlines circumstances where the stay does not apply.

[18] In this matter, the Officer stated in their hardship analysis:

> Overall, I accept that Iraq has been plagued with violence and is a country with a volatile security situation. Although he has not shown that his family would be able to locate him in Iraq, or that they would seek to harm him upon returning, I accept that he would experience some hardship as a result of returning to a place that has seen significant levels of violence in recent years. On the other hand, I note that Iraq currently has a TSR because it was determined that circumstances in the country posed a generalized risk to the entire civilian population and that the applicant does not fall within a category of persons able to be removed despite the TSR. Therefore, a refusal of this H&C application will not result in the applicant's removal. Rather, he may remain in Canada until the TSR is lifted. During his stay he may be eligible to apply for a work permits or study permit.

[19] In their conclusion, the Officer repeated their prior hardship findings and stated that, overall, the Applicant would face "some hardship" having to leave Canada but that he had not established that he would be at risk from his family in Iraq. The Officer further noted, "[a]dditionally, there is a TSR in place for Iraq. As such, this refusal will not result in his removal from Canada and I have assigned little positive weight on the grounds of hardship".

[20] In his submissions made to the Officer, the Applicant referred to the existence of the TSR and stated that he would have no choice but to leave Canada to apply for permanent residence unless an exception were made for him. This would force him into a situation of extreme hardship given the dire country conditions in Iraq. However, the Officer did not engage with that submission in their reasons.

[21] I agree with the Applicant that this situation is similar to *Bawazir.* There, the officer found that the existence of an ADR for Yemen strengthened the applicant's statements regarding the dire situation in that country but that it also rendered that situation far less relevant to the applicant's personal circumstances as he would not be returned to Yemen until Canada deemed it appropriate to remove individuals to that country. The officer stated that while the situation in Yemen was dire, it had little to no impact on the applicant's personal circumstances for as long as the ADR remained in place. The officer therefore gave the situation in Yemen little weight.

[22] Justice Norris held that the officer in *Bawazir* erred in giving the dire situation in Yemen little weight when conducting the H&C balancing:

> [16] It is true that Mr. Bawazir did not face removal to Yemen if his H&C application was refused, at least not for as long as the

ADR is in place. In this respect, his circumstances are unlike those of many applicants for H&C relief, such as Mr. Kanthasamy himself (see *Kanthasamy* at para 5). But this was not why he sought H&C relief. Rather, Mr. Bawazir argued that H&C considerations warranted an exception being made in his case from the requirement that he leave Canada to submit his application for permanent residence. Ordinarily, section 11 of the IRPA requires a prospective permanent resident to apply for a permanent resident visa before entering Canada. If an exception to this requirement is not made, Mr. Bawazir could not apply for permanent residence unless he returned to Yemen (there being no suggestion that he could go anywhere else). Mr. Bawazir also contended that conditions in Yemen should be considered (along with other circumstances) with respect to the merits of his application for permanent residence.

[17] One can certainly understand why Mr. Bawazir would like to secure his status in Canada by obtaining permanent residence here. In my view, a reasonable and fair-minded person would judge the requirement that he leave Canada and go to a war zone where a dire humanitarian crisis prevails so that he could apply for permanent residence as a misfortune potentially deserving of amelioration. The existence of the ADR demonstrates that Canada views the conditions in Yemen as a result of the civil war to "pose a generalized risk to the entire civilian population." The conditions are so dire there that, with a few exceptions, Canada will not remove nationals to that country. Applying the usual requirements of the law in such circumstances clearly engages the equitable underlying purpose of section 25(1) of the IRPA (cf. *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 at para 43) yet the officer finds that the conditions prevailing in Yemen and the "extreme hardship" Mr. Bawazir would face there deserve "little weight" in the analysis. This was because Mr. Bawazir is not facing the threat of imminent, involuntary removal. However, the officer did not consider that Mr. Bawazir has no choice but to leave Canada for Yemen if he wishes to apply for permanent residence unless an exception is made for him. The officer erred in effectively dismissing a factor which is clearly relevant to the equitable underlying purpose of section 25(1) of the IRPA.

……

[23] Like *Bawazir*, in this matter, the Applicant had submitted that he would have no choice but to leave Canada to apply for permanent residence unless an exception were made for him. However, the Officer did not engage with that factor.

[24] Similarly, in *Omar*, the officer noted the adverse country conditions in Somalia but assigned them little weight because an ADR prevented the applicant from being removed there. Justice Southcott, referring to *Bawazir*, stated:

> [16] I see no basis to distinguish the facts of the present case from those in *Bawazir*. As in *Bawazir*, the Applicant's H&C application submitted, based significantly on the adverse conditions in his home country, that it would be a hardship for him to return to there to apply for permanent residence in Canada as is ordinarily required by section 11 of IRPA. As in *Bawazir*, the Officer assigned little weight to the country conditions because of the effect of the ADR and did not consider the fact that, in the absence of relief on H&C grounds, the Applicant has no choice but to leave Canada for his home country if he wishes to apply for permanent residence.

[25] Justice Southcott rejected the respondent's argument that *Bawazir* was distinguishable because, in the case before him, the applicant was not required to return to Somalia to apply for permanent residence. Rather, he was presently entitled to remain in Canada because of the effect of the ADR. Justice Southcott found that the crux of the case before him was effectively identical to that described by Justice Norris: while the applicant could not be forced to return to Somalia while the ADR was in effect, he also could not apply for permanent residence in Canada without returning there.

[26] In my view, in the matter before me, there is similarly no basis upon which to distinguish the facts from those in *Bawazir* and *Omar*.

[27] The Respondent acknowledges that the existence of a TSR is relevant to an officer's H&C decision, that; a TSR cannot be ignored and, that an officer must assess the effect of the TSR as part of their obligation to consider each H&C application on its own facts (referencing *Al-Khamees v Canada (Citizenship and Immigration)*, 2022 FC 803 at paras 17-18; *Al-Abayechi v Canada (Citizenship and Immigration)*, 2021 FC 1280 at paras 17-19; *Leteyi* at para 25 and; *Emhemed v Canada (Citizenship and Immigration)*, 2018 FC 167 at para 9 [*Emhemed*]).

[28] However, the Respondent submits that an officer may deny an H&C application notwithstanding the existence of a regulatory stay of removal to that individual's country. In that regard, the Respondent refers to *Piard* at paragraph 19 (which, in turn, references *Nkitabungi v Canada (Citizenship and Immigration)*, 2007 FC 331 at para 12) and *Leteyi* at paragraph 25. The Respondent submits that this Court held in *Ndikumana* at paragraphs 17-21, that an officer is entitled to give difficult conditions in the applicant's home country little weight when there is a TSR.

[29] In *Omar,* Justice Southcott addressed a similar argument:

> [19] I have also considered other authorities upon which the Respondent relies. The Respondent refers the Court to jurisprudence to the effect that the mere presence of an ADR applicable to a given country does not mean that H&C applications from citizens of that country will automatically be allowed (see *Nkitabungi v Canada (Citizenship and Immigration)*, 2007 FC 331 at para 12; *Lalane v Canada (Citizenship and Immigration)*, 2009 FC 6 at para 41; *Emhemed v Canada (Citizenship and Immigration)*, 2018 FC 167 at para 9). I accept this line of authority but find that it has little application to the issue in the present case. The Applicant did not submit to the Officer, and does not argue before the Court, that the existence of the ADR necessitated that his H&C application be approved.
>
> ……

[22] Finally, the Respondent refers the Court to *Ndikumana v Canada (Citizenship and Immigration)*, 2017 FC 328 [*Ndikumana*], a case involving an applicant from Burundi. The Respondent emphasizes the Court's statement in *Ndikumana* that it would not be unreasonable to find that the applicant will continue to benefit from the ADR applicable to that country and that she will not have to deal with current conditions in Burundi (at para 19). However, that statement must be understood in the context of the surrounding paragraphs of the decision and the authorities relied upon therein.

[23] As in authorities cited above, *Ndikumana* noted the principle that, in the context of an H&C Application, the existence of an ADR with regard to a specific country cannot automatically lead to specific outcome, whether positive or negative (at para 18). It accurately cited *Likale v Canada (Citizenship and Immigration)*, 2015 FC 43 at para 40 [*Likale*] and *Alcin v Canada (Citizenship and Immigration)*, 2013 FC 1242 at para 55 as support for that principle. To the extent *Ndikumana* provides additional guidance as to the role of an ADR in the consideration of an H&C application, that guidance can be understood from its reliance (in para 20) upon the reasoning in *Likale*:

> 20 In *Likale*, the officer's decision was found to be reasonable because the applicant did not demonstrate that returning to his country would cause him hardship that would be unusual or disproportionate, "once the TSR is lifted" (*Likale* at para. 36). The Court concluded that it was reasonable to note that "the applicant can continue to avail himself of the TSR and remain in Canada," and that this analysis is consistent with humanitarian values (*Likale* at para. 38).

[24] Again, *Ndikumana* accurately captures the conclusion in *Likale*. However, as I read *Likale*, the applicant therein was asserting that it was likely that he would remain in Canada without status indefinitely because of a Temporary Suspension of Removal [TSR] applicable to the Congo. The officer analyzed the hardship he would have to face if he had to file his application for permanent residence from outside Canada once the TSR was lifted (at para 13). As such, it appears that, in *Likale,* neither the officer nor the Court was considering the argument presented by the Applicant in the present case (and similarly presented and considered by the Court in *Bawazir)* that, based on current conditions in the home country where an ADR is in place, it would be a hardship to return to apply for permanent

> residence in Canada, as is ordinarily required by section 11 of *IRPA*.
>
> (emphasis original)

[30] *Leteyi*, relied upon by the Respondent in the matter before me, referred to *Ndikumana* and *Likale* as well as *Emhemed* at paragraph 11, which held that it was not unreasonable for an officer, in their assessment of hardship, to rely on the fact that the applicant would not be removed from Canada given the existence of an ADR. Justice Roy concluded:

> 26 It appears to me that reasonableness must include the simple fact that an applicant cannot rely on a factual situation they will not face as a result of the TSR (or of an administrative deferral of removal [ADR]). If the situation in the country of citizenship were to change in such a way that the temporary suspension of removal was lifted, then it would be necessary to consider how, and to what extent, the domestic situation had worsened. At this point, the exercise is artificial and fundamentally moot.

[31] In my view, this does not assist the Respondent because the question at issue here, as was the case in *Bawazir* and *Omar*, is whether due to the current conditions in the home country of the applicant where a TSR (or ADR) is in place, it would be a hardship for the applicant to return there to apply for permanent residence, as is ordinarily required by s 11 of the IRPA, such that an exemption under s 25(1) of the IRPA would be warranted.

[32] In sum, I agree with the Applicant that the Officer erred by affording the country conditions in Iraq little weight in their hardship analysis, in part, on the basis that the TSR currently prevents the Applicant from being removed to that country. The error arises because the Officer failed to engage with the Applicant's submission that he would have no choice but to leave Canada and return to Iraq to apply for permanent residence. Had the Officer done so, this

would have required the Officer to consider whether the return to Iraq in that event warranted H&C relief under s 25(1) of the IRPA, especially in light of their finding that "Iraq has been plagued with violence and is a country with a volatile security situation". I recognise that the Officer considered other aspects of hardship. However, it is not possible to parse the Officer's treatment of the TSR from their conclusion that little positive weight was assigned on the grounds of hardship.

[33] As stated in *Al-Abayechi v Canada (Citizenship and Immigration)* 2022 FC 873*:*

> [13] But the result of the officer's approach is this: While they face a real risk in Iraq, one which the Government of Canada recognizes (the TSR for Iraq has been in place for nearly 20 years), the applicants should nevertheless have to return to Iraq to apply for permanent residence. In other words, the applicants cannot be forced to return to Iraq, but they must do so anyway if they want to obtain status in Canada. It does not appear that the officer considered the consequence of the decision for the applicants.

[34] In my view, this is a similar circumstance. This issue is determinative and the application must therefore be granted.

[35] I note in passing, however, that the Applicant also argues that the Officer ignored the profound difficulties that the Applicant would experience in Canada by virtue of being from a country with a TSR as he will be left in a position with unknown and precarious status for an indeterminate period of time and that his life will effectively be in limbo. In his written submissions, the Applicant states that "[w]ithout status, he may face loss of medical care coverage, difficulties obtaining identity documents, severe psychological stress and severe hardship if the TSR is lifted. He may experience limited employment opportunities or limited

professional advancement opportunities, as employers know he lacks status and therefore lacks the ability to remain in Canada long-term”. However, as the Respondent points out, this argument was not made before the Officer. The Officer cannot be faulted for not addressing a submission that was not before them and this new argument cannot be made at the judicial review stage as it was not made before the administrative decision-maker who was given the task of considering the arguments on the merits. It is for the administrative tribunal to consider arguments on the merits, not the reviewing court (*Leteyi* at para 27; *Association of Universities and Colleges of Canada v Access Copyright*, 2012 FCA 22 at paras 18-19; *Paramasivam v Canada (Citizenship and Immigration)*, 2022 FC 1084 at para 21 and; *Mohammed v Canada (Immigration, Refugees and Citizenship),* 2019 FC 193 at para 25).

Certified question

[36] The Applicant submits the following proposed question for certification:

> Is it unreasonable for an officer assessing an application for permanent residence on humanitarian and compassionate grounds to reduce weight given to adverse country conditions in the applicant’s country of origin because there is a Temporary Suspension of Removals or Administrative Deferral of Removal in place?

[37] In order for this Court to certify a question of general importance, it must be a serious question that is dispositive of the matter that transcends the interests of the parties, and raises an issue of broad significance or general importance (*Lewis v Canada (Public Safety and Emergency Preparedness),* 2017 FCA 130 at para 36).

[38] The Federal Court of Appeal in *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, revisited the criteria that must be met for certification of a proposed question:

> [46] This Court recently reiterated in *Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 (F.C.A.) at para. 36, the criteria for certification. The question must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance. This means that the question must have been dealt with by the Federal Court and must arise from the case itself rather than merely from the way in which the Federal Court disposed of the application. An issue that need not be decided cannot ground a properly certified question (*Lai v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FCA 21, 29 Imm. L.R. (4th) 211 (F.C.A.) at para. 10). Nor will a question that is in the nature of a reference or whose answer turns on the unique facts of the case be properly certified (*Mudrak v. Canada (Minister of Citizenship and Immigration)*, 2016 FCA 178, 485 N.R. 186 (F.C.A.) at paras. 15, 35).

[39] The Applicant submits that the importance of the proposed question relates to the exemption requested by applicants pursuant to s 25(1) of the IRPA. He further submits that there exists jurisprudence that answers the proposed question in the affirmative and yet the Respondent relies on jurisprudence that it submits answers the proposed question in the negative.

[40] On the other hand, the Respondent submits that the proposed question fails to meet the test for certification on three grounds. First, it does not transcend the interests of the parties since the relevance and weight of a TSR depends on an applicant's particular circumstances. Second, the proposed question is not determinative of the present case, as the Officer's decision was based on a consideration and balancing of all the H&C factors raised by the Applicant. Finally,

the proposed question essentially asks the Court to reconcile an alleged divergence in the case law, thus turning the appeal process into a kind of reference.

[41] In my view, the question as proposed is not determinative. Here the Officer failed to engage with the Applicant's submission that he would have no choice but to leave Canada and return to Iraq to apply for permanent residence and, as a result, the Officer did not consider whether the return to Iraq in that event warranted H&C relief under s 25(1) of the IRPA. This is not reflected in the question proposed for certification by the Applicant.

JUDGMENT IN IMM-7580-21 AND IMM-7584-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted;
2. The decision is set aside and the matter shall be remitted to another immigration officer for redetermination, having regard to these reasons and affording the Applicant an opportunity to update his H&C submissions;
3. There shall be no order as to costs; and
4. The proposed question is not certified.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mojan Farshchi	FOR THE APPLICANT
Keith Reimer	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Maynard Kischer Stojicevic Vancouver, British Columbia	FOR THE APPLICANT
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT