Federal Court Cour fédérale

Date: 20220829

Docket: IMM-3074-20

Citation: 2022 FC 1238

Ottawa, Ontario, August 29, 2022

PRESENT: Mr. Justice Norris

BETWEEN:

FRANCISCO MONTANO PEREZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant is a 51 year-old citizen of Mexico. After living in Canada without status for 10 years, he came to the attention of the Canada Border Services Agency ("CBSA") in March 2019. The applicant returned to Mexico in April 2019.

[2] The applicant had been married to a Canadian citizen since 1998. Over the years, his wife had tried unsuccessfully to sponsor the applicant for permanent residence in Canada.

Before another application could be completed, the applicant's wife passed away in September 2011 from complications following surgery after a long illness.

[3] While married to his wife and following her death, the applicant developed a close relationship with the families of four of her daughters, including nine step-grandchildren. (The daughters' birth father passed away in 1994.) When he was apprehended by the CBSA, the applicant was living with one of his step-daughters, her husband, and their two young sons.

[4] Before he returned to Mexico, the applicant submitted an application for permanent residence on humanitarian and compassionate ("H&C") grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). In the application, his counsel provided the following succinct explanation for why, having forever lost the opportunity to be sponsored by his wife, H&C relief for the applicant was both required and warranted:

> Francisco has significant establishment in Canada through his father figure relationship with his daughters and his grandfather relationship with his grandchildren. We submit that these kinds of family relationships are the strongest kind of establishment a person can have in Canada.
>
> Francisco has no other options to apply for permanent residence in Canada than through this application based on humanitarian and compassionate grounds. Although he has been a father figure to his five daughters for more than 20 years, his daughters cannot sponsor him as their parent because he does not meet the definition of parent as he is not related by blood or adoption.
>
> While Erika [his late wife] was sick, Francisco promised her that he would always be there for their daughters and grandchildren. We submit that through this application, you can allow Francisco to maintain this promise to his late wife and reunite him with his five daughters, his nine grandchildren, and his community in Canada.

[5] In a decision dated July 2, 2020, a Senior Immigration Officer with Immigration, Refugees and Citizenship Canada refused the application. The Officer concluded as follows:

> To obtain H&C relief, an applicant bears the onus of demonstrating, having regard to all of the circumstances, that decent, fair-minded Canadians aware of the exceptional nature of H&C relief would find it simply unacceptable to deny the relief sought. On balance, when assessing the submissions as presented by Mr. Montano Perez as a whole, it is determined that they do not support that relief from the requirement to apply for permanent residence from abroad is justified in this case.

[6] The applicant has now applied for judicial review of this decision under subsection 72(1) of the *IRPA*. As I will explain, I am satisfied that this application must be allowed.

[7] It is well-established that the substance of an H&C decision should be reviewed on a reasonableness standard: see *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44. That this is the appropriate standard has been reinforced by *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10.

[8] 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). A decision that displays these qualities is entitled to deference from the reviewing court (*ibid.*). The onus is on the applicant to demonstrate that the Officer's decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

[9] Subsection 25(1) of the *IRPA* authorizes the Minister to grant relief to a foreign national seeking permanent resident status who is inadmissible or otherwise does not meet the requirements of the Act. The Minister may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations under the Act. As the provision states, relief of this nature will only be granted if the Minister "is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national." Whether relief is warranted in a given case depends on the specific circumstances of that case: see *Kanthasamy* at para 25.

[10] When subsection 25(1) of the *IRPA* is invoked, the decision maker must determine whether an exception ought to be made to the usual operation of the law: see *Damian v Canada (Citizenship and Immigration)*, 2019 FC 1158 at paras 16-22. As the majority explains in *Kanthasamy*, this discretion to make an exception provides flexibility to mitigate the effects of a rigid application of the law in appropriate cases: see para 19. It should be exercised in light of the equitable underlying purpose of the provision: *Kanthasamy* at para 31. Thus, decision makers should understand that H&C considerations refer to "those facts, established by the evidence, which would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another – so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the *Immigration Act*" (*Kanthasamy* at para 13, adopting the approach articulated in *Chirwa v Canada (Minister of Manpower & Immigration)* (1970), 4 IAC 338). Subsection 25(1) should therefore be interpreted by decision makers to allow it "to respond flexibly to the equitable goals of the provision" (*Kanthasamy* at para 33).

[11] In contrast, the dissenting Justices in *Kanthasamy* (*per* Moldaver J, Wagner J (as he then was) concurring), would have formulated the test for relief under subsection 25(1) of the *IRPA* as "whether, having regard to all the circumstances, including the exceptional nature of H&C relief, the applicant has demonstrated that decent, fair-minded Canadians would find it simply unacceptable to deny the relief sought. To be simply unacceptable, a case should be sufficiently compelling to generate a broad consensus that exceptional relief should be granted" (at para 101, italics omitted). This test is plainly more stringent than the majority's. As well, the minority expressly rejects the majority's incorporation of equitable principles into an H&C determination, arguing that this sets the bar too low and "runs the risk of watering down the stringency of the hardship test" (*Kanthasamy* at para 107).

[12] In my view, the decision under review is unreasonable because the Officer failed to apply the legally binding test for H&C relief stated by the majority in *Kanthasamy*. Instead, as reflected in the passage quoted above in paragraph 5, the Officer applied the test formulated by the minority in dissent.

[13] As *Vavilov* states, "[a]ny precedents on the issue before the administrative decision maker or on a similar issue will act as a constraint on what the decision maker can reasonably decide" (at para 112). Further, where "there is a relevant case in which a court considered a statutory provision, it would be unreasonable for an administrative decision maker to interpret or apply the provision without regard to that precedent" (*ibid.*).

[14] *Vavilov* does allow for the possibility that an administrative decision maker could reasonably decline to follow a binding precedent: see para 112. Even assuming for the sake of argument that an IRCC Officer determining an H&C application has the discretion not to apply the analytical framework of the majority in *Kanthasamy* (a proposition I find doubtful notwithstanding the broad assertion in *Vavilov*), for the decision to do so to be reasonable, at the very least there must be some explanation or justification for why a binding precedent was not followed: see *Vavilov* at para 112. In the present case, the Officer offers no explanation or justification for why the test for H&C relief stated in the dissenting reasons in *Kanthasamy* was applied as opposed to the binding test formulated by the majority.

[15] In this regard, I find that the present case is indistinguishable from *Alghanem v Canada (Citizenship and Immigration)*, 2021 FC 1137. There, the decision maker also framed the test for H&C relief in the exact terms of the dissenting reasons in *Kanthasamy*. As Justice Diner held in *Alghanem*: "To adopt the exact test set out by the *Kanthasamy* minority, instead of adopting the guidance of the majority in a binding decision, is indeed unreasonable, particularly in the absence of any explanation for the departure" (at para 25).

[16] The respondent submits that the Officer's formulation of the test was simply a slip of the pen and that the Officer's analysis of the relevant factors reflects a proper understanding of the governing test. I cannot agree. Rather, I agree with the applicant that the analysis exemplifies the very focus on undue hardship as opposed to broader equitable considerations that the majority rejected in *Kanthasamy*.

[17] Furthermore, as noted above, whether relief is warranted in a given case depends on the specific circumstances of that case. A key circumstance relied on by the applicant is the loss of the opportunity to obtain permanent residence through his wife's sponsorship because of her untimely death. This, however, is not mentioned anywhere in the decision. As *Vavilov* states, "a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it" (at para 128). I find that to be the case here.

[18] To be sure, not all the circumstances favoured granting the applicant the relief he sought. The applicant first entered Canada in 1997 illegally as a stowaway on a train. He submitted an unsuccessful claim for refugee protection under a false identity. An earlier application for sponsorship by his late wife was refused because he had married her in British Columbia and submitted the sponsorship application using the same false identity. (The applicant and his wife attempted to rectify this later by re-marrying in Mexico in 2007 under the applicant's proper legal name.) The applicant left Canada in 2005 but he returned in February 2009 without an authorization to return and without presenting himself at a port of entry. He then lived and worked in Canada without status for some ten years. Nevertheless, it is often precisely because someone has not complied with Canadian immigration laws that it is necessary to submit an application for H&C relief: see *Mitchell v Canada (Citizenship and Immigration)*, 2019 FC 190 at para 23; see also *Mateos de la Luz v Canada (Citizenship and Immigration)*, 2022 FC 599 at para 28. The significance of that non-compliance must be assessed in the particular circumstances of the case at hand.

[19] Here, the Officer gave "negative weight" to the applicant's disregard for Canadian immigration laws simply because "[t]hose who disrespect and refuse to follow Canadian laws cannot by their misconduct become better placed than those who respect Canadian immigration laws and processes" (quoting *Joseph v Canada (Citizenship and Immigration)*, 2015 FC 904 at para 29). In my view, there are complexities and extenuating circumstances in the present case – including a sustained effort to regularize the applicant's status and the fact that the applicant had returned to Canada in 2009 to be with his ill wife – that the Officer fails to grapple with meaningfully or even at all. This, too, undermines the reasonableness of the decision.

[20] In summary, the applicant was entitled to a reasonable determination of his application for H&C relief. As I have explained, I am satisfied that this was not done.

[21] Accordingly, for these reasons, the application for judicial review is allowed. The decision of the Senior Immigration Officer dated July 2, 2020, is set aside and the matter is remitted for redetermination by a different decision maker.

[22] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-3074-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Senior Immigration Officer dated July 2, 2020, is set aside and the matter is remitted for redetermination by a different decision maker.
3. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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