Federal Court  Cour fédérale

Date: 20230316

Docket: IMM-213-21

Citation: 2023 FC 360

Ottawa, Ontario, March 16, 2023

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

ARIO FAISALI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant is a citizen of Iran who came to Canada in 1997. He was a permanent resident but lost that status because of his criminality. He benefitted from several stays of removal granted by the Immigration Appeal Division (IAD) on humanitarian and compassionate (H&C) grounds, but the stay was ultimately terminated because he was convicted of another serious crime (assault with a weapon) in 2018.

[2] The Applicant then applied for permanent residence from within Canada, seeking H&C relief under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

His application was denied because, although he demonstrated strong establishment and a close relationship with his family, this did not outweigh his history of criminality, including his failure to abide by the terms of the stays he was granted. He seeks judicial review of this decision.

[3] For the reasons that follow, this application will be dismissed. The Officer analyzed the relevant H&C factors put forward by the Applicant, in light of the evidence presented and the applicable legal framework. There is no basis to find the decision unreasonable.

I. Background

[4] The Applicant is a 39-year-old Iranian citizen, who arrived in Canada with his parents and brother in 1997. He became a permanent resident, but, for reasons that are not entirely clear, did not obtain citizenship when his parents and brother became naturalized Canadian citizens.

[5] None of the Applicant's extended family lives in Iran; he has two aunts, an uncle, and other relatives who reside in Canada. He obtained his high school diploma and a community college certification in Canada. He previously worked at Burger King, where he met his wife, and then managed a towing company; more recently, he operated his own construction company.

[6] The Applicant has numerous criminal convictions in Canada, beginning in 2003 and ending with a conviction in May 2018. These include: mischief under $5,000; theft under $5,000 (two separate convictions); possession of property obtained by crime (two separate convictions); possession of break-in instruments; break and enter; possession of cocaine for the purposes of

trafficking; use, possession and trafficking in unlawfully obtained computer password; conspiracy to commit an indictable offence; assault with a weapon; and, in addition, he has convictions for breach of probation and failure to attend court.

[7] In the Statutory Declaration submitted with his H&C application, the Applicant explains that most of his convictions stem from a troubling period in his life. His parents separated and then divorced shortly after they arrived in Canada. He lived with his mother, who was unable to work due to a chronic medical condition and so they lived under difficult circumstances. The Applicant says that he began to associate with the wrong crowd, and became involved in criminality, starting with car thefts before escalating to drug trafficking. He was convicted of credit card fraud and was incarcerated from November 2006 until March 2008. The Applicant was involved in a brawl in the prison for which he was convicted of assault.

[8] The Applicant says that almost all of his trouble with the law ended after his time in custody. A 2010 conviction for failing to comply with a recognizance resulted from his failure to inform his probation officer that he had begun working, but the Applicant says he had intended to tell her about his new job at a meeting scheduled to occur a few days after his arrest.

[9] The Applicant offered the following explanation for his May 2018 conviction for assault with a weapon:

> I was with my then employee […], when we got into an argument with a competitor at a body shop. The competitor made threats against our families, and we believed that he was behind a string of incidents in which our tow trucks were being set on fire. During

> the argument, he pulled out a gun, and [my employee] then attacked him. Although I was not involved in the physical altercation, I was involved in the argument and I was present for the physical altercation, so I too was convicted.

[10] In May 2007, a Deportation Order was issued against the Applicant because of his criminal convictions. The Immigration Appeal Division (IAD) stayed the Deportation Order that same month. The Applicant explains that the IAD has since granted him a number of stays of removal based on humanitarian and compassionate grounds, most recently on April 27, 2017. A condition of each of these stays of removal was that the Applicant not participate in any other criminal activity.

[11] A final reconsideration of his stay of removal was set for April 27, 2019, but this did not occur because he was convicted of assault in May 2018. That conviction terminated the stay of removal, by operation of the law.

[12] The Applicant submitted an H&C application in September 2019, based on the best interests of his then five-year-old Canadian son; his establishment in Canada and the impact of his departure on his wife, who suffers from psychological problems, and on his son – with whom he has a very close relationship; as well as other hardships that would flow from his removal. These include possible permanent familial separation, the Applicant's likely conscription into the military in Iran, and discrimination he would face in Iran due to his marriage to a Christian.

[13] A Senior Immigration Officer (Officer) rejected the Applicant's H&C application on January 6, 2021. The Officer found granting the H&C application would be in the best interests

of the Applicant's son, given their "close and loving relationship" and that the Applicant "has been an active, caring and supportive father to him." Regarding establishment, the Officer found that the Applicant had a great deal of establishment in Canada, given that he has resided in the country for 23 years, he has many family members who are Canadian citizens, and due to his educational and employment success here.

[14] The Officer acknowledged the possibility that the Applicant will need to complete mandatory military service if returned to Iran but did not find that hardship would flow from this or from any perception that the Applicant is a draft evader. The Officer rejected the Applicant's assertion that hardship would result from his marriage to a follower of the Mandaeanism faith due to an absence of definitive country documentation to indicate that the Iranian government does not recognize the Sabean-Mandaeanism faith.

[15] Finally, the Officer noted that the "length of the [Applicant's] criminal history in Canada, the severity of the criminal convictions, and the fact that the most recent criminal conviction was only two years ago all cause me to give significant, negative weight to [his] criminality." The Officer made a global determination based on all the information provided and concluded:

> I am sympathetic to the [Applicant's] situation that he faces of possibly having to return to Iran for a period of time in order to apply for permanent residence. While I have given positive consideration to the [Applicant's] establishment, to aspects of the [Applicant's] adverse country conditions, and to the Best Interest of the Child I find that the [Applicant's] numerous criminal convictions, the severity of those convictions, and the fact that the most recent of those convictions was only two years ago, outweighs the other factors on this H&C application.

[16] The Officer therefore denied the H&C application. The Applicant seeks judicial review of this decision.

II. Issues and Standard of Review

[17] The only issue in this case is whether the Officer's decision is reasonable. The Applicant submits that it is not, focusing on four elements:

A. The Officer's failure to consider the ample evidence about the impact of the Applicant's departure on his wife's mental health;

B. The incorrect assumption that the family's separation would only be for a "period of time";

C. The inadequacy of the Officer's assessment of the best interests of the child; and

D. The undue focus on the Applicant's criminal history, without consideration of his rehabilitation efforts or his explanation for the most recent conviction.

[18] The reasonableness of the decision is to be assessed under the framework set out by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[19] In summary, under the *Vavilov* framework, 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). An administrative decision-maker's exercise of public power must be "justified, intelligible and transparent" (*Vavilov* at para 95). The onus is on the Applicant to demonstrate flaws in the decision that are "sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100). The decision must be assessed in light of the history and context of the proceedings, including the evidence and submissions made to the decision-maker (*Vavilov* at para 94). Finally, "absent exceptional circumstances, a reviewing court will not interfere with [the decision maker's] factual findings" (*Vavilov* at para 125).

III. Analysis

A. *The impact on the Applicant's wife's mental health*

[20] The Applicant asserts that a central problem with the decision is the Officer's failure to grapple with the substantial evidence about his wife's mental health and the potential impact his departure from Canada would have on her. He argues that while the Officer acknowledged that in his H&C submissions he had stated that his wife's mental health issues would worsen if he had to leave Canada, there is no mention of any of the evidence he submitted about how serious his wife's condition was and her degree of dependence upon him.

[21] In support of this aspect of his H&C claim, the Applicant had submitted a letter from his wife's treating physician, which indicated that she had a history of "severe depression", and her symptoms had been exacerbated by his uncertain immigration status. The Doctor also noted that his wife feared a long separation because she could not return to Iran due to her fear of persecution based on her religion. The Doctor stated that he had referred the Applicant's wife to a psychiatrist who had treated her in the past. The psychiatrist's report confirmed the diagnosis of severe depression and anxiety, which was associated with the Applicant's uncertain immigration status and his potential departure. There was also evidence of the prescriptions for anti-depressants that his wife had received.

[22] The Applicant submits that this evidence was not considered, and because it was centrally important to his H&C claim, the absence of any mention of it is sufficient to render the decision unreasonable: *Begum v Canada (Citizenship and Immigration)*, 2013 FC 824 at para 52.

[23] I am not persuaded that the Officer's failure to recount this evidence in detail is an indication that it was ignored. It bears repeating that it is not the role of a reviewing court to re-weigh the evidence, because that is the task Parliament assigned to the Officer (*Vavilov* at para 125).

[24] In the decision, the Officer notes the Applicant's submissions that it would be very difficult for his family to be separated from him if he had to depart Canada to apply for permanent residence status from Iran. The Officer was aware of the Applicant's wife's mental health issues, as well as the Applicant's submissions regarding the hardships she and their son

would endure if he had to leave. In the discussion of the best interests of the child, the Officer notes the Applicant's submissions that his removal to Iran would have a negative impact on his wife's mental health, which would in turn have a negative impact on their son. The Officer also mentions that his wife would likely be unable to visit the Applicant in Iran due to adverse country conditions.

[25] The decision demonstrates that the Officer was aware of this evidence, because the wife's mental health is referred to in the decision, even if it is not discussed in detail. The Officer took this evidence into account in the ultimate weighing of all of the considerations relevant to the H&C assessment. However, the Officer did not find that these positive factors outweighed the Applicant's criminality, as indicated by the concluding sentence of this part of the Officer's decision:

> While I greatly sympathize with the applicant's family and the difficult situation that they now face concerning the applicant, I note that it was within the applicant's power to prevent this situation and he did not do so.

[26] Therefore, there is no basis to find this aspect of the decision unreasonable.

B. *Incorrect assumption about the length of the separation*

[27] The Applicant submits that the entire decision is founded on an incorrect assumption, namely that the Applicant would only be separated "for a period of time" from his wife, child, and other family in Canada if his H&C claim was denied. The Applicant says that the Officer

repeats this statement throughout the analysis, but never explains it, and this is a crucial flaw that makes the decision unreasonable, based on this Court's decision in *Shchegolevich v Canada (Citizenship and Immigration),* 2008 FC 527 [*Shchegolevich*] at paras 13-14.

[28] Although the Applicant asserts that the Officer unreasonably ignored his claim in his H&C application that he might never be able to return to Canada, a careful review of those submissions shows that this is mentioned in passing but not explained. He did express a fear that he might be killed if he was forced to serve his mandatory military service and hostilities erupted between Iran and the United States, but he does not raise specific arguments about the legal impediments he might face if he had to apply for permanent residence from Iran.

[29] In any event, I am not satisfied that it was unreasonable for the Officer to refer to the separation as being for "a period of time." The Applicant is not permanently inadmissible, and as the Respondent points out, there are several avenues for him to seek to return to Canada. While it is true that these may involve discretionary decisions and the Applicant's return is not guaranteed, the Officer's statement is not inconsistent with this fact, and it demonstrates that the Officer was alive to the fact that the separation would not be only for a very short time while the Applicant sorted out his paperwork.

[30] I do not find that the *Shchegolevich* decision is determinative on this question. In that case, the Court found at paragraph 5 that "(o)ne of the principal factors for the refusal was based on an assumption that the separation of Mr. Shchegolevich from his wife and step-son would only be temporary." It appears that the officer in that case had largely discounted the impact of

the separation on the stepchild because it would only be temporary, and the Court found this to be unreasonable speculation.

[31] In contrast, here the Officer acknowledged that there would be hardships associated with the separation, but did not find that it would necessarily be permanent, and thus these difficulties did not tip the balance in favour of H&C relief. The facts of this case are therefore distinguishable from those in *Shchegolevich*.

[32] There is no basis to find the decision to be unreasonable because of the Officer's statement that the separation would be for a period of time.

C. *Best Interests of the Child*

[33] The Applicant acknowledges that the Officer considered the best interests of the Applicant's child [whom I shall refer to as "A"], and the difficulties that they would face upon being separated, including difficulties in communicating because of controls Iran imposes on the internet and telecommunications. The problem, according to the Applicant, is that having found that the best interests of the child would be served by not separating A from the Applicant and having stated that this is an important factor to be weighed, the Officer then never does the actual weighing. Rather, the Officer simply states that the best interests factor does not outweigh the Applicant's criminality, without explaining why.

[34] I am unable to agree with the Applicant's argument. The Officer's analysis and weighing of the best interests of the child factor is demonstrated over the course of the analysis of this element in the decision, and then again in the global assessment at the end. The decision explains to the Applicant that while this was a positive element in his application, it did not outweigh his pattern of criminality and failure to abide by the terms of the stays he had been granted.

[35] The crux of the Officer's decision on the best interests of the child is set out in the following manner:

> I greatly sympathize with [A] and the situation that he is in with respect to the applicant. I note that it is not [A's] fault that the applicant has numerous criminal convictions in Canada and that the applicant has lost his Permanent Resident Status in Canada and is facing a return to Iran as a result of this. I find that the applicant's H&C materials indicate that, despite the applicant's numerous criminal convictions, he has a close and loving relationship with [A] and has been an active, caring and supportive father to him. I am also mindful of the distress that [A] has experienced in the past when he was separated from the applicant and the difficulties that [A] would likely experience in future if he was physically separated from the applicant for an extended period of time. While I note that there is little in the applicant's H&C materials to indicate that [A] would be unable to keep in regular contact with the applicant, such as through the telephone, if the applicant had to return to Iran for a period of time, I am mindful that this is not the same as having the applicant physically present in [A's] daily life. Accordingly, having carefully reviewed the applicant's H&C materials, I find that it would be in [A's] best interests for the applicant to remain in Canada and continue to be an active presence in [A's] daily life.
>
> However, I note that BIOC is only one of the factors for consideration on this H&C application and note that an H&C application is based on a global review of all of the factors for consideration that are brought forward. I note, therefore, that even though I have given a great deal of positive consideration to the BIOC on this H&C application, when weighed alongside the

> applicant's criminality, it might not be enough to result in a positive H&C assessment.

[36] The Officer then concludes by conducting the global assessment of all of the factors, as the law requires. The Officer states that they are sympathetic to the applicant's situation, but then concludes:

> While I have given positive consideration to the applicant's establishment, to aspects of the applicant's adverse country conditions, and to the Best Interest of the Child I find that the applicant's numerous criminal convictions, the severity of those convictions, and the fact that the most recent of those convictions was only two years ago, outweighs the other factors on this H&C application.

[37] While the Applicant disagrees with this assessment, it is not unreasonable, given the evidence in the record. The Officer's reasoning is clear, and the reasons why the positive best interests of the child factor do not outweigh the negative weight of the criminality is explained. That is all that reasonableness requires.

D. *Undue emphasis on criminality*

[38] The Applicant submits that the Officer failed to follow the Respondent's Guidelines in assessing his criminal record, because the Officer did not consider the circumstances of the crimes, the fact that his offences mainly dated from several years before, or that he provided an explanation for his most recent offence.

[39] The Applicant acknowledges his criminal history, stating that in the period from 2006-2008 he committed many crimes and had serious engagements with the law resulting in a lengthy prison term (November 2006- March 2008). However, he says that the Officer failed to give him credit for the fact that in the years after he finished his jail sentence he was mainly a law-abiding citizen. He explained that the breach of recognizance in 2010 was simply the result of his failure to inform his probation officer that he had started a job, and the 2012 conviction related to an incident dating back to 2006. The Applicant submits that the Officer should have noted that he had a good record after 2008, and had only one minor breach in nine years.

[40] Regarding his most recent offence, the Applicant argues that the Officer failed to explain how his explanation of the circumstances was considered, as is required by the Operational Guideline on assessing criminal inadmissibility in H&C claims. Instead, the Officer was unduly focused on the fact that he had a lengthy criminal record.

[41] I do not agree. The Applicant does not dispute the Officer's summary of his criminal record, other than to note that one of the latter convictions related to an incident that occurred several years prior. The Officer's summary of the relevant facts reflects the factors set out in the Guideline, which require consideration of the type of conviction; the sentence; the length of time since the conviction; whether it is an isolated incident or part of a pattern of criminality; and any other pertinent information about the circumstances of the crime.

[42] In this case, having summarized the Applicant's criminality, the Officer stated:

> … I am mindful that the applicant was given several chances by the Immigration Appeal Division (IAD) to stay his removal order, as long as he followed terms and conditions, including the condition that he not commit any further criminal acts. I note that despite being given these chances, the applicant reoffended which ultimately caused the stay of his removal order to be revoked and caused him to lose his Permanent Resident Status in Canada.

[43] Although the Applicant takes issue with the Officer's failure to mention the period during which there were no convictions and the failure to give positive weight to his efforts at rehabilitation, I am not satisfied that this is sufficiently serious to warrant overturning the decision. The Officer mentions the relevant facts and considers both the timing, pattern and escalating seriousness of the Applicant's criminality, noting that the most recent offence occurred only two years prior to the H&C claim. In the end, the decision makes clear that the Officer gave significant weight to the fact that despite benefitting from a series of stays of removal by the IAD, the Applicant did not manage to abide by the conditions that were set – in particular, the requirement that he not engage in criminal activity. In the circumstances of this case, that is a reasonable finding.

[44] The legal framework that applies to H&C assessments in the context of criminal inadmissibility pursuant to subsection 36(1) of IRPA was summarized in *Gannes v Canada (Citizenship and Immigration)*, 2018 FC 499:

> [17] As has been noted many times, s. 36(1) of the IRPA reflects a form of social contract. In exchange for the opportunity to reside in Canada, permanent residents (and foreign nationals) are expected not to commit serious criminal offences. The IRPA recognizes that immigration brings many benefits to Canada and that the "successful integration of permanent residents involves mutual obligations for those new immigrants and for Canadian

> society," including the obligation of the former to avoid serious criminality (Tran v Canada (Public Safety and Emergency Preparedness), 2017 SCC 50 at paras 1-2 [Tran]; see also s. 3(1) of the IRPA). The IRPA "aims to permit Canada to obtain the benefits of immigration, while recognizing the need for security and outlining the obligations of permanent residents" (Tran at para 40). When a permanent resident commits a serious criminal offence (as defined), this breach of the social contract can lead not only to the consequences imposed by the criminal courts but also to the loss of his or her immigration status and removal from Canada.
>
> [18] The obligation to avoid serious criminality lest adverse immigration consequences follow applies equally to all permanent residents (and foreign nationals). That being said, the uniform application of this principle to all cases can lead to injustice or unfairness in some. Section 25(1) of the IRPA exists to protect against this result.
>
> …
>
> [20] An H&C application is a weighing exercise in which an immigration officer is asked to consider different and sometimes competing factors. When, as in the present case, an H&C exemption from criminal inadmissibility is sought, the immigration officer must weigh the public policy reflected in s. 36(1) of the IRPA against the individual circumstances of the case and determine whether the latter outweigh the former so as to warrant making an exception to the usual rule that serious criminality by a permanent resident leads to loss of status and removal from Canada.

[45] In the circumstances of this case, the Officer's weighing of the relevant factors, and emphasis on the importance of the fact that the Applicant was granted a series of stays of removal by the IAD but nevertheless failed to abide by the conditions of those stays is clearly explained. These findings reflect the facts and the applicable legal framework, and are therefore reasonable. The Applicant's challenge on this point is, in effect, asking me to re-weigh the evidence and this is not my role on judicial review: see *Williams v Canada (Citizenship and*

Immigration), 2020 FC 8 at paras 50-51; see also *Palencia v Canada (Citizenship and Immigration)*, 2021 FC 1301 at paras 43-44.

IV. Conclusion

[46] For the reasons set out above, this application for judicial review is dismissed.

[47] Like the Officer, I have some sympathy for the Applicant, and in particular, for the difficulties and challenges his wife and son will face if he returns to Iran. However, I also agree with the Officer that the situation is the result of the Applicant's actions, which he now regrets, but whose consequences he was fully aware of at the time. He knew that he was inadmissible for serious criminality. He knew that he had been granted stays of removal by the IAD. He knew that one of the key conditions for remaining in Canada was that he not commit any other crimes. However, he failed to live up to that core element of the "bargain" struck between Canada and those who come here to live.

[48] The Officer's reasons convey that all of the relevant H&C factors were considered with reference to the available evidence. The Officer considered each factor individually and then cumulatively assessed their weight, as against the Applicant's history of criminality, the fact that his most recent serious offence was only two years before, and that he had failed to abide by the condition of the stays he had benefitted from. In the end, there is no basis to find the Officer's decision to be unreasonable.

[49] There is no question of general importance for certification.

JUDGMENT in IMM-213-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question of general importance for certification.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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