

Federal Court



Cour fédérale

Date: 20241003

Docket: IMM-763-23

Citation: 2024 FC 1556

Toronto, Ontario, October 3, 2024

PRESENT: Madam Justice Whyte Nowak

BETWEEN:

RICARDO ANTONIO LOPEZ ALVAREZ

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ricardo Antonio Lopez Alvarez [the Applicant] seeks judicial review of a decision by an Immigration Officer [Officer] dated January 3, 2023, which denied his application for permanent residence on Humanitarian and Compassionate [H&C] grounds [the H&C Decision].

[2] For the reasons that follow, I find the reasonableness of the H&C Decision to be undermined by two significant errors related to the Officer's consideration of the Applicant's rehabilitation and the best interests of the Applicant's children [BIOC]. Accordingly, I am granting this application for judicial review.

II. Facts

[3] The Applicant is a citizen of Honduras. He is married to a Canadian citizen, and the couple have two Canadian-born sons (ages 5 and 8 at the time of the H&C Decision). The Applicant says he resided in Canada continuously from August 17, 2012, to May 8, 2023. Before this, he was in Canada on a work permit from 2011.

[4] In 2017, the Applicant was convicted of driving with more than 80mgs of alcohol in the blood and failure to comply with conditions of an undertaking, making him inadmissible to Canada under paragraph 36(2)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. His Family Class application was refused in the same year because of this inadmissibility. The Applicant qualifies for a criminal record suspension [record suspension] and says his application for record suspension is currently in progress.

[5] The Applicant and his wife run a catering business and sports bar – enterprises that they started in 2018 and operate together as partners.

A. *Procedural History*

[6] The Applicant submitted an H&C application on July 30, 2018. The application was dismissed in late 2020 [the 2020 H&C Decision]. Upon judicial review, Justice Go of the Federal Court found the 2020 H&C Decision to be unreasonable, including by reason that the officer failed to weigh the Applicant's criminal record against any evidence of his rehabilitation (*Lopez Alvarez v Canada (Citizenship and Immigration)*, 2022 FC 130 at para 25). The 2020 H&C Decision was set aside and remitted for redetermination.

[7] The Applicant re-opened his H&C application in February 2022, and provided fresh materials in March of the same year. The resulting negative H&C Decision from this application is the subject of this judicial review.

[8] Following the H&C Decision, the Applicant sought a stay of his removal, which was denied by Order dated April 27, 2023. The Applicant was removed from Canada to Honduras on May 8, 2023.

B. *The H&C Decision*

[9] The Officer conducted a global assessment of the Applicant's case, awarding positive weight to the Applicant's establishment in Canada, his family ties, and hardship due to adverse country conditions in Honduras. The Officer also gave positive weight to the BIOC, finding their interests would be "best served by the [A]pplicant remaining in Canada with them and their mother as a family unit." However, the Officer assigned "significant negative weight" to the

applicant's criminal history, noting that it was only "tempered somewhat by the degree of rehabilitation demonstrated." The Officer also stated that the Applicant's non-compliance with immigration law "detracts... somewhat" from the positive weight awarded to his establishment in Canada. The Officer concluded:

Although there are a number of positive factors which weigh in the applicant's favour, considered globally, I am not satisfied that he has demonstrated that the circumstances justify an exemption from the requirement to not be criminally inadmissible from Canada and from the other relevant requirements or obligations under IRPA.

III. Legislative Framework

[10] The exercise of humanitarian and compassionate discretion under subsection 25(1) of the *IRPA* is limited to situations where a foreign national applies for permanent residency but is inadmissible or does not meet the requirements of the *IRPA* (*Kanthisamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 20 [*Kanthisamy*]). The Minister of Citizenship and Immigration [the Minister] may grant a foreign national permanent resident status or an exemption from any applicable criteria or obligations of the *IRPA* if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national.

[11] A decision made on H&C grounds is both discretionary and exceptional. It is not intended to serve as an alternative path to immigration, and should be applied sparingly (*Kanthisamy* at paras 23, 85). The test for relief under subsection 25(1) of the *IRPA* is whether the Applicant has demonstrated that decent, fair-minded Canadians would find it simply unacceptable to deny the relief sought in the circumstances (*Kanthisamy* at para 101).

Subsection 25(1) specifically requires consideration of the best interests of a child directly affected.

IV. Issues and Standard of Review

[12] The Applicant has raised a number of issues, however, I find two are dispositive of this application. Accordingly, I have limited my analysis to the following issues:

- A. Whether the Officer's analysis of criminality and rehabilitation is unreasonable; and
- B. Whether the Officer's analysis of BIOC is untenable in light of the relevant factual and legal constraints that bear on it.

[13] The applicable standard of review of the merits of the Officer's H&C Decision is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16-17, 23-25 [*Vavilov*]).

[14] Considerable deference should be afforded to immigration officers exercising the powers conferred by the *IRPA*. Their discretionary decisions are fact-specific and entail the weighing of multiple factors that this Court is not entitled to reassess or reweigh (*Vavilov* at para 125). While this Court's review is deferential, it is nevertheless a robust review (*Vavilov* at paras 12-13) which considers both the outcome and rationale of the decision, with an eye to the hallmarks of public power requiring it to be 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 is justified in relation to the facts and law that constrain the decision maker (*Vavilov* at para 85).

V. Analysis

[15] In this case, I find that the Officer's consideration of the evidence related to the Applicant's rehabilitation and the BIOC was unreasonable for the reasons that follow.

A. *Failure to Properly Assess the Applicant's Rehabilitation*

[16] First, the Officer failed to properly assess the Applicant's criminal record against the evidence of his rehabilitation.

[17] The Officer had this to say about the Applicant's criminal convictions:

It is trite to state that the applicant's criminal convictions are a serious matter and are contrary to the obligations incumbent upon all persons in Canada. The consequences under IRPA for criminal behaviour by foreign nationals and permanent residents highlights that Parliament views this as particularly true in the immigration context. In general, drunk driving results in significant harm to Canadian society in terms of death, injury, and damage, and remains all too common.

I note that the applicant has not been convicted of any other criminal offences and that his offence did not result in injury or damage. He also submits evidence demonstrating some degree of rehabilitation.

[18] In assessing the Applicant's rehabilitation, the Officer considered: (i) evidence of the Applicant's participation in two mandatory courses following his convictions, including an assessment sheet from one of the programs; (ii) the Applicant's statement that he regrets and takes responsibility for his actions; and (iii) evidence that since his conviction, he has variably at times stopped drinking outside his home and sometimes altogether.

[19] Based on a review of this evidence, the Officer concluded:

Although the convictions do not perhaps reflect the gravest of possible situations, they are nonetheless serious. I find that the applicant's criminal convictions carry significant negative weight in my assessment, but that this is mitigated to a degree by the evidence demonstrating some degree of rehabilitation.

[20] At no time in this assessment did the Officer consider the dated nature of the Applicant's convictions, which at the time of the H&C Decision were over 5 years old. In fact, in another section of the H&C Decision the Officer expressly recognized that the Applicant has applied for and appears to be eligible for a record suspension, such that he could submit a new Family Class application and request Authorization to Return to Canada under subsection 52(1) of the *IRPA*.

[21] While I absolutely agree that the nature of the Applicant's criminal convictions were serious, the Officer's failure to consider the dated nature of the Applicant's criminal record constitutes a significant flaw in the Officer's analysis. The Applicant's convictions date back to 2017 and he is entitled to and has applied to have his record suspended. His driver's license has also been restored. These important facts reflect two important considerations: first, the Applicant had fully paid his debt to society for his criminal convictions; and second, he has not reoffended in over 5 years. The failure to consider this aspect of the Applicant's rehabilitation is a sufficient basis alone for finding the H&C Decision unreasonable (*Cojuhari v Canada (Citizenship and Immigration)*, 2018 FC 1009 at paras 19, 21-22).

B. *Failure to Properly Assess the BIOC*

[22] The Officer's second error relates to the BIOC analysis. It must be emphasized that the Officer found that the children's interests are "best served" by the family unit remaining in Canada. However, primarily due to his criminal convictions, the Applicant's H&C application was denied, despite the fact that at the time of the H&C Decision, the Applicant was entitled to, and has applied for, a record suspension and his driver's license has already been restored.

[23] This means then, that it is the Applicant's children who stand to suffer ongoing hardship for their father's past mistake, despite their father's apparent rehabilitation. Given the Supreme Court's admonition that children will rarely, if ever, be deserving of *any* hardship (*Kanthisamy* at para 41), I find that the Officer was not attentive and sensitive to the importance of the rights of the Applicant's children and their best interests, or the potential hardship caused to them by a negative decision (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 74).

[24] While this Court must refrain from reweighing the evidence, it has a duty to ensure that the factors taken into account by the Officer as part of the Officer's global assessment of the evidence are justified in fact and law. In this case, the Officer erred in the assessment of two important factors and ignored the very intention of H&C exemptions which are intended to provide flexibility in order to mitigate the effects of a rigid application of the law in appropriate cases (*Kanthisamy* at para 19).

VI. Conclusion

[25] The individual errors on the Part of the Officer in considering the Applicant's rehabilitation and BIOC, coupled with the cumulative effect of these errors in the Officer's global assessment means that the Officer's reasons do not "add up" (*Vavilov* at para 104). Accordingly, this application for judicial review is granted.

JUDGMENT in IMM-763-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted;
2. The matter is remitted for redetermination by a different decision maker; and
3. There is no question for certification.

"Allyson Whyte Nowak"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-763-23

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MINISTER OF CITIZENSHIP AND IMMIGRATION

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