Federal Court Cour fédérale

Date: 20241028

Docket: IMM-14260-23

Citation: 2024 FC 1713

Ottawa, Ontario, October 28, 2024

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

RODICLEY PIMENTEL DOS SANTOS

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Rodicley Pimentel Dos Santos, seeks judicial review of decision by an officer (the "Officer") of the Canada Border Services Agency dated November 10, 2023 refusing to defer the Applicant's removal from Canada pending the determination of either his application for a Temporary Resident Permit ("TRP") or his permanent residence application under the Spouse and Common Law Partner in Canada Class (the "SCLPC Application"). The decision

was rendered pursuant to subsection 48(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] The Applicant submits that the Officer's decision is unreasonable and was rendered in a procedurally unfair manner.

[3] For the following reasons, I find that the decision is reasonable and rendered in a procedurally fair manner. This application for judicial review is dismissed.

II. **Facts**

A. *Background*

[4] The Applicant is a citizen of Brazil. He is a gay man. In 2017, the Applicant travelled to Canada with his then-common law partner to escape severe homophobia in Brazil.

[5] The Applicant states that he and his ex-partner arrived in Canada "seeking protection from persecution and harm because [they were] gay." However, "not understand[ing] the legal process," they "did not make formal refugee claims," instead applying for permanent residence on humanitarian and compassionate ("H&C") grounds. This application was refused in 2019.

[6] In 2020, the Applicant and his ex-partner submitted Pre-Removal Risk Assessment ("PRRA") Applications, along with a second application for permanent residence on H&C grounds. The PRRA was refused in 2021, the second H&C Application in 2022.

[7] The Applicant and his ex-partner then applied for leave and judicial review of the second H&C Application. Although the Applicant was successful in obtaining a settlement, his application was nonetheless again refused upon reconsideration in August 2023.

[8] In September 2023, the Applicant submitted a new application for permanent residence under the SCLPC Class. The Applicant was sponsored by his husband, S. At the time, the Applicant did not meet either the definition of spouse or the definition of common-law partner, as he and his husband were not married and had cohabited for less than a year. Consequently, he requested H&C relief in the SCLPC Application. The Applicant also submitted a TRP Application so he could remain in Canada until his SCLPC Application would be decided.

[9] In October 2023, the Applicant was scheduled for removal from Canada. The following month, the Applicant applied for a deferral of removal pending the outcome of the SCLPC and TRP Applications.

[10] The Officer rejected the Applicant's request for deferral, issuing written reasons on November 10, 2023 and November 14, 2023. The Applicant's request for a deferral was rejected on several grounds, including the invalidity of his underlying SCLPC Application; the best interests of T, the Applicant's godson; the Applicant's establishment in Canada; and the risks and hardship the Applicant would face upon removal as a gay man in Brazil.

[11] On the underlying SCLPC Application, the Officer initially determined that no such application existed, stating in the reasons dated November 10, 2023 that the records of Immigration, Refugees, and Citizenship Canada indicated that the application had been cancelled

and returned to the Applicant. The Officer subsequently issued a second reasons letter on November 14, 2023 acknowledging that the SCLPC Application had been resubmitted. Notwithstanding the re-submission, the Officer stated that the deferral still would not be granted, since a decision on the Application was not imminent, there was insufficient evidence that the Application could not be submitted from outside Canada, and the Application had been submitted more than three years after the Applicant had been declared removal ready in February 2020.

[12] On the best interests of T, the Officer determined that the Applicant's removal would not create such exceptionally difficult circumstances that a deferral of the Applicant's removal would be justified, given T's parents would remain with him in Canada.

[13] On the Applicant's establishment, the Officer affirmed that the Applicant "works, volunteers and established relationships in Canada" and acknowledged his concern that removal would cause him to be separated from his husband. However, the Officer determined that such separation is inherent to the removal process and that it would be open to the Applicant to return to Canada as a visitor or after an overseas SCLPC Application is processed.

[14] On the risks and hardship the Applicant would face as a gay man in Brazil, the Officer noted that "[the Applicant] benefitted from a full risk assessment during his PRRA process and the decision was rendered negative." Additionally, the Officer found that the evidence provided on the deferral request was insufficient to show a personalized risk to the Applicant.

III. **Issues and Standard of Review**

[15] As a preliminary matter, I note that the Respondent is correct that the proper responding party is the Minister of Public Safety and Emergency Preparedness. The style of cause is therefore amended by removing the Minister of Citizenship and Immigration and adding the Minister of Public Safety and Emergency Preparedness.

[16] The parties submit that the applicable standard of review for the merits of the Officer's decision is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paras 25, 86-87). I agree.

[17] The issue of procedural fairness is to be reviewed on the correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General*), 2018 FCA 69 ("*Canadian Pacific Railway Company*") at paras 37-56; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35). I find that this conclusion accords with the Supreme Court of Canada's decision in *Vavilov* (at paras 16-17).

[18] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is 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 that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the

record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[19] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100).

[20] Correctness, by contrast, is a non-deferential standard of review. The central question for issues of procedural fairness is whether the procedure was fair having regard to all of the circumstances, including the factors enumerated in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at paras 21-28; *Canadian Pacific Railway Company* at para 54).

IV. **Analysis**

[21] The Applicant submits that the Officer's decision is unreasonable and was rendered in a procedurally unfair manner. The Applicant maintains that the Officer made a veiled credibility finding against the Applicant and his counsel by determining in the November 10, 2023 reasons letter that the SCLPC Application had been cancelled. Having made this finding, the Officer was required to recuse themselves from the Applicant's file, rather than issuing a second reasons letter on November 14, 2023. The Applicant further submits that the decision was unreasonable,

as the Officer erred with respect to the best interests of T, the possibility of the Applicant re-entering Canada, the hardship of removal upon the Applicant, and the issue of the Applicant's employment in Canada.

[22] The Respondent submits that the Officer's decision is reasonable and was rendered in a procedurally fair manner. The Respondent submits that the Officer did not make a veiled credibility finding against the Applicant or their counsel. Moreover, the Respondent maintains that the Officer is not bound by the doctrine of *functus officio* and therefore retains the discretion to reconsider their previous decisions. The Respondent submits that the Officer's decision is reasonable, having appropriately considered T's best interests, the potential for the Applicant to re-enter Canada, the risk that would be faced by the Applicant in Brazil, and the issue of the Applicant's employment.

A. *There was No Breach of Procedural Fairness*

[23] I agree with the Respondent that there was no breach of procedural fairness.

[24] The Applicant mischaracterizes the Officer's rationale for stating in the November 10, 2023 reasons letter that the SCLPC Application had been cancelled. The Officer did not disbelieve the Applicant. They simply found no evidence to counter the information from IRCC that the SCLPC Application had been cancelled and returned to the Applicant in September 2023.

[25] The deferral request does not discuss the cancellation or re-submission of the SCLPC Application. Although there are supporting documents that suggest that there was a valid permanent residence application in October and November 2023, there is no clear indication that these documents are related to the SCLPC Application originally submitted in September 2023.

[26] Given the evidentiary record, it was open to the Officer to conclude that the Applicant submitted insufficient evidence of the continuing validity of the underlying SCLPC Application. As the Respondent put it, "[t]he Applicant's submission to the [Officer] was that an [application for permanent residence] was submitted in September 2023. The [Officer] did not challenge this submission. However, there was evidence before the [Officer] that this [application] had been returned to the Applicant."

[27] Moreover, I agree with the Respondent that, even if the Officer had made a veiled credibility finding against the Applicant, it was open to them to reconsider the SCLPC Application in the subsequent reasons letter issued on November 14, 2023. The Respondent correctly notes that the Officer is a non-adjudicative administrative decision-maker and thus not bound by the doctrine of *functus officio*. The Officer therefore retains the discretion to reconsider their assessment of the SLCPC Application upon receiving pertinent new evidence (*Gil v Canada (Citizenship and Immigration)*, 2014 FC 370 ("*Gil*") at para 18). As in *Gil*, "[t]his was a valid exercise of the discretion to reconsider and not an illegitimate attempt to justify a poorly crafted decision" (at para 18).

B. *The Decision is Reasonable*

[28] I agree with the Respondent that the Officer's decision is reasonable.

[29] On the issue of the underlying SCLPC Application, I accept the Respondent's position that these submissions are now moot, since the underlying SCLPC Application was withdrawn by the Applicant on April 24, 2024.

[30] In any case, the Applicant's submission that the Officer "completely ignored the human element of the request" for H&C relief is not borne out by the reasons for the decision. Although the Officer certainly could have been more attentive to the Applicant's submissions on this issue, the decision as a whole did engage with the "human element" of the deferral request. For instance, in their consideration of establishment, the Officer acknowledges the difficulty that family separation may cause on the Applicant and his husband, characterizing this hardship as "an unfortunate yet inherent result of the removal process." Despite their recognition of the H&C relief sought, it was nonetheless open to the Officer to conclude that a deferral was not warranted given the broader context of the request, including the fact that a decision was not imminent and section 50 of the *IRPA* stipulates that spousal sponsorship applications do not automatically grant stays of removal.

[31] On the issue of the best interests of the children ("BIOC") analysis, the Respondent correctly notes that decision-makers' consideration of BIOC factors in deferral requests is more limited than in H&C decisions, so much so that not even the adverse consequences of a parent's removal are considered a basis for granting a deferral (*Baron v Canada (Minister of Public*

Safety and Emergency Preparedness), 2009 FCA 81 at para 50; *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 56; *Caetano v Canada (Public Safety and Emergency Preparedness)*, 2022 CanLII 66876). Given this holding, the Officer reasonably concluded that T's best interests as the Applicant's godson do not warrant a deferral of removal in this case.

[32] On the issue of the Applicant's potential re-entry into Canada, I find that the Officer was responsive to the Applicant's submissions and demonstrated due consideration of both the possibility of the Applicant re-entering Canada and alternative methods for the Applicant to remain connected with friends and family, particularly his husband S, while in Brazil (*Vavilov* at paras 127-128). The decision is not unreasonable on this ground.

[33] On the issue of risk to the Applicant upon removal to Brazil, I find that the Applicant's submissions amount to a request for this Court to reweigh the evidence before the Officer. This is not permitted on reasonableness review (*Vavilov* at para 125). As the Respondent correctly notes, "a request for deferral is not the appropriate forum to seek to overturn an assessment of risk made in the course of a decision concerning refugee status or a PRRA" (*Melay v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 1406 at para 14). The record that was before the Officer included negative determinations on risk from the Applicant's PRRA decision. Given the Officer's limited discretion, the Officer was entitled to rely on these findings as well as to conclude that the Applicant's additional materials failed to establish a personalized risk upon removal from Canada (see *e.g.*, *Neves v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 575 at paras 23-25). The Officer's conclusions reflect the legal and

factual matrix in which they were made and do not warrant intervention by this Court (*Vavilov* at para 99).

[34] On the issue of employment, I agree with the Respondent that the Officer reasonably found that deferral was not justified on the basis of a loss of employment. Lost employment is a normal consequence of removal. In any event, no such loss would in fact be caused by removal in this case since the removal order against the Applicant invalidated his work permit.

V. **Conclusion**

[35] For these reasons, I find that the Officer's decision is reasonable and was rendered in a procedurally fair manner. This application for judicial review is dismissed. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-14260-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. The style of cause is amended by removing the Minister of Citizenship and Immigration and adding the Minister of Public Safety and Emergency Preparedness.

3. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-14260-23
STYLE OF CAUSE:	RODICLEY PIMENTEL DOS SANTOS v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
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