Federal Court  Cour fédérale

Date: 20190508

Docket: IMM-5011-17

Citation: 2019 FC 623

Ottawa, Ontario, May 8, 2019

PRESENT: The Honourable Mr. Justice Norris

BETWEEN:

ABDULRAHMAN BAWAZIR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Abdulrahman Bawazir, the applicant, is a citizen of Yemen. He was born in June 1984. He arrived in Canada in May 2008 and claimed refugee protection. This claim was refused in January 2010 but Mr. Bawazir was able to remain in Canada. Since 2012, he has been trying (without success) to obtain permanent resident status here. Most recently, in August 2016 he applied under section 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27

[*IRPA*]for permanent residence and an exemption from the usual requirement that such an application must be submitted from outside Canada. He explained in his application that humanitarian and compassionate [H&C] reasons prevented him from leaving Canada to make the application and also warranted granting him permanent resident status. He was well-established in Canada, his family in Yemen depended on him for financial support, and the ongoing civil war and associated humanitarian crisis in Yemen made it unsafe for him to return there.

[2] In a decision dated July 24, 2017, a Senior Immigration Officer refused Mr. Bawazir's application.

[3] Mr. Bawazir now applies for judicial review of this decision under section 72(1) of the *IRPA*. Among other things, he submits that the officer's determinations with respect to the hardships he would endure if he had to leave Canada are unreasonable.

[4] For the following reasons, I agree with Mr. Bawazir that the decision is unreasonable. This application for judicial review will, therefore, be allowed and the matter remitted for redetermination by a different decision-maker.

[5] It is well-established in the jurisprudence that generally a denial of H&C relief under section 25(1) of the *IRPA* is reviewed on a reasonableness standard (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44 [*Kanthasamy*]; *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 18 [*Kisana*]; *Taylor v Canada (Minister of Citizenship and Immigration)*, 2016 FC 21 at para 16). Since the provision creates a mechanism

to deal with exceptional circumstances and decisions under it are highly discretionary, decision-makers will be accorded a considerable degree of deference (*Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 15).

[6] On judicial review under a reasonableness standard, it is not the role of the Court to reweigh the evidence and relevant factors (*Kisana* at para 24) or to substitute its own view of a preferable outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61). Rather, the Court should examine the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determine "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[7] The deferential reasonableness standard of review presupposes that the decision-maker has applied the correct legal test. A decision will not be rational or defensible if the decision-maker has failed to carry out the proper analysis (*Lake v Canada (Minister of Justice)*, 2008 SCC 23 at para 41; *Németh v Canada (Justice)*, 2010 SCC 56 at para 10).

[8] Section 25(1) of the *IRPA* authorizes the Minister of Citizenship and Immigration 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. 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."

[9] In *Kanthasamy*, the Supreme Court of Canada endorsed an approach to section 25(1) that is grounded in its equitable underlying purpose. The discretion enacted in the provision is meant to provide flexibility to mitigate the effects of a rigid application of the law in appropriate cases (*Kanthasamy* at para 19). Justice Abella, writing for the majority, approved of the approach taken in *Chirwa v Canada (Minister of Citizenship and Immigration)*, (1970), 4 IAC 338, where it was held 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).

[10] One unusual but important feature of the present case is that currently there is an Administrative Deferral of Removals [ADR] to Yemen.

[11] The authority to put an ADR in place comes from section 230 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227. It provides as follows:

230 (1) Considerations – 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:	230 (1) Le ministre peut imposer un sursis aux mesures de renvoi vers un pays ou un lieu donné si la situation dans ce pays ou ce lieu expose l'ensemble de la population civile à un risque généralisé qui découle :
a) an armed conflict within the country or place;	(a) soit de l'existence d'un conflit armé dans le pays ou le lieu;
b) an environmental disaster resulting in a	(b) soit d'un désastre environnemental qui

substantial temporary disruption of living conditions; or	entraîne la perturbation importante et temporaire des conditions de vie;
c) any situation that is temporary or generalized.	(c) soit d'une circonstance temporaire et généralisée.
(2) Cancellation – The Minister may cancel the stay if the circumstances referred to in subsection (1) no longer pose a generalized risk to the entire civilian population.	(2) Le ministre peut révoquer le sursis si la situation n'expose plus l'ensemble de la population civile à un risque généralisé.

[12] Subsection 230(3) sets out a number of exceptions to this type of stay of removal but none of them apply to Mr. Bawazir.

[13] The ADR for Yemen was adopted in 2015, shortly after the civil war broke out. Given the conditions that continue to prevail there, it appears unlikely that the ADR will be cancelled in the foreseeable future.

[14] The officer addressed the implications of the ADR for Yemen as follows:

> Based on the information before me, I find that the situation in Yemen is such that it would be inappropriate to return the applicant to that country. I find it likely that the applicant would experience extreme hardship upon his return. However, I note that the Government of Canada has responded to the situation in Yemen by implementing an Administrative Deferral of Removals (ADR) for Yemen. The existence of the ADR for Yemen strengthens the applicant's statements regarding the dire situation in that country but it also renders that situation far less relevant to the applicant's personal circumstances as he will not be returned to Yemen until the Government of Canada deems it appropriate to remove individuals to that country. While the situation in Yemen is dire, it has little to no impact on the applicant's personal circumstances for as long as the ADR remains in place. I therefore give the situation in Yemen little weight.

[15] Mr. Bawazir submits that the officer erred in giving the dire situation in Yemen "little weight" in the H&C balancing. I agree.

[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*.

[18] *Cardenas v Canada (Citizenship and Immigration)*, 2018 FC 263, which is relied on by the respondent to defend the officer's decision, is distinguishable. In that case, the principal applicant was inadmissible to Canada on grounds of criminality. Seeking to avoid removal to Colombia, he made an H&C application for permanent resident status which was based, in part, on the hardship he would face there. Justice O'Reilly held that the officer did not err in obviating any analysis of this hardship for the time being by granting the principal applicant and his family Temporary Resident Permits, which allowed them to remain in Canada for at least three years (essentially to give the principal applicant a further opportunity to demonstrate his willingness to abide by the law). In such circumstances, any analysis of the hardship the principal applicant "might face in Colombia three years from now, or even later, would be inherently speculative and likely pointless" because conditions there could change before the principal applicant actually faced removal, if ever (at para 9). While this was found to be a reasonable decision by the officer in the circumstances of that case, it does not address the crux of this case – namely,

the fact that the applicant cannot apply for permanent residence without going to a place where he would face “extreme hardship” unless he is granted an exemption from the usual requirements of the law.

[19] The officer’s erroneous conclusion that conditions in Yemen are essentially irrelevant taints other aspects of the decision as well. For example, the officer appears to discount Mr. Bawazir’s establishment in Canada because he did not remain here after his refugee claim was refused in 2010 due to circumstances beyond his control. However, the officer does not consider how things might have changed in this regard as a result of the civil war breaking out in Yemen in 2015. This is surely a relevant consideration when assessing how Mr. Bawazir has continued to establish himself in Canada since then.

[20] The officer also concluded that the applicant’s lack of permanent resident status “does not appear to be a significant problem for the applicant in his daily life.” While acknowledging that the applicant’s situation “remains precarious due to his lack of permanent resident status and that this uncertainty may take a mental toll on the applicant,” the officer found the applicant’s ties to Canada to be “limited” and, in any event, the applicant is authorized to work and he could apply for a study permit if he wished. In my view, a reasonable and fair-minded person would not ignore the conditions prevailing in Yemen when deciding whether the applicant’s precarious situation in Canada is a misfortune deserving of amelioration.

[21] Looking at the matter through the broad equitable lens of section 25(1) of the *IRPA*, it may well be that upon a proper consideration of the “extreme hardship” Mr. Bawazir would face

in Yemen, any suggestion that he was not well-enough established in Canada to merit obtaining permanent residence on H&C grounds pales in significance in the overall balancing. That being said, it is neither necessary nor appropriate for me to decide this question. The matter must be re-determined and I expect that there will be additional evidence before the next decision-maker demonstrating Mr. Bawazir's ongoing efforts to establish himself in Canada.

[22] For these reasons, I have concluded that the officer failed to carry out the proper analysis under section 25(1) of the *IRPA*. The officer failed to "substantively weigh and consider all the relevant facts and factors" (*Kanthasamy* at para 25). As a result, the decision is not rational or defensible.

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

JUDGMENT IN IMM-5011-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The decision of the Senior Immigration Officer dated July 24, 2017, 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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APPEARANCES:

Marianne Lithwick	FOR THE APPLICANT
Kevin Doyle	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lithwick Law Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT