Federal Court  Cour fédérale

Date: 20200226

Docket: IMM-136-19

Citation: 2020 FC 307

Montreal, Quebec, February 26, 2020

PRESENT: Mr. Justice Pentney

BETWEEN:

SANTIAGO LOPEZ BIDART

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Context

[1] The Applicant, Santiago Lopez Bidart, seeks to overturn the decision of an immigration officer denying his application for permanent residence on humanitarian and compassionate (H&C) grounds. He claims the decision is unreasonable because the officer failed to consider the hardship that would be caused to him and his wife if he was forced to leave Canada, and applied a hardship lens to his case rather than considering the broad equitable nature of the H&C relief.

[2] The Applicant is a citizen of Uruguay, who came to Canada on December 10, 2008, on a visitor's visa to see his brother. This was his second trip to Canada. He did not leave or attempt to renew his status in Canada when it expired on June 10, 2009.

[3] In 2011, the Applicant began a relationship with a woman who had come to Canada from Mexico. In 2012, they began living together and moved to the national capital region. She became a permanent resident in July 2014 and they married in July 2016.

[4] The Applicant and his partner were living together when she applied for permanent residence. The Applicant's wife says that she did not realize that their cohabitation made them common law partners, and so she did not include him on her application. The Applicant proposed to her in May 2015, and that is when they began exploring how to regularize his immigration status. When they were advised that they qualified as common law partners because of their cohabitation, the Applicant applied for permanent residence under her sponsorship. In May 2017, the sponsorship application was refused because the Applicant had not been declared – and was therefore not examined – when his wife applied for permanent residence.

[5] The Applicant then applied for permanent residence based on H&C considerations pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. This application was refused on December 20, 2018, and this refusal forms the basis for the application for judicial review.

II. Issues and Standard of Review

[6] The issue in this case is whether the officer's decision is unreasonable. This includes the three questions raised by the Applicant, relating to the officer's exercise of discretion, the test for H&C relief stated by the officer, and the consideration of a psychologist's report.

[7] The parties agree that the standard of review is reasonableness: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44 [*Kanthasamy*]. When this case was argued, the leading authority on reasonableness review was *Dunsmuir v New Brunswick*, 2008 SCC 9, and its progeny. Since then the Supreme Court of Canada has updated and clarified the framework for judicial review in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]; *Bell Canada v Canada (Attorney General)*, 2019 SCC 66, and *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*].

[8] In view of paragraph 144 of *Vavilov*, I see no reason on the facts of this case to request additional submissions from the parties on either the appropriate standard or the application of that standard. This does not cause any unfairness because, as stated in *Canada Post* at paragraph 26, under both frameworks the result in this case would be the same.

[9] When reviewing for reasonableness, the Court asks "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). It must be internally coherent, and display a rational chain of analysis (*Vavilov* at para 85). As such, a decision will be unreasonable if the reasons read in conjunction

with the record do not enable the Court to understand the decision maker's reasoning on a critical point (*Vavilov* at para 103). The framework set by this decision "affirm[s] the need to develop and strengthen a culture of justification in administrative decision-making" by endorsing an approach to judicial review that is both respectful and robust (*Vavilov* at paras 2 and 12-13).

III. Analysis

[10] The Applicant submits that the officer made three key errors: (i) by focusing on his overstay in Canada, and failing to give due weight to the hardship that would arise from the separation of the spouses; (ii) by applying the wrong test to the exercise of H&C discretion in limiting it to "extraordinary situations unforeseen by the IRPA," rather than assessing whether the Applicant had presented a deserving case; and (iii) by giving little weight to the psychologist's report on the impact of the negative H&C decision on the couple.

A. *Legal framework*

[11] The onus is on the Applicant to demonstrate that the officer's decision is unreasonable. Before a decision can be set aside, 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). This involves a consideration of the reasons and outcome for the decision, in the context of the law that applies to it and the facts in the record.

[12] Subsection 25(1) of *IRPA* grants the Minister discretion 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 provision states that such relief is only to be granted if the Minister "is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national."

[13] The jurisprudence establishes an approach to H&C cases that is grounded in the underlying equitable purpose of the relief, and requires a broad consideration of all of the relevant factors. In *Kanthasamy*, the Supreme Court of Canada endorsed the approach previously set out in *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338, which described H&C considerations as "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" and so justify the granting of relief (*Kanthasamy* at para 13).

[14] It is not sufficient to demonstrate that being forced to leave Canada will cause some hardship, because that is an unavoidable consequence of removal. Instead, what is required is a circumstance that falls outside of the usual situation and this will vary with the facts and context of each case (*Kanthasamy* at paras 23-25). In the end, the core of the issue is whether the facts of the particular case demonstrate that an exception ought to be made to the usual operation of the law to mitigate its rigidity (*Damian v Canada (Citizenship and Immigration)*, 2019 FC 1158 at paras 16-22 [*Damian*]).

B. *Applicant's H&C application*

[15] In this case, the Applicant's H&C application was grounded primarily on the impact of separation from his wife, as well as his efforts to become established and self-sufficient in Canada, and the difficulties he would face if he were forced to return to Uruguay. His

submissions on these elements, as well as his immigration history, set the factual boundaries for the officer's decision.

[16] The Applicant submitted to the officer that he should have qualified for permanent residence as the common law partner of his wife when she made her application. Both he and his wife provided statutory declarations stating that they were not aware that they qualified as common law partners at the time of her application, because such a legal status is unknown in their countries of origin (Mexico and Uruguay). They acknowledge that they lived together, but said that, as practising Catholics, they both considered marriage to be a much more significant commitment.

[17] The Applicant indicated that they submitted the sponsorship application as soon as they received legal advice that they qualified as a common law couple. He also stopped working, because his lawyer advised him that he should not be working without authorization. The Applicant submits that this is an indication of his good faith in pursuing the spousal sponsorship, and that his efforts to regularize his situation in Canada should count as a positive factor for his H&C application. He and his wife both indicated the hardship that separation would cause them, and its impact on their plans to start a family.

[18] In addition, the Applicant submitted evidence that he had been working as an auto mechanic in Canada. He registered a business (a numbered company) under his name and used the business name as his social insurance number. While he was employed, income taxes were deducted from his salary and remitted to the Canada Revenue Agency, but he never filed any income tax returns (and thus he could not claim any deductions or receive any refunds) because

he did not have a social insurance number. He has purchased his own tools, and has been steadily employed.

[19] Letters of support were filed by family and friends, including the Applicant's parish priest, and a psychologist who had provided marriage counselling to the Applicant and his wife. The Applicant described the hardships he would face if he were forced to return to Uruguay, including difficulty finding a job comparable to the ones he has had in Canada, and the inability of his immediate family to support him there, because of his parents' age and his father's medical condition.

C. *Alleged errors by the officer*

[20] The Applicant contends that the officer's decision is unreasonable for three reasons, and each will be examined in turn.

[21] First, the Applicant argues that the officer gave undue weight to the fact that he overstayed his visitor's visa, and did not give adequate consideration to the fundamental basis of his H&C application, namely that he was seeking relief from his exclusion from the spouse or common law partner class by virtue of paragraph 125(1)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*]. He submits that in view of the innocent mistake made by his wife at the time of her application for permanent residence, and their explanation for it, excluding him from the spouse or common-law partner class does not advance the objectives of the legislation.

[22] The officer's decision refers to the letters of support, which indicated that "it would be devastating for the couple to be separated." The Applicant submits that the officer's focus on his overstay in Canada overshadowed the assessment of hardship. In *Jugpall v Canada (Citizenship and Immigration)*, 1999 CanLII 20685 (CA IRB), the Appeal Division of the Immigration and Refugee Board found that an assessment of a claim for H&C relief must consider the compassionate grounds for relief in relation to the legal basis for inadmissibility. The Applicant argues that the officer did not conduct this analysis.

[23] This submission is tied to the Applicant's second argument, that the officer applied the wrong test by indicating that the purpose of section 25 is to give the Minister "the flexibility to deal with extraordinary situations unforeseen by IRPA…" The Applicant claims this description is incorrect, and that it is inconsistent with Operational Manual IP 5 – Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds (the Manual), which should guide the officer's analysis. The Manual states, "[t]he purpose of H&C discretion is to allow flexibility to approve deserving cases not covered by the legislation." The Applicant submits that the Manual is consistent with the guidance of the Supreme Court of Canada in *Kanthasamy*, which calls for a compassionate consideration of all of the relevant facts and circumstances rather than the application of a strict hardship threshold.

[24] The Applicant argues that rather than approaching humanitarian relief as a flexible and responsive exception (*Torres v Canada (Citizenship and Immigration)*, 2017 FC 715 at para 7), the officer effectively created a higher threshold of relief "separate and apart from the humanitarian purpose of s. 25(1)" (*Kanthasamy* at para 33).

[25] The Respondent rejects these criticisms of the officer's decision, noting that Parliament assigned the task of weighing all of the evidence to the officer and it is not the role of this Court on a judicial review to re-weigh this evidence. The Respondent contends that the officer appropriately considered all of the evidence, and that the particular wording of the test by the officer is not an indication of any error in light of the overall analysis.

[26] The Respondent submits that the officer gave due consideration to the Applicant's degree of establishment, his strong relationship with his wife, and his other ties to Canada. The officer was also entitled to consider the fact that the Applicant had overstayed his visa, and had not taken steps to regularize his situation during this period. The officer accepted that the spouse's failure to declare the Applicant on her application was an innocent mistake, but found that it did not outweigh the other considerations.

[27] The Respondent argues that the officer reasonably concluded that there was no impediment to the Applicant's departure from Canada when his visa expired, and no evidence that he took steps to bring himself into compliance with the law, including in the period after he began his relationship with his current wife and before they were married. The officer took into consideration the skills and aptitudes the Applicant had displayed during his stay in Canada and reasonably considered that these would assist him in re-establishing himself in Uruguay. In addition, the officer considered the support that the Applicant would continue to receive from his wife, as well as the fact that he had family members in Uruguay who could provide him with some degree of support. All of this is based in the record, and the officer's analysis of it deserves deference.

[28] I agree with the arguments of the Applicant. The officer's analysis does not demonstrate "the hallmarks of reasonableness – justification, transparency and intelligibility" because it fails to indicate how the officer analyzed evidence which lay at the heart of the Applicant's request for H&C relief. Despite the deference, which is owed to a discretionary and highly fact-based decision, this decision cannot stand because it is impossible for the Court – or the Applicant – to know how relevant facts and considerations on central questions were weighed by the officer.

[29] Several key elements are missing from the analysis. First, the officer did not engage with the core basis of the claim for relief, yet justification and transparency require that the central issues and concerns raised by parties are meaningfully assessed (*Vavilov* at para 127). The officer notes that the couple have a close relationship, but finds that the Applicant's wife had not indicated that she would be unable to support him if he was forced to go to Uruguay while his application for permanent residence was in process. I find that this analysis misses the main point, which is that the Applicant's claim for H&C relief is based on the hardship that separation of the spouses would cause.

[30] The hardship caused by separation of spouses has been recognized as an important consideration in other cases, yet it is given almost no attention in this decision (see *Abdeli v Canada (Citizenship and Immigration)*, 2015 FC 146 at para 39, and *Uddin v Canada (Citizenship and Immigration)*, 2016 FC 314 at para 49). The officer does not describe how the impact of spousal separation for this particular couple has been weighed. In this regard, it is relevant to consider that the couple met in Canada, the Applicant's wife is a permanent resident and so her ability to travel is limited by the residency requirements for her to obtain citizenship, and therefore the separation would have significant consequences on the couple.

[31] A second dimension of the problem is the officer's focus on the Applicant's overstay, combined with the statement of the purpose of H&C relief. The Applicant submits that the officer misstated the test. In my view, this is not the primary question. If there is one key lesson from *Kanthasamy* and the subsequent jurisprudence, it is that officers will fall into error if they treat any particular form of words as a "magic formula" to be applied to H&C cases. Indeed, that is exactly what the Supreme Court counselled against in *Kanthasamy* (at paras 31-33). The real question is whether the officer engaged in a consideration of all of the relevant factors that weigh in favour of – or against – the grant of relief under subsection 25(1) (see *Damian* at paras 16-22).

[32] It is important to recall that the very reason an applicant is seeking H&C relief is that they are inadmissible to Canada or do not meet the requirements of the law for some reason. The reason why the person finds themselves in this situation is obviously a relevant consideration, and it must be given due weight in the analysis. It must not, however, eclipse adequate consideration of the nature and extent of the legal obstacles to admissibility (per *Jugpall* and *Patel v Canada (Citizenship and Immigration)*, 2019 FC 394 at para 12), as well as the considerations which weigh in favour of granting relief.

[33] In this case, the officer gave great weight to the fact that the Applicant had overstayed his visa, noting that he had previously visited Canada and left within the required time, and that he was a young adult when he came the second time and stayed. These are relevant and important considerations.

[34] However, the officer did not indicate how the efforts the Applicant had made to establish himself in Canada were considered; instead, the focus of the analysis is on how these efforts

would assist the Applicant with his transition to Uruguay. This is not reasonable, in light of the evidence before the officer (see *Sosi v Canada (Citizenship and Immigration)*, 2008 FC 1300; *Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813).

IV. Conclusion

[35] I am satisfied that the decision is unreasonable, because the officer's failure to grapple with the core of the claim, namely the impact of the separation of the spouses, as well as the failure to consider the Applicant's establishment in Canada as a positive factor, are "sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100).

[36] In light of my conclusions on these questions, it is not necessary to address the Applicant's third argument about the weight given to the psychologist's report.

[37] For all of these reasons, this application for judicial review is granted, and the matter is remitted back for reconsideration by a different officer.

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

JUDGMENT in IMM-136-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The matter is remitted back for reconsideration by a different officer.

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

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-136-19
STYLE OF CAUSE:	SANTIAGO LOPEZ BIDART v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 19, 2019
JUDGMENT AND REASONS:	PENTNEY J.
DATED:	FEBRUARY 26, 2020

APPEARANCES:

Arghavan Gerami	FOR THE APPLICANT
Taylor Andreas	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gerami Law Professional Corporation Barristers and Solicitors Ottawa, Ontario	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT