Federal Court  Cour fédérale

Date: 20210714

Docket: IMM-773-20

Citation: 2021 FC 734

Ottawa, Ontario, July 14, 2021

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

HAEYCEL FRANCO
RODERICK MARJES

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of an Immigration Officer [the "Officer"], dated November 19, 2020, refusing the Applicants' application for permanent residence on humanitarian and compassionate grounds [the "Decision"], pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the "*Act*"].

II. Background

[2] The Applicants, Haeycel Franco and Roderick Marjes, are citizens of the Philippines and common-law partners. They have two Canadian-born children.

[3] The Applicants initially arrived in Canada as foreign workers in 2009 and 2011. They each entered Canada on a work permit, valid until October 21, 2011 for Mr. Marjes and January 21, 2012 for Ms. Franco. Ms. Franco maintained her temporary status as a worker until March 17, 2015. Mr. Marjes received several extensions of his work permit until January 31, 2015. On September 2, 2015, his status was restored as a visitor and was valid until December 11, 2015. On July 9, 2018, Mr. Marjes obtained another work permit, to which he received several extensions, the last of which was valid until April 4, 2020.

[4] The Applicants have made three applications for permanent residence on humanitarian and compassionate grounds [H&C Applications]. The first two applications were refused on September 30, 2016 and August 8, 2018. On May 10, 2017, the Applicants were issued removal orders.

[5] A third H&C Application was submitted on May 23, 2019. The Applicants sought an exemption from the in-Canada selection criteria on H&C grounds to facilitate the processing of their application for permanent residence from within Canada. The grounds for the H&C Application included the Applicants' establishment in Canada, adverse country conditions in the Philippines and the best interests of the Applicants' two children.

[6] The Applicants had also filed pre-removal risk assessment applications, which were refused on November 18, 2019. The third H&C Application was refused on November 19, 2020 and is the subject of this current judicial review.

[7] The Applicants seek an Order quashing the Decision of the Officer, and remitting the third H&C Application for reconsideration by a different immigration officer.

III. Decision Under Review

[8] The Officer found that the factors cited in the third H&C Application were insufficient to grant the Applicants an exemption on H&C grounds and therefore refused the H&C Application.

[9] The Officer found that both Applicants have resided in Canada for significant periods of time. However, several of these years resulted from the Applicants overstaying their authorizations to remain in Canada (approx. 4.5 and 3.5 years, respectively). Further, the Applicants' family ties to Canada are no greater than their family ties to the Philippines. The Officer concluded that the Applicants' level of establishment in Canada is no greater than what similarly situated individuals would acquire over the course of living and working in Canada for several years.

[10] The Officer further noted the Applicants' submissions that the living conditions in Tondo, Manila, where Mr. Marjes's family lives, are extremely poor. However, nothing in the Applicants' materials indicated that they would have to settle in Tondo, Manila. Further, the Applicants' H&C materials do not demonstrate that the "[A]pplicants would experience a direct,

negative affect" with respect to poverty and crime in the Philippines. The Applicants' familiarity with the Philippines, the fact that Tagalog is their first language, the education they obtained in the Philippines, and the work experience that they have obtained in Canada, as well as in other countries, would all likely assist the Applicants to obtain employment upon their return to the Philippines.

[11] As it relates to the best interests of the Applicants' two children, the Officer found that they are completely dependent on the Applicants and would likely accompany them if they returned to the Philippines. One of the children no longer speaks Tagalog, but the Officer found that she likely has some familiarity with the language and that her young age would assist her to acquire greater fluency. The H&C materials further did not demonstrate that the Applicants would be unable to afford health care and educational expenses for their children in the Philippines, nor that they would experience a direct, negative affect as a result of any adverse country conditions in the Philippines.

IV. Issue

[12] The issue is whether the Officer's Decision was reasonable.

V. Standard of Review

[13] The standard of review is that of reasonableness, as it relates to the merits of the Officer's Decision to refuse the Applicants' H&C Application (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]).

VI. Relevant Provisions

[14] Subsections 25(1) and (1.3) of the *Act* provide:

Humanitarian and compassionate considerations — request of foreign national

25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

Non-application of certain factors

(1.3) In examining the request of a foreign national in Canada, the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the

Séjour pour motif d'ordre humanitaire à la demande de l'étranger

25 (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

Non-application de certains facteurs

(1.3) Le ministre, dans l'étude de la demande faite au titre du paragraphe (1) d'un étranger se trouvant au Canada, ne tient compte d'aucun des facteurs servant à établir la qualité de réfugié — au sens de la Convention — aux termes de l'article 96 ou de personne à protéger au titre du

hardships that affect the foreign national.	paragraphe 97(1); il tient compte, toutefois, des difficultés auxquelles l'étranger fait face.

VII. Analysis

[15] The Applicants submit that the Officer's Decision is unreasonable. The Applicants left a life of poverty, with the hopes of providing a better life for their family. They have two young Canadian-born children. However, the Officer's assessment of the best interests of the children remains unclear. Having found that it would not be in the children's best interests to return to the Philippines, the Officer erred in failing to assess a scenario that would allow the children to remain in Canada with their parents. Further, the Officer's conclusions ignore the reality of living conditions in the Philippines. It is not possible for the Applicants to avoid living in similar poverty conditions as experienced by their family members in the Philippines. There is also no clear finding as to whether the Applicants' establishment in Canada is being viewed positively or negatively in the overall H&C assessment.

[16] The Respondent posits that the Applicants' arguments do not demonstrate that the Officer erred in refusing the H&C Application. The best interests of the children do not outweigh other considerations and are not determinative on their own in the context of an H&C application. The Officer appropriately considered the country conditions within the specific context of the Applicants' evidence and submissions. Further, the Officer was entitled to draw a negative inference from the Applicants' establishment being, in large part, a result of their Decision to remain in Canada without status for a number of years.

[17] Section 25 of the *Act* allows for an immigration officer to offer equitable relief - an exemption to certain ordinary requirements of the *Act* on the basis of H&C grounds. This discretion is exercised in cases where a foreign national applies for permanent residency, but is inadmissible or does not otherwise meet the requirements of the *Act* (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 10, 20-21 [*Kanthasamy*]).

[18] The Officer's determination is based on an assessment of all relevant circumstances: "What *does* warrant relief will clearly vary depending on the facts and the context of the case, but officers making humanitarian and compassionate determinations must substantively consider and weigh *all* the relevant facts and factors before them" (*Kanthasamy*, above at para 25).

[19] In assessing the best interests of the children, a highly contextual approach is required, responsive to each child's particular age, capacity and maturity (*Kanthasamy* at paras 35-36, 39). The best interests of the children, while not determinative, is an important factor. A decision will be found unreasonable under subsection 25(1) of the *Act*, where the interests of the children are not sufficiently considered (*Kanthasamy* at paras 38-39). As the Supreme Court of Canada found in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraph 75:

> … The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H&C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent

> with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.

[20] I find that the Officer's Decision in this respect is unreasonable, lacking intelligibility and justification as it relates to the children's best interests (*Vavilov*, above at para 86). The Officer came to apparently two different conclusions as it relates to the children's best interests, finding both that the children would not experience a direct, negative affect as a result of the country conditions in the Philippines, yet their return to the Philippines would not be in their best interests. The Officer's reasoning and conclusions on this important factor remain unclear. Specifically, the Officer found:

> …However, I do not find that the applicants' H&C materials demonstrate that [the children] would experience a direct, negative affect as a result of any adverse country conditions in the Philippines. Nonetheless, I acknowledge that it is possible that [the children] might be negatively affected by adverse country conditions upon their return to the Philippines, which would not be in their best interests. I also find that it would generally not be in [the children's] best interests to reside in the Philippines where these adverse conditions are occurring. However, I note that an H&C decision is based on a global assessment of all of the factors for consideration that applicants bring forward, and that the best interest of the child is only one of the factors for consideration on this H&C application.

[21] While an Officer is presumed to know that living in Canada could offer opportunities to the children that they may not have otherwise, the Officer's assessment is lacking in that the Officer takes two seemingly contrasting positions and then simply dismisses the children's best interests as only one factor in the assessment. While the best interests of the children is not a determinative factor, it is a very important factor that needs to be clearly considered and articulated. Here the Decision falls short of the alert, alive and sensitive inquiry the Officer was

required to apply to the analysis of the children's best interests (*Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 5).

[22] I do not find that the Officer otherwise erred, in the assessment of the country conditions and the Applicants' level of establishment in Canada.

[23] I do not find that the Officer dismissed the country conditions in the Philippines on the basis that they affected a large portion of the population, holding the Applicants to a higher threshold than required in an H&C application. The Officer rather focused on the education, linguistic skills and work experience of the Applicants and their choice on a location of residence in finding that concerns related to crime and poverty did not have a direct, negative impact on the Applicants. While the fact that the Applicants have family members living in Tondo, Manila is persuasive, it does not render the Officer's Decision unreasonable. The Officer provided due consideration to this factor.

[24] Further, it was within the discretion of the Officer to positively consider the Applicants' establishment in Canada, while drawing a negative inference from the Applicants' choice to remain in Canada without status (*Zlotosz v Canada (Citizenship and Immigration)*, 2017 FC 724 at paras 34-35; *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at para 48). There is no lack of clarity in the Officer's consideration of this factor.

[25] For the reasons stated above, this Application is granted and will be remitted to a different immigration officer for reconsideration.

[26] There is no question for certification.

JUDGMENT in IMM-773-20

THIS COURT'S JUDGMENT is that:

1. The Application is granted and will be remitted to a different immigration officer for reconsideration; and
2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-773-20
STYLE OF CAUSE:	HAEYCEL FRANCO AND RODERICK MARJES v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	JULY 12, 2021
JUDGMENT AND REASONS:	MANSON J.
DATED:	JULY 14, 2021

APPEARANCES:

Bjorna Shkurti	FOR THE APPLICANTS
David Shiroky	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Caron & Partners LLP Barristers and Solicitors Calgary, Alberta	FOR THE APPLICANTS
Attorney General of Canada Calgary, Alberta	FOR THE RESPONDENT