Federal Court  Cour fédérale

Date: 20211203

Docket: IMM-1796-20

Citation: 2021 FC 1349

Ottawa, Ontario, December 3, 2021

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

LUIS ALBERTO VALERIO SANCHEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is the judicial review of a senior immigration officer [Officer] denying the Applicant's application for permanent residence which was based on humanitarian and compassionate [H&C] grounds pursuant to s 25(1) of the *Immigration and Refugee Protection Act* SC 2001, c 27 [IRPA].

Background

[2] The Applicant is a citizen of Costa Rica. There he had three children with Yorleny Blanco [Former Spouse], whom he married in 2002. That same year, the Applicant and his family came to Canada and claimed refugee protection. The Applicant's fourth child, Yeissy Jasuany Valerio Blanco [Yeissy], was born in Canada on June 5, 2003. In 2003 and 2004, the Applicant's and his Former Spouse's refugee claims were denied. The Applicant's Former Spouse returned to Costa Rica with the children while pregnant with their fifth child, who was born there in December 2004. The Applicant claims that he stayed in Canada to continue working to support his family.

[3] The Applicant's work permit expired in November 2003, but he continued to work without authorization.

[4] The Applicant made a Pre-Removal Risk Application, which was denied in January 2004. A warrant for the Applicant's arrest was issued in March 2004 after he failed to report for his removal from Canada. His first H&C application was refused in December 2012. The Applicant and his Former Spouse divorced in 2015.

[5] The Applicant made a second H&C application in 2017. The Officer refused the application by a decision dated March 6, 2020. This is the judicial review of that decision.

Decision under review

[6] With respect to the Applicant's establishment in Canada, the Officer found that the Applicant demonstrated efforts to be self-sufficient and economically productive, and has been employed in the construction industry since 2003. The Officer considered that the Applicant was an active member in his church and had volunteered there, and considered the Applicant's numerous letters of support. Based on this, the Officer found that the Applicant demonstrated a typical level of establishment for a person in similar circumstances. The Officer also reviewed the Applicant's immigration history. He found that the Applicant has not remained in Canada due to circumstances beyond his control and that his establishment is based on a wilful disregard of Canadian immigration law since he has continued to work in Canada without authorization after his removal order became enforceable and has evaded immigration authorities since the warrant for his arrest was issued in 2004.

[7] The Officer noted the Applicant has built a very close relationship with the extended family of his Former Spouse, who reside in Canada, and noted the emotional support that the Applicant has received from them. However, the Officer was not satisfied that the Applicant's removal from Canada would sever those relationships which could be maintained via telecommunication. The Officer found that the Applicant's emotional upset caused by his removal and separation from his family in Canada is an inherent consequence of removal.

[8] The Officer went on to address the best interests of the Applicant's daughter, Yeissy, who had returned to Canada from Costa Rica in 2008 with the Applicant's former mother-in-law who

obtained legal custody of her. The Officer stated that the Applicant felt that it was in Yeissy's best interests to have a stable home and a custodial parent who is a Canadian citizen. To that end, should the Applicant return to Costa Rica and Yeissy remain in Canada with his former mother-in-law, the Applicant's wishes for her would continue to be fulfilled. The Officer considered Yeissy's age, her extensive maternal family network present in Canada and the comfort and support it has provided to her, finding that Yeissy's best interests would not be compromised by remaining in Canada in the event of the Applicant's removal. The Officer noted that the Applicant's Former Spouse, their four children, and her current spouse have again entered Canada and are residing with Yeissy.

[9] The Officer also considered the Applicant's connection to his goddaughter, Adelyn, but concluded that there was insufficient objective evidence to suggest that his returning to Costa Rica would be detrimental to her social and emotional development.

[10] Finally, the Officer considered whether the country conditions in Costa Rica (other than factors described in ss. 96 and 97 of the IRPA) would cause hardship to the Applicant. The Officer considered a report from a psychiatrist and acknowledged the psychiatrist's opinion that the Applicant's mental health would likely worsen if he were removed to Costa Rica. The Officer noted that the psychiatrist had suggested that the Applicant connect with a family physician to seek monitoring and support for his anxiety and to monitor for the development of Major Depressive Disorder or, should the Applicant's symptoms worsen, that he speak to a physician to consider starting anti-depressants and counselling, but that there was no evidence

that such activity had taken place indicating that the Applicant did not require this support. The Officer ascribed low weight to the psychiatrist's report.

[11] The Officer noted that although the Applicant has not been to Costa Rica for many years, this was due to his own choice, and that he would not be unfamiliar with life in that country. The Officer, noting counsel's submission that the Applicant's prospects for employment are poor in Costa Rica, stated that the process of re-integration and re-establishment when returning to a country whose economic conditions are less prosperous than those found in Canada is an ordinary consequence of removal. While potentially not easy, tasks such as finding employment in the existing domestic labour market and realizing financial security are incidental to this process.

[12] The Officer concluded that the factors submitted by the Applicant, considered cumulatively, did not warrant granting the requested exemption under s 25(1) of the IRPA.

Issues and standard of review

[13] The Applicant identifies eight issues, including the standard of review. In my view these all fall within the overarching question of whether the Officer's decision was reasonable.

[14] The parties submit, and I agree, that when a court reviews the merits of an administrative decision the presumptive standard of review is reasonableness (*Canada (MCI) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 23, 25). No exceptions to that presumption have been raised nor apply in this matter.

[15] When reviewing a decision on the reasonableness standard 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).

Analysis

[16] Subsection 25(1) of the IRPA permits the Minister to provide relief from the requirements of the statute to a foreign national in Canada who applies for permanent resident status if the Minister is satisfied that "it is justified by humanitarian and compassionate considerations relating to the foreign national". The purpose and application of s 25(1) was addressed by the Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*]. There the Supreme Court held that the H&C discretion provided by s 25(1) permits the mitigation of the rigidity of the law where the facts warrant the granting of special relief from the effect of the IRPA in order to relieve misfortunes of another (*Kanthsamy* at para 13, 19; see also *Mursalim v Canada (Citizenship and Immigration)*, 2018 FC 596 at para 25).

[17] The discretionary granting of relief pursuant to subsection 25(1) of the IRPA is reserved for exceptional situations. The H&C circumstances of an applicant must justify their exemption from the otherwise applicable provisions of Canada's immigration laws. A decision maker engaged in an H&C assessment must apply these equitable concepts to the factual circumstances of the particular applicant. Because s 25(1) presupposes that an applicant has failed to comply with one or more of the provisions of the IRPA, a decision maker must assess the nature of the

non-compliance and its relevance and weight against the applicant's H&C factors in each case (*Mitchell v Canada (Citizenship and Immigration)*, 2019 FC 190 [*Mitchell*] at para 23).

Establishment

[18] The Applicant submits that the Officer erred by discounting the Applicant's significant establishment in Canada based solely on his lack of legal status and that the jurisprudence of this Court has held that this is unreasonable.

[19] I would first note that the Officer did not make a finding that the Applicant demonstrated significant establishment in Canada, as the Applicant asserts. The Officer found that the Applicant has integrated into the community over an extended period of time by his employment, the forming of social networks, performing volunteer work and practicing religious observance. However, that these are not uncharacteristic of activities undertaken by newcomers to Canada. The Officer found that the Applicant had established a typical level of establishment for a person in similar circumstances.

[20] Secondly, it was not an error for the Officer to factor into the assessment that the Applicant has knowingly lived and worked in Canada without status for an extended period of time.

[21] The Applicant refers to *Damian v Canada (Citizenship and Immigration)*, 2019 FC 1158 [*Damian*], in support of his position. There the officer, in assessing the applicant's establishment in Canada, found that her establishment was based on a wilful disregard of Canadian

immigration law since she had remained and worked in Canada without authorization. Justice McHaffie found that in reaching this conclusion, the officer did not take into account that the applicant was a minor for seven and a half of the almost ten years she was in Canada. Justice McHaffie held that a child who is brought to Canada by a parent cannot be faulted for remaining in Canada without legal status as a child. And if that child, grown to adulthood, applies for permanent residence, it is unreasonable for an immigration officer to hold it against them that the time they spent in Canada during their childhood resulted from a disregard of immigration law. That is not the Applicant's circumstance.

[22] In *Damian*, Justice McHaffie also stated that:

> [26] This Court has recognized that evidence of establishment in Canada may be considered in light of the circumstances that gave rise to it, including whether time in Canada arose from illegality or disregard of immigration laws. In *Semana*, for example, the applicant had remained in Canada "through repeated lies and fraud," and Justice Gascon found that it was not unreasonable for the Immigration Appeal Division to have concluded that "establishment under illegal circumstances should not be rewarded": *Semana* at paras 48-51.
>
> [27] At the same time, as Justice Walker noted recently in *Mitchell v Canada (Citizenship and Immigration)*, 2019 FC 190 at para 23, subsection 25(1) presupposes that an applicant has failed to comply with one or more of the provisions of the IRPA. It is thus appropriate that the decision-maker "assess the nature of the non-compliance and its relevance and weight against the applicant's H&C factors in each case." Here, the officer failed to assess or address the circumstances leading to the applicant's non-compliance, her age during the majority of the period of non-compliance, the fact that almost half of her life had been spent in Canada, or the timing of her application to regularize her status after reaching the age of majority. Given the importance of these circumstances to the matter being considered by the officer, failure to consider them renders the decision unreasonable and does not reflect the application of the approach to H&C applications prescribed by *Kanthasamy*.

[23] The Applicant also relies on *Mitchell*. However, like *Damian*, *Mitchell* concerned an applicant who was brought to Canada as a child.

[24] And, unlike in *Mitchell*, here the Officer did consider the Applicant's work ethic and community involvement – commending his contributions in both contexts – and did assess the nature of the Applicant's non-compliance with the IRPA. The Officer also noted that the Applicant chose to stay in Canada for over 15 years after a removal order had become effective following his failed refugee claim and that he had evaded immigration authorities since March 2004 when the warrant for his arrest was issued. He continued to live and work in Canada after his first H&C application was refused in 2012.

[25] The Officer did not err in considering that the Applicant was not in Canada for reasons beyond his control and that his establishment was based on his decision to remain in Canada without status (*Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at paras 48-51). This Court has held that that "The mere presence in Canada by someone who has been in this country illegally, for a long time, should affect weight in a negative way. There may well be other considerations, but length of time being illegally in Canada cannot carry much favour" (*Shackleford v Canada (Citizenship and Immigration)*, 2019 FC 1313 [*Shackleford*] at paras 23-24).

[26] The Officer did not ignore the Applicant's claim of establishment. The Officer assessed his claim of establishment and also assessed the nature of the non-compliance, weighing it as one of the factors in the H&C assessment. In my view, this does not give rise to a reviewable error.

[27] Throughout his submissions, the Applicant places great emphasis on the fact that he has been living, working and paying taxes in Canada since 2002. But H&C relief under s 25 is discretionary and exceptional. The longer an applicant stays and works illegally in Canada cannot mean that their chances of being granted permanent residence should increase accordingly. Rather, the question is whether their level of establishment is exceptional. As stated in *Shackleford*: “There may be cases when the establishment runs so deep and is so extensive, and the integration in the community is so far reaching and profound, that it would be unreasonable for the Minister not to grant chief [sic] because disrupting such rich establishment excites a desire to relieve the misfortunes of another. This does not constitute one of those cases. These cases will be few and far between” (*Shackleford* at para 25).

[28] The Officer found that the degree to which the Applicant has established himself in Canada is consistent with that of most people in similar circumstances (*Jaramillo Zaragoza v Canada (Citizenship and Immigration)*, 2020 FC 879 [*Jaramillo Zaragoza*] at para 22). Accordingly, that the Applicant’s level of establishment was typical, not exceptional. While the Applicant does not agree, and characterizes his establishment as significant, this amounts to a request that the Court reweigh the evidence. That is not the role of the Court (*Vavilov* at para 125).

Fettering of discretion

[29] The Applicant submits that the Officer fettered their discretion by elevating the “Ministerial Guidelines”, above s 25(1) and, in the process, importing into s 25(1) a legal

requirement of lawful employment and residence in Canada for an H&C applicant. There is no merit to this submission.

[30] The Officer does not actually explicitly refer to any guidelines in the decision, nor does the Applicant identify the guidelines that he claims the Officer relied upon or explain how the Officer allegedly elevated the guidelines. The Applicant refers to the fact that the Officer states that the Applicant has not remained in Canada "due to circumstances beyond his control". However, this is not in error. This is not a case, for example, where an applicant was brought to Canada as a young child by their parents and, therefore, remained in Canada due to that circumstance which was beyond their control, until they became adults.

[31] Rather, the Applicant in his affidavit states that in 2004 he elected to stay in Canada after his refugee claim was denied and his Former Spouse and children had returned to Costa Rica, initially to save money before rejoining his family there. Then, at some unspecified future time after his Former Spouse began a relationship with her current spouse (a supporting affidavit indicates that the Former Spouse entered into a new relationship in 2008), he decided to continue to stay in Canada to financially support his family at a level that he claims he could not achieve in Costa Rica.

[32] So, to the extent that the Applicant is suggesting that the Officer erred in considering whether his inability to leave Canada has led to establishment as a factor to be considered in an assessment of hardship, there is no error. There was no inability to leave and, as discussed above,

the Officer was entitled to consider the fact that the Applicant's level of establishment was achieved, in part, by his decision to live and work in Canada without status.

[33] The Applicant has also failed to establish that the Officer treated any guidelines as exhaustive or mandatory requirements that limit the equitable H&C discretion anticipated by s 25(1) of the IRPA (*Jaramillo Zaragoza* at para 31-32).

Wrong test

[34] The Applicant submits that the Officer applied the wrong test, using a strict hardship lens instead of considering broader H&C grounds as required by *Kanthasamy* and *Chirwa v. Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338. Essentially, the Applicant asserts that the Officer chose not to apply any compassion when assessing his application, submitting that the reasons show "***no*** indication that the Officer applied ***any*** compassion".

[35] Again, I do not agree with this submission. For example, the Officer acknowledged the Applicant's close relationship with the Former Spouse's family and stated, having reviewed the photos and letters submitted that they could appreciate how close-knit a family they are and the emotional support the applicant has received from them and understood the Applicant's desire to remain close to them. However, the Officer found that separation would not sever the relationships even if long distance communications are not a substitute for physical presence. That is, family separation is an unfortunate but usual hardship inevitably associated with removal.

[36] The Officer considered all the factors put forward by the Applicant and considered whether, cumulatively, those factors warranted equitable relief under s 25(1). The Officer did not err in this approach.

Psychiatrist's report

[37] The Applicant submits that having accepted the psychiatrist's diagnosis, the Officer erred in requiring further documentation to establish continuing hardship flowing from a mental health condition (*Kanthasamy* at para 47). Further, that the Officer missed the point as the Officer dismissed the Applicant's ongoing mental health issues in favour of issues that have not yet manifested, failed to engage with the material parts of the report and failed to appreciate that the Applicant's anxiety flows from a potential return to Costa Rica which would "trigger a drastic deterioration" in his mental health. The Officer also failed to consider how the Applicant's mental health would be affected upon his return to Costa Rica.

[38] The June 2, 2018 report by psychiatrist Dr. Michaela Beder states that she was contacted by counsel to assess the Applicant with regard to his psychological and emotional functioning and the possible impact on his emotional and mental health if he were removed from Canada. This was based on one 90-minute assessment and the psychiatrist was also provided with the Applicant's affidavit.

[39] The report notes that the Applicant had no history of psychiatric care and had never been diagnosed with any mental illness. However, after speaking with the Applicant and his sister-in-law who accompanied him, the psychiatrist found that it was likely that the Applicant

experienced a major depressive episode in the past shortly after the breakup of his marriage (the report does not state when this was, but, based on the record, appears to have been in 2008).

[40] As to the clinical assessment, the psychiatrist notes that the Applicant is currently very anxious about his own precarious immigration status, and that of four of his five children (who were born outside Canada), and states that the psychiatrist "would be very concerned, should he be separated from his children, family support, and church community in Toronto and returned to Costa Rica that his mental health would worsen".

[41] The report states that the Applicant fulfills DSM-V criteria for Adjustment Disorder – with anxious features. While he is still able to work, care for his children, and be active in his church, he has clearly experienced a very significant worsening in his mental health related to his life circumstances due to his anxiety as demonstrated by weight loss, occasional trouble sleeping, muscle tension and feeling irritable and having difficulty concentrating. The report states, "I would suggest that he connect with a family physician to monitor and support him for his anxiety, as well as monitor for the development of Major Depressive Disorder". Further, should his symptoms persist or worsen, the report suggests that the Applicant "speak with a physician to consider starting an anti-depressant medication and getting some counselling support".

[42] The report concludes that the Applicant's uncertain immigration situation, as well as that of his children, is destabilising for his mental health. The psychiatrist did not prescribe any medication or other treatment.

[43] The Officer summarized the above and notes that no evidence was tendered indicating that the Applicant had taken the steps suggested. The Officer found that evidence of psychological treatment or counselling would have been disclosed by the Applicant "if he believed that he required this support. While I do not discount this assessment, I do ascribe it low weight".

[44] In considering the Officer's treatment of the psychiatrist's report, *Kanthasamy* is the starting point. There, the applicant was arrested, detained and beaten by the Sri Lankan police. A psychological report concluded that he suffered from post-traumatic stress disorder and adjustment disorder with mixed anxiety and depressed mood resulting from his experiences in Sri Lanka, and that his condition would deteriorate if he was removed from Canada. An immigration officer discounted the report on the basis that the applicant had provided insufficient evidence that he had been or was in treatment regarding his mental health issues or that he could not obtain treatment if required in his native Sri Lanka.

[45] The Supreme Court of Canada held that the officer erred as:

> [47] Having accepted the psychological diagnosis, it is unclear why the Officer would nonetheless have required Jeyakannan Kanthasamy to adduce *additional* evidence about whether he did or did not seek treatment, whether any was even available, or what treatment was or was not available in Sri Lanka. Once she accepted that he had post-traumatic stress disorder, adjustment disorder, and depression based on his experiences in Sri Lanka, requiring further evidence of the availability of treatment, either in Canada or in Sri Lanka, undermined the diagnosis and had the problematic effect of making it a conditional rather than a significant factor.

[46] The Supreme Court also held that the officer ignored what the effect of removal from Canada would be on Mr. Kanthasamy's mental health, finding that "the very fact that Jeyakannan Kanthasamy's mental health would likely worsen if he were to be removed to Sri Lanka is a relevant consideration that must be identified and weighed regardless of whether there is treatment available in Sri Lanka to help treat his condition" (at para 48).

[47] In this matter, the Officer could have rejected the validity of the psychiatrist's diagnosis, giving their reasons for doing so (*Sutherland v Canada (Citizenship and Immigration)*, 2016 FC 1212 [*Sutherland*] at para 24; *Rainholz v Canada (Citizenship and Immigration)*, 2021 FC 121 [*Rainholz*] at para 47; *Jesuthasan v Canada (Citizenship and Immigration)*, 2018 FC 142 [*Jesuthasan*] at para 48). However, the Officer did not do so and I agree that the Officer appears to have accepted the psychiatrist's finding.

[48] Although the Officer's treatment of the report was brief, I do not agree that the Officer overlooked the Applicant's current anxiety symptoms or missed the point that his anxiety is connected to the possibility of his removal from Canada. The Officer acknowledged that the Applicant's underlying circumstance as described to the psychiatrist, being his precarious immigration situation, understandably had a "resultant negative impact on his psyche".

[49] However, and contrary to the Respondent's submissions, the Officer gave only one reason for giving the psychiatrist's report little weight. Based on this, the Officer appears to have impermissibly discounted the probative value of the report solely on the basis that the Applicant had not followed up with a family physician for monitoring and, if the Applicant's symptoms

persisted or worsened, to consider implementing treatment (*Sitnikova v Canada (Citizenship and Immigration)*, 2017 FC 1081 at para 26; *Jesuthasan* at paras 42 – 49; *Williams v Canada (Citizenship and Immigration)*, 2018 FC 241 at paras 23-24).

[50] It may be that the Officer was of the view the psychiatrist's report made it clear that, as of the time of the assessment, the Applicant's anxiety was not at a level that required treatment of any kind. On that basis, the Officer could perhaps have reasonably have afforded low weight the psychological report because it did not support a level of hardship warranting a s 25(1) exemption (*Jesuthasan* at para 49). This would have accorded with the Officer's apparent finding that, because the Applicant provided no evidence that he had followed the psychiatrist's suggestion to connect with a family physician, this demonstrated that the Applicant himself viewed his mental health not to having worsened to the point of needing treatment. However, this is not the approach taken by the Officer.

[51] In any event, although the psychiatrist expressed concern that the Applicant's mental health would worsen if he were separated from his family supports in Toronto, the Officer did not assess this or consider the impact on the Applicant's mental health should he be returned to Costa Rica. Where a psychiatric diagnosis is not rejected, an officer must consider evidence as to the effect that removal from Canada would have on the mental health of the applicant; failing to do so is a reviewable error (*Kanthasamy* at para 48; *Rainholz* at para 78; *Sitnikova* at paras 28-30; *Sutherland* at para 17).

[52] I acknowledge that here the psychiatrist's report states only a concern and does not state definitively that the Applicant's mental health would worsen or, if it did, what this might potentially entail. Nor is this a circumstance like *Kanthasamy* where the Applicant would be returning to a country where he suffered mistreatment which caused his mental health issues. However, this Court has held that even if the impact on return is not specifically analyzed in a medical report, then an officer may draw their own reasonable conclusions based on the totality of the evidence *(Apura v Canada (Citizenship and Immigration)*, 2018 FC 762 at para 29). Here it may have been reasonable, for example, for the Officer to conclude that the symptoms of anxiety described by the psychiatrist – weight loss, occasional trouble sleeping, muscle tension and feeling irritable and having difficulty concentrating – even if worsened by the Applicant's return to Costa Rica, would not have amounted to a degree of hardship sufficient to warrant H&C relief under s 25(1).

[53] However, the Officer's three lines of analysis do not offer this, or any other analysis, of what the effect of removal from Canada would be on the Applicant's mental health, resulting in a further reviewable error.

Conclusion

[54] Given that the Officer's treatment of the psychiatrist's report was unreasonable, I need not consider the other issues raised by the Applicant.

JUDGMENT IN IMM-1796-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted;

2. The decision is set aside and the matter shall be remitted to another officer for redetermination;

3. There shall be no order as to costs; and

4. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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