Federal Court  Cour fédérale

**Date: 20220315**

**Docket: IMM-3384-20**

**Citation: 2022 FC 340**

**Toronto, Ontario, March 15, 2022**

**PRESENT: Mr. Justice Diner**

**BETWEEN:**

**YAIR SUBAR**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] The Applicant is a 68-year old citizen of Israel, who first visited Canada in 1989. He has worked as a cantor (leading liturgy and prayer) within Ottawa's Jewish community at various points since 2003, and continuously in Canada since 2013. Apart from his liturgical duties, he has been heavily involved in other aspects of education and pastoral services in the Jewish community. When he entered Canada in December of 2013, he was granted authorization to stay

until May 31, 2015. On February 19, 2015, a prior humanitarian and compassionate (H&C) application was refused.

[2] Despite his temporary travel authorization, the Applicant has remained in Canada ever since because he feared that if he left, he would have difficulties returning to Canada in the future and his advanced age would make it nearly impossible for him to re-establish a career in Israel. The Applicant submitted a second H&C application on November 22, 2018, pursuant to s 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, the subject of this judicial review. He challenges its refusal, and, for the reasons that follow, I agree that it was unreasonable.

## I. H&C Application

[3] The Applicant stated in his H&C application that he had contemplated submitting an application to the Canadian Experience class in the past. However, though he has learned to speak English fluently, his written expression and comprehension are inadequate to meet the requirements. He notes that the written component of the English language is unnecessary to his profession, since he is a cantor fluent in Hebrew and knowledgeable in liturgical chanting and prayer. Permanently employed by a synagogue in Ottawa, the Applicant earns modest wages, has accumulated some savings through what he termed “sound financial management”, and has an established record of community participation.

[4] In support of his application, the Applicant provided twenty-one letters of support from members of his community, including colleagues in the clergy. Along with these letters of

support, he also provided copies of English language test results, various financial documents and a 2018 news article, which cites the Israel Democracy Institute figures stating that unemployment among Orthodox Jewish men in Israel is approximately 50%.

## II. Decision under Review

[5] In a decision dated August 4, 2020, a senior immigration officer (the Officer) noted the Applicant's immigration record and cited establishment in Canada, and unemployment in Israel, as the H&C factors in support of his application. The Officer noted the Applicant's stable employment, that "letters were provided from multiple individuals indicating that the applicant has engaged in some volunteer work", and observed that he owns a vehicle and has savings. The Officer then stated: "[w]hile I have given some favourable consideration to the applicant's establishment in Canada, I do not find his establishment to be exceptional." The Officer explained that it is not unusual for individuals to be employed, volunteer, rent property, own a vehicle or accumulate savings.

[6] The Officer highlighted the Applicant has been in Canada without lawful status and has not provided evidence that his prolonged stay was beyond his control, before stating: "[t]he simple fact that the applicant was employed in Canada is not sufficient to demonstrate integration in Canadian society so as to warrant granting an exemption" and that under all the circumstances, insufficient evidence was provided to warrant granting an exemption under s 25 on the basis of establishment. The Officer acknowledged the Applicant's ties to his community and friendships with a variety of individuals, but noted these could be maintained from abroad

and that none were characterized by such a degree of interdependence or reliance to justify granting an exemption.

[7] The Officer then acknowledged the difficulty the Applicant may face returning to Israel but mentioned his two sisters (aged 87 and 74) and three children (between the ages of 40 and 46) there, which would lessen his hardship. The Officer also noted that by resettling himself in Canada on multiple occasions, the Applicant had demonstrated his enterprising and resourceful nature, suggesting he could do so again if he returned to Israel where he was born, where he lived, and where he continues to have friends, family and social networks. The Officer gave "favourable consideration" to the family reunification factor. The Officer observed the submission that the Applicant alleged he would face hardship as a result of unemployment in Israel evidenced by the news article, but that there was insufficient objective evidence that he would be unable to find employment given his experience, skills, and knowledge.

[8] In sum, the Officer stated that having considered his personal circumstances, his establishment in Canada, unemployment levels in Israel, and his involvement in his community, the evidence did not justify an exemption.

## III. Analysis

[9] The Parties agree that reasonableness is the default standard of review that applies to an immigration officer's decision on whether to grant an exemption to permanent residency requirements based on H&C grounds.

[10] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court set out a revised framework to determine the standard of review, which provides no reason to depart from the reasonableness standard followed in previous case law (*Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*]; *Bhalla v. Canada (Citizenship and Immigration)*, 2019 FC 1638 [*Bhalla*]). A court conducting reasonableness review scrutinizes the decision maker's decision in search of the hallmarks of reasonableness – justification, transparency and intelligibility – to determine whether it is justified in relation to the relevant factual and legal constraints (*Vavilov*, at para 99). Both the outcome and the reasoning process must be reasonable (*Vavilov*, at para 83).

[11] While H&C decisions are exceptional and highly discretionary, warranting significant deference (*Miyir v. Canada (Citizenship and Immigration)*, 2018 FC 73 at para 12), officers must "substantively consider and weigh all the relevant facts and factors before them" (*Kanthasamy*, at para 25, emphasis in original). Where elements are overlooked, particularly central compassionate planks, the balancing will necessarily be deficient because those gaps in the reasons prevent the Court from knowing whether, if properly considered, the officer would have assigned positive, negative or neutral weight (*Bhalla*, para 21, 28).

[12] The only issue in this application is whether the Officer's decision was reasonable. The Applicant submits that the Officer unreasonably failed to make a proper assessment of the Applicant's establishment, as well as of the main thrust of his hardship submissions; I agree.

*Issue 1: Establishment*

[13] The Applicant argues that the Officer's assessment of his establishment was deficient and unreasonable, contending that the Officer was prepared to give favourable consideration to the Applicant's establishment factors, but nevertheless did not "find it to be exceptional" and later cited an insufficiency of evidence to be satisfied that the Applicant's establishment justified an exemption. According to the Applicant, the Officer did not indicate what would be considered exceptional under the circumstances or explain what threshold the Applicant had failed to meet. In short, there was no indication as to why his establishment evidence was insufficient (relying on *Chandidas v. Canada (Citizenship and Immigration)*, 2013 FC 258 [*Chandidas*]).

[14] The Respondent, on the other hand, acknowledges that the Officer was required to examine all relevant factors, to determine whether they excite in a reasonable person in a civilized community the desire to relieve the misfortunes of another (*Kanthasamy*, at para 13). However, the Respondent submits that the Officer, having made reference to the letters and to his involvement in the community, neither discounted the Applicant's ties, nor ignored any relevant factors, and that it was reasonable to conclude his establishment was unexceptional.

[15] In this regard, the Respondent submits that in this case, and distinct from *Chandidas*, the Officer provided an explanation for why the establishment evidence was insufficient by reasoning that it was not uncommon for individuals residing in Canada to be employed, volunteer, rent property, own a vehicle, or accumulate savings. The Respondent also relies on (i) *Regalado v. Canada (Immigration, Refugees and Citizenship)*, 2017 FC 540 [*Regalado*] to assert

that Officer cannot be expected to arbitrarily set the degree of establishment required or to speculate what would have triggered a s 25 exception, and (ii) *Zhang v. Canada (Citizenship and Immigration)*, 2021 FC 1482 [*Zhang*] to assert that "exceptional" was used descriptively, and not to imply the Applicant was required to demonstrate exceptional establishment.

[16] In the recent decision of *Quiros v. Canada (Citizenship and Immigration)*, 2021 FC 1412 [*Quiros*] at paras 14 to 21, Justice Go of this Court provides some comments I find instructive to address the Parties' interpretations of *Chandidas* and *Regalado*. As Justice Go effectively notes, while *Regalado* cautions against inventing an arbitrary standard, it does not stand for the principle that findings need not be explained. Rather, the absence of a standard benchmark for establishment is concerned with ensuring that decision makers are sensitive to the particular circumstances of each case.

[17] Furthermore, the situation here is distinguishable from *Regalado*, because there the applicant criticized the officer for failing to set out the level of establishment he required to warrant an exemption. Here, on the other hand – and as was the case in *Chandidas* - the problem is that the Officer's purported explanation for being unimpressed by the Applicant's establishment is vague and does not appear to have earnestly engaged with the Applicant's particular circumstances or the evidence he provided in support. In *Chandidas* Justice Kane explained at para 80:

> … the officer fails to provide any explanation as to *why* the establishment evidence is insufficient. The officer reviewed the family's degree of establishment in detail, and referred to their work, income, family ties, courses taken, schools attended, and community involvement in various passages of the decision. The officer does not indicate what he would consider to be extraordinary or

> exceptional establishment; he simply states that this is what he would expect and that it would not cause unusual and undeserved or disproportionate hardship if the family were forced to apply for a visa from outside Canada. While this could be argued to be a reason, it is barely informative.
>
> [emphasis in original.]

[18] This precisely explains the weakness in the Decision under review. Clearly, the thrust of the Applicant's submissions, along with the majority of the evidence submitted, were the ties to the community, and the integral nature of the role the cantor has sewn within it over more than 3 decades, having worked there during significant periods ever since the late 1980s.

[19] To begin with, the Applicant himself provided an explanation of his past, including the fact that in his many years in Canada, he had never received welfare, social assistance, or employment insurance. The Applicant provided details regarding his activities in Canada during the periods he had lived here since 1988, in the H&C forms themselves and in an addendum, stating in part:

> I'm well established in Canada and have never claimed or received welfare or social assistance or employment insurance. I am permanently employed at the Congregation Belt Tikvah of Ottawa synagogue where I am paid approximately $40,000 per annum. I own an automobile and am a long-term apartment renter in the West Ottawa area. In addition to my history of stable employment and residence, I have managed to accumulate savings through sound financial management. I have an impeccable civil record in Canada with absolutely no criminal charges or any other negative interactions with law enforcement. I have also participated in numerous community functions on a voluntary basis and established a stable pattern on living here…. Due to my occupation as a Cantor, I understand that I may work in Canada without a permit, pursuant to section 186(1) of the *Immigration and Refugee Protection Regulations*.

[20] Many H&C applications fail - and cannot be resurrected through judicial review - due to a lack or “insufficiency” of evidence in support of central assertions of the application (for a recent example, see *Lin v. Canada (Citizenship and Immigration*), 2022 FC 341 at paras 20-22). Here, the Applicant supported his application with over twenty detailed and distinctive letters of support that came from a diverse swath of people in his community. Community leaders who provided letters included senior rabbis (including the late Rabbi Bulka) and heads of community organizations.

[21] This evidence attested to different attributes of the Applicant’s character, his commitment to community work and volunteerism, and his unique and valuable role and contribution within the community he serves. Several letters, including from not-for-profits, spoke to his teaching, assistance to the sick, and help with individual study and prayer. Apart from his professional duties in clergy leadership as a cantor (for which proof of employment was provided), the writers spoke to a range of assistance provided to them, their family and friends, from Bar Mitzvah lessons, to assistance in personal crisis, including helping with illness and funerals.

[22] The Officer, purportedly addressing the contents of all 21 letters, had only the following one sentence to say in the entire decision: “[a]dditionally, letters were provided from multiple individuals indicating that the applicant has engaged in some form of volunteer work.” The Respondent submits that the Officer looked at the other evidence and gave some favourable consideration to the applicant’s establishment in Canada, but that the Officer concluded that the establishment was not exceptional. Simply saying that that “I have reviewed all the evidence” does not suffice. As the majority stated in *Vavilov*, at para 64, “it is not enough for the outcome

of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies" (emphasis in original).

[23] Here, the Officer casts the Applicant's establishment in the most generic of terms, and then uses that generic description to discount them as being ordinary. The Officer does so without any explanation as to why, despite detailed evidence from third parties, the Applicant himself, and submissions from his counsel. This is precisely what *Chandidas*, *Quiros*, and *Regalado* warn against. In this case, as with *Chandidas*, and *Quiros*, the Officer listed a series of establishment factors that, while acknowledged as positive, were then discounted and described as not being exceptional or uncommon. In doing so, the Officer clearly implied it was necessary for the Applicant's establishment to be exceptional to warrant unqualified positive weight.

[24] This failure to consider the H&C application in the context of the submissions also runs contrary to the guidance of this Court in *Cezair v. Canada (Citizenship and Immigration)*, 2019 FC 1510 [*Cezair*], a case raised by the Respondent. In *Cezair*, at paras 22-25 Justice McHaffie noted that the officer in that case could not be faulted for assessing the applicant's degree of interdependence as an individual within a network of friends and peers in terms of hardship, because that is precisely how she had cast her submissions. As such, the officer was required to assess her assertions and it would have been unreasonable to have ignored them. I understand Justice McHaffie's comments in *Cezair* to be concerned with an officer being required to be sensitive to the submissions made in support of the application.

[25] Here, it is clear to me that the Officer did not properly consider the submissions and supporting evidence on the central H&C factor the Applicant put forward (establishment) in the context of the submissions made in support of the application. A simple statement to the effect that "I have reviewed all the evidence" amounts nothing more than lip service, and does not substitute for an explanation as to *why* the establishment evidence is insufficient. On its own, and without anything more, that statement does not justify the conclusion.

[26] Turning to the Respondent's second argument, the Respondent relies on *Zhang* to describe as "purely descriptive" the Officer's phrase "I do not find [Mr. Subar's] establishment to be exceptional." I find that the reliance on *Zhang* is misplaced. In *Zhang*, Justice Zinn found that an Officer had unreasonably required an Applicant to demonstrate an exceptional degree of establishment. The officer in *Zhang* also stated that he did not find the applicants' establishment to be exceptional (at paras 1-3, 27-29). Justice Zinn explained that "the Officer was operating with an understanding that the Applicant was required to demonstrate "exceptional" establishment or hardship. This is not the test for a humanitarian and compassionate decision" (*Zhang*, at para 28).

[27] Similarly, in this case, and as I have noted above, I cannot agree with the Respondent that the Officer's use of the term "exceptional" in the present case was "purely descriptive." Here, the Officer wrote as follows:

> In consideration of the applicant's establishment in Canada, I note that the applicant has engaged in employed as a cantor for many years. The most recent being at the Congregation Beit Tikvah of Ottawa synagogue. Additionally, letters were provided from multiple individuals indicating that the applicant has engaged in some form of volunteer work. The applicant has also indicated that

> he has a vehicle, has been renting property and has cumulated savings in Canada. While I have given some favourable consideration to the applicant's establishment in Canada, I do not find his establishment to be exceptional. I do not find it uncommon for individuals who reside in Canada to be employed, volunteer, rent property, own a vehicle or cumulate a savings account…

[28] As with *Zhang*, the Officer in this case was mistakenly under the impression the Applicant's establishment had to be exceptional. That is not a threshold that needs to be attained to be meet the requirements for H&C or to excite in a reasonable person in a civilized community a desire to relieve his misfortune (*Kanthasamy*, at paras 13, 21). Rather, the factors raised by the applicant must be factored in and considered as a whole package, and together, the officer must explain whether or not the entire context justifies the grant of the s 25 exemption – and why.

[29] In sum, on the basis of the two errors made on the establishment factor - namely the failure to address the letter evidence, and expecting exceptionality of establishment - the decision is unreasonable.

*Issue 2: Hardship*

[30] I will now also address two other flaws in the decision which bear mentioning, both pertaining to the hardship analysis. On hardship, the Officer found:

> Furthermore, I find insufficient evidence has been put forth to support that the aforementioned relationships are characterized by a degree of interdependency and reliance to such an extent that if separation were to occur it would justify granting an exemption under humanitarian and compassionate considerations.

[31] The Respondent stated that there was not evidence of “interdependency” other than the continuing employment relationship with the cantor’s synagogue. This is not persuasive. While some of the included documentation comes from the Applicant’s employer, the bulk of the evidence and the application itself, focuses on elements outside of employment, namely the irreplaceable role played by the Applicant as a religious leader assisting both the community at large and individuals, inside and outside of his cantorial duties.

[32] This, again, harkens back to the first issue discussed above, namely the fact that the Officer does not advert to or reasonably characterize the contents of the supporting evidence, calling into question whether the letters were actually considered or weighed. Here, despite the evidence, the Officer fails to justify his comments regarding a lack of interdependency with any specifics. Indeed, most of the letters spoke to the tight integration of the applicant in the community in all the areas of life described above, and where they do not refer explicitly to strong “integration”, their content addresses strong bonds formed over the years.

[33] It is not for the Court to reweigh the evidence, and it would have been open to the Officer, in spite of these letters, to come to the same conclusion, and reasonably so. Indeed, in *Singh v. Canada (Citizenship and Immigration)*, 2022 FC 339 [*Singh*], a Sikh priest documented his H&C application with dozens of letters of support from his congregants. However, there, in contrast to the present case, the Officer had engaged in analysing and addressing the evidence presented in support of the application.

[34] For instance, on the supporting documentation, the Officer in *Singh* referred to several of the support letters and to their contents, and in analysis, made it clear they had been examined and considered, noting that several appeared to be largely replicated, thereby diminishing their probative value in the Officer's view (*Singh*, at para 3). The officer in that case also specifically noted that there were other priests at the Temple in question, that some of the applicant's teachings could still be delivered remotely and that there was no indication in the evidence that the activities of the Temple would be jeopardized (*Singh*, at para 4).

[35] By contrast, in the present case, the Officer's only reference to the letters is that they indicate the Applicant "engaged in some form of volunteer work." There is no mention of the repeated reference to the integral role played by the Applicant as a leader in his Synagogue, and more broadly in his community, other than the vague references to dependency discussed above. Such an incomplete explanation of the main evidence in support of the application is sufficient to constitute a significant misapprehension, leaving it unclear whether the substance of letters were actually considered to arrive at a finding of insufficient interdependency.

[36] While the Officer might certainly, after a genuine consideration, arrive at a negative outcome on this issue, it is difficult to understand, without an explanation, how the Officer arrived at a conclusion that a leader in clergy, and teacher, did not have any interdependency, given his involvement as outlined by the evidence. This was not a mere parishioner who observed from a pew in the back.

[37] The other important gap in the hardship analysis relates to the Officer's consideration of the Applicant's concern given unemployment levels for Orthodox Jews in Israel, stating that his prospects would be dim to non-existent given his age.

[38] The Respondent provided written submissions to the effect that it was reasonable, despite the single article submitted by the Applicant, for the Officer to determine that there was "insufficient evidence" that the Applicant would be unable to find employment in Israel, particularly given his established skills and knowledge.

[39] If the only issue raised by the Applicant was employment levels, I would agree. However, the Applicant particularized his hardship to finding employment as an Orthodox Jew of an advanced age:

> At my age of 65, I would have virtually no opportunity to re-establish a career of any sort in my native Israel. I respectfully ask that the decision-maker for this application adopt an empathetic approach in evaluating my request for humanitarian and compassionate consideration. I am not alleging persecution or any similar factor, but rather that I been making a significant contribution to the cultural and religious life of the Canadian Jewish community for a long-term period and that if I am required to leave Canada, I will not be able to continue in this position or role. This would constitute significant hardship for me, as well as for the community that I have been serving.
>
> (emphasis added)

[40] Nowhere does the Officer take the Applicant's age into consideration in the Decision, or his fear that returning to Israel, particularly at his age, would amount to forced retirement from his career. This omission is critical in my view, and clearly demonstrates that the Officer was not

attentive to the H&C factors forwarded by the Applicant in his application, and the evidence submitted that addressed a specific subset of the population in his native Israel.

[41] Although I acknowledge again that the Court's task is not to reweigh evidence, it is uncontested by either party that officers making H&C determinations must consider and weigh all the relevant facts and factors before them (*Kanthasamy*, at para 25). Here, the newspaper article included with the H&C specifically addressed the issue of unemployment within the Orthodox community. Without addressing the factors raised by the Applicant and supported by evidence, it was unreasonable to dismiss them on the basis of insufficiency.

## IV. Conclusion

[42] Give the flaws in the establishment and hardship analyses described above, I will grant this application.

**JUDGMENT in IMM-3384-20**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is granted.
2. The H&C decision is set aside and remitted to another officer for redetermination.
3. No questions for certification were proposed and I agree that none arise.
4. No costs will be issued.

"Alan S. Diner"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | IMM-3384-20 |
| **STYLE OF CAUSE:** | YAIR SUBAR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | HELD BY VIDEOCONFERENCE |
| **DATE OF HEARING:** | MARCH 1, 2022 |
| **JUDGMENT AND REASONS:** | DINER J. |
| **DATED:** | MARCH 15, 2022 |

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