Federal Court  Cour fédérale

Date: 20220405

Docket: IMM-618-21

Citation: 2022 FC 465

Ottawa, Ontario, April 5, 2022

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

HENNADIY BABYCH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Hennadiy Babych, is a citizen of Ukraine who applied from within Canada for permanent residence on humanitarian and compassionate [H&C] grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. A Senior Immigration Officer [Officer] of Immigration, Refugee and Citizenship Canada [IRCC] refused the Applicant's H&C application on January 14, 2021 [Decision].

[2] The Applicant now seeks judicial review of the Decision, arguing the Officer disregarded evidence and provided reasons that were unresponsive to the Applicant's circumstances and submissions. The Applicant also submits that, notwithstanding he has come to the Court with "unclean hands," the Court should consider the merits of his judicial review application.

[3] There is no dispute that the overarching issue for determination in this matter is whether the Decision was reasonable. The presumptive standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10. I find that none of the situations rebutting such presumption is present here.

[4] To avoid judicial intervention, the decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility: *Vavilov*, at para 99. A decision may be unreasonable if the decision maker misapprehended the evidence before it or did not meaningfully account for or grapple with central or key issues and arguments raised by the parties: *Vavilov*, at paras 125-127. The party challenging the decision has the onus of demonstrating that the decision is unreasonable: *Vavilov*, at para 100.

[5] As explained below, having exercised my discretion to hear the merits of this application, I am not satisfied that the Applicant has met his onus. I therefore dismiss this judicial review application.

II. Additional Background

[6] Mr. Babych first came to Canada in August 2004 and made a claim for refugee protection on the basis of his sexual orientation (bisexual). The Refugee Protection Division [RPD] denied the claim in 2006. His application for leave to review the denial judicially also was dismissed in 2006.

[7] Mr. Babych married Mr. Volodymyr Ivasyuk, his second spouse and now ex-husband, in 2007, having been previously married to a woman in Ukraine. Mr. Ivasyuk applied to sponsor Mr. Babych as a permanent resident to Canada in 2009. Mr. Babych also submitted an application for a pre-removal risk assessment [PRRA] which was refused in 2011. His removal was deferred while the spousal sponsorship was pending, and shortly after also was refused. IRCC found that the marriage was not genuine, and that the Applicant was cohabitating with his current spouse, Ms. Olena Usatenko, who became a Canadian citizen in January 2012. They married in February 2012.

[8] Before his marriage to Ms. Usatenko, Mr. Babych was arrested and released on a bond in 2011. A removal order was issued against Mr. Babych, and his removal from Canada was scheduled for June 2013. He brought a motion for a stay, which was heard and dismissed by (former) Justice Campbell (Court File No. IMM-3820-13). He did not appear for his removal, and a warrant for his arrest was issued on June 11, 2013. The warrant remains outstanding.

[9] Mr. Babych submitted his H&C application in June 2018, leading to the Decision.

III. Challenged Decision

[10] The Officer finds that the Applicant's lengthy unauthorized work history in Canada attracts significant negative weight. On the other hand, the Officer gives "modest" weight to the factors advanced of establishment and family ties in Canada, as well as adverse country conditions (specifically in the context of: generalized conditions involving less favourable economic conditions in Ukraine; the lack of medical care including fertility care and the unaffordability of IVF treatments in Ukraine; and sexual orientation). The Officer is not persuaded, however, that the collective weight of these factors is sufficient to grant an exemption under H&C considerations, given that the Applicant understood the temporary nature of his status when he arrived in Canada in 2004, and that he failed to leave multiple times when directed to do so by Canadian immigration officials.

[11] While the Officer acknowledges that the Applicant also advanced the factor of "best interest of the child" [BIOC], the Officer notes there is no evidence that Mr. Babych and his spouse currently have any children or that she is pregnant. Nor is there any obligation, as the Officer noted, to conduct a BIOC assessment in respect of speculative, future children, notwithstanding the breadth of the H&C considerations in section 25.

IV. Analysis

[12] Having considered the parties' material and heard their oral submissions, I am not persuaded that the Decision is unreasonable.

[13] Dealing first with the issue of "clean hands," the Federal Court of Appeal confirms that the reviewing court has discretion to dismiss a judicial review application without proceeding to determine the merits, or to deny relief in the face of a reviewable error, if satisfied that an applicant has engaged in misconduct: *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2006 FCA 14 [*Thanabalasingham*] at paras 9. In exercising its discretion, the reviewing court is directed "to attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and on the other, the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights": *Nwafor Ep Antoine Sayegh v Canada (Citizenship and Immigration)*, 2021 FC 795 at para 24, citing *Thanabalasingham* at para 10.

[14] A non-exhaustive list of factors for the Court to consider in the exercise of discretion, include: the nature and seriousness of the misconduct and the extent to which it undermines the proceeding in question, the strength of the case, the need for deterrence, the importance of the individual rights involved, and the likely impact on an applicant if the impugned administrative decision is permitted to stand: *Thanabalasingham*, above at para 10.

[15] In my view, the Applicant's blatant disregard for a validly issued removal order by failing to report for removal, resulting in a warrant for his arrest, represents serious misconduct that merits a strong deterrence message to those who might be inclined to engage in similar conduct. I agree with the Respondent that the Applicant has had multiple opportunities to present his case and have various applications considered, and has been found to have engaged in a marriage of convenience. He also has benefited from prior risk assessments (RPD and PRRA),

and his rights have been fully considered in prior decisions, albeit in the context of a more stable, less conflict-riddled environment that existed in Ukraine at the time of the decisions.

[16] That said, I am persuaded that the recent armed invasion of Ukraine, as acknowledged by the Respondent at the hearing of this matter, coupled with the fact that this Court already granted leave for the judicial review to commence, warranted the exercise of the Court's discretion in the circumstances to consider the merits of the instant judicial review application. As noted by my colleague Justice Norris, "[s]ince the reviewing Court must engage with the merits of the underlying judicial review in any event to assess 'the apparent strength of the case,' a full assessment of those merits would come at little extra cost to the administration of justice": *Alexander v Canada (Citizenship and Immigration)*, 2021 FC 762 at para 44.

[17] Turning to the issue of the reasonableness of the Decision, the Applicant submits that the Decision was unreasonable in three respects, namely, that his spouse would have family support in Canada were he to return to Ukraine, that the Officer was unresponsive to the asserted hardship regarding the unaffordability of fertility treatment in Ukraine, and that the Officer misapprehended or disregarded evidence regarding the Applicant's fear of being conscripted into military service as a pacifist and an LGBT person. I am mindful that while country conditions in Ukraine currently are less predictable and more volatile than at the date of the Decision, its reasonableness must be viewed through the lens of the conditions in evidence at that time.

[18] To argue that the Officer failed to engage with the substance of the evidence, as Mr. Babych does here, amounts in my view to advocating for the reweighing of the evidence that was

before the Officer. This is not the role of the Court on judicial review, however: *Vavilov* at para 125.

[19] For example, Mr. Babych argues that a central ground of his H&C application is the support he provides to his Canadian spouse in connection with medical and psychological issues. He submits that Officer erred by stating that his spouse, Ms. Usatenko "may continue to rely on her Canada based family members for emotional and physical support as the applicant indicates she has done in the past, alongside the care of her primary physician, should her husband depart Canada." The Applicant points in this regard to evidence that shows his spouse has only one family member in Canada, a sister, from whom she is estranged and they have not had any communication for several years. According to Mr. Babych, the Officer's conclusion that Ms. Usatenko has family support in Canada is directly contradicted, therefore, by the evidence before the Officer. I disagree.

[20] The Applicant's Record also contains the submissions of previous counsel in support of the H&C application which state that "they [meaning the Babych-Usatenko family] have strong relationships with their Canadian relatives and friends." In addition, one of the support letters states, "I am account [*sic*] Olena as my little sister as I know she is estrange [*sic*] with her oldest sister for many years. Especially I am the same years old as her oldest sister; we are both born in July 1972."

[21] When the Applicant's current counsel was asked at the hearing about the previous counsel's submissions regarding strong relationships with Canadian relatives and friends, the

counsel's response was that this is a "generic statement." To characterize the previous counsel's statement in this manner, however, in the absence of any evidence about what such counsel may have meant, is tantamount in my view to asking the Court to reweigh evidence the Officer is presumed to have considered: *Hashem v Canada (Citizenship and Immigration)*, 2020 FC 41 at para 28.

[22] Further, bearing in mind that perfection is not the applicable standard, a reasonable administrative decision is one that is justified in relation to the constellation of law and facts that are relevant to the decision: *Vavilov*, above at paras 91 and 105. On that basis, I am satisfied that the Officer's finding regarding family support for Ms. Usatenko is not unreasonable in the circumstances.

[23] Regarding the Applicant's asserted fear of being called into the army as a pacifist, I am not persuaded that the Officer erred in stating that "little evidence in relation to mandatory conscription has been submitted," and that the evidence submitted has limited probative value because it is not from an authoritative source. The evidence relied on in this regard takes the form of a Wikipedia article entitled "LGBT rights in Ukraine."

[24] Having reviewed the H&C application and accompanying support material and submissions, I note that the Applicant did not link his fear of conscription to his sexual orientation, only to his pacifist views. In his own letter in support of his H&C application, he states, "I am a pacifist and I am very scared to be called into the army, as I never served in the army in the past." The Officer cannot be expected to have considered an issue (fear of

conscription because of sexual orientation) that was not raised in the H&C application and is being raised for the first time on judicial review: *Nwosu v. Canada (Citizenship and Immigration)*, 2022 FC 181 at para 22.

[25] I add that there was no country conditions evidence about those with pacifist views in Ukraine. Further, as noted by the Officer, the onus is on the Applicant. Absent establishing that there is mandatory conscription in Ukraine as a first step, there was no need, in my view, for the Officer to consider the implications of holding pacifist views if conscripted (about which there was no evidence), or of being an LGBT person in the event of conscription (the latter issue not having been raised in the H&C application).

[26] I find that, on the whole, the Officer reasonably considered the Applicant's sexual orientation. The Officer accepts that the Applicant identifies as bisexual and that he could face more discrimination based on sexual orientation in Ukraine than he would face in Canada. The Officer notes, however, that the Applicant has not provided details of instances where he faced such discrimination. The Officer also notes the RPD determination that those who identify as homosexual and bisexual can express their orientation freely in Kiev (now known as, Kyiv), and further that the Applicant did not refute this determination nor describe how or why he was unable to express himself in Ukraine.

[27] I agree with the Respondent that the Officer was entitled to consider and assign weight to those of the RPD's findings about the Applicant's sexual orientation that were in evidence. Further, the Decision demonstrates, in my view, that the Officer was careful to delineate the

scope of the H&C analysis as an inquiry that is distinct from the RPD decision. The Officer nonetheless explains that the RPD is a decision making body who are experts in determining protection claims. The Officer notes that the Applicant raised the same risk of discrimination in Ukraine because of his sexual orientation, as in his H&C application, and the RPD found that there was adequate state protection: *Garcia Garcia v Canada (Citizenship and Immigration),* 2020 FC 300 at para 32.

[28] Regarding the availability of fertility care and IVF treatments in Ukraine, as the Officer noted, the evidence does not show that Ms. Usatenko is currently undergoing IVF treatment, nor does it support other claims regarding availability of IVF treatments.

[29] In sum, I find the Decision conveys that all the relevant H&C factors raised were considered reasonably with reference to the available evidence: *Palencia v. Canada (Citizenship and Immigration),* 2021 FC 1301 at para 39. In other words, the Decision permits the Court to understand the Officer's reasons which, on the whole, are justified, transparent and intelligible.

V. Conclusion

[30] For the above reasons, this judicial review application is dismissed.

[31] Neither party proposed a serious question of general importance for certification and I find that none arises in the circumstances.

JUDGMENT in IMM-618-21

THIS COURT'S JUDGMENT is that:

1. The Applicant's judicial review application is dismissed.

2. There is no question for certification.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**
***Loi sur l'immigration et la protection des réfugiés* (L.C. 2001, ch. 27)**

Entering and Remaining in Canada	**Entrée et séjour au Canada**
Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
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.	**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.

FEDERAL COURT

SOLICITORS OF RECORD

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