Federal Court  Cour fédérale

Date: 20230329

Docket: IMM-3935-21

Citation: 2023 FC 442

Ottawa, Ontario, March 29, 2023

PRESENT: Mr. Justice Norris

BETWEEN:

TAIWO PETER AKINWUMI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant is a 45 year-old citizen of Nigeria. In June 2019, he entered Canada irregularly from the United States and claimed refugee protection. In September 2019, his claim was found to be ineligible for referral to the Refugee Protection Division of the Immigration and Refugee Board of Canada because the applicant had previously claimed refugee protection in the United States: see paragraph 101(1)(c.1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] In February 2020, the applicant submitted an application for permanent residence in Canada on humanitarian and compassionate ("H&C") grounds under subsection 25(1) of the *IRPA*. The application was based on his establishment in Canada, the hardship he would experience in Nigeria as a bisexual man, the stigmatization he would face in Nigeria as someone requiring mental health treatment, and the unavailability of the treatment he requires there.

[3] In a decision dated May 28, 2021, a Senior Immigration Officer with Immigration, Refugees and Citizenship Canada refused the application. The officer concluded that the factors the applicant relied on were insufficient to justify granting an exemption under subsection 25(1) of the *IRPA* to permit the processing of his application for permanent residence from within Canada.

[4] The applicant now applies for judicial review of this decision under subsection 72(1) of the *IRPA*. He contends that the decision is unreasonable. As I explain in the reasons that follow, I agree. This application must, therefore, be allowed and the matter remitted for reconsideration by a different decision maker.

[5] Subsection 25(1) of the *IRPA* authorizes the Minister 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 Minister may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations under the Act only if the Minister "is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national." This discretion to make an exception provides flexibility to mitigate the

effects of a rigid application of the law in appropriate cases (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 19). Whether relief is warranted in a given case will depend on the specific circumstances of that case (*Kanthasamy* at para 25).

[6] The discretion conferred by subsection 25(1) of the *IRPA* should be exercised in light of the equitable underlying purpose of the provision (*Kanthasamy* at para 31). Thus, decision makers should understand that H&C considerations refer to "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 – so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the Immigration Act" (*Kanthasamy* at para 13, adopting the approach articulated in *Chirwa v Canada (Minister of Manpower & Immigration)* (1970), 4 IAC 338). Decision makers should therefore interpret and apply subsection 25(1) to allow it "to respond flexibly to the equitable goals of the provision" (*Kanthasamy* at para 33). At the same time, it is not intended to be an alternative immigration scheme (*Kanthasamy* at para 23).

[7] It is well-established that the merits of an H&C decision should be reviewed on a reasonableness standard (*Kanthasamy* at para 44). That this is the appropriate standard has been reinforced by *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10.

[8] A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). A decision that displays these qualities is entitled to deference from the

reviewing court (*ibid.*). For a decision to be reasonable, a reviewing court "must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that there is a line of analysis within the reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived" (*Vavilov* at para 102, internal quotation marks and citation omitted). On the other hand, "where reasons are provided but they fail to provide a transparent and intelligible justification [. . .], the decision will be unreasonable" (*Vavilov* at para 136).

[9] The onus is on the applicant to demonstrate that the officer's decision is unreasonable. To set aside a decision on this basis, 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).

[10] In refusing the H&C application, the officer acknowledged that the applicant identifies as bisexual. The officer also acknowledged that extensive evidence speaking to discrimination and human rights abuses against the LGBTQ community in Nigeria had been provided. The officer also recognized that the applicant wishes to remain in Canada to feel safe and free to express and practice his sexual orientation. However, the officer stated: "While I accept that it may be difficult for the Applicant to conceal his sexual orientation and live a double life for fear of discrimination, I find that the Applicant has managed to do so for over a decade while in Nigeria without incident". The officer also found that insufficient evidence had been provided to suggest that the applicant is, or will be perceived as, a gay/bisexual man in Nigeria. The officer therefore concluded that the applicant had submitted insufficient evidence to demonstrate that he will be

discriminated against based on his "sexual orientation and/or mental health" should he return to Nigeria.

[11] I agree with the applicant that the officer's weighing of this factor is unreasonable. The officer's assessment rests on the premise that any hardship flowing from the applicant's sexual identity could be managed by suppressing that identity. As Justice Barnes held in *VS v Canada (Citizenship and Immigration)*, 2015 FC 1150 at para 12, this is "quite simply, insensitive and wrong. The imposition on LGBT individuals of a legal requirement for discretion is a hold-over from a time when, unlike heterosexual couples, LGBT couples were expected to conceal their affection. This type of anachronistic thinking has no place in a humanitarian assessment."

[12] The respondent defends the decision by submitting that the officer reasonably determined that the applicant had presented insufficient evidence of his sexual identity so this issue is entirely theoretical. I do not read the key part of the decision in this way. While the decision as a whole is somewhat ambiguous in this respect, and while the evidence of the applicant's bisexuality was far from overwhelming, in the critical passage set out above, the officer does appear to accept the applicant's sexual identity as a fact that the applicant would have to conceal, requiring him to lead a "double life".

[13] Furthermore, I am unable to agree with the respondent's alternative argument that, while the officer may have made a poor choice of words, this was an appropriate response to the applicant's submission in his H&C application that if he is required to return to Nigeria, "he will be forced to live in hiding." According to the respondent, the officer was simply pointing out

that the applicant had previously managed to do this for many years in Nigeria without incident. I cannot agree that the officer's approach to this issue is reasonable. The important point in the context of an H&C application is that, even if the applicant has been able to suppress his sexual identity in the past and could presumably do so again in the future, having to do this can be, in and of itself, a hardship or misfortune deserving of relief in the mind of a reasonable person in a civilized community. The officer's failure to consider this and, instead, to see suppressing his sexual identity as the solution to the applicant's problems calls into question the reasonableness of the decision as a whole.

[14] The applicant has also challenged the reasonableness of the officer's assessment of hardship relating to his mental health needs. Since I am satisfied that the application must be allowed on the ground relating to the applicant's sexual identity, it is not necessary to consider this additional ground of review.

[15] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that no question arises.

JUDGMENT IN IMM-3935-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Senior Immigration Officer dated May 28, 2021, is set aside and the matter is remitted for redetermination by a different decision maker.
3. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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