Federal Court  Cour fédérale

Date: 20230908

Docket: IMM-5289-22

Citation: 2023 FC 1218

Ottawa, Ontario, September 8, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

JOHNNY ALFREDO CASTRO QUIEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Johnny Alfredo Castro Quiel, seeks judicial review of a decision by a Senior Immigration Officer (the "Officer") dated May 26, 2022, denying his application for permanent residence from within Canada on humanitarian and compassionate ("H&C") grounds, pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] The Officer found that the Applicant's evidence did not weigh in favour of granting the application. In particular, the Officer gave minimal consideration to the Applicant's establishment and negative weight to his "disregard for the immigration laws of Canada."

[3] The Applicant submits that the Officer engaged in an unreasonable assessment of the establishment factor and breached procedural fairness by raising a new issue regarding his Costa Rican citizenship and relying on extrinsic evidence.

[4] For the reasons that follow, I find that the Officer's decision is both reasonable and procedurally fair. This application for judicial review is dismissed.

II. Facts

A. *The Applicant*

[5] The Applicant is a 42-year-old citizen of Costa Rica. The Applicant has five children who live in Costa Rica, ranging in age from 8 to 23 years old. The Applicant's current spouse and her child are Canadian citizens. The Applicant's mother is also a Canadian citizen. The Applicant works as a self-employed painter and handyman in Canada, both to support his family in Canada and his minor children in Costa Rica.

[6] The Applicant first entered Canada on December 11, 2002, and made a claim for refugee protection. The RPD refused his claim on January 14, 2004. The Applicant waived his ability to apply for a Pre-Removal Risk Assessment ("PRRA") and arranged his return to Costa Rica.

[7] After failing to depart Canada within 30 days of the negative refugee determination, the Applicant left Canada on February 8, 2005 under a deemed deportation order. This barred the Applicant from returning to Canada unless he obtained an authorization to return.

[8] The Applicant re-entered Canada on May 20, 2019, without having applied for or received authorization to return and without presenting himself to a border official for re-examination. Later in May 2019, the Applicant met his current spouse, Evelin, who is a Canadian citizen. They married on February 14, 2020 and their daughter, Keydelin, was born in Canada on October 6, 2020. Evelin submitted a letter in support of the Applicant's H&C application, depicting their relationship and her reliance on the Applicant. Because Evelin could not sponsor him, the Applicant applied for permanent residence on H&C grounds in April 2021.

B. *Decision under Review*

[9] In a decision dated May 26, 2022, the Officer denied the Applicant's H&C application. The Officer noted that the onus is on the Applicant to make clear submissions on the relevant factors and to provide sufficient corroborative evidence. The Officer also noted that the Applicant does not wish to return to Costa Rica due to the economic situation, but that the Applicant presented minimal evidence on country conditions.

[10] The Officer found the Applicant's submissions indicated that he was self-employed in Costa Rica for a number of years. The Officer found no evidence demonstrating the Applicant's inability to support his family from Costa Rica or that the Applicant would be unable to find suitable employment upon his return. The Officer found that the provided information on

country conditions are general in nature. Given the Applicant's consistent employment in Canada, the Officer found that the Applicant could use his skills and experience to help him gain employment in Costa Rica.

[11] The Applicant’s siblings also live in Costa Rica. The Officer found no evidence that the Applicant's family would be unable or unwilling to help him upon his return to Costa Rica. Furthermore, the Officer found that there is no information suggesting that the Applicant cannot obtain help from community organizations to re-integrate should he wish to do so.

[12] The Officer found that not wanting to return to the country of origin is not a determinative factor in an H&C application. The Applicant spent much of his life in Costa Rica and is likely familiar with the language, customs and culture. Therefore, the Officer found that the Applicant is not likely to face hardship in Costa Rica such that an exemption to the typical immigration process is justified.

[13] Considering the best interests of the children (“BIOC”), the Officer noted that two of the Applicant’s children in Costa Rica were over 18 years old at the time the H&C application was received. The Officer considered their interests as family members since they were no longer minors. As for the minor children, the Applicant provides ongoing support to them back in Costa Rica. However, the Applicant spent 14 years in Costa Rica before his return to Canada. The evidence did not suggest to the Officer that the Applicant was unable to financially support his minor children at that time or that being closer to his children in Costa Rica would negatively impact their interests.

[14] The Officer also found insufficient evidence to demonstrate how a negative decision would be contrary to Keydelin's best interests. While Keydelin has lived in Canada for the entirety of her young life, the Officer found it reasonable to conclude that she has been exposed to the language, culture, and traditions of Costa Rica through her father, and would likely be able to adapt with minimal difficulty. The Officer found that since Keydelin is the daughter of a Costa Rican parent, she would be able to legally reside in Costa Rica with the Applicant. Ultimately, the Officer gave significant weight to the BIOC.

[15] Turning to the Applicant's establishment in Canada, the Officer found that the Applicant made efforts to establish himself in Canada through marriage to a Canadian citizen and self-employment as a painter/handyman. The minimal evidence of this establishment includes bank statements, utility bills, and photographs. The Applicant also submitted letters of support from family and friends in Canada. The Officer found that this evidence does not demonstrate a mutual dependence such that his departure would create hardship for those involved.

[16] The Applicant's mother also resides in Canada, although the Applicant failed to lead evidence of their current relationship or what impact his departure from Canada might have on his mother. The Officer also considered the Applicant's spouse, Evelin. However, in reviewing Costa Rican citizenship laws, the Officer noted that Evelin could likely obtain Costa Rican citizenship by naturalization as she is married to a Costa Rican citizen.

[17] Finally, the Officer turned to the Applicant's unlawful re-entry into Canada. The Officer noted that the Applicant realizes his mistakes. Citing *Joseph v Canada (Citizenship and*

Immigration), 2015 FC 904, an applicant cannot expect to profit from the time in which they lived/worked illegally in Canada in order to better position themselves for H&C relief (at paras 28-29). In the Applicant's case, he has been in Canada for more than three years without authorization. The Applicant noted that he is unable to have his spouse sponsor him because he is residing in Canada without status. The Officer found that while this may be accurate, the evidence does not demonstrate that an overseas spousal sponsorship cannot be submitted should the requirements of that class be met.

[18] Based on a cumulative assessment of the evidence submitted by the Applicant, the Officer considered the degree to which the Applicant may face difficulties in leaving Canada in order to apply for permanent residence abroad. The Officer found that this alone is insufficient to warrant H&C relief. For these reasons, the Officer refused the application.

III. Issues and Standard of Review

[19] This application for judicial review raises the following issues:

A. *Whether the decision is reasonable.*

B. *Whether there was a breach of procedural fairness.*

[20] I agree with the parties that the appropriate standard of review for the Officer's refusal of the application is reasonableness, in accordance with the Supreme Court of Canada's decision in

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 ("*Vavilov*") at paragraphs 16-17.

[21] The issue of procedural fairness is to be reviewed on the correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 ("*Canadian Pacific Railway Company*") at paras 37-56; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

[22] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13; 75; 85). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A decision that is reasonable as a whole 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). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[23] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than

superficial or peripheral to the merits of the decision, or a “minor misstep” (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36).

[24] Correctness, in contrast, is a non-deferential standard of review. The central question for issues of procedural fairness is whether the procedure was fair having regard to all of the circumstances, including the factors enumerated in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 21-28 (*Canadian Pacific Railway Company* at para 54).

IV. Analysis

A. *Whether the decision is reasonable*

[25] The Applicant argues that the decision is unreasonable because the Officer failed to appropriately assess the Applicant’s establishment in Canada. The Applicant submits that the Officer made two reviewable errors and the decision should be overturned on these bases: 1) the Officer erred by “double counting” the Applicant's misconduct; and 2) the Officer erroneously treated the Applicant’s establishment as evidence that he could become established back in Costa Rica upon removal.

[26] The Applicant first argues that the Officer erred by “double counting” the Applicant's lack of status in Canada as a factor weighing against him. The Officer acknowledged the Applicant’s establishment in Canada, including his self-employment and family ties. However, the Officer assigned diminished weight to the Applicant’s establishment. The Officer then

counted the Applicant's lack of status as a negative consideration in itself. The Officer's use of the language "in addition" makes it clear that they weighed the Applicant's misconduct against him under the establishment assessment and again as an independent consideration. For the proposition that this manner of "double counting" amounts to an irrational chain of analysis, the Applicant relies on this Court's decisions, such as *Jiang v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 413 ("*Jiang*") and *Phan v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 521. The Applicant submits that by "double counting" the Applicant's irregular entry, the Officer elevated the misrepresentation such that it would be impossible to overcome on an H&C application.

[27] The Applicant further submits that the Officer erred by treating the Applicant's establishment in Canada as evidence that he would not suffer hardship by removal because of his newfound ability to establish himself abroad. For example, the Officer notes that the Applicant has been consistently employed in Canada as a painter/handyman and is therefore independent and self-sufficient. The Applicant contends that this ought to be a positive consideration in the H&C assessment, rather than an additional factor weighing against granting the application. The Applicant notes that this Court has previously found reviewable errors where an officer suggests that an applicant's establishment in Canada improves their capacity to establish themselves elsewhere, citing *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 and *Singh v Canada (Citizenship and Immigration)*, 2019 FC 1633.

[28] The Respondent maintains that the Officer's establishment assessment is reasonable. There is no indication that the Applicant had status at ay point since re-entering Canada in 2019.

Contrary to the Applicant's submissions, it was open to the Officer to discount the Applicant's establishment because it resulted from his illegal entry/residence in Canada.

[29] The Respondent cites *Legault v Canada (Minister of Citizenship and Immigration) (C.A.)*, 2002 FCA 125 (CanLII), [2002] 4 FC 358 for the proposition that the Minister is entitled to consider an applicant's illegal entry in an H&C assessment. The Respondent submits that in this case, the Applicant entered Canada without the required authorization in May 2019 and has remained in Canada without status since then. The Respondent submits that any resulting establishment is a product of this illegality and the Officer reasonably considered this factor as a negative consideration.

[30] The Respondent submits that the Officer did not "double count" the Applicant's illegal residence in Canada. The Respondent notes that the jurisprudence on this point is not as clear as the Applicant may suggest, citing *Wang v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 705 ("*Wang*") at paragraphs 24-25. In *Wang*, the Court notes how *Jiang* has been distinguished and that the Immigration Appeal Division is free to compare factors against each other (*Wang* at para 24). The Respondent submits that this can turn into a "line-by-line treasure hunt for error" if an applicant is effectively arguing that the decision-maker conducted the weighing process too early in its reasoning (*Vavilov* at para 102).

[31] The Respondent further submits that the Officer did not convert a positive factor into a negative. The Officer noted the Applicant's long and successful history of self-sufficiency and employment, both in Costa Rica and Canada, and expected this pattern to continue. For the

Respondent, there is nothing unreasonable in considering the Applicant's abilities, including those developed in Canada, in assessing the hardship they might face if returned to their home country.

[32] I agree with the Respondent that the Officer's decision is reasonable overall and does not warrant this Court's intervention. The onus is on the Applicant to advance all of the H&C factors that the Applicant wishes the Officer to consider and to provide adequate evidence to support their application. It is open to the Officer to find that a portion of the Applicant's establishment occurred while he was failing to comply with Canadian immigration law and is therefore a negative factor.

[33] I take particular note of the fact that there was no evidence put before the Officer to explain or provide further insight into the Applicant's reasons for re-entering Canada in 2019, with no indication that his coming to Canada was a necessity. The Applicant claims that he is concerned with family reunification, but he has five children residing permanently in Costa Rica. The Officer may reasonably consider that if family separation is to be avoided, and no evidence is provided as to the circumstances that led the Applicant to return to Canada in 2019, a valid option for the Applicant would be for his family to return to Costa Rica together.

[34] In my view, the Applicant has not raised a reviewable error in the Officer's assessment of the H&C factors as they apply to his circumstances. The Officer's reasons are clear, cogent, and responsive to the evidence.

B. *Whether there was a breach of procedural fairness*

[35] The Applicant submits that the Officer's decision breached procedural fairness. The Applicant claims that his wife and Canadian daughter would face hardship in the event of his removal. The Applicant submits that the Officer dismissed this on the basis that the Applicant's wife and child both have a right to Costa Rican citizenship and that the family could reside there together. The Applicant submits that the Officer raised this as a new issue and conducted their own research on citizenship laws in Costa Rica. In raising and relying on this extrinsic evidence, the Applicant submits that the Officer denied the Applicant procedural fairness. The Applicant cites *Majdalani v Canada (Citizenship and Immigration)*, 2015 FC 294 for the proposition that not all information online can be considered publicly available documents.

[36] In assessing whether the duty of fairness requires a decision-maker to disclose documents, the Court will consider a host of factors, as outlined in *Alves v Canada (Citizenship and Immigration)*, 2022 FC 672 ("*Alves*") at paragraph 30. These factors include the source and its reputability, the public availability, the novelty and significance of the information, and the nature of the decision (*Alves* at para 30). In this case, the Officer relied on a single website, which has no affiliation with the Costa Rican government and provides no citation to any of the sources for its research on Costa Rican citizenship laws. The website includes a disclaimer, which disavows any claim to correctness. The Officer cited no other source for these findings. The Applicant submits that the Officer did not rely on a well-known or reliable source of information and the Applicant was therefore owed the opportunity to respond to such information before relying upon it to refuse the application.

[37] The Applicant further argues that the Officer's assessment of Costa Rican citizenship eligibility is incorrect and incomplete. The Applicant refers to the Costa Rican Constitution and information from the Embassy of Costa Rica in Washington, noting that a child may be eligible for citizenship but must first be registered by his parents. As for the Applicant's wife's eligibility, Article 15 of the Costa Rican Constitution provides that a spouse must reside as a married couple in Costa Rica for two years before becoming eligible, meaning that his spouse is not eligible at this time. Ultimately, the Applicant submits that the Officer failed to engage with citizenship law in Costa Rica.

[38] Furthermore, the Applicant did not put into evidence that his daughter and wife could/could not become Costa Rican citizens. Therefore, the Applicant submits that the information is novel in that it raises a new issue that the Applicant did not raise himself and procedural accommodation of advance notice was required. The Applicant argues that a stronger duty of fairness should have been accorded by way of notice and that the Officer's reliance on extrinsic evidence without providing any form of notice was a denial of procedural fairness, which warrants granting this application.

[39] The Respondent maintains that the Officer's treatment of the possibility of family relocation to Costa Rica was procedurally fair. The Respondent submits that the onus is on the Applicant to advance all H&C factors that they wish to have considered. The Respondent notes that the Applicant directly advanced family separation as a factor in support of his application and his submission letter accompanying his application specifically mentions the possibility of family relocation to Costa Rica. Therefore, the Applicant was alive to these options when

making his application. The Applicant did not argue that Costa Rican immigration or citizenship laws would prevent the family's relocation.

[40] Furthermore, the Respondent contends, the Applicant attempted to remedy the lack of information before the Officer by offering new evidence regarding Costa Rican citizenship law in his application for judicial review, highlighting the lack of evidence on this point in the Applicant's H&C application. The Respondent argues that this is not a situation where the Officer is resorting to other sources in an attempt to verify the Applicant's submissions. The Respondent submits that there was therefore no violation of procedural fairness when the Officer referred to a publicly accessible website, which provides a non-commercial collection of information. The Respondent argues that procedural fairness does not require the Officer to afford the Applicant the opportunity to address publicly available sources.

[41] I agree with the Respondent. The Respondent rightly notes that the possibility of the Applicant's family relocating to Costa Rica was not raised in a void—rather, this was raised by the Applicant's own submissions regarding the need to prevent family separation, the possible relocation of the family to Costa Rica, and the fact that the latter would be undesirable. However, the Applicant did not advance evidence to demonstrate how and why this relocation would be unreasonable or undesirable in the circumstances. The Officer reasonably attempted to remedy the lack of information provided by the Applicant on this issue and it was open to the Officer to find that in the circumstances, the family was free to relocate to Costa Rica. I do not find that the Officer breached procedural fairness by not providing the Applicant with an

opportunity to respond to a publicly available document regarding citizenship laws, particularly given the lack of evidence advanced by the Applicant on this issue.

V. Conclusion

[42] This application for judicial review is dismissed. The decision is both reasonable and procedurally fair. The Officer assessed reasonable considerations and appropriately weighed the Applicant's non-compliance and establishment. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-5289-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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