Federal Court Cour fédérale

Date: 20240409

Docket: IMM-7154-22

Citation: 2024 FC 551

Montréal, Quebec, April 9, 2024

PRESENT: The Honourable Madam Justice Turley

BETWEEN:

ABRAHAM YUSEF OLVERA QUIJANO and ROCIO MATA VAZQUEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS FOR JUDGMENT

I. Overview

[1] The Applicants seek judicial review of a decision of a Senior Immigration Officer [Officer] denying their application 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*].

[2] I am dismissing the application as the Applicants have failed to demonstrate any reviewable errors in the Officer's decision. Based on a global assessment of the relevant factors, the Officer reasonably determined that exceptional relief on H&C grounds was not warranted in the Applicants' circumstances.

II. Background

[3] The Applicants, citizens of Mexico, are common-law spouses. The male Applicant [Principal Applicant] arrived in Canada in January 2007 and the female Applicant [Associate Applicant] arrived in Canada in February 2008. In August 2021, they applied for permanent residence on H&C grounds based on their establishment in Canada and factors in their country of origin.

[4] By decision dated July 14, 2022, the Officer refused the Applicants' H&C application. Taking into account the hardship the Applicants will face if returned to Mexico, the best interests of the children [BIOC], and their establishment in Canada, the Officer was not satisfied that an exemption on H&C grounds was justified.

[5] On hardship, the Officer assigned limited weight to the country conditions evidence, finding that the Applicants did not provide sufficient evidence to establish a link between the adverse country conditions and their particular circumstances. The Officer found that the Applicants may face some challenges in returning to Mexico, such as securing employment: Humanitarian & Compassionate Grounds Reasons for Decision dated July 14, 2022 at p 5 [Officer's Decision]. However, after considering the Applicants' education, skills, and experience,

the Officer concluded that there was insufficient objective evidence the Applicants would not be able to secure employment and re-establish themselves in Mexico. Nevertheless, the Officer did attribute "some weight" to the challenges associated with returning to Mexico: Officer's Decision at p 5.

[6] The Officer considered the BIOC in relation to the Principal Applicant's two children in Mexico and the Associate Applicant's nieces and nephews in Canada: Officer's Decision at pp 5-6. The Officer concluded that while the BIOC carried "some positive weight" there was insufficient evidence that the children's interests "would be negatively impacted to an extent that warrants humanitarian and compassionate relief for the applicants when weighed collectively with the other factors": Officer's Decision at p 9.

[7] With respect to establishment, the Officer determined that, considering the length of time the Applicants had lived in Canada, "it is reasonable to expect they would attain a degree of establishment and integration": Officer's Decision at p 6. The Officer found that the Applicants' employment, finances, integration in the community, and familial ties carry weight in their favour: Officer's Decision at p 8. However, the Officer determined that the Applicants' negative immigration history – over 14 years of unauthorized residency and employment in Canada – did not weigh in their favour.

[8] Ultimately, considering the H&C application as a whole, the Officer concluded that the Applicants' circumstances did not merit granting special relief under section 25 of the *IRPA*.

III. Issues and Standard of Review

[9] The Applicants challenge the Officer's decision on numerous grounds. They allege that the Officer erred in: (i) applying the wrong standard and using a comparative approach; (ii) focusing on hardship and failing to apply a compassionate lens; (iii) failing to assess hardship and establishment separately; (iv) mitigating the Applicants' positive establishment in Canada with their lengthy overstay; and (v) failing to give positive weight to the Applicants' employment during the pandemic.

[10] There is no dispute that the applicable standard of review for all issues raised is reasonableness. Reasonableness is a robust but deferential standard of review: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 12-13 [*Vavilov*]. 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; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 8 [*Mason*]. A decision should only be set aside if there are "sufficiently serious shortcomings" such that it does not exhibit the requisite attributes of "justification, intelligibility and transparency": *Vavilov* at para 100; *Mason* at paras 59-61.

IV. Analysis

A. *Relevant Principles*

[11] Generally, foreign nationals can only apply for permanent residence in Canada from outside the country. However, subsection 25(1) of the *IRPA* provides an exemption to this general rule, allowing foreign nationals to apply from within Canada. An exemption based on H&C grounds is, however, an exceptional and highly discretionary remedy: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 94 [*Kanthasamy*]; *Williams v Canada (Citizenship and Immigration)*, 2022 FC 695 at para 12 [*Williams*]; *Miyir v Canada (Citizenship and Immigration)*, 2018 FC 73 at para 12.

[12] The onus is on the applicant to provide sufficient evidence to justify an H&C exemption: *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 45; *Toor v Canada (Citizenship and Immigration)*, 2022 FC 773 at para 16.

[13] An officer's H&C decision is a global assessment. The relevant considerations are to be weighed cumulatively to determine if relief is justified in the circumstances: *Mirashi v Canada (Citizenship and Immigration)*, 2023 FC 323 at para 20; *Williams* at para 11.

B. *The Officer did not apply the wrong standard*

[14] I do not agree with the Applicants that the Officer applied the wrong standard in assessing whether their circumstances warranted an H&C exemption: Applicants' Memorandum of Fact and

Law at paras 19-27. Specifically, the Applicants assert that the Officer erroneously relied on a "comparative analysis", requiring them to demonstrate "something beyond the norm": Applicants' Memorandum of Fact and Law at para 24. To the contrary, I find that the Officer's approach is consistent with the jurisprudence.

[15] As the Supreme Court made clear, "there will inevitably be some hardship associated with being required to leave Canada": *Kanthasamy* at para 23. However, in *Kanthasamy*, the Court emphasized that H&C applications must not be assessed against an "unusual and undeserved or disproportionate hardship" threshold. Rather, officers are required to undertake a global assessment of the relevant considerations:

> [33] The words "unusual and undeserved or disproportionate hardship" should therefore be treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). As a result, what officers should not do, is look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds, and use the language of "unusual and undeserved or disproportionate hardship" in a way that limits their ability to consider and give weight to *all* relevant humanitarian and compassionate considerations in a particular case. The three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision.
>
> [Emphasis added]

[16] In arguing that the Officer applied the wrong test, the Applicants seize on the following references in the Officer's decision:

- "I acknowledge the loss of employment will occur should the applicants return to Mexico; I note, however, this is a normal consequence of repatriation": Officer's Decision at p 4 [emphasis added];

- "The applicants may encounter some challenges associated with returning (i.e. securing work) and I give this some weight. At the same time I also note this is a normal and inherent consequence of repatriation": Officer's Decision at p 5 [emphasis added];

- "While hardships on return (I.e. securing work, reintegration, absence, etc…) carry some positive consideration, I do not find the applicants' personal circumstances unusual when compared to similarly situated individuals and I am not satisfied their circumstances are such that they were unanticipated by the IRPA": Officer's Decision at p 9 [emphasis added].

[17] I am not persuaded that these references demonstrate that the Officer imposed the wrong standard and assessed the Applicants' application against an "unusual and undeserved or disproportionate hardship" threshold. Reviewing the Officer's decision as a whole, I am satisfied that the Officer properly engaged in a global assessment of the relevant H&C factors as required by *Kanthasamy*.

[18] The Officer comprehensively reviewed the Applicants' evidence and submissions in respect of hardship in their country of origin, the BIOC, and their establishment in Canada. Based on an assessment of the totality of the Applicants' circumstances, the Officer was not satisfied that an H&C exemption was warranted. Significantly, many of the Officer's findings were based on insufficient evidence: Officer's Decision at pp 4-9.

[19] As part of this global assessment, the Officer did not err in considering whether the hardship that would be caused by requiring the Applicants to leave Canada would be "unusual" or beyond "the normal consequences of repatriation". Indeed, this Court has consistently held that the type of hardship that can warrant an H&C exemption is one that extends "beyond that which

is inherent in having to leave Canada": *Del Chiaro Pereira v Canada (Citizenship and Immigration)*, 2022 FC 799 at para 64; *Nyabuzana v Canada (Citizenship and Immigration)*, 2021 FC 1484 at para 27; *Rocha v Canada (Citizenship and Immigration)*, 2015 FC 1070 at para 17.

[20] As a result, there is no reviewable error in the Officer's finding that the Applicants' loss of employment in Canada, and challenges finding new employment and re-integrating in Mexico, are inevitable hardships or consequences of returning to one's country of nationality. Notably, while the Officer stated that these challenges were not "unusual", the Officer found that they carried "some weight" or "positive consideration": Officer's Decision at pp 5, 9.

C. *The Officer did not fail to consider humanitarian and compassionate factors*

[21] While there is no "magic formula", an H&C assessment must not focus on hardship alone, but must consider "humanitarian and compassionate factors in the broader sense": *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at para 33. Whether an officer adopted a compassionate approach to an H&C application "requires a consideration of the reasons as a whole, read in the context of the purpose and limitations of H&C relief": *Muti v Canada (Citizenship and Immigration)*, 2022 FC 1722 at para 11 [*Muti*].

[22] The Applicants argue that the Officer approached this case through the wrong lens − applying a hardship standard and failing "to apply a broader test of compassion": Applicants' Memorandum of Fact and Law at para 28. I do not agree.

[23] In support of their argument that the Officer failed to show compassion, the Applicants refer to the Officer's insufficiency of evidence findings: Applicants' Memorandum of Fact and Law at paras 28-31. The Officer, however, cannot be faulted for addressing specific arguments raised by the Applicants and finding a lack of sufficient evidence in relation to numerous factors advanced: *Mebrahtom v Canada (Citizenship and Immigration)*, 2020 FC 821 at para 25. As Justice McHaffie explained, "a compassionate approach does not mean that an officer is precluded from finding that certain factors only merit limited weight in the overall H&C assessment, or noting the lack of evidence to support a stronger finding": *Muti* at para 14.

[24] Reading the Officer's decision as a whole, I am not persuaded that the Officer lacked empathy or compassion for the Applicants' circumstances. The Officer appropriately considered and assessed all relevant H&C factors, finding that some militated in the Applicants' favour while others did not.

[25] The Officer was specifically alive to the close relationships the Applicants had developed with family members in Canada over the years: Officer's Decision at pp 6-8. The Officer recognized that "there will be a degree of difficulty arising from separation" and that their familial ties carried "weight in their favour": Officer's Decision at pp 7-8. The Officer also assigned positive weight to other establishment factors such as the Applicants' involvement in the community, integration, self-sufficiency, and employment. The Officer expressly recognized the Applicants' employment and contribution during the pandemic, finding it "admirable": Officer's Decision at p 7.

[26] I cannot conclude that the Officer demonstrated a lack of compassion in finding that H&C relief was not justified in the circumstances of this case.

D. *The Officer did not fail to consider hardship and establishment factors separately*

[27] The Applicants further make two interrelated arguments about the Officer's assessment of the Applicants' establishment in Canada and the hardship the Applicants would face in returning to Mexico. The Applicants assert that the Officer erred in: (i) using their establishment in Canada against them in assessing the hardship of a return to Mexico; and (ii) "intermingling" the hardship and establishment analysis. I do not accept either argument.

[28] In making the first argument, the Applicants submit that the Officer "use[d] the gains made by the Applicants against them in the H&C application": Applicants' Memorandum of Fact and Law at para 32. They rely on the following statement in the Officer's hardship analysis: "I have insufficient objective evidence before me that these applicants would not be able to secure employment and re-establish themselves in Mexico given the education, skills and experience they have acquired": Officer's Decision at p 4.

[29] The Applicants' reliance on this Court's decision in *Kilade v Canada (Citizenship and Immigration)*, 2019 FC 1513 is misplaced. In that case, the Court found that the officer's establishment analysis was unreasonable because the officer based the applicants' degree of establishment on whether they could carry out similar activities in their country of nationality. In other words, the officer discounted the applicants' establishment in Canada based on the transferability of skills they had acquired in Canada.

[30] This was not the case here. The Officer did not use a positive establishment factor to diminish the Applicants' establishment in Canada. Rather, under the hardship analysis and in the context of the Applicants' argument that they "would be returning to a country where they had not lived or worked in twelve years", the Officer considered the education, skills, and experience they had obtained in Canada. Based on these credentials, the Officer found there was insufficient objective evidence that they would not be able to secure employment and re-establish themselves in Mexico: Officer's Decision at p 4.

[31] The Officer's approach is consistent with the jurisprudence. Officers are permitted to consider whether skills acquired in Canada could minimize the hardship of returning to the country of nationality, as long as establishment is considered separately: *Bhujel v Canada (Citizenship and Immigration)*, 2023 FC 828 at para 46 [*Bhujel*]; *Joo v Canada (Citizenship and Immigration)*, 2022 FC 1229 at paras 40, 42; *Vitorio v Canada (Citizenship and Immigration)*, 2022 FC 177 at para 33; *Ajtai v Canada (Citizenship and Immigration)*, 2022 FC 963 at para 38.

[32] As Justice Strickland recently stated, "it is not unreasonable for certain traits – in this case adaptability – to impact establishment and hardship differently in a way that maintains the distinctiveness of the two factors": *Bhujel* at para 46. It was, therefore, not a reviewable error for the Officer to consider the Applicants' education, skills, and experience, in their separate assessment of hardship.

[33] Turning to the Applicants' second argument, I do not agree that the Officer erred in "intermingling" the hardship and establishment analysis. There are clearly three separate, distinct

components of the Officer's decision addressing the relevant H&C factors: (i) Factors in Country of Origin/Hardships: Officer's Decision at pp 4-5; (ii) BIOC: Officer's Decision at pp 5-6; and (iii) Establishment: Officer's Decision at pp 6-8. These three parts are followed by several concluding paragraphs: Officer's Decision at pp 8-9.

[34] While I acknowledge that the Officer referred to "hardship" in their establishment analysis, it had no bearing on the Officer's overall establishment analysis. In assessing the Applicants' familial ties in Canada, the Officer stated that the Applicants also have family in Mexico, but that there was insufficient evidence to establish that separation "would pose hardships which merit any significant weight" [emphasis added]: Officer's Decision at p 8. However, despite this statement, the Officer assigned positive weight to the Applicants' familial ties in Canada and did not use hardship to "draw down" the Applicants' establishment in Canada. Moreover, I agree with the Respondent that the remainder of the references to "hardship" following the establishment analysis in the decision constitute statements of the Officer's conclusion and are not part of the establishment analysis.

[35] A review of the decision clearly demonstrates that the Officer did not "intermingle" or conflate the hardship and establishment analyses. The Officer undertook a separate inquiry into the hardship the Applicants will face if returned to Mexico, in light of the country conditions evidence and the Applicants' skills, education, and experiences. The Officer then conducted a separate inquiry into establishment. The Officer accorded weight to the Applicants' "degree of self-sufficiency and integration in the community": Officer's Decision at p 8. The Officer explained why the positive evidence of the Applicants' establishment did not merit significant

weight after considering their financial records, community involvement, and ties to family in Canada.

E. *The Officer did not err in considering the Applicants' non-compliance*

[36] The Applicants' assertion that the Officer erred in relying on their lengthy overstay of 14 years in Canada is without merit: Applicants' Memorandum of Fact and Law at paras 39-43. This Court has held that an applicant's negative immigration history can be a relevant factor in an officer's overall balancing exercise: *Ollivierre v Canada (Citizenship and Immigration)*, 2023 FC 599 at paras 30-32 [*Ollivierre*]; *Hartono v Canada (Citizenship and Immigration)*, 2022 FC 1053 at para 23; *Williams* at paras 13-16; *Rozgonyi v Canada (Minister of Citizenship and Immigration)*, 2022 FC 349 at paras 29-30.

[37] As part of this balancing exercise, an officer must assess the nature and relevance of an applicant's non-compliance and weigh it in the context of the other relevant H&C factors: *Ollivierre* at para 31; *Helalifar v Canada (Citizenship and Immigration)*, 2022 FC 1040 at para 28 [*Helalifar*]; *Garcia Balarezo v Canada (Citizenship and Immigration)*, 2020 FC 841 at para 47. Non-compliance, in and of itself, cannot be invoked as an obstacle to the granting of H&C relief: *Ollivierre* at para 33; *Helalifar* at para 28.

[38] The Applicants argue that the Officer used their non-compliance to diminish their establishment in Canada and therefore failed to engage in a balancing exercise. In support of their argument, the Applicants rely on the Officer's singular use of the word "mitigated" at the outset of the Officer's analysis of the Applicants' non-compliance, as set out in paragraph 40 below.

However, focusing on one word in a decision-maker's reasons is wholly inconsistent with a main tenant of judicial review, which is to read a decision "holistically and contextually, for the very purpose of understanding the basis on which a decision was made": *Vavilov* at para 97.

[39] It is therefore critical to review the decision as a whole to determine whether the Officer undertook an appropriate balancing exercise in weighing the Applicants' non-compliance as one of the factors in the H&C assessment, as permitted by the jurisprudence.

[40] As the passage below demonstrates, the Officer thoroughly assessed the nature and relevance of the Applicants' non-compliance – both their unauthorized residency and their unauthorized employment in Canada for over 14 years. After considering their particular circumstances, the Officer ultimately concluded that the Applicants' non-compliance did not weigh in their favour:

> The positive aspects of the applicants' establishment are to a degree mitigated when taken into account in the context of their immigration history. With the exception of their first six months on entering Canada as visitors, the last 14 plus years of their residency here has been undocumented and unauthorized. The applicants had taken steps to establish themselves for a period of about 14 plus years, at their own risk reasonably given the knowledge that they did not have legal status to remain here. I am not persuaded that the applicants' establishment in Canada since 2007 and 2008 is a result of circumstances beyond their control or due to a prolonged inability to leave Canada. It was only when they filed this H&C in 2021 that their stay here came to be known. There is little before me that the applicants made any efforts to regularize their status in Canada until 2021. Their own submissions without explanation indicate they came to Canada as visitors (2007 and 2008) and never left. They also engaged in unauthorized employment since shortly after their arrivals. I find their deliberate non-compliance with the IRPA does not weigh in their favour in this assessment. Nor am I persuaded that some of the hardships inherent to the requirement of having to depart (i.e. job loss, resettling) after such a lengthy period of time in Canada

> are not a result of their own actions and could reasonably have been foreseen by them.
>
> Officer's decision at p 8.
>
> [Emphasis added]

[41] Notably, the Officer made this finding after undertaking a comprehensive establishment analysis. The Officer considered the Applicants' integration into Canadian society including their family ties and engagement in employment, training, education, volunteering, and community events. The Officer expressly granted weight to this evidence: Officer's Decision at p 8. In the concluding paragraphs of their decision, the Officer further acknowledged the "positive aspects of the applicants' establishment" but held that "the totality of the evidence does not merit significant weight": Officer's Decision at p 8.

[42] Furthermore, after summarizing the assessment and weight afforded to the different H&C factors, including establishment and ties to Canada, BIOC, and factors in the country of origin, the Officer repeats in the concluding paragraphs of the decision that the Applicants' "unauthorized stay in Canada does not weigh in their favour" [emphasis added]: Officer's Decision at p 9. This statement confirms that the Applicants' non-compliance was not used to discount establishment or indeed any other H&C factor. Rather, the Officer appropriately assessed the nature of the non-compliance, weighing it as one of the factors in their global assessment of the Applicants' H&C application: *Sanchez v Canada (Citizenship and Immigration)*, 2021 FC 1349 at para 26.

F. *The Officer did not err in assessing the Applicants' employment during the pandemic*

[43] Finally, I do not agree that the Officer erred in failing to accord "positive weight or consideration" to the Applicants' work in the food handling business during the pandemic: Applicants' Memorandum of Fact and Law at paras 44-46. In accordance with *Vavilov*, while a reviewing court is not to reassess or reweigh the evidence, a decision may be unreasonable if the decision-maker fails to "meaningfully grapple with key issues or central arguments": *Vavilov* at paras 125, 128. This is not the case here.

[44] While this Court has found negative H&C decisions unreasonable for failing to demonstrate appropriate regard for the contributions of essential workers during the pandemic, those cases are distinguishable. In particular, the applicants in those cases centered their H&C applications on their contributions in the workplace during the pandemic: *Cadougan v Canada (Citizenship and Immigration)*, 2023 FC 501 at para 22; *Mohammed v Canada (Citizenship and Immigration)*, 2022 FC 1 at paras 40-43. In those cases, the Court determined that the officers failed to meaningfully engage with the key issues and central arguments raised by the applicants, rendering the decisions unreasonable.

[45] This case, however, is similar to *Taqi v Canada (Citizenship and Immigration)*, 2023 FC 1607 [*Taqi*] wherein Justice Southcott found that "the Applicant's employment during the pandemic cannot be regarded as a key issue or central argument advanced in her H&C application": *Taqi* at para 18.

[46] As in *Taqi*, the Applicants' workplace contributions in the food handling industry during the pandemic was not a central focus of their H&C submissions. The Applicants' submissions on the issue were limited to the following:

> In response to Covid-19, Mr. Olvera and Ms. Mata have worked extremely hard, to contribute to Canada in times of pandemic, especially because they are essential workers in a food company. Every day they have gone to work and they sacrifice putting their lives in risk without any fear due to the commitment they have to Canadian society, their family, friends and themselves to get ahead, even in time of difficulty.
>
> Applicants' Application for Permanent Residence under H&C Grounds at p 5.

[47] The Officer accepted these submissions, acknowledging in their establishment analysis the Applicants' employment and contribution, "particularly during the pandemic", and stating that it was "admirable". The Officer, however, concluded that there was "insufficient objective probative evidence […] that the industries, if required could not turn to existing immigration programs and initiatives aimed at assisting current workforce and social needs of Canada": Officer's Decision at p 7. Given the Officer's engagement with the Applicants' submissions, there is no reviewable error that warrants this Court's intervention.

V. Conclusion

[48] For these reasons, the Applicants have failed to persuade me that the Officer's decision is unreasonable. The decision is intelligible, justified, and transparent. The application is therefore dismissed.

[49] The parties did not raise a question for certification and I agree that none arises in this case.

JUDGMENT in IMM-7154-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Anne M. Turley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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