Federal Court  Cour fédérale

Date: 20241223

Docket: IMM-15692-23

Citation: 2024 FC 2095

Toronto, Ontario, December 23, 2024

PRESENT: The Honourable Justice Battista

BETWEEN:

ABHIMANYU KAPOOR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant's permanent residence application on humanitarian and compassionate (H&C) grounds was refused by an Immigration, Refugees and Citizenship Canada officer (Officer). The Officer assigned "some weight" or "moderate weight" to most of the factors advanced by the Applicant in the absence of justified explanations regarding why limited weight was assigned.

[2] The Officer also fettered their discretion by stating that evidence of establishment cannot be determinative in an H&C application. While that principle has support in the jurisprudence of the Court, it is not justified given appellate jurisprudence and the broad discretion afforded to officers in H&C applications. Officers are obligated to consider all relevant evidence in H&C applications, but they have the discretion to find any one factor or any combination of factors to be determinative.

[3] As a result, the decision is unreasonable and the application for judicial review is granted.

II. Background

[4] The Applicant is an Indian citizen who has resided as a refugee claimant in Canada since January 2019. His refugee claim was based on fears of his abusive father who was the agent of persecution in successful claims made by the Applicant's mother and sisters in 2017. Aside from his mother and sisters, the Applicant's only other immediate family member is his father in India.

[5] The Refugee Protection Division (RPD), the Refugee Appeal Division (RAD), and a Pre-Removal Risk Assessment (PRRA) Officer all refused the Applicant's claim for protection, finding that he has potential internal flight alternatives (IFAs) in Agra, Jaipur, or Indore.

[6] The Applicant's H&C application was based on his establishment in Canada as well as the hardship of returning to India to be confined to three areas where he has never lived in order to ensure his safety. In support of his claim of establishment in Canada, he identified four factors: his length of residence in Canada, his family ties to his mother and sisters who cannot visit him in India, his employment, and his community involvement.

[7] The Officer who refused the application assigned moderate, little, or some weight to the Applicant's establishment factors and noted that "establishment alone is not a determinative factor in the outcome of an application." The Officer dealt with the allegation of hardship resulting from returning to live in the areas of potential IFAs by relying on the RPD and RAD's findings of the Applicant's lack of risk and ability to relocate in those areas. The Officer assigned "little weight to risk and adverse country conditions" in India.

III. Issue

[8] The sole issue is whether the decision is reasonable pursuant to the guidance provided by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] and *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 [*Mason*]. When a decision involves the exercise of discretion, this exercise "must accord with the purposes for which it was given" and, when the decision maker is given a wide discretion, it must not be fettered (*Vavilov* at para 108).

IV. Analysis

[9] The decision is unreasonable because the Officer failed to explain why the establishment factors advanced by the Applicant were assigned little or moderate weight. The Officer also fettered their discretion and failed to deal with the hardship involved in the Applicant's relocation to the potential IFAs.

A. *Unreasonable treatment of establishment factors*

[10] As stated above, the establishment evidence advanced by the Applicant consisted of his lengthy residence in Canada, his employment, his family and other relationships in Canada, and

his community involvement. There is no rationale or justification for the degree of weight assigned to this evidence. The Officer's assessment is therefore unreasonable (*Xue v Canada (Citizenship and Immigration)*, 2023 FC 1374 at paras 31–32).

[11] Officers have the authority to assign weight to evidence and factors advanced in H&C applications, and they are not under a general obligation to explain why each factor or source of evidence is assigned a particular amount of weight because this would impose an "undue burden" on them (*Harder v Canada (Citizenship and Immigration)*, 2022 FC 1260 at para 54).

[12] However, the culture of justification described in *Vavilov* and reinforced in *Mason* requires that decision makers provide transparent, intelligible, and justified explanations for assigning less than full weight to otherwise compelling factors and evidence in H&C applications. The more central the evidence to the H&C submission, the higher the obligation on the decision maker to respond to the evidence and justify the weight assigned to it (*Vavilov* at para 128). As stated in *Mason* at paragraph 66:

> The burden of justification varies with the circumstances, including the wording of the relevant statutory provisions, the applicable precedents, the evidence, the submissions of the parties, and the impact of the decision on the affected persons. The greater the interpretive constraints in a given case, the greater the burden of justification on the decision maker in deviating from those constraints.
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> [Emphasis added.]

[13] In the present case, the Applicant's establishment evidence played a central role in his submissions that he was deserving of H&C relief, yet the Officer failed to explain the constrained weight assigned to his evidence. The Officer then fettered their discretion by finding that such evidence could not be determinative.

(1) The Applicant's Canadian residence

[14] The Applicant submitted that the refusal of the application would force him to be uprooted after living in Canada since 2019. The Officer assigned "some weight" to the Applicant's length of residence without justification for assigning such limited weight. The Officer mentions the lack of evidence documenting his housing, such as leases, but does not explain the significance of this missing evidence. The Officer's finding related to the Applicant's length of residence as a component of establishment is unintelligible and therefore unreasonable.

(2) The Applicant's Employment

[15] The Applicant provided evidence that during his time in Canada he has held "excellent" employment with "excellent" potential, and that his annual income rose from just over $22,000 to over $80,000. The Officer accepted that the Applicant "has been gainfully employed the majority of the time he has been in Canada," but assigned "moderate" weight to his Canadian employment history in Canada without justifying why limited weight was assigned. The Officer's reasoning regarding this evidence is therefore unintelligible.

(3) The Applicant's financial self-sufficiency

[16] The Officer assigned "some weight" to the Applicant's financial self-sufficiency, noting that he did not provide evidence of bank statements or proof of financial assistance for his mother. It is not clear how bank statements or financial support for his mother would assist in assigning higher weight regarding the Applicant's financial self-sufficiency, given that the Officer clearly accepted the Applicant's evidence of his income. The Officer's reasons in relation to the Applicant's evidence of employment and financial self-sufficiency are not transparent and therefore unreasonable.

(4) The Applicant's Canadian family ties

[17] The Applicant provided evidence that his mother and two sisters reside in Canada as Convention refugees and that his only other family member is his abusive father in India. He provided evidence of his strong relationships with his mother and sisters. The Applicant submitted that his return to India would result in his permanent separation from his mother and sisters because they cannot return to India. The Officer assigned "moderate" weight to his family relationships without explaining why such constrained weight was assigned given the evidence. The Officer's reasons are therefore unjustified and unreasonable.

(5) Unreasonable finding that establishment cannot be determinative

[18] The Officer concluded their reasons on the establishment factor by noting that "positive consideration" was given to the evidence. However, the Officer stated: "I note that establishment alone is not a determinative factor in the outcome of an application." The Officer unreasonably fettered their discretion by finding that an H&C application cannot be approved based on establishment evidence alone.

[19] Decisions of this Court have determined that an applicant's establishment in Canada cannot be determinative in H&C applications (see *e.g.*, *Buio v Canada (Citizenship and Immigration)*, 2007 FC 157 at para 37; *Lynch v Canada (Citizenship and Immigration)*, 2009 FC 615 [*Lynch*] at para 43; *Alcin v Canada (Citizenship and Immigration)*, 2013 FC 1242 at para 59, citing *Lynch* at para 43).

[20] This has included decisions post-dating *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] (see *e.g.*, *D'Souza v Canada (Citizenship and*

Immigration, 2017 FC 264 [*D'Souza*] at para 13; *Zlotosz v Canada (Citizenship and Immigration)*, 2017 FC 724 [*Zlotosz*] at para 35, citing *D'Souza* at para 13; *Ntsima v Canada (Citizenship and Immigration)*, 2021 FC 1254 [*Ntsima*] at para 11, citing *Zlotosz* at para 35; *Lin v Canada (Citizenship and Immigration)*, 2022 FC 341 at para 51, citing *Ntsima* at para 11 and *Zlotosz* at para 35).

[21] Several cases illustrate how this principle has been extended to support the disregard of establishment evidence provided by applicants in H&C applications:

- In *Klais v Canada (Minister of Citizenship and Immigration)*, 2004 FC 785, the officer acknowledged the applicant's level of establishment, which included being an owner of a fashion studio that employed people, investments of over $200,000 in that business, and his same-sex relationship with a Canadian (at paras 3, 7). The Court dismissed review of the decision, finding that "[a] review of the decision confirms that the Officer did consider the length of time the Applicant was in Canada, his business, his investment, his skills, abilities and initiative as well as his other links to Canada. However the degree of establishment is not determinative of an H & C application. I can find no reviewable error on this issue" (at para 11).
- In *Samsonov v Canada (Citizenship and Immigration)*, 2006 FC 1158, an applicant filed an H&C application based on his care for his sick father in Canada, his father and wife being in Canada, and ownership of a construction company that employed Canadians (at para 4). The officer refused the application, finding that the evidence did not show the applicant would be caused unusual, undeserved, or disproportionate hardship if he filed an application for permanent residence outside of Canada (at para 13). On establishment, the Court found that "even though the officer determined that [the applicant] had made

considerable progress adapting to Canadian society and that he was working and had become financially self-sufficient, those factors alone were not enough for the officer to determine that there were humanitarian and compassionate grounds" (at para 16 [emphasis added]). The Court reiterated that "[e]stablishment is but one factor among others to consider in coming to a decision; it is not a determinative factor in and of itself" (at para 18 [citation omitted]). This case appears to conflate the obligation to consider all relevant evidence with the discretion to find only a portion of that evidence determinative.

- In *Qiu v Canada (Citizenship and Immigration)*, 2012 FC 859, the Court found that the officer in an H&C application made a reasonable conclusion on the establishment analysis based on the evidence and arguments provided (at para 14). Additionally, however, the Court found that because establishment evidence was not itself determinative, "even if the officer had made an unreasonable assessment of the establishment factor, this would not necessarily result in the decision's being set aside" (at para 15). This case signals the futility of establishment evidence given that its unreasonable treatment may not be subject to review.

[22] Some decisions describe the principle prohibiting establishment evidence from being determinative to be "settled law" (*D'Souza* at para 13; *Small v Canada (Citizenship and Immigration)*, 2021 FC 930 at para 34, followed in *Robinson v Canada (Citizenship and Immigration)*, 2021 FC 1416 at para 34). However, the quantity of decisions adhering to a principle cannot be the only criteria for following established precedent or "settled law." The underlying reasoning behind the precedential principle must be re-examined periodically to ensure that it is consistent with binding appellate authority.

[23] There is no appellate authority that affirms the principle that establishment in Canada cannot be determinative in an H&C application. Moreover, the principle conflicts with the administrative law doctrine prohibiting the fettering of discretion granted by Parliament and the Supreme Court's description in *Kanthasamy* of the wide discretion conferred in H&C applications.

[24] A departure from precedent is justified when the rationale behind the previous decisions has been "undermined by subsequent appellate decisions" (*R v Sullivan*, 2022 SCC 19 at paras 75–76). A re-examination of the principle that establishment cannot be determinative in H&C applications supports a departure from this principle.

(a) *The principle that establishment cannot be determinative is no longer consistent with the law*

[25] The origin of the principle that establishment cannot be determinative appears to be based in policy guidelines from a period in which "unusual, undeserved or disproportionate hardship" was the governing criterion for H&C applications. It was also based in a policy concern that establishment as a determinative factor would encourage refugee claims (*Irimie v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16640 (FC) [*Irimie*]).

[26] The applicants in *Irimie* argued that the officer had not given proper consideration and weight to their establishment (at para 18). The Court held otherwise, referring to policy guidelines requiring that applicants demonstrate unusual or undeserved hardship. The Court stated at paragraph 20 that:

> The guidelines could be seen as limiting a decision-maker's discretion as to when establishment can be considered as a factor for an H & C determination. Without anything more than reference to the guidelines themselves, I cannot agree with the applicants that the H & C officer was required to give some weight to their degree of establishment in Canada. It is a factor to be considered, but it is not,

> nor can it be, the determining factor, outweighing all others. The degree of attachment is relevant to the issue of whether the hardship flowing from having to leave Canada is unusual or disproportionate. It does not take those issues out of contention.
>
> [Emphasis added.]

[27] As described below, the "unusual, undeserved or disproportionate" criteria from policy instructions were found by the Supreme Court to be unjustifiably restrictive because they impede an officer from flexibly considering and giving weight to all relevant H&C factors (*Kanthasamy* at para 33). Therefore, to the extent that these criteria precluded establishment evidence from being a determinative factor in a specific case, the principle is no longer authoritative.

[28] *Irimie*'s second justification for preventing officers from finding establishment to be determinative was the deterrence of refugee claims. The Court stated at paragraph 26:

> I return to my observation that the evidence suggests that the applicants would be a welcome addition to the Canadian community. Unfortunately, that is not the test. To make it the test is to make the H & C process an *ex post facto* screening device which supplants the screening process contained in the *Immigration Act* and *Regulations*. This would encourage gambling on refugee claims in the belief that if someone can stay in Canada long enough to demonstrate that they are the kind of persons Canada wants, they will be allowed to stay. The H & C process is not designed to eliminate hardship; it is designed to provide relief from unusual, undeserved or disproportionate hardship. There is no doubt that the refusal of the applicants' H & C application will cause hardship but, given the circumstances of the applicants' presence in Canada and the state of the record, it is not unusual, undeserved or disproportionate hardship. Whatever standard of review one applies to the H & C officer's decision, it meets the standard. The application for judicial review must therefore be dismissed.

[29] The Court in *Irimie* identified a policy concern, "gambling on refugee claims", then narrowed the discretion afforded to officers deciding H&C applications as a solution to that self-identified policy concern.

[30] With respect, the approach in *Irimie* is not consistent with the role of a court conducting reasonableness review as described by the Supreme Court. In this role, the Court takes judicial restraint and respect for the distinct role of administrative decision makers as its "starting point" (*Vavilov* at para 75). The Court is not to focus on the conclusion it would have itself "reached in the administrative decision maker's place" (*Vavilov* para 15).

[31] Parliament delegated decision-making authority in H&C applications to the Minister of Citizenship and Immigration under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The Minister, as part of the executive branch of government, issues policies to assist with decision making. The Court, as part of the judicial branch, does not carry out either function.

[32] *Irimie* illustrates the risks of engaging in policy formation in an application for judicial review. The deterrence of refugee claims, which is one of *Irimie*'s justifications for narrowing the discretion in subsection 25(1), ignores the fact that an objective of the IRPA is "to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted" (s 3(2)(a)).

[33] Moreover, the policy solution crafted in *Irimie* is overbroad. The preclusion of establishment as a determinative factor impacts not just refugee claimants but other categories of applicants in Canada, such as economic migrants and students who may remain in Canada for years, establish roots, and contribute to Canadian society, but who may be foreclosed from accessing a pathway to permanent residence due to changes in circumstances. Preventing their access to an H&C application would not be consistent with the humanitarian and compassionate

purpose that is the foundation of subsection 25(1), designed as a "flexible and responsive exception to the ordinary operation of the [IRPA]" (*Kanthasamy* at para 19).

[34] Permanent residence based on H&C criteria is not intended to be an "alternative immigration scheme" (*Kanthasamy* at para 23) in the sense that this category is not found among economic, refugee and family class selection categories identified in section 12 of the IRPA. However, H&C applications do provide a distinct statutory pathway to permanent residence for inadmissible applicants or those who do not meet the requirements of the Act following the favourable exercise of the wide discretion provided for under subsection 25(1).

[35] Finally, the principle precluding establishment from being determinative in H&C applications makes it impossible for a person who has only establishment evidence in Canada to succeed in an H&C application, regardless of how compelling the evidence of establishment may be. This has the effect of writing a prohibition of a certain type of H&C application into the legislation. Again, this is not an appropriate function of the Court.

(b) *The principle that establishment cannot be determinative fetters the discretion granted to officers under subsection 25(1)*

[36] As we have seen, *Irimie* relied on outdated policy guidance and employed a policy-making method of judicial review inconsistent with the principles of *Vavilov*. In addition, *Irimie*'s preclusion of establishment from being determinative fetters the wide discretion provided to officers deciding H&C applications.

[37] The Supreme Court has held that in the context of discretionary decision making, "discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of

Canadian society, and the principles of the *Charter*" (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] at para 56).

[38] As previously noted, a fundamental principle of administrative law is that when a decision maker is given a wide discretion, it is unreasonable for that discretion to be fettered (*Vavilov* at para 108).

[39] Parliament has assigned a broad discretion under subsection 25(1) of the IRPA. This breadth is apparent from the unqualified wording of the relevant text—"humanitarian and compassionate"— that animates the purpose behind subsection 25(1).

[40] The breadth of discretion under subsection 25(1) is also apparent from the Supreme Court's caution that policy guidelines cannot inhibit the discretion provided in subsection 25(1), as discussed in *Kanthasamy*. The Supreme Court made a number of points reflecting this broad discretion:

- Guidelines can be helpful to assess granting H&C relief, but cannot be the "only possible formulation" (at para 31), should not be used to fetter discretion by treating them "as if they were mandatory requirements" (at para 32), or should not create three new thresholds through the use of the terms "unusual, undeserved, or disproportionate hardship" (at para 33).
- Officers must "substantively consider and weigh *all* relevant facts and factors before them" (at para 25 [emphasis in original]).
- Policy guidelines are "not legally binding" nor are they "intended to be either exhaustive or restrictive" (at para 32).

- Officers can refer to guidelines but "should turn '[their] mind[s] to the specific circumstances of the case'" (at para 32).

[41] *Kanthasamy* makes it clear that all relevant evidence and factors must be considered and weighed in H&C applications, free from constraint by policy guidelines. The only constraint on the discretion under subsection 25(1) is that the "exercise of discretion must accord with the purposes for which it was given" (*Vavilov* at para 108; *Kanthasamy* at para 17; *Baker* at para 66). In H&C applications, it must be clear that discretion was exercised in a manner consistent with humanitarian and compassionate considerations (*Baker* at para 66).

[42] Supreme Court jurisprudence therefore demonstrates that the discretion to be exercised under subsection 25(1) is broad and context-specific. It would be inconsistent with the broad discretion provided by Parliament in subsection 25(1) for the Court to carve out one factor and preclude officers from finding it to be determinative. It is not the Court's role to frustrate decision makers by confining their determinations based on relevant evidence or confining their capacity for compassion.

[43] In summary, the principle that establishment can never be determinative in an H&C application does not reflect subsequent developments in the law, including Supreme Court jurisprudence describing the parameters of a Court's role on judicial review. Moreover, the principle does not respect the broad discretion granted under subsection 25(1) and the administrative law principle prohibiting the fettering of discretion.

[44] As such, I respectfully disagree with the principle from *Irimie* that officers in H&C applications are precluded from finding establishment a determinative factor in appropriate cases and I depart from the jurisprudence of this Court that relies on that principle.

[45] For the above reasons, it was unreasonable for the Officer to determine that the Applicant's establishment evidence cannot be determinative.

B. *Unreasonable treatment of submissions relating to requirement to reside in IFAs*

[46] The RPD, RAD, and PRRA decisions determined that if the Applicant returns to India, he could be safe if he resides in three areas of the country where he has never lived, has no connections, and has no family. The Applicant submitted that life in India in these constrained circumstances would cause hardship justifying H&C relief.

[47] The Officer assigned "little weight to risk and adverse country conditions" based on insufficient evidence that the Applicant "would be singled out for treatment that would be substantially different from other residents based on the applicant's personal circumstances." The Officer—who was the same decision maker in the Applicant's unsuccessful PRRA application—approached this factor from a risk-based perspective, relying on a conclusion that was not responsive to the Applicant's submissions (*Lin v Canada (Citizenship and Immigration)*, 2024 FC 185 at para 23; *Mason* at para 74). The Officer's finding on this factor was therefore unreasonable.

V. Conclusion

[48] The principle that evidence of establishment cannot be determinative in H&C applications is not justified in light of the broad discretion assigned by Parliament in subsection 25(1) of the IRPA and the humanitarian and compassionate purpose of this provision. Officers have the authority to find one factor—any factor—or any combination of factors advanced by an applicant to be determinative in an H&C application. Establishment evidence alone may be sufficient to grant H&C relief, depending on the circumstances.

[49] The Officer's decision was unreasonable for its lack of intelligibility, transparency, and justification, unresponsiveness to the Applicant's submissions, and because the Officer fettered their discretion. The application for judicial review is granted and the application will be re-determined by a different decision maker in accordance with directions to assist the new decision maker in rendering a reasonable decision.

JUDGMENT in IMM-15692-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted, the decision refusing the humanitarian and compassionate application for permanent residence is quashed, and the matter is returned for redetermination by a different officer.

2. The redetermination will be consistent with the following directions:
   a. The redetermination will be rendered in accordance with these reasons within 60 days of the date of this order;
   b. If a humanitarian and compassionate factor is assigned less than full weight, the decision will explain clearly why less than full weight was assigned to that factor;
   c. If the application is refused, the reasons will explain clearly how the refusal is consistent with the humanitarian and compassionate purpose behind subsection 25(1) of the IRPA.

3. There is no question for certification.

"Michael Battista"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Sumeya Mulla	FOR THE APPLICANT
Mariam Shanouda	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman and Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT