Federal Court  Cour fédérale

Date: 20211215

Docket: IMM-5303-20

Citation: 2021 FC 1425

Ottawa, Ontario, December 15, 2021

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

OLUBUSOLA OGUNNIYI

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Olubusola Ogunniyi, seeks judicial review of a decision of a senior immigration officer (the "Officer") of Immigration, Refugees and Citizenship Canada, dated April 30, 2020, refusing her application for permanent residence within Canada on humanitarian and compassionate ("H&C") grounds pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] The Applicant submits the Officer's decision is unreasonable because the Officer erred in the assessment of the Applicant's establishment in Canada and the best interest of the child ("BIOC") with respect to the Applicant's youngest daughter, Opeyemi.

[3] For the reasons that follow, I find the Officer's decision is unreasonable. I therefore allow this application for judicial review.

II. **Facts**

A. *The Applicant*

[4] The Applicant is a 54-year-old citizen of Nigeria. She and her husband have four children. The Applicant's youngest daughter, Opeyemi, is 16 years old and is included in the H&C application.

[5] On June 24, 2012, the Applicant arrived in Canada on a visitor's visa. The Applicant submitted a refugee claim on July 13, 2012. The Refugee Protection Division rejected her claim on October 24, 2017.

[6] On December 19, 2017, the Applicant submitted an application for permanent resident status based on H&C grounds. The Applicant requested special relief based on the BIOC of her youngest daughter, Opeyemi, their level of establishment in Canada, and the adverse country conditions in Nigeria.

B. *Decision Under Review*

[7] By letter dated April 30, 2020, the Officer refused the Applicant's application, finding that the H&C factors did not justify an exemption under subsection 25(1) of the *IRPA.*

[8] In their assessment of the Applicant's establishment in Canada, the Officer gave some weight to the Applicant's residence and employment in Canada, as well as the Applicant's ties to community, family and friends in Canada. However, the Officer gave considerable weight to the Applicant's strong connections to Nigeria.

[9] In the BIOC analysis, the Officer gave little weight to Opeyemi's best interest. The Officer noted that Opeyemi has been registered in the Ontario public school system since 2013 and has built a strong network of friends. The Officer also noted that Opeyemi holds citizenship in the United States (the "US") and would be able to continue her education in the US school system. The Officer found that the Applicant had not demonstrated that it would be a significant disruption for Opeyemi to live in the US, should she not want to return to Nigeria with her mother. While the Officer recognized that Opeyemi might face an adjustment period if she were to return to Nigeria, the Officer ultimately concluded that she would be sufficiently supported by family in Nigeria.

[10] With respect to the adverse country conditions in Nigeria, the Officer determined that the Applicant had not demonstrated that her life would be at risk if she were to return to Nigeria.

The Officer noted the Applicant's significant business experience and found that she would have no issue reintegrating into the economy to support herself and Opeyemi.

III. **Issue and Standard of Review**

[11] The sole issue in this application for judicial review is whether the Officer's decision is reasonable.

[12] It is common ground between the parties that the applicable standard of review for the above issue is reasonableness. I agree that the appropriate standard of review for H&C decisions is reasonableness (*Chen v Canada (Citizenship and Immigration),* 2019 FC 988 at para 24; *Kanthasamy v Canada (Citizenship and Immigration),* 2015 SCC 61 ("*Kanthasamy*") at paras 44-45; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paras 16-17).

[13] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). 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 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). 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).

[14] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). 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).

IV. **Analysis**

[15] When assessing whether H&C circumstances warrant an exception under subsection 25(1) of the *IRPA*, an officer is required to determine whether the hardship to the applicant "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another" (*Kanthasamy* at para 21). An application for H&C consideration is a request for exceptional relief involving a weighing of the various factors at play to determine if an applicant should be exempt from the general rules for permanent residence applications (*Kanthasamy* at para 101).

A. *Establishment*

[16] The Applicant submits that her evidence demonstrates she is well-established in Canada. She has lived continuously in the same region since 2012 and has no criminal record. The Applicant states that she has remained financially independent and has held steady employment with the same employer since February 2013. She has developed strong community ties, as demonstrated by the letters of support submitted with her application. The Officer considered this evidence and gave it some weight, yet also weighed it against the Applicant's strong ties in Nigeria.

[17] The Applicant submits that the Officer restrictively applied the test for H&C and went out of their way to fish for "infinitesimal reasons" to refuse her application. For instance, the Officer questioned why some of the referees did not explain how they came to know the Applicant, and expressed concern that the Applicant failed to address the nature of her relationship with her first daughter, Mary. The Applicant argues that this ignores the fact that she first came to Canada to visit Mary and that there is no evidence that the relationship that propelled her to come to Canada no longer exists.

[18] While I do not find that the Applicant's failure to address the status of her relationship with her daughter Mary was a major factor influencing the Officer's decision, I do agree with the Applicant that the Officer did not fully address the many support letters that speak to the Applicant and Opeyemi's establishment in Canada.

[19] The Respondent submits that the Applicant is attempting to use the H&C process to circumvent other immigration channels, an approach that the courts have found to be improper. The Supreme Court of Canada in *Kanthasamy* recognized that inevitably, being required to leave Canada will be associated with some hardship, but that "[t]his alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under s.25(1)" (at para 23) and that H&C exemptions should only be made available in exceptional cases to avoid becoming an "alternative immigration stream or an appeal mechanism" (at para 90).

[20] The Respondent contends that the Applicant is a failed refugee claimant who is essentially arguing that she should be permitted to stay in Canada because she has become

accustomed to living here, and because her economic prospects and relationships are better here than in Nigeria. The Respondent notes that this Court has rejected similar lines of reasoning many times (*Hee Lee v Canada (Citizenship and Immigration),* 2008 FC 368 at paras 1-2).

[21] In my view, I find that the Officer's analysis of the Applicant's establishment and the decision to afford more weight to the Applicant's strong ties to Nigeria was unreasonable in light of the evidence on the record. I agree with the Applicant's submission that the Officer conducted a microscopic analysis of the application, instead of focusing on the Applicant's establishment over nine years and, as discussed below, Opeyemi's establishment in Canada. The Officer also failed to explain why more weight was given to the Applicant's strong connections to Nigeria.

B. *BIOC*

[22] The Officer gave little weight to the BIOC analysis with respect to Opeyemi's best interest. The Officer found that Opeyemi would have two options if she left Canada: to return to Nigeria with her mother, where the Officer determined she would benefit from the support of both of her parents, or to continue her studies in a similar environment to Canada in the US, where she holds citizenship and where her two other siblings live. The Officer reasoned:

> As the applicant's daughter has citizenship in the USA, she is legally able to reside in the USA. Opeyemi would be able to continue her education in the US school system. Further, as a US Citizen she could choose to visit Canada without a visa to maintain the relationships she has developed here. I also note that Opeyemi has two adult siblings, also US Citizens, who currently reside in Detroit, Michigan, which is not far from the applicant's current

> residence in Windsor, Ontario. The applicant has not demonstrated it would be a significant disruption to Opeyemi's life for her to live in the United States should the applicant not wish to have her return to Nigeria. I acknowledge that Opeyemi may miss her mother, but find that they could remain in touch via video conferencing over the internet.
>
> I recognize the applicant may choose to have her daughter return with her to Nigeria if she is required to leave Canada. I accept that Opeyemi may face an adjustment period when returning to Nigeria though I find that as Opeyemi's father and her mother's extended family reside in Nigeria, she has support should she face challenges in readjusting to life in Nigeria.

[23] The Applicant submits that the Officer conducted a microscopic analysis of the evidence and erred by focusing excessively on Opeyemi's US citizenship and the hypothetical option of relocating to the US to live with her siblings, and failed to adequately consider the negative impact Opeyemi would face if separated from her mother, or uprooted from her life in Canada.

[24] The Applicant also submits that the Officer failed to adequately consider the hardship Opeyemi would face if her education in Canada was disrupted, in particular the negative impacts that a removal from her current environment would have on her schooling and her psychological well-being.

[25] The Respondent contends that the Applicant's submissions imply that it would be in Opeyemi's best interest to continue her education in Canada, with the company of her mother. The Respondent submits that this Court has found that simply the fact that living in Canada is more desirable for children is not determinative of an H&C application (*Garraway v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 286 at para 38, citing: *Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356 at para 31).

[26] The Respondent also submits that while the BIOC is one factor that must be examined with a "great deal of attention" (*Kanthasamy* at para 39), it is up to the officer to determine the appropriate weight to accord to the BIOC depending on the circumstances of a case, and, as affirmed in *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, "it is not the role of the courts to re-examine the weight given to the different factors by the officers" (at para 11). The Respondent relies on *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 (CanLII) at paragraph 8 to submit that the onus was on the Applicant to provide relevant evidence to support her claim, and that in this case, insufficient evidence was provided to demonstrate that Opeyemi's best interests would be served if she was to stay in Canada.

[27] I disagree with the Respondent. I do not find that the Applicant is arguing that it would simply be more desirable for Opeyemi to live in Canada, but rather that she would face significant hardship if uprooted at this crucial point in her life. At the time the H&C application was assessed, Opeyemi was 15-years-old. She is now 16-years-old and finishing high school in an environment where she is thriving. In their reasons, the Officer discussed Opeyemi's establishment:

> The letter from her teacher states that Opeyemi is a hardworking student who has many friends, and that she is called upon to assist with activities by staff because she is trustworthy. Additionally, the applicant has also submitted a letter from the mother of one of Opeyemi's friends. The letter states Opeyemi is a friend of her daughter Marie, that they have sleepovers and help each other with homework, and that Opeyemi has adapted well to life in Canada.

[28] I further note that the evidence on record demonstrates that Opeyemi is a responsible, hard-working student and a team leader who is supportive of her peers and well-integrated into the Ontario school system, in which she has studied since 2013. A former teacher describes her as "a positive, outgoing young woman who is a leader in our school" and states that "[…] Opeyemi is the first to offer assistance to complete any classroom jobs and volunteers her time and talents in a variety of capacities […]" A letter from Opeyemi's friend's mother remarks that "Opeyemi has become well-adapted to life in Canada," that she has "gotten so familiar and comfortable with the Canadian school system and curriculum," and that she "has built a life here and has made friends here who love and care for her and whom she cares for, as well."

[29] Despite the significant evidence of her integration and establishment in Canada during her most formative years, the Officer found that Opeyemi "has citizenship in the USA and could reside there" and that "she has family in Nigeria who would support her if she chose to return there." The Officer concluded, "the applicant has not demonstrated it would be a significant disruption to Opeyemi's life for her to live in the United States should the applicant not wish to have her return to Nigeria."

[30] I find the Officer's reasoning to be flawed, as it fails to fully account for the disruption that would result if Opeyemi were to leave Canada at such an important time in her life, and unreasonably places significant weight on the ways in which Opeyemi could be supported by her family in Nigeria or the US. I also find that, irrespective of Opeyemi's US citizenship, any disruption to her current educational environment when she is so close to completing high school would not be in her best interest.

[31] Pursuant to *Kanthasamy*, the discretion afforded to an officer when examining an H&C application is meant to allow for flexibility to mitigate the rigid application of the law in appropriate cases (at para 19). An officer is required to take into account the emotional, social, cultural and physical well-being of a child when assessing an H&C application. In *Oladele v Canada (Citizenship and Immigration)*, 2017 FC 851, at paragraph 55, this Court held:

> Such an analysis is highly contextual because of the multitude of factors that may impinge on the child's best interest; therefore, it must be done in a manner responsive to each child's particular age, capacity, needs and maturity (*Kanthasamy*, at para 25). The child's level of development will guide its precise application in the context of a particular case (*Kanthasamy*).

[32] As the Applicant's counsel rightly noted during the hearing, the Officer in this case misdirected their attention to issues unrelated to the BIOC, and failed to adequately examine the impacts of removal on Opeyemi, and the benefits that would accrue should the application be granted.

[33] During the hearing, the Respondent's counsel suggested that the Applicant brought her daughter to Canada to create a situation through which the negative impact of her daughter's removal could be used to justify an H&C exemption to circumvent the regular immigration process. The Respondent's counsel questioned why Opeyemi had been sent to be with her mother in Canada, assuming that she had also done well in school and had friends in Nigeria before she came to Canada, and noted that the Applicant had failed to explain why it would not be in Opeyemi's interest to return to Nigeria with her mother.

[34] I disagree with the assumptions made by the Respondent's counsel at the hearing. I find these statements to be speculative and without foundation. As counsel for the Applicant aptly pointed out, the reasons for why Opeyemi came to Canada in the first place are irrelevant to the analysis of the establishment and BIOC factors in this H&C application.

[35] In light of the ample evidence that Opeyemi has laid down strong roots in Canada, I agree with the Applicant's submission that Opeyemi's interests in this case are significant, and were minimized by the Officer in their BIOC analysis (*Kanthasamy* at paras 74-75).

[36] When conducting an assessment on H&C grounds, "[a]pplying compassion requires an empathetic approach" (*Damte v Canada (Citizenship and Immigration*), 2011 FC 1212 at para 34). I do not find that the Officer in this case stepped into the shoes of the child impacted by this application, nor did they consider the destabilizing impacts of being uprooted from Canada and relocating at such a formative period in her youth. Accordingly, I find that the Officer was not "alert, alive and sensitive" (*Kanthasamy* at para 143, citing *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para 75) to Opeyemi's best interests, and that the Officer's narrow view of the BIOC assessment renders their decision unreasonable.

[37] Having found that the Officer's analysis of the BIOC and establishment factors is unreasonable, I do not find it necessary to address the Applicant's submissions with respect to country conditions and the hardship she would face in Nigeria.

V. **Conclusion**

[38] I find that the Officer's decision is unreasonable. I therefore allow this application for judicial review.

[39] No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-5303-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed. The decision under review is set aside and the matter is referred back for redetermination.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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