Federal Court  Cour fédérale

Date: 20220126

Docket: IMM-7281-19

Citation: 2022 FC 88

Ottawa, Ontario, January 26, 2022

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

AMER OBEID
DOUA TAHA
ALMA OBEID

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Fearing beatings and threats from Hezbollah in Lebanon, the Principal Applicant Amer Obeid, his spouse Doua Obeid and their minor daughter Alma Obeid, Lebanese citizens, claimed refugee status after arriving in Canada in 2016. The family also includes a minor son Adam Amer Obeid, a Canadian citizen.

[2] The Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] dismissed their claim in January 2017. The RPD found that they are neither Convention refugees nor persons in need of protection, under sections 96 and 97 respectively of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], and further, that there is a viable Internal Flight Alternative [IFA] in Tripoli, Lebanon. See Annex "A" for relevant provisions. The Refugee Appeal Division [RAD] upheld the RPD's finding of an available IFA in Tripoli and dismissed the Applicants' appeal in January 2018.

[3] The Applicants applied in August 2018 for permanent residence in Canada based on humanitarian and compassionate [H&C] grounds, namely their establishment in Canada, hardship in Lebanon, and the best interests of their children [BIOC]. The Applicants submitted their son Adam suffers from speech impairment, and is seeing a speech pathologist to address his speech issue. The Principal Applicant stated in the H&C application that "[n]o such effective therapy if any is available for my son in Lebanon."

[4] The Officer refused their H&C application on November 18, 2019 [Decision]. The Officer found that the Applicants had failed to address the RPD's and RAD's findings, including that an IFA exists, that the Applicants can seek assistance from the police or the judicial system in Lebanon, and further, that they had not demonstrated their establishment in Canada warrants the H&C exemption. With respect to the BIOC factor, the Officer stated that the children are "resilient and adaptable to changing situations," and that despite the different standards of living in Canada and Lebanon, the BIOC "would be met if they continued to benefit from the personal

care and support of their parents in Lebanon." The Officer also reasoned that the Applicants had not submitted sufficient evidence that Adam would be denied medical services in Lebanon.

[5] The Applicants now seek judicial review of the Decision.

[6] There is no dispute that the presumptive reasonableness standard of review is applicable: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 25. I find none of the situations that can rebut this presumptive standard is present in the circumstances: *Vavilov*, at para 17.

[7] Having considered the parties' material, including their written and oral submissions, as well as the applicable law, I am satisfied that the Applicants have met their onus of demonstrating the Decision is unreasonable: *Vavilov*, above at para 100. The determinative issue, in my view, is the Officer's treatment of the BIOC factor. For the reasons that follow, I grant this judicial review application.

II. Analysis

[8] I find the Officer erred in several respects in the BIOC analysis.

[9] First, the Officer stated that, "at this young age… **these children** are resilient and adaptable to changing situations" [emphasis added] but failed to point to any supporting evidence for reaching this conclusion. The fact that the adult Applicants' daughter was only two years old, essentially a toddler, when the family arrived in Canada, in itself, does not speak to her

resiliency and adaptability, in my view. Further, I find the statement unintelligible or opaque insofar as the son is concerned, without anything more, because he was born in Canada. A generalized assumption about the resilience and adaptability of children, with reference only to age, does not demonstrate, in my view, sufficient or adequate consideration of the best interests of the particular children. In other words, it is indicative that the Officer here did not perform, but should have, an individualized assessment for each child.

[10] Second, the Officer continued by noting that, "[w]hile it may be difficult for them to leave Canada, in the end they will be returning to Lebanon with their parents." It is not the correct approach to a BIOC analysis for the Officer to start with the presumption that the parents will be removed to their country of origin and that the minor children will accompany them: *Sivalingam v Canada, (Citizenship and Immigration)*, 2017 FC 1185, at para 17; *Jeong v Canada (Citizenship and Immigration)*, 2019 FC 582, at para 61.

[11] Third, to conduct a BIOC correctly, the Officer must determine first what is in the children's best interests (that is, in each child's best interests): whether to remain in Canada where there are better social, economic and medical opportunities or supports, or to go with their parents to their country of origin. Only once the Officer has articulated clearly what is in the children's best interests can the Officer then weigh this against the other positive and negative elements in the H&C application: *Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813 [*Sebbe*] at para 16.

[12] The Officer did consider the son's best interests in the context of his speech impairment. Leaving aside whether the Officer did so reasonably, I find that, apart from mentioning her age, the Officer failed to identify the daughter's best interests at all.

[13] Rather, the Officer found that "**[w]hatever adjustments they will have to make** to their lives in Lebanon, they will do so with the support of their parents" and "that the best interests of the children would be met if they continued to benefit from the personal care and support of their parents in Lebanon." [Emphasis added.]

[14] On its face, the Officer's above finding evinces a failure to identify and define the children's interests and needs, and to examine them with a great deal of attention: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 (CanLII), [2015] 3 SCR 909 [*Kanthasamy*], at para 39. Further, this finding does not demonstrate, in my view, that the Officer determined the likely degree of hardship to each child in this case caused by the parents' removal and weighed such degree of hardship, together with other factors favouring or disfavouring the removal of the parents: *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 6. Instead, the Officer simply concluded, "I am not satisfied that returning to Lebanon would have any significant negative impact on the best interests of the children."

[15] While I agree with the Respondent that the BIOC is a factor that does not necessarily outweigh all others, I disagree with the Respondent that the Officer gave this factor either considerable or significant weight, as argued. In my view, the BIOC was but one factor considered by the Officer in the constellation of H&C factors applicable in the circumstances.

There was no recognition, however, of the substantial weight (let alone, significant or considerable weight) to be accorded the BIOC, as the Supreme Court instructs in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at page 864. Further, "[b]ecause children may experience greater hardship than adults faced with a comparable situation, circumstances which may not warrant humanitarian and compassionate relief when applied to an adult, may nonetheless entitle a child to relief": *Kanthasamy*, above at para 41.

[16] I find the Officer failed to apply the highly contextual, best interests principle in a manner responsive to each child's particular age, capacity, needs, maturity and level of development: *Kanthasamy*, above at para 35. The Officer neither framed nor identified the interests and needs of the children in any meaningful way. Instead, the Officer's reasons are premised on the assumption that the family would be returning to Lebanon, and that the children's best interests would be served with their parents' care and support, rather than identifying and giving those interests significant weight: *Zima v Canada (Citizenship and Immigration)*, 2019 FC 986, at para 22.

[17] Further, to the extent the Officer was of the view there was insufficient objective evidence that Adam would be unable to obtain medical services in Lebanon, I find this highlights the Officer's failure "to ask the question the Officer is mandated to ask: What is in [each] child's best interest?": *Sebbe*, above at para 16. As noted in the same paragraph of *Sebbe*, it is perverse to suggest that a child's interests in remaining in Canada are balanced if the alternative meets their basic needs.

[18] In light of my determinative finding regarding the unreasonable treatment of the BIOC factor, I decline to consider the remaining IFA and establishment in Canada issues.

III. Conclusion

[19] For the above reasons, I therefore grant the Applicants' judicial review application. The Decision is set aside, with the matter to be redetermined by a different officer or decision maker.

[20] Neither party raised a serious question of general importance for certification and I find that none arises in the circumstances.

JUDGMENT in IMM-7281-19

THIS COURT'S JUDGMENT is that:

1. The Applicants' judicial review application is granted.
2. The November 18, 2019 H&C Decision is set aside, with the matter to be redetermined by a different officer or decision maker.
3. There is no question for certification.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

***Immigration and Refugee Protection Act,* SC 2001, c 27**
***Loi sur l'immigration et la protection des réfugiés* (L.C. 2001, ch. 27)**

Convention refugee **96** A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, **(a)** is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or **(b)** not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	**Définition de réfugié** **96** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques : **a)** soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays; **b)** soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
Person in need of protection **97 (1)** A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally **(a)** to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or **(b)** to a risk to their life or to a risk of cruel and unusual treatment or punishment if **(i)** the person is unable or, because of that risk, unwilling to avail themself of the protection of that country, **(ii)** the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country, **(iii)** the risk is not inherent or incidental to lawful sanctions, unless	**Personne à protéger** **97 (1)** A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée : **a)** soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture; **b)** soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant : **(i)** elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, **(ii)** elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas, **(iii)** la menace ou le risque ne résulte pas de sanctions légitimes — sauf

imposed in disregard of accepted international standards, and **(iv)** the risk is not caused by the inability of that country to provide adequate health or medical care.	celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles, **(iv)** la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
Person in need of protection **(2)** A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	**Personne à protéger** **(2)** A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

FEDERAL COURT

SOLICITORS OF RECORD

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