Federal Court  Cour fédérale

Date: 20220426

Docket: IMM-3892-21

Citation: 2022 FC 611

Ottawa, Ontario, April 26, 2022

PRESENT: Madam Justice McDonald

BETWEEN:

OMOLOLA OLUWAKEMI AYATIAN
SUNDAY ADEKUNLE MOSES ONIFADE
MORIREOLUWA AYOMIDE ONIFADE (A MINOR)

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants seek judicial review of the decision of the Senior Immigration Officer dated May 26, 2021, refusing their application for permanent residence on humanitarian and compassionate (H&C) grounds. For the reasons that follow, I am allowing this judicial review on the sole basis that the Officer erred in the best interests of the child (BIOC) considerations.

I. Background

[2] The adult Applicants are citizens of Nigeria and have two young children. Their first child, Morireoluwa, was born in 2016 and is a citizen of the United States and Nigeria. Their second child, Mojolaoluwa, was born in November 2020 in Canada. Following his birth, the Applicants made additional submissions in support of their H&C application in December 2020.

II. H&C Decision

[3] In considering their H&C claim, the Officer noted that the Applicants have been in Canada since February 2018, and it was reasonable to conclude that they would have achieved some level of establishment. However, the Officer found the establishment was relatively minimal. The Officer noted that the adult Applicants were "very well educated internationally, held high level employment positions in Nigeria, and assumedly would be able to find employment in well paid position in their home country again." The Officer, therefore, gave little weight to this factor.

[4] With respect to hardship, the Officer noted the Applicants returned to Nigeria from the United States twice before proceeding to Canada. The Officer reasoned "[i]f the applicants truly were concerned about suffering in Nigeria, they would not have returned between their visits to the USA." As a result, this factor was also given little weight.

[5] In considering the BIOC of Morireoluwa, the Officer does note that he was diagnosed as being on the autism spectrum, however the Officer determined that there was insufficient

evidence that he would be negatively affected if they returned to Nigeria. The Officer does reference the assessment of Dr. Akinloye, dated May 6, 2020, regarding services that would be available in Nigeria, but notes that Dr. Akinloye did not assess the child and relied upon an assessment from the child's pediatrician. The Officer also considered an assessment from psychotherapist Natalie Riback, dated April 3, 2020, but noted that she also had not met the child, and that "any references to the child's possible outcomes are speculative at best."

[6] The Officer's decision makes no reference to Mojolaoluwa and conducts no BIOC analysis for the Applicants' Canadian-born son. Further, under "sources consulted", the Officer lists "H&C Application and supporting documentation received 05 August 2020", but does not list the additional submissions filed by the Applicants in December, 2020.

III. Issue and Standard of Review

[7] The Applicants raise a number of issues with the H&C decision. However, the failure of the Officer to undertake a BIOC analysis with respect to their Canadian-born child is determinative of this judicial review, and I, therefore, decline to address the other issues.

[8] Although the Applicants submit that the failure to conduct a BIOC analysis is a procedural fairness issue, in my view, reasonableness is the proper standard upon which to review the Officer's BIOC analysis.

[9] As stated in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], "a court must consider the outcome of the administrative decision in light of its underlying rationale

in order to ensure that the decision as a whole is transparent, intelligible and justified" (at para 15); and, "[t]he reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it" (*Vavilov* at para 126).

IV. Analysis

[10] The H&C decision is silent on the BIOC of Mojolaoluwa, the Applicants' son who was born in 2020. This is despite the Applicants' having made additional submissions following the birth of their son. These submissions, which appear in the certified tribunal record (CTR), are not referenced directly by the Officer and are also not listed in the "sources consulted" section of the H&C decision. Accordingly, the Court can be left with no other impression but that the Officer failed to consider the submissions and, thereby, failed to conduct the necessary BIOC analysis.

[11] As noted in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], citing *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC): "for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them" (at para 38). Further "[a] decision under s 25(1) will therefore be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered […] This means that decision-makers must do more than simply *state* that the interests of a child have been taken into account […] Those interests

must be ‘well identified and defined’ and examined ‘with a great deal of attention’ in light of all the evidence” (*Kanthasamy* at para 39) [Emphasis in original].

[12] The reasons of the Officer make clear that they were only speaking about the Applicant’s American-born son. For example, the Officer writes: “There is insufficient evidence before me to demonstrate that the applicants’ departure from Canada will negatively affect the best interests of their son as he will return with them and also holds Nigerian citizenship […] it is noted that the PA and SA never made a claim to the country where the child was born”. In contrast, the Officer failed to give any consideration to the best interests of Mojolaoluwa, and there is no reference to Mojolaoluwa in the H&C decision. The Court is left to conclude that the Officer was not “alert, alive and sensitive” to the BIOC of the Applicants’ Canadian-born child. This is a material error.

[13] The H&C decision is, therefore, unreasonable.

[14] This judicial review is granted and the matter is remitted for reconsideration by another Officer.

[15] There is no question for certification.

JUDGMENT IN IMM-3892-21

THIS COURT'S JUDGMENT is that:

1. This judicial review is granted and the matter is remitted for reconsideration by another Officer; and

2. There is no question for certification.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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