Federal Court Cour fédérale

Date: 20220713

Docket: IMM-5213-21

Citation: 2022 FC 1041

Ottawa, Ontario, July 13, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

KHALEELUDDIN MOHAMMAD KHAJA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Khaleeluddin Mohammad Khaja, seeks judicial review of the decision of a Senior Immigration Officer of Immigration, Refugees and Citizenship Canada ("Officer"), dated May 20, 2021, refusing the Applicant's 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 that the Officer's decision is unreasonable. In particular, he argues that the Officer erroneously applied a hardship analysis to the best interest of the child ("BIOC") assessment, and erred in analyzing the establishment factors by focusing exclusively on how the Applicant and his family could mitigate hardship upon removal from Canada.

[3] The Officer's analysis failed to take into account what is in the best interest of the Applicant's three children, and in particular, failed to consider whether it would be in the children's best interests to remain in Canada. For the reasons that follow, I find that the Officer's decision is unreasonable. I therefore allow this application for judicial review.

II. **Facts**

A. *The Applicant*

[4] The Applicant is a 38-year-old citizen of India. His spouse, Hajira Ibrahim ("Ibrahim"), is also a citizen of India. Together, they have three children. Their seven-year-old daughter ("Aleena") was born in India, and their two sons, "Moinuddin" (age five) and "Ayaanuddin" (age three) are Canadian citizens by birth.

[5] The Applicant, Ms. Ibrahim and Aleena arrived in Canada as visitors on March 28, 2017. They made a refugee claim on April 24, 2018, which was ultimately dismissed by the Refugee Appeal Division on November 7, 2019.

[6] The Applicant's youngest son Ayaanuddin was diagnosed at birth with Tetralogy of Fallot, a congenital heart disease ("CHD"). On February 25, 2019, at five months old, Ayaanuddin underwent heart surgery. He is being followed by a cardiologist and seen on a yearly basis to monitor his condition.

[7] Aleena's speech and language abilities were assessed when she was three-and-half years old. According to a report dated February 19, 2019, Aleena had significant delayed expressive language skills, and delayed language and speech sound skills.

[8] On August 19, 2020, the Applicant submitted an application for permanent residency on H&C grounds. Ms. Ibrahim and Aleena were listed as accompanying dependents.

B. *Decision Under Review*

[9] By letter dated May 20, 2021, the Officer refused the Applicant's H&C application. The Officer considered the Applicant's submissions on establishment in Canada and the BIOC.

[10] The Officer's decision gives some weight to the establishment in Canada, noting the length of time the Applicant and his family have lived in Canada, the meaningful friendships they have made, and evidence of volunteering at the local mosque. The Officer found that while they may experience a level of hardship upon return to India, they would likely be able to re-establish themselves successfully after an initial adjustment period.

[11] In reviewing the BIOC, the Officer considered the Applicant's submissions that his children would have difficulty accessing healthcare services, mental health supports, and adequate schooling in India. The Officer found that the Applicant failed to submit sufficient evidence to demonstrate that his children would face a deficient school system or hardship in accessing education in India. With respect to access to health care, the Officer acknowledged Ayaanuddin's diagnosis of Tetralogy of Fallot, yet found that the Applicant's submissions lacked detail regarding Ayaanuddin's current medical situation and whether he experiences enduring symptoms. The Officer also found little evidence to indicate that the Applicant and Ms. Ibrahim are unable to access the necessary support services or treatment in India that Ayaanuddin may require. Nonetheless, the Officer placed considerable weight on the fact that Ayaanuddin suffers from a medical condition, and noted "[…] he may endure some hardships and challenges to his health and well-being in the event he is to return to India with his parents and siblings."

[12] The Officer emphasized that while the general country conditions in India may be less ideal than Canada's, the purpose of section 25 of the *IRPA* is not to make up for the difference in standard of living between Canada and other countries. The Officer determined that the children's best interests would be met as long as they remain with their parents. The Officer found that the weight accorded to the BIOC is not enough to justify an exemption "because of the insufficient evidence demonstrating a negative impact on the children in the event they return to India […]".

III. **Issue and Standard of Review**

[13] The sole issue in this application for judicial review is whether the Officer's assessment of the H&C factors was reasonable.

[14] Both parties concur that the issue is to be reviewed on the reasonableness standard. I agree that the appropriate standard of review for H&C decisions is reasonableness (*Qureshi v Canada (Citizenship and Immigration),* 2020 FC 88 at paras 5-8; *Kanthasamy v Canada (Citizenship and Immigration),* 2015 SCC 61 ("*Kanthasamy*") at paras 8, 44-45; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paras 16-17).

[15] 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).

[16] For a decision to be unreasonable, an applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. 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). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36).

IV. **Analysis**

[17] Under subsection 25(1) of the *IRPA,* the Minister may grant permanent residency to a foreign national who does not meet the requirements of the *IRPA* if the circumstances are justified under H&C considerations, including the BIOC directly affected. An H&C exemption is a discretionary remedy. What warrants relief will vary depending on the facts and context of the case. This means that the decision maker must "substantively consider and weigh all the relevant facts and factors before them" (*Kanthasamy* at para 25, citing *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) ("*Baker*") at paras 74-75), and that "[…] there will sometimes be humanitarian or compassionate reasons for admitting people who, under the general rule, are inadmissible" (*Kanthasamy,* at paras 12-13).

[18] In assessing the BIOC, a decision-maker is required to be "alert, alive and sensitive" to the best interests of any children directly affected by a decision (*Baker* at para 75). As affirmed in *Kanthasamy,* the BIOC must be "well identified and defined" and examined "with a great deal of attention" (at para 39, citing *Legault v Canada (Minister of Citizenship and Immigration),* 2002 FCA 125 at paras 12 and 31; *Kolosovs v Canada (Citizenship and Immigration),* 2008 FC 165 at paras 9-12). The BIOC assessment must begin with the question: "what is in the best interest of the child?" (*Sun v Canada (Citizenship and Immigration),* 2012 FC 206 at para 45)

and an analysis must "address the "unique and personal circumstances" that removal from Canada would have for the children affected by the decision [citations omitted]" (*Nagamany v Canada (Citizenship and Immigration),* 2019 FC 187 ("*Nagamany*") at para 38).

[19] With respect to the BIOC, the Applicant submits that the Officer erred by applying a hardship analysis to the BIOC, instead of focusing on the best interests of his three children and analyzing the "multitude of factors that may impinge on the [children]'s best interest" (*Nagamany* at para 38). The Applicant notes that the only statement in the decision that identifies the children's best interest is when the Officer writes: "[the children's] best interests will be met as long as they remain with their parents". The Officer exclusively relied on the ways in which the Applicant and his family could mitigate any hardship upon removal from Canada, an approach that has been rejected by this Court.

[20] The Applicant argues that the evidence clearly outlined how Ayaanuddin's medical condition will require close monitoring by a cardiologist and likely further surgery. The evidence also indicates that Aleena has been diagnosed with significant language delay that will require ongoing intervention. Despite acknowledging this evidence and the fact that the children would likely experience difficulty adapting to life in India, the Officer was not satisfied "that accompanying their parents to India would greatly compromise [the children's] wellbeing and development and impact them significantly on a negative basis". The Applicant asserts that this analysis focuses on basic needs and the mitigation of hardship, rather than the best interests of the children, and that the Officer filtered through the evidence to justify a refusal (*Augusto v Canada (Citizenship and Immigration),* 2022 FC 226 ("*Augusto*") at para 42). The Applicant

relies on *Bautista v Canada (Citizenship and Immigration),* 2014 FC 1008 at paragraph 28, to submit that the Officer's emphasis on the children's adaptability renders the BIOC analysis devoid of meaning:

> To see everything through the lens of whether one reasonably can overcome the inevitable hardships that accompany a new life, as the Officer did in this case, resembles the H&C test that is applied to adults. Children are malleable – far more so than adults – and starting with the question of whether they can adapt will almost invariably predetermine the outcome of the script, namely that the child will indeed overcome the normal hardships of departure, and adjust to a new life […] Undertaking the analysis through this lens renders the requirement to take into account the best interests of a child directly affected, as statutorily required in subsection 25(1) devoid of any meaning.

[21] The Applicant further submits that in filtering through the record for reasons to mitigate the risks of a return to India, the Officer ignored the harsh realities he and his family face in India. The Applicant's ability to re-establish in India with his family is impacted by the family's change in circumstances since they left India, including the births of Moinuddin and Ayaanuddin, and Ayaanuddin's medical diagnosis. The Applicant argues that the Officer's failure to substantially analyze this change in personal circumstances renders the decision unreasonable (*Epstein v Canada (Citizenship and Immigration),* 2015 FC 1201 at paras 13-16). Overall, the Officer failed to weigh the hardship that a removal from Canada would impose on the Applicant and his family, and instead improperly assessed whether it would be impossible to mitigate such hardship. This flawed analysis also extended to the BIOC.

[22] In response to the Applicant's critique that the Officer applied a hardship analysis to the BIOC assessment, the Respondent submits that this is in fact how the Applicant's H&C

submissions were framed, as the Applicant specifically used the term “hardship” in describing the difficulties his children would face if removed to India. The H&C application states:

> It is submitted that the children would be personally affected by their removal and that their removal is not in their best interests as it would have a direct and negative adverse impact on their lives.

[23] The Respondent argues that the Applicant’s attempt to impugn the Officer’s assessment of his own submissions and evidence is unconvincing. In any event, the Respondent maintains that the Officer did more than assess the hardship the children would face in India: the Officer examined educational opportunities, health care, and family integrity in order to ensure the children’s best interests would be met in India. It was not unreasonable for the Officer to conclude that the children’s best interests will be met by living with their parents in India.

[24] The Respondent maintains that the BIOC was clearly at the forefront of the Officer’s assessment, and submits that the onus remains on an applicant to provide enough evidence to support their arguments, including with respect to the BIOC (*Chaudhary v Canada (Immigration, Refugees and Citizenship),* 2018 FC 128 at para 35). The Officer reviewed the Applicant’s BIOC submissions and evidence in detail, and examined each issue. As noted by the Supreme Court in *Kanthasamy,* H&C relief is not an alternative immigration scheme, and some level of hardship associated with leaving Canada is generally not sufficient to warrant relief under section 25(1) of the *IRPA* (at para 23). The Applicant has failed to show an error in reasoning or provide compelling evidence to establish that the decision is untenable. The Respondent asserts that the Applicant’s arguments mischaracterize the Officer’s reasons in

disconnected ways to create issues, when the Applicant simply disagrees with the weighing of the evidence and the outcome.

[25] With regard to the Officer's BIOC analysis, I agree with the Respondent that the Officer conducted a detailed examination of each BIOC factor raised by the Applicant. However, I find that it was unreasonable of the Officer to conclude that the BIOC considerations, in particular Ayaanuddin's best interests, do not outweigh the other H&C factors to justify an exemption under section 25(1) of the *IRPA*. I also cannot accept the Respondent's argument that the 'hardship' analysis conducted by the Officer was in response to the Applicant's own submissions. In my view, the Officer had a duty to consider what was in the children's best interests, and erred in applying a hardship lens to the analysis of the H&C application.

[26] Nonetheless, I would first note that I find the Officer reasonably determined that there is insufficient evidence to demonstrate the Applicant's children would face hardship in accessing education in India. I am also satisfied that the Officer conducted an in-depth review of the evidence in Aleena's situation, including an assessment of Aleena's speech and language development and Aleena's kindergarten report cards from June 2020. Given the lack of evidence to demonstrate how Aleena would face barriers to education in India, it was reasonable of the Officer to place less weight on this factor.

[27] Where I find the Officer's decision lacks rationale is in the analysis of Ayaanuddin's best interests. Ayaanuddin has faced severe health challenges since birth and was diagnosed with a heart condition that required surgery when he was five months old. The evidence indicates that

he will require ongoing and lifelong monitoring by a cardiologist and may need surgery in the future. In the decision, the Officer acknowledged Ayaanuddin's medical condition and its effects, yet found there was a lack of detail about Ayaanuddin's current medical situation:

> I accept that Ayaanuddin is diagnosed with this medical condition and I am sympathetic that he is enduring the effects of it. I recognize that this must be difficult for him and his family.
>
> Aside from the aforementioned submissions, the Applicant and his spouse mention little about Ayaanuddin's current situation and how he is affected by these circumstances. I acknowledge that certain submitted medical documents mention Ayaanuddin's need for follow up appointments after a certain stated period of time. However, I note that over two years have passed since Ayaanuddin underwent the surgery and there is little current information detailing or describing any updates of his condition and/or whether he has completed any of the required follow ups. It is unknown if Ayaanuddin is experiencing any complications from the surgery and/or requires further surgeries; details as to whether he is enduring any symptoms of this disease or whether his health is experiencing other difficulties are absent for consideration.

[28] I note that in a written statement, also cited in the Officer's decision, Ms. Ibrahim discusses her concerns for Ayaanuddin's health, including how doctors have advised that he could require surgery in the future:

> Doctors advised that in future there could be one more surgery of my son if the health issue remained. As a parents[sic] we are very much concern and worried about our childs [sic] health as he is doing well today we are happy to see him healthy but we don't no [sic] how its gonna [sic] be in future […]

[29] A letter on record from Ayaanuddin's cardiologist, dated December 10, 2019, discusses the surgery he underwent on February 25, 2019, and notes that Ayaanuddin is being followed on a yearly basis to monitor his condition:

> [Ayaanuddin] has been stable from a cardiovascular standpoint and is being followed on a yearly basis to monitor the right ventricular outflow tract for worsening obstruction which would cause an increase in pressure in the right ventricle and for worsening regurgitation which could increase the size of the right ventricle and effect its function.

[30] Furthermore, an article on the record from the Centers for Disease Control and Prevention discussing Tetralogy of Fallot notes:

> Most infants will live active, healthy lives after surgery. <u>However, they will need regular follow-up visits with a cardiologist (a heart doctor) to monitor their progress and check for other health conditions that might develop as they get older</u>. As adults, they may need more surgery or medical care for other possible problems.
>
> [Emphasis added]

[31] Given the evidence that indicates Ayaanuddin lives with a life-long condition that will require continuous monitoring and potentially further surgery, the Officer's statement that there was insufficient information about Ayaanuddin's present medical state lacks rationale. The Officer's decision also states that there is little evidence to indicate that Ayaanuddin would face barriers to accessing health supports and services in India:

> As mentioned earlier, it is unknown whether Ayaanuddin requires further surgery for his medical condition. I find it reasonable to

> assume that Ayaanuddin now requires post-operative care and follow ups to monitor his condition. There is little evidence in the submissions to indicate that such supports and services are unavailable and/or unaffordable in India for the Applicant and his spouse to obtain for Ayaanuddin. Additionally, I find there is little to indicate that in the event the Applicant and his spouse return to India with their children, that they will stop monitoring and following up on Ayaanuddin's condition and not provide him the same level of care and attentiveness as they have given him in Canada.
>
> Nonetheless, I acknowledge that Ayaanuddin suffers from a medical condition and that he may endure some hardships and challenges to his health and well-being in the event he is to return to India with his parents and siblings. As such, I place considerable weight to this factor in the decision.

[32] The Applicant's H&C application included several articles on the barriers to effective care for CHD in India, including financial constraints, lack of access to specialists, and lengthy wait times. A study from 2017 notes:

> […] a vast majority of children born in India with CHD have no access to affordable treatment. Rapid population grown, lack of healthcare funding, competing priorities, inefficient and inadequately equipped infrastructure and shortage of trained staff are some of the major roadblocks to cardiac care of children with CHD.

[33] Another study from 2018, *Congenital Heart Disease in India: A Status Report,* highlights the inadequacy of resources for the treatment and care children with CHD in India, as well as obstacles including the affordability of care, inadequate infrastructure and a deficit of trained staff. In discussing the lack of follow-up care, the author writes:

> Most children with CHD, including those who have undergone intervention, require long-term care for a good outcome. Unfortunately, a large number of children in India, especially those from middle or lower socioeconomic strata, are lost to follow-up. The onus of follow-up is totally on the family of the affected child as our health system is not proactive despite having a network of primary heath care units.

[34] In light of this evidence on the record, I do not find that the Officer reached a reasonable conclusion in finding that there is “little evidence” to indicate that the Applicant and his family would face barriers in accessing medical supports and services for Ayaanuddin in India. As rightly noted by the Applicant, in finding that there is no indication that the Applicant and Ms. Ibrahim would cease being attentive to Ayaanuddin’s condition in India, the Officer diminished the Applicant’s concerns about accessing health care for Ayaanuddin and reduced them to an issue of monitoring. I am therefore not convinced that the Officer fully grappled with the real-life impacts of a negative decision on Ayaanuddin’s best interests (*Nagamany* at para 44; *Baker* at para 75).

[35] Furthermore, I agree with the Applicant that the Officer’s analysis places an undue focus on the adaptability of the children and how hardship could be mitigated in India. As noted by the Supreme Court in *Kanthasamy* at paragraph 41,

> […] And since “[c]hildren will rarely, if ever, be deserving of any hardship”, the concept of “unusual and undeserved hardship” is presumptively inapplicable to the assessment of the hardship invoked by a child to support his or her application for humanitarian and compassionate relief: [*Hawthorne v Canada (Minister of Citizenship and Immigration),* 2002 FCA 475 at para 9]. <u>Because 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</u>

> adult, may nonetheless entitle a child to relief: [Emphasis added; citations omitted.]

[36] Overall, the Officer failed to undertake a sensitive and individualized assessment of the BIOC and to be "alert, alive and sensitive" to the best interests of the children (*Kanthasamy* at para 38; referencing *Baker* at paras 74-75). By focusing on a lack of evidence that the Applicant's children would endure hardship if they were required to relocate to India, the Officer became fixated on finding reasons to mitigate the hardship that the children – and particularly Ayaanuddin – would face in India. In doing so, I find that the Officer lost sight of what is in each child's *best* interests (*Augusto* at para 42), particularly given the evidence of the children's ties to Canada, including extensive evidence of Ayaanuddin's health needs that require continued presence in Canada. Not once in their decision did the Officer consider how the children's best interests could be served by remaining in Canada – where they are currently able to access the health and education services they require.

[37] While I can appreciate that the Officer reviewed each factor in the Applicant's submissions, the Officer's analysis failed to adequately weigh the hardship that a removal would impose on the Applicant and his family, and instead focused on how they would be able to mitigate that hardship. This 'hardship' lens extended into the Officer's BIOC analysis and reflects a failure of the Officer to adequately apply the approach advanced in *Kanthasamy*. I therefore do not find that the Officer's conclusion follows a rational chain of analysis, nor is it justified in relation to the relevant facts and law (*Vavilov* at paras 85; 99).

[38] Having determined that the Officer's BIOC analysis was unreasonable, it is unnecessary to review the Applicant's submissions with respect to establishment.

V. **Conclusion**

[39] For the reasons above, I find that the Officer's decision is unreasonable. I therefore allow this application for judicial review. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-5213-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed. The decision under review is set aside and the matter returned back for redetermination by a different decision-maker.

2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5213-21
STYLE OF CAUSE:	KHALEELUDDIN MOHAMMAD KHAJA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	MAY 17, 2022
JUDGMENT AND REASONS:	AHMED J.
DATED:	JULY 13, 2022

APPEARANCES:

Mario D. Bellissimo	FOR THE APPLICANT
Charles Jubenville	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Bellissimo Law Group PC Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT