Federal Court  Cour fédérale

Date: 20220714

Docket: IMM-445-21

Citation: 2022 FC 1047

Montréal, Quebec, July 14, 2022

PRESENT: Madam Justice St-Louis

BETWEEN:

TEMITOPE ELIZABETH ADEKO
OLUWATOMIWA EMMANUEL BADRU
OLUWATOMILOLA ELIZABETH BADRU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicants seek judicial review of the decision [the Impugned Decision] of a senior immigration officer [the Officer] dated January 4, 2020, refusing the application they presented for Canadian permanent residence status based on humanitarian and compassionate [H&C]

considerations per section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] For the reasons that follow, I will dismiss the application for judicial review.

II. Context

[3] The Applicants are Ms. Temitope Elizabeth Adeko [the Principal Applicant] and two of her minor children, 9 and 6 years old, all citizens of Nigeria. Ms. Adeko has a third minor child, 2 years old, who is a Canadian citizen.

[4] Through 2016 and 2017, Ms. Adeko applied for a Canadian visitor's visa on three occasions. In 2017, Ms. Adeko obtained a visitor's visa for the United States, on December 2017, she entered the United States, and on January 9, 2018, she entered Canada and claimed refugee protection. She then alleged that she was persecuted in Nigeria based on her sexual orientation as a bisexual woman. On January 10, 2019, the RPD denied her claim and stated the claim was manifestly unfounded, which, per section 107 of the Act, means it considered Ms. Adeko's claim fraudulent. The Applicants did not challenge the RPD decision before the Court.

[5] On June 25, 2019, the Applicants filed their permanent residence application raising H&C considerations. Ms. Adeko's husband, Mr. Owolabi Adebowale Badru, is identified on the H&C applications as a non-accompanying spouse, and Ms. Adeko indicated she would apply for him later.

[6] The Applicants' H&C application was submitted by counsel. Many documents were submitted with the application forms, but no submissions were actually presented. Counsel's letter simply lists all the documents accompanying the application, and indicates that submissions will be filed later. In her application forms, Ms. Adeko provided no information on particular H&C considerations, referring to "see submissions".

[7] On January 4, 2021, the Officer denied the Applicants' H&C application. On January 20, 2021, the Applicants applied for leave and for judicial review of this negative H&C decision, and on January 7, 2022, the Court granted leave in regards to the January 4, 2021 decision.

[8] On April 19, 2021, hence, after the Applicants had filed their Application for leave and judicial review of the negative H&C decision, the Applicants asked the Officer to reconsider its negative decision. They alleged that the officer had omitted to examine additional documents, allegedly submitted by previous counsel on or around September 25, 2020. On April 20, 2021, the Officer refused to reconsider, and the Applicants have not challenged that decision before the Court.

[9] On December 2, 2021, the Certified Tribunal Record [CTR] was filed with the Court. It contains only one correspondence from the Applicants' counsel to Citizenship and Immigration Canada [CIC] in regards to their H&C application, which is the one dated June 25, 2019. It does not contain the reconsideration documents, nor the documents that the Applicants argue had been sent to Immigration, Refugees and Citizenship Canada [IRCC] on or around September 25, 2020.

[10] In support of their Application in these proceedings, the Applicants filed the affidavit of Mr. Josef Brown, a law clerk with the Applicants' current counsel firm, sworn on April 9, 2021. Mr. Brown affirms that "[o]n or around September 25th, 2020, the applicants' former representative, Mr. Orr Kolesnic from Globe Immigration in Toronto, disclosed an additional package of documents to support the Applicants' application. A copy of this additional package is attached hereto and marked as **Exhibit 'A'**". In his affidavit, Mr. Brown says nothing about any attempt to contact previous counsel in order to obtain details and confirmation that the documents and the letter were sent to IRCC or as to how they were sent, or failure from previous counsel to respond. Likewise, the affidavit contains no information as to how these documents were identified or obtained by current counsel.

III. The Impugned Decision

[11] In the Impugned Decision, the Officer determined the following factors were submitted for consideration (1) the establishment in Canada; (2) the best interest of the children; and (3) the adverse country conditions.

[12] With regards to establishment in Canada, the Officer found a 3-year period in Canada was not a significant period of time. The Officer noted the several educational opportunities pursued by the Principal Applicant while in Canada and found that it is likely to support her employment opportunities whether she is in Canada or not. The Officer noted that little evidence, such as bank statements, has been provided to demonstrate that the Principal Applicant is showing a pattern of sound financial management. The Officer was not satisfied that the Principal Applicant currently possessed the funds to support her family's long-term stay in

Canada and noted that foreign nationals are generally expected to be financially autonomous and self-supporting. The Officer noted that the Principal Applicant's brother wishes to take financial responsibility for the family, but the Officer found insufficient documentary evidence to demonstrate that the brother was fully supporting the Applicants. The Officer accepted that the Applicants have made friends within their church community and in school during their stay in Canada. The Officer noted that the Applicants could maintain contact with their friends and others in Canada through mail, telephone and via the internet.

[13] With regards to the best interest of the children, among others things, the Officer noted that, in accounting for the children's youth, the children would adapt to the new country conditions with less difficulty than older children with more ties to their community and surroundings. The Officer noted the health condition of the youngest son, but relying on the medical expert's opinion, found that this condition will not result in more than mild symptoms. The Officer found that the best interests of the children in this case would be for them to be cared for by both parents. The Officer found that there is little evidence that suggest that the Principal Applicant has sole custody of her children and concluded that the father, who is in Nigeria, has a right to be an active participant in the children's life. The Officer added that the children would benefit from the emotional support of their grandparents, aunts, and extended family, most of whom reside in Nigeria.

[14] The Officer considered the effect of their decision on the children of the Principal Applicant's cousins in Manitoba. The Officer noted little evidence indicating that the Applicants had visited their cousins in Manitoba since their arrival in Canada. The Officer stated that

relationships are not bound by geographical locations and that the Applicants have the option to maintain contact with their family and their extended family in Canada through mail, telephone and via the internet.

[15] With regards to adverse country conditions and the situation of the Principal Applicant as a bisexual woman, the Officer stated that the findings of fact remain the same, referring to the RPD's findings. The Officer found insufficient evidence to demonstrate that having to depart Canada for the purpose of applying for permanent residence would have a significant negative impact on the Applicants, as a result of the current conditions in Nigeria.

IV. Submissions by the parties and analysis

[16] The Applicants submit that (1) the Officer did not consider documents that were sent by previous counsel; (2) the Officer failed to take into consideration the Principal Applicant's education and work as a Personal Support Worker; (3) the Officer erred in the assessment of the Applicants' establishment in Canada by: (i) dismissing the Applicants' relationships in Canada; and (ii) erring in their assessment of the Principal Applicant's work opportunities; and (4) the Officer failed to take into consideration the best interests of the children.

[17] The Applicants have raised before the Court arguments that were not contained in their Memorandum of Fact and Law. Following the guidance of the Court's jurisprudence on the matter, I will not consider these new arguments (*Abdulkadir v Canada (Citizenship and Immigration)*, 2018 FC 318 at para 81; see also *Del Mundo v Canada (Citizenship and Immigration)*, 2017 FC 754 at paras 12-14; *Mishak v Canada (Minister of Citizenship and*

Immigration), (1999) 173 FTR 144 (TD) at para 6; *Adewole v Canada (Attorney General)*, 2012 FC 41 at para 15).

A. *Standard of review*

[18] I agree with the parties that the applicable standard is reasonableness, as established by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[19] Where the applicable standard of review is reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision-maker and determine whether the decision is based on "an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2, 31). A reviewing court must therefore ask itself whether "the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility" (*Vavilov* at para 99 citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47, 74).

B. *Did the Officer fail to consider the documents sent by previous counsel?*

[20] The Applicants submit that the Officer failed to receive and/or consider the supplementary documentation that was sent to them by the Applicants' previous counsel. The Applicants explain that on or around September 25, 2020, the former counsel sent the Officer an additional package of documents to support the application. The Applicants argue that, as the Officer stated "little information was provided to indicate how she had been employed", it is

clear that the employment letters, pay stubs, and tax reports were not included in the Officer's assessment of the Applicants' establishment in Canada.

[21] The Applicants submit that IRCC does not provide any information or acknowledgement to applicants who submit further documentation to their existing applications.

[22] The Minister responds that where the Applicants chose to provide updated unsolicited submissions, they have a duty to ensure that the submissions are received before the tribunal renders its decision. The Minister adds that there is no proof, excluding the affidavit of Mr. Brown, or email confirmation that the additional package of documents was sent, citing *Singh Khatra v Canada (Citizenship and Immigration)*, 2010 FC 1027 at paragraph 6 [*Singh Khatra*] and *Luzati v Canada (Citizenship and Immigration)*, 2011 FC 1179 at paragraph 14 [*Luzati*]). The Minister submits that there is no record that the package was received.

[23] I agree with the Minister's position. The Minister cited appropriate authorities on that matter. As stated in *Singh Khatra* at paragraph 6, "[w]here, as here, the CTR does not contain a document or make any reference to such a document, a bare assertion by the Applicant that the document was sent will not generally suffice to meet that burden". Additionally, in Luzati, the applicant only provided a statement in their affidavit that the document was presented to the PRRA office by their lawyer and the Court found that "[…] this is insufficient to establish that the letter was in fact submitted in the absence of any evidence that it was mailed or delivered from someone who would have knowledge of that fact" (*Luzati* at para 14). Finally, "[t]his Court has recognized on numerous occasions that the judicial review of a decision has to be made in

light of the evidence that was submitted before the decision maker" (*Zolotareva v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1274 at para 36).

[24] As I indicated earlier, at paragraph 2 of his affidavit, Mr. Brown affirms that "[o]n or around September 25th, 2020, the applicants' former representative, Mr. Orr Kolesnic from Globe Immigration in Toronto, disclosed an additional package of documents to support the Applicants' application." It is my understanding that Mr. Brown does not have personal knowledge of such information, and that his statement cannot serve to prove that the said package was sent to IRCC. Consequently, the Officer made no error, as they could not take into account documents that were not before them.

[25] On the fact that the Applicants alleged in their reply that there has been a lack of procedural fairness in the negative reconsideration decision, I note that this decision is not under review in these proceedings. Per section 72 of the Act, judicial review by the Federal Court is subject to section 86.1, commenced by making an application for leave to the Court. Per Rule 302 of the *Federal Courts Rules*, SOR/98-106, an application for judicial review shall be limited to a single order in respect of which relief is sought. The Applicants have not challenged the reconsideration decision, leave was therefore not granted and the Court cannot examine it. I further note that the facts of the *Naderika v Canada (Citizenship and Immigration)*, 2015 FC 788 decision are distinguishable from the present case where the reconsideration request was sent to IRCC months after the Applicants filed their Application for leave before the Court in regards to the Impugned Decision.

C. *Did the Officer fail to take into consideration the Applicant's education and work as a Personal Support Worker?*

[26] The Applicants argue that the Officer erred by not taking into consideration the Applicant's educational history in Canada and especially her education as a Personal Support Worker. The Applicants add that it was not enough for the Officer to gloss over the Principal Applicant's employment without considering the nature of such employment and what it means to her establishment in Canada, as she contributed to the country and the health and well-being of its citizens.

[27] The Minister responds that the Applicants' argument is not supported by the record as (1) the evidence of the Principal Applicant's employment as a personal support worker in 2020 was not before the Officer; and (2) the evidence before the officer indicated that the Principal Applicant was enrolled in an adult education and personal support worker program, which the Officer found to be commendable, and likely to support her future employment opportunities whether she is in Canada or not.

[28] In their memorandum, the Applicants cite the Exhibit A of Mr. Brown's affidavit in support of their argument. As previously stated, this evidence was not before the decision-maker and can therefore not be examined by the Court. The Applicants' argument cannot succeed.

D. *The Applicants' establishment in Canada*

(1) Did the Officer err in dismissing the Applicants' relationships in Canada?

[29] The Applicants argue that if every relationship can be maintained from abroad, ties to Canada would never be taken under consideration. The Applicants also submit that the Officer could not use ambiguous language when assessing the Applicants' establishment, such as "some positive consideration" and "little positive consideration".

[30] The Minister responds that it was reasonable for the Officer to find that the Applicants had the option to maintain contact with their extended family in Canada through mail, telephone and via the internet, as they had been doing since their arrival.

[31] It is important to repeat that the Court found in *Garcia Diaz v Canada (Citizenship and Immigration)*, 2021 FC 321 at paragraph 42 that "[s]ubsection 25(1) of the [Act] gives the Minister discretion to exempt foreign nationals from the ordinary requirements of that statute and grant permanent resident status in Canada, if the Minister is of the opinion that such relief is justified by humanitarian and compassionate considerations."

[32] Subsection 25(1) authorizes the Minister to grant an exemption to a foreign national who applies for permanent resident status, but who is inadmissible or does not comply with the law, if the Minister "is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national". In *Kanthasamy*, the Supreme Court adopted an approach to respond more flexibly to the equitable goals of the provision (*Kanthasamy* at para 33). The discretion based on H&C considerations provided by subsection 25(1) is "seen as being a flexible and responsive exception" to mitigate the effects of the rigid application of the Act in appropriate cases (*Kanthasamy* at para 19).

[33] Those considerations are to include the best interests of a child directly affected. The H&C discretion in subsection 25(1) is a flexible and responsive exception to the ordinary operation of the Act and the Regulations, to mitigate the rigidity of the law in an appropriate case (*Kanthasamy* at para 19). Moreover, the H&C exemption is "an exceptional and discretionary remedy" (*Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at para 15).

[34] The Applicants did not cite any case law to support their position that the Officer erred in considering the Applicants' relationships in Canada, and that they could continue to maintain contact by virtual means. This is particularly reasonable given that no evidence was adduced as to whether the family's uncle and the Applicants had actually visited one another or not.

(2) Did the Officer err in assessing the Principal Applicant's ability to support her family in Canada?

[35] The Applicants submit that the Officer discredited the Principal Applicant for not clearly demonstrating her ability to work, contrary to the supplemental documentation and contrary to its subsequent finding. The Applicants further allege that the Officer finds that the Principal Applicant's lack of work is a factor that is used against her establishing herself and her upgraded education is used by the Officer to favorably find that she could find work in Nigeria. The Applicants argue that the Officer cannot make this contradictory finding.

[36] As stated by the Applicants, the Officer first found that the Principal Applicant does not currently possess the funds to support her family's long-term stay in Canada, but later found that it is more likely than not that the Applicant's education in Canada would assist her in securing

employment upon return in home country. The first finding was made on establishment and the second finding is one on adverse country conditions.

[37] I disagree with the Applicants' position. The two findings made by the Officer do not contradict themselves and have a different purpose. Indeed, each finding was made under a different criteria to assess. With regards to establishment, the Officer could reasonably conclude that the Principal Applicant do not have the funds to support her family in Canada. This assessment is not contradicted by the analysis on adverse country conditions.

E. *Did the Officer fail to take into consideration the best interests of the children?*

[38] The Applicants submit that the Officer made two assumptions without providing any documentation: (1) the Officer concluded that the children would adapt to the new country conditions with less difficulty than older children with more ties to their community and surroundings; and (2) the Officer found that since the Applicant does not have full custody, that the father "has a right to be an active participant in their lives" and that "the children would benefit from the emotional support of their grandparents, aunts, and extended family, most of whom reside in Nigeria."

[39] The Minister responds that the approach taken by the Officer, i.e., to consider the potential impact of the Applicants' return to Nigeria where they could benefit from the emotional support of their extended family as well as their father, is not unreasonable.

[40] It must be noted again that the Applicants filed no submissions to guide the Officer or to pin point any issue affecting the children. In addition, again, the Applicants do not cite any case law to support their allegation that the Officer's findings with regards to the best interests of the children are unreasonable.

[41] The first point raised by the Applicants, i.e., young children would adapt to the new country conditions with less difficulty than older children with more ties to their community and surroundings, is not an unreasonable conclusion to reach for the Officer in light of the record.

[42] Likewise for the second finding that the best interests of the children in this case would be for them to be cared for by both parents. There was in fact no evidence to suggest that the Principal Applicant has sole custody of the children and it is not unreasonable to suggest that their father has a right to be an active participant in their live. First, the Court has recognized a common-sense presumption that it is in the best interests of a child to be raised by both parents (*Sivalingam v Canada (Citizenship and Immigration)*, 2017 FC 1185 at para 17). Second, I note that the father is not in Canada and thus likely remains in Nigeria and the Officer could reasonably conclude that it was in the best interest of the children to have the family reunited.

[43] With the information and documents provided, the Officer made a coherent analysis, addressing subsection 25(1) of the Act, and the issues raised by the application.

V. Conclusion

[44] The Applicants have not convinced me that the Officer did not reasonably exercise their discretion, per subsection 25(1) of the Act.

[45] The application for judicial review will be dismissed.

JUDGMENT in IMM-445-21

THIS COURT'S JUDGMENT is that :

1. The Application for judicial review is dismissed.

2. No question is certified.

3. No costs are awarded.

"Martine St-Louis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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