Federal Court  Cour fédérale

Date: 20221125

Docket: IMM-3494-20

Citation: 2022 FC 1623

Ottawa, Ontario, November 25, 2022

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

DANA KATHERINE AL-ASWADI
HUSSAIN ABDULLA HUSSAIN AL-ASWADI
ROMAYSA HUSSAIN AL-ASWADI
JALAL HUSSAIN AL-ASWADI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The Applicants, Dana Katherine Al-Aswadi [Principal Applicant or PA], Hussain Abdulla Hussain Al-Aswadi [Mr. Al-Aswadi], and their two children seek judicial review of a Senior Immigration Officer's [Officer] July 21, 2020 decision refusing their application for

permanent residence on humanitarian and compassionate [H&C] grounds pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] [Decision].

[2] The application for judicial review is allowed. The Officer erred in their assessment of the country conditions in Yemen and the associated hardship on Mr. Al-Aswadi upon return.

II. Background

[3] The Applicants are a family of four. The PA and the two children, Romaysa and Jalal, are citizens of the United States [US]. Mr. Al-Aswadi is a citizen of Yemen, but moved to the US at the age of seven. The PA sponsored Mr. Al-Aswadi for permanent residence in the US following their marriage.

[4] On September 24, 2009, Mr. Al-Aswadi pled guilty to criminal sexual conduct in the US. He was incarcerated until his release on parole in 2015. Mr. Al-Aswadi lost his permanent residence status in the US as a result.

[5] Prior to his incarceration, Mr. Al-Aswadi entered Canada on two separate occasions in an attempt to submit a refugee claim. He was returned to the US authorities on both occasions.

[6] In May 2017, the Applicants entered Canada from the US and submitted refugee claims. The PA's and the children's claims were refused on June 19, 2017. Mr. Al-Aswadi was found inadmissible to Canada on the ground of serious criminality pursuant to paragraph 36(1)(b) of *IRPA*. On May 17, 2017, Mr. Al-Aswadi was issued a deportation order.

[7] On April 19, 2018, the PA's application for a temporary resident permit was denied. Subsequently, on August 30, 2018, Mr. Al-Aswadi's application for a Pre-Removal Risk Assessment [PRRA] was refused.

[8] On December 11, 2019, the Applicants submitted their H&C application.

III. The Decision

[9] The Officer found that the Applicants had been living in the US until their entry into Canada in 2017. The PA and the children were all born in the US and had lived there for the majority of their lives. While the PA explained that she would not have family support, accommodation, or employment upon their return to the US, there was no evidence that her family in the US was unwilling or unable to assist. Similarly, there was no evidence that Mr. Al-Aswadi's family in Canada was unwilling or unable to continue supporting the PA and the children.

[10] The Officer acknowledged that Mr. Al-Aswadi completed several courses following his release from incarceration, demonstrated deep remorse, and was at a low risk to re-offend. Although Mr. Al-Aswadi had not resided in Yemen for more than 30 years, the Officer found that his education in the US, ease in integrating into Canada, and participation in rehabilitation courses demonstrated his resilience in new environments. Accordingly, it was reasonable to conclude that he could utilize this knowledge to secure employment in Yemen. The Officer further noted that there was no evidence that Mr. Al-Aswadi's family in Canada was unwilling or unable to contact their extended family or friends in Yemen to assist with his re-integration.

Lastly, the Officer found that, while the country conditions in Yemen are not ideal, they "are general in nature and would be applicable to most similarly situated persons in Yemen."

[11] The Officer acknowledged that the refusal of the Applicants' H&C application could result in the permanent separation of the family unit. Nevertheless, the Officer found that the family could utilize several forms of communication to maintain their relationships. While the Applicants had lived in Canada for more than three years, the Officer determined that their level of establishment was not exceptional compared to others and that severing their ties would not amount to hardship to the extent that warranted a favourable decision.

[12] Turning to the best interests of the children, the Officer considered both Romaysa's health conditions and a letter from Dr. Khalid Nurae, in which Dr. Nurae explained that Romaysa's separation from Mr. Al-Aswadi would have physical and psychological impacts. The Officer noted that Dr. Nurae did not indicate how they arrived at the conclusion that separation would, rather than could cause a flare up in her health issues or have a psychological impact. There was insufficient evidence to demonstrate that Romaysa would be unable to access adequate medical or psychological care in the US if such health issues arose. Moreover, while both children attended school, made friends, and grew close to their family in Canada, there was no evidence to demonstrate their inability to access adequate schooling in the US or maintain contact with their family through modern communication methods. Given the Applicants' submissions, the Officer determined that the negative impact on the children fell short of justifying an exemption.

[13] In conclusion, the Officer determined that a cumulative assessment of the evidence did not warrant an exemption on H&C grounds. The Officer noted that, while family reunification was a cornerstone of *IRPA*, it did not eclipse Mr. Al-Aswadi's inadmissibility for serious criminality.

IV. Issues and Standard of Review

[14] Having considered the submissions of the parties, the sole issue for determination is whether the Decision was reasonable. The relevant sub-issues are:

(1) Did the Officer err in their assessment of the country conditions in Yemen?

(2) Did the Officer err in their assessment of the best interests of the children?

(3) Did the Officer err in failing to consider the ongoing COVID-19 pandemic?

[15] The Applicants did not provide submissions on the applicable standard of review. The Respondent submits the standard of review is reasonableness.

[16] I agree with the Respondent that the standard of review for the merits of the Decision is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). None of the exceptions outlined in *Vavilov* arise in this matter (at paras 16-17). A reasonableness review requires the Court to examine the decision for intelligibility, transparency, and justification. In conducting a reasonableness review, the reviewing court must look to both the outcome of the decision and the justification of the result (*Vavilov* at para 87). A reasonable decision must be "justified in relation to the relevant factual and legal constraints that bear on the

decision" (*Vavilov* at para 99). However, a reviewing court must refrain from reweighing and reassessing the evidence considered by the decision-maker (*Vavilov* at para 125, citing *Canada (Canadian Human Rights Commission) v Canada (AG)*, 2018 SCC 31 at para 55). If the reasons of the decision-maker allow a reviewing Court to understand why the decision was made and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law, the decision will be reasonable (*Vavilov* at paras 85-86).

[17] The Applicant's arguments surrounding natural justice and procedural fairness in the first sub-issue are more accurately characterized as the reasonableness of the Officer's assessment of the country conditions in Yemen.

V. Analysis

A. *Did the Officer err in their assessment of the country conditions in Yemen?*

(1) Applicants' Position

[18] The Officer's characterization of the country conditions in Yemen "as less than ideal" is an unfair and unreasonable trivialization of the ongoing civil war and humanitarian crisis. The Officer failed to refer to the administrative deferral of removal [ADR] in place for Yemen. By classifying the conditions as general in nature, the Officer improperly imported the personalized risk standard under subsection 97(1) of *IRPA*. The Officer unreasonably failed to consider that Mr. Al-Aswadi's lack of ties to Yemen would only exacerbate his hardship upon return.

(2) Respondent's Position

[19] The Applicants' submissions ask the Court to engage in a microscopic assessment of the Decision. The Officer is presumed to have weighed and considered all of the evidence unless the contrary is shown. The Officer acknowledged the conflict and humanitarian crisis in Yemen, and reasonably concluded that the conditions were general in nature. The Officer noted the Applicants' submissions did not specifically refer to Mr. Al-Aswadi's personal situation. Contrary to the Applicants' submissions, the Officer was not required to consider the ADR, as the Applicants did not raise the existence of an ADR in their H&C submissions.

(3) Conclusion

[20] I agree with the Applicants that the Officer failed to meaningfully engage with the country conditions in Yemen.

[21] The Officer stated that the Applicants had not demonstrated that the adverse conditions would have "a direct, negative impact" on Mr. Al-Aswadi. In doing so, the Officer imported the elevated personalized risk test under subsection 97(1) of *IRPA* into their Decision.

[22] This Court has recognized that two different lines of jurisprudence exist in regard to this issue, but that *Kanthasamy* requires consideration of the living conditions of the home country when assessing hardship, which necessarily includes general conditions (*Marafa v Canada (Citizenship and Immigration),* 2018 FC 571 at paras 4-7 [*Marafa*]):

> [4] Many decisions of our Court emphasize that, for an H&C application, officers must not limit their assessment of the hardship the claimants would face in their home country to hardship connected to a personal characteristic of the claimant (see, for example, *Shah v Canada (Citizenship and Immigration),* 2011 FC

1269 at paras 67-73; *Diabate v Canada (Citizenship and Immigration)*, 2013 FC 129 at paras 32-36; *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 at paras 30-31; *Rubayi v Canada (Citizenship and Immigration)*, 2018 FC 74 at paras 14-25). In reality, an officer who commits this error is confusing the criteria applicable to an H&C application, governed by section 25 of the Act, with those that define a person in need of protection pursuant to section 97.

[5] The respondent cites three decisions by this Court that seem to put forward a different approach (*Lalane v Canada (Citizenship and Immigration)* [*Lalane*], 2009 FC 6; *Joseph v Canada (Citizenship and Immigration)* [*Joseph*], 2015 FC 661; *Ibabu v Canada (Citizenship and Immigration)* [*Ibabu*], 2015 FC 1068). The reasoning behind these three decisions is succinctly expressed in *Lalane* (at para 1):

> The allegation of risks made in an application for permanent residence on humanitarian and compassionate grounds (H&C) must relate to a particular risk that is personal to the applicant. The applicant has the burden of establishing a link between that evidence and his personal situation. Otherwise, every H&C application made by a national of a country with problems would have to be assessed positively. . .

[6] With respect for my colleagues, I find that this reasoning exaggerates the scope of the dominant line of cases mentioned above and neglects the discretionary nature of a decision on an H&C application. Considering a factor does not necessarily mean that the decision will be favourable to the applicant. Therefore, considering the general conditions in the country of removal does not result in the prohibition of any removal to certain countries where living conditions are particularly difficult.

[7] The reasoning in *Lalane*, *Joseph* and *Ibabu* is difficult to reconcile with the Supreme Court of Canada's decision in *Kanthasamy*. In fairness to my colleagues, I note that *Kanthasamy* was rendered after their decisions. In that decision, the Supreme Court rejected a silo approach to the factors relevant to an H&C application and affirmed that officers must "consider and give weight to all relevant humanitarian and compassionate considerations" (paragraph 33, italics in the original). In reality, refusing to consider the living conditions in the country of removal is tantamount to saying that the applicant is

> being sent to an imaginary country. Such a detached approach is contrary to the spirit of *Kanthasamy*.
>
> [Emphasis added.]

[23] To reiterate, it is an error for an officer to limit their assessment of hardship in an applicant's home country to hardship connected to a personal characteristic. This error confuses the criteria applicable to an H&C application under subsection 25(1) of *IRPA* with those that define a person in need of protection under subsection 97(1) of *IRPA* (*Marafa* at para 4; *Quiros v Canada (Citizenship and Immigration)*, 2021 FC 1412 at paras 30-31; *Aboubacar v Canada (Citizenship and Immigration)*, 2014 FC 714 at para 4).

[24] Further, there is no need to lead direct evidence that an applicant will personally experience adverse conditions in an H&C application (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 52-56 [*Kanthasamy*]).

[25] Applying these considerations to the present matter, I find that the Officer failed to meaningfully assess the living conditions in Yemen on the basis that it was not personalized to Mr. Al-Aswadi.

[26] This is sufficient to grant the application for judicial review. Accordingly, it is unnecessary to address the remaining arguments.

VI. Conclusion

[27] The application for judicial review is allowed. The Officer unreasonably assessed the country conditions in Yemen and the associated impact on Mr. Al-Aswadi upon return.

[28] The parties do not propose a question for certification and I agree that none arises.

JUDGMENT in IMM-3494-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The matter is remitted to a different officer for redetermination.
2. There is no question of general importance for certification.
3. There is no order as to costs.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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