Federal Court Cour fédérale

**Date: 20230201**

**Docket: IMM-4984-21**

**Citation: 2023 FC 151**

**Ottawa, Ontario, February 1, 2023**

**PRESENT: Mr. Justice Norris**

**BETWEEN:**

**KHALED ZAED A. ALAJNF**
**KARIMA ALI A. OSMAEDA**
**ZAED KHALED ZAED ALAJNF**
**AMAR KHALED ZAED ALAJNF**
**MRWAN KHALED ZAED ALAJNF**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. OVERVIEW

[1] In January 2014, the principal applicant, Khaled Zaed A. Alajnf, arrived in Canada from Libya (his country of nationality) on a study permit. He was accompanied by his spouse, Karima Ali A. Osmaeda (who is also a citizen of Libya), and their three children.

[2] In March 2018, the applicants applied for refugee protection in Canada. Their claims were denied by the Refugee Protection Division ("RPD") of the Immigration and Refugee Board of Canada ("IRB") in June 2019. In November 2019, the Refugee Appeal Division of the IRB dismissed the applicants' appeal of the RPD's decision.

[3] In September 2020, the applicants applied for permanent residence in Canada on humanitarian and compassionate ("H&C") grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). They based this application on their establishment in Canada, the hardship they would experience in Libya due to the prevailing adverse conditions there, and the best interests of the children who would be affected by the decision – namely, the three Libyan-born children (who were born, respectively, in December 2009, April 2011, and June 2013) as well as two Canadian-born children (who were born, respectively, in May 2015 and December 2019).

[4] Among the considerations relied on by the applicants was the fact that, since March 20, 2015, Canada has had an Administrative Deferral of Removals ("ADR") in place for Libya. Under paragraph 230(1)(a) of the *Immigration and Refugee Protection Regulations,* SOR/2002-227 ("*IRPR*"), the Minister "may impose a stay on removal orders with respect to a country or a place if the circumstances of that country or place pose a generalized risk to the entire civilian population as a result of [. . .] an armed conflict within the country or place." While the applicants are not at risk of removal to Libya as long as the ADR is in place (none of the exceptions set out in subsection 230(3) of the *IRPR* apply to them), they nevertheless pointed to the ADR as compelling evidence that the Government of Canada had recognized that

conditions in Libya are dire. They also provided extensive evidence to show that conditions there had not improved since March 2015; if anything, they had only become worse.

[5] The H&C application was initially refused by a Senior Immigration Officer in a decision dated July 9, 2021. However, because further submissions on behalf of the applicants had not been brought to the Officer's attention before that decision was made, the Officer reconsidered the matter in light of the further submissions. For reasons set out in an addendum to the original decision, the Officer refused the application again on July 13, 2021.

[6] The applicants now apply for judicial review of this decision under subsection 72(1) of the *IRPA*. Their central contention is that the Officer's assessment of the conditions in Libya and their potential impact on the applicants is unreasonable. As I explain in the reasons that follow, I agree. This application for judicial review must, therefore, be allowed and the matter remitted for redetermination.

## II. STANDARD OF REVIEW

[7] The parties agree, as do I, that the substance of an H&C decision should be reviewed on a reasonableness standard: see *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44. That this is the appropriate standard has been reinforced by *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10.

[8] 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). A decision that displays these qualities is entitled to deference from the reviewing court (*ibid.*). When applying the reasonableness standard, it is not the role of the reviewing court to reweigh or reassess the evidence considered by the decision maker or to interfere with factual findings unless there are exceptional circumstances: see *Vavilov* at para 125.

[9] This limitation on the role of the reviewing court is especially important in the present context. Decisions made under subsection 25(1) of the *IRPA* are highly discretionary and, as a result, decision makers will be accorded a considerable degree of deference (*Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 15).

[10] At the same time, reasonableness review is not a rubber-stamping process; it remains a robust form of review: see *Vavilov* at para 13. The 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).

[11] The onus is on the applicants to demonstrate that the Officer's decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

## III. ANALYSIS

[12] When subsection 25(1) of the *IRPA* is invoked, the decision maker must determine whether an exception ought to be made to the usual operation of the law (*Damian v Canada (Citizenship and Immigration)*, 2019 FC 1158 at paras 16-22). This discretion to make an exception provides flexibility to mitigate the effects of a rigid application of the law in appropriate cases (*Kanthasamy* at para 19). It should be exercised in light of the equitable underlying purpose of the provision (*Kanthasamy* at para 31). Thus, decision makers should understand that H&C considerations refer to "those facts, established by the evidence, which would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another – so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the *Immigration Act*" (*Kanthasamy* at para 13, adopting the approach articulated in *Chirwa v Canada (Minister of Manpower & Immigration)* (1970), 4 IAC 338). Decision makers should therefore interpret and apply subsection 25(1) to allow it "to respond flexibly to the equitable goals of the provision" (*Kanthasamy* at para 33). At the same time, it is not intended to be an alternative immigration scheme (*Kanthasamy* at para 23).

[13] As Justice Abella observed for the majority in *Kanthasamy*, "[t]here will inevitably be some hardship associated with being required to leave Canada. This alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under s. 25(1)" (at para 23). What does warrant relief will vary depending on the facts and context of the case (*Kanthasamy* at para 25).

[14] The existence of an ADR for a given country can be compelling evidence that being required to return to that country would likely lead to significant hardship. After all, an ADR will be put in place only if the Minister is satisfied that circumstances in that country "pose a generalized risk to the entire civilian population" as a result of an armed conflict, an environmental disaster resulting in substantial temporary disruption of living conditions, or any situation that is temporary and generalized: see *IRPR*, subsection 230(1). General country conditions (including those that support the adoption of an ADR) can provide the necessary evidentiary basis for a reasoned inference as to the hardship a particular applicant would face on return (*Kanthasamy* at para 56, citing and quoting with approval *Aboubacar v Canada (Minister of Citizenship and Immigration)*, 2014 FC 714 at para 12). As a result, a moratorium on removals "is a relevant consideration in the context of the country conditions and the assessment of hardship" (*Milad v Canada (Citizenship and Immigration)*, 2019 FC 1409 at para 36).

[15] At the same time, the existence of an ADR can complicate an application for H&C relief. This is because, apart from some narrow exceptions, Canada will not require nationals of a country for which an ADR is in place to leave Canada. As a result, there may be a sense in which the potential hardship in the country of nationality is largely hypothetical. Apart from specific exceptions, even someone who has been ordered removed from Canada will not be required to leave as long as the ADR is in place (even if their application for H&C relief is refused).

[16] However, a removal order is not the only reason someone can be required to leave Canada. Another reason is the general requirement that permanent residence in Canada must be

applied for from abroad: see *IRPA*, subsection 11(1). As a result of this requirement, generally speaking, someone who is already in Canada and who wishes to apply for permanent residence here will be required to leave Canada and presumably return to their country of nationality in order to submit that application. This Court has held that, in H&C applications seeking relief from this requirement based on conditions in the country of nationality, it is a reviewable error for the decision maker to ignore or diminish the weight attributable to adverse country conditions simply because an ADR or a temporary suspension of removals is in place for that country. See *Rubayi v Canada (Citizenship and Immigration)*, 2018 FC 74; *Bawazir v Canada (Citizenship and Immigration)*, 2019 FC 623; *Camacho Valera v Canada (Citizenship and Immigration)*, 2021 FC 1087; *Moore v Canada (Citizenship and Immigration)*, 2019 FC 1662; *Omar v Canada (Citizenship and Immigration)*, 2021 FC 1201; *Malave Turmero v Canada (Citizenship and Immigration)*, 2022 FC 402; *Elbeibas v Canada (Immigration, Refugees and Citizenship)*, 2022 FC 468; *Younan v Canada (Citizenship and Immigration)*, 2022 FC 484; *Al-Abayechi v Canada (Citizenship and Immigration)*, 2022 FC 873; and *Ibrahim v Canada (Citizenship and Immigration)*, 2022 FC 1194.

[17] The decision maker in the present case did not commit this error. The Officer appears to have given careful consideration to the prevailing conditions in Libya. The Officer accepted that they are poor. The Officer did not judge those conditions to be irrelevant or deserving of only little weight because there is an ADR in place for Libya. Instead, the Officer concluded that the country condition evidence adduced by the applicants was not sufficiently compelling to warrant H&C relief because the applicants had not demonstrated that they themselves would face hardship in Libya. I agree with the applicants that this determination is unreasonable.

[18] In support of their application for H&C relief, among other things, the applicants submitted extensive evidence to establish the following:

- Inspired by the Arab Spring, a revolution broke out in Libya in February 2011. This ultimately led to the overthrow of Colonel Muammar Ghaddafi and his government in October 2011.
- By the summer of 2014, a civil war had erupted in Libya. It continues to the present day.
- The conflict has engulfed most areas of the country, including all its important cities.
- The central authority and state institutions have collapsed. The rule of law has broken down completely. The country is dominated by well-armed, rival militias and lawlessness prevails.
- The conflicts between rivals groups have resulted in large numbers of civilian casualties, displaced hundreds of thousands of civilians, and destroyed vital infrastructure.
- Basic necessities such as food, water and fuel are in short supply.
- The country is experiencing significant economic turmoil and unemployment is high. Corruption is rampant.
- Since the start of the civil war, there has been a significant increase in crime throughout the country. As a former university professor and someone who has lived abroad, Mr. Alanjf would be a likely target for robbery, kidnapping or extortion. His wife and children would also be at risk of becoming victims of serious crime.

[19] On the basis of this evidence, the applicants submitted that they would experience significant hardship if they were required to return to Libya and that this warranted relief under subsection 25(1) of the *IRPA*. Relatedly, they also submitted that requiring the children to leave Canada and go to Libya would not be in their best interests.

[20] The Officer acknowledged that the ADR for Libya was still in effect. The Officer also accepted that "Libya is currently experiencing persistent insecurity, sustained armed conflict and an unpredictable political situation" and that conditions there "remain poor." However, the Officer was not persuaded that H&C relief was warranted, primarily because of the absence of evidence of personalized hardship.

[21] This determination is found at several points in the reasons for the original decision, including the following (emphasis added):

> While I acknowledge that Libya is currently still in a state of political unrest and is experiencing political-military instability, <u>I find there is little evidence to demonstrate that the Applicant and his family risk the serious possibility of the aforementioned hardships in the event he and his family are to return to the country</u>. Firstly, I note that such conditions are not new, as the first Libyan Civil War, also known as the Libyan Revolution, took place in 2011. The application and submissions indicate that from 2011 to January 2014, before he and his family departed Libya, the Applicant was employed as a teacher at a faculty in Libya. <u>The Applicant does not mention that he and his family endured any hardships or mistreatment during their time in Libya nor does he indicate that they were living in a state of poverty. Additionally, he provides little explanation as to why he would be unable to financially support his family again in the event of their return to Libya.</u>
>
> . . .
>
> Furthermore, the Applicant does not suggest that people similarly situated as him and his family, such as their family members,

friends, or former colleagues, who are currently in Libya, are experiencing any of the aforementioned hardships. It is unknown what their circumstances or situations are and little details are provided for consideration. I understand that Libya is far from perfect; however, I find the Applicant provides little evidence that he and his family were and/or will be personally or directly affected by any of the previously mentioned general country conditions. Such argument is unpersuasive without evidence that has sufficient probative value to support that the generalized country conditions will personally or directly affect the Applicant and his family.

Overall, I find the Applicant fails to present sufficient documentation and evidence that establishes the serious possibility that he and his family will face threats and/or persecution by militia forces or other perpetrators or that they will be personally and directly affected by the aforementioned generalized country conditions in the event of their return to Libya. As such, I place little weight to [*sic*] this factor in this decision.

. . .

While I acknowledge the Applicant and his spouse's wishes to provide their children with a safe environment and the best educational opportunities, I find their assertions that their children will face hardships such as kidnapping, extortion, rape and murder in Libya to be general and unsupported by evidence. There is little evidence present in the submissions to demonstrate that their children will experience such hardships upon their return to Libya. I find little information is presented to describe specific experiences or examples of other children that are in a similar circumstance as theirs, who have encountered such crimes and mistreatment in Libya.

. . .

While I accept that the current country conditions in Libya remain poor, I find that the Applicant and his family fail to present sufficient evidence to support that they will be personally and directly affected by these country conditions in Libya in the event of their return there. Based on the Applicant's previous education and employment in Libya, their extensive network of family members in the country and their family's ability to successfully adapt to new environments, I see little reason why the Applicant and his family cannot re-establish themselves to a similar degree they enjoyed in Libya, prior to their departure from the country.

[22] In my view, these passages demonstrate a complete failure on the part of the Officer to consider whether the evidence of adverse conditions in Libya (which the Officer accepted) could support a reasoned inference that the applicants would suffer significant hardship if required to return to Libya: see *Kanthasamy* at para 56; see also *Polinovskaia v Canada (Citizenship and Immigration)*, 2022 FC 696 at para 29; and *Bindra v Canada (Citizenship and Immigration)*, 2023 FC 119 at paras 17-23.

[23] The ADR for Libya reflects the Minister's determination that, because of adverse conditions affecting the entire civilian population there, requiring particular individuals to return to that country is generally unacceptable by Canadian lights. This is presumably because of the significant hardship those particular individuals would likely experience given that the adverse conditions affect the entire civilian population (of which they would be a part if they were required to return to Libya). In such circumstances, it could seem obvious that general country conditions will likely affect the applicants, establishing the necessary link between the general and the particular. This is because, as the Minister has determined, those conditions affect "the entire civilian population." If the applicants were required to return to Libya, they would be part of that population. In light of the existence of the ADR for Libya and the reason for it, the inference from the general to the particular that the applicants urged the Officer to draw would appear to be particularly compelling. At the very least, for the decision to be reasonable, the Officer had to provide a reasoned explanation for why they did not find this to be so. Absent such an explanation, one that meaningfully grappled with the key issues and arguments raised by the applicants and the evidence on which they relied (including the ADR), the Officer's

determination that the country condition evidence was entitled to "little weight" is unreasonable: see *Vavilov* at para 128.

[24] Relatedly, a reviewing court "must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that there is a line of analysis within the reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived" (*Vavilov* at para 102, internal quotation marks and citation omitted). In the present case, at several key junctures in the decision, the Officer reasoned that since the applicants had been able to lead successful lives in Libya in the past, they would be able to do so again in the future. For example, as set out above, the Officer could "see little reason why the Applicant and his family cannot re-establish themselves to a similar degree they enjoyed in Libya, prior to their departure from the country." The Officer appears not to have considered the outbreak of civil war in Libya and the ongoing collapse of the country since the applicants left as a reason why the applicants could not return to the lives they once enjoyed there. More generally, the relevance of how the applicants were able to live before the revolution and the civil war is debatable, to say the least, given all that has happened since then. The Officer does not address this question at all. This leaves a fundamental gap in the Officer's reasoning (cf. *Vavilov* at para 96).

[25] In summary, country conditions may or may not be sufficiently compelling in a given case to warrant relief, even if those conditions are so dire that Canada has adopted a moratorium on removals (*Rubayi* at para 24; *Camacho Valera* at para 26). The ultimate determination as to whether relief is warranted in a given case is a global one and all relevant considerations must be

weighed cumulatively (*Kanthasamy* at para 28). Nevertheless, the applicants placed significant reliance on the adverse conditions in Libya in their request for H&C relief. The reasonableness of the decision as a whole is undermined by the Officer's unreasonable assessment of this important factor (cf. *Vavilov* at para 100).

[26] While this is sufficient to require that the decision be set aside and the matter be reconsidered, there is one additional element of the Officer's analysis that must be addressed. The Officer also concluded that H&C relief was not warranted because the applicants had not demonstrated that an alternative pathway to permanent residence would not be available to them in the future. I agree with the applicants that this determination is unreasonable.

[27] The Officer wrote as follows:

> I note that the Applicant and his family made the decision to uproot their lives in Libya in order to study, work and live in Canada. The Applicant successfully applied for and obtained the necessary temporary resident documents for him and his family upon their arrival in Canada and as such, would have been aware that their status in the country would not be permanent. I am aware that the Applicant and his spouse currently both have valid work permits that are to expire on December 30, 2021. I find that they may apply for subsequent permits thereafter in order to remain and extend their family's temporary stay in Canada while the ADR for Libya is in place. There is little evidence in the submissions to indicate that the Applicant and his family are unable and ineligible to do so.

[28] The Officer reiterated these findings in the addendum to the original decision and then added the following:

> In addition, I find that the Applicant can apply for permanent residence under an economic class program or make a second H&C application for him and his family closer to the expiry date of

> their current work permits that explains how they do not meet any of the other immigration classes and which provides probative evidence that they are more likely than not going to be directly impacted by the negative, adverse country conditions in Libya.

[29] This analysis is flawed for at least two reasons. First, it simply begs the question: it is no answer to the applicants' request for relief in order to establish themselves permanently in Canada to say that they can continue to live here on a temporary basis. The second reason is that it is based on speculative considerations. The applicants have sought H&C relief now because they do not have any other pathway to permanent residence at this time. It is entirely speculative for the Officer to reason that relief is not warranted now because another pathway might become available in the future, or because the applicants might be able to submit a more compelling H&C application at some later point. In *Alkarrami v Canada (Citizenship and Immigration)*, 2022 FC 1165, Justice Fothergill held: "An applicant for H&C relief is entitled to have the request considered on the basis of the circumstances as they presently exist, not as they may exist at some indefinite future time. It was unreasonable for the Officer to refuse equitable relief based on a series of contingencies that may or may not materialize." These propositions apply with equal force here.

## IV. CONCLUSION

[30] For these reasons, the application for judicial review must be allowed. The decision of the Senior Immigration Officer refusing the application for relief under subsection 25(1) of the *IRPA* is set aside and the matter is remitted for redetermination by a different decision maker.

[31] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

**<u>JUDGMENT IN IMM-4984-21</u>**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is allowed.
2. The decision of the Senior Immigration Officer refusing the application for relief under subsection 25(1) of the *Immigration and Refugee Protection Act* is set aside and the matter is remitted for redetermination by a different decision maker.

"John Norris"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DATED:** | FEBRUARY 1, 2023 |

**APPEARANCES:**

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|---|---|
| Astrid Mrkich | FOR THE APPLICANTS |
| Pavel Filatov | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Mrkich Law<br>Toronto, Ontario | FOR THE APPLICANTS |
| Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |