Federal Court  Cour fédérale

Date: 20220406

Docket: IMM-819-21

Citation: 2022 FC 488

Toronto, Ontario, April 6, 2022

PRESENT: Madam Justice Go

BETWEEN:

LARA ALLEENE SUPAN
BENJAMIN FAGENSON POTOK

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Lara Alleene Supan and her spouse Mr. Benjamin Fagenson Potok [collectively the Applicants] are citizens of the United States of America [USA] of Jewish heritage. They have two Canadian born children.

[2] The Applicants entered Canada for the first time in April 2017 on visitor visas, and were travelling back and forth between Canada and the USA until February 2019, when they started to reside in Canada. They have been living rent-free at a family-owned cottage. The Applicants are involved in the local Windsor community through their participation in various arts institutions and a synagogue. They earn income through online work.

[3] On October 8, 2019, the Applicants filed an application for permanent residence on humanitarian and compassionate [H&C] grounds under s.25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Applicants also requested exemptions from medical and financial inadmissibility (ss. 38 and 39 of the *IRPA*). Their application was based on the factors of establishment, the best interest of their children, and the risk and adverse country conditions in the USA.

[4] The Applicants stated in their initial H&C submissions that their son Arthur will face discrimination in the USA because he is Jewish and because his maternal grandfather is transgender. (Their initial submissions did not mention their second child, who was born after they filed the H&C application.) The Applicants also fear gun violence, mass shootings and anti-Semitism in the USA.

[5] On January 25, 2021, an Immigration Officer [Officer] refused the Applicants' H&C application. Having considered the circumstances of the Applicants, the Officer found that cumulatively, there were insufficient H&C considerations to justify an exemption under s. 25(1) of the *IRPA* [Decision].

[6] The Applicants brought an application for leave and for judicial review of the Decision. The Applicants argue that the Officer erred in their hardship assessment and that the Officer's analysis of the best interests of the child [BIOC] was inadequate. For the reasons set out below, I find the Decision reasonable and dismiss the application.

II. Issues and Standard of Review

[7] The central issue is whether the Decision was reasonable. The parties agree that the standard of review is reasonableness, in accordance with *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[8] 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.

[9] For a decision to be unreasonable, the 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.

III. Preliminary Issues

Does the Affidavit of Lara Alleene Supan improperly seek to supplement the factual basis of the application?

[10] The affidavit of the female Applicant, Ms. Supan, referred to additional evidence that was not before the Officer. As a general rule, on judicial review the Court is confined to a consideration of the evidence that was before the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright*), 2012 FCA 22, 428 NR 297 at para 19). Additional evidence may be admissible only in narrow circumstances. The Applicants have not provided any reason as to how their situation may fall under any of the narrow exceptions.

[11] I find that the affidavit of the female Applicant improperly attempts to supplement the evidentiary record through her assertions in paragraphs 18, 27-28, 38-44, and as such I will give these paragraphs no weight in assessing the reasonableness of the Officer's decision (*Boyacioglu v Canada (Citizenship and Immigration*), 2021 FC 1356 at para 8).

IV. Analysis

A. *Did the Officer err in their hardship analysis?*

[12] The Applicants submit that the Officer conducted a very limited analysis of the risk associated with anti-Semitism in the USA "in light of the history of the significance of anti-Semitism and the degree of suffering of the Jewish people including but not limited to the Holocaust." They contend that the hardship associated with anti-Semitism is felt differently by each Jewish person and "is not to be dispatched lightly." The Applicants argue that their "own particular perceptions and their own particularized hardships" have not been analyzed.

[13] The Applicants plead that the climate in the USA towards Jewish people is "extremely volatile" and that the weight of being Jewish has been debilitating for them. They submit that they have identified events that have occurred within their own realm of experience and submit these events needed to be analyzed for the decision to be intelligible.

[14] The Applicants submit that the Officer's finding that the dangers of gun violence and mass-shootings are not specific to them or their son Arthur is unreasonable. They submit that the documentary evidence that was before the Officer confirmed otherwise.

[15] Finally, the Applicants submit that the Officer did not undertake a meaningful analysis of hardship, as provided by the Supreme Court in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], and that his reasoning does not have the attributes of justification, transparency and intelligibility. They contend that it is unintelligible for the Officer to assign "moderate weight" to the risks of gun violence and mass shootings in the USA, and then conclude that there is insufficient evidence to approve the H&C application.

[16] I find the Applicants' submissions amount to a disagreement with the Officer's weighing of the evidence, which does not give rise to a reviewable error.

[17] The Officer did consider the Applicants' fear of gun violence, mass shootings and anti-Semitism in the USA. The Officer reviewed the country documentation submitted by the Applicants. The Officer found that there had been an increase in anti-Semitic incidents in recent years, and that gun violence and mass shootings "continues to be an issue." The Officer also reviewed additional sources on country conditions in the USA, and noted that the USA has a long tradition of religious freedom and vigorously prosecutes hate crimes based on religion. The Officer acknowledged that the Applicants may face some discrimination and hardship on account of their Jewish heritage, but noted that the dangers of gun violence and mass shootings are not specific to them and their son Arthur. The Officer attached moderate weight to this factor.

[18] From these findings, it is clear that the Officer did acknowledge and consider that anti-Semitism was an issue in the USA. While the Officer did give limited weight to this factor, I agree with the Respondent that the Officer reasonably noted that antisemitism is vigorously prosecuted in the USA. That the Officer did not refer to specific events experienced by the female Applicant does not render the decision unintelligible. An administrative decision-maker is presumed to have considered the entirety of the evidence and does not have to refer to every submissions or factual detail advanced by an applicant *(Florea v Canada (Minister of Employment and Immigration*), [1993] FCJ No 598 (FCA) [*Florea*] at para 1; *Vavilov* at para 128).

[19] The Respondent contends that the fact that the Applicants would prefer to live in Canada is not a basis for the granting of an H&C application. I agree.

[20] The Respondent further submits that on the Applicant's theory of their application purportedly justifying the granting of H&C relief, every one of the approximately 7 million Jewish persons in the USA, every child in the USA, every racialized person in the USA, every parent with a child concerned for their safety in the USA, and so forth, (in other words the vast majority of the US population) should be granted H&C relief if they request it.

[21] I do not endorse the Respondent's "floodgate" argument (which by the way was not the basis of the Decision). But I do agree with the Respondent's submission that the Officer reasonably found that these risks were not specific to the Applicants in light of the evidence. I also agree that the Applicants are improperly using the H&C process as an alternative stream to enter Canada, contrary to the teachings of the Supreme Court in *Kanthasamy*. The risks associated with gun violence and mass shootings are generalized risks that all US residents face. The absence of a clear relationship between an applicant's personal situation and the general country conditions cannot support the granting of permanent residency via an H&C exemption (*Laguerre v Canada (Citizenship and Immigration*), 2020 FC 603 at para 28).

[22] I also find that the Officer considered the Applicants' submissions and the relevant country documentation, acknowledged that they may face hardship on return to the USA on the basis of their Jewish heritage and that their son, Arthur, may face discrimination because of his

transgender grandparent, but reasonably found that the H&C considerations put forth did not justify H&C relief.

[23] While the Applicants disagree with the Officer's assessment of the evidence and with the outcome of their application, the Court should refrain from re-evaluating the weight given to the different H&C factors considered by an officer (*Matthias v Canada (Citizenship and Immigration*), 2014 FC 1053 at para 19; *Begum v Canada (Minister of Citizenship and Immigration*), 2013 FC 265 at para 20).

[24] I will also add that anti-Semitism is not an issue that happens only in the USA. As the Respondent notes, Canada is not immune to white supremacy which fuels anti-Semitism, Islamophobia and racism in this country. I take judicial notice that hate crimes against Jewish people, along with Muslims and people of colour – all common targets of white supremacy – are prevalent in Canada. I also take judicial notice that mass shootings targeting women and Muslims have in fact occurred in Canada, and Jewish Canadians are among those most targeted for religiously motivated hate crimes in Canada. Even if there is less likelihood that these forms of hatred would be acted upon in the form of mass shootings and gun violence in Canada as compared to the US, the granting of H&C relief must still be based on the circumstances of the individuals involved. The Officer decided, in this particular case, that the granting of such a relief is not warranted. I find no basis to interfere with that conclusion in light of the evidence.

B. *Did the Officer fail to conduct a meaningful BIOC analysis?*

[25] The Applicants submit that the Officer failed to properly apply *Kanthasamy* with respect to the BIOC. They submit that the Officer's analysis of the BIOC was done in a cursory manner and that the Officer failed to consider or cite any country condition documents that address hardship for children.

[26] The Respondent submits that there was no insufficiency in the Officer's BIOC analysis. It pleads that the Officer's BIOC analysis was commensurate with what was put forth by the Applicants. The Respondent notes that the existence of some hardship does not mandate the granting of an H&C application and it was not unreasonable for the Officer to conclude that any difficulties the Applicants' children may face in USA did not warrant granting an H&C exception in the overall circumstances of the Applicants' case (*Lim v Canada (Citizenship and Immigration*), 2021 FC 1393 at para 46).

[27] At the hearing, the Applicants made a surprise submission relying on *Inniss v Canada (Minister of Citizenship and Immigration)*, 2015 FC 567, with quotes from Justice Russell in *Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166 [*Williams*]. In response, the Respondent argued that *Williams* has not been followed. Instead, the jurisprudence confirmed there is no magic formula for the BIOC analysis.

[28] I agree with the Respondent that the approach set out in *Williams* is "not a rigid or required formula": *Lin v Canada (Citizenship and Immigration)*, 2021 FC 1452 at para 55.

[29] Once again, the Applicants are seeking this Court to reassess their H&C considerations and to come to its own conclusions. That is not the role of the Court. Further, while BIOC is an important factor, it is not determinative of an H&C application.

[30] In this case, the Officer appropriately considered the best interests of Arthur. The Officer acknowledged that Arthur has attended kindergarten in Ontario. The Officer also found, after a review of the country documentation, that Arthur may face some mild discrimination in the USA on account of his grandfather being transgender. The Officer found that the Applicants had not submitted sufficient evidence to demonstrate that Arthur's best interests would be compromised if the Applicants' application was to be refused. The Officer's assessment, in my view, demonstrated that they were alert, alive, and sensitive to the BIOC involved.

[31] Contrary to the Applicants' submission that the Officer displayed a zeal to find instances of contradiction in their testimony, which influenced their credibility determination, the Officer did not conduct any credibility assessment. Instead, the Officer considered the Applicants' submissions and the relevant country documentation, but noted that insufficient evidence had been provided to demonstrate that the best interests of the Applicants' son would be compromised if the Applicants did not remain in Canada. I see no error in that assessment.

[32] The fact that the Officer did not specifically refer to country documents that address potential hardships for children in the USA is not a reviewable error (*Florea*, at para 1).

[33] Finally, I see no error in the Officer not referring to the birth of the Applicants' second child. While the Applicants' submissions dated, August 20, 2020 did note that their second child was born recently, no submission was made with respect to that child.

C. *Other Arguments*

[34] At the hearing before the Court, the Applicants made several arguments challenging the Officer's findings on establishment. These arguments were raised for the first time at the hearing, and some of the submissions were never brought before the Officer. I need not consider these submissions as they have been inappropriately raised.

V. Conclusion

[35] The application for judicial review is dismissed.

[36] There is no question for certification.

JUDGMENT in IMM-819-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-819-21
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