Federal Court Cour fédérale

Date: 20220509

Docket: IMM-2656-21

Citation: 2022 FC 679

Toronto, Ontario, May 9, 2022

PRESENT: Madam Justice Go

BETWEEN:

BARRISTER FESTUS UWAIFO
YVONNE FUMNAYA UWAIFO
HARMONY EDUKPE UWAIFO
FLOURISH OMOLEGO UWAIFO
EVAN OHIS UWAIFO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. and Ms. Uwaifo are citizens of Nigeria with three children born in Nigeria in 2006, 2010, and 2012 respectively [together the Applicants]. After they entered Canada in 2018, they had a fourth child in 2020.

[2] The Applicants made refugee claims in April 2018, and the adult Applicants obtained work permits in the following month.

[3] The Refugee Protection Division [RPD] refused the Applicants' refugee claims in February 2019. After holding an oral hearing, the Refugee Appeal Division [RAD] dismissed the appeal in January 2020. The Applicants applied to the Federal Court for leave and judicial review of the RAD decision. Their application for leave was dismissed in February 2021 (Federal Court File No. IMM-1046-20).

[4] After their refugee claims were refused, the Applicants applied for permanent residence on humanitarian and compassionate grounds [H&C application] pursuant to s. 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[5] In their H&C application, the Applicants highlighted certain facts regarding their circumstances. Among other things, Mr. Uwaifo, who was a lawyer in Nigeria, had been working for a security company and as an Uber driver, while attempting to become an accredited lawyer in Ontario. Ms. Uwaifo was working as a hair stylist until she gave birth to their fourth child in 2020. She completed a personal support care worker [PSW] program and has been offered a position working at a healthcare facility. Their three older children attend school and are involved in sports. The whole family has been involved in church since arriving in Canada, while Mr. and Ms. Uwaifo have also volunteered in various organizations in their community.

[6] The Applicants also provided adverse country conditions evidence, while continuing to rely on the allegations in their previous refugee claims to argue that they would face hardship if returned to Nigeria.

[7] In subsequent submissions filed on January 27, 2021, the Applicants brought up the new temporary pathway to permanent residence for certain refugee claimants working in healthcare during the COVID-19 pandemic [pathway program], arguing that Mr. Uwaifo's contributions as an essential worker during the pandemic should be similarly recognized.

[8] On April 6, 2021, a Senior Immigration Officer [Officer] refused the Applicants' H&C application [Decision].

[9] The Applicants seek judicial review of the Decision. For reasons set out below, I allow the application for judicial review.

II. Issues and Standard of Review

[10] The Applicants raise two issues: (1) Did the Officer err by evaluating the Applicants' circumstances pursuant to the factors used in the evaluation of an application under ss. 96 and 97 of *IRPA*, in contravention of s. 25(1.3) of *IRPA*? (2) Did the Officer err in requiring the Applicants to demonstrate an exceptional level of establishment?

[11] The parties agree that the decision is reviewable on a reasonableness standard, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[12] 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). The onus is on the Applicant to demonstrate that the decision is unreasonable (*Vavilov* at para 100). 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

Did the Officer err in requiring the Applicants to demonstrate an exceptional level of establishment?

[13] The Officer's findings on establishment were quite brief. After noting that the adult Applicants have engaged in employment, with Mr. Uwaifo being in the process of becoming a qualified lawyer and Ms. Uwaifo having completed a PSW program and received a job offer in that field, the Officer accepted that the Applicants "are self-supporting." The Officer continued:

> Based on the information before me I give some consideration to the applicant's establishment in Canada. However, while I have given some consideration to the applicant's establishment in Canada, I do not find their establishment to be exceptional. I find the length of time the applicants have been in Canada to be limited and I do not find that it is uncommon for individuals who reside in Canada to work, attend church and volunteer their time.

[14] The remainder of the Officer's analysis on establishment focused on the relationships the Applicants have made within the community, before concluding that the separation from those relationships would not justify granting an exemption on H&C grounds.

[15] The Applicants argue that in impugning them for failing to demonstrate an exceptional level of establishment, the Officer set a threshold that is so high it is "virtually insuperable", which indirectly impacts the weight accorded to the evidence.

[16] The Applicant further submits that "it is unreasonable to require, without more explanation, an 'extraordinary' level of establishment": *Sivalingam v Canada (Citizenship and Immigration)*, 2017 FC 1185 [*Sivalingam*] at para 13 (see also *Apura v Canada (Citizenship and Immigration)*, 2018 FC 762 at para 23; *Damian v Canada (Citizenship and Immigration)*, 2019 FC 1158 at para 21).

[17] I acknowledge, as the Respondent urges, that "the mere use of the word 'exceptional' is not proof that the Officer applied an unreasonably high threshold"; rather, the question is whether reading the decision as a whole, the Officer conducted a proper analysis: *Davis v Canada (Citizenship and Immigration)*, 2022 FC 238 at para 43; see also *Shah v Canada (Citizenship and Immigration)*, 2018 FC 537 at para 58.

[18] However, as I will explain further below, I find in this case the word "exceptional" is not merely used as a "descriptor" and that the case at hand can be distinguished on facts from cases cited by the Respondent, including that of *Thiyagarasa v Canada (Citizenship and Immigration)*, 2019 FC 111.

[19] The Respondent further argues that H&C applicants "must demonstrate the existence or likely existence of misfortune or other H&C considerations that are greater than those typically

faced by others who apply for permanent residence in Canada", citing *Huang v Canada (Citizenship and Immigration)*, 2019 FC 265 at paras 17-25. The Respondent also cites *Dessie v Canada (Citizenship and Immigration)*, 2022 FC 397 [*Dessie*] at para 44, in which Justice Strickland stated that "unless the establishment in Canada is both exceptional in nature and not of the applicant's own choosing, this will not normally be a factor that weighs in favour of the applicants."

[20] I acknowledge Justice Strickland's comment in *Dessie*. However, I also recognize there is a different line of case law from this Court which cautions against the imposition of a comparative standard in assessing an H&C application. For instance, in *Zhang v Canada (Citizenship and Immigration)*, 2021 FC 1482 at para 24, Justice Zinn noted:

> [23] There is a significant difference between observing that this exceptional relief is provided for because the personal circumstances of some are such that deportation falls with more force on them than others, and stating that the relief is available only to those who demonstrate the existence of misfortunes or other circumstances that are exceptional relative to others. The first explains why the exemption is there, while the second purports to identify those who may benefit from the exemption. The second imports a condition into the exception that is not there.
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> [Emphasis in original]

[21] Regardless of where the Court stands on the application of an "exceptional" standard, there seems to be a general consensus, as noted in *Dessie* at para 44, that the assessment of establishment "must be done in reference to the particular circumstances of the applicant", quoting *Ikeji v Canada (Citizenship and Immigration)*, 2016 FC 1422 at paras 61-62 citing *Persaud v Canada (Citizenship and Immigration)*, 2012 FC 1133 at paras 44-45; *Ranji v Canada (Citizenship and Immigration)*, 2008 FC 521 at paras 19-20).

[22] With that, I see two reviewable errors with the Officer's assessment on establishment.

[23] I find first of all, it is unclear what, if any, weight the Officer gave to the Applicants' establishment. The Respondent submits the Officer gave the Applicants' establishment positive weight. I see no such findings made in the Decision. The Officer stated in the Decision that they have given "some consideration to the applicant's establishment in Canada" without explaining what that consideration was. Was it positive or negative? How much weight was the Applicants' establishment worth? Instead, the only discernable reason the Officer gave in this regard was that the Officer did not find the Applicants' establishment to be "exceptional." Read as a whole, I find that the Officer erred either by making a decision that is unintelligible, or by failing to give the Applicants' establishment much weight simply because it was found not to be exceptional, without giving any explanation: *Sivalingam* at para 13.

[24] Second, I find the Officers' assessment was not done in reference to the particular circumstances of the Applicants.

[25] In the Applicants' supplementary submission dated January 27, 2021, Mr. Uwaifo provided a substantive affidavit confirming that he continued working during the COVID-19 pandemic despite stress about bringing the virus home to his family, including his youngest child who was born premature and requires ongoing medical monitoring. Mr. Uwaifo worked over 3000 hours as an essential worker both as a security guard and an Uber driver. Among his riders were healthcare workers, grocery shop workers and many other essential workers. He delivered food to people who might have tested positive for COVID-19 and did not have anyone to bring

them food. Mr. Uwaifo talked about how his work "gives him happiness" knowing he is helping the community in any way he can. But he also talked about being devastated to learn that he did not qualify for the special pandemic pathway to permanent residence for essential workers, as his job was not in the eligible National Occupation Classification categories, despite him being an essential worker.

[26] Also, as noted in the Applicants' supplementary submission:

> It is submitted that Mr. Uwaifo is among the front-line workers who have been making a significant contribution during the COVID-19 pandemic, while being at risk of contracting COVID-19. In recognition of their selfless service to Canadians, the Government of Canada recently created a public policy to acknowledge their contribution and risk to their health during the pandemic by paving a pathway for refugee claimants and former refugee claimants toward residency in Canada. According to the Temporary public policy to facilitate the granting of permanent residence for certain refugee claimants working in the health care sector during the COVID-19 pandemic (the "Pathway Policy"), the Minister used his authority under section 25.2 of the IRPA to justify granting permanent residence to individuals who meet specified eligibility criteria. [emphasis in original]

[27] The Applicants thus submitted to the Officer that Mr. Uwaifo's significant contribution for performing essential services during the pandemic should be "similarly recognized by the Government of Canada as he would otherwise meet all of the specified eligibility criteria."

[28] The Applicants did not address the issue of the pathway program in their written submission before this Court, however they raised an argument at the hearing that they would have qualified for the pathway program because of their exceptional establishment.

[29] The Respondent submitted in reply that the Applicant was arguing a new issue that was not properly raised. As well, whether the Applicants would have qualified for the pathway program was a separate issue from their H&C application consideration. In any event, the Respondent argued that the Officer did consider Ms. Owaifo's completion of a PSW program, and that the Applicants' argument amounts to asking the Court to reweigh the evidence.

[30] In reply, the Applicants submitted that they had included their eligibility for the pathway program as part of their H&C application to demonstrate that they have made great establishment during the time they were in Canada, and the Officer's assessment that their establishment was not exceptional was unreasonable in light of the facts.

[31] While I agree with the Respondent that the Applicants ought to have addressed this issue more directly in their written submission, I also accept that the Applicants' submission is not about the pathway program *per se*, but more about the evidence they have submitted to demonstrate the significant contributions they have made, similar to those who are granted permanent residence status under the pathway program during the pandemic.

[32] I note that the Decision made no mention of the Applicants' submission regarding the pathway program, nor did it acknowledge the contribution made by Mr. Uwaifo as an essential worker during the pandemic. The lack of analysis is particularly disconcerting, in my view, in light of the substantial evidence and submissions made by the Applicants in this respect.

[33] From the Decision, it is unclear why, in this exceptional time of ours, when the Government of Canada has seen fit to create a program to provide a pathway for permanent resident status to certain essential workers in recognition of their significant contribution to Canada, that an Officer would not even consider the Applicants' similarly significant contributions before dismissing their establishment as not "exceptional."

[34] The Applicants argue that it is difficult to think of circumstances that would more excite in a reasonable person the desire to relieve the misfortunes of another than those of a hard-working family, who have contributed to the Canadian economy and their community. The Applicants ask: what more can a person do in order to prove that they are well established in Canada than become accredited as a Canadian lawyer or become a personal support worker?

[35] While these are valid questions, it is not my role to provide an answer. However, I note Justice Ahmed's following comments in *Mohammed v Canada (Citizenship and Immigration)*, 2022 FC 1:

> [42] As a health care aide, the Applicant risked her own health and safety to support health-compromised and aging individuals. She is applying the very skills she acquired in Canada over a decade ago at a time when they are desperately needed, while not knowing if she herself will be able to stay in Canada. To frame this commitment and these contributions as only a "moderately positive" factor in the Applicant's appeal is unintelligible.
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> [43] The moral debt owed to immigrants who worked on the frontlines to help protect vulnerable people in Canada during the first waves of the COVID-19 pandemic cannot be understated. I do not find that the IAD gave this contribution the weight it deserved.

[36] Given the Officer's failure to provide reasons for their findings with regard to the Applicants' establishment, and to assess the Applicants' establishment in relation to their particular circumstances, I find the Decision unreasonable. I need not consider the other arguments made by the Applicants.

IV. Conclusion

[37] The application for judicial review is granted.

[38] There is no question for certification.

JUDGMENT IN IMM-2656-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the matter sent back for redetermination by a different officer.
2. There is no question for certification.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2656-21
STYLE OF CAUSE:	BARRISTER FESTUS UWAIFO, YVONNE FUMNAYA UWAIFO, HARMONY EDUKPE UWAIFO, FLOURISH OMOLEGO UWAIFO, EVAN OHIS UWAIFO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	APRIL 25, 2022
JUDGMENT AND REASONS:	GO J.
DATED:	MAY 9, 2022

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