Federal Court Cour fédérale

Date: 20221011

Docket: IMM-2723-21

Citation: 2022 FC 1389

Ottawa, Ontario, October 11, 2022

PRESENT: Mr. Justice Norris

BETWEEN:

AYAT MOHAMMED A ALREBEH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant is a 37 year-old citizen of Saudi Arabia who has been living in Canada since December 2009. She is the mother of a Canadian child, Ali, who was born in December 2010. Ali has been diagnosed with Autism Spectrum Disorder ("ASD") and Attention Deficit Hyperactivity Disorder ("ADHD").

[2] In April 2020, the applicant submitted an application 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*"). The application was based on the applicant's establishment in Canada and on Ali's best interests. In a decision dated March 31, 2021, a Senior Immigration Officer with Immigration, Refugees and Citizenship Canada refused the application.

[3] The applicant now applies for judicial review of this decision under subsection 72(1) of the *IRPA*. She contends that the Officer's assessment of Ali's interests is unreasonable. For the reasons that follow, I do not agree that the decision is unreasonable. This application for judicial review must, therefore, be dismissed.

II. BACKGROUND

[4] The applicant first arrived in Canada in December 2009 as the accompanying dependent of her husband (who held a study permit at the time). Their son Ali was born a year later. The applicant's husband has since returned to Saudi Arabia but the applicant and Ali have remained in Canada. They have returned to Saudi Arabia for family visits during the summer months.

[5] Ali was originally diagnosed with ADHD by a physician in Saudi Arabia. In February 2018, he was assessed for developmental delays by a pediatrician in St. Catharines, Ontario. The pediatrician concluded that Ali has ASD and that this was contributing to his developmental delays. In March 2018, Ali was placed on a waiting list for services with the

Hamilton-Niagara Regional Autism Program at McMaster Children's Hospital. At school, an Individual Education Plan was developed to accommodate Ali's particular needs.

[6] In March 2019, Ali was assessed by a psychiatrist at the St. Catharines General Hospital Mental Health Outpatient Clinic. The psychiatrist recommended a slight adjustment to Ali's medication as well as cognitive behavioural therapy for his anxiety. The psychiatrist made a referral to Contact Niagara, an organization that provides child and developmental services.

[7] A case worker with Contact Niagara conducted an intake interview with the applicant in September 2019. In the course of that interview, the applicant related that she and Ali had just returned from a two month visit to Saudi Arabia. While they were there, Ali had attended a day camp but after the first week the family was told that he could not continue because of his needs and behaviours. The applicant also related that Ali was very unhappy in Saudi Arabia and on several occasions had made statements about wanting to die. Ali was now very happy to be back in Canada.

III. DECISION UNDER REVIEW

[8] As noted above, the applicant's H&C application was based on her establishment in Canada and Ali's best interests.

A. *Establishment in Canada*

[9] The Officer found the applicant had demonstrated a modest level of establishment and gave this finding significant weight based on the following:

i. The applicant has resided in Canada for about 10 years in the past 11 years; during that time she was a stay-at-home mother or was studying.

ii. The applicant has spent about 1.5 years in school during her time in Canada.

iii. The applicant's husband resides and works in Saudi Arabia and sends money to Canada to support the applicant and their son.

iv. Beyond two letters of support (one from a neighbour and one from an English language facilitator), there is little documentation demonstrating the applicant's community integration. The Officer expected greater ties to the community given the amount of time the applicant has spent in Canada.

v. The applicant spent the first 24 years of her life in Saudi Arabia and her husband continues to reside there.

vi. The applicant has made positive efforts to improve her English speaking abilities, but lacks the degree of establishment of someone who has held employment while residing in Canada.

[10] The Officer found that the applicant and her son would not experience hardship if they were required to leave Canada. The applicant's only family in Canada is her son; her parents, siblings, and husband are in Saudi Arabia. The Officer noted that the applicant cites issues with her in-laws regarding Ali's diagnosis but she has her own family for support. The Officer found that these family ties would mitigate any hardship when adapting to life in Saudi Arabia and gave this factor some weight.

B. *Best Interests of the Child*

[11] In support of her application, the applicant provided documentation confirming the following:

i. Ali has been diagnosed with ADHD, ASD, and a learning disability;

ii. Ali requires constant supervision, is easily overwhelmed by sounds, and is fearful of new places and people. Ali also suffers from speech and development delay issues;

iii. Ali's treatment includes medication. As well, speech and behaviour therapy have been recommended;

iv. Ali is able to attend school in a regular classroom with appropriate supports; and

v. The applicant had described the 2019 summer day camp experience and Ali's unhappiness in Saudi Arabia (including saying he wanted to die) in the September 2019 intake interview with Contact Niagara.

[12] Submissions from counsel in support of the H&C application also emphasized the following:

i. Ali's father's family in Saudi Arabia "do not approve of Ali taking ADHD medication and took him off his medication whenever they visited."

ii. Ali's father "would not stand up against his family."

iii. The applicant, being female, "does not have the political power in Saudi Arabia to oppose her husband's family's directives."

iv. The therapy Ali needs is not readily available in Saudi Arabia.

v. There is a lack of understanding of autism in Saudi Arabia and autistic individuals are stigmatized there.

[13] The Officer noted the account of what had happened when the applicant and Ali were visiting Saudi Arabia in the summer of 2019. However, the Officer observed that the summary was based on second hand information, was vague, and lacked detail. The Officer found it significant that no medical professional had stated that Ali suffers from depression or suicidal ideation. Thus, while the Officer notes the seriousness of Ali's comments about wanting to die, the Officer also found that there was insufficient evidence that Ali would actually attempt to harm himself if he accompanied his mother to Saudi Arabia.

[14] The Officer noted the information that the applicant's in-laws would take Ali off his medication when he was in Saudi Arabia. While accepting that a change of medication like this

could have serious consequences, the Officer also found that the applicant has not described any attempts to address the situation with her in-laws. The applicant stated that her husband would not stand up to his family and, as a woman in Saudi Arabia, she has no power to oppose her husband's family. However, the Officer found that, given the seriousness of the potential consequences, the applicant should be expected to deal with her in-laws directly and, if necessary, to distance her son from them.

[15] The applicant submitted country documentation to demonstrate that therapy is not available in Saudi Arabia and that there is a stigma against people with autism in the country. However, the Officer found that:

i. In 2014, Saudi Arabia adopted the Mental Health Law, adopting many of the recommendations by the World Health Organization as contained in the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (1991).

ii. Saudi Arabia has passed specific programs to address autism and ADHD in children in 2002 and 2009, respectively.

iii. Saudi Arabia has an awareness-raising strategy designed to reduce stigma, including a Gulf Autism Week.

iv. Saudi Arabia's Ministry of Education provides psychotherapy for children with disabilities.

[16] The Officer found that Ali would be able to attend a regular classroom with additional treatment in Saudi Arabia. In addition, while Ali's specific medication is not available in Saudi Arabia, there are three other viable options.

[17] In summary, the Officer found that, while it would be in Ali's best interests to remain in Canada and to continue attending the same school with the same treatment, if he were to relocate to Saudi Arabia with the applicant he will not experience negative outcomes. Consequently, the Officer gave the best interests of the child factor little weight.

C. *Global Assessment*

[18] Based on a global assessment of the relevant factors (including the applicant's establishment in Canada, family ties, and best interests of the child), the Officer determined that the applicant had not demonstrated sufficient grounds to grant an H&C exemption. The Officer gave some weight to the applicant's education but found that only a modest degree of establishment had been demonstrated (particularly considering the applicant's ongoing ties to family in Saudi Arabia). Given his age, Ali's primary support is his mother. If she is required to leave Canada, it would be in Ali's best interests to be with both of his parents in Saudi Arabia, where he also has extended family. Finally, Ali would be able to adapt to a new life in Saudi Arabia, where treatment for his conditions and a suitable education are available.

[19] Accordingly, the Officer refused the application for H&C relief.

IV. STANDARD OF REVIEW

[20] It is well-established 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.

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

[22] The onus is on the applicant 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).

V. ANALYSIS

A. *The Nature of H&C Relief*

[23] Subsection 25(1) of the *IRPA* authorizes the Minister to grant relief to a foreign national seeking permanent resident status who is inadmissible or otherwise does not meet the requirements of the Act. The Minister may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations under the Act. As the provision states, relief of this nature will only be granted if the Minister "is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national." Whether relief is warranted in a given case depends on the specific circumstances of that case: see *Kanthasamy* at para 25. In the present case, the applicant seeks an exemption on H&C grounds from the usual requirement that someone in her position must apply for permanent residence from outside Canada.

[24] 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: see *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: see *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). Subsection 25(1) should therefore be interpreted by decision makers 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: see *Kanthasamy* at para 23.

[25] As Justice Abella observed 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).

[26] H&C relief is an exceptional and highly discretionary measure: see *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 15; and *Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4. The onus is on an applicant to present sufficient evidence to warrant the exercise of such discretion in his or her case: see *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 45; *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 5; *Ahmad v Canada (Minister of Citizenship and Immigration)*, 2008 FC 646 at para 31; and *Zlotosz v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 724 at para 22.

[27] Subsection 25(1) expressly requires a decision maker to take into account the best interests of a child directly affected by a decision made under that provision. The "best

interests" principle is "highly contextual" because of the "multitude of factors that may impinge on the child's best interests" (*Kanthasamy* at para 35, quoting *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 11 and *Gordon v Goertz*, [1996] 2 SCR 27 at para 20). As a result, it must be applied "in a manner responsive to each child's particular age, capacity, needs and maturity" (*Kanthasamy* at para 35). Protecting children through the application of this principle means "[d]eciding what . . . appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention" (*Kanthasamy* at para 36, quoting *MacGyver v Richards* (1995), 22 OR (3d) 481 (CA) at p 489).

[28] Given the fact-specific nature of the inquiry into the best interests of a child affected by the decision, evidence to support one's reliance on those interests must be provided: see *Zlotosz* at para 22; and *Lovera v Canada (Minister of Citizenship and Immigration)*, 2016 FC 786 at para 38.

[29] Finally, it follows from the discretionary nature of decisions under subsection 25(1) of the *IRPA* that generally the administrative decision maker's determinations will be accorded a considerable degree of deference by a reviewing court: see *Williams* at para 4; and *Legault* at para 15.

B. *Is the Officer's Decision Unreasonable?*

[30] In summary, the applicant challenges the reasonableness of the Officer's best interests of the child analysis in four specific respects:

i. Ignoring or minimizing Ali’s experiences in Saudi Arabia;

ii. Ignoring the fact that, as a woman, it would be difficult for the applicant to protect Ali’s best interests in Saudi Arabia;

iii. Assessing Ali’s best interests through a hardship lens; and

iv. Ignoring general country condition evidence, which contradicts the Officer’s findings on the experiences of children with ASD and ADHD in Saudi Arabia.

[31] I am not persuaded that the decision is unreasonable in any of these respects.

[32] First, I do not agree that the Officer ignores or minimizes Ali’s experiences. When assessing what happened in the summer of 2019, the Officer specifically notes that their analysis does not take away from potential seriousness of Ali’s statements about wanting to die. The Officer’s finding that the summary of the events in the intake report is second-hand and vague is reasonable. If anything, the Officer may have given the information in the intake form more weight than it reasonably deserved since the Officer appears to have thought (mistakenly) that it was a psychiatric assessment instead of simply an intake interview. The important point, however, is that, as the Officer noted, no medical professional had diagnosed Ali with depression or suicidal ideation. The applicant submits that, by noting the “second hand” nature of the account of what had taken place during the visit to Saudi Arabia in 2019, the Officer implied that Ali himself should have described the events. I do not read the decision in this way. Rather, the Officer was simply observing that the applicant had not provided a first-hand account of the

events in her application for H&C relief. Instead, her account only appears second-hand in the intake interview.

[33] Moreover the absence of any details about the precise circumstances under which Ali had made the concerning comments, how his parents had dealt with them, or how Ali had responded also suggests that it was not unreasonable for the Officer to conclude that the applicant had failed to establish that Ali would harm himself if he accompanied the applicant to Saudi Arabia.

[34] Second, the Officer reasonably concluded that the applicant's difficulties with her in-laws added little positive weight to the H&C application. The Officer acknowledged that the applicant's in-laws disagree with Ali's diagnoses and have taken him off his medication when he has visited Saudi Arabia in the past. The Officer also noted the applicant's claims that her husband would not stand up to his family and that, as a woman, she does not have the "political power" to oppose her husband's family. The applicant faults the Officer for failing to consider country condition evidence demonstrating the inferior position of women in Saudi society relative to men in general and their husbands in particular. However, that evidence is largely beside the point here because the applicant has not suggested that she and her husband disagree that it is better for Ali to remain on his medication. Notably, no first hand evidence from the applicant's husband was provided in support of the H&C application. The Officer also reasonably considered that the applicant had not provided any evidence regarding whether she had tried to resolve the conflict with her in-laws and, if they maintained their position, that she could not protect Ali in other ways. In assessing the reasonableness of the Officer's conclusion, I also note that there was no explanation in the record for why, if the applicant and Ali were to

return to Saudi Arabia, the applicant's in-laws would have control over whether Ali received his medication.

[35] Third, I do not agree that the Officer erred by assessing Ali's best interests through a hardship lens. While the Officer does conclude that, if he were to relocate to Saudi Arabia, Ali "will not experience negative outcomes," this was said in the context of being satisfied that Ali would have access to suitable medication, treatment and educational opportunities in Saudi Arabia and would also have the support of his immediate family there. The applicant challenges the Officer's conclusion that Ali "would be able to adapt to the changes [entailed in relocating to Saudi Arabia] since treatment options would be available to him." Even if this conclusion went beyond what the record reasonably supported, which I would not necessarily conclude, this would not undermine the overall reasonableness of the decision. This is because it was not necessary for the Officer to make this affirmative finding to conclude that the applicant had failed to make a sufficient case for relief. In this regard, it is important reiterate that it was the applicant's burden to demonstrate that H&C relief was warranted. It is implicit in the Officer's conclusion that the Officer was not satisfied that the applicant had demonstrated that Ali would be unable to adapt to living in Saudi Arabia. This finding is not unreasonable on the record before the Officer.

[36] Finally, the applicant contends that the Officer ignored country condition evidence that was inconsistent with their conclusion that suitable treatment would be available to Ali in Saudi Arabia. I do not agree. The Officer notes that the applicant had submitted country documentation suggesting that therapy is not readily available in Saudi Arabia and that people

with autism are stigmatized there. The Officer then cites several documents addressing the diagnosis, treatment, and de-stigmatization of children with autism and ADHD in Saudi Arabia. While I agree with the applicant that the Officer is not a physician and is not qualified to determine suitable treatment or medication options for Ali, in fairness to the Officer, the decision is responsive to the submissions advanced. Significantly, the applicant had not provided any expert evidence relating specifically to Ali's particular needs to establish that those needs would not be met in Saudi Arabia. Once again, one must not lose sight of the fact that it was the applicant's burden to demonstrate that H&C relief was warranted. The Officer reasonably determined that she had failed to discharge this burden.

[37] To the extent that the applicant takes issue with the Officer's conclusions on the country condition evidence, she is effectively asking this Court to reweigh the evidence and reach a different conclusion. That is not this Court's role on judicial review. Rather, the Court's role is to determine whether the Officer's decision is reasonable. For the reasons set out above, I am satisfied that it is.

VI. CONCLUSION

[38] For these reasons, the application for judicial review must be dismissed.

[39] 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.

JUDGMENT IN IMM-2723-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No question of general importance is stated.

"John Norris"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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