Federal Court Cour fédérale

Date: 20221025

Docket: IMM-294-21

Citation: 2022 FC 1454

Ottawa, Ontario, October 25, 2022

PRESENT: Mr. Justice Norris

BETWEEN:

JESSICA ALEX
SAMUEL AYEVBOSA FELIX
RHODA OYEMWENBIMINIA FELIX
GLORIOUS EHIMWENMA FELIX

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Jessica Alex, the principal applicant, was born in Sierra Leone in August 1984. In 2001, she fled the civil war and sought refuge in Italy. She became a permanent resident of Italy in 2007 and a citizen in 2017. Her three children (the co-applicants) were all born in Italy and are Italian citizens.

[2] Ms. Alex and her children first came to Canada on visitor visas in February 2018. Shortly after arriving here, they submitted applications for permanent residence on humanitarian and compassionate ("H&C") grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). These applications were refused in July 2019.

[3] In October 2019, the applicants submitted a second H&C application. The application was based on the hardship the applicants would face if they had to return to Italy, their establishment in Canada, and the best interests of the children. (At the time of the second H&C application, the children were, respectively, ages 14, 12 and 7.) Their submissions on hardship and the best interests of the children related primarily to the discrimination they would face in employment, in schooling, and in society at large as Black persons of African descent if they were required to return to Italy. These submissions were supported by evidence of their own personal experiences of racial discrimination when they lived in Italy and country condition evidence demonstrating the growing prevalence of racial discrimination there.

[4] In a decision dated January 6, 2021, a Senior Immigration Officer with Immigration, Refugees and Citizenship Canada refused the application. The Officer gave some positive weight to Ms. Alex's establishment in Canada (although this was mitigated somewhat by the fact that she had remained here without status after her visitor visa expired in 2019). The Officer found that little weight could be given to the economic hardship Ms. Alex alleged she and her family would suffer if they had to return to Italy because little evidence of their economic circumstances while living in Canada had been provided. The Officer gave "somewhat more favourable consideration" to hardship in Italy and the best interests of the children given the

family's experiences of racial discrimination in Italy and evidence confirming the existence of anti-Black discrimination and xenophobia there. The Officer was satisfied that the situation in Italy for the applicants "is not without its challenges due to the country's problems with racism and xenophobia." However, the Officer found that "there is state-sponsored assistance available to victims of discrimination and the application contains no evidence that the applicant sought out such assistance in the past for herself or her family." This consideration led the Officer to conclude that "the applicant and her children do not face any serious, or imminent, obstacles to resettling in Italy at this time." Balancing all of the relevant considerations, the Officer was not satisfied "that the collective weight carried by these factors is sufficient to grant relief." Accordingly, the Officer refused the application.

[5] The applicants now apply for judicial review of this decision under subsection 72(1) of the *IRPA*. Their central argument is that it was unreasonable for the Officer to effectively import a test applicable to claims for protection under sections 96 or 97 of the *IRPA* – including a presumption of state protection – into the H&C analysis and then find against the applicants because they had failed to rebut that presumption. They also contend further, or in the alternative, that even if it was not unreasonable for the Officer to consider that measures to prevent and redress racial discrimination are available in Italy, the decision is unreasonable because the Officer failed to consider the effectiveness of those measures before concluding that the applicants "do not face any serious, or imminent, obstacles to resettling in Italy at this time."

[6] As I will explain, I do not agree that it was unreasonable for the Officer to consider the availability of measures to prevent or redress racial discrimination in Italy when assessing the

applicants' allegations of hardship based on such discrimination and their contention that it would not be in the best interests of the children to return to Italy given the prevalence of anti-Black discrimination there. However, I do agree that the decision is unreasonable because the Officer failed to address in any way the effectiveness of those measures. This application must, therefore, be allowed and the matter remitted for reconsideration.

[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. 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).

[9] 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).

[10] 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.

[11] 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).

[12] It is indisputable that racial discrimination can constitute hardship that is relevant to an H&C application. It is also clearly relevant to the assessment of the best interests of children who would be exposed to it. The Officer does not suggest otherwise. Rather, the Officer found that the potential impact of such discrimination on the applicants was mitigated by the availability of anti-discrimination measures in Italy and the absence of evidence that Ms. Alex had ever reached out for assistance. The Officer wrote:

> Taken together, while I generally accept the applicant's narrative based on the evidence she has submitted regarding racial discrimination in Italy, I find that the favourable weight that I can give to this evidence is limited by the findings from my own research on the subject. More specifically, I find that there is sufficient objective evidence to indicate that Italy has strong anti-discrimination measures in place and also offers various institutional assistance to victims of discrimination. I further note that the applicant does not indicate in any way that she reached out to the authorities or to the [Observatory for Security Against Acts of Discrimination] or another pertinent organization for help in Italy. In the absence of more information from the applicant in this regard and additional persuasive evidence of racial discrimination and anti-African sentiment in Italy, I find that I can give only some favourable weight to this particular hardship.

[13] Similarly, the Officer wrote as follows in connection with the best interests of the children:

> The applicant states that her children will experience hardship in Italy because they were bullied and taunted in school there because of their race and ethnicity and will be subjected to more of the same if they return. I note that the application includes some evidence that racism and xenophobia in Italy is a problem and that persons of African descent experience some discrimination in daily life, but my research on the subject also indicates that Italy has

> taken institutional steps to address racism in the country and made assistance available to victims of discrimination, as discussed above. I also note that the applicant does not provide any information or evidence to indicate that she reached out to authorities for help in response to the discrimination she and her children experienced in Italy prior to departing the country, as discussed above.

[14] The same analysis is reiterated in the Officer's overall conclusion regarding the H&C application.

[15] As noted above, the applicants contend that the Officer effectively imported a test applicable to claims for protection under sections 96 or 97 of the *IRPA* (including a presumption of state protection) into the analysis of their H&C application. I agree with the applicants that, if this is what the Officer had done, it would be a reviewable error because H&C applications involve a broader understanding of hardship than claims for protection under sections 96 or 97: see *Walcott v Canada (Citizenship and Immigration)*, 2011 FC 415 at paras 59-64. However, I do not agree that the Officer erred in the manner the applicants allege.

[16] State protection may be a relevant consideration in an assessment of an H&C application: see *Walcott* at para 64. Thus, it was not unreasonable for the Officer to consider measures that had been adopted in Italy to combat racial discrimination. Moreover, the Officer did not treat state protection as a determinative factor; on the contrary, the Officer went on to consider whether, despite the existence of measures to combat racial discrimination, the applicants' circumstances nevertheless warranted being granted an exemption from the requirements of the *IRPA*, as the Officer was required to do: see *Walcott* at para 64; see also *Raju v Canada (Citizenship and Immigration)*, 2022 FC 900 at para 15.

[17] Similarly, I do not agree that, by noting that the applicants had not presented any evidence that they had sought out assistance from the authorities to address the discrimination they had suffered in Italy, the Officer effectively concluded that the applicants had failed to rebut a presumption of state protection. Rather, in my view, the Officer reasonably considered the absence of such evidence to be relevant to the degree of hardship the applicants would experience in Italy. Critically, the Officer did not treat this as a determinative consideration. In this regard, it must be recalled that the applicants bore the burden of establishing that the hardship they would experience in Italy due to racial discrimination warranted an H&C exemption. Thus, I agree with the respondent that the Officer's analysis reflects a reasonable application of the burden of proof as opposed to an erroneous application of a presumption.

[18] On the other hand, I do agree with the applicants that the decision is unreasonable because the Officer failed to address the effectiveness of the anti-discrimination measures Italy has adopted.

[19] In assessing the grounds for an H&C exemption advanced by the applicants, the Officer focused on the availability of anti-discrimination measures in Italy. As discussed above, it was not unreasonable for the Officer to do so. However, having done so, for the Officer to conclude reasonably that, given these measures, the applicants would not "face any serious, or imminent, obstacles in resettling in Italy at this time," the Officer had to be satisfied that the measures would be reasonably effective in preventing or redressing racial discrimination in the applicants' particular circumstances. While the Officer may well have believed this (in fact, at one point in

the decision the Officer describes the measures as "strong"), the decision provides no explanation of the basis for that belief. This omission is significant because there was evidence in the record – including the very report the Officer located and relied on (a report from the Office of the United Nations High Commissioner for Human Rights of a mission to Italy on racial discrimination (28 January – 1 February 2019)) – that concerns had been raised about the effectiveness of the measures on which the Officer placed significant weight. As well, the applicants flagged the issue of the effectiveness of anti-discrimination measures in their submissions in support of the H&C application. Given the importance of these measures to the Officer's decision, the lack of any analysis of their effectiveness in practice leaves a fundamental gap in the Officer's reasoning that undermines the reasonableness of the decision as a whole: see *Vavilov* at paras 96 and 128; see also *Ramesh v Canada (Citizenship and Immigration)*, 2019 FC 778 at paras 19-22.

[20] The applicants also challenge the reasonableness of the Officer's assessment of the best interests of the children in other respects as well as the assessment of their establishment in Canada. Since the matter must be reconsidered in light of the flaw I have identified above, and since that reconsideration will presumably be based on updated information regarding the minor applicants and the family's establishment in Canada (among other things), it is not necessary to address these other issues.

[21] For these reasons, the application for judicial review is allowed. The decision of the Senior Immigration Officer dated January 6, 2021, is set aside and the matter is remitted for redetermination by a different decision maker.

[22] Neither party suggested any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-294-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Senior Immigration Officer dated January 6, 2021, is set aside and the matter is remitted for reconsideration by a different decision maker.
3. No question is general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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