Federal Court Cour fédérale

Date: 20230309

Docket: IMM-4246-22

Citation: 2023 FC 323

Calgary, Alberta, March 9, 2023

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

MARSELA MIRASHI
MARIN MALAJ
QUENTIN MALAJ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants seek judicial review of a decision made by an Officer at the Embassy of Canada to Italy in Rome, dated April 22, 2022, refusing their request for a humanitarian and compassionate (H&C) exemption to overcome the definition of a dependant child for the Principal Applicant, Marsela Mirashi, from the permanent resident application requirements.

[2] The Applicants assert that various aspects of the Officer's weighing of the H&C factors are unintelligible and inconsistent and that the Officer made a number of errors, all of which render the decision unreasonable.

[3] For the reasons that follow, I find that the Officer's decision is unreasonable and accordingly, the application for judicial review shall be granted.

I. Background

[4] The Applicants, Marsela Mirashi and Marin Malaj [Associate Applicant], are Albanian citizens and the parents of two minor children, one of whom is also named in this application. Neither children are Albanian citizens, but respectively have Canadian and U.S. citizenship by birth.

[5] The Principal Applicant left Albania for the U.S. with her parents and her brother in September of 2000 at the age of eleven. In 2005, the family's asylum claim in the U.S. was denied and her father was removed to Albania.

[6] The Associate Applicant left Albania as a teenager and made an asylum claim in the U.S. in 2001, which was refused.

[7] In December of 2005, the Principal Applicant, her mother and her brother crossed into Canada and her father was able to join them in Canada, where they made a refugee claim. The Principal Applicant's father's refugee claim was severed from the claim made by the balance of

the family and in July of 2007, the father's refugee claim was denied. The refugee claim made by the Principal Applicant, her mother and her brother was subsequently denied in September of 2008.

[8] The Associate Applicant came to Canada towards the end of 2007 and worked as a painter.

[9] In October of 2010, at the age of 21, the Principal Applicant married the Associate Applicant, both of whom continued to reside in Canada.

[10] In March of 2012, the Principal Applicant and her family applied for a Pre-Removal Risk Assessment, which was denied in July of 2012.

[11] In November of 2012, the Principal Applicant's son, Claudio, was born in Canada.

[12] In late 2012, the Associate Applicant was provided with notice of removal. In early 2013, the Associate Applicant left Canada for the U.S.

[13] In 2013, the Principal Applicant left Canada to join the Associate Applicant in the U.S., where she then claimed asylum.

[14] In September of 2015, the Principal Applicant gave birth to their second son, Quentin [Minor Applicant], in the U.S.

[15] In January of 2016, the Principal Applicant's mother, father and brother applied for permanent residence in Canada upon H&C considerations. In March of 2017, the Principal Applicant's parents and brother were granted an H&C exemption and proceeded to obtain their permanent resident status.

[16] In January of 2018, the Principal Applicant's U.S. asylum claim was denied and she was detained for approximately four months for having entered the U.S. illegally, until she was removed to Albania in June 2018. Later in June 2018, the Associate Applicant voluntarily left the U.S. with their two children and returned to Albania to join the Principal Applicant.

[17] In November 2019, the Principal Applicant's parents submitted a family class sponsorship application to sponsor the Principal Applicant as their dependent child, which was refused on the basis that the Principal Applicant was married and had two children. The application was then reviewed on the basis of H&C considerations and was refused in February 2020. The Applicants commenced an application for leave and for judicial review, which was ultimately resolved by the parties and the application was sent for re-determination. Prior to the re-determination, the Applicants submitted additional evidence in support of their application.

[18] The Applicants cited the following grounds in seeking an H&C exemption:

A. The country conditions in Albania being a lack of or failure of all aspects of life, from the economy, healthcare, education, employment, policing and government; the Principal and Associate Applicants had left Albania when they were young and

spent 18 years living in North America with the Principal Applicant being a student and then both employed for many of those years.

B. The Principal Applicant is employed at a Hilton Garden Inn in Albania for low wages and shift work, citing mismanagement of the hotel and that the Associate Applicant cannot find employment despite his experience as a painter and having his own small business as a painter in Canada.

C. The standard of living in Albania is lower than in Canada and there is a lack of affordability in housing and an unaffordable cost of living.

D. With respect to the best interests of the children, the children speak English and do not speak Albanian and Claudio struggles in the Albanian school. Quentin has gluten and dairy allergies which the Applicants assert are challenging as Albania is not set up for allergies. The Applicants assert that the Principal Applicant's parents and brother support them by sending supplies for the children (including food and medicine) and by paying for private school tuition as Claudio was refused admission to other schools for lack of Albanian language.

[19] On April 22, 2022, the Officer refused the Applicants' H&C exemption request.

II. Analysis

[20] Subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] gives the Minister discretion to exempt foreign nationals from the ordinary requirements of that statute and grant permanent resident status in Canada if the Minister is of the opinion that such relief is justified by H&C considerations. An H&C determination under section 25(1) of the *IRPA* is a global one, where all the relevant considerations are to be weighed cumulatively in order to determine if relief is justified in the circumstances. Relief is considered justified if the circumstances would excite in a reasonable person in a civilized community a desire to relieve the misfortunes of another [see *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 13, 28; *Caleb v Canada (Citizenship and Immigration)*, 2020 FC 1018 at para 10].

[21] Subsection 25(1) presupposes that an applicant has failed to comply with one or more provisions of the *IRPA*. As such, a decision-maker must assess the nature of that non-compliance and its relevance and weigh this against the H&C factors in each case when conducting its analysis [see *Mitchell v Canada (Citizenship and Immigration)*, 2019 FC 190 at para 23].

[22] The granting of an exemption for H&C reasons is deemed to be exceptional and highly discretionary and therefore "deserving of considerable deference by the Court" [see *Qureshi v Canada (Citizenship and Immigration)*, 2012 FC 335 at para 30]. There is no "rigid formula" that determines the outcome [see *Sivalingam v Canada (Citizenship and Immigration*), 2017 FC 1185 at para 7].

[23] The applicable standard of review of an H&C decision is reasonableness [see *Kanthasamy, supra* at para 44]. In conducting a reasonableness review, the Court's focus is on "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 83]. The Court must ask itself whether the decision bears the hallmarks of reasonableness – namely, justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision [see *Vavilov, supra* at para 99]. The burden is on the party challenging the decision to show that it is unreasonable and the Court "must be satisfied that any shortcomings or flaws relied on […] are sufficiently central or significant to render the decision unreasonable" [see *Vavilov, supra* at para 100].

[24] I find that there are a number of aspects of the Officer's decision that render it unreasonable.

[25] First, the Officer sets out a list of factors that the Officer finds weigh in favour of H&C relief. This list includes "an argument that the PA and her spouse have struggled to find adequate employment in Albania". However, the Officer then goes on find that the following factors, among others, weigh against an H&C exemption:

> - Both the PA and spouse declare they were able to travel and settle in the country without issue and have been able to find some success in the labour market, despite the declaration of limited language skills and the declared challenges present in the Albanian labour market. Additionally, they have work and entrepreneurial experience, as well as English language skills, acquired in the US and Canada which could improve their

> competitiveness in the local labour market. I note that the PA was able to find employment in a western hotel chain in Albania.
>
> - The PA and her immediate family continue to receive financial support from their extended families in the US and Canada, with money transfer receipts on file showing sums of up to 2000USD. Additionally, the family receives clothing, gluten-free food, children's medicines and toys from family based in Canada and the US. I note that the family is able to support private system education for at least one of the children.

[26] I agree with the Applicant that it is internally inconsistent for the Officer to find that the Applicants have settled in Albania "without issue", while recognizing that they require the assistance of their extended family living abroad in order to support the needs of their family in Albania and acknowledging their struggle to find adequate employment. The evidence before the Officer did not support a finding that the Applicants have settled in Albania without issue.

[27] Second, I find that the Officer's best interest of the children [BIOC] analysis is flawed. In reviewing an H&C application, an officer must be "alert, alive and sensitive" to the interests of any children who may be impacted by the officer's decision [see *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75]. In this regard, the evidence with respect to the child's interests must be examined with care and attention in light of all of the evidence and in the context of the child's personal circumstances [see *Garraway v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 286 at para 33]. Once that is done, it is up to the officer to determine what weight those interests should be given in the circumstances [see *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 12].

[28] Further, in conducting an H&C analysis, an officer must determine whether to assign a positive, negative or neutral weight to each factor raised by an applicant. Where a positive or negative weight is assigned, the officer must also determine the amount of weight to assign, often expressed as “significant”, “some” or “little” weight. The officer must then conduct a global assessment, where all of the relevant considerations are to be weighed cumulatively in order to determine if relief is justified in the circumstances.

[29] However, in this case, while the Officer has a section of their decision dedicated to addressing their BIOC analysis, the Officer’s reasons are silent as to what weight, if any, was ultimately assigned to the BIOC factor, which prevents the Court from knowing whether a proper global assessment was conducted.

[30] In addition, I find that the BIOC analysis placed undue emphasis on the financial and material support provided by the Applicants’ family abroad. The evidence before the Officer was that Albania lacks the resources to accommodate Quentin’s medical needs and his parents are unable to meet his medical needs absent the assistance of their extended family. The Officer’s reasons fail to properly consider whether it is in Quentin’s best interests to reside in a country that cannot accommodate his medical needs and where his medical needs can only be met through care packages and money sent by his extended family.

[31] I find that the BIOC analysis conducted by the Officer failed to consider “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” as required by

Kanthasamy, supra at para 36, and instead improperly focused on whether the children were "making due" in Albania.

[32] In light of the above, I find that the Officer's decision is unreasonable and must be set aside.

[33] Neither party proposed a question for certification and I agree that none arises.

JUDGMENT in IMM-4246-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The decision of the officer dated April 22, 2022 refusing the Applicants' request for a humanitarian and compassionate exemption to overcome the definition of a dependant child for the Principal Applicant, Marsela Mirashi, from the permanent resident application requirements is set aside and the matter is remitted to a different officer for redetermination. The Applicants shall be provided with an opportunity to provided updated submissions in support of their application.

3. The parties proposed no question for certification and none arises.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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