Federal Court  Cour fédérale

Date: 20240125

Docket: IMM-10202-22

Citation: 2024 FC 126

Ottawa, Ontario, January 25, 2024

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

EDDIE AIGBE IDIAGBONYA
BECKY EFE IBHARIA
OSAKIODUWA JESSE AIGBE
OSAYUWAMEN ZOE AIGBE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants seek judicial review of the decision of a Senior Immigration Officer [the Officer] dated August 31, 2022, refusing their application for permanent residence in Canada. The Applicants seek an exemption from the requirements of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] on humanitarian and compassionate [H&C] grounds, pursuant to section 25 of the Act.

[2] The Applicants are Eddie Aigbe Idiagbonya [Mr. Idiagbonya], his spouse Becky Efe Ibharia [Ms. Ibharia] and their two American-born children. The family also includes two Canadian born children.

[3] For the reasons that follow, the Application is dismissed. The Officer reasonably exercised their discretion and found that the H&C exemption was not warranted based on the evidence presented by the Applicants in support of their H&C application.

I. Background

[4] The Applicants, originally from Nigeria, arrived in the United States [US] in June 2016. Two of their children were born in the US in September 2016. They did not claim asylum while in the US. The Applicants entered Canada from the United States on November 19, 2017.

[5] The Applicants then sought refugee protection in Canada. The Refugee Protection Division [RPD] refused their refugee claim in December 2018. The Refugee Appeal Division [RAD] dismissed their appeal in October 2019. The decisions of the RPD and RAD were not submitted to the Officer and are not on the Applicants' record for this Application. However, the Officer noted that their refugee claim was based on the fear of female genital mutilation [FGM] and subjection to occultic religious practices. The RPD and RAD found, among other things, that the Applicants had an internal flight alternative to Port Harcourt.

[6] In May 2021, the Applicants submitted their H&C application.

II. The Decision under Review

[7] The Officer refused the Applicants' request for an exemption from the requirements of the Act on H&C grounds.

[8] The Officer considered the Applicants' degree of establishment in Canada, the hardship upon return to Nigeria and the best interest of the children [BIOC]. The Officer also addressed Ms. Ibharia's health and the concern about FGM and occultic religious practices. The Officer considered the evidence submitted, noting that the onus rests on the Applicants to establish the grounds they rely on for the H&C exemption. The Officer found that there was insufficient evidence to support many of their submissions, for example, with respect to one of the children's medical procedures and any potential need for on-going medical treatment, and Ms. Ibharia's health condition and studies in Canada.

[9] With respect to establishment, the Officer noted Mr. Idiagbonya's employment history, Ms. Ibharia's part-time employment for five months, and the Applicants' Notice of Assessment (only for 2019). The Officer found that the Applicants' establishment was not unusual in the circumstances and did not "merit exceptional discretion".

[10] The Officer found that the Applicants did not provide sufficient evidence of health conditions requiring ongoing treatment, and failed to provide details or evidence relating to their claim that Ms. Ibharia and the children were at risk of FGM or occultic religious practices upon return to Nigeria.

[11] The Officer noted that an H&C application assesses, among other factors, hardship. The Officer noted that hardship associated with leaving Canada, on its own, is generally not sufficient to warrant H&C relief.

[12] The Officer noted that evidence raised regarding alleged risks, including country conditions, was assessed in the context of hardship. The Officer considered the impact of the COVID-19 pandemic on the Nigerian economy, noting that evidence had not been provided regarding the permanency of the economic effects of the pandemic or the inability of the country to recover. The Officer considered that the adult Applicants had lived most of their lives in Nigeria and had been well educated, were aware of the customs and language, and had extended family in Nigeria that could assist with their re-integration.

[13] The Officer acknowledged that generalized risk is a relevant factor, but is not sufficient to establish an H&C exemption. The Officer accepted that conditions in Nigeria may not be ideal, but noted that the Applicants had not provided evidence to show that they would experience the conditions that they alleged upon return.

[14] With respect to the BIOC, the Officer noted the need to be alert, alive and sensitive to the children's best interests and that BIOC remains a significant factor in an H&C application, but does not necessarily outweigh all other factors. The Officer also noted that the onus rests on an applicant to provide evidence to support their submissions regarding the BIOC.

[15] The Officer considered the Applicants' submission regarding a medical procedure for one of the children, noting that there was no follow-up information regarding the need for any other

treatment. The Officer also noted the report cards submitted. The Officer considered the ages of the children, noting that they remained dependant on their parents and that no evidence had been submitted to demonstrate that the children could not adapt to a new country. The Officer noted that the US and Canadian-born children would have dual citizenship and, in the absence of evidence to the contrary, would accompany their parents upon return to Nigeria. The Officer also considered the country condition information in the assessment of the BIOC. The Officer further noted that the Applicants have extended family in Nigeria and no extended family in Canada.

[16] The Officer explained that the BIOC had been assessed based on the evidence provided. The Officer found that the weight given to the BIOC did not, on its own, warrant granting the H&C exemption. The Officer reiterated that some hardship arising from leaving Canada is inevitable, but this also does not warrant granting the exemption.

[17] The Officer concluded that based on a cumulative assessment of the evidence and the relevant factors, including the exceptional nature of the H&C exemption, the exemption was not warranted.

III. Standard of Review

[18] H&C decisions are discretionary decisions and are reviewed on the reasonableness standard (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 57–62, 174 DLR (4th) 193 [Baker]; *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 at para 44 [*Kanthasamy]*; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16, 23 [*Vavilov*].

[19] In *Vavilov*, the Supreme Court of Canada provided extensive guidance to the courts in reviewing a decision for reasonableness. In brief, the reviewing court must ensure that the decision bears the hallmarks of reasonableness, notably that the decision is justifiable, intelligible, and transparent (*Vavilov* at para 95). The party challenging the decision bears the burden of establishing that the shortcomings or flaws are central to the decision, rendering it unreasonable (*Vavilov* at para 100).

[20] 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 paras 85, 102, 105–10). The court does not assess the reasons against a standard of perfection (*Vavilov* at para 91).

IV. The Applicants' Submissions

[21] The Applicants submit that the Officer erred by: requiring them to demonstrate an exceptional level of establishment in Canada; requiring them to establish a high level of hardship to them personally; and, failing to properly assess the best interests of their children.

[22] First, the Applicants submit that the Officer erred by requiring an "unusual" level of establishment in Canada. The Applicants submit that the Officer also erred by finding that their establishment in Canada was not unusual compared to others in similar circumstances. The Applicants submit that there is no requirement to demonstrate a particular level or exceptional level of establishment. They submit that the Officer disregarded that Mr. Idiagbonya worked

continuously, the family did not rely on social benefits, and they took courses and were involved in the community.

[23] The Applicants point to *Sivalingam v Canada (Citizenship and Immigration)*, 2017 FC 1185 at para 13 [*Sivalingam*], where the Court found that it is unreasonable to require an extraordinary level of establishment in Canada.

[24] Second, the Applicants submit that the Officer erred in assessing hardship. They submit that the Officer failed to give significant weight to the country conditions in Nigeria, which they would face upon return, including inadequate healthcare, discrimination, the risk of harassment, and other hardships.

[25] The Applicants further submit that the Officer erred by applying the test for risk that would apply in a refugee claim and requiring evidence of personalised risk rather than considering the hardship they will experience upon return to Nigeria.

[26] Third, the Applicants submit that the Officer's assessment of the BIOC was flawed. The Applicants submit that the Officer failed to consider the impact of moving to Nigeria on the children's emotional, social, cultural, and physical well-being. While the Officer considered the factors arising from the current country conditions, the Officer did not consider how this would affect the children. The Applicants submit that the children will face hardship due to a high level of insecurity, a poor educational system, and inadequate healthcare.

V. The Respondent's Submissions

[27] The Respondent submits that the Officer considered all of the relevant factors and evidence submitted and reasonably concluded that the Applicants' circumstances do not warrant H&C relief.

[28] The Respondent submits that the Officer reasonably found that the family did not demonstrate an unusually high level of establishment in Canada. The Respondent argues that, contrary to the Applicants' submission, the Officer did not use the term "exceptional" to introduce a new or higher threshold for establishment, but rather, to describe the nature of the H&C exemption.

[29] The Respondent points to post-*Kanthasamy* jurisprudence to note the principles that guide granting H&C relief, including that the relief is highly discretionary, the Applicants must demonstrate (with sufficient evidence) that their hardship will be greater than those typically faced by others seeking permanent residence in Canada, and that more than a sympathetic case is required for relief to be granted (citing *Buitrago Rey v Canada (Citizenship and Immigration)*, 2021 FC 852 at para 86 [*Buitrago Rey*]; *Shackleford v Canada (Citizenship and Immigration)*, 2019 FC 1313 at para 16; *Huang v Canada (Citizenship and Immigration)*, 2019 FC 265 at paras 17-25).

[30] The Respondent also notes that the Applicants have the onus to establish their claims, which includes providing evidence and framing the issues to be considered by the Officer (citing

Khir v Canada (Citizenship and Immigration), 2021 FC 160 at para 26; *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at paras 5, 8).

VI. The Decision is Reasonable

[31] The Officer did not ignore or misapprehend relevant evidence. The Officer correctly described the purpose of the section 25 exemption and the law that governs its application. The Officer exercised their discretion in accordance with the facts and the law. The decision is intelligible, transparent, and justified. While the Applicants clearly want a different outcome, the Court's role is not to reweigh the evidence or remake the decision.

[32] Section 25 of the Act provides that an exemption from the criteria or obligations of the Act may be granted based on H&C considerations, "taking into account the best interests of a child directly affected". This is discretionary relief. In the present case, the exemption, if granted, would permit the Applicants to apply for permanent residence while remaining in Canada rather than returning to their home country and seeking to immigrate to Canada in accordance with applicable eligibility criteria in the Act. The jurisprudence confirms that the exemption is "exceptional".

[33] Officers tasked with making H&C determinations have expertise and the Court should defer to their assessments unless there are "sufficiently serious shortcomings in the decision" that are "sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100).

[34] In *Kanthasamy*, the Supreme Court of Canada provided extensive guidance about how section 25 should be interpreted and applied. The Supreme Court of Canada endorsed the approach previously set out in *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338, which described H&C considerations as "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" [emphasis added] (*Kanthasamy* at para 13). However, the Supreme Court of Canada added, at para 23, that the H&C process is not an alternative immigration scheme and that "[t]here will inevitably be some hardship associated with being required to leave Canada", which on its own is generally not sufficient to grant relief.

[35] The Supreme Court of Canada explained that what will warrant relief under section 25 varies depending on the facts and context of each case. The significant aspects of *Kanthasamy* are the Court's clear directions to avoid imposing a threshold of unusual, undeserved or disproportionate hardship, to consider and weigh all of the relevant facts and factors, and to "give weight to *all* relevant humanitarian and compassionate considerations in a particular case" [emphasis in original] (at para 33; see also para 25).

[36] In *Buitrago Rey*, this Court reviewed the principles established in the jurisprudence and summarized them at para 86:

> The post-*Kanthasamy* jurisprudence confirms the following principles, among others:
>
> - An H&C exemption is discretionary and exceptional relief;
> - Reviewing courts must not substitute their discretion for that of the Officer;

- While undue, undeserved and disproportionate hardship is not required, hardship can be considered;
- Some hardship is the normal consequence of removal and, on its own, does not support the exemption;
- Applicants must demonstrate with sufficient evidence that the misfortunes or hardships they will face are relatively greater than those typically faced by others seeking permanent residence in Canada;
- The BIOC is an important consideration but is not necessarily determinative of an H&C application; and
- All relevant factors must be considered and weighed.

As Justice Roy noted in *Shackleford*, more than a sympathetic case is required.

[37] The Officer's decision reflects *Kanthasamy* and post-*Kanthasamy* jurisprudence and the above noted principles.

[38] First, the Officer did not err in assessing the Applicants' establishment in Canada; the Officer did not impose a particular level or exceptional level of establishment. The Officer simply noted that it is not unusual for foreign nationals that have resided in Canada for approximately five years to have established similar ties (i.e., employment, community, or church ties). This observation does not suggest that there is some benchmark to meet or that only exceptional establishment will be a positive factor.

[39] The Officer did not ignore the available evidence of establishment, including Mr. Idiagbonya's employment, but reasonably noted the lack of other supporting evidence of establishment. The Officer noted, among other things, that the letter from the Applicants' church merely stated that they were members, Ms. Ibharia's study permit did not provide any additional

details regarding whether she attended or completed any courses, and the documents submitted about her mental health did not indicate any treatment or follow up for her post-partum depression.

[40] The Applicant's submission that the Officer ignored their work throughout the pandemic on the "front lines" is without merit. The Officer considered all relevant establishment factors. As the Court noted in *Sivalingam* at para 13, "establishment, is reviewed to assess whether the applicant deserves H&C relief, not an award for a special contribution to society."

[41] Second, the Officer did not err in assessing hardship upon return to Nigeria. Contrary to the Applicants' submission, the Officer did not err in not finding that they would experience the hardships set out in the country condition documents. The Applicants point to the following passage in the Officer's decision:

> While the submissions support that conditions in Nigeria may not be ideal, including as they relate to employment and general security, they allude to country conditions faced by the general population. It is emphasized that these generalized country conditions have been duly considered in the context of this H&C application. However, upon weighing the submitted evidence, a link between the risk and the applicants' personal situation has not been sufficiently established by the presented evidence, nor is it sufficiently demonstrated that the applicants would endure such conditions upon their return to their home country that an exemption is warranted in this case. [Emphasis added]

[42] While risks alleged in a claim for refugee protection may be raised as hardships, the focus is on hardship. Although the Officer referred to risk, the Officer previously clarified that risk, which is assessed in the section 96 and 97 context, is assessed as hardship in the H&C context.

[43] The Applicants' argument, that the Officer erred by finding that they had not provided evidence of the hardship rather relied only on country conditions, is not an error. The Applicants have conflated the jurisprudence governing the assessment of risk in a section 96 or 97 claim or pre-removal risk assessment with the assessment of hardship in an H&C context. Applicants must provide evidence of the hardship that they would experience upon return. While country conditions are relevant to this, as noted by the Officer, an applicant cannot simply assert that they will likely be subjected to the general country conditions (including unemployment, lack of medical care, or poor education), without evidence of their own situation.

[44] In this case, the Officer repeatedly noted the lack of evidence to support many of the Applicants' assertions, including the hardship they would experience.

[45] Third, the Officer did not err in assessing the BIOC. The Officer's assessment of the BIOC is reasonable based on the evidence before the Officer and the Officer's application of the law.

[46] The BIOC is an important factor in an H&C application where children are directly affected; the principles established in *Baker* continue to apply (*Kanthasamy* at paras 38–39).

[47] In *Baker* at para 75, the Supreme Court of Canada noted:

> [75] . . . for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this

> consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable. [Emphasis added]

[48] The jurisprudence also establishes that the fact that Canada may be a better place to live than an applicant's country of origin does not determine that it is in a child's best interest to remain in Canada, nor does a positive BIOC necessarily result in an H&C exemption (see, for example, *Landazuri Moreno v Canada (Citizenship and Immigration)*, 2014 FC 481 at paras 36-37).

[49] The jurisprudence has also established that, ideally, children should not suffer any hardship, but also recognizes that there will inevitably be hardship associated with removal from Canada.

[50] The Officer's approach to the BIOC analysis reflects the guidance of the Court to the extent that the evidence provided to the Officer permitted. The Officer acknowledged that there would be some hardship – as this is an inherent consequence of leaving Canada and that life in Canada may have benefits – but such hardship does not justify the exemption.

[51] The Officer reasonably concluded that the best interests of the children are to remain together with their parents. The Officer did not have evidence of any concerns that the children would be unable to adapt or would face challenges in education or health care in Nigeria.

[52] The Officer correctly noted that while the factors influencing the BIOC should be given substantial weight, the BIOC is only one of the factors in the overall H&C application. The weight attached to the BIOC in the overall H&C determination is within the Officer's discretion. The Officer reasonably concluded that the weight given to the BIOC factor was not sufficient to justify the exemption.

[53] In conclusion, the Officer's decision is justified in relation to the facts and the law. An H&C exemption is discretionary relief and the Court will not interfere with an Officer's exercise of discretion absent a serious shortcoming or fatal flaw central to the decision. In the present case, no such shortcomings or flaws have been found.

JUDGMENT in IMM-10202-22

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is dismissed.

2. No question for certification was raised or arises.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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