Federal Court  Cour fédérale

Date: 20241029

Docket: IMM-12044-22

Citation: 2024 FC 1707

Ottawa, Ontario, October 29, 2024

PRESENT: Mr. Justice McHaffie

BETWEEN:

OLUSOLA MOSES OBIWALE
ELIZABETH OLUFUNMILAYO OBIWALE
OLASUBOMI VICTORIA OBIWALE
OLATUBOSUN ELIZABETH OBIWALE
OLABAMBO ESTHER OBIWALE
OMOBOBOLA SAMUEL OBIWALE

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants are a family of six who arrived in Canada from Nigeria in late 2018. After their application for refugee protection was refused, they applied 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*]. Their H&C application raised their establishment in Canada in the years since their arrival; the hardship they would face if they had to return to Nigeria; and the best interests of the four children, who ranged in age from 15 to 22 at the time the application was received by Immigration, Refugees and Citizenship Canada [IRCC].

[2] The Senior Immigration Officer with IRCC who reviewed the applicants' application considered the factors they put forward, but was ultimately not satisfied that the factors cumulatively warranted relief under subsection 25(1) of the *IRPA*. On this application for judicial review challenging the refusal of their application, the applicants argue that the Officer's decision was unreasonable since it ignored the evidence filed and inadequately explained the reasons for refusing the application. They also argue the decision was reached in a procedurally unfair manner, both because they were not given an opportunity to respond to the Officer's concerns, and because the Officer apparently made the decision hurriedly in the context of a challenge to their removal before this Court.

[3] Having considered the parties' arguments and the evidence before the Court, I conclude the applicants have not met their onus to demonstrate that the decision was unreasonable or unfair. The Officer's decision shows they considered and reasonably assessed the evidence and submissions raised in the applicants' H&C application. There is no indication that the timing of the decision adversely affected the Officer's consideration of the application, and the Officer was not required to provide the applicants with an additional opportunity to respond to their assessment of the application.

[4] As the applicants have not demonstrated the decision was unreasonable or unfair, the application for judicial review must be dismissed.

II. Issues and Standards of Review

[5] The various arguments presented by the applicants on this application raise the following two central issues:

A. Was the Officer's decision rendered in a procedurally unfair manner?

B. Did the Officer err in refusing to exercise their discretion to grant the applicants permanent residence on H&C grounds?

[6] The first issue relates to the duty of procedural fairness. The Court assesses such issues by asking whether the procedure leading to the decision was fair having regard to all of the circumstances: *Salt River First Nation #195 v Tk'emlúps te Secwépemc First Nation*, 2024 FCA 53 at para 38, citing *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Bhujel v Canada (Citizenship and Immigration)*, 2023 FC 828 at para 14. The Federal Court of Appeal has recently noted that the standard of review for an allegation of procedural unfairness is "functionally correctness": *Salt River* at para 38.

[7] The second issue goes to the merits of the Officer's decision. The Court reviews the merits of an H&C decision on the standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44. When applying the reasonableness standard, the Court reviews the decision in its administrative context and in the context of the record, to assess whether it is transparent, intelligible, and justified in relation to the factual and

legal constraints that bear on the decision: *Vavilov* at paras 15, 82–86, 91–100, 105–107. In doing so, it is not the Court's role to simply reweigh the evidence or the factors put forward in support of the H&C application, or reach its own conclusions as to whether the applicants' circumstances warrant relief: *Vavilov* at paras 15, 83, 125. Rather, the burden is on the applicants to demonstrate that the Officer's decision displayed a sufficiently central failure of reasoning, legal or factual analysis, or justification to render the decision as a whole unreasonable: *Vavilov* at paras 99–100.

III. Analysis

A. *The Officer's Decision was not Procedurally Unfair*

[8] The applicants raise two concerns regarding the process leading to the Officer's refusal of their H&C application. First, they argue they were not given an opportunity to explain or respond to any concerns that the Officer had regarding their application. I cannot accept this argument, which runs contrary to established case law.

[9] In its 2009 decision in *Kisana*, the Federal Court of Appeal confirmed that "the onus of establishing that an H&C exemption is warranted lies with an applicant; an officer is under no duty to high-light weaknesses in an application and to request further submissions": *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 45, citing *Thandal v Canada (Citizenship and Immigration)*, 2008 FC 489 at para 9. Applying *Kisana*, this Court has repeatedly held that an officer reviewing an H&C application is generally not under an obligation to notify an applicant of concerns and give them an opportunity to address them: see, *e.g.*, *Begum*

v Canada (Citizenship and Immigration), 2013 FC 265 at para 46; *Goraya v Canada (Citizenship and Immigration)*, 2018 FC 341 at para 26; *Bagatnan v Canada (Citizenship and Immigration)*, 2021 FC 1188 at paras 16–19; *Pascual v Canada (Citizenship and Immigration)*, 2022 FC 878 at para 48; *Crawford v Canada (Citizenship and Immigration)*, 2024 FC 176 at paras 17–18.

[10] In the present case, the Officer's decision was based on their review of the evidence presented and the relevant factors identified by the applicants. The Officer raised no concerns about the authenticity of documents or about the credibility of the applicants or their evidence, and raised no new issues independent of the applicants' application, matters that may require further inquiry. The applicants had the opportunity to put forward the evidence and submissions they felt supported their application. They did so, filing an original submission letter with supporting evidence, and supplementing that with additional evidence several months later. The Officer reviewed the submissions and evidence and based their decision on their assessment of them. The duty of procedural fairness did not require the Officer to identify any concerns they had with the application and provide the applicants with a further opportunity to make submissions in support of their application.

[11] Second, the applicants argue that the Officer did not give their application a fair hearing because they made their decision "hurriedly" in the context of a challenge to their potential removal from Canada. By way of background to this argument, the applicants' refugee claim was dismissed by the Refugee Appeal Division in March 2021, and an application for leave and judicial review of that decision was dismissed by this Court in January 2022 (Court File

No IMM-2284-21). On October 31, 2022, facing removal to Nigeria, the applicants requested a deferral of their removal citing, among other grounds, their outstanding H&C application.

[12] The Officer's decision on their H&C application was rendered on November 18, 2022, about two and a half weeks after the applicants' deferral request. On November 28, 2022, the applicants brought an application for judicial review in respect of their deferral request, which had not yet been decided (Court File No IMM-11939-22), and a second application for judicial review in respect of the refusal of the H&C application (the current file, Court File No IMM-12044-22).

[13] The deferral request was refused on November 30, 2022, the same day that this Court heard and dismissed the applicants' motion for a stay of removal based on the refusal of the deferral request: *Obiwale v Canada (Public Safety and Emergency Preparedness)*, 2022 CanLII 113749 (FC). Their application for leave to seek judicial review of the refusal of the deferral request was subsequently dismissed, while leave was granted in the current application in respect of the H&C application.

[14] The applicants contend that the Officer was motivated to render their decision quickly given the timing of their removal and the fact that the outstanding H&C request had been raised as a reason for deferral. They argue the Officer made their decision in haste and did not consider their application with an open mind, resulting in an inadequate assessment of their application and inadequate reasons for the decision.

[15] Again, I am unable to agree. I see nothing in the timing of the decision on the H&C application that suggests that the applicants received an unfair hearing. Even if the timing of the Officer's decision was influenced by the timing of removal, this alone does not mean that the process was unfair. Nor is there any indication that the timing influenced the result of the application or resulted in the Officer having a closed mind. If an officer's decision shows they failed to adequately review and engage with the evidence and submissions filed in support of the application, or failed to apply a compassionate approach to that review, this may render the decision unreasonable: *Vavilov* at paras 125–128. However, I am unable to conclude that the fact that a decision was rendered shortly before the applicants' scheduled removal in late 2022—which did not ultimately occur—evidences an unfair process or a predetermined result.

B. *The Officer's Decision was Reasonable*

(1) Legal framework

[16] Subsection 25(1) of the *IRPA* permits the Minister to grant a foreign national permanent resident status or an exemption from any applicable criteria or obligations of the *IRPA* if the Minister is "of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected." As the Supreme Court of Canada has noted, the purpose of this provision is "to offer equitable relief in circumstances that 'would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another'": *Kanthasamy* at para 21, citing *Chirwa v Canada (Minister of Citizenship and Immigration)*, [1970] IABD No 1 at para 27.

[17] What warrants such relief will vary depending on the facts and context of the case, but officers making H&C determinations must substantively consider and weigh all the relevant facts and factors before them on a global and cumulative assessment of the applicant's circumstances: *Kanthasamy* at paras 25, 28. While setting out this general approach to H&C applications under subsection 25(1) of the *IRPA*, the Supreme Court underscored that the subsection was not intended to be an "alternative immigration scheme," or to duplicate refugee proceedings: *Kanthasamy* at paras 23–24.

[18] The extent to which an applicant will face hardship if required to return to their country of nationality is often a significant factor in an H&C application. On this issue, the Supreme Court noted that an applicant was not required to show "unusual and undeserved" or "disproportionate" hardship to justify relief, but also underscored that not every hardship associated with being required to leave Canada will be sufficient to warrant relief on H&C grounds: *Kanthasamy* at paras 23, 29–33.

[19] Subsection 25(1) expressly requires consideration of the best interests of any children directly affected. This principle, which applies to all children under 18 years of age, is an important part of the evaluation of H&C grounds that must be examined with a great deal of attention, although the presence of children does not dictate a positive outcome of an H&C application: *Kanthasamy* at paras 34, 38–39; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at paras 11–12. The best interests principle is highly contextual, and is to be applied in a manner responsive to each child's circumstances, including their age, capacity, needs, and maturity: *Kanthasamy* at para 35.

(2) The Officer's decision

[20] In their reasons for decision, the Officer reviewed and assessed the three factors raised by the applicants in their application, namely their establishment in Canada, the best interests of the children, and the hardship they would face in Nigeria if required to return there.

[21] On the question of establishment, the Officer acknowledged that the principal applicant, Olusola Moses Obiwale, and his spouse, Elizabeth Olufunmilayo Obiwale (the two parents of the family) had demonstrated efforts to be self-sufficient and economically productive, and that the applicants had been active in their church and community, undertaken studies, and developed friendships. The Officer commended these positive steps and their integration in the community. At the same time, the Officer noted that these were not uncharacteristic activities, concluding that the applicants had demonstrated a "typical level of establishment for persons in similar circumstances."

[22] In considering the best interests of the children, the Officer considered the circumstances of all four children, although only two of them were under 18 when the application was received by IRCC. The Officer acknowledged that all children had adjusted well to Canada and that it may be difficult for them to leave this environment. However, the Officer was satisfied that the children would be able to assimilate into a new scholastic environment after a period of adjustment, and found it was reasonable to expect that continued education would be available to them in Nigeria. They also noted that the children depended on their parents and that the parents could help them navigate the transition to Nigeria. The Officer recognized that Canada could be considered a more desirable place to live for the children, but concluded the applicants had

“adduced insufficient objective evidence to establish that leaving Canada for Nigeria [would] compromise [the children’s] best interests.”

[23] On the issue of hardship, the Officer accepted that the economic climate in Nigeria was poor relative to that of Canada, and recognized the applicants’ concerns they would not be able to secure satisfactory employment to permit them to support themselves and their family. However, the Officer found this was an “ordinary consequence” of a return to a country with less prosperous economic conditions.

[24] Considering the factors cumulatively, the Officer was not satisfied that the applicants’ circumstances warranted granting relief under subsection 25(1) of the *IRPA* and dismissed the H&C application.

(3) The applicants’ arguments do not establish that the decision was unreasonable

[25] The applicants contend that the evidence submitted in support of their H&C application was comprehensive and met the requirements of the *IRPA*. They argue that in refusing the application, the Officer ignored or failed to consider the evidence, and based their conclusions on conjecture, speculation, and the application of improper criteria. However, beyond these general statements, the applicants identified no particular evidence that the Officer ignored, any conjecture or speculation they engaged in, or any particular criteria the Officer applied that was improper.

[26] In oral argument, the applicants referred to a number of aspects of the evidence, suggesting that the Officer failed to consider them. This included evidence regarding their establishment, the courses that Mr. Obiwale took, the children's schooling, the parents' employment, the high unemployment rate and other adverse conditions in Nigeria, and various letters of reference and support from friends and members of their church. However, these are all matters addressed in the Officer's reasons, showing that the Officer reviewed and considered the evidence in coming to their conclusions.

[27] As set out above, the burden lies on the party challenging an administrative decision to show that it is unreasonable: *Vavilov* at para 100. This burden is not met by broad statements that the decision maker ignored evidence or applied improper criteria, without more detailed reference to the evidence or criteria said to be relevant that would allow the Court to assess whether 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.

[28] The applicants also argue that the Officer's reasons were inadequate, citing the Federal Court of Appeal's decision in *Via Rail Canada Inc v National Transportation Agency*, 2000 CanLII 16275 (FCA) at para 22. The applicants argue that the lack of detail in the Officer's analysis was such that the decision lacked justification, failing to provide adequate reasons for their conclusions and failing to set out the reasoning process followed to get to their conclusion.

[29] I am not persuaded. While the Officer's reasons for decision could have been more comprehensive in certain aspects, the Officer meaningfully accounted for the principal

arguments and evidence put forward by the applicants in their application, and explained their assessment of the applicants' circumstances in respect of each of the relevant factors: *Vavilov* at paras 127–128. I am therefore unable to conclude that the Officer's reasons lacked transparency, intelligibility, or justification.

[30] In this regard, it is important to highlight that an administrative decision is to be read in light of the record before the decision maker, including the evidence and submissions before them: *Vavilov* at paras 91–96, 125–128. In the present case, the applicants' submissions in support of their application provided limited detail on how the children's best interests would be adversely affected by returning to Nigeria. The Officer noted this, stating that the applicants had adduced insufficient objective evidence to establish that leaving Canada for Nigeria would compromise the children's best interests. The applicants' submissions also contained limited argument on the hardships the family would face in Nigeria, focusing on the high unemployment rate and the resulting difficulty the parents would face in supporting the family. The Officer directly addressed these submissions and provided clear reasons for concluding that they did not justify relief under subsection 25(1). Reading the Officer's decision in the context of the family's H&C application, I conclude that the Officer adequately and reasonably explained the basis for their conclusions and set out their reasoning process.

[31] Finally, the applicants submitted in oral argument that the Officer's decision does not show compassion, as is required of a reasonable H&C decision that applies the approach set out in *Kanthasamy*: see, *e.g.*, *Singh v Canada (Citizenship and Immigration)*, 2022 FC 147 at para 30. I cannot agree. The Officer considered the applicants' particular circumstances,

acknowledged the difficulties that they might face in returning to Nigeria, and commended their efforts in establishing themselves in Canada, but was ultimately not satisfied that their circumstances merited the discretionary relief available under subsection 25(1). A compassionate approach requires a considered and sensitive assessment of an applicant's circumstances, but it does not require a particular outcome of the applicant's H&C application. Nor is it this Court's role on judicial review to conduct a reassessment of the H&C factors and come to its own conclusions as to whether relief under subsection 25(1) should be granted. I am satisfied in the present case that the Officer conducted the necessary compassionate, sensitive, and reasonable assessment of the applicants' circumstances.

IV. Conclusion

[32] As I have concluded that the Officer did not breach the duty of procedural fairness and that the Officer's decision was reasonable, the application for judicial review will be dismissed.

[33] Neither party proposed a question for certification. I agree that no question meeting the requirements for certification arises in the matter.

JUDGMENT IN IMM-12044-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-12044-22
STYLE OF CAUSE:	OLUSOLA MOSES OBIWALE ET AL v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	MARCH 26, 2024
JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	OCTOBER 29, 2024

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