Federal Court  Cour fédérale

Date: 20211118

Docket: IMM-5977-20

Citation: 2021 FC 1254

Ottawa, Ontario, November 18, 2021

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

BONE NTSIMA
TIRELO JULIET RAMAEBA
SELAH PAKA NTSIMA (A MINOR)
DURIEL NTSIMA (A MINOR)

Applicants

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are citizens of the Republic of Botswana who applied for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds.

[2] A Senior Immigration Officer [Officer] refused the Application. The Officer found, based on a cumulative assessment of the circumstances that the requested H&C exemption was not justified.

[3] The Applicants apply under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for judicial review of the Officer's September 30, 2020 decision. The issue is whether the Officer reasonably refused the requested H&C relief in light of the factors identified by the Applicants and the evidence. The Respondent submits the Officer provided a cogent and reasonable explanation for the refusal and reasonably concluded the factors identified together with the evidence submitted were insufficient to warrant relief.

[4] After having considered the submissions advanced by the parties, I am not convinced that the Officer's decision is unreasonable. For the reasons set out below, the Application is dismissed.

II. Background

[5] The adult Applicants are the parents of three children, all under eight years old. The third and youngest child was born in Canada after the family's arrival in 2016.

[6] The Applicants' claim was refused by the Refugee Protection Division in January 2017, a decision affirmed by the Refugee Appeal Division in September 2017. The Applicants submitted their H&C application in January 2019, relying on hardship in their home country, the best interests of the minor children and establishment in Canada.

III. Standard of Review

[7] The decision to grant or refuse an exemption on H&C grounds is reviewable on a standard of reasonableness (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 16 and 17 [*Vavilov*]; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 10 and 44 [*Kanthasamy*]). The party challenging a decision has the burden of demonstrating the decision is unreasonable (*Vavilov* at para 100).

[8] 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" (*Vavilov* at para 83). Reasons are to be read holistically and contextually in order to understand the basis on which a decision was made (*Vavilov* at para 97). A court must ask "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). A decision maker's failure to meaningfully grapple with key issues raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it (*Vavilov* at para 128).

IV. Analysis

[9] What will warrant H&C relief under section 25 of the IRPA will vary depending upon the facts and context, but decision makers must substantively consider all relevant facts and factors before them globally and weigh them cumulatively (*Kanthasamy* at paras 25 and 28). This assessment includes a consideration of the best interests of any children directly affected, an

important factor that is to be given substantial weight but that is not necessarily determinative and can be outweighed by other considerations (*Kanthasamy* at paras 35 and 38).

[10] It is not sufficient for an applicant to simply demonstrate some misfortune or hardship, as "[t]here will inevitably be some hardship associated with being required to leave Canada" (*Kanthasamy* at para 23). The purpose of section 25 of the IRPA has been described as offering 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).

A. *The Officer's assessment of establishment was reasonable*

[11] Where an officer considers all the relevant factors when assessing establishment, a reviewing court will rarely intervene in respect of that assessment or the weight given in the officer's overall assessment (*Herrera v Canada (Citizenship and Immigration*, 2015 FC 261 at para 20). Nor will an applicant's degree of establishment be sufficient, in and of itself, to justify the granting of H&C relief (*Zlotosz v Canada (Citizenship and Immigration)*, 2017 FC 724 at para 35).

[12] The Officer gave some positive weight to the Applicants' establishment in Canada, acknowledging the family had resided in the country for approximately five years, were well respected and active in their community and that the adult Applicants both worked full-time.

[13] The Applicants do not argue that the Officer failed to consider all the factors relevant to establishment. Instead, they take issue with the Officer's conclusions: the evidence demonstrated moderate establishment and was to be assigned some positive weight.

[14] I am not convinced that the Officer's conclusions are inconsistent with the evidence, incoherent or lacking in justification. The Applicants rely on *Fernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 899, but in my view that case can be distinguished on the basis that there was evidence of family ties in Canada that were not addressed. This suggested the officer in that instance failed to consider all relevant factors in assessing establishment. I also note that the reasonableness standard of review recognizes a range of possible, acceptable outcomes (*Vavilov* at para 86).

[15] The Applicants' submissions amount to a request that the Court reassess and reweigh the evidence. It is well recognized that this is not the Court's role on judicial review.

B. *The Officer's hardship assessment was reasonable*

[16] In assessing hardship, the Officer noted that the adult Applicants had a number of family members living in Botswana. The Officer found there was no evidence to indicate the Applicants could not establish new social networks in Botswana and that networks established in Canada could be maintained through communications technology. The Officer recognized that conditions in Botswana, including the unemployment rate, were more difficult than those in Canada, but noted the adult Applicants' familiarity with Botswana coupled with the work experience gained in Canada were factors that could lessen the hardship of having to give up

employment in Canada. The Officer also recognized that the water supply in Botswana is susceptible to extreme weather events but concluded these circumstances affect the population generally and found the adult Applicants had not reported having been greatly affected by water or electricity shortages while living in Botswana.

[17] The Applicants take issue with the weight the Officer gave to the documentary evidence relating to the unemployment situation in Botswana and argue the Officer overstated the value of the adult Applicants' work experience in Canada. They submit that, as a result, the Officer failed to recognize the dire consequences that may transpire should they not obtain employment in Botswana. The Applicants further submit that the Officer's consideration of evidence relating to conditions in Botswana, particularly water and electricity shortages was selective and partial.

[18] The Officer did address the unemployment situation in Botswana and acknowledged a higher unemployment rate than Canada. These conclusions were consistent with the documentary evidence, which spoke to unemployment challenges generally in Botswana (particularly among youth) but provided no specific data in regard to actual unemployment in that country. In light of the evidence, the Officer's reliance on the adult Applicants' past work history in Canada and in Botswana as factors mitigating the hardship arising from potential unemployment was not unreasonable.

[19] The Officer also addressed the water supply and electricity reliability concerns raised. The Officer recognized the water supply was susceptible to extreme weather events but also noted United Nations statistics – in 2001, 99.5 % of the population in urban centres and 83.5% of

the rural population had access to drinking water. The Officer did not ignore the statements of the adult Applicants that there had been many occasions where they had to obtain fresh water from a borehole; this evidence was not inconsistent with the Officer's finding that the Applicants had not indicated they had been greatly affected by water and electricity shortages.

C. *The Officer did not err in assessing the children's best interests*

[20] In considering the children's best interests, the Officer recognized the children would benefit from having access to a higher standard of living in Canada, noting the Applicants' submissions that the quality of education and healthcare is higher in Canada and the risk of water or electricity insecurity does not exist. On the other hand, the Officer noted that the children would be in the company of both parents, that there are many extended family members in Botswana who may provide support and, given their ages, the children are likely to adapt quickly to Botswana. The Officer nonetheless concluded the best interests of the three children would be best served by remaining in Canada.

[21] The Applicants submit the Officer's assessment is irrational and reflects a reluctance to acknowledge the best interests of the children would be served by remaining in Canada despite the officer's ultimate conclusion. The Applicants further argue that the analysis failed to consider the issues of unemployment and infrastructure shortcomings from the perspective of the children.

[22] In considering the children's best interests, the Officer grappled with the evidence provided by the Applicants. The Officer reviewed the children's circumstances and considered the benefits of remaining in Canada, the negative impacts of moving to Botswana and the value

to the children of both parental and extended family support. The Officer recognized the submissions relating to infrastructure challenges, as these issues had been addressed as part of the hardship analysis.

[23] Having engaged in a consideration of all of these factors, the Officer found that the children's best interests would be served by remaining in Canada. According to jurisprudence, this is a finding that may be presumed in most circumstances (*Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 5). The Officer's assessment of the evidence is not irrational and the conclusion reached on the best interests of the children is reasonable.

D. *The Officer's cumulative assessment of the evidence was also reasonable*

[24] The Officer, having assessed the factors identified by the Applicants, considered the evidence cumulatively. The Officer acknowledged some hardship but also noted that some hardship is inevitable when an individual is required to leave Canada. The Officer acknowledged the children's best interests but concluded the weight to be given to this factor was not sufficient to justify relief, noting the insufficiency of the evidence demonstrating a negative impact on the children should they leave Canada for Botswana. The Officer concluded that, when considered in combination, the factors were insufficient to warrant the granting of the relief.

[25] The Applicants argue this conclusion is inconsistent with the Officer's findings in respect of each of the individual factors and that the decision does not add up. I disagree. The Officer

undertook the cumulative consideration of the evidence as is required and detailed the reasons for concluding H&C relief was not warranted in this instance.

[26] The Applicants further submit that the Officer's decision includes vague findings and unwarranted inferences. Again, I disagree.

[27] The examples of vague findings cited by the Applicants are the Officer's findings as they relate to the weight to be attached to establishment and the children's best interests. The assignment of weight is not a science and is routinely expressed in generalized terms.

[28] The unwarranted inference the Applicants cite is the Officer's conclusion that children are typically highly adaptable. In the absence of evidence indicating the children would experience particular difficulties in adapting, I am unable to conclude that this statement warrants the Court's intervention.

V. Conclusion

[29] The Application is dismissed. The parties have not identified a serious question for certification and I am satisfied none arises.

JUDGMENT IN IMM-5977-20

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is dismissed; and

2. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5977-20
STYLE OF CAUSE:	BONE NTSIMA TIRELO JULIET RAMAEBA SELAH PAKA NTSIMA (A MINOR) DURIEL NTSIMA (A MINOR) v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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