Federal Court  Cour fédérale

Date: 20230829

Docket: IMM-5445-22

Citation: 2023 FC 1165

Toronto, Ontario, August 29, 2023

PRESENT: Madam Justice Go

BETWEEN:

Elizabeth Yetunde ELUWOLE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Elizabeth Yetunde Eluwole [Applicant] is a citizen of Nigeria. She arrived in Canada in 2015 and made a claim for refugee protection. Her claim was refused in 2017, the appeal was dismissed in 2018, and leave for judicial review was denied by this Court in 2019.

[2] The Applicant has a Canadian-born child, Jemima, who is now seven years old and has spent her entire life in Canada. In addition to raising her child as a single mother, the Applicant has been employed on and off since coming to Canada, including at a long-term care home since 2019.

[3] The Applicant applied for permanent residence on humanitarian and compassionate [H&C] grounds on June 25, 2021 pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] on the basis of her establishment in Canada, the best interests of the child [BIOC], hardship and adverse country conditions. In a decision dated May 25, 2022, an immigration officer [Officer] refused the Applicant's H&C application [Decision]. The Applicant seeks judicial review of the Decision.

[4] I find the Decision unreasonable as the Officer erred in their BIOC analysis.

II. Issues and Standard of Review

[5] The Applicant raises three issues:

A. Did the Officer err in their BIOC analysis?

B. Did the Officer unreasonably assess the Applicant's establishment?

C. Did the Officer breach procedural fairness by relying on extrinsic evidence without providing the Applicant with an opportunity to respond?

[6] The parties agree that the Decision is reviewable on a reasonableness standard, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[7] 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). The onus is on the Applicant to demonstrate that the decision is unreasonable (*Vavilov* at para 100). 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).

III. Analysis

[8] The determinative issue in my view is the Officer's flawed BIOC analysis.

[9] Subsection 11(1) of the *IRPA* requires all foreign nationals wishing to reside permanently in Canada to apply from abroad and obtain a visa before entering Canada. Subsection 25(1) of the *IRPA* allows foreign nationals to seek discretionary and equitable relief from the Minister for an exemption from the ordinary requirements of the *IRPA* based on H&C considerations.

[10] In *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at para 33, the Supreme Court of Canada [SCC] warns officers not to use the language of "unusual and undeserved or disproportionate hardship" in a way that limits their ability to consider and give weight to *all* relevant humanitarian and compassionate considerations in a particular case. Rather, officers must allow subsection 25(1) to respond more flexibly to the equitable goals of the provision.

[11] With respect to the BIOC, the SCC states, at para 39 of *Kanthasamy:*

> A decision under s. 25(1) will therefore be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered: *Baker*, at para. 75. This means that decision-makers must do more than simply *state* that the interests of a child have been taken into account: *Hawthorne*, at para. 32. Those interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence: *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 (CanLII), [2002] 4 F.C. 358 (C.A.), at paras. 12 and 31; *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 165 (CanLII), 323 F.T.R. 181, at paras. 9-12.

[12] In her H&C application, the Applicant argued that it was in the best interests of Jemima to grant the H&C relief for four primary reasons:

a. Since Jemima could not be vaccinated due to her young age at the time, she would be vulnerable to the COVID-19 pandemic in Nigeria;

b. Jemima would be subject to female genital mutilation in Nigeria as the Applicant would be unable to protect her in the absence of male protection;

c. Jemima has never been to Nigeria and does not speak the various languages spoken in that country; and

d. Jemima would suffer hardship from separating from her church community and friends in Canada.

[13] In rejecting these arguments in the Decision, the Officer found that it would be in Jemima's best interests to remain with her mother. However, the Officer found "insufficient evidence to demonstrate that departing Canada with her mother would, on a balance of probabilities, compromise Jemima's best interest."

[14] In so concluding, the Officer erred.

[15] As a starting point, rather than considering what would be in Jemima's best interests, including whether that would be to remain in Canada with her mother, the Officer reversed the analysis and found that Jemima's best interests "would not be compromised" if she left Canada with her mother.

[16] In *Osun v Canada (Citizenship and Immigration)*, 2020 FC 295 [*Osun*], Justice Diner warned against interweaving a hardship analysis into a BIOC analysis when he explained at paras 23-24:

> [23] This is not to say that the hardship (or lack thereof) of leaving Canada and returning to one's home country cannot be a central consideration in an H&C analysis. Indeed, it is often one of the key factors mixed into the H&C recipe. However, those ingredients must be identified when it goes into the mix and not disguised or conflated with others – particularly BIOC. As Justice Abella wrote in *Kanthasamy*, since "'[c]hildren will rarely, if ever, be deserving of any hardship', the concept of 'unusual and undeserved hardship' is presumptively inapplicable to the assessment of the hardship invoked by a child to support his or her application for humanitarian and compassionate relief: *Hawthorne*, at para. 9" (at para 41). Clearer delineation is needed to allow a Court to confirm a decision maker reasonably considered all relevant factors.
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> [24] To summarize, while hardship can be a weighty element of an H&C outcome, to justify the outcome, it must be explained. A hardship analysis interwoven with – and indistinguishable from – BIOC analysis is not transparent, because the Court cannot assess the weight afforded to these factors.
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> [Emphasis added]

[17] At para 20 of *Osun*, Justice Diner quotes the officer's BIOC analysis and finds at para 21 that it is "very resonant of a hardship analysis" because the starting point of the analysis was whether or not it will be difficult to leave Canada. This was found to be one of the cumulative errors that rendered the decision unreasonable: at para 27.

[18] In this case, the Officer appeared to acknowledge that Jemima would accompany the Applicant to Nigeria if the latter were to be removed from Canada, because the Applicant's common-law relationship with Jemima's father has ended. The Officer then focused their analysis on why departing from Canada and relocating to Nigeria would not compromise Jemima's best interests. Nowhere in the Decision did the Officer once identify what would be in the child's best interests.

[19] The Officer's BIOC analysis was also "resonant of a hardship analysis", when the Officer noted such findings as "insufficient evidence to establish that Jemima would be negatively impacted by relocation or face barriers to integration in Nigeria", and "a lack of evidence to demonstrate Jemima would be unable to adapt to Nigeria." These findings were indicative of an analysis through a hardship lens.

[20] I also find the Officer committed two specific errors with respect to their BIOC analysis by failing to appropriately engage with the evidence.

[21] First, the Applicant submits that the Officer speculated when finding that the Applicant and Jemima could rely on their extended family in Nigeria for support without evidence of such,

citing *Mitchell v Canada (Citizenship and Immigration)*, 2019 FC 190 [*Mitchell*] in support. While the facts in *Mitchell* are different, I find a similar error was committed by the Officer when they engaged in speculation about the ability of the extended family members to provide for the Applicant in the absence of such evidence.

[22] Second, in her H&C application, the Applicant submitted that Jemima has never been to Nigeria, and does not know the various languages prevalent there. Relying on extrinsic research, the Officer determined that the official language in Nigeria is English, which is also the language of instruction in Nigeria's education system. Assuming that Jemima speaks English, the Officer then concluded that there is insufficient evidence to establish Jemima would be negatively impacted by relocation or face barriers to integration in Nigeria. But, as the Applicant submitted at the hearing, and I agree, the Applicant never suggested that Jemima's interests would suffer because she did not speak English, but rather she did not know the various languages spoken in Nigeria. The Officer either misconstrued the evidence and submissions before them, or simply failed to engage with this particular issue.

[23] The Respondent argues that the Officer was alive and alert to the BIOC and reasonably found, when assessing the requisite factors, insufficient evidence to support the BIOC arguments. The Respondent asserts that the Applicant merely seeks to reweigh the BIOC factors in her favour, and recalls that while important, the BIOC analysis is contextual and not determinative of an H&C application: *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 12; *Louisy v Canada (Citizenship and Immigration)*, 2017 FC 254 at para 11.

[24] I agree that the BIOC analysis is contextual, and that the Applicant has submitted somewhat limited evidence and submissions on BIOC. However, in light of the cumulative errors made by the Officer in their BIOC analysis based on the evidence before them, I find the Officer was not alert, alive and sensitive to Jemima's best interests. As such, the Decision as a whole cannot stand: *Kanthasamy*, at para 39.

IV. Conclusion

[25] The application for judicial review is granted.

[26] There is no question for certification.

JUDGMENT in IMM-5445-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the matter sent back for redetermination by a different officer.
2. There is no question for certification.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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