Federal Court Cour fédérale

Date: 20240205

Docket: IMM-12685-22

Citation: 2024 FC 177

Montréal, Québec, February 5, 2024

PRESENT: The Honourable Madam Justice Ngo

BETWEEN:

JIDE AJAYI, CAROLINE AJAYI,
OPEOLUWAMIPO AJAYI,
IREOLUWAMPIO AJAYI

Applicants

and

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants seek judicial review of a humanitarian and compassionate [H&C] decision rendered pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [*IRPA*]. In a decision dated November 24, 2022 [Decision], the Applicants' H&C application was denied.

[2] The Applicants submit that the officer [Officer] erred in failing to properly assess their establishment, by imposing an incorrect burden of proof and the wrong legal test to the evidence, and failing to properly assess the best interests of the children by ignoring and failing to engage with the relevant evidence.

[3] For the reasons that follow, this application for judicial review is granted. The Applicants have demonstrated that the Decision was unreasonable. The determinative issue is the assessment of the best interests of the child.

II. Relevant Facts

[4] The Applicants, Jide Ajayi [Principal Applicant] and his wife Caroline [Secondary Applicant], and their two minor children, Opeoluwamipo or James [James] now aged 16 and Ireoluwamipo, now aged 12 arrived in Canada in 2018. Their refugee claim was refused in 2019 and the appeal of that decision was dismissed in November 2020.

[5] The Applicants application for permanent residence under the Health-care Workers Pathway to Permanent Residence program was refused in January 2022. The Applicants then filed their H&C application on March 28, 2022.

[6] In their H&C application, the Applicants submitted that the factors for consideration were the best interest of the child, establishment within Canada, and hardship they will face upon return to Nigeria. They presented documents demonstrating the work and church activities they

engaged in since their arrival in 2018. The Principal Applicant was employed as a Support Worker and the Secondary Applicant as a Business analyst.

[7] In the Decision, the Officer determined that the Applicants had not demonstrated that they have achieved a significant degree of establishment in the short period of time that they have lived in Canada.

[8] The Principal Applicant submitted that his work as a support worker during the pandemic warranted consideration as an exceptional contribution to society. The Officer placed positive weight towards this contribution.

[9] The Officer found that while the Applicants may face some hardship if they were to leave Canada, they have not demonstrated that they would be unable to re-establish themselves in Nigeria, citing their ability to secure employment and housing in their short time in Canada.

[10] With respect to the best interest of the children, the Officer accepted they created friendships and bonds within their church and community but said they could maintain these through the telephone or other modes of communication. The Officer noted that, despite the Applicants' departure from Canada, the children will remain in the loving care of their parents and that it was in their best interest to remain with their parents, wherever they reside.

[11] The Decision had a separate section dealing with the Applicants' "Son's Special Needs Diagnosis" and listed programs that James was enrolled in, as well as a letter from a physician

confirming James' diagnosis of ADHD-Combined type, his learning disability [LD], and mild intellectual delays. The Officer referred to the refugee claim in 2019 and that the Applicants did not submit any objective evidence concerning problems in accessing care in Nigeria for individuals with James' condition. The Officer stated that the Applicants have not provided any further information from educational or medical professionals in Nigeria, and the Officer was unable to place a substantial weight on this factor due to the lack of information provided from the Applicants to show their son would not be able to access programs and support for his diagnosis.

[12] The Officer found that the Applicants could re-establish themselves based on their work experience and education they obtained through the years. In respect to the issue of the best interests of the children, the Officer concluded that "I have carefully considered the best interests of the children concerned. Having carefully reviewed the information presented with this H&C application I am unable to conclude that the applicants' return to Nigeria would have a significant negative impact on their two children."

[13] The Officer was not satisfied that the H&C considerations justified the exemption under section 25(1) of the *IRPA*.

III. Analysis

A. *Standard of Review*

[14] The Applicants submit that the standard of review with respect to the applicable H&C test is correctness, and that the standard of review with respect to the Officer's assessment of the various H&C factors is reasonableness. However, reading the Decision as a whole, I did not find that the Officer applied the wrong legal test. The Officer was aware of the factors to be addressed in an H&C application as set out in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*].

[15] The Respondent states that the standard of review is reasonableness, and that there was no error in the H&C test.

[16] The determinative issue in this case is the Officer's assessment of the best interests of the child. Thus, the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23, *Kanthasamy* at para 44) and the analysis of the Decision will proceed under the reasonableness standard of review.

[17] A reviewing court does not attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis, or seek to determine the "correct" solution to the problem (*Vavilov* at para 83). Absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from

"reweighing and reassessing the evidence considered by the decision maker" (*Vavilov* at para 125).

[18] A reasonable decision is one 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. The reasonableness standard requires that a reviewing court defer to such a decision (*Vavilov* at para 85).

[19] The onus is on the party challenging the decision to show that the decision is unreasonable (*Vavilov* at para 100).

B. *H&C Applications and the Best Interests of the Child*

[20] Section 25(1) of the *IRPA* gives the Minister discretion to exempt foreign nationals from the ordinary requirements of the *IRPA* if the Minister is of the opinion that such relief is justified by H&C reasons, taking into account the best interests of a child directly affected.

[21] In considering an H&C application, the Officer must consider whether the facts, established by the evidence, would excite in a reasonable person in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes "warrant the granting of special relief" from the effect of the provisions of the *IRPA*. The purpose of the H&C provision is provide equitable relief in those circumstances (*Kanthasamy* at paras 13 and 21).

[22] The onus of establishing that an H&C exemption is warranted lies with the applicant (*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 [*Kisana*] at para 45).

[23] It is not sufficient to establish the existence or likely existence of misfortunes relative to Canadian citizens and permanent residents of Canada. It would be expected that most persons facing removal to, or currently living in, a country where living standards are significantly below those in Canada would face relative misfortune. There will inevitably be some hardship associated with being required to leave Canada. The Applicant bears the onus to demonstrate the existence or likely existence of misfortunes or other H&C considerations that are greater than those typically faced by others who apply for permanent residence in Canada (*Huang v Canada (Citizenship and Immigration)*, 2019 FC 265 [*Huang*] at paras 17 to 20).

[24] In assessing whether an applicant has established sufficient H&C considerations to warrant a favourable exercise of discretion, all of the relevant facts and factors advanced by the applicant must be considered and weighed (*Kanthasamy* at para 25). The words "unusual and undeserved or disproportionate hardship" should be seen as instructive, but not determinative (*Kanthasamy* at para 33).

[25] Assessing the best interests of the child is highly contextual, and the guidance in *Kanthasamy* describes the application of this assessment to be responsive to each child's particular age, capacity, needs, maturity, and level of development. The Officer must determine 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. When legislation such as subsection 25(1) of the *IRPA* specifies that the best interests of a child who is "directly affected" be considered, those interests are a singularly significant focus and perspective (*Kanthasamy* at paras 35-36, 40).

[26] The Supreme Court in *Kanthasamy* cited its decision in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699, [1992] 2 SCR 817 [*Baker*] where the "best interests" principle was identified as an important part of the evaluation of H&C grounds, that the decision maker should give this factor substantial weight, and to be alert, alive and sensitive to it. It does not mean that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H&C claim. However, a decision under s. 25(1) of the *IRPA* will be unreasonable if the interests of children affected by the decision are not sufficiently considered (*Kanthasamy* at paras 38 to 39).

[27] The decision maker must do more than simply state that the interests of a child have been taken into account. Those interests must be well identified, defined, and examined with a great deal of attention in light of all the evidence (*Kanthasamy* at para 39).

[28] The Applicants argue that the Officer did not consider all of the relevant factors and evidence in assessing the best interests of the children and emphasize that the Decision is "sparse at best".

[29] The Applicants pointed to factors in the Ministerial Guidelines “IP 5 Immigrant Applicants in Canada made on Humanitarian or Compassionate Grounds” [Guidelines] that the Officer ought to have considered in assessing James’ needs. At section 5.12 of the Guidelines, officers are provided guidance in assessing the best interests of a child to include factors such as the conditions of that country and the potential impact on the child, the medical issues or special needs the child may have, and the impact to the child‘s education. The Applicants submit that they provided ample evidence in support of these factors but they were not considered by the Officer.

[30] The Respondent argues that the Applicants are asking this Court to reweigh the evidence and put more emphasis on the Applicants’ personal and supporting documents, compared to the lack of evidence with respect to whether James would be able to access programs and support for his ADHD diagnosis. The Respondent further submits that the factors listed in the Guidelines are not exhaustive and not a definitive list.

[31] Indeed, it is well established that the Guidelines are not legally binding and are not intended to be exhaustive or restrictive, but are useful in assessing the reasonableness of decisions. Officers can consider the Guidelines in the exercise of their s. 25(1) discretion but should turn their minds to the specific circumstances of the case. They should not fetter their discretion by treating these informal Guidelines as if they were mandatory requirements that limit the equitable humanitarian and compassionate discretion under the *IRPA* (*Kanthasamy* at para 32).

[32] The Officer stated that there was a lack of information showing how James would not be able to access programs and support for his ADHD diagnosis in Nigeria. The Respondent submits that the Decision form listed documents under section 4 entitled “Factors for consideration” that referenced “various letter of support are on file” in a subsection related to establishment. In the subsection related to James’ special needs diagnosis, there is reference to the special educational program and the psychiatrist letter as well as the Applicants’ refugee claim dated September 20, 2019. The Respondent also argued that not explicitly listing all of the evidence reviewed does not constitute an error.

[33] However, simply listing or referring to documents is not sufficient. The Applicants had submitted objective evidence demonstrating James’ diagnosis, his particular schooling requirements, and psychological health arising from his diagnosis, as well as other documents including country conditions and their potential impact on James. Reading the Decision as a whole, and based on the record before the Officer, I am unable to find that the Officer engaged with the evidence dealing with James’s special needs and diagnosis. The Decision simply referenced James’ circumstances, and the Officer concluded that they were unable to give it significant weight due to a lack of evidence that James could not access programs or support in Nigeria. There was no engagement with the evidence or analysis of the impact on his educational accommodations, the medical treatment he receives, and the special seven-year program for children with ADHD and developmental delays that he is enrolled in.

[34] In this case, I find that the Officer did not engage in a reasonable analysis to sufficiently consider the best interests of the child. The Decision does not demonstrate that the Officer

considered and assessed the totality of the relevant evidence. This is a reviewable error and renders the Decision unreasonable (*Kanthasamy* at para 39).

[35] Given my finding with respect to the Officer's assessment of the best interests of the child, it is not necessary for me to address the other errors raised by the Applicants.

IV. Conclusion

[36] Based on the above, the Decision must be set aside as it is unreasonable.

[37] At the beginning of the hearing, the parties identified that the style of cause should be corrected. The Notice of Application originally listed five (5) applicants, but there are four (4) applicants challenging the Decision. Edith Osoyo was originally listed as an applicant but this was an oversight by the Applicants' counsel.

[38] The style of cause will be amended accordingly.

[39] The parties confirmed that there was no question for certification and none arises.

JUDGMENT in IMM-12685-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the Decision is set aside.

2. The Officer's Decision dated November 24, 2022 is set aside and the matter is remitted for re-determination by another officer.

3. The style of cause is amended to remove Edith Osoyo as an Applicant, with immediate effect.

4. There are no questions for certification.

"Phuong T.V. Ngo"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-12685-22
STYLE OF CAUSE:	JIDE AJAYI ET AL. v MCI
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 24, 2024
JUDGMENT AND RESONS:	NGO J.
DATED:	FEBRUARY 5, 2024

APPEARANCES:

Vakkas Bilsin	FOR THE APPLICANTS
Alethea Song	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lewis & Associates LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT