Federal Court  Cour fédérale

Date: 20190603

Docket: IMM-4529-18

Citation: 2019 FC 778

Ottawa, Ontario, June 3, 2019

PRESENT: The Honourable Madam Justice Walker

BETWEEN:

GUNANAYAGAM ANTONY RAMESH
ANJALIN DULSHIKA THULANJANI ANTONY RAMESH
ABIJAH ADONIJAH ANTONY RAMESH
AARON ADONIKAM ANTONY RAMESH

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants are a family of four from Swaziland. They are: Gunanayagam Antony Ramesh (Principal Applicant), the father; Anjalin Dulshika Thulanjani Antony Ramesh, his wife; and their two minor children, Abijah Adonijah Antony Ramesh and Aaron Adonikam Antony Ramesh. The Applicants seek judicial review of a decision (Decision) of a senior immigration

officer (Officer) of Citizenship and Immigration Canada. The Officer refused the Applicants' request for permanent residence from within Canada on humanitarian and compassionate (H&C) grounds pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA). This application is brought pursuant to subsection 72(1) of the IRPA.

[2] For the reasons that follow, the application will be allowed.

I. Background

[3] The Applicants arrived in Canada on May 6, 2016. They are citizens of Swaziland and are of Tamil nationality. The adult Applicants were born in Sri Lanka. The Principal Applicant moved to Swaziland in 1998 due to the civil war in Sri Lanka and became a successful businessman. He married Anjalin in 2005 in Sri Lanka and they returned to Swaziland. The Principal Applicant was granted citizenship in Swaziland and was required to renounce his Sri Lankan citizenship. Anjalin, his wife, remains a citizen of Sri Lanka. Abijah, their daughter, is 12-years old and Aaron, their son, is 8-years old.

[4] After moving to Swaziland, the Principal Applicant established two businesses between 1999 and 2009, the second of which enjoyed success in the information technology and internet security sectors. However, the Applicants state that the societal climate in Swaziland began to change in 2009 and non-Swazi citizens increasingly became targets of discrimination and violence. The Principal Applicant states that he and his family suffered a number of burglaries and that he was threatened by a business competitor and was kidnapped in 2015 and held for ransom. The Principal Applicant alleges that Anjalin and Abijah were repeatedly harassed when

he was not present and that Abijah was subject to cruel treatment in school. He describes incidents in which Anjalin and Abijah were followed and threatened with forced marriage by Swazi men. As a result of the harassment, they both feared leaving the house and Anjalin was hospitalized for a period of time.

II. Decision under review

[5] The Decision is dated September 5, 2018. The Officer first noted that the Applicants bore the onus of establishing that their personal circumstances warranted the granting of an exemption from the requirements of the IRPA to allow their application for permanent residence on H&C grounds, taking into account the best interests of the children (BIOC). The Officer reviewed the Applicants' request for relief on three grounds: (1) the hardship the Applicants would face in Swaziland; (2) their establishment in Canada; and (3) the best interests of the two children.

[6] The Officer set out the Applicants' narrative regarding the issues they had faced in Swaziland and then reviewed the documentary evidence in the record. The Officer cited excerpts from the United States (US) Department of State (DOS) Country Report on human rights practices for 2017 (Swaziland) (US DOS Report) and the National Report (Swaziland) from 2016 submitted in accordance with United Nations Human Rights Council resolution 16/21 (UN National Report). The US DOS Report described a broad range of serious human rights issues in Swaziland, including governmental and societal discrimination against non-Swazis and systemic gender-based discrimination and violence. The report noted a lack of institutional accountability in cases involving rape and violence against women and detailed the subordinate role of women in Swaziland at law and in society.

[7] In summarizing the two reports, the Officer recognized that human rights conditions in Swaziland were poor but stated that Swaziland "has put institutional initiatives in place that will help improve its human rights record". With regards to the treatment of women, the Officer acknowledged that women are subordinate to men in Swaziland but found that the government was "making efforts" to honour its obligation to address discrimination against women by passing legislation.

[8] The Officer referred to the Principal Applicant's success in Swaziland despite his ethnicity, the fact that Anjalin was able to obtain a certificate in catering, and the Applicants' ability to obtain Swazi passports to conclude that any hardship they may face in Swaziland should be accorded modest weight.

[9] With respect to the Applicants' establishment in Canada, the Officer noted that the adult Applicants have been employed, attend church and are integrated into their community. Despite only arriving in Canada in 2016, the Officer found that the Applicants demonstrated some positive establishment.

[10] The Officer acknowledged the Applicants' family and friends in Canada, evidenced by letters of support in the record, but found that the relationships did not reflect interdependency and reliance. The Officer found that the Applicants were adaptable and resourceful and, while returning to Swaziland would pose some difficulties, they would not be returning to an unfamiliar place, language or culture.

[11] The Officer considered a medical report from a doctor in Swaziland from April 2016 which stated that Anjalin had attended the clinic during the prior year and was suffering from anxiety, depression and stress-induced peptic ulceration. The doctor recommended that she change her country of residence but did not explain the reasons for his recommendation. There was no evidence that Anjalin had received any treatment in Canada or that she could not seek treatment in Swaziland as she had done in the past. In light of the vague language and limited information in the letter, the Officer assigned it no weight.

[12] The Officer began the BIOC analysis by noting the ages of the children and the fact that they had adapted to life in Canada and were thriving at school. However, the Officer stated that there was insufficient evidence to establish that the children would not be able to reintegrate or readjust in Swaziland. In addition, there were no significant obstacles to prevent the children from pursuing their education in Swaziland. The Officer was not persuaded that a return to Swaziland would jeopardize their best interests.

[13] The Officer considered the documentary evidence regarding the treatment of young girls in Swaziland. The Officer referred to the Applicants' evidence that the children had faced threats and harassment due to their ethnicity but stated that "[a]lthough the environment in Swaziland may have different educational or social aspects and thus not comparable to Canada; I do not find this to be an exceptional circumstance to justify a positive exemption".

[14] The Officer concluded that a return to Swaziland for the Applicants was feasible. They are citizens of Swaziland and have pursued educational, employment and business successes

there. The additional skills they acquired in Canada are transferable and the Applicants are well traveled. The Officer stated that the Applicants would be able to establish themselves in Swaziland and concluded that an exemption on H&C grounds, an exceptional remedy, was not warranted.

III. Issues

[15] The Applicants submit that the Decision was not reasonable. They raise three issues in their submissions:

1. Was the Officer's hardship assessment reasonable?
2. Was the Officer's BIOC analysis flawed?
3. Was the Officer's assessment of the establishment factor reasonable?

IV. Standard of review

[16] It is well established that a denial of H&C relief pursuant to subsection 25(1) of the IRPA is reviewed on the reasonableness standard (*Kanthasamy v Canada (Citizenship and Immigration*), 2015 SCC 61 at para 44 (*Kanthasamy*); *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 18; *Marshall v Canada (Minister of Citizenship and Immigration)*, 2017 FC 72 at para 27). Subsection 25(1) provides the Minister a mechanism to deal with exceptional circumstances. As a result, H&C decisions are highly discretionary and must be reviewed with considerable deference *(Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4). It is not the role of this Court to reweigh the evidence or to substitute its own appreciation of the appropriate outcome *(Canada (Citizenship and*

Immigration) v Khosa, 2009 SCC 12 at para 59). My role is to determine whether the Decision is justified, transparent and intelligible and falls within the range of possible, acceptable outcomes which are defensible on the particular facts of the Applicants' case and in law *(Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

V. Analysis

1. Was the Officer's hardship assessment reasonable?

[17] The Applicants make three submissions in support of their argument that the Officer's hardship analysis was unreasonable: (1) the Officer ignored the operational adequacy of the government's efforts to address discrimination and assessed the documentary evidence in the record superficially; (2) the Officer failed to consider the Applicants' personal narrative; and (3) the Officer erred by attributing no weight to the doctor's April 2016 letter.

[18] I find that the Officer committed two reviewable errors in the hardship analysis. As a result, the Decision was neither intelligible nor adequately justified. First, the Officer focussed solely on the efforts of the Swaziland government to improve its human rights record and to prevent discrimination against women. There is no discussion in the Decision of whether the government's efforts have had any positive operational effect. Second, the Officer failed to assess the Applicants' allegations of discrimination, threats and violence due to their Tamil ethnicity and, in the case of Anjalin and Abijah, their gender, against the documentary evidence for Swaziland.

[19] The issue of hardship and adverse country conditions must be taken into account by an officer in assessing a subsection 25(1) application (*Kanthasamy* at paras 50-56; *Miyir v Canada (Citizenship and Immigration)*, 2018 FC 73 at para 19). As noted above, the Officer's analysis of the documentary evidence for Swaziland focussed on the US DOS Report and the UN National Report. The UN National Report refers to the fact that Swaziland has "put in place an institutional framework that will help improve its human rights record". In contrast, the US DOS Report details the significant and ongoing discrimination women and girls face in Swaziland where they occupy a subordinate role in society notwithstanding constitutional safeguards. The Officer's conclusions regarding the documentary evidence were as follows:

> I recognize that human rights conditions and adverse country condition are poor, the evidence before me indicates the Swaziland government has put institutional initiatives in place that will help improve its human rights record. The institutions include the Human Rights Commission, the Election and Boundaries Commission and the Land Management Board.
>
> [With] respect to the treatment of women and girls in Swaziland, I acknowledge that Swaziland is a patriarchal society in which women were subordinate to men. The evidence before me also states that Swaziland is making efforts to honour its obligation with legislation that prohibits discrimination against women and offers remedies available for women whose rights have been violated as a result of discrimination.

[20] The Officer's reliance solely on the efforts of the government to effect change is a reviewable error. An officer must look beyond the efforts of or changes implemented by a government to determine the impact those efforts or changes have had on actual societal conditions. An analysis that does not do so is flawed (*Ocampo v Canada (Citizenship and Immigration)*, 2015 FC 1290 at para 9):

> [9] The Court finds that it was unreasonable for the Officer not to have discussed in his reasons this contradictory evidence and not to

> have included an assessment of the operational adequacies of the government's efforts to improve the situation of Afro-Colombians in Columbia. Unlike cases concerning state protection, the Officer must assess the probability of hardship occurring in reality, rather than just efforts on the part of the state to address such hardship.

[21] In my view, the Officer failed to assess the probability of hardship occurring in reality. There is no assessment in the Decision of whether the initiatives of the Swazi government have actually improved the bleak human rights conditions for women and non-ethnic Swazis described in the documents cited by the Officer. As stated by my colleague, Justice Russell, the mere enactment of legislation does not alone translate into adequate protection for vulnerable individuals (*Nwaeme v Canada (Citizenship and Immigration)*, 2017 FC 705 at para 67).

[22] I also find that the Officer's aspirational conclusions were not adequately explained, nor are they supported by the evidence in the record, with the result that the Decision does not withstand examination against the reasonableness standard (*Kavugho-Mission v Canada (Citizenship and Immigration)*, 2018 FC 597 at para 14). As this Court has stated, deference does not constitute a "blank cheque" (*Aguirre Renteria v Canada (Citizenship and Immigration)*, 2019 FC 133 at para 5 (*Aguirre Renteria*)). While the UN National Report takes a forward-looking approach to broad governmental actions, the US DOS Report states that women and girls remain subject to significant discrimination in Swaziland due to the continued importance of customary laws and their enforcement by a patriarchal society. The Officer cited at length from the US DOS Report but then appears to have ignored its negative findings. Further, there is no suggestion in the Decision that the Officer considered the other documentary evidence in the record which confirms the problems of xenophobia and gender-based violence in Swaziland, the central issues in the Applicants' narrative. There is a troubling disconnect between the Officer's reliance on the

government's efforts to address human rights issues and the evidence in the record that ethnic- and gender-based discrimination remain part of the societal fabric of the country.

[23] I turn now to the Applicants' argument that the Officer failed to consider their personal experiences. I find the argument persuasive. In my view, the Officer's failure to engage with the realities of discrimination in Swaziland led to an inadequate assessment of the Applicants' narrative. In the course of the hardship analysis in the Decision, the Officer detailed the broad scope of discrimination in Swaziland but, in concluding the analysis, focussed on the Principal Applicant's business successes and the fact that the adult Applicants were able to pursue post-secondary education:

> Having considered the documentary evidence before me pertaining to human rights conditions, adverse country conditions, treatment of women and non-ethnic Swazi, I acknowledge that conditions are poor and not favourable, however, in the applicants personal circumstances, I [find] that they were able to successfully pursue post-secondary education, secure employment operating their own business and secure a passport to travel overseas. For the aforementioned reasons, I give this factor modest weight.

[24] Despite the Officer's acknowledgement of non-ethnic Swazi and gender-based discrimination, there is no analysis in the Decision of the Applicants' allegations of ethnic discrimination and criminal activity (burglaries, threats, kidnapping, general harassment), gender-based discrimination (continued harassment, threats of forced marriage) or discrimination at the children's school (the experiences related by Abijah). The allegations were listed but not weighed against the documentary evidence. The Officer relied on the fact that the Applicants ran a business and attended school in concluding that any hardship in Swaziland should be given moderate weight in the H&C assessment. I am unable to determine whether the Officer found

that the Applicants' allegations were not credible or whether there was another reason the Officer ignored the allegations. I find that the Officer unreasonably failed to address the Applicants' evidence.

[25] The Applicants raise a third argument in support of their position that the Officer's hardship analysis was unreasonable. They argue that the Officer erred in affording no weight to the April 2016 letter from Anjalin's doctor on the basis that she had failed to seek treatment in Canada (*Kanthasamy* at para 47). I do not agree. The Officer placed no weight on the letter because the doctor did not explain the basis for his recommendation that Anjalin leave Swaziland. The Officer stated that it was unclear whether the doctor made his recommendation because treatment was unavailable in Swaziland or whether there was another reason for the recommendation. I find that it was open to the Officer to give no weight to this evidence.

2. Was the Officer's BIOC Analysis Flawed?

[26] The Applicants submit that the Officer's BIOC analysis was superficial and did not engage with the extent and nature of the hardships the children would suffer in Swaziland. They argue that the Officer was not "alert, alive and sensitive" to the children's best interests, particularly those of Abijah. The Applicants state that the Officer improperly relied on the adaptability and previous experience of the children in Swaziland, and argue that the Officer's finding that there was no evidence the children's fundamental rights would be denied in Swaziland was perverse.

[27] The Respondent submits that the Officer's analysis of the different educational and societal aspects of Canada and Swaziland was reasonable and should not be disturbed. The Respondent also submits that the Applicants improperly framed the question to be assessed in a BIOC analysis in their submissions. The question is not whether it was in the children's best interest to remain in Canada or return to Swaziland as such a question will inevitably lead to the response that the children should remain in Canada.

[28] In *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 (*Williams*), Justice Russell framed the role of a BIOC analysis in an H&C application as follows (at para 67):

> [67] A child's best interests are certainly not determinative of an H&C application and are but one of many factors that ultimately need to be assessed. However, requiring that certain interests not be "met" or that a child "suffer" a certain amount before this factor will weigh in favour of relief, let alone be persuasive in the decision, contradicts well-established principle that officers must be especially alert, alive and sensitive to the impact of the decision from the child's perspective. Furthermore, this would seem to contradict the instruction of the Supreme Court of Canada that this factor be a primary consideration in an H&C application that must not be minimized.

[29] Although the *Williams* decision pre-dates *Kanthasamy*, the principles set out by Justice Russell are consistent with the approach of the Supreme Court of Canada.

[30] I agree with the Respondent that the question the Officer was required to address was not whether it was in the children's best interests to remain in Canada or to return to Swaziland. Rather, the Officer was required to meaningfully assess all of the social and emotional consequences to the children of a return to Swaziland (*Aguirre Renteria* at para 8):

> [8] We are told by the Supreme Court of Canada in *Kanthasamy* that the BIOC analysis required of an H & C review requires consideration of a multitude of factors relating to a child's emotional, social, cultural and physical welfare. Included on the list are country conditions, education, special needs, health care and matters related to gender. We are also told that children are often deserving of special consideration and that their interests are to be given significant weight in the overall H & C analysis. It is not enough to state that the best interests of a child affected by a removal from Canada have been taken into account. Where a child is to be sent to a place where conditions are markedly inferior to Canadian standards and where the expected hardship is still found to be insufficient to support relief, there must be a meaningful engagement with the evidence. This is what the Court meant in *Kanthasamy* at paragraph 25 when it said that H&C decision-makers "must substantively consider and weigh all the relevant facts and factors before them".

[31] In this case, the Officer did not substantively consider the relevant factors and specific consequences for Abijah and Aaron of a return to Swaziland. I find that the Decision contains only a superficial assessment of the best interests of these particular children. The Officer's BIOC analysis failed to meet the requirements for a reasonable BIOC analysis set forth in *Kanthasamy* and applied in the jurisprudence of this Court.

[32] The Officer considered the children's ages and the fact that they are thriving in their private school here in Canada, and stated that they have adapted and assimilated to life in Canada. The Officer noted that the children were raised in Swaziland and were exposed to the Swazi culture and lifestyle. While the children would face challenges readjusting to life in Swaziland, the Officer was not convinced that their circumstances justified the granting of an exemption on H&C grounds. To this point, the Officer's analysis was not unreasonable. However, the Officer then discounted without explanation the Applicants' written submissions regarding the discrimination experienced by the children:

> As previously mentioned, Counsel provides written submission and documentary evidence regarding gender-based violence and the treatment of young girls in Swaziland. Counsel submits that the applicant's daughter, Abijah will face hardship and discrimination in Swaziland on account of her gender. It is also submitted that the children have been repeatedly followed by native Swazi men and they faced discrimination, threats and violence based on their ethnicity, as non-Swazis. I acknowledge that the conditions in the Swaziland are less than favourable; however, insufficient objective evidence has been adduced to satisfy me that the children will be unable to attend school there or that their best interests will be compromised or that their fundamental rights will be denied.

[33] I find that the Officer was not alert, alive and sensitive to the children's best interests. The Officer recited the Applicants' submissions regarding the discrimination, harassment and threats they fear the children will suffer in Swaziland, dismissed the conditions in Swaziland as less than favourable, and concluded there was insufficient evidence (1) that the children will be unable to attend school; (2) that their best interests will be compromised; and (3) that their fundamental rights will be denied. In my view, these statements do not constitute a reasonable examination of either the evidence presented by the Applicants or the documentary evidence for Swaziland. There is no meaningful assessment of the impact on the children of the adverse country conditions in Swaziland specific to their ethnicity and gender.

[34] The Officer relied on the fact that the children would be able to attend school but ignored the Applicants' allegations that Abijah experienced cruel and discriminatory treatment at school. It may be that the Officer disbelieved this evidence or determined that it was insufficient to materially impact Abijah's ability to go to school but this is mere speculation on my part. There is no indication in the Decision that the evidence was considered.

[35] The Officer's unequivocal statement that the children's best interests will not be compromised is contradicted by the documentary evidence in the record. The children's interests will likely be compromised. The question the Officer did not address was the extent of the compromise and its role in the overall H&C analysis. The Officer's consideration of adverse impacts on the children was limited to the statement that the conditions in Swaziland were "less than favourable".

3. Was the Officer's assessment of the establishment factor reasonable?

[36] The Applicants submit that the Officer erred in using their adaptability, as evidenced by their successes in Canada, as support for their ability to re-establish themselves in Swaziland (*Lauture v Canada (Minister of Citizenship and Immigration)*, 2015 FC 336 (*Lauture*)). The Respondent argues that the onus was on the Applicants to demonstrate that their H&C factors extended beyond the usual consequences of removal and that the Officer's conclusion that they had failed to do so was reasonable.

[37] I find that the Officer's assessment of the Applicants' establishment in Canada was reasonable. In *Lauture*, Justice Rennie reviewed the error committed by the officer (at para 21):

> [21] In the present case, the Officer concluded that the applicants' "engagement in society is remarkable" and that the relations they had formed with their community were significant. However, despite this conclusion the Officer did not weigh the establishment factor in the applicants' favour, and instead dismissed the factor on the basis that community involvement also may occur in Haiti. This is not a proper application of the establishment factor.

[38] The Officer's assessment of establishment in the present case is distinguishable. First, there was no finding of remarkable establishment in Canada by the Applicants as was the case in *Lauture*. Second, the Officer did not dismiss the Applicants' establishment in Canada:

> Although the applicants have spent minimal time in Canada, I accept that they have demonstrated some positive establishment and integration into Canadian society and their community; however, establishment is only one factor which I have considered in conjunction with the other H&C considerations presented by the applicants.
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> …
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> I recognize that the applicants has demonstrated positive establishment in Canada and I understand that they would prefer to remain in Canada; however I give more weight in this application to the evidence that the applicants could reasonably re-establish themselves in Swaziland

[39] The Officer accepted the Applicants' positive establishment in Canada. The fact that the Officer gave more weight to the evidence that they could reasonably re-establish themselves in Swaziland was not an error.

VI. Conclusion

[40] I am mindful of the fact that an officer's decision in an H&C application is discretionary and must be afforded significant deference. However, the Officer's hardship and BIOC analyses were not reasonable when reviewed against the evidence in the record. The Officer's conclusions were not adequately justified and it is not possible to determine whether the refusal of the Applicants' H&C application was a reasonable and possible outcome. Therefore, this application for judicial review will be allowed.

[41] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT in IMM-4259-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. No question of general importance is certified.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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