Federal Court  Cour fédérale

Date: 20200721

Docket: IMM-2500-19

Citation: 2020 FC 777

Ottawa, Ontario, July 21, 2020

PRESENT: Mr. Justice Pentney

BETWEEN:

LIBAN HASSAN AHMED
ASLI OMAR MOHAMED
LOUKMAN LIBAN HASSAN
OMAR LIBAN HASSAN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants are citizens of Djibouti who seek judicial review of the denial of their application for permanent residence based on humanitarian and compassionate (H&C) grounds.

I. Context

[2] The Applicants, Liban Hassan Ahmed, his wife, Asli Omar Mohamed, and two of their children, Loukman Liban Hassan and Omar Liban Hassan, are citizens of Djibouti. They have a

third child, Ilyan Liban Hassan, who was born in Canada. The Applicants arrived in Canada in August 2016 and made a refugee claim, which was dismissed by the Refugee Protection Division. They filed an application for judicial review of this decision, which was dismissed because the record was not perfected.

[3] In December 2017, the Applicants applied for permanent residence on the basis of H&C grounds, pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. On March 27, 2019, their application was denied, because the Officer did not find that the Applicants' degree of establishment in Canada, the best interests of their children, or the adverse country conditions in Djibouti, warranted the granting of this relief.

II. Decision Under Review

[4] The Officer noted that the Applicants had been in Canada for just over two and a half years, and that both the husband and wife had found employment, taken language training and participated in various employment workshops and training sessions during their time in Canada. The Officer found that "there is a degree of establishment which is expected to take place. I find that the applicants' efforts mentioned above are not beyond what would normally be expected of people in similar situations." In addition, the Officer noted that the husband and wife were well educated, had been well established in Djibouti prior to coming to Canada, and would likely be able to obtain employment and continue with their volunteer activities upon their return to that country.

[5] The Officer noted the close relationships that the Applicants had demonstrated with their family members who resided in Canada, but found that the evidence did not demonstrate a

degree of inter-dependence among them that would impose hardship if the Applicants were to return to their home country.

[6] In conclusion on the issue of establishment, the Officer found that while there may be a period of adjustment for the Applicants upon their return to Djibouti, they had not demonstrated that they would be unable to reintegrate into the professional workplace there, or turn to their family members still in that country for support. The hardships the Applicants may experience could be mitigated because the Applicants had spent the vast majority of their lives in Djibouti where they still had family members, they had previously been employed there, and could re-establish themselves. In contrast, the Officer noted the Applicants had only been in Canada for two years.

[7] Concerning the best interests of the children, the Officer noted that the Applicants had three sons: Loukman, Omar, and Ilyan, who were aged 6, 4, and 1 respectively at the time of the decision. The Applicants claimed that the children would be negatively impacted by returning to Djibouti, because the country conditions there were substantially inferior to those in Canada. They argued that Loukan and Omar had adapted remarkably well to school and pre-school respectively, and that they were thriving in their current environments. The Applicants expressed concerns for the disruption of their eldest son’s education and social development. In addition, they noted that their middle son had started to become more socially engaged in pre-school and daycare, and argued that he would be adversely affected by being forced to leave Canada because he did not handle change well.

[8] The Officer observed that the evidence showed that the parents were "exemplary" and deeply involved in their children's lives, and that they had demonstrated a "high degree of adaptability and proactivity in integrating into their community in Canada."

[9] The Officer found that the evidence did not demonstrate that the children would not be able to attend school, or obtain medical or social services upon their return to Djibouti. The core of the Officer's conclusions on the best interests of the children is expressed in the following passage:

> While the applicants may have preferred their children be raised in Canada, the evidence does not support that it would be contrary to their best interests to accompany their parents back to Djibouti… I have no doubt that the applicants only want the best for their children, this is a desire shared by most parents around the world; however, I am not satisfied that returning to Djibouti as a family unit would adversely impact the best interests of the children in this case.

[10] The Applicants seek judicial review of this decision.

III. Issues and Standard of Review

[11] The Applicants raise two issues:

A. Did the Officer apply the wrong test in assessing the best interests of the children?

B. Did the Officer err in the analysis of the Applicants' establishment in Canada?

[12] The jurisprudence has established that the first issue is subject to review on a correctness standard (*Guxholli v Canada (Citizenship and Immigration)*, 2013 FC 1267 at paras 17-18) while the second issue involves a question of mixed fact and law, which is reviewed on a standard of

reasonableness (*Lopez Gallo v Canada (Citizenship and Immigration)*, 2019 FC 857 at paras 9-11).

[13] The recent decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] establishes a presumption that judicial review of the merits of an administrative decision is to be done on the standard of reasonableness. None of the exceptions to this approach articulated in *Vavilov* apply here, so I will apply the reasonableness standard to both issues.

[14] When reviewing for reasonableness, the Court asks "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). It must also be internally coherent, and display a rational chain of analysis (*Vavilov* at para 85).

[15] Based on this framework, a decision will likely be found to be unreasonable if the reasons read in conjunction with the record do not enable the Court to understand the decision maker's reasoning on a critical point (*Vavilov* at para 103). However, not every slip or error will make a decision unreasonable:

> [100] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside 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. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a

> minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

[16] The framework set by this decision "affirm[s] the need to develop and strengthen a culture of justification in administrative decision-making" by endorsing an approach to judicial review that is both respectful and robust (*Vavilov* at paras 2, 12-13).

IV. Analysis

A. *Did the Officer apply the wrong test in assessing the best interests of the children?*

[17] The Applicants submit that the Officer failed to assess what would be in the children's best interests, and that the statement that "[i]t is in the best interest of every child to gain an education and have their parents' constant love and support as they journey through life" does not demonstrate that the Officer was actually "alert, alive and sensitive" to the best interests of the children, as required by *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 73-75 [*Baker*].

[18] The Applicants argue that the correct approach to a consideration of the best interests of the child is described in *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 [*Williams*], which sets out a three-step analysis:

> [63] When assessing a child's best interests an Officer must establish first what is in the child's best interest, second the degree to which the child's interests are compromised by one potential decision over another, and then finally, in light of the foregoing assessment determine the weight that this factor should play in the ultimate balancing of positive and negative factors assessed in the application.

[Emphasis in original.]

[19] The Applicants argue that the Officer in this case simply stated a generalized conclusion that parental care and support are always in a child's best interests, and did not engage with the evidence about the differences in country conditions as between Djibouti and Canada, nor did the Officer engage in any analysis of the best interests of the son born in Canada. This Court has found that the requirement to determine what is actually in the child's best interests is not satisfied by simply finding that it is in the child's interests to remain with their parents. This is simply "stating the obvious": *Chandidas v Canada (Citizenship and Immigration)*, 2013 FC 258 at para 69 [*Chandidas*]; *Blas v Canada (Citizenship and Immigration)*, 2014 FC 629 at para 60.

[20] The Applicants contend that the Officer adopted a "basic needs" approach, in concluding that because the evidence did not show that the children would be unable to attend school, obtain medical care or other social services, the Applicants had not made out a claim for H&C relief. In several decisions this Court has expressly rejected such a "basic needs" or "basic amenities" approach to the assessment of the best interests of the child: see *Pokhan v Canada (Citizenship and Immigration)*, 2012 FC 1453 at paras 13-17; *Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813 at para 15 [*Sebbe*]. The Officer committed the same error here.

[21] In addition, the Applicants contend that the Officer erred by importing an implicit hardship analysis into the consideration of the best interests of the children. In particular, the Applicants point to the passage in the decision in which the Officer states that "[the Applicants] have not provided evidence to support that the best interests of their children would be affected by their removal from Canada to the extent that an exemption is justified in this case." The

Applicants argue that this is saying, in effect, that the children would not suffer enough to justify H&C relief. This is an error because the jurisprudence is clear that there is no "hardship threshold" in a best interest of the child analysis: see *Williams* at para 64, and *Conka v Canada (Citizenship and Immigration)*, 2014 FC 985 at para 23.

[22] I am not persuaded that the Officer applied the wrong legal test, or that the Officer's assessment of the best interests of the children was not reasonable. It was not a reversible error for the Officer to fail to specifically quote and apply the *Williams* test. In several decisions this Court has found that there is no specific formula to be applied in assessing the best interests of the child: *Beggs v Canada (Citizenship and Immigration)*, 2013 FC 903 at para 10; *Onowu v Canada (Citizenship and Immigration)*, 2015 FC 64 at para 44. Indeed, it would be contrary to the teachings of the Supreme Court in *Baker* and *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 to require an Officer to follow one particular formula for such an inherently discretionary decision.

[23] The basic principles for a reasonable best interests of the child analysis are set out in *Baker* at para 75:

> [F]or the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.

[24] While it is not sufficient merely to state that the best interests of the child have been considered, it is also not necessary in each case to follow the three-step analysis set out in *Williams*. Given the wide variety of circumstances in which a child's interests may be affected in the immigration or refugee process, it is difficult to imagine that a specific formula could adequately address each situation. Instead, the analysis must demonstrate that the specific circumstances of the child (or children), and their family are identified and considered, within the context of the real-life impact of the specific decision being taken: see *Canada (Minister of Citizenship and Immigration) v Hawthorne*, 2002 FCA 475 at para 32 [*Hawthorne*]; and *Chandidas* at paras 61 and 71.

[25] I find that the Officer's analysis demonstrates an engagement with the specific facts of the case in regard to the children and the family, with a view to the impact of the decision upon them. The Officer did not ignore specific evidence relevant to the particular circumstances of the children, and unlike many of the cases cited by the Applicants there are no medical or other circumstances that needed to be addressed. The Officer reviewed the evidence and considered the impact of removal upon the children and the family.

[26] The fact that the children have the benefit of loving and involved parents is a relevant consideration, and in light of the unfortunate reality that many children do not have such an advantage, the Officer's reference to this is not merely "stating the obvious." As stated by Justice Yvan Roy in *De Sousa v Canada (Citizenship and Immigration)*, 2019 FC 818 at para 38 [*De Sousa*], "[i]t is difficult to see how the officer could be faulted for having addressed these issues by finding that being with her parents in Portugal, the child will be able to adjust." The same is true here.

[27] The Officer was required to consider the real-life impact of the decision on the best interests of the children. That is what was done here, and the Officer explains how and why the decision was reached. That is all that reasonableness review requires: see *Beharry v Canada (Citizenship and Immigration)*, 2011 FC 110 at para 14, and *De Sousa* at paras 37-39.

[28] I disagree with the Applicants' argument that the Officer applied a "basic needs" approach. The term does not appear in the decision, and whether the children will have access to education, health care, and social services if they are removed to Djibouti is a relevant consideration. The Officer acknowledges that the quality of these services may not equal that available in Canada, but this is not, in itself, a basis for H&C relief: *Hawthorne* at para 5.

[29] In summary on this point, I am not persuaded that the Officer applied the wrong legal test, or that the analysis of the best interests of the children was unreasonable. It can be presumed in most cases that the children will be better off with the *status quo* of remaining in Canada with their parents; it can also be presumed in most cases that there will be some degree of hardship associated with leaving Canada and moving to a different country. What is required in an analysis of the best interests of the children is that these considerations are given due weight, together with all of the other relevant evidence concerning the circumstances of the children, within the context of their particular family, and with a view to the real-life impact of the decision upon them. This is what the Officer did in this in this case. This aspect of the decision is reasonable.

B. *Did the Officer err in the analysis of the Applicants' establishment in Canada?*

[30] The Applicants submit that the Officer erred by discounting their degree of establishment by comparing it to an unexplained "expected" standard, and further that the Officer ignored relevant evidence contained in their supplementary submissions.

[31] On the first argument, the Applicants point to the following passage from the Officer's decision:

> While I assign some positive weight to the applicants' efforts to work on their employability, secure employment and contribute volunteer hours to their community, I note that they have received due process through the Canadian refugee determination system, were issued work permits, and as such, find that there is a degree of establishment which is expected to take place. I find that the applicants' efforts mentioned above are not beyond what would normally be expected of people in similar situations.

[32] The Applicants contend that the Officer committed the same error as that discussed in *Sebbe*, in which Justice Russel Zinn found that a similar analysis was not reasonable:

> [21] The second area that I find troublesome has to do with comments the officer made when analyzing establishment. The officer writes: "I acknowledge that the applicant has taken positive steps in establishing himself in Canada, however, I note that he has received due process through the refugee programs and was accordingly afforded the tools and opportunity to obtain a degree of establishment into Canadian society." Frankly, I fail to see how it can be said that the due process Canada offers claimants provides them with the "tools and opportunity" to establish themselves in Canada. I suspect that what the Officer means is that because the process has taken some time, the applicants had time to establish themselves <u>to some degree</u>. That is a statement with which one can agree. However, what is required is an analysis and assessment of the degree of establishment of these applicants and how it weighs in favour of granting an exemption. The Officer must not merely discount what they have done by crediting the Canadian immigration and refugee system for having given them

> the time to do these things without giving credit for the initiatives they undertook. The Officer must also examine whether the disruption of that establishment weighs in favour of granting the exemption.
>
> [Emphasis in original.]

[33] The Applicants also rely on *Chandidas*, in which Justice Catherine Kane found, at paragraph 80, that the officer's failure to provide an explanation of why the degree of establishment was insufficient, or the standard that was expected, to be unreasonable. The Applicants contend that in their case the Officer also discounted their degree of establishment and focused instead on an unexplained expected level of establishment.

[34] In addition, the Applicants submit that the Officer ignored relevant evidence set out in their supplementary submissions. The Officer states that Mr. Ahmed was employed full-time, but the supplementary evidence they submitted demonstrates that he lost that job due to a re-structuring, and he has since found two other jobs. Furthermore, the supplementary evidence showed that Ms. Mohamed had begun to work assisting other newcomers with their adjustment to Canadian society. The Applicants submit that the Officer's failure to consider this evidence has a greater impact because they made all of these efforts during the relatively short period of time that they had been in Canada. In light of this, the failure to consider all of the evidence impaired the Officer's analysis of their degree of establishment to a greater degree than if the analysis had spanned a period of many years.

[35] The Respondent contends that the Officer must be presumed to have considered all of the evidence, and the submissions allegedly ignored do not support the Applicants' claim of

establishment in Canada because they indicate the precarious nature of Mr. Ahmed's employment.

[36] In light of the Officer's failure to make any reference to the information contained in the supplemental submissions, and given the reliance placed on out-dated information, in particular relating to Mr. Ahmed's employment, I am persuaded that the Officer's analysis is unreasonable.

[37] The proper approach to judicial review under the *Vavilov* framework is summarized in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 2: "This Court's role is to review the reasons given by the administrative decision maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints."

[38] To put it another way, on judicial review on the deferential standard of reasonableness, a key concern is whether the process and decision indicate that the decision-maker truly "engaged" with the evidence, applying the appropriate legal test, and then explained the reasoning that lead to the conclusion reached by the Officer. The standard is not perfection.

[39] However, it is also important to recall that one of the underlying goals of the *Vavilov* framework is to "affirm the need to develop and strengthen a culture of justification in administrative decision-making" (*Vavilov* at paras 2, 79-81). One core element of this is that a reasonable decision must be justified in light of the factual constraints that bear upon the decision. The importance of a particular fact will be determined in light of the legal framework that applies to the decision. As noted in *Vavilov* at paragraph 126, while a reviewing court will

not lightly interfere in factual findings, and must not re-weigh the evidence, an administrative decision-maker must take the factual record into account, and "[t]he reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it."

[40] This must include consideration of the submissions of the parties, insofar as these address elements that are core to the decision under review. As stated in *Vavilov* at paragraph 127, the administrative decision-maker's reasons must "meaningfully account for the central issues and concerns raised by the parties… because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties" (emphasis in original). Once again, the standard is not perfection, and it is not a reversible error to fail to respond to every argument or to list every fact. As stated in *Vavilov* at paragraph 128, "a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it."

[41] In this case, I am generally able to follow the Officer's reasoning, and to understand why the analysis of both the degree of establishment in Canada, as well as the likely prospects for the Applicants, given their recent history of establishment in Djibouti, supported the decision that was reached. It is not the role of the Court to re-weigh the evidence (*Vavilov* at para 125), and in many respects the Officer's reasons demonstrate consideration of the appropriate factors and relevant evidence.

[42] However, the Officer did not indicate any consideration of the new information contained in the supplementary submissions filed by the Applicants on October 17, 2018, five months prior

to the decision under review. In particular, these submissions noted that Mr. Ahmed had lost his job at Olympia Tile due to corporate restructuring, but he had almost immediately obtained new employment, and then found another job that was closer to his home and thus required a shorter commute. The submissions also indicate that Ms. Mohamed had obtained part-time employment and was pursuing English as a Second Language instruction.

[43] I accept the Respondent's argument that an Officer may generally be presumed to have considered all of the evidence in the record, and it is not required that every piece of evidence be recited in the decision. The difficulty with this omission, however, is that the Officer appears to have relied on out-dated information regarding Mr. Ahmed's employment. The decision refers to his employment at Olympia Tile, and makes no reference to the subsequent developments. The Respondent argues that the job loss is not a positive factor in this case, and it cannot be an error to have failed to mention it. However, it is equally true that the fact that Mr. Ahmed lost his job due to corporate restructuring – rather than unsatisfactory performance – and that he almost immediately obtained other employment, are relevant considerations in assessing the overall degree of establishment. This is equally true of Ms. Mohamed's efforts to obtain employment and pursue language training.

[44] The Applicants are not asking this Court to re-weigh the evidence; indeed, the Applicants admit that this evidence may not have persuaded the Officer to reach another conclusion. However, the Applicants deserved a decision in which the Officer demonstrated that this relevant evidence had been considered. While the Officer's decision should receive a degree of deference, in light of the highly discretionary nature of the assessment set out in section 25 of *IPRA*, a "culture of justification" must require that the reasons indicate that all of the most relevant

evidence is considered. I agree with the Applicants that in this case, the Officer's reasons indicate that the last two jobs held by Mr. Ahmed were not considered in assessing his employment history, nor was the employment and language training pursued by Ms. Mohamed assessed. These are obviously important elements in assessing the family's degree of establishment in Canada, and the failure to indicate any consideration of these facts makes this decision unreasonable.

[45] In summary on this point, I am persuaded that the Applicants have demonstrated flaws in the Officer's analysis of the degree of establishment in Canada that "are sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100).

V. Conclusion

[46] For all of these reasons, the application for judicial review is allowed. The matter is referred back to a different officer for reconsideration.

[47] No question of general importance was proposed for certification, and none arises in this case.

[48] There is one procedural point: the style of cause shows the Respondent as "The Minister of Immigration, Refugees and Citizenship Canada". The proper legal name of the Minister is "The Minister of Citizenship and Immigration", and by consent of the parties, the name of the Respondent in the style of cause is hereby amended, with immediate effect.

JUDGMENT in IMM-2500-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The matter is remitted back to a different officer for reconsideration.

3. There is no question for certification.

4. The style of cause is amended to reflect the name of the Respondent as "The Minister of Citizenship and Immigration."

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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