Federal Court  Cour fédérale

**Date: 20210615**

**Docket: IMM-6109-19**

**Citation: 2021 FC 603**

**Ottawa, Ontario, June 15, 2021**

**PRESENT: Madam Justice St-Louis**

**BETWEEN:**

**FRANCA AFOLABI**
**ELIZABETH AFOLABI**
**VICTORIA AFOLABI**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Introduction

[1] Mrs. Franca Afolabi and her two minor daughters, Elizabeth and Victoria [the Applicants] seek judicial review [the Application] of the decision of a Senior Immigration Officer, as a representative of the Minister of Citizenship and Immigration Canada [the Officer],

who decided that an exemption based on humanitarian and compassionate [H&C] grounds was not granted.

[2] For the reasons set out below, the Application will be dismissed.

## II. Context

[3] Mrs. Afolabi and her daughter Elizabeth are Nigerian citizens, while Victoria is an American citizen.

[4] On February 22, 2016, Mrs. Afolabi and her daughter Elizabeth were each granted a two year, multiple-entry visitor's visa by the American authorities. On April 2, 2016, they entered the United-States, where Victoria was born in June 2016.

[5] On December 20, 2017, the Applicants arrived in Canada and claimed refugee protection, essentially citing fear from Mrs. Afolabi's in-laws. On September 12, 2018, the Refugee Protection Division [RPD] rejected their claim on the basis of a reasonable internal flight alternative in Ibadan, Nigeria. Concerning Victoria, as per the record, both Mrs. Afolabi and her counsel indicated to the RDP that they had no claim against the United-States.

[6] On November 21, 2018, Mrs. Afolabi withdrew the appeal she had filed before the Refugee Appeal Division against the RPD decision.

[7] On February 14, 2019, the Applicants filed an application for permanent residence based on humanitarian and compassionate considerations [the H&C Application], pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act* (SC 2001, c 27) [the Act]. The H&C Application was filed with original supporting documentation, but counsel indicated his submissions would be provided in the coming weeks. The initial H&C Application thus contained, *inter alia*, an affidavit from Mrs. Afolabi sworn on January 29, 2019, and a psychotherapy assessment report and treatment plan related to Mrs. Afolabi, dated December 8, 2018.

[8] On August 6, 2019, counsel added written submissions and other documents, including a psychotherapy progress report in regards to Mrs. Afolabi and a support letter from the shelter caseworker dated November 26, 2018.

[9] Through counsel submissions, the Applicants confirmed their H&C Application sought exemptions for the Principal Applicant's medical inadmissibility, as well as for non-compliance with the Act for failing to return to Nigeria after the departure order came into effect in December 2018. The Applicants based their H&C Application on two considerations, hence (1) hardship based on Mrs. Afolabi's mental health diagnoses; and (2) establishment in Canada.

[10] In regards to the first consideration, the Applicants raised (a) Mrs. Afolabi's current medical diagnoses, as established by the evidence; (b) hardship deriving from removal process, with emphasis on Mrs. Afolabi's most recent mental health report that instructs her to check herself in an emergency department should she receive a notice of removal; (c) hardship deriving

from the lack of access to, and availability, of mental health care in Nigeria citing extracts of the April 2019 National Documentation Package, and submitting that Mrs. Afolabi will have difficulty accessing prescription medication and psychotherapy; and (d) hardship faced by minor Applicants and best interests of the child, citing the situation for girls in Nigeria today, and the impact their mother's situation will have on them.

[11] In regards to the second consideration, the Applicants dedicated two paragraphs to their level of establishment in Canada. They submitted that Mrs. Afolabi had achieved strong establishment, despite her "relatively short-term stay in Canada". The submissions essentially cited Mrs. Afolabi's training and employment, the fact that she has no criminal record, does not rely on social assistance, volunteers in her church community and the work she had done to gain financial independence, with supporting documents.

[12] The Applicants also requested, in the alternative, that they be considered for a temporary resident permit [TRP] on "the same grounds raised in this application".

[13] The Applicants' removal to Nigeria, scheduled on August 21, 2019, was deferred.

[14] On September 12, 2018, the Office, not satisfied that the humanitarian and compassionate considerations presented justified an exemption under subsection 25(1) of the Act, refused the Applicants' H&C Application.

## III. The Impugned Decision

[15] The Officer's "Reasons for decision" contains five (5) sections. Notably, section 4 pertains to the "Factors for consideration" summarising the Applicants' submissions in regards to (1) establishment in Canada; (2) best interest of the child (BIOC); (3) risk and adverse country conditions; and (4) request for a TRP.

[16] Section 5 pertains to the "Decision and Reasons" where the Officer examines each of the afore-mentioned factors. The Officer confirms that the purpose of the assessment is to determine whether the Applicant, in order to obtain permanent residence, should be exempt on humanitarian and compassionate grounds, from the requirement to present her application from outside Canada, and from the obligation to meet the requirements of a permanent resident category.

[17] In regards to establishment, the Officer notes that Mrs. Afolabi has been in Canada for less than two years, and that while she worked hard at finding employment, she resided in an emergency shelter from December 2017 until February 2019. The Officer acknowledges that she achieved a level of establishment through her employment and friendships; however, he gave Mrs. Afolabi's establishment minimal weight in support of the H&C Application.

[18] In regards to the best interests of the children, the Officer notes that little documentary evidence was presented, but acknowledges that the children attend school and extracurricular activities. However, the Officer was not satisfied that returning to Nigeria as a family unit will

adversely impact the best interests of the children in this case. The Officer notes the children have shown resilience, and that, in Nigeria, they will have their father and extended maternal family to support them. The Officer confirms having read Mrs. Afolabi's concern with respect to her daughters, and the possibility of sexual violence and similar gender abuse. However, the Officer notes that Mrs. Afolabi has not demonstrated why, or how, the realities described are personalised to the children in this decision. The Officer gave little weight to this factor.

[19] In regards to risk and adverse country conditions, the Officer confirms having read Mrs. Afolabi's statement with respect to her mental health, as well as the two psychotherapy reports and country documentation on healthcare/mental health in Nigeria. The Officer acknowledges that healthcare in respect to mental health in Nigeria is not as advance as in Canada, and notes that Mrs. Afolabi's condition is treated and medicated. He notes the expert report from a psychotherapist on file. He particularly notes that Mrs. Afolabi did not check herself into an emergency room upon receiving her removal order, as was suggested in the report, and that she was thus able to manage her condition after meeting with CBSA and receiving her removal order. The Officer acknowledges that prescription drugs and psychotherapy are not as readily available in Nigeria as they are in Canada, and adds that Mrs. Afolabi is an educated woman who can advocate for herself to receive medication and therapy she requires. He also finds Mrs. Afolabi has her spouse and her family in Nigeria who can support and help her. Finally, the Officer found there was little evidence demonstrating that, should Mrs. Afolabi find herself in conflict with her in-laws upon her return, she and her spouse could not relocate to Idaban.

[20] On the TRP request, given the circumstances, the Officer did not believe the issuance of a TRP was justified by the circumstances and determined he would not issue a TRP.

[21] The Officer ultimately, was not satisfied that the humanitarian and compassionate considerations that were submitted justified an exemption under subsection 25(1) of the Act.

## IV. Section 25 of the Act

[22] Section 25 of the Act states:

> 25 **(1)** Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

[23] As Justice Little outlined in *Diaz v Canada (MCI)* 2021 FC 321 [*Diaz*] Subsection 25(1) of the Act gives the Minister discretion to exempt foreign nationals from the ordinary requirements of that statute and grant permanent resident status in Canada, if the Minister is of the opinion that such relief is justified by humanitarian and compassionate considerations. Those considerations are to include the best interests of a child directly affected. The H&C discretion in subsection 25(1) is a flexible and responsive exception to the ordinary operation of the

legislation, to mitigate the rigidity of the law in an appropriate case: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 (Abella J.), at para 19.

[24] As further noted in *Diaz*:

> [43] Humanitarian and compassionate considerations refer to "those facts, established by the evidence, which 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]": Chirwa v. Canada (Minister of Citizenship and Immigration) (1970), 4 I.A.C. 338, at p.350 as quoted in Kanthasamy at paras 13 and 21. The purpose of the H&C provision is provide equitable relief in those circumstances: Kanthasamy, at paras 21-22, 30-33 and 45.
>
> [45] The discretion in subs. 25(1) must be exercised reasonably. Officers making humanitarian and compassionate determinations must substantively consider and weigh all the relevant facts and factors before them: Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817 (L'Heureux-Dubé J.), at paras 74-75; Kanthasamy, at paras 25 and 33.
>
> [46] With respect to the interests of a child directly affected under subs. 25(1), an officer must always be alert, alive and sensitive to the child's best interests: Baker, at para 75; Kanthasamy, at para 38; Canada (Minister of Citizenship and Immigration) v. Hawthorne, 2002 FCA 475, at para 10. An officer must also abide by the guiding admonition that children will rarely, if ever, be deserving of any hardship: Kanthasamy, at para 59.
>
> [47] 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, [2010] 1 FCR 360 (Nadon JA), at paras 35, 45 and 61. Lack of evidence or failure to adduce relevant information in support of an H&C application is at the peril of the applicant: Owusu v. Canada (Minister of Citizenship and Immigration), 2004 FCA 38, [2004] 2 FCR 635 (Evans JA), at paras 5 and 8.

## V. Arguments raised by the Applicants

[25] The Applicants raised three issues in their memorandum of facts and law, but maintained two at the hearing, hence (1) did the Officer provide adequate reasons in their assessment of the Applicants' establishment and was the assessment reasonable; and (2) was the Officer's assessment of Mrs. Afolabi's mental health reasonable?

## VI. Parties' submissions and analysis

### A. *Standard of Review*

[26] I agree with the parties that the presumptive standard of review is reasonableness, and nothing refutes the presumption in this case (*Vavilov*). An officer's assessment of H&C grounds presented by an application involves questions of mixed fact and law and is reviewable on a standard of reasonableness *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44 [*Kanthasamy*].

[27] When the reasonableness standard of review is applied, the burden is "on the party challenging the decision to show that it is unreasonable" (*Vavilov* at para 100). The Court's focus must be "on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83) to determine whether the decision is "based on an internally coherent and rational chain of analysis and […] is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). It is not for the Court to substitute its preferred outcome (*Vavilov* at para 99).

B. *Did the Officer provide adequate reasons in their assessment of the Applicants' establishment and was the assessment reasonable?*

[28] The Applicants submit that the Officer failed to provide adequate reasons and rendered an unreasonable decision regarding their establishment in Canada. They cite the decisions holding that "[a] statement of fact coupled with a conclusion, but without an analysis, does not constitute reasons and is in breach of procedural fairness" (*R v Sheppard*, 2002 SCC 26, [2002] 1 SCR 869, and *West Region Child and Family Services Inc v North*, 2007 FCA 96, 362 NR. The Applicants submit that the Officer committed this error by failing to provide reasons for ascribing minimal weight to their establishment in Canada.

[29] The Applicants add that the Officer ignored evidence, particularly the support letter from the caseworker, without explaining why. The Applicants submit that the Officer's failure to provide adequate reasons in their assessment of the Applicants' establishment is erroneous, and that the jurisprudence of the Court support their position.

[30] The Minister responds that the Officer's reasons for ascribing minimal weight to the Applicants' level of establishment are easily discernable, and are sufficient in the circumstances. The Minister add that written reasons given by an administrative body must not be assessed against a standard of perfection.

[31] I agree with the Minister that the Officer mentioned and weighed the factors outlined in the submissions filed in support of the H&C Application, and which can reasonably support his conclusion. Contrary to the Applicants' submission, the Officer acknowledged that Mrs. Afolabi

found employment and developed friendships; the Officer did not have to refer to each piece of evidence. After reading the submissions the Applicants' presented with their H&C Application, we can easily infer that the Officer was of the view that less than two years is not a significant amount of time. In fact, the Applicants themselves acknowledged this in their submissions (page 118 of the Applicants' Record) when they specifically indicated that Mrs. Afolabi had achieved strong establishment, *despite* her "relatively short-term stay in Canada". The Officer also noted it took Mrs. Afolabi until February 2019 to find housing outside the emergency shelter, putting in perspective the submission that she had gain financial independent per counsel's submissions, and referring to the information contained in the caseworker's letter. The Court can here connect the dots on the page and thus find the Officer's reasons sufficient given the submissions that were presented.

[32] As indicated in *Vavilov*, 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] (*Vavilov* at para 127). Perfection is therefore not the norm. The Applicants have not convinced me that the Officer's finding, hence that the establishment had minimal weight, is unreasonable given the circumstances, the evidence and the submissions that they presented.

C. *Was the Officer's assessment of Mrs. Afolabi's mental health reasonable*

[33] The Applicants submit that the Officer's assessment of risk and hardship, as a result of the Principal Applicant's diagnosed mental health issues, is also unreasonable.

[34] They first submit that the Officer failed to conduct any analysis on the availability or accessibility of the type of mental health services Mrs. Afolabi would require in Nigeria; and, add, second that the Officer engages in speculation and misconstrued facts in concluding that she is stable and in a position to care for her mental health in Nigeria.

[35] The Applicants note that they submitted evidence regarding Mrs. Afolabi's condition and that the Applicants would face undue hardship if required to apply for status from outside Canada. They point to a report outlining how the removal process would trigger suicidal ideations for Mrs. Afolabi. The Officer did not point to the evidence on conditions in Nigeria, which did not support his conclusion that Mrs. Afolabi could seek care for herself as a result of her education and advocacy skills. The Applicants submit one cannot decipher if the Officer concluded the resources were not available, in which case Mrs. Afolabi's skills are not useful, or if they concluded they were available, in which case they provided no reasoning.

[36] The Applicants also submit that the Officer speculated to draw erroneous conclusions, amounting to a veiled credibility issue. The Officer noted that Mrs. Afolabi had not checked her self into a hospital upon receiving a removal order, as suggested in her psychotherapist's report. They explain that requiring evidence to that effect does not respect the Supreme Court's guidance in *Kanthasamy* (at para 47) and that the Officer was not aware that her removal order was pending the H&C decision. The Applicants submit the Officer's rationale for his conclusions are again unclear, and contradict the expert evidence. In concluding that Mrs. Afolabi would benefit from assistance from her family, the Officer concluded without an evidentiary basis or appropriate expertise that this support could substitute mental health treatment.

[37] The Minister responds that the Officer reasonably acknowledged the expert report and the evidence of conditions in Nigeria. He concluded that Mrs. Afolabi could properly advocate for herself given her circumstances, and the fact that her condition is medicated and diagnosed. The Officer also noted that she did not check herself into an emergency room when she received her removal order, as the psychologist report had instructed her to do, and that she would benefit from social support in Nigeria.

[38] I find the Officer reasonably enunciated factors to support his conclusions. The Officer reasonably acknowledged the expert report, and the evidence of conditions in Nigeria. Further, I find that the Applicants' submission, that the Officer was unaware that Mrs. Afolabi's removal order was pending the H&C decision, unpersuasive, as the Officer was rendering that very decision. Also, unlike in *Kanthasamy* (at para 47), the psychotherapist made a specific recommendation in Mrs. Afolabi's report, and the Applicants specifically relied upon it in their submissions to support the H&C Application. The Officer could thus reasonably assess whether Mrs. Afolabi complied with it or not and what this entailed. Finally, the Officer did not conclude that social support could substitute medical treatment: they found that Mrs. Afolabi would have the support of her husband and family in Nigeria, and that she could seek treatment even if it is less accessible than in Canada.

[39] The Applicants have not convinced me that the Court is left guessing and speculating as to the Officer's rationale, or underlying thoughts, and how they have informed their assessment of risk. The Officer's assessment responds to the submissions and evidence presented in support of the H&H Application, and I have not been persuaded that it is unreasonable.

## VII. Conclusion

[40] The Applicants have not convinced me that the Officer did not reasonably exercise their discretion, per subsection 25(1) of the Act. For the afore-mentioned reasons, the application for judicial review will be dismissed.

**JUDGMENT in IMM-6109-19**

**This Court's judgment is that:**

1. The Application for judicial review is dismissed;

2. No question is certified.

"Martine St-Louis"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-6109-19 |
| **STYLE OF CAUSE:** | FRANCA AFOLABI, ELIZABETH AFOLABI, VICTORIA AFOLABI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | MONTREAL, QUÉBEC – BY VIDEOCONFERENCE |
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| **DATED:** | JUNE 15, 2021 |

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| Me Jennifer S. Bond | FOR THE RESPONDENT |

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