Federal Court Cour fédérale

Date: 20211207

Docket: IMM-3282-20

Citation: 2021 FC 1371

Ottawa, Ontario, December 7, 2021

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

AISHA ADIL
ADIL RIAZ BUTT

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, Ms. Aisha Adil ("Ms. Adil") and Mr. Adil Riaz Butt ("Mr. Butt"), seek judicial review of a decision of an immigration officer (the "Officer") to refuse their application for permanent residence 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*").

[2] The Applicants are citizens of Pakistan and have four Canadian-born children. They submit that the Officer's decision is unreasonable in light of the circumstances of their case. In particular, the Applicants argue that the Officer erred in the assessment of the Applicants' establishment in Canada, the hardship they would face if returned to Pakistan, and the best interest of the children ("BIOC").

[3] In my view, the Officer did not give weight to all the relevant H&C considerations, in particular the family's establishment in Canada and the best interests of the four Canadian-born children. For the reasons that follow, I find that the Officer's decision is unreasonable.

II. **Facts**

A. *The Applicants*

[4] The Applicants are a married couple and citizens of Pakistan. Ms. Adil arrived in Canada in March 2011, and Mr. Butt arrived in October 2010. The couple have four children: two daughters: Fatima (9 years-old) and Filza (3 years-old), and two sons: Yahya (7 years-old) and Mujtaba (6 years-old). All four children were born in Canada and are Canadian citizens.

B. *Previous Decisions*

[5] On March 14, 2012, the Refugee Protection Division (the "RPD") of the Immigration and Refugee Board of Canada denied the Applicants' claim for refugee protection. Leave challenging the RPD decision was denied by this Court in July 2012.

[6] In 2012, the Applicants submitted a Pre-Removal Risk Assessment ("PRRA"), which was rejected on December 10, 2013. Leave challenging the PRRA decision was denied by this Court in April 2015.

C. *Decision Under Review*

[7] On July 17, 2018, the Applicants submitted their second application for permanent residence on H&C grounds. The Officer refused the H&C application on July 8, 2020.

[8] The H&C application identified the Applicants' establishment in Canada, hardship related to their return to Pakistan, and the best interests of the Applicants' four Canadian children as H&C grounds for consideration.

[9] In the reasons for the decision, the Officer determined the Applicants had insufficient establishment and ties in Canada and that the Applicants would not face hardship upon return to Pakistan to warrant an exemption on H&C grounds. The Officer placed favourable weight on the BIOC considerations, but found insufficient evidence to demonstrate "that the best interests

of the children warrants relief when weighed against all other factors." Ultimately, the Officer concluded:

> While I acknowledge that it may be difficult for the applicants to leave Canada and return to Pakistan, I am satisfied they have strong family ties in Pakistan, are familiar with the culture, language and way of life in Pakistan, such that they should be able to re-integrate and resettle in Pakistan. On a balance of probabilities, I am not satisfied the applicants will face hardships in returning to Pakistan that warrant an exemption.

III. **Issue and Standard of Review**

[10] The sole issue in this application for judicial review is whether the Officer's assessment of H&C factors is reasonable.

[11] It is common ground between the parties that the applicable standard of review for the issue above is reasonableness. I agree that the appropriate standard of review for H&C decisions is reasonableness (*Chen v Canada (Citizenship and Immigration),* 2019 FC 988 at para 24; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 ("*Kanthasamy*") at paras 8, 44-45; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paras 16-17).

[12] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is

justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[13] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125).

IV. **Analysis**

[14] Under subsection 25(1) of the *IRPA*, the Minister may grant permanent residency to a foreign national who does not meet the requirements of the *IRPA* if the Minister is of the opinion that the circumstances are justified under H&C considerations, including the BIOC directly affected.

[15] An H&C exemption is a discretionary remedy. What warrants relief will vary depending on the facts and context of the case. In *Kanthasamy*, the Supreme Court defines H&C considerations as being "those facts, established by the evidence, which would excite in the reasonable [person] in a civilized community a desire to relieve the misfortune of another" (at para 21, citing *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338 at p 350).

[16] This means that the decision maker must "substantively consider and weigh all the relevant facts and factors before them" (*Kanthasamy* at para 25, citing *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 ("*Baker*") at paras 74-75), and that "there will sometimes be humanitarian or compassionate reasons for admitting people who, under the general rule, are inadmissible" (*Kanthasamy*, at paras 12-13). The Applicants bear the onus of establishing that an H&C exemption is warranted (*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 45).

A. *Establishment in Canada*

[17] In the reasons for the decision, the Officer acknowledged the steps the Applicants have taken to integrate into the Canadian community, yet assigned little weight to the Applicants' relationships in Canada. The Officer was not satisfied "that sufficient evidence has been provided to support a level of interdependency with those in Canada such that they cannot be separated," nor that the Applicants are sufficiently established to warrant an exemption on H&C grounds.

[18] Furthermore, the Officer gave significant weight to the fact that the Applicants have no family in Canada, but have strong family ties in Pakistan. While acknowledging that the Applicants had stated that they faced family violence from Ms. Adil's family, the Officer found "no indication of any issues with the male applicant's family" and was therefore satisfied that the Applicants' family ties in Pakistan are strong.

[19] The Applicants submit that the Officer failed to provide intelligible reasons for why their establishment was found to be insufficient or to explain the expected level of establishment. The Applicants rely on the case of *Stuurman v Canada (Citizenship and Immigration)*, 2018 FC 194, in which this Court held that an officer's assessment of establishment in Canada was unreasonable because they focused on an expected degree of establishment and failed to explain what would consist of an acceptable level of establishment (at para 24).

[20] When considering whether the barriers to employment in Pakistan will expose the children to poverty, the Officer determined that there was insufficient evidence that the Applicants would struggle to find employment because of their adaptability and resilience:

> The applicants present as adaptable and resilient. I find these factors would reasonably enhance the applicants' employability profile and by extension their employment prospects and their ability to support their family.

[21] The Applicants submit that the Officer's decision conflates the analysis of hardship with establishment: The Officer considered the factors that militate in favour of a finding of sufficient establishment in Canada to warrant an H&C exemption, but instead used them to determine that the Applicants have transferrable skills and will not face hardship if relocated to Pakistan. I agree with the Applicants that the Officer's analysis undermines the intelligibility and transparency of the decision. In *Jeong v Canada (Citizenship and Immigration)*, 2019 FC 582 at paragraph 53, this Court addressed how this type of analysis is problematic:

> [53] It is also problematic that the Officer conflated establishment with hardship. The Officer dismissed significant positive signs of

> establishment by stating the Applicants could continue their religious activities, friendships, and extracurricular activities in South Korea. The Officer's task was not to determine whether the Applicants would have access to similar activities in South Korea, thereby diminishing hardship, but whether they are established in Canada (*Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 at paras 21 to 26 [*Lauture]*). The Officer's analysis of the Applicants' degree of establishment in Canada should not have been based on whether they could carry on similar activities in South Korea. Under this type of analysis, "the more successful, enterprising and civic minded an applicant is while in Canada, the less likely it is that an application under section 25 will succeed" (*Lauture* at para 26).
>
> [emphasis added]

[22] The Respondent submits that it is not an error for the Officer to find that the Applicants are adaptable and resilient and thus have transferable skills. In *De Sousa v Canada (Citizenship and Immigration)*, 2019 FC 818 this Court notes that "[…] the applicants have shown resilience and resourcefulness which may be used if they so wish" (at para 34). And in *Rehmat Din v Canada (Citizenship and Immigration)*, 2013 FC 356 at paragraph 26, when discussing the officer's analysis of economic hardship upon return to Pakistan, this Court states:

> Given the work experiences of the Male and Female Applicants, it was reasonable for the Officer to find that the adult Applicants have transferable skills for employment in Pakistan. This finding was not speculative or contrary to the evidence.

[23] In my view, I find that the Officer failed to fully engage with how the Applicants' evidence of their resiliency and adaptability to life in Canada weighed in favour of their establishment in Canada, and instead used it to extrapolate that any hardship in Pakistan would be minimized by their transferrable skills. I also find that the Officer failed to give adequate

weight to the strong network of support the Applicants have built for themselves in Canada, particularly with regards to the interests of the four Canadian-born children, as discussed below.

B. *BIOC*

[24] The Applicants submit that the Officer failed to adequately consider the best interests of their four Canadian-born children, including the hardship the children would experience if relocated to Pakistan. Specifically, the Applicants argue that the Officer failed to consider how the children would be impacted by the sub-standard education system in Pakistan and the ways in which the daughters will face gender-based discrimination.

[25] The H&C application included evidence of the poor education system in Pakistan including details related to lack of trained teachers, poor infrastructure, gender bias and violence from armed groups. In addressing the impact of Pakistan's poor education system on the children, the Officer noted that Ms. Adil had attended school in Pakistan, obtained a university education and was employed as a teacher. The Officer stated:

> I am not satisfied that sufficient objective evidence has been adduced to demonstrate that the children cannot be exposed to similar opportunities in Pakistan as their mother.

[26] The Officer also noted that the letters of support provided in the application highlight how Ms. Adil currently helps her children and other children in the community with homework and with Urdu writing and reading. From this, the Officer determined:

> Given her experience as a teacher and familiarity with the system in Pakistan, I am satisfied the applicant would be able to provide assistance to her own children with their education pursuits in Pakistan.

[27] The Applicants draw parallels to the flawed analysis of the officer in the case of *Duhanaj v Canada (Citizenship and Immigration),* 2015 FC 416 ("*Duhanaj*"). In *Duhanaj,* this Court found that the officer's reasons failed to consider how the children would benefit from continuing their education in Canada and that the officer made no effort to weigh that benefit against the disadvantages of completing their education in the sub-standard education system in Albania (at para 11). In finding that the officer erred in the BIOC assessment, this Court held at paragraph 12:

> Having failed to fully consider the consequences that returning to Albania would have for the two children involved in this case, the officer could not properly weigh their best interests against the other H&C factors cited in support of their application. It is, moreover, apparent from the entirety of the BIOC analysis that while the officer was satisfied that the children would indeed face some hardship in Albania, they would eventually be able to adjust to life there. This in turn led to the officer's conclusion that the hardship that the children faced was not unusual and undeserved or disproportionate.

[28] The Respondent contends that a review of the decision shows that the Officer undertook a reasonable assessment of the interests and impacts of relocation to Pakistan on the four children. To distinguish the case at hand from *Duhanaj,* the Respondent relies on *Hameed v Canada (Public Safety and Emergency Preparedness),* 2017 FC 657 ("*Hameed*") and submits that, like in *Hameed,* the Officer in the case at hand did not conclude that a direct negative impact would not be experienced by the children just because substandard education conditions were common to

all children (at para 15). Rather, the Officer acknowledged that while the social and educational environment in Pakistan may not be comparable to Canada, the evidence indicates that the children's mother was educated in Pakistan and that there is no evidence to demonstrate that her children would not also be afforded this opportunity.

[29] I am not persuaded by the Respondent's argument. In my view, the evidence shows a mother working hard to ensure her children maintain connections to their language and culture, while growing up and thriving in a Canadian context. I agree with the Applicants' submission that rather than considering the evidence on the record to assess whether the children will experience hardship by leaving the Canadian education system and attending school in Pakistan, the Officer engaged in speculation about Ms. Adil's ability to compensate for deficiencies in the education system in Pakistan. I also find that the Officer has once again misconstrued the evidence submitted by the Applicants in favour of their establishment in Canada to mitigate the hardship they would experience if relocated to Pakistan.

[30] The Applicants further submit that the female children, Fatima and Filza, would face disproportionate hardship and the risk of gender-based violence in Pakistan. The H&C application included evidence of gendered attacks on schools by extremist groups and violence towards female students. The Officer addressed this evidence in the following way:

> I also note that the female applicant attended school in Pakistan and was herself a student and a teacher and has not provided any evidence to demonstrate that she faced adverse conditions while she lived in Pakistan. I note the applicants have female family members living in Pakistan and there is no indication that these family members have been adversely affected by any incidents. I

> am not satisfied that the applicants have linked their statements with their personal circumstances.
>
> […]
>
> The applicants have provided insufficient evidence to demonstrate that their daughters will not have the same access to education or not be protected from adverse treatment in Pakistan. I also note the female applicant has not provided any objective evidence to indicate that she experienced adverse treatment as a female in Pakistan.

[31] *Kanthasamy* establishes that inferences can be drawn from the experiences of discrimination by others who share an applicant's identity and that section 25(1) of the *IRPA* does not require an applicant to provide evidence that they will be personally targeted (at paras 55-56). The Applicants submit that the Officer erred by dismissing the evidence that demonstrates that Fatima and Filza are part of a group that experiences gender-based discrimination in Pakistan. Instead, requiring Ms. Adil to prove that she or her female family members had experienced gender-based violence or discrimination in Pakistan.

[32] The Respondent contends that there was insufficient evidence before the Officer to demonstrate that the Applicants' daughters would not be protected from adverse treatment in Pakistan. The Respondent contends that the Officer properly assessed the impact that violence in schools in Pakistan will have on Fatima and Filza and that the Officer's inference was supported by the fact that Ms. Adil attended school in Pakistan, as did the Applicants' female family members, and there was no evidence that they faced adverse conditions or were affected by any incidents. The Respondent argues that the Officer reached their conclusion after a balanced and reasonable consideration of the evidence.

[33] I am not convinced by the Respondent's argument. I agree with the Applicants that by requiring the Applicants to provide evidence that Ms. Adil or her female family members personally experienced violence and by dismissing the evidence of widespread discrimination and gender-based violence against female students in Pakistan, the Officer's analysis was unreasonable. As my colleague Justice McHaffie held in *Cezair v Canada (Citizenship and Immigration)*, 2019 FC 1510, at paragraph 41:

> […] Effectively creating a requirement that family members have been subjected to discrimination or gender-based violence before evidence of pervasive discrimination and violence are given weight is unreasonable.

[34] While placing favourable weight on the BIOC, the Officer ultimately found that given their young age, the children could adjust to the change with the support of their parents and their extended family in Pakistan:

> I acknowledge that as Canadian born children they would face some adjustment, however, I have insufficient evidence before me that they will not be able to integrate or their best interests will not be met or their fundamental rights will be denied in Pakistan if they were to leave Canada with their parents. Given their young age, it is reasonable to expect that they would be able to adjust to the changing situations with the continued support of their parents and extended family members in Pakistan. I am satisfied that the best interest of the children would continue to be met with the benefit of care and support from their parents. Though the environment in Pakistan may have different educational or social aspects and may not be comparable to Canada, I do not find this is a circumstance to justify a positive exemption.

[35] In my view, it is clear from the ample amount of evidence in the record that the Applicants have established a strong support network in Canada for their children over the last 10 years. Friends and neighbours describe the Applicants as "polite, dependable, honest, courteous, organized and responsible people", "a young couple with integrity, honesty and good moral character. They are community-minded people who often put the needs of others ahead of their own." The record also demonstrates Ms. Adil's extensive involvement in the community, including participation in several programs for families and young children. A neighbour who sees the children regularly describes them as "good and well brought up children" and it is evident from the two older children's school report cards and awards for "most reliable student" and "best attendance" that they are thriving in their current environment and developing relationships of their own.

[36] Case law is quite clear that while the BIOC is not determinative and is one of many factors assessed by an officer, it remains an important factor to be taken into consideration in an H&C finding. In *Kolosovs v Canada (Citizenship and Immigration),* 2008 FC 165, my colleague Justice Campbell stressed that an officer is required to demonstrate that they are "alert, alive and sensitive" to the best interests of the children under consideration (at paras 8-12, citing *Baker* at para 75). When discussing what is required of an officer with respect to demonstrating sensitivity, Justice Campbell explains at paragraph 12:

> To demonstrate sensitivity, the officer must be able to clearly articulate the suffering of a child that will result from a negative decision, and then say whether, together with a consideration of other factors, the suffering warrants humanitarian and compassionate relief.

[37] The Applicants' position in this case is not simply that the conditions in Canada are better than those in Pakistan, but also that the conditions in Pakistan are different and detrimental to the BIOC at the core of this case. The four children involved, each at a different stage of life, have lived their entire lives in Canada. If forced to relocate to Pakistan, the children would be uprooted from the life they have always known and forced to start completely afresh, a fact the Officer seems to ignore. They will have to adapt to a new society, a foreign education system and a new language of instruction. The Officer did not need additional material to understand this.

[38] I find that the Officer in this case was neither alert, alive nor sensitive to the children's situations and that the Officer's analysis minimized the children's best interests (*Baker* at para 75), thus rendering this decision unreasonable. I also find that the Officer's reasons directly contradict the evidence in the record with respect to the hardship the children would face in Pakistan, and that the Officer's conclusion about the BIOC thus fails to flow logically from the evidence.

[39] Having determined that the decision is unreasonable based on the Officer's flawed assessment of the Applicants' establishment in Canada and the BIOC, I find it unnecessary to address the Applicants' arguments with respect to the hardship they would face should they return to Pakistan.

V. **Conclusion**

[40] In my view, I find that the Officer failed to properly evaluate the evidence demonstrating the Applicants' establishment in Canada, and erred in the BIOC assessment with respect to the Applicants' four Canadian-born children. I therefore find the Officer's decision to be unreasonable. Accordingly, this application for judicial review is granted.

[41] No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-3282-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial reviewed is granted. The decision under review is set aside and the matter is referred back for redetermination.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3282-20
STYLE OF CAUSE:	AISHA ADIL AND ADIL RIAZ BUTT v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	OCTOBER 4, 2021
JUDGMENT AND REASONS:	AHMED J.
DATED:	DECEMBER 7, 2021

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