Federal Court  Cour fédérale

Date: 20220113

Docket: IMM-6076-20

Citation: 2022 FC 36

Ottawa, Ontario, January 13, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

SEMHAR HABTE TEWELDEMEDHN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Semhar Habte Teweldemedhn, seeks judicial review of a decision of a senior immigration officer (the "Officer") of Immigration, Refugees and Citizenship Canada, dated September 18, 2020, refusing her application for permanent residence in 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 Applicant submits that the Officer's decision is unreasonable and that the Officer erred in their assessment of the Applicant's establishment in Canada, hardship and the best interest of the child ("BIOC").

[3] For the reasons that follow, I find the Officer's decision is unreasonable. This application for judicial review is granted.

II. Facts

A. *The Applicant*

[4] The Applicant is a 33-year-old national of Eritrea. The Applicant has a three-year-old daughter ("Mia"), who is a Canadian citizen.

[5] The Applicant fled Eritrea and arrived in Italy in 2008. In 2009, the Applicant was granted subsidiary protection status in Italy. The Applicant states that it was very difficult for her to find gainful employment and become self-sufficient in Italy.

[6] In 2013, the Applicant made a refugee claim in the United States, which was denied. The Applicant remained in the United States until 2017.

[7] The Applicant entered Canada on November 16, 2017 and claimed refugee protection, which was denied by the Refugee Protection Division ("RPD") on December 7, 2018. The RPD

found that the Applicant was excluded under Article 1E of the Refugee Convention because of the subsidiary protection status she held in Italy.

B. *Decision Under Review*

[8] By letter dated September 18, 2020, the Officer refused the Applicant's H&C application. In the reasons for their decision, the Officer considered the Applicant's establishment in Canada, the adverse country conditions in Italy, and the BIOC with respect to Mia. While the Officer gave some positive weight to the factors advanced by the Applicant, they found that no factor attracted a significant level of weight and that overall, the Applicant had not established that her personal circumstances merit an exception on H&C grounds.

III. Issue and Standard of Review

[9] The sole issue in this application for judicial review is whether the Officer's decision is reasonable.

[10] Both parties agree that the above issue is to be reviewed on the reasonableness standard. 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).

[11] 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).

[12] 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). Flaws or shortcomings must be more than peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156, at para 36).

IV. Analysis

[13] Under subsection 25(1) of the *IRPA*, a foreign national who does not meet the requirements of the *IRPA* may be granted permanent residency if the Minister is of the opinion that the circumstances are justified under H&C considerations, including the BIOC. An H&C exemption is a discretionary remedy that requires the decision-maker to "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). The Applicant bears 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*

[14] The Officer gave modest favourable weight to the Applicant's establishment and ties in Canada. The Officer considered the Applicant's part-time employment at a retirement home since February 2019, as well as her strong relationships with her sister, brother-in-law, uncle and their families in Canada. The Officer found that the three years the Applicant had spent in Canada was not significant, and that the Applicant had not submitted any evidence of community engagement. The Officer noted that the Applicant is only employed part-time and that she had received social assistance payments in 2018. The Officer acknowledged the hardship of being separated from family in Canada, yet found that there was no evidence these relationships could not be maintained from a distance.

[15] The Applicant submits that the Officer failed to assess the establishment factor with a view of her personal history and circumstances, and contends that there is no requisite "level" of establishment that must be demonstrated for positive consideration (*Osun v Canada (Citizenship and Immigration)*, 2020 FC 295 at para 16).

[16] The Respondent submits that it was reasonable for the Officer to only give modest favourable weight to the Applicant's establishment based on her family ties and part-time employment, which was the only evidence put forward on this issue.

[17] I agree that it was reasonable for the Officer to give moderate favourable weight to the Applicant's establishment. I find that the Applicant's argument that there is no requisite 'level' of establishment for a positive consideration to be beside the point, since the Officer did attribute positive weigh to the establishment factors – albeit only moderately.

B. *Adverse Country Conditions in Italy*

(1) Hardship in Italy

[18] The Officer acknowledged evidence on the record of the xenophobia in Italy, including the difficulties migrants and refugees face when searching for housing. The Officer stated:

> […] while I did not find that she would face persecution, I did find that she would face discrimination if she returned to Italy. I note that this discrimination extends to employment, even though the law prohibits it.

[19] The Officer accepted that the Applicant had found it difficult to become self-supporting when she lived in Italy, yet emphasized the Applicant's resourcefulness in finding employment and housing in both Canada and the United States:

> I accept that the applicant has spent a significant amount of time outside of Italy, and that she stated that she had issues with finding employment and housing when she was first in Italy. However, I note that she has not presented evidence that the influx of refugees and the discrimination made it difficult for her to find a job. In addition, since she has left, she has worked five different jobs in three different cities in two different countries. She was also able to find housing in these cities. I have not been presented with

> evidence that her experience […] would not be transferable to the Italian job market.

[20] The Officer concluded that the Applicant had not demonstrated how potential discrimination would affect her ability to find a job or housing. The Officer also found that the Applicant had not provided sufficient evidence to show that she "would be unable to reintegrate herself into Italy, as she has integrated herself into Canada and the US."

[21] The Applicant submits that the Officer erroneously used the Applicant's ability to establish herself in the United States and Canada as a factor to mitigate the hardship she would face in Italy. The Applicant relies on *Singh v Canada (Citizenship and Immigration),* 2019 FC 1633 ("*Singh*") to argue that this type of analysis is flawed. In *Singh*, this Court found: "To turn positive establishment factors on their head is unreasonable. The officer cannot, as s/he does here, use the Applicants' shield against them as a sword" (at para 23). This Court in *Li v Canada (Citizenship and Immigration),* 2020 FC 848 also states: "This Court has warned against using the degree of establishment in Canada to undermine the hardship faced on removal" (at para 22, citing *Lauture v Canada (Citizenship and Immigration),* 2015 FC 336 at para 26).

[22] The Respondent submits that it was reasonable for the Officer to note that the Applicant had not presented evidence to link the discrimination faced by refugees in Italy to her issues related to finding a job and housing. The Respondent contends that it was also reasonable for the Officer to rely on the Applicant's previous work experiences to highlight the fact that there was no evidence to indicate that she would be unable to find work in Italy.

[23] Upon reviewing the evidence before the Officer, I do not find that they applied an empathetic approach to the hardship factor, as is required by the jurisprudence (*Damte v Canada (Citizenship and Immigration),* 2011 FC 1212 at para 34). I find that it was unreasonable for the Officer to only give "moderate favourable weight" to the hardship factor, despite recognizing the ways in which the Applicant faces discrimination in Italy. In particular, the evidence before the Officer shows that migrants, including women, have been targets of assault, and individuals of African descent face increased violence and racism in Italy. This is compounded by the fact that the Applicant must support a young child and would have no family support in Italy.

[24] I also agree with the Applicant that the Officer's hardship assessment unreasonably turned positive establishment factors on their head (*Singh* at para 23). In their reasons, the Officer accepts that the Applicant would face discrimination in Italy, and that this discrimination extends to employment. The Officer also accepts that the Applicant previously struggled to find work and housing when she lived in Italy. To then state that the Applicant could reintegrate herself in Italy as she did in Canada and in the United States and not face undue hardship is unintelligible. The Officer's conclusion also fails to take into account how the Applicant's circumstances have changed since she first lived in Italy: as a single mother, the Applicant is even more vulnerable now.

(2) Status in Italy

[25] In their reasons, the Officer acknowledged that they are not bound by the RPD's findings and distinguished the test for a refugee protection claim and the test for an application on H&C

grounds. However, the Officer gave considerable weight to the RPD's finding that the Applicant had not established that she could not resume her previous status in Italy.

[26] The Applicant submits that the Officer provided no analysis to support the conclusion that the Applicant could regain her subsidiary protection status in Italy.

[27] In my view, I find that the Officer conducted a reasonable assessment of the evidence before them to conclude that the Applicant had not met her onus to prove that she could not regain her status or that she would be afforded limited rights in Italy.

C. *BIOC*

[28] The Officer gave only moderate weight to the BIOC. The Officer found that Mia would be able to follow her mother to Italy and receive subsidiary protection status, which would offer her similar essential services as an Italian citizen.

[29] The Officer acknowledged that Mia was born in Canada, has never been to Italy, and likely does not speak Italian. The Officer also gave weight to the fact that Mia has extended family in Canada, and none in Italy. While accepting that Mia would face some adjustments, the Officer found that Mia is adaptable and has ample time to adjust to life, the culture, and the local school system in Italy, with help from her mother. The Officer wrote: "[…] children are more resilient and adaptable to changing situations especially at such a young age." Furthermore, the Officer noted:

> […] Mia would also most likely be faced with similar discrimination as is faced by her mother, and this warrants weight as well. It is possible that the applicant would have more difficulty finding a job in Italy than in Canada, and therefore their standard of living would be lower.

[30] Nonetheless, the Officer found that the purpose of section 25 of the *IRPA* is not "to make up the difference between the standard of living between Canada and other countries," and found that Mia's key interests, such as her health and well-being, would not be compromised in Italy.

[31] The Applicant submits that the Officer erred in determining that Mia would be conferred status in Italy because of her mother. I disagree. I find that the Officer assessed the evidence before them and came to a reasonable conclusion that the Applicant failed to demonstrate that Mia would be unable to acquire status in Italy, like her mother.

[32] The Applicant further submits that the Officer's BIOC analysis unreasonably focused on hardship rather than what is in Mia's best interest. The Applicant argues that, having found that Mia would likely face similar discrimination as her mother, the Officer diminished the impact this would have on Mia by determining that she is young and resilient. In *Singh*, this Court found it to be problematic to reason that "the younger the child, the less necessary a BIOC analysis becomes, because the greater their adaptability would be" (at para 31).

[33] The Respondent contends that it was reasonable for the Officer to determine that given her young age, Mia would be able to adapt to life in Italy. The Respondent states that the Officer correctly found that while Mia may have a lower standard of living in Italy if her mother has

difficulty securing employment due to discrimination, a higher standard of living in Canada is not a sufficient ground upon which to grant an H&C exemption.

[34] In their reasons, the Officer found that moving to Italy would not compromise Mia's "[…] access to a good education, a stable upbringing, and health care […]". I agree with the Applicant that this finding of a lack of hardship cannot substitute an analysis of what is in Mia's *best* interest (*Singh,* at para 30). The Applicant's submissions do not merely address how Mia would be afforded a higher standard of living in Canada. The Applicant also highlights the hardship associated with Mia's separation from her family in Canada, and how Mia's best interest depends on her mother's wellbeing, which would be affected by the risk of discrimination in Italy. In particular, a letter from the Applicant's sister and brother-in-law shows the extent of support the Applicant and Mia have received from family in Canada:

> […] Semhar stayed in our house until she got her own home. We are supporting Semhar emotionally during these tough periods. We had been the main support during her pregnancy time, delivery at the hospital, and post-natal. We are caring [for] her baby whenever she needs. We continue to comfort her during this bleak and stressful time. Our kids […] have bonded so well as first cousins.
>
> […] We believe that the best interest of her child Mia is to grow in Calgary, where she will receive the care and love of extended family, [and] would also get to know what it means to have cousins. […] We also worry [about] the difficulties Semhar and her child will face if they are deported to any country.

[35] I do not find that the Officer was sufficiently "alert, alive and sensitive" to Mia's best interests in their H&C analysis (*Baker* at para 75; *Kanthasamy* at para 39). In *Kanthasamy*, the Supreme Court stressed:

> [34] This brings us to the fact that s. 25(1) refers to the need to take "into account the best interests of a child directly affected". In *Agraira*, LeBel J. noted that these interests include "such matters as children's rights, needs, and best interests; maintaining connections between family members; and averting the hardship a person would suffer on being sent to a place where he or she has no connections" (at para 34, citing *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, at para 41).

[36] I find that the Officer's overall assessment of the H&C factors was unreasonable and fails to adequately account for all the compassionate factors raised in this case (*Dayal v Canada (Citizenship and Immigration)*, 2019 FC 1188 at paras 31-32; *Salde v Canada (Citizenship and Immigration)*, 2019 FC 386 at paras 23-24). The Officer gave "moderate weight" to all three factors assessed, yet concluded that they were insufficient to warrant H&C relief. In my view, I find that the Officer failed to adequately consider the Applicant's circumstance as a whole.

V. Conclusion

[37] The Applicant has shown that the Officer failed to consider and weigh relevant factors in addressing her application for permanent residence on H&C grounds. For these reasons, the decision must be returned for reconsideration by a different officer.

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

JUDGMENT in IMM-6076-20

THIS COURT'S JUDGMENT is that:

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

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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