Federal Court  Cour fédérale

Date: 20220329

Docket: IMM-6257-19

Citation: 2022 FC 424

Ottawa, Ontario, March 29, 2022

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

A K M FIROJ SHAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background and decision under review

[1] The applicant, A K M Firoj Shah, his wife, and their eight-year-old son who has been diagnosed with Autism Spectrum Disorder [ASD], are citizens of Bangladesh. The couple also have two young daughters (six years old and three years old), who were born in Canada. Mr. Shah is seeking judicial review of a decision of a senior immigration officer [Immigration Officer], dated October 4, 2019 [Decision], refusing his second application for permanent

residence on humanitarian and compassionate [H&C] grounds; ultimately the Immigration Officer examined and weighed the factors put forward by Mr. Shah yet was not satisfied that the factors warranted the granting of the requested exemption from the application of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act].

[2] After obtaining his bachelor's degree in accounting and working as a teacher in Dhaka, Mr. Shah moved to the United Kingdom [UK] in 2008, where he worked as an accounts trainee then as an accounts manager while earning his Masters of Business Administration from Liverpool John Moores University in Liverpool. He was joined by his wife in 2011 after they were married in Bangladesh; their son was born in the UK in 2013. In November 2014, the family arrived in Canada, where they claimed refugee protection; their claim was rejected by the Refugee Protection Division [RPD] in April 2015 for lack of subjective fear – Mr. Shah failed to claim asylum either in the UK or in the United States, where he had travelled at some point before coming to Canada – and for not demonstrating that Mr. Shah was a high profile individual who would be targeted by the Bangladeshi government as an anti-government blogger. The Refugee Appeal Division upheld the RPD's decision in September 2015.

[3] In November 2015, their son was diagnosed with moderate to severe ASD; since then, many professionals have been involved with his development, in particular, the young boy receives behavioural services from Toronto Autism Services, and the Toronto District School Board formulated an individual education plan for him.

[4] The family's first application for permanent residence based on H&C grounds, which was refused in September 2017, raised three main grounds: (1) discrimination and adverse country conditions upon return to Bangladesh; (2) their ties to Canada; and (3) the best interests of their children; in short, the officer at the time found that the family had not demonstrated that they would face hardship because of the employment situation in Bangladesh, that the establishment factors were insufficient to warrant an exemption from the Act and, putting aside the fact that the son was not reassessed following the initial diagnosis of ASD, there existed services in Bangladesh for children with autism and resources that could be accessed by the family to assist the young boy. The officer concluded that it would not be contrary to the children's best interests to return to Bangladesh and that the consequences of returning would not have a "negative impact . . . to the extent that an exemption is justified."

[5] The application for judicial review was dismissed in May 2018 (*Shah v Canada (Citizenship and Immigration)*, 2018 FC 537 [*Shah*]). In the end, Madam Justice Kane concluded that the officer did not breach the principles of procedural fairness by relying upon his own internet search with respect to the services in Bangladesh that could support their son with autism, did not apply an outdated approach to the H&C determination, and did not fetter his discretion or fail to meaningfully assess the best interests of the children affected by the decision.

[6] Mr. Shah and his family had also applied for a pre-removal risk assessment, which was refused in September 2017.

[7] In June 2018, Mr. Shah submitted a second H&C application – to which the present application relates – raising the same factors that had been raised in his first H&C application: establishment in Canada, best interests of the children and country conditions in Bangladesh. On the issue of establishment, the Immigration Officer reviewed the family's history in Canada and determined that, in particular, they demonstrated efforts to be self-sufficient and economically productive with a relatively continuous employment history, gave weight to the factors which were put forward by the applicants, recognized that some degree of integration into Canadian society has been established, however, found that such factors did not overcome the burden of establishing that an exemption for H&C considerations was warranted; in the end, the Immigration Officer found that the facts established by the couple were "not uncharacteristic activities undertaken by newcomers to a country" and reflected a "typical level of establishment for persons in similar circumstances." The Immigration Officer also took note of the refusal of the family's first H&C application and the fact that the family has "continued to accumulate time in Canada by their own volition" although being subject to a removal order, and concluded that they "continued to assume their establishment efforts being fully cognizant that their immigration status was uncertain and that removal from Canada could become an eventuality."

[8] On the issue of the best interests of the children – including the two Canadian-born daughters – Mr. Shah argued as he did during his first H&C application that issues such as the children's safety, health, education and overall well-being militate against being removed to Bangladesh. The Immigration Officer acknowledged that it may be difficult for the son, in particular, to leave his familiar environment in Canada because of his autism, however, the Immigration Officer noted that autism and other neurological disabilities are getting more

attention in Bangladesh, as set out in the UNICEF report that Mr. Shah had submitted, which is entitled *Situation Analysis on Children with Disabilities in Bangladesh* [UNICEF report] and which outlines "some of the extensive efforts that have been made by governmental and non-governmental organizations to aid children with ASD." The Immigration Officer also found that a specialized education and training centre exists in Dhaka for students with autism, confirming the availability of specialized support services in Bangladesh for the son that are similar to those that he is receiving in Canada. As for the young girls, they are not yet of school age but would have access to education in Bangladesh, although admittedly inferior. Given their young age, the Immigration Officer also found that, as with their brother, the girls are dependent on their parents and have not developed any significant ties to Canada. The Immigration Officer determined the following:

> I have considered the existing living environment of the three children in Canada relative to that offered in Bangladesh which could include inferior educational prospects, healthcare availability and security conditions. In doing so, I recognize that societal factors in Bangladesh may not be favourable relative to those in Canada for raising children. Canada could be considered a more desirable place to live for [the children]. It stands to reason that they may enjoy better future opportunities and find greater comfort in Canada than in Bangladesh. However, while important, this comparative sociological advantage that Canada offers is not in and of itself a determinative factor of this application.

[9] On the issue of the country conditions in Bangladesh, the Immigration Officer did not agree with the applicant's arguments that they would face hardship in Bangladesh because of poor prospects for employment and a low level of liveability. The Immigration Officer noted that Mr. Shah was "highly educated and mobile". The Immigration Officer stated:

> The applicants state their prospects for employment are poor in Bangladesh. With no viable job opportunities, the applicants would face poverty and would struggle to survive since the cost of living

> is high in Bangladesh. I realize that the prevailing economic climate in Bangladesh is poor relative to Canada. Although regrettable, I find that the process of re-integration and re-establishment when returning to a country whose economic conditions are less prosperous than those found in Canada to be an ordinary consequence of removal. While potentially not easy, tasks such as finding employment in the existing domestic labour market, obtaining housing and realizing financial security are incidental to this process.

[10] Finally, the Immigration Officer balanced all the factors and refused to grant an exemption under subsection 25(1) of the Act. The Immigration Officer stated:

> I have examined all the factors the applicants have put forth within this application. I have given little positive weight to the applicants' establishment in Canada and little positive weight to the best interests of their children. I have ascribed no positive weight to the factors in their country of origin. Considered cumulatively, I am not of the opinion that granting the requested exemption under subsection 25(1) of the Act is warranted.

II. Issue

[11] Mr. Shah's sole issue in this application for judicial review is whether the Decision was reasonable. Mr. Shah raises two specific questions:

a. whether the Immigration Officer erred in misinterpreting and misapplying the test for establishment in Canada;

b. whether the Immigration Officer ignored and misconstrued evidence when considering the best interests of Mr. Shah's son, in particular in the assessment of the availability of services for his son's medical condition in Bangladesh.

III. Standard of review

[12] The parties agree that the applicable standard of review for both issues is the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 25 [*Vavilov*]; see also *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44 [*Kanthasamy*]; *Khir v Canada (Citizenship and Immigration)*, 2021 FC 160 at para 27). I should also mention that an H&C exemption under subsection 25(1) of the Act is an exceptional and highly discretionary remedy entitled to deference (*Liang v Canada (Citizenship and Immigration)*, 2017 FC 287 at para 23; *Kanthasamy* at para 23).

IV. Analysis

A. *The Immigration Officer did not err when assessing the family's establishment in Canada*

[13] Mr. Shah raises two issues here; first, Mr. Shah argues that when the Immigration Officer found that the family demonstrated only "a typical level of establishment for persons in similar circumstances", she/he applied an impermissible exceptionality requirement (*Amer v Canada (Citizenship and Immigration)*, 2009 FC 713 at paras 11-13). Mr. Shah relies on *Apura v Canada (Citizenship and Immigration)*, 2018 FC 762 at paragraph 23; *Jimenez v Canada (Citizenship and Immigration)*, 2021 FC 1039 at paragraph 26; *Ndlovu v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 878 at paragraph 14; and *Sivalingam v Canada (Citizenship and Immigration)*, 2017 FC 1185 at paragraph 13; in short, Mr. Shah argues that "exceptional establishment" is an incorrect legal standard.

[14] Before me, Mr. Shah concedes that the word “exceptional” was not used by the Immigration Officer and that the use of the words “typical level of establishment” does not, in and of itself, constitute a heightened legal standard beyond that which is required by subsection 25(1) of the Act (*Jaramillo Zaragoza v Canada (Citizenship and Immigration)*, 2020 FC 879 at para 22 [*Jaramillo Zaragoza*]), however, in this particular case, he says that it does. Mr. Shah did not press the issue before me, but in any event, I was not persuaded that the Immigration Officer’s assessment of establishment was tainted by her/his reliance on an exceptionality test or that her/his words reflected a legal standard that is more stringent than the requirements of section 25 of the Act. After considering the evidence and the factors relevant to establishment, the Immigration Officer was not convinced that they weighed in favour of granting the relief that was sought, stating in particular that the activities undertaken by the family were “not uncharacteristic” and demonstrate a “typical level of establishment”. The Immigration Officer was not, in the words of Justice McHaffie in *Damian v Canada (Citizenship and Immigration)*, 2019 FC 1158 [*Damian*], using the words to import a legal standard higher than what was called for in *Kanthasamy*, but was rather using the words descriptively, and when doing so, was in keeping with the teaching in *Kanthasamy* (*Damian* at paras 20-21).

[15] On Mr. Shah’s second point, I do not think that the Immigration Officer failed to actually assess the evidence of establishment. Mr. Shah argues that the Immigration Officer actually constricted himself/herself in terms of the assessment, in other words, after setting out the factors on establishment and finding that they represented a “typical level of establishment”, the Immigration Officer prematurely ended the analysis on establishment by failing to assess whether the factors themselves leant themselves to humanitarian relief. This is different, argues

Mr. Shah, than the situation he faced the first time around in *Shah*, where Madam Justice Kane determined that the officer in that case actually did consider the degree of their establishment in the context of all the evidence. Here, Mr. Shah argues that the Immigration Officer failed to take that second step because she/he felt constrained by the standard of "typical" and went directly to the conclusion that the evidence did not warrant the relief sought; the Decision therefore lacks the transparency and intelligibility required by *Vavilov*. Mr. Shah points to my decision in *Jaramillo Zaragoza*, where I had concluded that the officer in that case had failed to assess whether the disruption of establishment in that case "weighs in favour of granting an exemption" (*Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813 at para 21).

[16] First of all, I have already determined that the Immigration Officer did not set a higher standard by the use of her/his language, thus I do not agree that she/he somehow felt constrained in any way. In addition, and unlike the situation in *Jaramillo Zaragoza*, there was in this case an assessment of the factors put forward by Mr. Shah. It should be noted that immigration officers can only address the factors that are put to them. Here, the submissions of Mr. Shah on the issue of establishment are skimpy at best; the real focus of his submissions before the Immigration Officer dealt with the situation of his son and the prospects of what he will face if he is to return to Bangladesh, as well as conditions in that country. Faced with little evidence on establishment, in particular on the consequences of disrupting that establishment, I can hardly fault the Immigration Officer for not detailing his/her analysis to the extent to which Mr. Shah argues should have been undertaken. Mr. Shah argues that he did set out for the Immigration Officer what he and his family have accomplished in Canada and therefore it was then up to the Immigration Officer to determine whether those accomplishments warrant any humanitarian

relief. I do not agree with Mr. Shah; it is not enough for an applicant to simply lay out his or her accomplishments and leave it thereafter simply to the officer to assess. Applicants must demonstrate why their degree of establishment, together with the challenges and hardships they may encounter having to leave Canada, is beyond what would normally be expected and why it would thus weigh in favour of the exemption to the application of the Act as sought (*Kanguatjivi v Canada (Citizenship and Immigration)*, 2018 FC 327 at paras 24, 52 [*Kanguatjivi*]); this is what Mr. Shah failed to do. Faced with the evidence, the Immigration Officer outlined the factors submitted by Mr. Shah, described them as being "typical" in the sense, as I read it, that they are not at the level required to constitute hardship that was unusual and undeserved or disproportionate if that establishment had to be disrupted, and gave them little positive weight when it came down to the determination as to whether the relief sought was warranted. There is no lack of a chain of analysis as argued by Mr. Shah. In the end, the Immigration Officer does in fact ascribe weight to the establishment factors, along with the other factors that would weigh in favour of granting the relief sought, and determined that, "considered cumulatively, [he/she was] not of the opinion that granting the requested exemption under subsection 25(1) of the Act is warranted." I find nothing unreasonable with such a finding.

[17] Nor do I find here, as I found in *Jaramillo Zaragoza*, that the Immigration Officer's analysis of establishment failed to consider the *Kanthasamy* factors such as equity, compassion, or the misfortune or hardship that Mr. Shah and his family will suffer if they must return to Bangladesh; there was consideration of the broader H&C factors – the evidence of hardship that was presented related to Mr. Shah and his wife supposedly not being able to find employment in Bangladesh and their children supposedly not having the same quality of life, in particular their

son, given his medical condition. The hardship relating to the employment situation in Bangladesh was considered as part of the country conditions, and the impact on the children, in particular Mr. Shah's son, was considered in the section on the best interests of the children. In reading Mr. Shah's submissions to the Immigration Officer, there is no doubt that his principal concern was the well-being of his family, in particular his children; I would not expect anything less of a father. However, Mr. Shah had to convince the Immigration Officer that a return to Bangladesh would have a greater adverse impact on him and his family, because of their particular circumstances, than on other applicants for permanent residence (*Kanthasamy* at para 15; *Kanguatjivi* at para 24); this he did not do and considering that the Immigration Officer is owed deference in identifying the level of establishment that is typical of persons who have resided in Canada for the same approximate length of time, I see no reason to disturb the conclusions on this issue (*Villanueva v Canada (Citizenship and Immigration)*, 2014 FC 585 at para 11; *Kaur v Canada (Citizenship and Immigration)*, 2017 FC 757 at para 69; *Bhatia v Canada (Citizenship and Immigration)*, 2017 FC 1000 at para 27).

[18] Mr. Shah then argues that the Immigration Officer compounded the problem regarding her/his assessment of establishment by stating the following:

> The male applicant is highly educated and mobile. He completed undergraduate studies in Bangladesh which was followed by a period of employment as a teacher in the country. He then travelled to and lived in the UK from January 2008 to November 2014 during which time he completed further studies at the graduate level and found employment. Considering his accomplishments, he has not shown that he could not use his education, skills and work experience to once again find employment to secure his livelihood in Bangladesh.

[19] Mr. Shah asserts that the Immigration Officer improperly turned what should have been a positive factor of establishment into a negative one, weighing against the granting of the exemption (*Sosi v Canada (Citizenship and Immigration)*, 2008 FC 1300 at para 18; *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 at para 26). I cannot agree with Mr. Shah. The paragraph of the Decision cited by him is found in the section regarding country conditions, not in the analysis on establishment, and is meant to address Mr. Shah's argument that he would not be able to find employment in Bangladesh.

B. *The Immigration Officer did not ignore or misconstrue the website evidence and evidence in the UNICEF report regarding the availability of services for Mr. Shah's son in Bangladesh*

[20] The Immigration Officer spelled out at length the extent to which Mr. Shah's son was receiving care and appropriate services in Toronto and recognized that he "will need help in managing his autism." However, he/she also determined that the available documentation on the subject "confirms the availability of specialized support services in Bangladesh for children with ASD."

[21] Before me, Mr. Shah conceded that such services are available in Bangladesh but argues principally that the extent of those services do not match up to the level that his son is receiving in Toronto and that there was no assessment by the Immigration Officer as to whether those services would be reasonably available to his son in Bangladesh. In particular, Mr. Shah submits that the Immigration Officer ignored portions of the information found on the website of the Society for the Welfare of Autistic Children [SWAC] and in the UNICEF report.

[22] The Minister reminds the Court that the best interests of the children are not necessarily determinative of the H&C application (*Kanthasamy* at paras 10, 35, 39; *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at paras 2, 8) and that the onus to demonstrate a sufficient basis on which to exercise positive discretion is on the applicant (*Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at paras 42-43; *Gesite v Canada (Citizenship and Immigration)*, 2017 FC 1025 at para 19).

[23] From the website, it is to be noted that the SWAC school is a not-for-profit special needs school run by parents that, as noted by the Immigration Officer, "provides intensive individualized instruction to children with autism" with "intensive one-on-one interaction between student and teacher . . ." The Immigration Officer also sets out at length sections of the website dealing specifically with the nature of the programs and the faculty of 51 teachers and professionals from various disciplines at the school.

[24] Mr. Shah argues that the Immigration Officer erred by assuming that the services offered at the school would be available to his son; the website demonstrates only limited enrolment for the services required by his son, with only two centres available: one in Dhaka, enrolling only 14 children, and one in Rangamati, enrolling only 15 children. The fees to attend the main centre in Dhaka are not specified and therefore it is not clear whether Mr. Shah would be able to afford to pay for the services, assuming that he will be called upon to do so. Although the website demonstrates the existence of some level of services for children with ASD in Bangladesh, Mr. Shah argues that it does not ensure that those services will be available to his son or, if they are, that they will be at the same level as what his son is receiving in Canada.

[25] The problem, says Mr. Shah, is that there was no evidence regarding the issues of accessibility and affordability that the Immigration Officer could assess. However, that is exactly the point; how can the Immigration Officer assess information or submissions that were not available or made before him/her? Going back to the submissions of Mr. Shah that were before the Immigration Officer, Mr. Shah himself identifies the SWAC school as being one of the numerous organizations and programs that have been set up since 2000 in order to address the special needs of autistic children. Although Mr. Shah underscores the limitations regarding programs for autistic children in Bangladesh, at no point does he assert that the programs that are provided are not reasonably accessible to his son – whether because of a waiting list or otherwise – or that he would not be able to afford the programs, which he seems to have access to at no cost as part of the public school system in Canada. Again, I can hardly fault the Immigration Officer for not addressing an issue that was not raised before him/her.

[26] As regards the UNICEF report, the Immigration Officer reviewed it, in particular the sections that highlight some of the "extensive efforts that have been made by the governmental and non-governmental organizations to aid children with ASD." The UNICEF report states that extensive efforts have been made by governmental and non-governmental organizations to aid children with ASD and other neurological disabilities and provides, *inter alia*, the following examples: the enactment of the Neurodevelopmental Disabled Persons Protection and Trust Act, which was passed in 2013 and provides for a trust to be set up for the benefit of people with neurodevelopmental disabilities; the launching of the Centre for Neurodevelopment and Autism in Children, the first training and research facility for paediatric neurodevelopment and autism-related disorders in Bangladesh, in 2011; the inclusion of autism and neurodevelopmental

disabilities in the five-year National Strategic Heath Plan for effective coordination of essential ASD screening, diagnostic and intervention facilities; and the setting up of non-governmental organizations such as SWAC, the Autism Welfare Foundation, the Autistic Children's Welfare Foundation, Creative World of Autistic Children, Smiling Children and Alokito Shishu, which are mostly run by parents.

[27] Mr. Shah argues that the Immigration Officer did not consider contrary evidence found in the UNICEF report as regards the availability of services for children with ASD (*Ocampo v Canada (Citizenship and Immigration)*, 2015 FC 1290 at para 5), and points to other pages from the UNICEF report where it is stated that the "laws and policies continue to discriminate, are slow to be implemented and are often not adequately funded", that "[o]verall, the rights of children with disabilities to quality health care are not yet realized" and that but "for the lucky few", the reality is that the "realization of rights for children with disabilities in Bangladesh is quite uneven."

[28] I note that this is general information meant to address disabled children generally and is not specific to children with ASD, however, in any event, I cannot accept Mr. Shah's assertions. There is a presumption that the Immigration Officer has reviewed the evidence put before him/her, and it is not for the Court to reweigh such evidence. In the end, it seems to me that Mr. Shah simply failed to provide sufficient evidence to establish that his son's best interests would be compromised to the extent of influencing the weighing of all factors in favour of the exemption under subsection 25(1) of the Act if forced to return to Bangladesh (*Shah* at para 74).

Again, I reiterate that the Decision is meant to reflect the Immigration Officer's assessment of the case presented to him/her.

[29] I have read Mr. Shah's 15-page submissions on his H&C application, which were deeply moving, however, it remains that the fact that living in Canada is more desirable for the children, or that the level of specialized services may be better in Canada than in Bangladesh, is not sufficient in and of itself to grant an H&C application (*Sanchez v Canada (Citizenship and Immigration)*, 2015 FC 1295 at para 18; *Vasquez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 91 at paras 41-44).

[30] Here, the Immigration Officer recognized that Mr. Shah's son required specialized behavioural services to manage his medical condition and found that services were available in Bangladesh; I see nothing unreasonable with such a finding. The Court cannot undertake an exercise of reweighing the voluminous record on the issue that was reviewed by the Immigration Officer, who determined, after reviewing the SWAC website, the UNICEF report and the other material submitted by Mr. Shah, that autism and other neurological disabilities are getting more attention in Bangladesh and that services to address such conditions are available in the very city where Mr. Shah is from in Bangladesh. I also do not agree with Mr. Shah that the Immigration Officer "fundamentally misapprehended or failed to account for the evidence before [him/her]" (*Vavilov* at para 126). The onus to demonstrate that services were not available to his son was on Mr. Shah; here, the documents were insufficient to establish that autism services are not available to his son in Bangladesh. On the contrary, the documents suggest that services that are the same as or similar to those that Mr. Shah's son is receiving in Toronto are available in

Bangladesh, in particular in Dhaka. I accept that there may be a difference in the level of those services, however, I am not persuaded that such a difference rendered the Decision unreasonable.

V. Conclusion

[31] I would dismiss the application for judicial review.

JUDGMENT in IMM-6257-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There are no questions for certification.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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