Federal Court  Cour fédérale

Date: 20220405

Docket: IMM-167-21

Citation: 2022 FC 430

Ottawa, Ontario, April 5, 2022

PRESENT: Madam Justice St-Louis

BETWEEN:

GEZIM VUSHAJ
MARIJE VUSHAJ
SAMANTHA VUSHAJ

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Mr. Gezim Vushaj, the Principal Applicant, his spouse, Ms. Marije Vushaj, and their minor daughter, Samantha Vushaj [collectively the Applicants] seek judicial review of the decision of a Senior Immigration Officer of Immigration, Refugees and Citizenship Canada [the Officer] dated January 6, 2021. The Officer denied the in-Canada application for permanent

residence the Applicants presented based on humanitarian and compassionate considerations [the H&C Decision] per subsection 25(1) of the *Immigration and Refugee Protection Act,* SC 2001, c 27 [the Act].

[2] For the reasons exposed below, I find the Applicants have not met their burden to convince me that the Officer's decision is unreasonable per the teachings of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 [*Vavilov*].

[3] As the Federal Court of Appeal stated at paragraph 35 of its decision in *Kisana v Canada (Citizenship and Immigration),* 2009 FCA 189 [*Kisana*], "[i]t cannot be disputed that the appellants had the burden of proving the claims made in their H&C application". In this case, the Applicants made scarce submissions in support of their H&C application, apart from citing case law, and adduced little or no evidence on certain issues, namely on the ones pertaining to the best interest of the children. The Applicants' submissions before the Court generally amount to asking the Court to reverse the burden so to impose on the Officer the burden to demonstrate that there exists insufficient H&C considerations and that the Applicants would not suffer hardship should they have to apply abroad, rather than the other way around.

[4] For the reasons exposed below, I will dismiss the application for judicial review.

II. Context

[5] As always, it is important to understand the facts and evidence that were before the Officer in order to assess their Decision. In this case, the Applicants are citizens of Albania. In February 2012, Mr. Vushaj entered Canada and claim refugee status. On November 27, 2013, Ms. Vushaj arrived in Canada and claimed refugee status, and on January 11, 2014, Samantha arrived and claimed refugee status as well. They based their claim on an alleged ongoing blood feud in Albania against the Lumaj family. The Applicants firstly left Albania for Italy in 2007, where Samantha was born, but returned to Albania, as they were afraid that the Lumaj family would be able to travel to Italy to harm them.

[6] On November 3, 2014, the Refugee Protection Division [RPD] denied the Applicants' claim and found the determinative issue to be credibility. The RPD found, on a balance of probabilities that the Applicants were not at risk from a blood feud if they returned to Albania.

[7] Ms. Vushaj and her daughter challenged the RPD decision separately from Mr. Vushaj. On March 13, 2015, the Refugee Appeal Division [RAD] denied Ms. Vushaj and her daughter's appeal, but on February 29, 2016, the Federal Court overturned the RAD decision on judicial review. The RAD issued a second decision, still dismissing the appeal, and on May 16, 2017, the Court denied leave against this second RAD decision.

[8] I pause to signal that on February 11, 2010, the RPD had found that two other members of the Vushaj family, Sokol and Drita, had established their claim for refugee status in Canada based on the blood feud.

[9] On April 1, 2015, the Applicants' presented their first application based on H&C consideration, and on September 20, 2016, it was denied. On March 28, 2018, the Applicants applied for a Pre-Removal Risk Assessment [PRRA] and on April 17, 2018, they presented their second application based on H&C considerations. These two applications were assessed concurrently, and on August 22, 2018, they were both denied. The Applicants filed applications for leave and judicial review of each decisions before the Court. They discontinued the challenge of the H&C decision, while on March 18, 2019, the Court denied leave to challenge the PRRA decision.

[10] On March 27, 2019, the Applicants filed a third application based on H&C considerations. In their application, they initially raised (1) the best interest of their daughters, Samantha and Sidni, whereby the Applicants submitted that Samantha was born in Italy and Sidni in Canada, that Samantha knows life only in developed countries, speaks English extremely well, has developed many friendships here in Canada and is doing well in school, attaching copy of two elementary report cards and they added that the children would be deprived of living in a very advanced country, and cited a number of case law; (2) their establishment particularly through their window cleaning company and involvement in the church; (3) the unusual, underserved or disproportionate hardship they would face based on their

risk in Albania because of the allegations of blood feud, and their fear of persecution based on the same allegations.

[11] On July 4, 2019, the Applicants updated their H&C application. They (1) indicated having had their second Canadian child on May 30, 2019; (2) included the adults' tax information; (3) submitted that recent documentary evidence indicated essentially that the Albanian economy was worsening and that there was a constitutional crisis; (4) a return to Albania would result in unemployment, merely attempting to get ahead in an economically destitute country; and (5) removal to Albania's economic purgatory would not be in the children's best interests and would result in unreasonable hardship, event without consideration of the risk factor.

[12] On January 25, 2020, the Applicants updated again their application and added (1) documents showing they operate a business, employ people and engage subcontractors; (2) information about Albania alleging that the political situation is essentially, in tatters; (3) that the Applicants now have two Canadian born children and one born in Italy; and (4) that the situation in Albania is such that the children would be sent to live in a lifelong state of poverty, deprived of reasonable educational, healthcare and other social programs.

[13] On July 11, 2020, the Applicants again updated their H&C application to outline that they run a business and enclosed an affidavit and documents. Mr. Vushaj indicated being concerned about the welfare of their children in Albania, alleging that it did not have the economy to support them or the healthcare system in the time of a pandemic.

[14] On January 6, 2020, their H&C was denied.

III. The Impugned Decision

[15] The H&C Decision is divided in 7 sections: (1) Background; (2) Establishment; (3) Ties to Canada; (4) Best Interest of the Children; (i) Access to Education and Healthcare in Albania; (5) Adverse Country Conditions; (6) Hardships in Applying abroad; and (7) Conclusion.

[16] On establishment, the Officer specified that the Principal Applicant and his spouse operate a business, Samantha Windows Inc. The Officer examined the Applicants' letters of support from contractors, but noted that they do no speak of adversities the organizations would be face without the contributions of the Applicants' business. The Officer also found that the Applicants submit little to no evidence that their employees will be unable to secure a work in a similar fashion, should the applicant cease to operate their business. Although the Officer wrote that they are giving the letters of a pastor and friends some positive consideration, they noted that they are general and speak little of the adversities. The Officer took into consideration the self-employment of the Applicants, but found little evidence on linguistic training or community involvement.

[17] Ultimately, the Officer was not satisfied that the Applicants' establishment in Canada was that of an exceptional nature to warrant an exemption.

[18] On the Applicants' ties to Canada, the Officer took into consideration the fact that the Principal Applicant's brother and family reside permanently in Canada as well as the Principal

Applicant’s mother currently residing in Canada. The Officer concluded that there are alternative modes of communication.

[19] On the best interest of the children, the Officer acknowledged the potential negative impact and disruption of daily routines on the children and gave this some consideration. However, the Officer found that the children will continue to have access to an emotional support system in Albania and noted that the Canadian children will continue to have all the rights of a Canadian citizen living abroad. The Officer found that the children would continue to be raised and nurtured by their parents and noted that returning to Albania would mean additional support and love from their maternal grandparents and other extended family members.

[20] On the access to education and healthcare in Albania, the Officer conducted their own independent research, cited a document on education and cited a report published by the World Health Organization on the Albanian health system and particularly on the system during the pandemic. The Officer found that little to no evidence has been submitted to indicate that the Applicants’ children would be unable to receive an education or health care in Albania. The Officer stated that, although the best interest of the Applicants’ children constitute the most compelling aspect of the application, the potential negative impact to the best interests of the Applicants' children that would be occasioned by a refusal of this application is not sufficient to warrant an exemption, either alone or when considered, globally, in conjunctions with establishment and other factors cited.

[21] On the aspect of adverse country conditions, the Officer noted that the Applicants' refugee claim before the RPD was rejected based on a lack of credibility and lack of well-founded fear of persecution and gave significant weight to the RPD's and the RAD's findings. The Officer stated that the Applicants have presented insufficient evidence to demonstrate that their extended family in Albania will be unable to support them or provide any security and that the Applicants will likely continue to have important and viable ties in Albania. The Officer found that insufficient evidence had been presented to overcome the findings of the RPD and the RAD.

[22] With regards to the hardship in applying abroad, the Officer noted the transferable skills of the Principal Applicant and found that, although the Applicants may earn less money in Albania, the adverse country conditions in Albania are generalized. They gave these considerations little weight.

[23] The Officer concluded that this application had insufficient evidence to warrant an exemption and is not satisfied that the humanitarian and compassionate considerations before me are justified under section 25 of the Act.

IV. Issues before the Court

[24] Before the Court, the Applicants argue that the Officer (1) applied the wrong legal test when assessing the best interests of the children in wrongly assessing the emotional support they would receive in Albania, in failing to consider the lost of the children's English skills and wrongly assessing the healthcare and education in Albania; (2) failed to engage with adverse

country condition evidence when assessing the best interest of the children; and (3) unreasonably discounted evidence of the Applicants' establishment in Canada.

[25] Given the applicable standard of review stated below, I would reformulate the issues as whether the H&C decision is reasonable.

V. Standard of review

[26] I cannot identify an issue of procedural fairness in the present case. The issue is whether the decision under review is reasonable and the standard of reasonableness applies (*Vavilov*). As explained in *Vavilov*, there is a presumption of reasonableness review in administrative decision-making. Previous case law confirms that the standard of review in H&C decisions is the standard of reasonableness (*Kisana* at para 18; *Williams v Canada (Citizenship and Immigration)*, 2020 FC 8 at para 20). The Court shall bear in mind the deference that is owed to decisions made under section 25(1) of the Act (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 64 [*Kanthasamy*]).

[27] As noted in a decision from this Court on an H&C application, "[t]he reviewing court examines the reasons, the record and the outcome and, if there is an explanation for the result obtained, it refrains from intervening" (*Braud v Canada (Citizenship and Immigration),* 2020 FC 132 at para 46 [*Braud*]). H&C decisions are "[…] highly discretionary, and a reviewing court should not find that an immigration officer's decision is unreasonable simply because it does not like the outcome and would have decided otherwise" (*Braud* at para 52).

[28] The H&C findings of an officer on an H&C decision are reviewed on the standard of reasonableness. The Supreme Court of Canada stated that "[…] the reviewing court asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). Indeed, "[…] 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).

VI. Issues

A. *Principles relating to an H&C application per section 25 of the Act*

[29] It is important to repeat that an H&C application remains an exceptional and extraordinary remedy, see *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 per Justice Gascon at paragraph 15 [*Semana*]:

> It has been consistently held that an H&C exemption is an exceptional and discretionary remedy (*Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 [*Legault*] at para 15; *Adams v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1193 [*Adams*] at para 30). This relief sits outside the normal immigration classes or refugee protection streams by which foreign nationals can come to Canada permanently, and it acts as a sort of safety valve available for exceptional cases. Such an exemption is not an "alternative immigration stream or an appeal mechanism" for failed asylum or permanent residence claimants (*Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 [*Kanthasamy FCA*] at para 40).

[30] In this connection, see also *Santiago v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 91 at paragraphs 27 and 28, *Canada (Public Safety and Emergency*

Preparedness) v Nizami, 2016 FC 1177 at paragraph 16, and *Joseph v Canada (Citizenship and Immigration)*, 2015 FC 904 at paragraph 24.

> (1) Did the Officer apply the wrong legal test when assessing the best interests of the children in wrongly assessing the emotional support they would receive in Albania, in failing to consider the lost of the children's English skills and wrongly assessing the healthcare and education in Albania?

[31] An Officer must be "alert, alive and sensitive" to the best interests of the children when making their H&C determination (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at 75). A decision will be unreasonable if the best interests of the children are not sufficiently considered (*Kanthasamy* at para 39).

[32] The fact that the situation might be better for the children, and indeed all of the Applicants, were they to remain in Canada, is not the test. As stated by Mr. Justice de Montigny in *Landazuri Moreno v Canada (Citizenship and Immigration)*, 2014 FC 481 at paragraph 37 [*Landazuri Moreno*]:

> In the absence of any personalized evidence to the contrary, the Officer could reasonably conclude that the best interests of the children were to remain in the care of their parents, and that the hardships associated with relocation could reasonably be expected to be minimal given their young ages. There was no evidence that the children would not be able to access health care and education in Columbia or Mexico, and it was certainly not sufficient to show that Canada is a more favourable country to live than the country of origin of their parents. It is also to be presumed that the Officer considered the report submitted by the Applicant, even though he did not specifically address it.

[33] In addition, "[t]here is no explicit test that must be followed by an Officer when considering the best interests of the children, so long as the Officer is alert, alive and sensitive to

the best interests of the children directly affected and the child's interests are well identified and defined after which they are to be examined with a great deal of attention in light of all the evidence" (*Babafunmi v Canada (Citizenship and Immigration)*, 2019 F 151 at para 70 citing *Semana* at para 24).

[34] This being said, the Officer responded to the submissions presented to them by the Applicants. In this case, the Applicants provided very limited submissions and documents in support of their allegation regarding the best interests of their children. Their submissions essentially consisted of one paragraph outlining the ages of the children and that the eldest child is in school, speaks English and has friends. The submissions included only a copy of two elementary report cards. The concluding paragraph mentions that the educational and health services in Albania are lagging. The update adds that a child was born in Canada.

[35] In light of these submissions, the Officer's assessment, having conducted their own research, is reasonable.

[36] I disagree with the Applicants that the Officer did not analyze that the closest relatives, uncle, aunt, grandparent, and cousins are in Canada. The Officer wrote a specific section addressing the Applicants' ties to Canada, considering the Principal Applicant's brother and mother, for instance. However, again there was no evidence to speak of the children's relationship with their family members in Canada. I will assume that the Officer erred in assuring that the uncle could visit Albania, but this has no impact on the reasonableness of the Decision, as it is not an essential element. As "[a]ny alleged flaws or shortcomings must be more than

merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep" (*Vavilov* at para 100).

[37] The Applicants cited *Yang v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1236 at paragraph 18 [*Yang*]. I here reproduce the paragraph:

> Second, the IAD relied on rationale and conclusions this Court has previously considered to be unreasonable concerning the future ability for the children to communicate with Mr. Yang, given that his wife and two children (all three being Canadian citizens) stated they would remain in Canada rather than face the prospect of living in China. The IAD's conclusion that the two children could communicate with their father electronically or see him once a year while on vacation did not adequately address the concerns that were raised in the evidence, including a detailed psychological assessment from Dr. Weir, which spoke at length about the impact on these two children, and others in analogous situations (by referring to studies of the long-term impacts of separation from a parent at a young age). Indeed, this Court has recognized that infants may simply be too young to establish a relationship with a parent via videoconference (see, for instance, *Oladele v Canada (Citizenship and Immigration)*, 2017 FC 851 at para 61).

[38] I note that the *Yang* decision was made in the context of a judicial review of an Immigration Appeal Division [IAD] decision on H&C considerations and not on a section 25 application. Moreover, my understanding of paragraph 18 is that IAD concluded that the children could communicate with their father electronically and that the Court warned against relationship with parent via videoconference. In the present case, the Officer does not suggest such a possibility: the Officer proposes that the children can maintain a relationship via electronic means with the extended family, not speaking of the parents. On the contrary, in this case, the children would be with their parents. I was not convinced the Officer's reasoning is flawed.

[39] The argument on language skills cannot succeed. In light of the whole decision, context and the clear assessment of the child's best interest by the Officer, not mentioning or assessing the English language skills fall within the scope of reasonableness, particularly given the dearth of evidence adduced by the Applicants.

[40] In short, the Applicants allege that the situation in Canada is better than the one in Albania (comparison of education and health care systems). I do not think that this argument can succeed. While the overall conditions in Canada can be better, this cannot mean that every applicant shall remain in Canada. Indeed, the Court stated that "[i]t is not enough to simply describe general conditions which are worse in the country of removal than conditions in Canada. The Applicant must show that he and the children would likely be subject to these conditions personally" (*Landazuri Moreno* at para 36).

[41] With regards to the Applicants' argument on higher risk of domestic and sexual violence, the Applicants have, again, submitted nothing in this regard as part of their H&C application, nor have they demonstrated that the children are subject to those conditions personally (*Landazuri Moreno* at para 36).

[42] The Court noted in *Garraway v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 286 at paragraph 18 that "[…] an officer cannot merely say that the interests of children were given significant weight but must demonstrate that this in fact was done". The Officer here demonstrated that they considered the evidence and the interest of the children.

[43] Overall, a reading of the Officer's reasons in the present case demonstrates that the decision regarding the children's interests was reasonable given the scarce submissions provided, and the lack of evidence adduced. The assessment was not simply based on a finding that the children would not be subject to hardship or that their basic needs would be met in Albania. Rather, the Applicants failed to present evidence regarding the best interests of the children, which would not be met by staying with their parents and moving to Albania as a family unit. I agree with the Minister that the Applicants' arguments cannot succeed, as they are not supported by an evidentiary basis.

(2) Did the Officer failed to engage with adverse country condition evidence when assessing the best interests of the children?

[44] The Officer noted the findings of the RPD and the RAD that the Applicants' evidence was not credible and that they are not at risk of a blood feud upon return to Albania. The Officer did consider the possibility that the family may be involved in a blood feud, but concluded that given that members of the Applicants' family continued to live in Albania without evidence of harm, the Applicants had failed to provide evidence to overcome the findings of the RPD and RAD. There was therefore no requirement for the Officer to consider the impact of any risk to the children in this context.

[45] Furthermore, the finding of a blood feud by the RPD in another file, albeit in relation to the Applicants' extended family, does not bound the Officer. In regards to the Applicants' claim, the RPD, the RAD and the Court all confirmed that the Applicants were not at risk because of a blood feud, and the Officer reasonably concluded that these findings had not been rebutted.

[46] As the Officer did not depart from the RPD's and RAD's reasoning, I agree with the Minister's position. I do not find the Officer's decision unreasonable on this matter.

(3) Did the Officer unreasonably discount evidence of the Applicants' establishment in Canada?

[47] Given that the Applicants had been in Canada since 2012, it was open to the Officer to assess their level of establishment in the context of all of the circumstances. In the Officer's assessment, the degree of establishment shown by the Applicants was not beyond what would be expected in these circumstances.

[48] It is inaccurate to state that the Officer, without more explanation, required an extraordinary level of establishment. The Officer provided explanations to their reasoning. The Officer used the word "exceptional" in their decision. However, as noted Justice Grammond in his decision *Boukhanfra v Canada (Citizenship and Immigration),* 2019 FC 4 at paragraph 29 [*Boukhanfra*], "[t]he mere use of the language of exceptionality, while unfortunate, does not direct the verdict". When reading the decision as a whole, I cannot find that the Officer used a "[…] boilerplate language intended to cover the officer's disregard of the facts establishing the strength of the ties" (*Boukhanfra* at para 29).

[49] The Officer did consider establishment in Canada and particularly the fact that the Applicants operate a business. However, as the Supreme Court of Canada noted in *Kanthasamy* at paragraph 98, deference should be given to the Officer's assessment of the factors taken into

account. This Court held in *Villanueva v Canada (Citizenship and Immigration)*, 2014 FC 585 at paragraph 11, that this assessment is appropriate for an officer when assessing establishment:

> Similarly, I see no error in the Officer's analysis of the Applicants' establishment in Canada. The Officer has the expertise and experience necessary to permit him or her to identify the level of establishment that is typical of persons who have resided in Canada for the same approximate length of time as the Applicants and, therefore, to use this as a yardstick in assessing their establishment. In that regard, the Officer stated that it is not uncommon for individuals to be employed, pay taxes, do volunteer work, participate in a church and in other activates, similar to those undertaken by the Applicants, upon moving to a new country. The Officer is to be afforded deference in this regard. There was also no error in the Officer's assessment of the Applicants' allegation of age discrimination. The Officer assessed the evidence that was submitted and stated why it was insufficient to support their submissions.

[50] Contrary to Applicants' submissions, the Officer did not consider the Applicants' success in Canada in a manner that counted against them. Rather the establishment was analyzed in context and in relation to the test that the Officer's was required to apply. Therefore, deference is owed to the manner in which the Officer weighed the evidence and the conclusions reached.

VII. Conclusion

[51] The Applicants have failed to establish how the Officer's decision was unreasonable. The application for judicial review will be dismissed.

JUDGMENT in IMM-167-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No question is certified;

3. No costs are awarded.

"Martine St-Louis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-167-21
STYLE OF CAUSE:	GEZIM VUSHAJ, MARIJE VUSHAJ, SAMANTHA VUSHAJ v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	MARCH 17, 2022
JUDGMENT AND REASONS:	ST-LOUIS J.
DATED:	APRIL 5, 2022

APPEARANCES:

Me Jeffrey L. Goldman	FOR THE APPLICANTS
Me Sally Thomas	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jeffrey L. Goldman Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT