Federal Court  Cour fédérale

Date: 20220506

Docket: IMM-748-21

Citation: 2022 FC 672

Ottawa, Ontario, May 6, 2022

PRESENT: Mr. Justice McHaffie

BETWEEN:

EUCILENE DE FREITAS ALVES
JOSE CARLOS MACEDO FARIA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Eucilene de Freitas Alves and Jose Carlos Macedo Faria seek judicial review of the refusal of their application for permanent residence on humanitarian and compassionate (H&C) grounds, filed pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. They argue the senior immigration officer examining their application did not reasonably consider the best interests of their son, a young child with autism spectrum disorder,

and how those interests would be affected by a return to Brazil. They also argue the officer unfairly considered new documents without giving them the opportunity to respond or comment.

[2] Having reviewed the officer's decision in the context of the submissions and evidence presented to them, I conclude the officer's assessment of the best interests of the child (BIOC) was reasonable and the process leading to the decision was fair. The applicants presented no evidence or submissions in their H&C application about how their son's condition would affect his ability to relocate with his parents or how their removal would affect him personally. In such circumstances, the officer was not obliged to assume that the child's condition would make removal with his parents materially more challenging or distressful for him. The officer's assessment of the evidence regarding the availability in Brazil of treatment and support services for children on the spectrum was also reasonable. While the officer did refer to new information obtained from the Brazilian government's website on this issue, the duty of fairness did not require that it be disclosed to the applicants, given the source and nature of the information.

[3] The application for judicial review is therefore dismissed.

II. Issues and Standard of Review

[4] The applicants raise two main issues on this application:

A. Was the officer's decision unreasonable due to their treatment of the BIOC?

B. Was the officer's decision unfair because it referred to evidence obtained by the officer to which the applicants were not given the opportunity to respond?

[5] The first of these issues goes to the merits of the officer's decision. There is no dispute that the merits of H&C decisions are reviewable on the standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44. The second issue is a matter of procedural fairness. On such issues, the Court must assess whether the procedure was fair having regard to all of the circumstances: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54.

III. Analysis

A. *The officer's treatment of the BIOC was reasonable*

[6] Ms. Alves is a citizen of Brazil. Mr. Faria holds both Venezuelan and Portuguese citizenship. The couple's son, who was three years old when their H&C application was assessed, is a Canadian citizen. He has been diagnosed with autism spectrum disorder, with language impairment, level 2-3 social communication, and restricted and repetitive behaviours. When he was assessed at the age of 18 months, he showed significant language delay and communication difficulties with limited receptive and expressive language abilities.

[7] Mr. Faria also has a daughter from an earlier relationship, who lives in Brazil with her mother.

[8] Ms. Alves and Mr. Faria argue the officer who considered their H&C application failed to be "alert, alive and sensitive" to their son's best interests, as required of a reasonable

H&C decision: *Kanthasamy* at para 38, citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 74–75. In particular, they argue the officer erred in (1) asserting the son was adaptable; (2) misapprehending evidence related to the availability of support services in Brazil; and (3) failing to articulate the suffering of the son that would result from a negative decision. None of these three arguments satisfies me that the officer's decision was unreasonable.

(1) The officer did not unreasonably characterize the son as adaptable

[9] The officer who refused the H&C application considered the BIOC with reference to both the couple's son and Mr. Faria's daughter. In their assessment of the best interests of the son, the officer referred to the child's diagnosis and Ms. Alves' concern that he would not receive the care he needs in Brazil or Portugal. They reviewed the country condition documents submitted regarding support for those on the spectrum, as discussed below. They then made the following statements:

> In accounting for [the son's] young age, I find that <u>he would adapt to new country conditions with less difficulty than older children with more ties to their community and surroundings</u>. I further note that in the medical assessments completed when diagnosing [him], it was recorded that the applicants speak Portuguese at home and that he had a <u>better understanding of Portuguese than English</u>. I find it likely that this would benefit his establishment in Portugal [or] Brazil. Although I am sympathetic that [the son] may experience a period of readjustment if he has to leave Canada, I find that the most important aspect of his best interests is to continue to be in the care and nurturance of his primary caregiver. I do not find that his best interest would be severely compromised in the event this H&C is refused.
>
> [Emphasis added.]

[10] The applicants argue it was unreasonable for the officer to conclude their son is "adaptable" given the medical information about his condition, including his intellectual, language, and social impairments. They also cite this Court's decision in *Bautista* for the principle that "starting with the question of whether [children] can adapt will almost invariably predetermine the outcome of the script" and render the H&C analysis devoid of meaning: *Bautista v Canada (Citizenship and Immigration),* 2014 FC 1008 at para 28.

[11] In my view, this argument reads more into the officer's reference to adaptability in the passage above than can reasonably be understood from the decision. As I read the passage as a whole, the officer assessed the impact on the son's best interests of having to leave Canada with his parents. In doing so, the officer considered the child's age and how that may affect the impact of departure. I do not read the officer to either reach a conclusion about the son's particular level of adaptability, or to find him to be more or less adaptable than children not on the spectrum. Rather, they simply note that at age three, the child would adapt to new country conditions with less difficulty than at an older age.

[12] I agree that a BIOC analysis cannot unduly rely on a child's adaptability or resilience or discount any potential hardship on grounds that a child can overcome it, particularly in the face of evidence regarding the impact of removal: *Bautista* at paras 28–30. However, this does not mean it is unreasonable for an officer to consider a child's age in assessing how an adverse H&C decision will affect their best interests. To the contrary, the BIOC principle must be "applied in a manner responsive to each child's particular age, capacity, needs and maturity": *Kanthasamy* at para 35.

[13] The applicants also submit the officer did not consider their son's autism spectrum disorder when considering the personal impact on him of having to relocate and re-establish in a new country. They argue his condition means he will be more affected by the change and that the officer unreasonably failed to recognize this. However, this argument, and the officer's reasons, must be read in light of the evidence filed and submissions made on the issue in the H&C application: *Vavilov* at paras 125–128. Nothing in the medical evidence indicates the son would have a heightened difficulty in relocating or changing environments due to his condition. The parents' H&C submissions similarly did not suggest this, focusing instead on the availability of treatment and support in Brazil.

[14] I appreciate counsel's submissions about the characteristics of autism spectrum disorder. However, I cannot agree that the nature of the condition as it manifests in a particular child of a particular age is something that can simply be the basis of "common sense inferences" as counsel suggests, or that the heightened impact of removal on this child in light of his condition is something that can be simply assumed or "reasonably deducted from the facts": *Sultana v Canada (Citizenship and Immigration)*, 2009 FC 533 at para 36. This is particularly so where the officer has not been asked to draw those inferences or deductions. Put another way, in the absence of any evidence or submission that relocation would be particularly difficult for the son because of his condition, I cannot fault the officer for not making assumptions to that effect based simply on the child's diagnosis.

[15] Similarly, I cannot accept the argument that the officer's reference to the son's understanding of Portuguese was unreasonable given his limited language skills. The officer

fairly concluded from the medical evidence that the son understood Portuguese better than English, and did not overstate his ability to communicate in that language. In my view, it was reasonable to consider this as an element in the overall assessment of the impact of an adverse decision on his best interests.

(2) The officer's assessment of the country condition evidence was reasonable

[16] As noted above, the applicants' primary submission with respect to their son's condition related to the difficulties in obtaining care and support in Brazil for those on the spectrum. They submitted country condition evidence in the form of a news article entitled "Treatment Pending: Legally Obligated to Treat Autism, Brazil Lacks Resources" and a 2015 pediatric journal article entitled "Autism in Brazil: a systematic review of family challenges and coping strategies." As reflected in its title, the news article speaks to legal protections in Brazil for those on the spectrum, while noting that a lack of resources means that accessing assistance can be difficult. The journal article speaks primarily to the strategies families employed to cope with emotional stresses faced by families caring for children with autism spectrum disorder, stresses that included "poor access to health services and social support."

[17] In their analysis of this evidence, the officer referred to the legal protections and the existence of support organizations referred to in the news article. While recognizing that "the availability of services may be asymmetric across the country," the officer noted Ms. Alves and Mr. Faria had demonstrated resilience and adaptability and found they could use these qualities to re-establish themselves in a location in Brazil or Portugal that had the services necessary to support their son.

[18] Ms. Alves and Mr. Faria criticize the officer's assessment of the country condition evidence as "cherry-picking" the positive aspects of the information and disregarding the negative thrust of the news article in particular. I cannot agree.

[19] On judicial review, this Court's role is not to reweigh or reassess evidence considered by an administrative decision maker, unless their evaluation of that evidence is unreasonable: *Vavilov* at para 125. I accept that it may be unreasonable for an officer to refer only to elements of country condition evidence that support one conclusion while ignoring important evidence to the contrary: *Awolope v Canada (Citizenship and Immigration)*, 2010 FC 540 at para 71; *Ponniah v Canada (Citizenship and Immigration)*, 2014 FC 190 at paras 13–17. However, while the officer's reasons in this case could have reviewed the country condition evidence more thoroughly, their overall assessment did not unreasonably ignore concerns about access to support for families with children on the spectrum.

[20] Contrary to the applicants' submission, I cannot agree that a fair reading of the information they submitted is that assistance and support for their son will be "expensive, scarce and difficult, if not impossible to obtain in Brazil" or that despite the legislation "such rights do not exist in practice." The news article the applicants rely on refers both to difficulties in accessing resources, particularly in some areas, and to no-cost services being provided by a government-funded autism awareness organization. On an overall review of the evidence, which itself presented only limited information on the state of autism treatment and support services in Brazil, I am unable to conclude that the officer's assessment represents a fundamental

misapprehension of the evidence or an unreasonably cherry-picked reliance on only the positive elements of the evidence.

[21] I am also not persuaded by the applicants' argument that the officer's reference to their resilience and adaptability shows the reasoning criticized in cases such as *Sosi*, *Lauture*, and *Jeong*: *Sosi v Canada (Citizenship and Immigration)*, 2008 FC 1300 at para 18; *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 at paras 21–26; *Jeong v Canada (Citizenship and Immigration)*, 2019 FC 582 at paras 49–53. In those cases, the officers effectively discounted positive evidence of establishment on the basis that the applicants' adaptability to Canada showed an ability to readapt to their country of origin. That was not what occurred in this case. Rather, the officer was assessing the availability in Brazil of treatment and support services for families with children with autism spectrum disorder. Having recognized that access to such services was unequal in different places in Brazil, the officer concluded Ms. Alves and Mr. Faria would be able to establish themselves in a location where services were available. This was a reasonable factor to consider in assessing the applicants' BIOC submissions.

(3) The officer did not unreasonably fail to articulate the son's suffering

[22] Ms. Alves and Mr. Faria argue the officer failed to articulate the hardship and suffering their son would face as a result of a negative H&C decision, and thereby failed to be alert, alive, and sensitive to his best interests: *Kolosovs v Canada (Citizenship and Immigration)*, 2008 FC 165 at paras 9–12, cited with approval in *Kanthasamy* at para 39. They argue that "few

can disagree" with the sufferings of a child on the spectrum that would flow from a negative decision and that it was unreasonable for the officer not to articulate this suffering.

[23] As with the applicants' argument regarding adaptability, this argument seeks to fault the officer for not reaching conclusions that were neither proposed to them nor supported by evidence. Although medical evidence was filed regarding the son's condition, nothing in that evidence attempts to address any particular suffering he would experience upon relocation owing to his condition. Nor did the statements filed by his parents, who know him better than anyone, identify any concern that he would be particularly affected by moving to Brazil because of his condition. Rather, the focus of their submission was on the availability of treatment and support in Brazil. In the absence of any evidence or submissions regarding this issue, I cannot conclude the officer's analysis was unreasonable for failing to articulate the son's suffering as a function of his condition.

[24] During oral argument, counsel suggested that the suffering in question flowed from the absence of available treatment and support in Brazil, and that their arguments about suffering were effectively a shorthand for the stated concern about the availability of those services. To the extent this is so, this argument effectively overlaps with the argument about the officer's assessment of the evidence regarding treatment and support in Brazil. As set out above, the officer reasonably assessed that evidence.

[25] I am therefore not satisfied that Ms. Alves and Mr. Faria have met their onus to identify sufficiently serious shortcomings in the officer's decision that would justify the Court's intervention: *Vavilov* at para 100.

B. *The officer's reference to additional evidence was not unfair*

[26] After reviewing the evidence on the availability of support services in Brazil for families with children on the spectrum, the officer made the following statement:

> A search of the website for the Government of Brazil returned several articles on autism awareness, World Autism Awareness Day Events, training, and the availability of support services such as Applied Behavior Analysis (ABA) in hospitals affiliated with the Ebserh Network. The Brazilian Hospital Services Company (Ebserh) is owned by the Ministry of Education and currently manages 40 federal university hospitals.

[27] In addition to the evidence submitted by the applicants, the certified tribunal record contains a printout of the website search result referred to in the passage above. It is a two-page list, in Portuguese, of links to articles and news items on the Brazilian government's website containing the Portuguese word "autismo." The record also contains a copy of an article from the government's website, also in Portuguese, pertaining to a hospital promoting "training for assistance in autism."

[28] Ms. Alves and Mr. Faria argue it was unfair for the officer to conduct their own internet searches and rely on the results without giving them an opportunity to make submissions on those documents, citing *Lopez Arteaga v Canada (Citizenship and Immigration)*, 2013 FC 778 at paras 21–26.

[29] I agree that consulting extrinsic sources or documents may create a risk of unfairness. However, this Court has recognized that the "reference to online resources does not automatically trigger a duty to provide the applicant with an opportunity to respond": *Shah v Canada (Citizenship and Immigration)*, 2018 FC 537 at para 34. In *Shah*, a case also involving internet research with respect to support services for children with autism, Justice Kane thoughtfully reviewed the jurisprudence regarding internet searches, including *Lopez Arteaga*, concluding that a "more contextual approach to the treatment of such evidence is required": *Shah* at paras 34–42.

[30] In assessing whether the duty of fairness requires the disclosure of such documents, the Court will consider factors such as (i) the source, including its reputability; (ii) the public availability of the documents and the extent to which the applicant could be reasonably expected to know of them; (iii) the novelty and significance of the information, including the extent to which it differs from other evidence; and (iv) the nature of the decision, including the applicant's allegations and the evidentiary burden: *Shah* at paras 35–38; *Majdalani v Canada (Citizenship and Immigration)*, 2015 FC 294 at paras 29–37; *Rutayisire v Canada (Citizenship and Immigration)*, 2021 FC 970 at paras 80–88. In considering such factors, the ultimate question remains whether the procedure was fair having regard to all of the circumstances: *Canadian Pacific* at para 54.

[31] In the present case, Ms. Alves and Mr. Faria expressly raised concerns about the availability of care and support for their son in Brazil. In support of this allegation, they filed limited evidence regarding the state of care in Brazil for those on the spectrum. The officer

reviewed information obtained not from an obscure or suspect source but from the website of the government of Brazil. As the Minister notes, that information did not conflict with the information put forward by the applicants, but rather supplemented it. I conclude that the duty of fairness did not require the officer to draw these documents to the attention of Ms. Alves and Mr. Faria to provide them with an opportunity to comment on them. I find the following language from paragraph 42 of Justice Kane's decision in *Shah* to apply equally in this case:

> The onus remained at all times on the Applicants to support their H&C application with sufficient evidence, including with respect to the BIOC. As in *Majdalani*, the evidence they provided in support of their view that their son could not be treated for autism in [the country of origin] − all of which was considered by the Officer − was not sufficient, and was equivocal. Further, the objective information gathered by the Officer regarding schools and other support services could have been easily accessed by the Applicants, just as they accessed the articles they submitted. Therefore, the Officer had no duty to share those articles with the Applicants.

IV. Conclusion

[32] The application for judicial review will therefore be dismissed. Neither party proposed a question for certification, and I agree that none arises in the matter.

JUDGMENT IN IMM-748-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-748-21
STYLE OF CAUSE:	EUCILENE DE FREITAS ALVES ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	FEBRUARY 16, 2022
JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	MAY 6, 2022

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