Federal Court  Cour fédérale

Date: 20240723

Docket: IMM-8231-22

Citation: 2024 FC 1160

Ottawa, Ontario, July 23, 2024

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

LINDA NWANNE HENRY-OKOISAMA
CHUKWUNONYELUM MICHELLE OKOISAMA
OTITOCHUKWU HENRY OKOISAMA
CHUKWUDUBEM DAVID OKOISAMA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants seek judicial review of a decision of a Senior Immigration Officer (the "Officer") of Immigration, Refugees and Citizenship Canada ("IRCC"), dated August 8, 2022, denying their application for permanent residence on humanitarian and compassionate ("H&C")

grounds pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). The Officer was not satisfied that the circumstances of the Applicants, adverse country conditions, or best interests of the children ("BIOC") justified an exemption under subsection 25(1) of the *IRPA*.

[2] The Applicants submit that the Officer committed several reviewable errors.

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

II. **Facts**

A. *The Applicants*

[4] Linda Nwanne Henry-Okoisama (the "Principal Applicant") and her three children (the "Minor Applicants") are citizens of Nigeria.

[5] On June 30, 2018, the Applicants arrived in Canada and submitted a refugee claim. In a decision dated October 8, 2020, the Refugee Protection Division ("RPD") refused their claim. In a decision dated April 26, 2021, the Refugee Appeal Division ("RAD") rejected the appeal of the RPD decision.

[6] Since 2020, the Principal Applicant has been working as a Support Worker. She has completed various certification courses in Canada since arriving, and has been an active member

of her community. She has been raising her children and making these efforts as a single mother, stating in her H&C application that there is "no chance of reconciliation" between her and the Minor Applicants' biological father.

[7] On October 18, 2021, IRCC received the Applicants' H&C application.

B. *Decision under Review*

[8] In a decision dated August 8, 2022, the Officer found that the H&C relief was not warranted pursuant to subsection 25(1) of the *IRPA*.

[9] On establishment, the Officer acknowledged the Principal Applicant's employment, finances, education, religious involvement, and community in Canada. However, the Officer concluded that separation was an inherent outcome of removal and that connections could be maintained from abroad, the Applicants obtaining establishment "at a level that would be expected of a person in their circumstances to obtain." The Officer gave establishment some weight.

[10] On the BIOC, the Officer found that the Minor Applicants' young age could see them return to Nigeria with their mother, that reunification with their family would be important in Canada or Nigeria, and that there was no evidence that the Minor Applicants' "basic needs" were not met before coming to Canada. The Officer acknowledged the Minor Applicants' connections in Canada but found that these bonds would not be severed by returning to Nigeria. The Officer gave the BIOC some weight.

[11] On the mental health concerns, the Officer found that the Principal Applicant's mental health concerns were not "debilitating or life threatening." The Officer found that the Principal Applicant was "an educated and resourceful woman; she was able to locate and procure assistance for her mental health needs from community organizations." The Officer gave the mental health considerations minimal weight.

[12] On adverse country conditions, the Officer largely deferred to the RPD and RAD decisions, finding little evidence to establish that the Principal Applicant or the Minor Applicants would face harm upon removal to Nigeria.

[13] For these reasons, the Officer was not satisfied that the Applicants' circumstances warranted an H&C exemption under subsection 25(1) of the *IRPA*—a provision, in the Officer's words, that attends to "extraordinary situations."

III. **Issue and Standard of Review**

[14] This sole issue in this application is whether the Officer's decision is reasonable.

[15] The standard of review on the merits of the decision is not disputed. The parties agree that the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25) ("*Vavilov*"). I agree.

[16] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13; 75; 85). 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 decision that is reasonable as a whole 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).

[17] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. 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 superficial or peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100).

IV. **Analysis**

A. *The decision is unreasonable*

[18] The Applicants submit that the Officer committed several errors. The Applicants maintain that the Officer erred by evaluating the Minor Applicants' basic necessities, rather than their best interests (*Ganaden v Canada (Citizenship and Immigration)*, 2023 FC 325 ("*Ganaden*")) and failed to account for their interests and circumstances in Canada. The Applicants submit that the Officer erred in the establishment analysis by requiring the Applicants to demonstrate "exceptional" establishment, misapprehending evidence, and by providing

inadequate reasons, especially with regard to the fact the Principal Applicant was a support worker during the pandemic (*Mohammed v Canada (Citizenship and Immigration)*, 2022 FC 1 ("*Mohammed*")). Additionally, the Applicants submit that the Officer erred in the adverse country conditions analysis, having failed to account for the Principal Applicant's circumstances and simply reproducing the RPD and RAD's decisions.

[19] The Respondent submits that the decision is reasonable. The Respondent submits that the Officer considered several factors in a "robust assessment" of the BIOC based on the evidence, the Applicants' submissions being largely "block quotes and recitation of general principles." The Respondent submits that the Applicants' submissions on the establishment analysis amount to a request to reweigh the evidence, that the Officer reasonably relied upon the RPD and RAD decisions in the adverse country conditions analysis, and that there was no issue with the Officer finding that the Principal Applicant could access mental health services in Nigeria. Additionally, the Respondent submits that the "onus is on an applicant to establish exceptional circumstances, including establishment, in order for an exemption under s. 25(1) of the *IRPA* to be warranted."

[20] I agree with the Applicants.

[21] The Officer's BIOC analysis is flawed. The Officer's finding that the Minor Applicants could "reasonably accompany" the Principal Applicant to Nigeria is an unconvincing disguise for a finding that the Minor Applicants could adapt to life in Nigeria. This "adaptability" approach is unsound. In my colleague Justice Norris's words, "[t]he life can be hard but children are resilient approach taken by the officer is the antithesis of the compassion that is meant to be shown under section 25(1) of the *IRPA*" (*Reducto v Canada (Citizenship and Immigration)*, 2020

FC 511 at para 53; see also *Singh v Canada (Citizenship and Immigration)*, 2019 FC 1633 ("*Singh*") at para 31).

[22] Furthermore, I agree with the Applicants that the Officer erred by finding that there was no evidence that the Minor Applicants' "basic or educational needs were not met prior to their arrival to Canada or that they would not be able to access social services upon their return to Nigeria." The Officer did not qualify this finding with any further analysis of the Minor Applicants' best interests in Nigeria. The Officer therefore analyzed only the Minor Applicants' basic interests, not their best interests. This too is an error (*Ganaden* at para 16).

[23] At the hearing for this matter, counsel for the Respondent argued that the Officer was "alert, alive, and sensitive" to the BIOC because the Officer stated in the decision that they were alert, alive and sensitive to the BIOC.

[24] I have cautioned against robotically assessing a checklist of factors in H&C decisions *(Salde v Canada (Citizenship and Immigration)*, 2019 FC 386 at paras 22-26). An officer saying that they have been "alert, alive, and sensitive" to a child's best interests does not make it so. The reasons must reflect alertness, aliveness, and sensitivity to children's best interests in accordance with the evidence presented. An incantation of "I have been alert, alive, and sensitive to the best interests" will not suffice (see *(Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 ("*Kanthasamy*") at para 39).

[25] The reasons given by the Officer here, as provided above, are plainly erroneous with respect to the law. They are also made without any semblance of justification in relation to the

evidence provided about the Minor Applicants' interests, including the fact that there was no evidence that the Minor Applicants would wish to live with their father in Nigeria. The Officer relying upon family reunification as rationale for this finding—a misunderstanding of this purpose in paragraph 3(1)(d) of the *IRPA*, which provides for family reunification in Canada—is thus unjustified in relation to its legal and factual constraints (*Vavilov* at para 101) and a disturbing use of an otherwise admirable feature of Canadian immigration law.

[26] Given the prime importance of the BIOC analysis in H&C applications *(Kanthasamy* at para 38, citing *Baker v Canada (Minister of Citizenship and Immigration*), 1999 CanLII 699 (SCC), [1999] 2 SCR 817 ("*Baker*") at paras 74-75), the errors identified in the Officer's BIOC analysis are sufficient to render the Officer's decision unreasonable as a whole *(Vavilov* at para 100).

[27] But there are further aspects of the Officer's decision that strikes at its reasonableness. The first is the Officer's failure to acknowledge the Principal Applicant's role as an essential worker during pandemic. I have ruled on what frontline immigrant workers are owed for what they did for this country during the pandemic (*Mohammed* at paras 42-43). The Applicants explicitly noted that the Principal Applicant worked as a personal support worker during the pandemic in their H&C submissions. Aside from merely acknowledging that the Principal Applicant worked as a support worker during the pandemic, I find that the Officer's failure to meaningfully grapple with this key submission is an error and sees the decision lack justification in light of its legal and factual constraints (*Vavilov* at paras 101, 127-128).

[28] The Officer also found that the Applicants' establishment was "typical" for people in their circumstances. This Court has recently found this approach to establishment analyses to be an error (*Cheng v Canada (Citizenship and Immigration)*, 2024 FC 560 ("*Cheng*") at paras 19-21). Moreover, the Officer finding the Principal Applicant to be a resourceful and educated woman turned "positive establishment factors on their head," in my colleague Justice Diner's words (*Singh* at para 23). This is unreasonable.

B. *Exceptionality in H&C Decisions*

[29] Both counsel made arguments about whether the Applicants had to prove that their circumstances were "exceptional" to justify an H&C exemption.

[30] On one side of the steady stream of H&C cases that this Court has published lies a duo of cases, both published in 2019 (*Huang v Canada (Citizenship and Immigration)*, 2019 FC 265 ("*Huang*"), followed shortly afterwards by *Bakal v Canada (Citizenship and Immigration)*, 2019 FC 417 ("*Bakal*")). These cases equate the term "exemption" with "exceptional," whereby one's circumstances must be "exceptional" to access the "exception" of the H&C remedy (*Huang* at para 20; *Bakal* at para 14).

[31] On the other bank of the H&C jurisprudential stream lies a long list of cases that have been published in the five years since *Huang* and *Bakal*. These cases essentially interpret "exemption" as synonymous with "exception," and not "exceptional."

[32] It is useful to situate us by returning to the H&C shores as envisioned by the Supreme Court in *Baker*, and then *Kanthasamy*.

[33] I will begin with the words of the statute. In *Baker*, the relevant H&C provision read:

> The Governor in Council may, by regulation, authorize the Minister to exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations. (at para 7)

[34] At the time the Supreme Court considered subsection 25(1) in *Kanthasamy*, the provision read:

> 25.(1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected. (at para 10)

I note that the pith and substance of the provision was the same in the Supreme Court's analysis of H&C law in 1999 when it decided *Baker* pre-*IRPA* and in the current iteration of the *IRPA*; specifically, that the focus of the provision was considering whether humanitarian and compassionate considerations justified an exemption from immigration laws (see *e.g.*, *Kanthasamy* at paras 17, 19-21).

[35] Thus, despite some revisions (including the subsequent implementation of *IRPA* in 2002) over the past 23 years of jurisprudence that has flown under the bridge erected by *Baker*, *Baker* remains good law—particularly in the area of procedural fairness, but also on the H&C exemption. Justice L'Heureux-Dubé, writing for the majority in *Baker*, stated at paragraph 15:

> In addition, while in law, the H&C decision is one that provides for an exemption from regulations or from the Act, in practice, it is one that, in cases like this one, determines whether a person who has been in Canada but does not have status can stay in the country or will be required to leave a place where he or she has become established. It is an important decision that affects in a fundamental manner the future of individuals' lives. In addition, it may also have an important impact on the lives of any Canadian children of the person whose humanitarian and compassionate application is being considered, since they may be separated from one of their parents and/or uprooted from their country of citizenship, where they have settled and have connections. [Emphasis in original]

[36] When the H&C provision was considered some 15 years or so later in *Kanthasamy*, Justice Abella wrote the majority opinion, noting at paragraphs 19 and 21 that:

> The humanitarian and compassionate discretion in s. 25(1) was, therefore, like its predecessors, seen as being a flexible and responsive exception to the ordinary operation of the Act, or, in the words of Janet Scott, a discretion "to mitigate the rigidity of the law in an appropriate case".
>
> […]
>
> But as the legislative history suggests, the successive series of broadly worded "humanitarian and compassionate" provisions in various immigration statutes had a common purpose, namely, to offer equitable relief in circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another": *Chirwa*, at p. 350. [Emphasis added]

[37] With these cases in mind and the reading of the terms “exemption” and “exception” obvious, in my view Parliament did not intend that applicants had to clear an “exceptionally” high bridge to obtain H&C relief from the regular requirements of entry or admissibility to Canada. Requiring this emasculates the *IRPA* remedy, unduly setting it apart from its dual descriptors of “humanitarian and compassionate,” and in so doing, removing any realistic possibility of the provision’s words and *Kanthasamy*’s promise that officers have the discretion to place a bridge above applicants’ troubled waters.

[38] Another way of visualizing the concept is as a hurdle that must be cleared: The *IRPA* is a series of standards someone must meet before they may pass through the figurative immigration door and obtain Canadian status, whether temporary or permanent. Without this status, some must first clear a hurdle that prevents them from walking through that door.

[39] In my view, *Huang* and *Bakal* elevate the bridge, or the hurdle, to an apotheosis of immigrant achievement: It is raised to such an exalted height that the vast majority of applicants could rarely clear it, particularly in view of where they start from, given the very fact that H&C applications will involve some non-compliance with immigration laws in the first place (*Augusto v Canada (Citizenship and Immigration)*, 2022 FC 226 at para 23). Conflating the remedy as an “exception” with one’s circumstances as needing to be “exceptional” is done despite subsection 25(1)’s clear wording, flexible operation, and humanitarian and compassionate purpose—not to mention its interpretation by Canada’s apex court.

[40] I mentioned before that there are two lines of thought on this issue. *Huang* and *Bakal* have characterized the holding that one's circumstances do not need to be "exceptional" to access the remedy promised by subsection 25(1) of the *IRPA* as a suggestion, "flying in the face" of other jurisprudence, and inaccurate (*Huang* at para 21; *Bakal* at para 14).

[41] I disagree. An individual's circumstances do not need to be "exceptional" to warrant H&C relief (*Apura v Canada (Citizenship and Immigration)*, 2018 FC 762 at para 23; *Damian v Canada (Citizenship and Immigration)*, 2019 FC 1158 at para 21; *Jimenez v Canada (Citizenship and Immigration)*, 2021 FC 1039 at para 27; *Zhang v Canada (Citizenship and Immigration)*, 2021 FC 1482 ("*Zhang*") at paras 1-2, 24-28; *Peter v Canada (Citizenship and Immigration)*, 2022 FC 208 at para 48; *Subar v Canada (Citizenship and Immigration)*, 2022 FC 340 at para 28; *Usiayo v Canada (Citizenship and Immigration)*, 2022 FC 509 at paras 19-22; *Rahbarnia v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 592 at para 36; *McDonald v Canada (Citizenship and Immigration)*, 2022 FC 394 at para 23; *Asu v Canada (Citizenship and Immigration)*, 2022 FC 661 at para 11; *Pimentel Dos Santos v Canada (Citizenship and Immigration)*, 2022 FC 765 at para 22; *Helalifar v Canada (Citizenship and Immigration)*, 2022 FC 1040 at para 21; *Nonso Ajah v Canada (Citizenship and Immigration)*, 2022 FC 1061 at paras 21-22; *Sukan v Canada (Citizenship and Immigration)*, 2023 FC 45 at para 26; *Farhat v Canada (Citizenship and Immigration)*, 2023 FC 1427 at para 29; *Wray-Hunt v Canada (Citizenship and Immigration)*, 2023 FC 1687 at para 17; *Solis Olvera v Canada (Citizenship and Immigration)*, 2023 FC 1760 at para 24; *Trinh v Canada (Citizenship and Immigration)*, 2024 FC 66 at para 27; *Rukhaber v Canada (Citizenship and Immigration)*, 2024 FC 294 at para 17; *Wahyudini v Canada (Citizenship and Immigration)*, 2024 FC 350 at para 25; *Hugnu v Canada (Citizenship*

and Immigration), 2024 FC 540 at para 31; *Galindo Caballero v Canada (Citizenship and Immigration)*, 2024 FC 642 at para 8; *Cheng* at para 21).

[42] There is good reason for this holding. In fact, there are several—see immediately above, as well as, for example, my colleague Justice Zinn's decision in *Zhang* at paragraphs 15-26. I would add the following.

[43] First, I go back to first principles, and the jurisprudence by which this Court is bound. *Baker* and *Kanthasamy* both emphasized, as we have seen in the extracts quoted above, that the approach must consider the words of the statute. As noted by Justice Abella in paragraph 17 of *Kanthasamy*, citing *Baker*:

> [The] words [humanitarian and compassionate considerations] and their meaning must be central in determining whether an individual [humanitarian and compassionate] decision was a reasonable exercise of the power conferred by Parliament. The legislation and regulations direct the Minister to determine whether the person's admission should be facilitated owing to the existence of such considerations. They show Parliament's intention that those exercising the discretion conferred by the statute act in a humanitarian and compassionate manner. This Court has found that it is necessary for the Minister to consider [a humanitarian and compassionate] request when an application is made.
>
> […]
>
> Similarly, when considering it, the request must be evaluated in a manner that is respectful of humanitarian and compassionate considerations. [Emphasis deleted; citation omitted; para 66]

[44] Thus, as the Supreme Court stated in *Baker* and then emphasized in *Kanthasamy*, an H&C request must be evaluated and a decision-maker must exercise the discretion conferred by Parliament by taking into account both "humanitarian and compassionate considerations".

[45] A "humanitarian" approach calls for an approach that recognizes a person's humanity. Requiring a person demonstrate that their circumstances are "exceptional" does not accord with this approach. The implication of this position is that the failure to meet this requirement is a designation of one's circumstances as not exceptional—as unexceptional. Aside from the subjectivity bound up in the word "exceptional," no one—including an immigration officer, this Court, or others—can meaningfully commit to another's humanity and act with compassion when they view others' circumstances through the lens of "exceptional" or "unexceptional," "extraordinary" or "expected," "remarkable" or "banal". This approach amounts to evaluating an H&C application through a test that is disjunctive, analytically unsound, and antithetical to the very words of the exemption prescribed by section 25(1) of the statute.

[46] The Officer's decision in this matter described section 25 of the *IRPA* as dealing with "extraordinary situations." This is the same as finding that the Applicants have to prove that their circumstances were "exceptional" to warrant an H&C finding. The Officer's decision thus errs, once again, and must be quashed.

[47] In sum, an exception from the usual requirements of the *IRPA* under section 25(1) need not circumstances that are "exceptional." It is an error to require that one's circumstances are so. Rather, the exemption must be justified through the lens set out by the Supreme Court in *Kanthasamy* and *Baker*, both of which place primacy on the humanitarian and compassionate

precepts of the discretionary power conferred by this provision. To elevate that discretion to one of exceptionality is far removed from what these precepts have promised, and still promise. Once more, I reject it.

V. **Conclusion**

[48] This application for judicial review is granted. The Officer's decision contains several significant errors that render the decision unreasonable (*Vavilov* at para 100). No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-8231-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.

2. The underlying decision is quashed and the matter remitted to a different officer for redetermination.

3. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8231-22
STYLE OF CAUSE:	LINDA NWANNE HENRY-OKOISAMA, CHUKWUNONYELUM MICHELLE OKOISAMA, OTITOCHUKWU HENRY OKOISAMA, AND CHUKWUDUBEM DAVID OKOISAMA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JULY 2, 2024
JUDGMENT AND REASONS:	AHMED J.
DATED:	JULY 23, 2024

APPEARANCES:

Anna Davtyan	FOR THE APPLICANTS
Nicole John	FOR THE RESPONDENT

SOLICITORS OF RECORD:

EME Professional Corp Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT