Federal Court  Cour fédérale

Date: 20170718

Docket: IMM-4624-16

Citation: 2017 FC 694

Ottawa, Ontario, July 18, 2017

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

MARSELA BACO AND EDMOND BACO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants, Edmond and Marsela Baco, are a married couple who are citizens of Albania. They arrived in Canada on May 5, 2012 and, upon arrival, made a claim for refugee protection which was refused on April 29, 2014. After their failed claim for refugee protection, the Applicants applied for permanent residence on humanitarian and compassionate [H&C] grounds, but that application was refused on September 19, 2014. Their application for leave to apply for judicial review of the H&C decision was denied on March 3, 2015. The Applicants

then submitted a second H&C application on November 26, 2015, but this too was refused on June 20, 2016. After the Applicants applied for leave to apply for judicial review of the second H&C decision, the parties consented to the H&C application being re-determined by a different officer. In a letter dated October 28, 2016, a Senior Immigration Officer informed the Applicants that their H&C application was not granted. The Applicants have now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [*IRPA*], for judicial review of the Officer's decision denying their request for permanent residence.

I. The Officer's Decision

[2] After reviewing the Applicants' immigration history, the Officer addressed the H&C grounds raised by the Applicants, namely, their establishment in Canada, their risk of return to Albania, and the best interests of their two young children who had been born in Canada.

[3] The Officer reviewed the Applicants' employment and involvement in their community since their arrival in Canada. The Officer accepted that the Applicants "have demonstrated a measure of establishment in Canada" but later found that their "degree of establishment is of a level that was naturally expected of them… [and] … not… beyond the normal establishment that one would expect the applicants to accomplish in their circumstances." The Officer noted that "a person who is in Canada making a claim to refugee status is afforded the tools such as employment and student authorizations which … allow them to be self-sufficient and to integrate into [the] Canadian community." The Officer stated:

> I do not give significant weight to the applicants' length of time or establishment in Canada. In addition, it is understandable that the applicants would like to remain in Canada; however, they have not

> established that severing their ties and employment in Canada justifies granting an exemption under humanitarian and compassionate considerations.

[4] The Officer also acknowledged that, while the Applicants had developed close relationships with people in their community, they could nonetheless maintain these relationships if returned to Albania. The Officer stated relationships are "not bound by geographical locations and while the hardship of being physically separated from friends here in Canada will cause some dislocation, it does not mean that they will be unable to contact one another."

[5] The Officer then addressed the Applicants' submissions that they will suffer hardship if they return to Albania because of a blood feud between the Baco and Pango families. The Officer referenced the Applicants' argument about Mr. Baco, and eventually his sons, facing self-confinement as well as the certificate from the Municipality of Tirana verifying the blood feud between the families. The Officer noted that he had conducted his own independent research of country conditions in Albania and also reviewed information from the Research Directorate of the Immigration and Refugee Board about blood feuds. Based on the Officer's review of this evidence, the Officer found that:

> …the applicants can safely relocate to the city of Fier, Albania. The female applicant's parents and sister currently reside there. According to the evidence provided, the conflict occurred in Sharre, Tirane. I have been provided insufficient evidence that the Pango family would be able to locate the applicants in Fier and harm them. I note that the male applicant's parents and brother currently reside in Berat, Albania and insufficient evidence has been provided to indicate that they have been targeted or harmed by the Pango family. … I accept that returning may pose some challenges and that there will be a period of adjustment. However, the applicants would not be returning to an unfamiliar place, language or culture. …the male applicant's parents and brother continue to reside in Berat and insufficient evidence has been

> adduced to establish that they are forced to live in self-confinement and have been unable to secure employment as a result of this blood feud. Taking into consideration all of the facts of this case as well as the documentary material, I find that the applicants can safely return to Fier, Albania and secure employment there such that would allow the male applicant to provide for his family. Also, they would have the assistance of the female applicant's parents and sister in Fier. I have been presented insufficient evidence that they would be unwilling or unable to assist the applicants in resettlement and re-establishment into community and society in Fier, Albania.

[6] After finding that the Applicants could safely relocate to the city of Fier, the Officer then discussed the Albanian government's steps to address blood feuds in Albania. These steps include better policing, specific criminalization of blood feuds, and the creation of specialized police units. The Officer referenced various sources as to how the Albanian State Police and other authorities were implementing efforts to address criminal acts of murder for blood feuds. Based on this information, the Officer concluded that:

> … if the applicants encounter any problems in Albania from anyone including the Pango family, they can seek the assistance of the police, judicial system or non-governmental organizations… Also as indicated previously, I have been provided insufficient objective evidence that the Pango family has tried to harm the male applicant's family namely, the male applicant's father or brother or that they have been forced to live in self-confinement as a result of this ongoing blood feud. The applicants also have the option of relocating to Fier, Albania where they can secure employment, provide for their family and be reunited with the female applicant's parents and sister.

[7] With respect to the best interests of the Applicants' two children, the Officer reviewed the Applicants' submissions that their children will be forced to live in self-confinement and, even if they are not forced to live in self-confinement, they will still be faced with trying to obtain education in the Albanian school system which falls significantly short of Canadian

standards. The Officer acknowledged the difference in living standards between Canada and Albania, and how many countries do not have the same social, financial, educational, or medical supports as Canada. The Officer concluded, however, that Parliament's purpose in enacting section 25 of the *IRPA* was not "to make up for the difference in standard of living between Canada and other countries." The Officer noted there was no evidence that the Applicants' parents and siblings who reside in Albania would be unwilling or unable to assist with their resettlement and re-establishment. The Officer also noted that the Applicants' children are young and therefore resilient and adaptable to changing situations, and thus could successfully integrate into Albanian society despite some adjustment. The Officer noted that the children had spent their entire lives in Canada, but considering their young age, the Officer said they "lack the awareness to distinguish and/or decipher their surroundings whether it is Canada or Albania" and "they had not yet entered into the school system nor established friendships in Canada that, if severed, would be contrary to their best interests."

[8] The Officer found the children's best interests "would be met if they continued to benefit from the personal care and support of their parents." In the Officer's view, these interests would be met if they returned with their parents to Albania where their grandparents, aunts, and uncles reside. The Officer concluded his assessment of the children's best interests by stating:

> …although relocating to Albania would mean leaving Canada, I note that Canadian born children will retain their Canadian citizenship regardless of where they reside and they would be afforded all the rights and opportunities available to other Canadian citizens. I acknowledge that the conditions in the Albania [*sic*] are less than favourable; however, insufficient objective evidence has been adduced to satisfy me that the children will be unable to attend school there or that their best interests will be compromised or that their fundamental rights will be denied.

[9] In the end, the Officer concluded that the Applicants' establishment in Canada, their perceived hardship upon return to Albania, and the best interests of their children did not warrant an exemption under subsection 25(1) of the *IRPA* and, therefore, the Officer refused their application.

II. Issues

[10] Although the Applicants raise several issues concerning the Officer's decision, I find only two of these issues need to be addressed, namely:

1. Was the Officer's analysis of the Applicants' establishment unreasonable?
2. Did the Officer breach the duty of procedural fairness by assessing the Applicants' internal flight alternative without providing them an opportunity to respond to this issue?

III. Analysis

[11] An immigration officer's decision to deny relief under subsection 25(1) of the *IRPA* involves the exercise of discretion and is reviewed on the reasonableness standard (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 44-45, [2015] 3 SCR 909 [*Kanthasamy*]). An officer's decision under subsection 25(1) is highly discretionary, since this provision "provides a mechanism to deal with exceptional circumstances," and the officer "must be accorded a considerable degree of deference" by the Court (*Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4, [2016] FCJ No 1305; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 15, [2002] 4 FC 358).

[12] Under the reasonableness standard, the Court is tasked with reviewing a decision for "the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708. Additionally, "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome"; and it is also not "the function of the reviewing court to reweigh the evidence": *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59, 61, [2009] 1 SCR 339 [*Khosa*].

[13] The standard to review issues of procedural fairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502; *Khosa* at para 43). Under the correctness standard, a reviewing court shows no deference to the decision-maker's reasoning process and the court will substitute its own view and provide the correct answer if it disagrees with the decision-maker's determination (see: *Dunsmuir* at para 50). Moreover, the Court must determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the circumstances of the matter (see: *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115, [2002] 1 SCR 3). When applying a correctness standard of review, it is not only a question of whether the decision under review is

correct, but also a question of whether the process followed in making the decision was fair (see: *Hashi v Canada (Citizenship and Immigration)*, 2014 FC 154 at para 14, 238 ACWS (3d) 199; and *Makoundi v Canada (Attorney General)*, 2014 FC 1177 at para 35, 471 FTR 71).

A. *Was the Officer's analysis of the Applicants' establishment unreasonable?*

[14] The Applicants take issue with the Officer's comments that the Applicants' "degree of establishment is of a level that was naturally expected of them… [and] … not… beyond the normal establishment that one would expect the applicants to accomplish in their circumstances." The Applicants say the Officer failed to state what else is expected to put them beyond the level of establishment sufficient for their H&C application to be approved. Although the Officer acknowledged the Applicants' evidence about their employment in Canada and that their employment would be disrupted if returned to Albania, the Officer did not, according to the Applicants, provide any reasoning as to why the interruption in their establishment would not result in unusual and underserved or disproportionate hardship. The Applicants contend that the Officer erred by ascribing little weight to their establishment since they had benefited from the length of time to determine their immigration status and were afforded tools such as employment and student authorizations which allowed them to be self-sufficient and to integrate into the Canadian community.

[15] The Respondent defends the Officer's decision as to the Applicants' establishment, arguing that there is no reviewable error because the Applicants' establishment in Canada is not such that they would face undue, underserved, or disproportionate hardship by having to apply for permanent residence from outside Canada.

[16] The Court's comments in *Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813, 414 FTR 268 [*Sebbe*], are instructive in this case. In *Sebbe*, Justice Zinn stated:

> [21] The second area that I find troublesome has to do with comments the officer made when analyzing establishment. The officer writes: "I acknowledge that the applicant has taken positive steps in establishing himself in Canada, however, I note that he has received due process through the refugee programs and was accordingly afforded the tools and opportunity to obtain a degree of establishment into Canadian society." Frankly, I fail to see how it can be said that the due process Canada offers claimants provides them with the "tools and opportunity" to establish themselves in Canada. I suspect that what the Officer means is that because the process has taken some time, the applicants had time to establish themselves <u>to some degree</u>. That is a statement with which one can agree. However, what is required is an analysis and assessment of the degree of establishment of these applicants and how it weighs in favour of granting an exemption. The Officer must not merely discount what they have done by crediting the Canadian immigration and refugee system for having given them the time to do these things without giving credit for the initiatives they undertook. The Officer must also examine whether the disruption of that establishment weighs in favour of granting the exemption. [emphasis in original]

[17] Similarly, in *Chandidas v Canada (Citizenship and Immigration)*, 2013 FC 258, [2014] 3 FCR 639 [*Chandidas*], Justice Kane remarked that:

> [80] …in the present case, the officer fails to provide any explanation as to *why* the establishment evidence is insufficient. The officer reviewed the family's degree of establishment in detail, and referred to their work, income, family ties, courses taken, schools attended, and community involvement in various passages of the decision. The officer does not indicate what he would consider to be extraordinary or exceptional establishment; he simply states that this is what he would expect and that it would not cause unusual and undeserved or disproportionate hardship if the family were forced to apply for a visa from outside Canada. While this could be argued to be a reason, it is barely informative.

[18] The degree of an applicant's establishment in Canada is, of course, only one of the various factors that must be considered and weighed to arrive at an assessment of the hardship in an H&C application. The assessment of the evidence is also, of course, an integral part of an officer's expertise and discretion, and the Court ought to be hesitant to interfere with an officer's discretionary decision. However, the Officer in this case followed the same objectionable and troublesome path as in *Chandidas* and in *Sebbe*. It was unreasonable for the Officer to discount the Applicants' degree of establishment merely because it was, in the Officer's view, "of a level that was naturally expected of them… [and it is not] beyond the normal establishment that one would expect the applicants to accomplish in their circumstances." The Officer unreasonably assessed the Applicants' length of time or establishment in Canada because, in my view, the Officer focused on the "expected" level of establishment and, consequently, failed to provide any explanation as to why the establishment evidence was insufficient or to state what would be an acceptable or adequate level of establishment.

B. *Did the Officer breach the duty of procedural fairness by assessing the Applicants' internal flight alternative without providing them an opportunity to respond to this issue?*

[19] The Applicants contend that the Officer failed to provide them with an opportunity to make submissions or provide evidence regarding an internal flight alternative [IFA] in Fier. According to the Applicants, they made no submissions about an IFA in their H&C application and this was not an issue in connection with their refugee claim. The Applicants say the Officer breached the duty of procedural fairness by assessing an IFA without affording them an opportunity to respond to this issue.

[20] The Applicants rely on jurisprudence from refugee matters to argue that the Officer owed a duty of procedural fairness to allow them to make submissions about an IFA. They reference *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* (1993), [1994] 1 FC 589 at para 10, [1993] FCJ No 1172 (CA), where the Federal Court of Appeal stated that: "there is an onus on the Minister and the Board to warn the claimant if an IFA is going to be raised." The Applicants also cite *Moreno v Canada (Citizenship and Immigration)*, 2015 FC 1224 at para 18, [2015] FCJ No 1270, where this Court stated that: "failing to raise an IFA in previous procedures, an expectation or reliance interest arises, such that an applicant may conclude that it is not necessary to consider an IFA when submitting the application."

[21] In my view, it is inappropriate to import case law concerning refugee decisions in the context of an H&C application because an H&C officer cannot assess risk pursuant to subsection 25(1.3) of the *IRPA*. As the Supreme Court stated in *Kanthasamy*, subsection 25(1) "is not meant to duplicate refugee proceedings under s. 96 or s. 97(1), which assess whether the applicant has established a well-founded fear of persecution, risk of torture, risk to life, or risk of cruel and unusual treatment or punishment" (para 24). An IFA is an integral aspect of whether a refugee claimant requires Canada's protection, since the availability of a place within a claimant's home country where the claimant would not have a well-founded fear of persecution, or face a risk to life, or a risk of cruel and unusual treatment or punishment, relieves Canada from its obligations under the *Convention relating to the Status of Refugees*, 22 April 1954, 189 UNTS 150. This is not to say, however, that an H&C cannot look to the existence of an IFA in the context of assessing hardship when determining whether to grant or not grant an exemption under section 25(1) of the *IRPA*. It is to say though, from a procedural fairness perspective, the

Officer in this case should have afforded the Applicants an opportunity to address the viability of an IFA in Fier. The Applicants' H&C submissions did not raise this issue.

[22] Fairness dictates that the Applicants should have had notice that the Officer was going to address whether their hardship could be mitigated by relocating to a different part of Albania. For all the Officer knew, there may have been some facts or factors within the Applicants' knowledge, unidentified by or unknown to the Officer, which may have affected the Officer's finding that their hardship could be mitigated or reduced by relocating to Fier.

IV. Conclusion

[23] For the reasons stated above, the Applicants' application for judicial review is allowed because the Officer not only unreasonably assessed their establishment in Canada but also breached procedural fairness by not allowing the Applicants to make submissions regarding the existence of an IFA in Albania.

[24] Neither party raised a serious question of general importance; so, no such question is certified.

JUDGMENT in IMM-4624-16

THIS COURT'S JUDGMENT is that: the application for judicial review is granted; the decision of the senior immigration officer dated October 28, 2016, is set aside; the matter is returned for redetermination by a different immigration officer in accordance with the reasons for this judgment; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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