Federal Court  Cour fédérale

Date: 20190305

Docket: IMM-2903-18

Citation: 2019 FC 271

Ottawa, Ontario, March 5, 2019

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

AMAL IDRIS MOHAMMED

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of a decision made by a Senior Immigration Officer [Officer] dated April 11, 2018 wherein the Officer denied the Applicant's application for permanent residence on humanitarian and compassionate [H&C] grounds.

I. BACKGROUND

[2] The Applicant is a citizen of Ethiopia. She has a daughter who was born in February 2012 in Canada.

[3] The Applicant arrived in Canada in 2006 after being sponsored by her husband who is a Canadian citizen. The Applicant and her husband were divorced in 2009. The Applicant traveled to South Africa in 2011 and became pregnant by a man who she dated casually. She returned briefly to her family's home in Ethiopia, but was told to leave by her parents due to her out-of-wedlock pregnancy.

[4] The Applicant then returned to Canada and gave birth to her daughter. In 2014, the Applicant was deemed inadmissible under the Act for misrepresentation due to entering into a marriage of convenience with her former husband. An exclusion order was issued against the Applicant. The Applicant appealed the decision, but the appeal was rejected by the Immigration Appeal Division [IAD] in 2016.

[5] The Applicant applied for permanent residence based on H&C grounds in 2017. The best interests of her daughter formed the primary basis for the application. The Applicant is concerned that her family and community will treat her daughter with hostility. Additionally, she fears that her daughter will be traumatized by having to relocate to Ethiopia from Canada where she is currently settled. One of the Applicant's major worries is that her daughter will be forced to undergo female genital mutilation [FGM]. Finally, the Applicant argued that she will lack

support in Ethiopia and that her establishment in Canada militates in favour of the granting of permanent residence based on H&C grounds.

II. DECISION UNDER REVIEW

[6] On April 11, 2018, the Officer denied the Applicant's application for permanent residence on H&C grounds.

[7] The Officer began by discussing the numerous credibility concerns identified by the IAD. These concerns were based on an array of inconsistent and inaccurate information contained in the Applicant's testimony. The IAD also noted that the Applicant engaged in intentional misrepresentation for which she was not remorseful. Finally, the Officer held that positive H&C grounds were rebutted by the Applicant's intentional efforts to mislead the IAD. The Officer gave the IAD decision considerable weight and held that the Applicant was required to overcome the IAD's findings with persuasive evidence.

[8] The Officer considered the Applicant's assertions that she will face hardship due to gender-based discrimination and violence. The Officer also considered the Applicant's claim that her daughter will be exposed to FGM and that her family is not only unsupportive, but hostile to her. The Officer noted the absence of any corroborative evidence to show that the Applicant's cousin was mistreated for supporting the Applicant. Similarly, the Officer noted a lack of evidence substantiating the Applicant's fear that her family will harm her or her daughter. The Officer also noted that the Applicant did not supply any evidence to confirm that she was subjected to FGM or that she suffered complications from the procedure. Finally, the Officer

found insufficient evidence related to the father of the Applicant's daughter. Based on these findings, the Officer assigned "very little evidentiary weight" to the Applicant's affidavit (Applicant's Record at 14).

[9] The Officer then considered the country conditions in Ethiopia. The Officer acknowledged that discrimination against single mothers in Ethiopia could cause difficulties for the Applicant and that being a single mother anywhere is difficult. The Officer went on to find that there was insufficient evidence to conclude that the Applicant would be unable to find housing or employment. Furthermore, the Officer found insufficient evidence to corroborate the Applicant's claim that she would be unable to access state protection or that she and her daughter would face hardship due to lack of family assistance.

[10] The Officer also considered the Applicant's level of establishment in Canada. Although the letters of reference from volunteer organizations and friends were considered favourably, the Officer found no evidence to demonstrate sound financial management. The Officer noted that the Applicant had submitted no information about her search for employment in Canada or her work experience in Ethiopia. The Officer concluded that the Applicant had failed to prove that she had the expected level of establishment in Canada.

[11] Finally, the Officer considered the best interests of the Applicant's daughter. The Officer determined that there was insufficient evidence to demonstrate that the daughter would be threatened by the Applicant's family or that she would be subject to FGM. The Officer noted that the daughter would not have established strong ties to friends or community members in Canada

due to her young age. The Officer acknowledged the difficulties that the daughter would face upon relocation to Ethiopia, but held that she would have her mother's care and protection to deal with them.

IV. ISSUES

[12] The issues to be determined in the present matter are the following:

1. What is the standard of review applicable to the Officer's Decision?
2. Did the Officer use the correct legal test in assessing the best interests of the child [BIOC]?
3. Was the Officer's Decision reasonable?

V. STANDARD OF REVIEW

[13] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[14] An officer's decision to grant or deny relief under s 25(1) of the Act is reviewable on a standard of reasonableness (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44 [*Kanthasamy*]; *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 18).

[15] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[16] Whether the Officer applied the correct legal test in assessing the best interests of the child is reviewable on a standard of correctness (*Singh Sahota v Canada (Citizenship and Immigration)*, 2011 FC 739 at para 7; *Kaneza v Canada (Citizenship and Immigration)*, 2015 FC 231 at para 34). When reviewing the Officer's application of the legal test on a standard of correctness, this Court will show no deference to the Officer's reasoning (see *Dunsmuir*, above, at para 50). If the Officer erred by applying the incorrect legal test, the Court will provide the correct test. It is essential to note, however, that the BIOC test is inherently flexible. As stated by Justice Diner in *Zlotosz v Canada (Citizenship and Immigration)*, 2017 FC 724:

> [24] … the Court has consistently held since *Kanthasamy* that there is no formula that must be used in considering BIOC. The

framework for BIOC analysis remains largely unchanged since *Baker v Canada (Minister of Citizenship and Immigration)*, in that the legal test is whether the officer was alert, alive and sensitive to child's best interests.

VI. STATUTORY PROVISIONS

[17] The following provisions of the Act are relevant to this application for judicial review:

25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or 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 obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.
…	…

48. (1) A removal order is enforceable if it has come into force and is not stayed.	48. (1) La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.
(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and it must be enforced as soon as is reasonably practicable.	(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être appliquée dès que les circonstances le permettent.

VII. ARGUMENT

A. *Applicant*

[18] The Applicant argues that the Officer applied the wrong legal test for the BIOC analysis. The Officer incorrectly imported a requirement that the Applicant demonstrate that her daughter would face trauma if returned to Ethiopia. Additionally, the Officer incorrectly assessed hardship, basic needs, and risk instead of considering the child's best interests.

[19] The Applicant says that the Officer also unreasonably assessed the best interests of the child. The Officer's analysis was not meaningful because she did not start from the presumption that the daughter's best interests would be to stay in Canada. Further, the Officer did not discuss the country conditions in Ethiopia in the assessment of the daughter's best interests.

[20] The Applicant argues that the Officer failed to consider country conditions which were inconsistent with the decision to refuse an H&C exemption. Firstly, the Officer failed to consider

a report which describes widespread forced FGM in Ethiopia. Secondly, the Officer failed to consider several reports which describe harassment and discrimination against women. Thirdly, the Officer did not consider evidence which documents widespread child abuse and lack of educational opportunities. Finally, the Officer failed to assess the repression which characterizes Ethiopia's system of governance.

B. *Respondent*

[21] The Respondent defends the Officer's decision to deny permanent residence based on H&C grounds. The Officer considered all relevant factors in arriving at the Decision including the best interests of the Applicant's daughter and country conditions in Ethiopia.

[22] The Respondent argues that it was not an error for the Officer to consider whether the daughter would face hardship in Ethiopia. The Officer undertook an assessment of the daughter's circumstances and assigned significant weight to her best interests. In the result, however, the Officer determined that the daughter's best interests were outweighed by the other factors identified. This conclusion was open to the Officer. The Officer applied the correct legal test for assessing the best interests of the child and did not import a trauma requirement.

[23] The Respondent also says that the Officer properly considered the country condition evidence. The Officer found that several country condition documents were irrelevant to the Applicant's circumstances or were out of date.

VIII. ANALYSIS

[24] The BIOC analysis is at the heart of this Decision.

[25] As the Applicant points out, in *Kanthasamy*, the Supreme Court of Canada confirmed and refined the duty of the content of a BIOC analysis and provided the following guidance:

> 35 The "best interests" principle is "highly contextual" because of the "multitude of factors that may impinge on the child's best interest": *Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 (S.C.C.), at para. 11; *Gordon v. Goertz*, [1996] 2 S.C.R. 27 (S.C.C.), at para. 20. It must therefore be applied in a manner responsive to each child's particular age, capacity, needs and maturity: see *Manitoba (Director of Child & Family Services) v. C. (A.)*, [2009] 2 S.C.R. 181 (S.C.C.), at para. 89. The child's level of development will guide its precise application in the context of a particular case.
>
> 36 Protecting children through the "best interests of the child" principle is widely understood and accepted in Canada's legal system: *A.B. (Litigation Guardian of) v. Bragg Communications Inc.*, [2012] 2 S.C.R. 567 (S.C.C.), at para. 17. It means "[d]eciding what ... appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention": *MacGyver v. Richards* (1995), 22 O.R. (3d) 481 (Ont. C.A.), at p. 489.
>
> 37 International human rights instruments to which Canada is a signatory, including the *Convention on the Rights of the Child*, also stress the centrality of the best interests of a child: Can. T.S. 1992 No. 3; Baker, at para. 71. Article 3(1) of the *Convention* in particular confirms the primacy of the best interests principle:
>
> > In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration*.

38 Even before it was expressly included in s. 25(1), this Court in *Baker* identified the "best interests" principle as an "important" part of the evaluation of humanitarian and compassionate grounds. As this Court said in *Baker*:

> ... attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for [a humanitarian and compassionate] decision to be made in a reasonable manner....
>
> ... for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying [a humanitarian and compassionate] claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable. [paras. 74-75]

39 A decision under s. 25(1) will therefore be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered: *Baker*, at para. 75. This means that decision-makers must do more than simply *state* that the interests of a child have been taken into account: *Hawthorne*, at para. 32. Those interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence: *Legault v. Canada (Minister of Citizenship & Immigration)*, [2002] 4 F.C. 358 (Fed. C.A.), at paras. 12 and 31; *Kolosovs v. Canada (Minister of Citizenship & Immigration)* (2008), 323 F.T.R. 181 (Eng.) (F.C.), at paras. 9-12.

[Emphasis in original.]

[26] The Officer makes it clear at the outset that “the burden of proof rests with the Applicant” and “Officers do not have to elicit information on H&C factors and are not required to satisfy applicants that such grounds do not exist.”

[27] The Officer lists the documentation he has considered and also makes it clear that “I have also considered my own country condition research listed under ‘Sources Consulted’ and the contents of the Immigration Appeal Division (IAD’s) Reasons for Decision.”

[28] When it comes to the BIOC analysis itself, the Officer first of all, sets out his general approach to the issue as well as the concerns raised by the Applicant:

> In considering this application, I must be alert and alive to the interests of children; this applies to children under the age of 18 years in accordance with the Convention on the Rights of the Child. The applicant had listed her Canadian citizen daughter, six year old Heyam Karim Abdlkerim, as a child directly affected by this application. I have considered the facts before me in order to assess whether Heyam’s best interests would likely be adversely affected if she returned to Ethiopia with her mother.
>
> The applicant raises, and I have considered, the following concerns; the child’s establishment and ties to Canada, the only country she knows and is accustomed to, will be severed; she will be surrounded by an unfamiliar language, culture and far from people and friends she knows; she will no longer have access to public education in French or English, the languages she is familiar with and; for all these reasons leaving Canada will be traumatic. The applicant states that her daughter will face additional hardship as a child whose biological father is unknown and due to the gender discrimination. The applicant also highlights her worry that, should she be found and harmed or killed by her family, her daughter may be killed as well or harmed by being forced to undergo FGM.

[29] Of the concerns raised by the Applicant, the Officer specifically addresses FGM, relocation difficulties (school, friends, different language, different cultural values), and discrimination as a child with no known biological father.

[30] The relocation analysis is worth quoting in full for what it reveals about the Officer's approach:

> The applicant's submissions indicate that her young daughter is young enough to be completely dependent on her emotionally, psychologically and practically. I find I have not been provided with sufficient objective evidence to demonstrate that the stated dependency will be affected or will change in any way should Heyam return to Ethiopia with her mother. I understand that she will likely face the initial difficulties associated with relocation. For example, I acknowledge that Heyam will likely miss her school, her friends and other people she knows and that she will have to learn a different language in a different culture. However, as has been the case since she was born, she will have her mother and main caregiver to provide her with the love and confidence needed to overcome any such issue. I have not been provided with sufficient objective evidence that Heyam would suffer trauma as a result of her relocation to Ethiopia.

[31] While acknowledging that Heyam will face significant relocation difficulties, the Officer feels that they can be dealt with because of her mother's continuing presence in her life: "However, as has been the case since she was born, she will have her mother and main caregiver to provide her with the love and confidence needed to overcome any such issue."

[32] The same approach is evident in the Officer's BIOC conclusions:

> In considering Heyam's best interests, I have taken into account factors such as her emotional, social, cultural and physical wellbeing. Namely, I have considered her age, the level of dependency on the applicant, her degree of establishment in Canada and the impact that leaving Canada could have on her

> education. I acknowledge that should Heyam leave Canada, she would be faced with the difficulties associated with establishing herself in Ethiopia, namely, becoming acquainted with family members and meeting different people in a different environment as well as making new friends in a different school. However because of her youth, she likely has not formed strong ties with her community nor is she likely to have formed strong friendships that would cause her to experience anything more than the difficulties associated with relocation. I find that although the child may be accustomed to living in Canada, it can be reasonably expected that her well-being is dependent not on where she resides but on the continued presence and support of her caregiver, in this case, the applicant. I have not been provided sufficient evidence that the applicant will not be able to provide for her daughter both financially and emotionally. Based on the information in my possession, I am confident that Heyam's youth and her mother's continued love, guidance and protection will likely provide the environment required to help her adjust to life in Ethiopia. I am not satisfied, based on the evidence before me, that leaving Canada would be detrimental to Heyam's well-being/development and therefore not in her best interests.
>
> [Emphasis added.]

[33] I think the best way to describe this analysis is that it is incomplete. It appears to assume that Heyam is simply changing countries so that the future she faces in Ethiopia will not affect her best interests. We know that s 25(1) of the Act is not intended to relieve applicants of all difficulties of leaving Canada or to provide an alternative route to permanent residence. However, no true H&C assessment can occur unless the difficulties and hardships of removal are fully identified and their impacts acknowledged.

[34] What is missing in the BIOC analysis is any acknowledgement of the broader cultural, economic, and political conditions for young girls and women in Ethiopia that Heyam will be subjected to, and that no amount of mother's love and care can overcome.

[35] There is considerable dispute in this case about what evidence was before the Officer and that she/he was obliged to consult, especially given the fact that the Officer dealt with the pre-removal risk assessment decision on the same day. However, the Officer specifically tells us that, in addition to the Applicant's evidence, he or she also considered "my own country condition research listed under 'Sources Consulted' and the contents of the Immigration Appeal Division (IAD's) Reasons for Decision."

[36] The Respondent concedes that, at least, the following documentation was before the Officer for purposes of the H&C analysis:

(a) US DOS report on *Human rights Practices for 2016 in Ethiopia*;

(b) Dutch Council for Refugees, *Country of Origin Information Report Ethiopia*, 2016;

(c) Immigration and Refugee Board of Canada, Response to Information Request for Ethiopia, April 2014; and

(d) Immigration and Refugee Board of Canada, Response to Information Request for Ethiopia, for July 2016.

[37] In counsel's written submissions for the H&C application, she specifically raised, *inter alia*, the following:

(a) "[T]he child's ties to Canada will be severed and she will be surrounded by unfamiliar language, culture and far from people she knows."

(b) The child "will not have access to public education in French or English, the languages she is familiar with in Canada."

(c) "Significant gender based discrimination" as a result of the Applicant being "a single mother with a child born out of wedlock and similarly her daughter, as a child whose father is unknown."

(d) "Systemic discrimination and hardship in Ethiopia as an unwed mother and child out of wedlock" compounded by general "discrimination against women" and "widespread" child abuse.

[38] A review of the country documentation before me suggests that this is not the most comprehensive identification of the hardships that the Applicant and her daughter will face, but it is clear that it requires the Officer to consider general discrimination against women, child abuse, ostracism and hardship faced by the Applicant and her daughter because there is no father in the picture, and the Officer is clear that he has considered his own country condition research.

[39] I have reviewed the documentation that the Respondent agrees was before the Officer and that he had to consult and take into account. And without even going to the broader documentation package that the Applicant says the Officer had to examine, it is clear that young Heyam would face a formidable systemic, long-term impoverishment of life in Ethiopia that goes well beyond just "difficulties of establishing herself in Ethiopia, namely becoming acquainted with family members and meeting different people in a different environment as well as making new friends in a different school" that her mother can assist her with. Heyam faces serious

gender discrimination, widespread child abuse, an education system that will not permit her to maintain French and English, widespread human rights violations, widespread sexual harassment, discrimination, an authoritarian regime that denies free speech, and on and on.

[40] As a child born out of wedlock to an unidentified father, the Response to Information Request for Ethiopia, April 2014 refers to Ethiopia being a very "traditional society" and that some women returnees "have been turned back with babies or kids out of wedlock" because "Ethiopia being the society that it is, this is taboo. It is simply unacceptable and most women will be viewed as commercial sex workers." There would also appear to be little help available for women and children who find themselves in this position.

[41] These systemic issues and their short and long-term impact upon Heyam are not addressed by the Officer. The Officer appears to think that the only problems are short-term adjustment issues that can be overcome by motherly love and support.

[42] This experienced Officer (who did the pre-removal risk assessment decision on the same day), must be fully aware that Ethiopia is among the most repressed and disadvantaged countries in the world. Ethiopia is a corrupt authoritarian state where personal freedom, security of the person and life prospects – particularly for girls and women – are abysmal. The Officer simply overlooks these general country conditions and, at least implicitly, asserts that the Applicant will have the power and the wherewithal ("love and confidence") "needed to overcome any such issue" for Heyam.

[43] The Officer only addresses the "initial difficulties associated with relocation." There is no attempt to address the systemic difficulties that Heyam will face as a girl and young woman in Ethiopia. The evidence before the Officer is that her well-being and future development have, contrary to the Officer's conclusion, a great deal to do with where she resides.

[44] And even if she is able to return to Canada, she will return as someone who has not been educated in either official language and will be at a distinct disadvantage to her fellow Canadians.

[45] The Officer's use of the words "overcome any such issue" are telling. The systemic issues Heyam faces cannot be overcome. I think what the Officer really means is "reconcile her to any such issue," or, to use the Officer's own terminology "become accustomed to her life in Ethiopia as she has in Canada."

[46] I am not saying, of course, that these broader, systemic disadvantages for Heyam should carry the day or dictate a positive result for the Applicant. That decision is for the Officer to make, not the Court. However, all relevant factors need to be addressed by the officer making the decision, and obvious systemic factors cannot be ignored or left to motherly love to overcome.

[47] For these reasons, I think the Decision is unreasonable and must be returned for reconsideration.

[48] The Respondent has raised no question for certification and I agree.

JUDGMENT IN IMM-2903-18

THIS COURT'S JUDGMENT is that

1. The proper name of the Respondent under statute is the Minister of Citizenship and Immigration, therefore, the style of cause is amended as such.
2. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a different officer in light of these reasons.
3. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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