Federal Court  Cour fédérale

Date: 20190718

Docket: IMM-6342-18

Citation: 2019 FC 954

Ottawa, Ontario, July 18, 2019

PRESENT: Mr. Justice McHaffie

BETWEEN:

AHMED ABDULLAH ALHAJ ABDULLAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ahmed Alhaj Abdullah, a Syrian citizen who has been found inadmissible to Canada for having misrepresented himself as a citizen of the Dominican Republic, applied for permanent residence based on humanitarian and compassionate [H&C] considerations. Mr. Alhaj Abdullah contends that the refusal of that application by an immigration officer was unreasonable and seeks judicial review of the decision.

[2] Among the issues raised by Mr. Alhaj Abdullah is the officer's reliance on Saudi Arabia as a country of reference in assessing the impact of his removal from Canada. The officer noted Mr. Alhaj Abdullah's past residency and business in Saudi Arabia and the presence of siblings there, and concluded that he could return to Saudi Arabia rather than Syria in the event of removal. That conclusion affected the officer's assessment of H&C considerations, notably the fear of discrimination and personal ties outside Canada.

[3] On this issue, I agree with Mr. Alhaj Abdullah. Although he was previously a long-standing resident of Saudi Arabia, there was no evidence that Mr. Alhaj Abdullah now has legal status in that country or a right to return there. As this Court has previously held, it is an error to assess an H&C application with reference to a country where the applicant has no legal status or right to return. As the officer's reliance on Mr. Alhaj Abdullah's potential return to Saudi Arabia materially affected the overall assessment of the H&C grounds, the error renders the officer's decision unreasonable. This application is therefore granted.

II. Background

[4] Mr. Alhaj Abdullah has not lived in his native Syria since he moved to Saudi Arabia with his family in 1970, at the age of 12. For the next 35 years, he lived in Saudi Arabia, first on his father's work visa and later on his own work visa, having established a gold company and worked as a goldsmith. He met his wife, also a Syrian citizen, in Saudi Arabia and their six children were all born there.

[5] In 1997, the family's Syrian passports expired. The Syrian government refused to renew those passports, as Mr. Alhaj Abdullah had not performed compulsory military service in Syria. To remain in Saudi Arabia, Mr. Alhaj Abdullah obtained Dominican Republic passports for himself and his family, through arrangements the Immigration Appeal Division [IAD] of the Immigration and Refugee Board [IRB] later described as being "such as to cause any reasonable man to question the legitimacy of the process": *Alhaj Abdullah v Canada (Public Safety and Emergency Preparedness)*, 2014 CanLII 94350 (CA IRB) at para 29.

[6] In 2003, Syrian passports were re-issued to Mr. Alhaj Abdullah's wife and their five minor children, but were still denied to him and to his eldest child, who had by then also become eligible for military service. The Alhaj Abdullah family applied for permanent residence in Canada, with Mr. Alhaj Abdullah and his eldest son relying on their Dominican Republic passports and the rest of the family on their Syrian passports. They all became permanent residents of Canada in 2004.

[7] The Canada Border Services Agency subsequently identified the Dominican Republic passports as fraudulent. The Immigration Division [ID] of the IRB found that Mr. Alhaj Abdullah was not a Dominican Republic national, and that he was inadmissible to Canada for misrepresenting himself as a citizen of the Dominican Republic at the time of his application for permanent residence. Mr. Alhaj Abdullah's appeal of that determination was dismissed by the IAD in 2014 in the decision referenced above, and leave to appeal was denied by this Court. Although the ID also found his eldest son inadmissible, the IAD set aside the removal order with respect to the son on H&C grounds.

[8] Mr. Alhaj Abdullah applied for permanent residence on H&C grounds pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] in 2017. His application referred to his establishment in and ties to Canada, including the fact that his wife, children and two grandchildren are all Canadian citizens and residents; and to the hardship associated with conditions in Syria, including the unavailability of health services needed for his medical conditions and the risks associated with being a person who had not performed mandatory military service.

III. Decision Under Review

[9] The officer reviewing the H&C application considered Mr. Alhaj Abdullah's degree of establishment in Canada; his personal relationships and ties; the best interests of his grandchildren; his fear of discrimination; his inadmissibility based on the misrepresentation of Dominican Republic citizenship; and his medical concerns.

[10] The officer found that although Mr. Alhaj Abdullah had been in Canada for over 10 years and provided some evidence of being a volunteer and active member in his local Muslim community, there was not sufficient evidence to indicate that he had integrated into Canadian society. With respect to his personal relationships and ties in Canada, the officer noted that of his wife and six children, letters of support were only filed by his eldest son and that son's wife, and that these were dated in April 2015. Those letters confirmed Mr. Alhaj Abdullah's role in caring for his grandchildren, but were both out of date and gave no indication that other family members could not provide such care in the event of his removal.

[11] In addressing ties outside Canada, the officer noted that Mr. Alhaj Abdullah had previously been employed in Saudi Arabia, had repeatedly held work permits there, and had six siblings living in Saudi Arabia. The officer also referenced the IAD's 2014 conclusion that "relocation to Saudi Arabia is a viable alternative for the principal appellant…" As a result, in assessing relevant H&C considerations, the officer considered potential removal to either Syria or Saudi Arabia, finding that:

(a) if Mr. Alhaj Abdullah needed to re-establish himself in Syria or Saudi Arabia, he would have access to his business savings to support himself and could apply his skills to find employment if needed;

(b) while recognizing the fear of persecution in Syria and the country conditions there, including Canada's Administrative Deferral of Removal [ADR] to Syria, it was "not the only option open to the applicant to be removed to" and no fears of returning to Saudi Arabia had been advanced; and

(c) Mr. Alhaj Abdullah had provided insufficient objective evidence to indicate that he would be refused medical care due to discriminating factors or that his basic medication would not be available in Syria, and no evidence that he would not be able to obtain his necessary medications in Saudi Arabia.

[12] In concluding the H&C analysis, the officer noted that Mr. Alhaj Abdullah had resided for the majority of his years in Saudi Arabia, and would not be returning to an unfamiliar place, culture or language, devoid of support networks, companionship or family. The officer held that:

> [c]onsidering the applicant's minimal establishment and integration into the community, the abundance of family remaining

> in Canada to care for the grandchildren and the lack of evidence to indicate that he will be discriminated against in Saudi Arabia, I am not satisfied that there are sufficient humanitarian and compassionate considerations before me to overcome the applicant's inadmissibility(s) [*sic*] and justify granting this application.

IV. Analysis

[13] The parties agree that the standard of review applicable to H&C decisions is that of reasonableness: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at para 44; *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 18.

[14] Mr. Alhaj Abdullah asserts that the officer's decision was unreasonable. While expressed in somewhat different terms, the application raises four main grounds, namely that the officer: (i) inappropriately concluded that Mr. Alhaj Abdullah could return to Saudi Arabia and assessed the H&C considerations with reference to that country as an alternative to Syria; (ii) misapprehended the arguments and evidence regarding his medical concerns should he be removed to Syria; (iii) concluded that he had minimal establishment and integration despite having lived in Canada for over 10 years; and (iv) failed to adequately explain why the H&C factors presented did not overcome the inadmissibility based on the misrepresentation as to citizenship.

[15] For the reasons below, I conclude that the first of these grounds is dispositive of this application.

A. *Assessment Based on Removal to a Country Where an Applicant Has No Legal Status*

[16] Hardship and adverse country conditions must be considered on an application under section 25 of the *IRPA* when they form part of an applicant's H&C circumstances: *Ramesh v Canada (Citizenship and Immigration)*, 2019 FC 778 at para 19; *Miyir v Canada (Citizenship and Immigration)*, 2018 FC 73 [*Miyir*] at paras 15-19; *Kanthasamy* at paras 30-33, 50-56; *IRPA* at s. 25(1.3). The question that arises in this case is whether it was unreasonable for the officer undertaking that consideration to do so with reference to both Syria and Saudi Arabia and ultimately to rely on the impact of potential removal to Saudi Arabia.

[17] This Court has held that assessing an H&C application with reference to a country where the applicant has no legal status is an error that renders a decision unreasonable. In *Joe (Litigation guardian of) v Canada (Citizenship and Immigration)*, 2009 FC 116 [*Joe*], the minor applicant was a citizen of New Zealand, although she had resided in China with her parents, who were Chinese citizens, before coming to Canada. In assessing the H&C application, the immigration officer concluded that the applicant was a Chinese citizen and assessed the hardship that would be faced by her returning to China.

[18] Justice Maurice E. Lagacé found that the applicant did not have legal status in China and that the officer therefore erred in basing his decision on China as the country of reference rather than New Zealand. This error then also affected the assessment of the applicant's best interests, which would not be served by removal to New Zealand, where she had no remaining ties and had

not been since she was a baby. These errors based on the use of the improper country of reference rendered the decision unreasonable: *Joe* at paras 23-24, 35-37.

[19] The *Joe* decision was considered in *Xie v Canada (Citizenship and Immigration)*, 2010 FC 580 [*Xie*], a case relied on by the Minister in the present case (*Xie* has also been referred to as *Jiang*, the name of the other applicants in the matter). The Minister cites *Xie* for the proposition that an officer may reasonably assess the hardship that might be faced by a foreign national facing removal to a country where they do not currently have status, and to assess the possibility of obtaining status there. However, a review of *Xie* shows that while it distinguishes *Joe* factually, it does not disturb the principle in *Joe* and does not go as far as the Minister contends.

[20] In *Xie*, the applicants were two Chinese citizens and their minor daughter who was a Peruvian citizen. The immigration officer assessing their H&C application concluded that the daughter could seek Chinese citizenship by naturalization, and assessed the question of hardship with reference to both Peru and China.

[21] Justice Yves de Montigny, then of this Court, found that the officer's findings did not contradict the *Joe* decision. Although the officer had assessed hardship in both Peru and China, Justice de Montigny noted that the assessment of hardship in returning to China "was merely out of an abundance of caution." He also found that unlike the situation in *Joe*, the daughter in *Xie* had family in Peru, making the assessment of the best interests of the child different from that in *Joe*. The remainder of the decision focuses on the reasonableness of the officer's findings regarding hardship if the daughter were returned to Peru, where the daughter did have status: *Xie*

at paras 34-40. The decision therefore does not sanction basing an H&C decision on the impacts of removal to a country where an applicant has no legal status.

[22] The Minister also points to sections 238 and 241 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*], which contemplate removal of a foreign national to a country other than their country of nationality. Section 238 permits a foreign national who wants to voluntarily comply with a removal order to submit a choice of destination. Section 241 addresses the country of removal where a foreign national does not voluntarily comply with a removal order, specifying that it be the country from which they came to Canada; the country in which they last permanently resided before coming to Canada; a country of which they are a national or citizen; or the country of their birth.

[23] A section 25 application and the enforcement of a removal order under sections 48 to 52 of the *IRPA* and sections 235 to 243 of the *IRPR* are different processes that engage different questions. Nonetheless, I agree that there needs to be coherence between the two, such that consideration of sections 238 and 241 of the *IRPR* may be material in assessing whether an applicant in Canada may be removed to a given country, or any country: see, *e.g.*, *Abeleira v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1008 at paras 37 to 45; *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 [*Chieu*] at paras 51-55. At the same time, a central aspect of the regulations governing removal is the requirement that the identified country of removal "authorize" the foreign national to enter: *IRPR* at ss. 238(1)(*a*), 240(a)(*d*) and 241(2). Where an applicant has no legal status in the identified country and there is

no evidence that the country has otherwise authorized the applicant's return, there is no basis to ground an H&C assessment on the potential for removal to that country.

[24] This conclusion is consistent with the purpose of the assessment of foreign country conditions in H&C applications. Where an applicant is in Canada, the assessment is of the conditions and circumstances that will be faced by the applicant should the application not be granted and the applicant be removed from Canada as a result: *Miyir* at paras 18-19 and 33. For that assessment to be meaningful, it must be made with reference to the country that the applicant is expected to return to: what is termed in *Chieu* the "likely country of removal." While *Chieu* arose in the context of an appeal under Division 7 of Part 1 of the *IRPA*, there does not seem to be any reason to use a different approach to the country of reference when considering foreign hardship on a section 25 application.

[25] As the Supreme Court of Canada recognized in *Chieu*, the likely country of removal will most often be the applicant's country of origin (the country or countries of nationality, except in the case of stateless persons), as the country with a duty to receive that person under international law: *Chieu* at paras 53-54. In some cases it may be appropriate to consider a third country to which the applicant may be removed, instead of or in addition to the country of origin, *e.g.*, a country in which the applicant has permanent residence or other status: *Zuluaga v Canada (Citizenship and Immigration)*, 2017 FC 1005 [*Zuluaga*] at paras 18-23; *Chieu* at para 88.

[26] Even where an applicant can return to a third country based on a temporary ability to enter, such as a spouse's work visa, this Court has held that consideration must be given in the

H&C assessment to the risk of potential further removal from that third country to the country of nationality: *Dandachi v Canada (Citizenship and Immigration)*, 2016 FC 952 at paras 8-10 and 15-16. Similarly, even where an applicant is believed to have status in a third country but there is a possibility that it has been lost, risk of removal to the country of nationality must be considered: *Zuluaga* at paras 19-23. This being so, it would be incongruous to allow an H&C assessment to be based on an assumption of removal to a country where the applicant has no legal status or right to return.

B. *Application in the Present Case*

[27] In the present case, the officer considered Saudi Arabia as a "viable alternative" (the IAD's language), and described Syria as "not the only option open to the applicant to be removed to." This reliance on Saudi Arabia for purposes of the foreign hardship analysis was contrary to the available evidence of Mr. Alhaj Abdullah's legal status there and the approach set out in *Joe*.

[28] As described above, the officer found that Mr. Alhaj Abdullah could return to Saudi Arabia based on his employment and work permit history, his siblings living there, the ability to live off the savings from the goldsmith business, and the 2014 conclusion of the IAD that relocation to Saudi Arabia was a viable alternative "given the presence of his family members, substantial assets and the residency permits already held by his wife and son which remain valid as at the time of the hearing."

[29] In reaching this conclusion, the officer failed to determine whether Mr. Alhaj Abdullah had legal status or a right to return to Saudi Arabia at the time the assessment was made, which was the relevant time frame given the forward-looking nature of the exercise: *Dandachi* at para 16; *Zuluaga* at para 18. In this regard, there was no evidence before the officer that the residency permits held by his wife and son in 2014 were still valid in December 2018, by which time they had become Canadian citizens, or that those permits if in place would allow Mr. Alhaj Abdullah to return to Saudi Arabia. The officer also appears to have overlooked or ignored Mr. Alhaj Abdullah's evidence that he could not obtain a new work visa from Saudi Arabia. The conclusion that Mr. Alhaj Abdullah's could live off the savings from his goldsmith business similarly contradicts the statements in his affidavit that he lived off those savings during his first years in Canada, but that now his children contributed financially to allow him to meet expenses.

[30] The officer thus appears to have reached a conclusion that Mr. Alhaj Abdullah could be removed to Saudi Arabia without concluding that he had legal status in that country or a right to return there, and in the face of evidence that indicated that he did not have such status or right. In keeping with the principle in *Joe*, this is an error.

[31] Unlike the situation in *Xie*, this was not a case where the officer's assessment of conditions in Saudi Arabia might be viewed as having been done "out of an abundance of caution." Rather, the expectation of relocation to Saudi Arabia was relied on significantly by the officer in assessing the potential for discrimination upon return and ties to the country of return, and was held up in contrast to the concerns relating to Syria. Further, the officer's overall conclusion on H&C factors was expressly based on a return to Saudi Arabia rather than to Syria.

[32] In this regard, while the officer recognized that there is an ADR in place with respect to Syria, he gave no consideration to how that impacted his consideration, other than to note that Mr. Alhaj Abdullah could return to Saudi Arabia. As Justice Diner noted in *Rubayi v Canada (Citizenship and Immigration)*, 2018 FC 74 at paras 22-24, with reference to a temporary suspension of removals [TSR], such status may not be determinative, but it is relevant and must be considered in light of all of the circumstances. The same principles apply whether the country or area in question is subject to a TSR or an ADR.

[33] The officer's approach on this issue had a material impact on the outcome of the H&C application, and renders the decision as a whole unreasonable. As a result, I do not need to address the other grounds raised by Mr. Alhaj Abdullah.

[34] The application for judicial review will therefore be allowed. Neither party proposed that a question be certified, and none is certified.

[35] At the hearing of the matter, the respondent requested that the style of cause be amended to name the respondent as the "Minister of Citizenship and Immigration", to which there was no objection. The Minister is currently known as the "Minister of Immigration, Refugees and Citizenship"; however, in accordance with section 4(1) of the *IRPA* and section 5(2) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, the Minister is appropriately named as the Minister of Citizenship and Immigration, and the style of cause will be amended accordingly.

JUDGMENT IN IMM-6342-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed and the applicant's application pursuant to section 25 of the *Immigration and Refugee Protection Act* is sent back for determination by a different officer.

2. The style of cause is amended to name the respondent as the Minister of Citizenship and Immigration, in place of the Minister of Immigration, Refugees and Citizenship.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6342-18
STYLE OF CAUSE:	AHMED ABDULLAH ALHAJ ABDULLAH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	OTTAWA, ONTARIO
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