Federal Court  Cour fédérale

Date: 20200225

Docket: IMM-3297-19

Citation: 2020 FC 295

Toronto, Ontario, February 25, 2020

PRESENT: Mr. Justice Diner

BETWEEN:

BUNMI TOMILOLA OSUN
OLUWANISUN FERANMI OSUN
FARAYOLA BRENDA OSUN
OLUWADARASMI ABISOLA OSUN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] In this judicial review, the Applicants challenge the decision to deny their application for permanent residence on humanitarian and compassionate grounds [H&C]. I agree that the assessment was flawed, particularly with respect to the consideration of the best interests of the children, and as a result will grant this application for judicial review.

I. Background

[2] Ms. Osun and her three minor children are citizens of Nigeria. All three children are currently enrolled in school in Canada, and Ms. Osun works as a Personal Support Worker. The family came to Canada in September 2016 and made a claim for refugee protection with the Refugee Protection Division [RPD]. The RPD rejected that claim in December 2016.

[3] The family appealed that negative decision to the Refugee Appeal Division [RAD], but the appeal was refused in May 2017. Their application for leave to this Court for judicial review of the RAD decision was denied. The Applicants then submitted a Pre-Removal Risk Assessment [PRRA] in September 2018, which was rejected in February 2019.

[4] The Applicants submitted their H&C application around the same time as their PRRA application. In a March 13, 2019 decision [Decision], a senior immigration officer [Officer] with Immigration, Refugees and Citizenship Canada refused the H&C, and that is the Decision under review today.

[5] In the Decision, the Officer began by quoting extensively from the RPD and the RAD decisions, noting that both tribunals had found Ms. Osun's claims of bisexuality to lack credibility, and that she would not be at risk in Nigeria.

[6] The Officer then considered the hardship the Applicants would face upon removal to Nigeria. The Officer noted that the H&C contained some of the same evidence from the refugee

claim and appeal, and that the Applicants had not addressed the negative credibility findings of the two refugee tribunals. The H&C Officer concluded that insufficient objective evidence was provided to demonstrate that they would face hardship due to Ms. Osun's sexual orientation. However, the Officer determined that they would experience some hardship in returning to Nigeria after an absence of almost three years, and thus accorded "due weight" to this factor.

[7] The Officer then considered Ms. Osun's degree of establishment in Canada, noting evidence of the college courses she has taken, employment as a Personal Support Worker, membership in a church, and accompanying letters. The Officer acknowledged that Ms. Osun has taken positive steps towards establishing herself in Canada and gave "due weight" to this factor. However, the Officer also noted that Ms. Osun has received "due process through the refugee and immigration program and was accordingly afforded the tools and opportunity to obtain a degree of establishment into Canadian society," that her level of establishment is "not uncommon," and that the severing of her new friendships would not "cause a hardship" justifying H&C relief.

[8] Finally, the Officer gave "particular consideration" to the best interests of the three children [BIOC]. The Officer noted that there is insufficient evidence to demonstrate "their welfare would be compromised" upon removal to Nigeria. The Officer acknowledged that their interests would be better served in Canada and that removal would cause a disruption, but reasoned that the disruption would be minimal because the children would be with their mother (their primary caregiver) and would be able to re-connect with their father and other extended family members, having only been away from Nigeria under three years. The Officer accepted

that the standards of living between Nigeria and Canada are different, but remarked that the purpose of H&C discretion is not to make up for these differences. In conclusion, the Officer gave "considerable weight" to BIOC, but found this factor not sufficient to justify an H&C exemption.

II. Analysis

[9] The Applicants challenge the merits of the Decision, and do not raise any issues of procedural fairness. Accordingly, the parties agree that a reasonableness standard applies (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]). This means that I must decide whether the Decision is justified in relation to the relevant factual and legal constraints (*Vavilov* at para 99).

[10] The Applicants argue that the Decision as a whole was unreasonable, alleging three specific errors, namely in the Officer's analysis of (i) the evidence of Ms. Osun's mental health; (ii) establishment; and (iii) BIOC. As discussed below, although I do not find that each error raised by the Applicants amounts to a reviewable error, I find the Decision as a whole to be unreasonable.

A. *Assessment of psychological evidence*

[11] First, the Applicants submit that evidence before the Officer – a psychologist's report dated October 2016 [Report] – demonstrated that Ms. Osun had mental health issues, and that the Officer was required to consider and weigh the effect removal would have on her mental health. They rely on *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 48

[*Kanthasamy*]. The Applicants submit that the Officer failed to do so and instead only mentioned the Report in passing.

[12] I am not persuaded on this first point. The Officer explicitly mentioned the Report, but found that "the applicant has not addressed the credibility findings of either the RPD or the RAD who had the same evidence before them." An H&C officer may certainly reject evidence that has been found not to be credible by refugee tribunals (*Zingoula v Canada (Citizenship and Immigration)*, 2019 FC 201 at para 11; *Nwafidelie v Canada (Citizenship and Immigration)*, 2017 FC 144 at para 22).

B. *Establishment*

[13] Second, the Applicants argue that the Officer unreasonably discounted Ms. Osun's establishment by noting that she had received "due process" in Canada, and held her establishment to an unreasonably high standard by noting that the steps she had taken towards establishment were "not uncommon." The impugned parts of the Decision are:

> While I acknowledge that the applicant has taken positive steps in establishing herself in Canada, I also note that the applicant has received due process through the refugee and immigration program and was accordingly afforded the tools and opportunity to obtain a degree of establishment into Canadian society. It is my finding that it is not uncommon for individuals to be employed, pay taxes, do volunteer work, participate in a church and in other activates [*sic*], similar to those undertaken by the applicant. … While the applicant has acquired some establishment through her studies and job experience, and would like to enjoy the quality of life she has in Canada, I do not find that this is an exceptional situation unanticipated by our immigration laws.
>
> [Emphasis added.]

[14] The Officer concluded the establishment analysis by stating that "[b]ased upon a totality of the evidence before me, I acknowledge that the applicant has taken positive steps in establishing herself in Canada, and have given it due weight in this assessment."

[15] I agree that this passage reflects the flawed logic pointed out in *Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813 [*Sebbe*], where Justice Zinn explained that an officer "must not merely discount what [the applicants] 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." Rather, the officer must assess an applicant's establishment and how it weighs in favour of granting an exemption (*Sebbe* at para 21).

[16] Furthermore, this Court has held it unreasonable to require, without more explanation, an "extraordinary" level of establishment (*Sivalingam v Canada (Citizenship and Immigration)*, 2017 FC 1185 at para 13). Here, the Officer concluded that while Ms. Osun has acquired some establishment, this is not an "exceptional situation."

[17] While the mere use of the language of exceptionality does not itself render a decision unreasonable, in that the officer may simply mean that the applicant has not shown ties that are strong enough to justify an H&C exemption (*Boukhanfra v Canada (Citizenship and Immigration)*, 2019 FC 4 at para 29), the combined references to the Applicants receiving "due process," and their situation not being "uncommon" or "exceptional", undermine the establishment analysis in this case. In any event, the weakness is exacerbated by the faulty BIOC analysis that followed. Taken together, these flaws render the Decision unreasonable.

C. *BIOC*

[18] I note two problems with the Officer's BIOC assessment. The first relates to the discussion of hardship within that factor. The second relates to one of the children's psychological report. These will be discussed in sequence.

[19] First, the Courts have on numerous occasions cautioned against filtering H&C assessments exclusively through the lens of hardship (see, for example, *Mursalim v Canada (Citizenship and Immigration)*, 2018 FC 596 at para 37, as well as *Kanthasamy*). In other words, while officers may consider hardship as a factor in assessing the BIOC, a hardship analysis cannot supplant a complete and contextual BIOC analysis. Reviewing courts should have reason to believe that officers "considered not just hardship but humanitarian and compassionate factors in the broader sense" (emphasis added, *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at para 33 [*Marshall*]).

[20] Here, referring to the three children, the Officer wrote, "I have insufficient evidence before me to indicate that their welfare would be compromised should they depart Canada and go to Nigeria." While the Officer acknowledged that the interests of the children are "better served in Canada," s/he did not elaborate on this point and proceeded to explain how the disruption caused by removal would be minimized. S/he wrote in this portion of the Decision:

> … I note that the minor applicants have been absent from Nigeria for less than three years and all their other family members continue to reside in Nigeria and hence, it would be reasonable to believe that this disruption should be minimal. I accept that the conditions that the minor applicants will face in Nigeria may not be as favourable as they may have enjoyed in Canada; however, different standards of living exist between countries and many

> countries are not as fortunate to have the same social, financial and medical supports as those found in Canada. The intent of humanitarian and compassionate discretion is not to make up for the differences in standards of living between Canada and other countries, rather the purpose of humanitarian and compassionate discretion is to allow the flexibility to approve cases where the circumstances justify granting an exemption.

[21] This is very resonant of a hardship analysis, as the starting point within the BIOC analysis, as to whether it will – or will not – be difficult to leave Canada. This approach erroneously substitutes findings on hardship for assessing BIOC in determining what course of action is most appropriate in the circumstances. As recently found in *Singh v Canada (Citizenship and Immigration)*, 2019 FC 1633 at para 30 [*Singh*], and *Patousia v Canada (Citizenship and Immigration)*, 2017 FC 876 at paras 53-56, a lack of hardship cannot serve as a valid substitute for a BIOC analysis.

[22] Similarly, one cannot substitute a finding of hardship in returning to one's country, or lack thereof, for an establishment analysis: an officer "should not evaluate hardship under the label of 'establishment' lest these two factors be amalgamated into one, and the establishment factor be rendered meaningless. As this Court observed in *Marshall* at para 35, to do so improperly filters establishment through the lens of hardship" (*Singh* at para 26).

[23] This is not to say that the hardship (or lack thereof) of leaving Canada and returning to one's home country cannot be a central consideration in an H&C analysis. Indeed, it is often one of the key factors mixed into the H&C recipe. However, those ingredients must be identified when it goes into the mix and not disguised or conflated with others – particularly BIOC. As Justice Abella wrote in *Kanthasamy*, since "'[c]hildren will rarely, if ever, be deserving of any

hardship', the concept of 'unusual and undeserved hardship' is presumptively inapplicable to the assessment of the hardship invoked by a child to support his or her application for humanitarian and compassionate relief: *Hawthorne*, at para. 9" (at para 41). Clearer delineation is needed to allow a Court to confirm a decision maker reasonably considered all relevant factors.

[24] To summarize, while hardship can be a weighty element of an H&C outcome, to justify the outcome, it must be explained. A hardship analysis interwoven with – and indistinguishable from – BIOC analysis is not transparent, because the Court cannot assess the weight afforded to these factors.

[25] One further gap in the BIOC analysis – namely the failure to justify the Decision in light of the facts and the law – in this case is that a letter from a family therapist was submitted. It noted that (i) one of Ms. Osun's children was experiencing "trauma symptoms" triggered by her fear of being deported to Nigeria, (ii) the child requires access to mental health services, and (iii) returning to Nigeria would put her emotional, social and psychological well-being at risk.

[26] The Officer's response to this letter was a statement that s/he gave it "careful consideration," with no further comment. There was no assessment of the contents of this evidence, nor any mention of the letter's commentary on how removal may impact the child's mental health, a factor of hardship in itself. Considering the importance of this evidence – i.e. the one letter speaking to the child's mental health – I find the lack of any assessment, such as an explanation regarding why it was insufficient, renders the Decision unreasonable (*Vavilov* at para 98). This aspect of the Decision also fails to implement *Kanthasamy*'s guidance that BIOC

must be “well identified and defined” and examined “with a great deal of attention” in light of all the evidence (at paras 35, 39).

[27] As a cumulative result of the various flaws discussed above, the Decision as a whole does not “add up.” Certainly, the Officer noted that Ms. Osun had taken positive steps towards establishment, and that the children’s interests would be better served in Canada (but again, with no meaningful analysis). Given the centrality of establishment and BIOC to any H&C analysis, we cannot know whether the outcome might have been different without the Decision’s flaws.

III. Conclusion

[28] The fact that the Applicants received “due process,” and that Ms. Osun was found to lack credibility regarding her alleged sexual orientation, does not mean shortcuts can be taken on unrelated grounds advanced in an H&C, especially when they relate to her children. The Officer erred in failing to assess central BIOC evidence, as well as in making problematic comments in the analysis of establishment and hardship. Cumulatively, these errors result in the Decision lacking the requisite level of transparency and intelligibility under the *Vavilov* framework. I will thus allow the judicial review.

JUDGMENT in IMM-3297-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.

2. The matter is remitted to the department for reconsideration by a different officer.

3. No questions for certification were argued, and I agree none arise.

4. There is no award as to costs.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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