Federal Court  Cour fédérale

Date: 20201030

Docket: IMM-2947-19

Citation: 2020 FC 1018

Ottawa, Ontario, October 30, 2020

PRESENT: Mr. Justice McHaffie

BETWEEN:

ROSEMARY AGBONMHERE CALEB
OSELUOLE EMMANUELLA CALEB
ERONMHOSELE PRINCE MOSES CALEB

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Rosemary Caleb and two of her children applied for permanent residence in Canada on humanitarian and compassionate (H&C) grounds, after their claim for refugee protection was denied: see *Caleb v Canada (Citizenship and Immigration)*, 2018 FC 384. On this application, they challenge the refusal of their H&C application. They argue the H&C officer applied an

improper approach to the assessment of the hardship they would face if removed to Nigeria, and failed to adequately assess the best interests of the children (BIOC).

[2] I conclude that the H&C officer's decision was reasonable. The officer's assessment of hardship was appropriately forward-looking and reasonably took into account the Calebs' personal circumstances. When read in light of the Calebs' H&C application, I do not find the H&C officer's references to the Calebs not having been subjected to criminal activity or discrimination indicate that the H&C officer improperly imposed a requirement to show personalized risk, as the Calebs argue. Nor do I find that the H&C officer unduly weighed Ms. Caleb's education and employment history to the exclusion of other relevant evidence or factors, as the Calebs argue.

[3] With respect to the BIOC analysis, I am not persuaded that the H&C officer unreasonably failed to assess the children's best interests, or limited their analysis to particular hardship thresholds. Rather, the H&C officer considered the BIOC factors put forward by the Calebs, and considered those factors alongside other H&C factors, but found that their circumstances as a whole did not warrant granting H&C relief. This conclusion was open to the H&C officer on the evidence, and their reasons for the decision show that they conducted the requisite analysis reasonably.

[4] The application for judicial review is therefore dismissed.

II. Issues and Standard of Review

[5] The Calebs applied for H&C relief pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. Their application relied on three main aspects of the family's circumstances: the hardships that they would face if required to return to Nigeria; the best interests of the four Caleb children, two of whom are Canadian citizens; and their establishment in Canada. On this application for judicial review, the Calebs challenge the H&C officer's refusal of the H&C application based on their treatment of the first two of these elements, raising the following issues:

A. Did the H&C officer err in their approach to analyzing hardship as an H&C factor?
B. Did the H&C officer err in their assessment of the best interests of the child as an H&C factor?

[6] The parties agree that H&C decisions are subject to review on the reasonableness standard: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25.

[7] A reviewing court conducting reasonableness review begins its inquiry by examining the reasons with "respectful attention" and seeking to understand the reasoning process followed by the decision maker: *Vavilov* at para 84. The Court must determine whether the decision is both reasonable in outcome and process, considered in relation to the factual and legal constraints that bear on the decision: *Vavilov* at paras 87, 99. A reasonable decision is one that is justified,

transparent, and intelligible to the individuals subject to it, reflecting "an internally coherent and rational chain of analysis" when read as a whole and taking into account the record before the decision maker and the submissions of the parties: *Vavilov* at paras 81, 85, 91, 94–96, 99, 127–128.

III. Analysis

A. *The H&C Officer's Hardship Analysis was Reasonable*

[8] On their H&C application, the Calebs submitted they would face serious hardship if required to return to Nigeria. They pointed to adverse country conditions in Nigeria with respect to (i) economic conditions, including gender-based discrimination in employment and occupation; (ii) crime and safety; and (iii) military conflict and instability. The H&C officer considered each of these issues in their reasons, using as headings the categories of hardship identified by the Calebs. With respect to each, the H&C officer considered the country condition evidence as well as the Calebs' personal circumstances, and accorded weight to the factor based on their assessment of that evidence.

[9] The Calebs make two main arguments with respect to the H&C officer's approach to the hardship assessment. First, they argue the H&C officer required them to show direct evidence that they had been subjected to discrimination or violence in the past, contrary to the jurisprudence regarding H&C assessments. Second, they argue the H&C officer unduly fixated on Ms. Caleb's education and an employment position she had held for a brief time, using these facts to effectively discount or dismiss any risk of hardship, a problem they say also pervades the

BIOC analysis. In my view, neither of these arguments can be sustained on a fair reading of the H&C officer's reasons.

(1) The H&C officer did not improperly require personal experience of hardship

[10] As the Calebs point out, the consideration of hardship in an H&C application is not the same as an assessment of the fear of persecution or risk faced by a refugee claimant under sections 96 and 97 of the *IRPA*, although facts relevant to refugee protection may also be relevant to an H&C assessment: *Kanthasamy* at paras 50–51; *Miyir v Canada (Citizenship and Immigration)*, 2018 FC 73 at paras 18–21. An H&C assessment must consider all relevant factors globally to assess whether the circumstances would excite in a reasonable person in a civilized community a desire to relieve the misfortunes of another, so long as those misfortunes justify the granting of relief: *Kanthasamy* at paras 13–21, 25, 28–31; *IRPA*, s 25(1).

[11] In *Kanthasamy*, the Supreme Court of Canada underscored that an applicant for H&C relief need not show that they have been personally affected or targeted by adverse country conditions: *Kanthasamy* at paras 52–56; *Isesele v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 222 at para 16. Similarly, unlike in an assessment under section 97, country condition evidence showing a risk faced by the entire population in the country of origin may still be relevant on an H&C application: *Diabate v Canada (Citizenship and Immigration)*, 2013 FC 129 at paras 32–33; *Miyir* at paras 21, 29–30.

[12] The Calebs argue that the H&C officer fell into the error of requiring them to demonstrate that Ms. Caleb had personally suffered discrimination in order to consider this as an

adverse country condition factor weighing in favour of the H&C application. The Calebs rely on the following passage from the H&C officer's reasons, which follows a review of the country condition evidence regarding adverse economic conditions and gender-based discrimination in employment in Nigeria:

> In terms of the applicants' particular profile, I note that the H&C application shows that the principal applicant graduated from *Ambrose Alli University* studying Business Administration. Her previous work experience includes employment with the *Consulate General of Nigeria* in Cameroon from August 2006 to July 2007. From July 2010 to March 2016, she was self-employed in sales. In submissions, the principal applicant writes that her work consisted of selling petty goods from her home. Still, based on her education and experience working with the Consulate General, I find that she possesses strong credentials which could aid in procuring employment. While her previous experience in sales consisted of selling personal petty goods, I am not persuaded that sufficient evidence has been presented to indicate the factors which held her to selling petty personal items and whether she was denied employment opportunities in other fields due to economic or discriminatory factors.
>
> While I accept the inequality between men and women in the Nigerian workforce, based on the applicant's specific educational background, I attach less weight to the assertion that she would struggle to find employment and be forced into poverty. Moreover, her husband abroad also has strong employment skills with a background in Information Technology.
>
> [Emphasis added.]

[13] The Calebs argue that the underlined portion of the above passage shows that the H&C officer imposed a requirement that they provide direct evidence Ms. Caleb had suffered economic discrimination in the past, and that the officer disregarded the country condition evidence of discrimination in consequence. I do not agree, for three reasons.

[14] First, on my read of the H&C officer's reasons, they were directed primarily toward considering the likely future impacts on the Calebs of the adverse economic conditions in Nigeria. In assessing this potential hardship, the H&C officer considered Ms. Caleb's education and employment history, which they believed increased the chances of her gaining employment in the future. The H&C officer also considered the fact that Ms. Caleb's employment history was primarily limited to selling petty goods, despite her degree in business administration. Evidently, if economic conditions or discrimination in Nigeria had previously prevented Ms. Caleb from obtaining employment in her field despite her education, this would be relevant evidence, as it could have affected the H&C officer's conclusion that her education and employment history attenuated some of the risks of hardship suggested by the country condition evidence. The H&C officer noted, however, that there was no evidence that this was the cause of Ms. Caleb being unable to secure such employment in the past. I do not take this as the H&C officer "requiring" Ms. Caleb to have suffered discrimination in the past. Rather, they simply recognized the potential relevance of such evidence and noted that it did not exist in Ms. Caleb's case. As this Court has noted, what has happened in the past can be a relevant indicator of what is likely to happen in the future: *Trach v Canada (Citizenship and Immigration)*, 2019 FC 747 at para 23. Provided it is not taken as a requirement before H&C relief is granted, it is not unreasonable for an H&C officer to consider an applicant's past experiences of hardship and discrimination, or to note when such experiences are not part of the applicant's profile.

[15] Second, the H&C officer did not dismiss the concerns about economic hardship and gender-based discrimination, as the Calebs contend. To the contrary, the H&C officer stated that they "accept the objective evidence presented on behalf of the applicants relating to the poverty,

high unemployment rate and gender-based discrimination in Nigeria." In the passage reproduced above, they also concluded that they "accept the inequality between men and women in the Nigerian workforce," but attached "less weight to the assertion that [Ms. Caleb] would struggle to find employment and be forced into poverty" because of her specific educational background [emphasis added]. In my view, these are not unreasonable conclusions. It is open to an H&C officer to assess the country condition evidence and conclude that the concerns raised by an applicant may be exacerbated or attenuated as a result of factors such as education. This is particularly the case where, as here, the country condition evidence expressly notes that level of education was a factor in marginalization of women in the work force.

[16] I agree with the Calebs that it would have been unreasonable if the H&C officer dismissed any concern about economic hardship or discrimination, or assumed that Ms. Caleb would be fully insulated from such concerns, based solely on her degree or on the lack of evidence she had previously suffered discrimination. However, that is not what the H&C officer did. They simply indicated that they attached "less weight" to the concern about difficulties with future employment, given Ms. Caleb's education. This is a reasonable approach to the discretionary weighing function the H&C officer is called upon to undertake, and one to which this Court ought to defer: *Sivalingam v Canada (Citizenship and Immigration)*, 2017 FC 1185 at para 7.

[17] Third, the H&C officer's assessment of economic conditions in Nigeria and in particular concerns about gender-based discrimination must be considered in the context of the Calebs' submissions in their H&C application: *Vavilov* at paras 94, 127–128. Of the fairly extensive

submissions made by the Calebs regarding economic conditions and other hardships in Nigeria, the submissions related to gender-based discrimination were limited to the submission that "[w]omen have particularly higher rates of unemployment than men. As such, if Rosemary is forced to leave Canada, her and her family's economic situation would decline as she would have difficulties in finding employment due to widespread discrimination against women." This was followed by reference to a passage from the country condition evidence regarding gender-based discrimination in employment. Given that the Calebs' only submission with respect to discrimination was that Ms. Caleb would have difficulties finding employment due to widespread discrimination against women, it was reasonable for the officer to assess the evidence, including personal evidence, as it pertained to whether Ms. Caleb's previous employment had been impacted by such discrimination.

[18] The Calebs also argue that the H&C officer similarly imposed a requirement that they have suffered violence in the past, and imported a requirement for evidence of personalized risk or hardship in respect of this factor. The Calebs point to the following passage in the H&C officer's reasons, which appears after a lengthy consideration of the country condition evidence regarding crime and violence:

> With respect to the applicants' particular circumstances, they resided in Abuja prior to arriving in Canada. There is little reliable evidence to demonstrate that they were subject to any criminal actions. Indeed, this assessment is forward-looking but I find that there is insufficient objective evidence to demonstrate that the applicants could not seek protection in an area such as Abjua [*sic*]. Moreover, the UK Home Office Foreign Travel Advice states that major towns and cities remain at risk besides Abuja.
>
> In terms of the assertion that the applicants would face a personalized risk due to their time spent in a foreign country, I am not persuaded that sufficient objective evidence has been presented

> to demonstrate that those returning to Nigeria, particularly in Abuja, face heightened risk.
>
> Based on the above information, I have accorded moderate weight to concerns relating to crime and safety in Nigeria. Certainly, I do find conditions in Canada to be safer.
>
> [Emphasis added.]

[19] The Calebs argue this passage shows that the H&C officer effectively faulted them for not showing they had been subject to criminal action in the past, and that they improperly imported notions of adequate state protection from the refugee protection assessment into the H&C analysis.

[20] Again, however, reviewing this passage in the context of the Calebs' submissions shows that it was directly responsive to arguments being made by the Calebs. The Calebs had initially made a claim for refugee protection, asserting that Mr. Caleb's family had insisted that their daughters be subjected to female genital mutilation (FGM), and had harassed and threatened them when they refused to comply: *Caleb* at paras 6–11. That claim was rejected on grounds of credibility and lack of subjective fear: *Caleb* at paras 3, 12–15. On their H&C application, the Calebs reiterated their concern that the female children faced FGM and threats from Mr. Caleb's family. In their discussion of "Crime and Safety in Nigeria," the Calebs referred to country condition evidence regarding ineffectiveness and corruption of Nigerian police forces, and then made the following submission:

> It is our submission that the above evidence supports the Principal Applicant's concern that her and her family will not receive police/government protection from [Mr. Caleb's] family, their threats and their attacks.

[21] In this context, it is clear that the first part of the passage from the H&C officer's reasons reproduced above directly responds to this submission. First, it finds that there was no reliable evidence that the Calebs had been subject to any criminal actions, given the Refugee Appeal Division's rejection of the narrative about attacks by Mr. Caleb's family. Second, it concludes that the evidence did not support the Calebs' contention that they could not benefit from police protection. The H&C officer neither required evidence of being subject to criminal attacks nor imported notions of adequate state protection; they simply responded directly to the arguments raised by the Calebs. This conclusion is reinforced by the fact that the next paragraph in the reasons set out above responds directly to the immediately following submission in the Calebs' H&C application, which related to the risks faced by returnees.

[22] Having made these submissions in their H&C application, the Calebs cannot now argue that it was unreasonable for the H&C officer to have addressed and responded to them. To the contrary, such responsiveness is an indicator of a reasonable decision: *Vavilov* at paras 127–128.

[23] Contrary to the Calebs' submissions, the H&C officer conducted the necessary "forward-looking" assessment, and did not dismiss the country condition evidence of crime and safety because the Calebs had not shown they were victims of crime in the past. Rather, they assessed the information as a whole in the context of the Calebs' submissions and accorded "moderate weight" to the concerns regarding crime and safety in Nigeria. This was not unreasonable.

(2) The H&C officer did not unduly privilege certain evidence

[24] The Calebs raise a second concern with the section of the reasons reproduced at paragraph [12] above. They argue that the H&C officer unduly "fixated" on Ms. Caleb's educational and work experience to the effective exclusion of the other evidence, and without regard to the overall nature of the Calebs' claim. I cannot accept this submission.

[25] The H&C officer noted that Ms. Caleb is a graduate of Ambrose Alli University, where she studied business administration. Ms. Caleb's work experience included a ten-month position in the 2006–2007 time frame with the Consulate General of Nigeria in Cameroon, a position she obtained with the help of an uncle. She returned from that position to Nigeria at the request of Mr. Caleb, whom she had recently married. Apart from that position, Ms. Caleb's work history consisted of selling clothing and petty goods from home. Ms. Caleb's husband is also educated, being trained and working in the information technology field, although this work has not been stable in the past few years.

[26] The H&C officer referred to the parents' education and work experience in three places in their decision: once in considering the allegations of hardship (the passage reproduced in paragraph [12]), and twice in addressing the best interests of the Caleb children (once in assessing education prospects, noting that they would provide a "strong positive foundation for their children"; and once in noting that private health care "may also be an option"). In each case, the H&C officer considered that the educational and employment profile of Ms. Caleb and

her husband was likely to attenuate to some degree the concerns identified by the Calebs regarding conditions in Nigeria.

[27] Reviewing the reasons as a whole, I am unable to conclude that the H&C officer unduly or improperly "fixated" on Ms. Caleb's education and employment history, or used this fact to ignore country condition evidence or other aspects of the Calebs' narrative. Consideration of the personal circumstances of an applicant, including such matters as their education and employment history, in assessing the degree to which they will suffer hardship upon return is not unreasonable in an H&C assessment. Indeed, it is an integral aspect of such an assessment.

[28] As noted above, I agree that it would be unreasonable to assume that a university degree was a panacea that would insulate an applicant from all manner of adverse country conditions. However, contrary to the Calebs' submissions, I do not read the H&C officer's reasons as suggesting that they believe the Calebs "will escape the overwhelming poor economic conditions in Nigeria and gender-based discrimination due to educational background." Rather, the H&C officer considered this among other factors in assessing whether H&C considerations justified granting the requested relief. The H&C officer gave some weight to the various hardships identified in the country condition evidence, although less than might have been the case if the Calebs did not have the educational and employment background they did. The Calebs' arguments effectively amount to a submission that the H&C officer should have given less weight to their education and employment history, or found that the economic conditions were a stronger factor in their favour than they did. Such a reweighing is not the role of this

Court on judicial review, provided the weighing exercise has been undertaken reasonably: *Vavilov* at para 125. I conclude in this case that it has been.

B. *The H&C Officer's Analysis of the Best Interests of the Child was Reasonable*

[29] The Calebs' H&C application highlighted the best interests of the four Caleb children: an older brother and sister who are Nigerian citizens, and younger Canadian twin daughters. The application raised a number of submissions regarding their best interests, noting their success and establishment in Canada, and the adverse impacts of the family returning to Nigeria. The latter included the poor education and health care systems; risks of child labour; poor employment prospects for youth; and risks of violence from child abduction and trafficking, from FGM practices, and from the terrorist organization Boko Haram. The H&C officer considered these factors, balancing the factors relating to conditions in Nigeria, while concluding that there was little evidence of risk of abduction, child labour, or threats from Boko Haram.

[30] The Calebs argue that the H&C officer took the wrong approach to the BIOC analysis. They claim that the H&C officer failed to identify what would be in the children's best interests and compare which outcome (remaining in Canada or returning to Nigeria) would most affect this. They also argue that the H&C officer began from a presumption that the H&C application would be refused, and simply concluded that none of the resulting hardship would be insurmountable, an analysis this Court has recognized as unreasonable: *Sivalingam* at para 17.

[31] I do not find it unreasonable that the H&C officer did not expressly state that the BIOC would be best served by the family remaining in Canada. As the Federal Court of Appeal stated

in *Hawthorne*, an officer "may be presumed to know that living in Canada can offer a child many opportunities": *Canada (Minister of Citizenship and Immigration) v Hawthorne*, 2002 FCA 475 at para 5. Here, the H&C officer made a number of statements comparing the situation in Nigeria to that in Canada on issues such as education and health care, implicitly recognizing that remaining in Canada would be in the children's best interests, and assessing the degree to which those best interests would be affected by the alternative, namely removal to Nigeria.

[32] In this regard, it is again instructive to consider the H&C officer's reasons in light of the submissions on BIOC made by the Calebs. A significant portion of those submissions pertained, reasonably, to the adverse impacts on the children of returning to Nigeria. These submissions were considered and addressed by the H&C officer. In such circumstances, it is untenable to argue that it was unreasonable for the H&C officer to undertake an assessment that focused on the adverse impacts of removal. In this regard, unlike in the *Patousia* decision cited by the Calebs, the H&C officer did not conclude their decision, or base it, on whether the hardships for the children in Nigeria warranted an H&C exemption: *Patousia v Canada (Citizenship and Immigration)*, 2017 FC 876 at paras 54–56.

[33] I also see no basis to read the H&C officer's reasons as presuming any particular outcome as a starting point. Rather, they assessed the impacts of the various adverse factors in Nigeria that were raised by the Calebs in their submissions and assigned weight to these factors according to their assessment of the evidence.

[34] Nor do I consider that the H&C officer's reference to the parents' education indicates a conclusion that the children would be unaffected by moving to Nigeria or that that education would "somehow prevent the children from being exposed to the dire socio-economic conditions in Nigeria," as the Calebs contend. Rather, as discussed above, the H&C officer accepted the adverse conditions in Nigeria, but at the same time noted that the parents' personal circumstances could attenuate—not eliminate—the impacts of those country conditions. This is far from the assumption imputed to the H&C officer by the Calebs, namely that Ms. Caleb's university degree acted as a shield against all possible hardships in Nigeria.

[35] Concluding that the impact of a removal on a particular child may be reduced to some degree by particular conditions, does not in itself mean that that impact has been improperly discounted, or that an H&C officer has inappropriately introduced a minimum standard of hardship. Rather, it is an awareness that the impact of adverse country conditions will vary depending on the personal circumstances of the family, and an assessment of the H&C application in the specific context of the applicants. This is the assessment required by subsection 25(1), which calls for an examination of the "circumstances concerning the foreign national" and the "humanitarian and compassionate considerations relating to the foreign national."

[36] I do agree with the Calebs that one of the H&C officer's observations regarding literacy rates is difficult to sustain. After stating that the literacy rate in Nigeria is "alarmingly low at an average of 59,6% with only 49.7% of the female population," the H&C officer noted that literacy figures vary throughout the country, and that a 2012 UNESCO report "shows that the literacy

rate in Abuja [where the Calebs would likely return] sat at 62%, greater than the country average." While this may be factually true, I agree with the Calebs that the difference between a 59.6% literacy rate and a 62% literacy rate is so small as to be an immaterial consideration. However, this was only one element of the assessment of this issue, which also recognized the parents' education and employment backgrounds as circumstances presenting a "strong positive foundation for their children." I therefore cannot conclude that the single comparison of literacy rates renders the decision as a whole unreasonable. To do so would be to improperly engage in the type of "treasure hunt for error" the Supreme Court of Canada has repeatedly warned against: *Vavilov* at para 102. Rather, this appears to be a "minor misstep" in the reasoning that should not lead this Court to overturn the decision: *Vavilov* at para 100.

[37] The Calebs also argue that the H&C officer failed to acknowledge that three of the Caleb children are girls, and to analyze the effect of this on the adverse impacts they may face in Nigeria, particularly as it relates to education and employment. While I agree that gender-based discrimination issues are a relevant and important aspect of the BIOC analysis where raised, I cannot fault the H&C officer for not addressing a concern not raised by the Calebs in their submissions. While the Calebs made lengthy submissions on the best interests of the four children, their submissions regarding gender-based discrimination and gender-based violence were limited to (i) reference to differential statistics on literacy rates and enrollment; (ii) risks at the hands of Boko Haram; (iii) reference to abduction and sex trafficking; and (iv) the risk of the girls facing FGM. Each of these was addressed by the H&C officer in their reasons.

[38] Overall, I am satisfied that the H&C officer's reasons show that the bests interests of the Caleb children were well identified and defined, and examined with a great deal of attention: *Hawthorne* at para 32, citing *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at paras 12, 31. The bests interests of the Caleb children would certainly be to remain in Canada, as is the case in respect of most if not all H&C applicants: *Osorio Diaz v Canada (Citizenship and Immigration)*, 2015 FC 373 at para 29, quoting *Landazuri Moreno v Canada (Citizenship and Immigration)*, 2014 FC 481 at paras 36–37. However, this alone is not determinative of an H&C application: *Landazuri Moreno* at para 36. Here, the H&C officer conducted a reasonable assessment of the BIOC factors put forward by the Calebs, in accordance with the principles established in the jurisprudence.

IV. Conclusion

[39] The H&C officer considered each of the elements put forward by the Calebs on their H&C application, and found positive elements in their application, but was not ultimately persuaded that there was sufficient evidence to grant the application. The H&C officer's decision was justified, transparent and intelligible, and it is not this Court's role to reassess the H&C application or substitute its own decision in the absence of "sufficiently serious shortcomings in the decision": *Vavilov* at paras 15, 86, 99–100. I conclude that there were no such shortcomings in the H&C officer's decision in this case.

[40] The application for judicial review is therefore dismissed. Neither party proposed a question for certification. I agree that none arises in the matter.

JUDGMENT IN IMM-2947-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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