Federal Court  Cour fédérale

Date: 20211015

Docket: IMM-1966-20

Citation: 2021 FC 1072

Ottawa, Ontario, October 15, 2021

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

SYLVIA KETJINGANDA
ZEBULON UPENDURA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Ms. Sylvia Ketjinganda and Mr. Zebulon Upendura [the Applicants] seek judicial review of a decision [Decision] rendered by a Senior Immigration Officer [Officer] dated March 3, 2020, refusing their application for permanent residence on humanitarian and compassionate [H&C] grounds under s. 25(1) of the *Immigration and Refugee Protection Act* [IRPA].

[2] After careful consideration of the record and the submissions of both parties, for the reasons that follow, I conclude that this application for judicial review must be dismissed.

I. Background

[3] The Applicants are citizens of Namibia. Ms. Ketjinganda, born in 1988, entered Canada on June 3, 2011 and claimed refugee protection on June 4, 2011. Her spouse, Mr. Upendura, born in 1981, entered Canada on June 14, 2011, and claimed refugee protection on June 15, 2011. Ms. Ketjinganda's refugee claim was refused on June 25, 2012 and leave for judicial review was denied on October 18, 2012. Mr. Upendura's refugee claim was refused on January 16, 2014. A warrant for Mr. Upendura's arrest was issued on December 16, 2014, and executed on August 11, 2015, following which he was released on conditions.

[4] The Applicants then applied for pre-removal risk assessments [PRRA]. Ms. Ketjinganda's and Mr. Upendura's PRAA applications were refused on January 4, 2016 and April 14, 2016, respectively.

[5] In the intervening years, the Applicants have been issued numerous work permits, which do not confer temporary resident status.

[6] The Applicants have two children who were born in Canada in 2013 and 2016. Aside from the Applicants and their two children, the Applicants' fourteen family members reside in Namibia.

[7] On February 8, 2018, the Applicants submitted their application for permanent residence based on H&C grounds. On March 3, 2020, the application was refused.

[8] The Decision considered the establishment of the Applicants in Canada, the best interests of the children, and the adverse country conditions in Namibia. Having considered the circumstances of the Applicants and the documentation submitted, Officer concluded that the H&C considerations did not justify an exemption from the requirement of having to apply from outside of Canada for permanent residence.

[9] In their application for judicial review, the Applicants filed an affidavit from Ms. Ketjinganda, sworn after the Decision, containing statements that were not before the Officer. The general rule is that evidentiary record before this Court on judicial review of an administrative decision is restricted to the evidentiary record that was before the administrative decision-maker. I informed the parties at the hearing that the statements in Ms. Ketjinganda's new affidavit are inadmissible and will not be taken into account.

II. Issues

[10] The Applicant has raised numerous issues, which I reformulate as follows:

A. Did the Officer breach procedural fairness by using Google searches to locate certain country documentation?

B. Was the Decision reasonable?

III. H&C Applications and Standard of Review

[11] As stated by my colleague Justice Mosely in *Fatt Kok v Canada (Citizenship and Immigration)*, an exemption under subsection 25(1) of the *IRPA* is an exceptional and discretionary remedy (2011 FC 741 at para 7; See also *Huang v Canada (Citizenship and Immigration)* 2019 FC 265 at paras 19 - 20). Subsection 25(1) of the IRPA confers broad discretion on the Minister, and by implication on his delegate, the Officer, to determine H&C applications. My colleague Justice Little describes the general principles and purposes of H&C applications in *Rainholz v Canada* (*Citizenship and Immigration*), 2021 FC 121:

> [13] Subsection 25(1) of the IRPA gives the Minister discretion to exempt foreign nationals from the ordinary requirements of that statute and grant permanent resident status in Canada, if the Minister is of the opinion that such relief is justified by humanitarian and compassionate considerations. Those considerations are to include the best interests of a child directly affected. The H&C discretion in subs. 25(1) is a flexible and responsive exception to the ordinary operation of the IRPA, to mitigate the rigidity of the law in an appropriate case.
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> [14] Humanitarian and compassionate considerations refer to "those facts, established by the evidence, which would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the [IRPA]" The purpose of the H&C provision is provide equitable relief in those circumstances.
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> [15] Subsection 25(1) has been interpreted to require that the officer assess the hardship that the applicant(s) will experience on leaving Canada. Although not used in the statute itself, appellate case law has confirmed that the words "unusual", "undeserved" and "disproportionate" describe the hardship contemplated by the provision that will give rise to an exemption. Those words to describe hardship are instructive but not determinative, allowing subs. 25(1) to respond flexibly to the equitable goals of the provision.

> [16] An applicant may raise a wide variety of factors to show hardship on an application for H&C relief. Commonly raised factors include establishment in Canada; ties to Canada; health considerations; consequences of separation of relatives; and the BIOC. The H&C determination under sub. 25(1) is a global one, and relevant considerations are to be weighed cumulatively as part of the determination of whether relief is justified in the circumstances.
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> [17] The discretion in subs. 25(1) must be exercised reasonably. Officers making humanitarian and compassionate determinations must substantively consider and weigh all the relevant facts and factors before them.
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> [18] The onus of establishing that an H&C exemption is warranted lies with the applicants. Lack of evidence or failure to adduce relevant information in support of an H&C application is at the peril of the applicant.
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> [Citations omitted]

[12] With regard to the first issue, the Federal Court of Appeal has confirmed that, on judicial review, questions of procedural fairness are reviewed on the correctness standard (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

[13] With regard to the second issue, the Supreme Court of Canada confirmed in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, that the applicable standard when reviewing H&C decisions is reasonableness. For the reviewing court to intervene, the challenging party must satisfy the court that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency", and that such alleged shortcomings or flaws "must be more than merely superficial or peripheral to the merits of the decision" *Canada (Minister of Citizenship and*

Immigration) v Vavilov, 2019 SCC 65 at para 100 [*Vavilov*]. A reviewing court should also refrain from reweighing or reassessing the evidence considered by the decision maker and must not, absent exceptional circumstances, interfere with factual findings (*Vavilov* at para 85). The burden rests on the party challenging the decision to show that it is unreasonable (*Vavilov* at para 100).

IV. Analysis

A. *Did the Officer breach procedural fairness by using Google searches to locate country documentation?*

[14] The Officer used Google to locate the following documents, upon which, among other things, the Officer relied:

- On the question the official language in Namibia, the Officer located: Government of Namibia, Languages Spoken in Namibia, https://gov.na/languages-spoken Retrieved on 14 February 2020;
- On the question of health care in Namibia, the Officer located: Republic of Namibia, Embassy/Permanent Mission in Vienna, Health, http://www.embnamibia.at/health/ Retrieved on 24 February 2020;
- On the question of poverty in Namibia, the Officer located: The World Bank, The World Bank in Namibia: Overview, https://www.worldbank.org/en/country/namibia/overview Retrieved on 14 February 2020;

[15] The Officer also consulted and relied on the United States Department of State, 2018 Country Reports on Human Rights Practices: Namibia (retrieved on 14 February 2020), but it is unclear from the Decision whether the Officer used Google to locate this report.

[16] The Applicant submits that the Officer breached procedural fairness by having embarked "on a self-imposed voyage of discovery to conduct a google search… [and] then used the fruits of the search without giving the applicants an opportunity to respond". At the hearing, the Applicant also argued that the very act of using Google to search was a breach of procedural fairness. The Respondent, on the other hand, argues that the use of Google is not problematic, and rather it is the document that is ultimately used that should be the focus of the analysis. The Respondent submits that the documents relied upon are not obscure, controversial or difficult to locate, and, in any event, it would have been expected for the Officer to verify recent country conditions.

[17] I agree with the Respondent. The focus of the analysis must be on the documents or sources consulted, rather than the method that lead the Offer to them, namely Google.

[18] To reframe the issue, was there a breach of procedural fairness because the Officer consulted extrinsic evidence from the internet without providing the Applicants with the opportunity to comment on it? Officers are entitled to, and routinely do, consider "standard documents from sources such as Human Rights Watch, Amnesty International, or from a government authority such as the United States Department of State", and "there is no duty to disclose them even though they are extrinsic to the application because an applicant is deemed to know that this type of evidence will be considered and where to find it" (*Riaji v Canada (Citizenship and Immigration)*, 2011 FC 1240 at para 27). The use of Google to obtain information has been found by this Court not to be a breach of procedural fairness, provided the information was publicly available and not novel (*Olanrewaju v Canada (Citizenship and*

Immigration), 2020 FC 569 at para 27; *Aladenika v Canada (Citizenship and Immigration)*, 2018 FC 528 at para 16).

[19] The documents consulted by the Officer were all recent documents from two Government of Namibia sources, one United States Department of State source, and the World Bank. They are easily located, publicly available and not novel. Given the nature of the documentation consulted by the Officer, I am satisfied that there was no denial of procedural fairness.

[20] The Applicant took issue in particular with the two-page overview of Namibia published by the World Bank in 2020, submitting that the Officer conducted a selective reading of the document. The World Bank overview focuses on the economic outlook and development challenges for 2020, based on 2019 data. The overview's introduction states that Namibia's "natural mineral riches and tiny population of about 2.5 million people (2019) have made it an upper-middle income country. Political stability and sound economic management have helped anchor poverty reduction. However, this has not yet been translated into job creation, and extreme socio-economic inequalities inherited from years it was run under apartheid system persist, despite generous public spending on social programs."

[21] Ultimately, this is an argument about weight, rather than procedural fairness. I find that the Applicants have not demonstrated that the Officer dealt with the information contained in the country documentation in an unreasonable manner. This issue will be dealt with in greater detail in the section below.

B. *Was the Decision reasonable?*

[22] The Respondent prefaced its specific points with a general submission that, in the Respondent's view, the Applicants are effectively arguing that they should be allowed to stay in Canada to apply for permanent residence because they have become accustomed to living in Canada and their family's economic and educational prospects are better in Canada than in Namibia. The Respondent, relying on *Canada (Public Safety and Emergency Preparedness) v Nizami* 2016 FC 1177 at para 16, cautioned the Court against permitting the Applicants to use the H&C application process as an alternate stream of immigration. The Applicants, on the other hand, submit that the Officer imposed an excessive and unreasonable burden on the Applicants, and but for that burden, a different conclusion would have been reached.

[23] With respect to the Applicants' establishment in Canada, the Officer found that while the Applicants had developed valuable friendships with people in several provinces in Canada, there was insufficient evidence put forth to demonstrate that the relationships with their friends, coworkers and neighbours are such that if separation were to occur it would justify granting an H&C application. The Officer noted the fact that the Applicants are financially self-sufficient, have demonstrated a level of integration into Canadian society and community, but found that their establishment is at a level that would be expected of a person their circumstances. The Officer ultimately found that the Applicants' ties to Canada were not greater than their ties to Namibia, and attributed little weight to the Applicants' factors of establishment.

[24] The Applicant submits that the Officer's decision was unreasonable and critiques, among other things, the Officer's comments that the Applicants will be able to maintain contact with their friends in Canada through the mail, phone or internet. The Applicant submits that the communication infrastructure in Namibia and the cost of communication will not permit the Applicants to sustain these relationships, however, no evidence is on the record as to the availability or costs of communication. The Respondent submits that the Officer's determination was reasonable, because the Officer did not discern any characteristic of the Applicants' level of establishment that set it apart from the myriad of other H&C applications that are submitted for consideration.

[25] The Applicants are effectively inviting this Court to reweigh the evidence. I decline to do so. The Officer conducted an assessment of the evidence on establishment in Canada and I find that the Decision falls within the range of possible, acceptable outcomes that are defensible in light of the facts and the law.

[26] With respect to the best interests of the children, the Officer, at pages 5 through 7 of the Decision, identified, defined and examined the interests of the Applicants' two children, one daughter and one son, with due attention to the material submitted by the Applicants. The Officer also examined the material submitted with respect to the Ms. Ketjinganda's eldest child in Namibia and two children, one in Ontario and one in Alberta, in that Ms. Ketjinganda had cared for during the day.

[27] The Applicant submits that the Canadian born children will face disproportionate hardship, including gender-based discrimination, unemployment, poor education and health care, in Namibia. The Respondent submits that the fact that the two Canadian-born children may be better off in Canada in terms of general comfort and future opportunities cannot be conclusive of an H&C application. The Respondent further submits that the implicit thrust of the Applicants' submissions are that it is self-evident that it would be in the children's best interests to be educated in Canada.

[28] The Respondent relies on *Garraway v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 286. In *Garaway*, my colleague Justice Strickland addressed the different standards of living in the context of an analysis on the best interests of the child:

> [38] Moreover, in Sanchez at paragraph 18, the Court stated that the simple fact that living in Canada is more desirable for children is not sufficient, in and of itself, to grant an H&C application, quoting *Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356 as follows:
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> > 31 Finally, the Applicants have argued that conditions in Argentina are dismal and not good for raising children. They cited statistics from the documentation, which were also considered by the H & C Officer, to show that Canada is a more desirable place to live in general. But the fact that Canada is a more desirable place to live is not determinative on an H & C application *(Vasquez v. Canada (M.C.I.)*, 2005 FC 91; *Dreta v. Canada (M.C.I.)*, 2005 FC 1239); if it were otherwise, the huge majority of people living illegally in Canada would have to be granted permanent resident status for Humanitarian and Compassionate reasons. This is certainly not what Parliament intended in adopting section 25 of the Immigration and Refugee Protection Act. [My emphasis.]
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> [39] The Officer accepted that the conditions in St. Vincent may not be perfect and that different standards of living exist between

> countries. The Officer acknowledged that many countries are not as fortunate in having the same social supports, including financial and medical, as can be found in Canada. However, that Parliament did not intend the purpose of s 25 of the IRPA to be to make up for the difference in standard of living between Canada and other countries.

[29] The Officer addressed the different standards of living in Namibia and Canada, and found that the Applicants, having been born, raised, and spent their formative years in Namibia, will be in a position to assist their Canadian-born children's integration and adaptation into Namibian society. The Officer further noted that English was the official language of Namibia, a factor that would assist the children in their integration into Namibian society.

[30] I note that the factors raised by the Applicants in this Application were captured by the Officer in the Decision. The Applicants plead that the Canadian-born children will face harsh gender-based practices and socio-economic realities, and that the Namibian resident child born in 2007 faces such hazards. The Officer noted in the Decision, however, that there is little evidence on file to indicate that the Applicants or their children would face the alleged hazards, such as impoverishment or lack of access to healthcare, or that the Namibian born child was in fact experiencing the various hazards.

[31] I find that the Applicants have not established a reviewable error on the Officer's behalf. The Applicants are effectively asking this Court to reweigh the evidence adduced before the Officer which, absent exceptional circumstances, a reviewing Court should refrain from doing (*Vavilov* at para 85).

[32] With respect to the adverse Country conditions, the Applicants submit that their families rely on their support, that there is drought and the unemployment rate in Namibia is very high. The Respondent submits that the thrust of the Applicants' submissions are that the socio-economic conditions are significantly better in Canada than Namibia.

[33] The record shows that Ms. Ketjinganda's mother is on a disability pension. Furthermore three remittances, with one described as a funeral expense, were sent to the family, one in September 2013, one in March 2016 and one in August 2016. The record lists fourteen of the Applicants' family members, including Ms. Ketjinganda's eldest child, in Namibia. The Officer attributed little weight to this argument that the Applicants' family rely on their support, noting that there was a three-year gap without funds being sent and there was little evidence on file to demonstrate that the Applicants' family abroad required their financial assistance.

[34] The Officer further noted that while articles were submitted by the Applicants, there was little evidence on file to indicate that the Applicants' family abroad are affected by the drought, and in turn food insecurity and poverty. The Officer concluded that that most of the adverse country conditions submitted by the Applicants were generalized country conditions, and attributed little weight to them.

[35] The burden rests on the Applicants to demonstrate that the Officer's Decision was unreasonable. This Court has also held that an applicant bears the onus to establish a link between the general documentary evidence and the applicant's specific circumstances (*Gandhi v*

Canada (Citizenship and Immigration), 2020 FC 1132 at para 61). I do not find that the Officer erred in attributing little weight to the documentation submitted by the Applicants.

[36] While the Officer acknowledged that the Applicants will face some challenges upon returning to a country from which they have been absent for years, the Officer found that there was little evidence or information to indicate that the Applicants are estranged from their family members or that they would not offer their care or support even on a short-term basis upon the Applicants' return.

[37] I find the Decision reasonable, given that the Officer evaluated the Applicants' circumstances as a whole and was persuaded that that their circumstances did not warrant the remedy sought under section 25(1) of the IRPA. The Decision falls within the range of acceptable outcomes defensible on the facts and the law.

V. Conclusion

[38] To conclude, the Applicants have failed to demonstrate a reviewable error in the Officer's decision. When read holistically and contextually, I am satisfied that the Officer's decision meets the reasonableness standard as set out in *Vavilov*. Furthermore, I find no breach of procedural fairness resulting from the Officer's use of Google to locate the Government of Namibia, United States State Department and World Bank documentation.

[39] Neither party proposes a question to certify, and in my view, no such question arises in this case.

JUDGMENT in IMM-1966-20

THIS COURT'S JUDGMENT is that:

1. The Applicants' application for judicial review is dismissed;

2. There is no question for certification arising.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1966-20
STYLE OF CAUSE:	SYLVIA KETJINGANDA, ZEBULON UPENDURA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC – BY ZOOM VIDEOCONFERENCE
DATE OF HEARING:	SEPTEMBER 16, 2021
JUDGMENT AND REASONS:	ROCHESTER J.
DATED:	OCTOBER 15, 2021

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