Federal Court Cour fédérale

Date: 20211004

Docket: IMM-3754-20

Citation: 2021 FC 1028

Ottawa, Ontario, October 4, 2021

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

MULUGETA YIMAM DESTA
ELIZABETH TEDLA AYELE
SARON MULUGETA DESTA
EYESUSWORK MULUGETA DESTA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by a Senior Immigration Officer [Officer], dated May 4, 2020, refusing the Applicant's application for permanent residence on humanitarian and compassionate [H&C] grounds [Decision]. The Officer found the Applicants

did not have sufficient H&C considerations to grant an exemption under section 25(1) of the *Immigration and Refugee Protection Act,* SC 2001, c. 27 [*IRPA*].

II. Facts

[2] The Applicants are citizens of Ethiopia. The Principal Applicant is Mulugeta and Elizabeth is his spouse. They have a daughter (age 24), and a son (age 17) [Minor Applicant].

[3] The Principal Applicant is a Nuclear Safeguards Inspector employed by the International Atomic Energy Agency (IAEA), an international body based in Vienna which reports to the United Nations Security Council and the United Nations General Assembly. Before being assigned to work in Canada, the Applicants lived in Vienna based on the Principal Applicant's work as an official for the IAEA.

[4] In 2013, the Applicants came to Canada based on the Principal Applicant's 5-year posting to the IAEA's regional office in Toronto. The Applicants were issued Temporary Resident Visas which they renewed to extend their stay. Although their intention in 2013 was to stay in Canada temporarily, they applied for permanent residence on H&C grounds in 2017.

III. Decision under review

[5] The Officer was not satisfied the Applicants' H&C situation was exceptional so as to justify an exemption under section 25(1) of the *IRPA* and dismissed their application on May 4,

2020. The H&C grounds raised were establishment, best interests of the child, and hardship upon return.

[6] Regarding establishment, the Officer gave some positive consideration to the Applicants' demonstrated history of stable employment in Canada, albeit as an international agency employee who was obliged to return to Vienna upon the conclusion of his assignment, their history of church attendance and volunteerism, and their community involvement. The Officer acknowledged steps the Applicants have taken towards establishing themselves but ultimately found they had not achieved an exceptional degree of establishment during their time in Canada.

[7] Regarding hardship upon return to Vienna, Austria, the Officer noted the Principal Applicant, his wife, and son have indicated they will be returning to Austria, and that the Principal Applicant is required to return to Austria to maintain his employment. The Applicants are well established in Austria where he will be well paid (as is the case in Canada) and where he also owns a rental property generating an additional $4,000.00 a month income, thereby ensuring their successful reintegration on relocation from Canada.

[8] Regarding hardship upon return to Ethiopia, that is in the possible case of the daughter, the Officer acknowledged the daughter might be unable to follow the rest of the family to Austria because children of diplomats are unable to follow their parents past the age of 21. However, the Officer noted she may have other avenues available to remain in the European Union [EU] but had not provided evidence of making an effort in that regard. The Officer assessed her hardship if returned to Ethiopia. The Officer reviewed the situation for women, the economy, and

healthcare in Ethiopia, along with impact of family separation. The Officer found she will likely experience a period of adjustment; however, with her strong ties in Ethiopia and support from her parents and family, she would be able to re-establish herself in her country of nationality.

[9] Regarding best interests of the child, the Officer accepted a return to Ethiopia would pose challenges for the Minor Applicant. However, the Officer acknowledged the family is not looking to return to Ethiopia and the evidence demonstrated the Minor Applicant would be remaining in the care of his parents, and thus returning to Austria. This scenario in other words in not in the cards.

[10] Regarding the Minor Applicant's best interests if he were to return to Austria, the Officer acknowledged he may have experienced some bullying in school, but found bullying of adolescents within educational institutions to be a worldwide issue. Moreover, the Officer found the evidence was insufficient to suggest the bullying he experienced was due to his ethnicity. The Officer concluded it would be in the best interests of the Minor Applicant to follow his parents to Austria to remain in the care of his primary caregivers while the family applies for permanent residence in the normal fashion.

IV. Issues

[11] The issues raised are as follows:

A. Did the Officer err in their assessment of the Applicants' establishment?

B. Did the Officer err in their assessment of hardship upon return?

C. Did the Officer err in their assessment of best interests of the child?

V. Standard of Review

[12] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, majority reasons by Justice Rowe [*Canada Post*], which was issued at the same time as the Supreme Court of Canada's decision in *Vavilov*, the majority explains what is required for a reasonable decision, and importantly for present purposes, what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or

> significant to render the decision unreasonable" (*Vavilov*, at para. 100).
>
> [Emphasis added]

[13] In the words of the Supreme Court of Canada in *Vavilov*, a reviewing court must be satisfied the decision-maker's reasoning "adds up":

> [104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".
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> [105] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir*, at para. 47*; Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.
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> [Emphasis added]

[14] The Supreme Court of Canada in *Vavilov* at para 86 states, "it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision-maker to those to whom the decision applies," and provides guidance that the reviewing court review decide based on the record before them:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has

> fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would also have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.
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> [Emphasis added]

[15] Furthermore, *Vavilov* makes it clear that the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances":

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
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> [Emphasis added]

VI. Analysis

A. *Preliminary Issue: Should this Court grant an extension of time?*

[16] The Applicants made submissions requesting an extension of time, because they did not meet usual statutory timelines for filing an application for leave and judicial review. The Respondent submits, and I agree, there is no need to grant an extension of time because "the

Applicants' deadline to apply for leave and judicial review fell within the suspension period running from March 13, 2020 and September 13, 2020" which is applicable to "statutory time periods in federal legislation for starting proceedings" in the Federal Court. See *Reference re Section 6 of the Time Limits and Other Periods Act (COVID-19) (CA),* 2020 FCA 137 [Noël CJ] at para 12; *Time Limits and Other Periods Act (COVID19),* SC 2020, c 11, s 11, section 6.

B. *Establishment*

[17] The Applicants submit the Officer erred in assessing their establishment because they say they provided significant evidence in support of their establishment. The Applicants submit the IP5 Guide for H&C applications list factors for measuring establishment, noting this Court has confirmed and adopted these factor for assessing establishment, see *Hee Lee v Canada (Citizenship and Immigration),* 2008 FC 368 [Shore J] at para 18 and *Ahmad v Canada (Citizenship and Immigration),* 2008 FC 646 [Dawson J] at para 44-45. With respect, and in my view, the Applicants failed to persuade me based on the record in this case which need not be repeated in these reasons.

[18] The Applicants submit the Officer erred by requiring the Applicants provide evidence of an exceptional degree of establishment yet failed to explain what constitutes "exceptional". The Applicants rely on *Apura v Canada (Minister of Citizenship and Immigration),* 2018 FC 762 [Ahmed J] at para 23 to argue when the absence of exceptional circumstances forms the basis of a decision maker's analysis denying relief, this imposes an incorrect legal standard. However, the preponderance of jurisprudence (including my decision in *Li v Canada (Citizenship and*

Immigration), 2018 FC 187 at paras 25-26) is outlined in *Huang v Canada (Citizenship and Immigration)*, 2019 FC 265 [*Huang*] at para 21 [Crampton CJ] at para 21 and is to the contrary.

[19] The Applicants submit the Officer erred in discounting the Principal Applicant's employment because it was not tied to Canada – indeed he had to leave to keep his job - while ignoring his willingness to acquire comparable employment in Canada. The Principal Applicant stated in his affidavit he has considered gaining employment with a Canadian-based employer and informal discussions have taken place with potential employers. The Applicants submit the Officer failed to consider this evidence. In my view, this is simply a matter of weighing and assessing evidence, a matter withheld from reviewing judges per para 125 in *Vavilov* quoted above.

[20] In my view, the Officer reasonably considered establishment, which flowed from the Principal Applicant's diplomatic work assignment and found relocation was expected of individuals who work for international organizations. I agree the Applicants' "ties to Canada did not depend on circumstances beyond their control and were in no way exceptional or atypical as compared with other people in their situation", see *Puri v Canada (Citizenship and Immigration)*, 2018 FC 132 [Martineau J] at para 19, citing to *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [Abella J] at para 26. There is no unreasonableness in this finding which was open on this record.

[21] The Applicants submit the Officer erred in finding the Applicants' departure will not impact their community as this was contrary to the evidence. The Applicants submit the Officer

failed to consider evidence such as the Principal Applicant receiving a Bikila award in 2015, evidencing him being a role model among the Ethiopian Canadian community. However, in my view, the Officer reasonably assessed the relevant factors noting H&C officers are under no obligation to cite every piece of evidence submitted. At the end of the day, the Officer was not able to conclude the Applicants' case was exceptional. That was the Officer's job, and with respect, while it seems the Court is being asked to re-litigate the record before the Officer, that is not the job of this Court on judicial review.

C. *Hardship Upon Return to Austria*

[22] The Applicants say they provided corroborating evidence of the hardship they face if required to apply for permanent residence from outside Canada. In my view, the Officer reasonably considered conditions in Austria, as the Principal Applicant, his wife, and the Minor Applicant will be returning to Austria, not Ethiopia. The Officer found the Applicants would be able to re-establish themselves in Austria in light of their high levels of education, home ownership, and the Principal Applicant's existing employment with the IAEA. I am unable to agree this finding is anything but reasonable given the facts and constraining law.

[23] While the daughter might possibly be unable to follow her family to Austria, the Officer reasonably found little to no evidence to demonstrate she attempted and was unable to secure status in Austria since turning 21 two years ago. The Officer found this did not preclude "other avenues available to her to remain in EU, if her entire nuclear family resides there." With respect, as is well known, the onus is and remained on the Applicants to establish grounds for the exceptional relief conveyed by a positive H&C review: see *Goraya v Canada (Citizenship and*

Immigration), 2018 FC 341 [Fothergill J] at para 16. In this connection they failed on a factual matter made by the Officer; I am not persuaded to intervene, per *Vavilov* at para 125.

D. *Hardship Upon Return to Ethiopia (the daughter)*

[24] The Applicants make submissions for hardship upon return to Ethiopia for the daughter. The Applicants submit the Officer erred in finding the daughter was familiar with Ethiopian culture despite having lived most of her life outside Ethiopia. Based on the evidence adduced, the Applicants submit the daughter will face hardship that is more than "what would ordinarily be expected of someone leaving a country where they have spent some time", see *Irimie v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1906 [Pelletier J] at para 12.

[25] The Applicants submit that in finding the daughter will be able to re-establish herself as a highly educated woman, but only with the help of her parents' financial support, the Officer was contradictory. I note this is not what the Officer found. Moreover, the Officer was entitled to weigh her education and ability to draw support from her parents against adverse country conditions regarding women with low education; see *Caleb v Canada (Citizenship and Immigration)*, 2020 FC 1018 [McHaffie J] at para 28.

[26] The Applicants submit the Officer erred in assessing the human rights conditions in Ethiopia and ignored relevant evidence contained in the National Documentation Package [NDP]. The Applicants submit the NDP is not extrinsic to the Record and should have been considered by the Officer, pointing to extracts from the NDP regarding political changes brought by Prime Minister Abiy's regime and Ethiopia's prison system. However, the NDP is extrinsic

evidence in the context of an H&C application, as found by Justice Strickland in *Hoyte v Canada (Citizenship and Immigration)*, 2015 FC 175 at para 14: "extrinsic evidence, in the context of an H&C application, is evidence that does not form a part of the submissions of the applicant, the immigration record of the respondent concerning the applicant, or, the disclosed tribunal record, which includes online NDPs." Moreover, while the NDP may be a public resource, "the onus was upon the Applicants to put forward the factors that they wanted the Officer to consider"; see *Santiago v Canada (Citizenship and Immigration),* 2020 FC 198 [Russell J] at para 59.

[27] The Applicants submit the Officer did not analyze the daughter's hardship considering her establishment, her life spent mostly outside Ethiopia, and adverse country conditions, all of which constitute a sufficient degree of hardship. The Applicants submit the Officer erred in deciding the case at bar without applying the totality of the evidence to the daughter's situation, citing to *Liyanage v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1045 [Lufty CJ as he was then]. However, this was not the *dicta* in *Liyanage* and instead, Chief Justice Lufty rejected the applicant's submission that "the officer did not consider the evidence placed before her in its totality". With respect, again this seems to be a request to re-litigate the case which *Vavilov* notes, is outside the parameters of judicial review.

E. *Best Interests of the Child*

[28] The Applicants submit the Minor Applicant will face hardship if returned to Ethiopia; however, it has been established the Minor Applicant will return to Austria with his parents and not Ethiopia. The Applicants also submit the Minor Applicant suffered from bullying in Austria because of his ethnicity and the Officer erred by stating the bullying could have occurred for

other reasons. The Applicants submit the Officer's doubts regarding the bullying of the Minor Applicant amounted to a veiled credibility finding and a hearing should have been conferred.

[29] With respect, I disagree. The Officer did not make veiled credibility findings. Rather, the Officer's concern was the Applicant had neglected to provide any particulars on bullying from school authorities, the minor Applicant's parents, or the minor Applicant himself, see *Zhang v Canada (Citizenship and Immigration),* 2020 FC 503 [McDonald J] at paras 18-19. There simply was not enough evidence put forward by the Applicants on this point.

VII. Conclusion

[30] In my respectful view, the Applicants have not shown the decision of the Officer was unreasonable. These Applicants did not demonstrate how their establishment was exceptional for the family of a diplomat; they did not demonstrate how they would face hardship in returning to a country where they will be gainfully employed, housed, have substantial assets and lived for many years; the daughter did not demonstrate any efforts to show she would be unable to obtain status in Austria or the EU; and the Officer reasonably assessed the best interests of the Minor Applicant. In my view, the Decision is transparent, intelligible and justified based on the facts and law. Therefore, judicial review will be dismissed.

VIII. Certified Question

[31] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-3754-20

THIS COURT'S JUDGMENT is that judicial review is dismissed, no question is certified and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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