Federal Court Cour fédérale

Date: 20211126

Docket: IMM-4266-20

Citation: 2021 FC 1309

Toronto, Ontario, November 26, 2021

PRESENT: Madam Justice Go

BETWEEN:

JULIANA APPIAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Juliana Appiah [Applicant] brought an application for leave and for judicial review of a decision of a Senior Immigration Officer [Officer], dated April 22, 2020, which denied the Applicant's application for permanent residency status pursuant to Humanitarian and Compassionate [H&C] considerations [Decision] under s. 25 of the *Immigration and Refugee Protection Act* [*IRPA*].

[2] The Applicant argues that the Officer's assessment of the evidence in support of her H&C application is unreasonable.

[3] I find the Decision unreasonable because the Officer failed to engage with the evidence and submissions regarding the best interests of the children affected. On that basis alone, I will set aside the Decision.

II. **Background**

A. ***Factual Context***

[4] The Applicant was born on May 23, 1968 in Ghana. She is a citizen of Ghana, a country where the Applicant's adult son, her mother and some of her siblings are living. The Applicant also has a brother who is living in Canada as a permanent resident, along with his wife and three sons, all of whom are Canadian citizens.

[5] The Applicant obtained a visa to visit Canada on July 25, 2013 and arrived as a visitor in Canada in October 2013. Her reason for coming to Canada was to help her brother and her sister-in-law look after their three children, the youngest of whom was born on July 24, 2013.

[6] In Canada, the Applicant met someone and got married. Unfortunately, the marriage did not work out. The Applicant was abused by her husband and sought counselling for the abuse. After her marriage broke down, she moved in with her brother and his family. The Applicant has taken on a parenting role to her brother's children, Nigel, Jordan and Nathan, who were at the

time of the Application, 10, 7, and 4 years of age respectively. The Applicant has also become actively involved in the local Ghanaian Canadian community.

[7] The Applicant's visa expired on January 22, 2014. On March 11, 2014, the Applicant's application for a Visitor Record was refused.

[8] On March 1, 2018, after residing in Canada for six years, the Applicant submitted her H&C application. In May 2018, the Applicant's representative submitted additional supporting evidence and legal submissions to Immigration, Refugees and Citizenship Canada.

[9] The Officer's decision to reject her H&C Application was rendered on April 22, 2020.

B. ***Decision Under Review***

[10] In the Decision, the Officer considered: (1) the Applicant's establishment in Canada including her involvement in her community and with her church, her relationship with her family members in Canada and in Ghana; (2) the Applicant's abusive marriage and the support she has received in Canada, as well as the Applicant's submissions stating that she would be unable to access assistance and emotional support concerning her abusive marriage if she were to return to Ghana; (3) the Applicant's medical issues; (4) the adverse country conditions in Ghana that might negatively affect the Applicant if she were to return to Ghana; and (5) the best interest of the Applicant's nephews. The Officer found the H&C materials did not indicate that the Applicant would be unable to continue to receive assistance and emotional support from her

family if she had to return to Ghana. The Officer rejected the Applicant's argument that it was in her nephews' best interests for her to stay in Canada to help look after them.

III. **Issues**

[11] In her factum the Applicant raises the following two issues:

a) *Did the Officer deny the Applicant due process by ignoring submitted evidence?*

b) *Did the Officer deny the Applicant's visa based on speculative and arbitrary reasons?*

[12] At the hearing, the Applicant reframed her issues by submitting that the Decision was unreasonable as the underlying assessment was faulty. The Respondent objected on the basis that none of the issues raised at the hearing were included in the factum. While I do not agree with the Respondent's characterization, I do note that the Applicant's written submission was quite bare bones and only contained a general outline of her arguments. However, leave was granted, notwithstanding the Applicant's brief written submission, and I rejected the Respondent's objection at the hearing. To their credit, the Respondent was able to provide a fulsome response at the hearing.

[13] The only issue to address is whether the Decision was reasonable.

IV. **Standard of Review**

[14] The presumptive standard of review of the merits of an administrative decision is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65

[*Vavilov*] at para 25. 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). The onus is on the Applicant to demonstrate that the decision is unreasonable (*Vavilov* at para 100).

[15] To set aside a decision on this basis, "the reviewing court must be satisfied 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" (*Vavilov* at para 100).

V. **Analysis**

A. ***Was the Decision Reasonable?***

[16] The Applicant submits that the Decision is unreasonable for three reasons: (1) the Officer's "failure to properly assess the material before them"; (2) the Officer "failed to properly assess the consequence of the applicant's removal upon her brother's Canadian born children"; and (3) the Officer "erred by failing to consider the risk of harm that the applicant faced if she were to return to Ghana."

[17] The Respondent submits that the Decision considered "[a]ll of the factors raised by the applicant" and "assessed each of the factors presented and then performed a global assessment on all factors together." Doing so, the Officer concluded that the Applicant had failed to meet her evidentiary onus of demonstrating that an exemption was warranted in her case.

[18] Citing *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], the Respondent submits that an H&C decision "involves an exemption to the normal requirements of the Immigration and Refugee Protection Act [IRPA]. It provides for special and additional considerations, and is therefore an exceptional remedy." The Respondent further submits that the H&C process "is not an 'alternative immigration stream or an appeal mechanism' and must be applied in a manner ensuring the maintenance of the immigrations [sic] system's integrity and to ensure the respect for Canada's immigration laws." I would note, however, that the Respondent has relied in part on a quote from the dissent in *Kanthasamy* (para 90) which may not reflect the majority view of the Supreme Court of Canada.

[19] Subject to my analysis below with respect to the best interest of the child (BIOC), I find the Decision with respect to much of the evidence and submissions raised by the Applicant was reasonable.

B. ***Medical Issues, Establishment in Canada, and Adverse Country Conditions in Ghana***

[20] As a starting point, I do not accept the Applicant's submission that because the Officer regarded the Applicant's six-year residency in Canada to be "a fairly short period of time", that determination became an overriding factor in the Decision. I do not find this factor to have influenced the rest of the Decision.

[21] While accepting that the Applicant is a victim of abuse and may still require additional support, I find it reasonable for the Officer to conclude that there is little to demonstrate the lingering impact, if any, of the abusive marriage on the Applicant's hypertension. On this point,

the Applicant relied on an extremely short letter from her doctor. The letter simply states that the Applicant's hypertension has been "aggravated by situational stress" from an abusive marriage and does not opine on the ongoing effect, if any, on the Applicant's health. In that regard, I also find reasonable the Officer's conclusion that there is little in the H&C materials to indicate that the Applicant would be unable to obtain the medical treatment she requires for her hypertension in Ghana. I agree with the Respondent that the country conditions of inequitable access to health care for women in Ghana are insufficient to support the Applicant's argument, in the absence of evidence linking her own situation to the country conditions.

[22] I also agree with the Respondent that the letter from the Working Women Community Centre contains little details about what, if any, services the Applicant may have received from the Centre and whether these services are still provided today, nor does it indicate what further counselling services the Applicant may require, either in Canada or in Ghana. In that context, I find reasonable the Officer's finding that the Applicant's H&C materials do not indicate that the Applicant would be unable to continue to receive assistance and emotional support from her family in Ghana.

[23] With respect to the adverse country conditions, the Officer did acknowledge the poor economic and employment opportunities in Ghana, but the Officer's conclusion that there is little in the H&C materials to indicate that the Applicant would be unable to support herself in Ghana was reasonable given the Applicant's 27-year history of working as a seamstress to support herself in that country.

[24] The same cannot be said, however, about the Officer's BIOC analysis.

C. ***Best Interest of the Children***

[25] Although a child's interests will not always be determinative of an underlying application, it is uncontested in law that a child's best interest is an important factor that is to be given substantial weight by a decision maker (*Kanthasamy* at para 38 and *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75 [*Baker*]). This is particularly true in the context of s. 25 of the *IRPA*, which expressly states that the Officer must "tak[e] into account the best interests of a child directly affected." In assessing the BIOC, the decision maker should consider children's best interests as an important factor and be "alert, alive and sensitive" to them: *Baker* at para 75.

[26] As part of her H&C application, the Applicant submitted a letter from her brother, which describes in detail the Applicant's relationship with his family, and the support and care that the Applicant has provided to his three children since 2013. The letter from the Applicant's brother explained that both he and his wife are working and that the Applicant came to Canada in order to assist him and his wife with childcare and household duties, especially as his wife had just given birth to their third child. The brother explained in the letter: "It is extremely difficult for us with three children and both my wife and I work full time." The brother further noted in his letter that it was not his intention to keep the Applicant in Canada "illegally", but the circumstances regarding her previous failed abusive marriage led them to realize they had "no other options to rectify her immigration status". As the brother explained:

> By that time it was difficult to live without her help and she needed my emotional support to overcome the effects of an abusive marriage. We became co-dependent on each other and if we are separated we both would face hardship. (emphasis added)

He continued in his letter:

> My children are young and they deserve to have the best care possible and Juliana has helped us to do just that. As a result my children have grown attached to and rely on Juliana for support as well and if she leaves now it is not fair to me or my children but I simply cannot help it, without Juliana here helping my wife and me, we simply are unable to cope.
>
> I support Juliana financially and if she returns to Ghana I will have to send money to support her there and with my family's current income doing that would take a tremendous financial toll on my family. (emphasis added)

[27] Indeed, the Applicant's brother was so eager to have his sister remain in Canada to assist him that he submitted an application to sponsor her in support of her H&C application.

[28] I note that the Applicant's initial purpose of coming to Canada in 2013 was to help her brother look after his children. She obtained a visa to Canada one day after Nathan was born. The brother's letter confirmed the role the Applicant has played in supporting him, his wife and their children, which is consistent with the Applicant's submission describing herself as assisting with daily activities such as picking up the kids from school, helping with baths and grooming, making their dinners, etc. The Applicant's H&C submission further noted: "Because of this she and the children have formed a very strong bond and they even consider her as their second mother." The Applicant's affidavit also confirmed that since coming to Canada she has spent most of her time caring for her brother's children.

[29] The Officer did not question any of the evidence provided by the Applicant with respect to the BIOC. In the Decision, the Officer acknowledged that the Applicant's three nephews "benefit from the applicant's care and presence in their daily lives", that they "are very close to the applicant and consider her to be like a second mother", and that "it might be emotionally difficult for them to be separated from the applicant if she had to return to Ghana."

[30] Even though the Officer had access to all of the above, the Officer found there was little in the Applicant's H&C materials to indicate that her brother and his wife "would be unable to make alternate care arrangements for [their children]" or that the children "would be unable to keep in regular contact with the applicant" if she had to return to Ghana.

[31] The Officer's conclusion in this regard is directly contradicted by the evidence before him, namely the letter from the Applicant's brother stating that they have become "co-dependent" on each other and that he and his wife would be "unable to cope" if the Applicant were to return to Ghana. The Decision did not address this contradiction, even as the Officer accepted the other evidence with regard to the substantial role that the Applicant has played in the care of her brother's three children.

[32] I refer to the decision in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), [1999] 1 FC 53 which finds that, where a decision maker fails to address contradictory evidence, an inference can be drawn that the contradictory evidence was not considered or was overlooked (at para 17).

[33] The letter from the brother further confirms that the Applicant's nephews have grown attached to the Applicant and rely on her for support. It is unclear, for instance, how the six-year-old Nathan is supposed to stay attached to and receive care from the Applicant - like bathing and grooming, picking up from school and making dinner - "through email or via the telephone" if the Applicant returns to Ghana, as the Officer has suggested in the Decision.

[34] As the majority in the Supreme Court of Canada has noted in *Kanthasamy* at para 35:

> [35] The "best interests" principle is "highly contextual" because of the "multitude of factors that may impinge on the child's best interest": *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, at para. 11; *Gordon v. Goertz*, [1996] 2 S.C.R. 27, at para. 20. It must therefore be applied in a manner responsive to each child's particular age, capacity, needs and maturity: see *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181, at para. 89. The child's level of development will guide its precise application in the context of a particular case.

[35] The Supreme Court further stated at para 39:

> [39] A decision under s. 25(1) will therefore be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered: *Baker*, at para.75. This means that decision makers must do more than simply state that the interests of a child have been taken into account: *Hawthorne*, at para. 32. Those interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence: *Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358 (C.A.), at paras. 12 and 31; *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 323 F.T.R. 181, at paras. 9-12.

[36] Drawing from the Ministerial Guidelines for H&C applications (as they were drafted at the time), the Supreme Court reproduced factors that are relevant considerations for the BIOC inquiry. While the guidelines have changed, the factors listed by the Supreme Court that I find

most relevant to the case at hand are the age of the child(ren) and the level of dependency between the child(ren) and the Applicant (see *Kanthasamy* at para 40).

[37] In this case, instead of engaging in an analysis of what is in the best interests of the Applicant's nephews, the Officer adopted "boilerplate" language in the Decision by suggesting that the three children could keep in regular contact with the Applicant through email or the telephone.

[38] In *Yu v Canada (Citizenship and Immigration)* 2021 FC 1236 [*Yu*], Justice Sadrehashemi, quoting from Justice Grammond in *Boukhanfra v Canada (Minister of Citizenship and Immigration*), 2019 FC 4 at para 9, acknowledged that the practice of using boilerplate language in the context of the "pressure of mass adjudication" is not forbidden as "there was no requirement on decision-makers to be original." However, Justice Sadrehashemi continued:

> The issue is not the use of the boilerplate language in and of itself but rather, whether the reasons are intelligible and responsive to the particular legal and factual context raised by the application. As explained by Justice Grammond: "If the conclusion does not flow from the premises, or if the use of boilerplate gives cause to doubt that the decision-maker duly considered the specific facts of the case, the decision may well be unreasonable" (at para 9).

[39] Noting that the officer in *Yu* used the same "boilerplate language" to evaluate the loss of friendship among adults as that to assess a child losing the day-to-day parent-child relationship by stating the child would be able to stay connected with their parent through "letters or the internet with avenues such as email, instant messaging, or Facebook", Justice Sadrehashemi found "the Officer's reliance on a boilerplate statement about mitigating the severing of bonds

through various written communication tools fails to grapple with the specific, real issues facing this child set out in this application", and "demonstrates a lack of care and sensitivity to the interests of this child."

[40] The same conclusion, in my view, must be reached in this case. The Decision did not even acknowledge, let alone address, the level of dependency of the Applicant's nephews on her, the dependency of the children's parents on the Applicant to care for these children, and the relatively young age of the children involved, one of whom was born mere months before the Applicant came to Canada. There was no analysis whatsoever as to what these children's best interests are, and how the best interests of these children might be affected if the Applicant had to return to Ghana.

[41] The Respondent submits that the children's situations have changed since they are now six years older than when the Applicant first came to Canada. I take the Respondent's submission to suggest that these children now need less care than they did six years ago. I reject this argument for three reasons. First, the children being older was not a reason cited by the Officer to reject the application. Second, while children of different ages may require different types of care, there is no evidence that six-year-old Nathan, for instance, requires less care now than he did when he was a newborn. Finally, I agree with the Applicant that, if anything, the six-year period within which the Applicant has played a role in the development of these children should be a factor that strengthens – not weakens – her H&C application.

[42] In view of the Officer's failure to adequately access the best interests of the Applicant's three nephews, I find the decision unreasonable.

VI. **Certification**

[43] Counsel for both parties were asked if there were questions requiring certification. They each stated that there were no questions arising for certification and I concur.

VII. **Conclusion**

[44] The application for judicial review is allowed.

THIS COURT'S JUDGMENT is that:

1. The Applicant's judicial review application is granted.

2. The decision under review is set aside and the matter referred back for redetermination by a different decision maker.

3. There is no question to certify.

JUDGMENT in IMM-4266-20

THIS COURT'S JUDGMENT is that:

1. The Applicant's judicial review application is granted.
2. The decision under review is set aside and the matter referred back for redetermination by a different decision maker.
3. There is no question for certification.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4266-20
STYLE OF CAUSE:	JULIANA APPIAH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	NOVEMBER 16, 2021
JUDGMENT AND REASONS:	GO J.
DATED:	NOVEMBER 26, 2021

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