Federal Court  Cour fédérale

Date: 20211126

Docket: IMM-1533-21

Citation: 2021 FC 1313

Ottawa, Ontario, November 26, 2021

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

ADERIYIKE TEMITOPE ASHIRU
OLAIDE OPEYEMI ASHIRU
FAVOUR ENIOLA ASHIRU
CHRISTIANAH OLAMIDE ASHIRU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants, Aderiyike Temitope Ashiru, Olaide Opeyemi Ashiru and two of their four children, seek judicial review of the March 2, 2021 decision of a Senior Immigration Officer [the Officer]. The Officer refused the Applicants' application for permanent residence from within Canada, which the Applicants sought on humanitarian and compassionate [H&C] grounds pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] The Applicants argue that the Officer breached the duty of procedural fairness by relying on extrinsic evidence regarding the employment situation and the healthcare and educational systems in Nigeria. The Applicants also argue that the decision is unreasonable due to errors in the Officer's assessment of their establishment in Canada and the best interests of their children.

[3] For the reasons that follow, the Application is allowed. The Officer did not breach procedural fairness by relying on a Response to Information Request [RIR] that provided information regarding employment, education and healthcare in Nigeria. Although the RIR was issued after the Applicants made their H&C submissions, the information included in the RIR was not novel and was not significant to the decision. There was no duty on the Officer to provide the Applicants with the opportunity to address this information, the content of which was accessible and generally known to them given that their submissions noted high unemployment, inadequate healthcare and the poor quality of education.

[4] However, I find that the Officer erred in the assessment of the Applicants' establishment and the best interests of the children. Although H&C decisions are highly discretionary and should not be lightly interfered with, and the Officer's analysis and findings in many respects are sound and reasonable, the unreasonable findings have an impact on the Officer's global assessment and determination of whether the H&C exemption is warranted. As a result, the application must be determined by a different decision-maker.

I. Background

[5] Mrs. Aderiyike Temitope Ashiru and Mr. Olaide Opeyemi Ashiru arrived in Canada in July 2017 via the United States with two children. Since arriving in Canada, the family now includes two Canadian-born children, born in October 2017 and March 2020 respectively.

[6] The Applicants' claim for refugee protection was refused on October 25, 2018.

[7] Since their arrival, both Mrs. and Mr. Ashiru have completed a personal support worker certificate program and associated safety training. Mrs. Ashiru has been employed as a personal support worker at several different long term care and retirement homes. Mr. Ashiru has worked as a production associate at two different companies. They described their involvement in their community and church and their volunteering at the Nigerian Canadian Association. The three eldest children attend elementary school or daycare, and the family has a close network of friends in Ottawa.

II. The Decision under Review

[8] The Officer considered the Applicants' submissions in support of their H&C application based on their establishment, the hardship in Nigeria associated with adverse country conditions, and the best interests of their children (including the two Canadian-born children).

[9] With respect to their establishment, the Officer noted that the family had been in Canada approximately four years and the adult Applicants had taken courses and been employed. The

Officer found, however, that the courses taken were of “less value” than their previous education. The Officer also noted the family’s participation in their community and the letters of support from friends who attested to their good character. The Officer concluded that the Applicants had been in Canada for a short time and that their degree of establishment was “unremarkable and modest.” The Officer found that their ties to Nigeria were stronger.

[10] With respect to hardship if returned to Nigeria, the Officer noted the country condition evidence of high unemployment and gender discrimination. The Officer accepted that there was a high unemployment rate in Nigeria which led to an increase in poverty and that this was the situation for the majority of citizens. The Officer noted that the adult Applicants were highly educated and had been gainfully employed in Nigeria prior to coming to Canada. The Officer considered information in a RIR, dated November 2020, which indicated that there is a shortage of jobs for those who relocate to Nigeria, but that individuals who are skilled and have work experience have a higher chance to find employment. The Officer concluded that it was reasonable to believe that the adult Applicants would be able to find the same or similar employment as they previously held. The Officer added that the adult Applicants’ education, work experience and newly obtained skills would assist them to find employment in Nigeria.

[11] With respect to the best interest of the children [BIOC], the Officer considered the Applicants’ submissions regarding inadequate healthcare, a poor education system, corporal punishment in schools, the emotional impact of removal, and the impact of the adult Applicants’ possible unemployment on the children.

[12] The Officer accepted the general evidence of high infant mortality and health issues among younger children, but found there was little evidence to suggest the Applicants' children would be particularly affected. The Officer noted that the Applicants had not identified any health issues faced by their two Canadian-born children, nor had they noted any health issues for their two older children while in Nigeria until they were ages 5 and 3.

[13] The Officer acknowledged the Applicants' submissions and documentary evidence relating to the Nigerian education system and the widespread use of corporal punishment. The Officer noted that the education system differs from that of Canada, but is free and compulsory. The Officer also noted that the adult Applicants had not identified any issues regarding their own education. With respect to corporal punishment, the Officer stated: "I am not of the opinion that this form of learning and discipline would inflict hardship onto the children."

[14] The Officer considered the children's ages and English language abilities and concluded that the children's education would not be negatively affected if they were removed to Nigeria.

[15] The Officer again referred to the November 2020 RIR with respect to access to healthcare and education. The Officer reiterated that the education system is adequate and available to all children. The Officer accepted that there was limited access to health insurance and medical care, but found that healthcare is available and accessible in major cities and to those who can afford it. The Officer concluded that the Applicants did not fall into the category of persons who would be unable to access healthcare and education for their children.

[16] The Officer further noted that the children would be returning to Nigeria with both parents and, coupled with their other significant family ties in Nigeria, found that the children would "transition with relative ease." The Officer concluded that the best interests of the children would not be negatively affected if they were removed to Nigeria.

[17] The Officer concluded, after considering all the factors, that the exemption was not justified.

III. The Issues and Standard of Review

[18] The Applicants raise two issues: whether the Officer breached procedural fairness by relying on independent research without providing them with notice and an opportunity to respond; and, whether the Officer erred in assessing their establishment and the best interests of the children.

[19] H&C decisions, which are discretionary decisions, are reviewed on the reasonableness standard (*Baker v Canada (Minister of Citizenship and Immigration*), [1999] 2 SCR 817 at paras 57–62, 174 DLR (4th) 193 [*Baker*]; *Kanthasamy v Canada (Citizenship and Immigration),* 2015 SCC 61 at para 44 [*Kanthasamy*]).

[20] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16, 23 [*Vavilov*], the Supreme Court of Canada confirmed that reasonableness is the applicable standard of review for discretionary decisions. The Supreme Court provided extensive guidance to the courts in reviewing a decision for reasonableness.

[21] 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 paras 85, 102, 105–07). The court does not assess the reasons against a standard of perfection (*Vavilov* at para 91).

[22] Where allegations of a breach of procedural fairness arise, the question is whether the procedure followed by the decision-maker was fair, having regard to all of the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54-56). This is not a standard of review *per se*, but is akin to correctness; no deference to the decision-maker is owed.

IV. The Applicant's Submissions

[23] The Applicants argue that the Officer's reliance on the RIR, which they characterize as extrinsic evidence and which was not disclosed to them in order for them to respond, is a breach of procedural fairness.

[24] With respect to the BIOC, the Applicants generally argue that the Officer failed to meaningfully consider all the evidence and erred by applying a hardship test.

[25] The Applicants submit that the Officer focussed on the availability of education in Nigeria rather than considering the evidence of pervasive corporal punishment and the poor quality of education. The Applicants add that the Officer did not consider their daughter's letter describing her ties to her school community.

[26] With respect to the impact of their unemployment on their children, the Applicants submit that the Officer had no evidence to support the finding that they would be able to secure employment in Nigeria.

[27] With respect to the impact on the children of returning to Nigeria, the Applicants submit that the Officer relied only on speculation to find that family members in Nigeria would be present, available, and willing to support the children and aid in their development.

[28] With respect to the Officer's assessment of their establishment in Canada, the Applicants submit that the Officer erred by requiring them to show an "extraordinary" level of establishment.

[29] The Applicants further submit that the Officer unreasonably discounted their achievements by stating that the courses taken in Canada "hold less value [than] what they already have." The Applicants add that the Officer erred in finding that their education and work experience in Canada would help them secure future employment in Nigeria, which turns a positive factor into a negative factor.

V. The Respondent's Submissions

[30] The Respondent submits that the Officer did not breach the duty of procedural fairness by relying on the RIR. The Respondent argues that although the RIR is dated November 2020, it is not extrinsic evidence, as the information was reasonably available or otherwise known to the Applicants based on their own experience in Nigeria.

[31] The Respondent submits that the Officer did not assess the BIOC through a hardship lens, but rather responded to the Applicants' submissions that there would be hardship. The Respondent adds that hardship remains a consideration in an H&C application.

[32] The Respondent argues that the Applicants relied on general country condition evidence about corporal punishment but failed to link this to their children's personal circumstances. The Respondent notes that the Officer relied on the educational history of the adult Applicants and the lack of evidence that they had themselves been subject to corporal punishment.

[33] The Respondent submits that the Officer's consideration of the ties with the Applicants' family in Nigeria was reasonable, and in any event, it was not a key finding in the overall analysis. The Respondent adds that the core of the Applicants' argument is that their children would be better off in Canada, noting that the jurisprudence has clearly established that this is not determinative of a BIOC or overall H&C analysis.

[34] The Respondent submits that the Officer's comment about the Applicants' modest establishment does not suggest that some particular level of establishment is expected. The Respondent notes that the jurisprudence has found that assessing establishment as unexceptional does not amount to requiring the demonstration of an extraordinary level of establishment.

[35] The Respondent argues that the Officer's findings regarding the adult Applicants' prospects of employment were reasonable in light of the evidence, and do not amount to turning positive factors against the Applicants.

VI. There Was No Breach of Procedural Fairness

[36] The Officer's consideration of the November 2020 RIR regarding unemployment, education and healthcare in Nigeria is not a breach of procedural fairness. Although the RIR was dated six months after the Applicants made their submissions, the content of the RIR was not novel and was not significant, in the sense that the Officer's findings turned on this information. Moreover, the information in the RIR was generally consistent with the Applicants' submissions and elaborated on the situation regarding healthcare, education and employment.

[37] The only aspect of the RIR that did not reflect information that was otherwise publicly available before the Applicants made their submissions is the reference to the statement by the Executive Director of the African Network for Environment and Economic Justice that "skilled people with experience stand a higher chance of getting jobs." The Applicants submit that they should have had an opportunity to "test" the evidence; however, this is a statement more in the nature of common knowledge.

[38] Moreover, the Officer's reference to this information was only a small part of the Officer's assessment of the Applicants' allegations regarding the hardship they would experience due to high unemployment. The Officer accepted that there was high unemployment but also noted the adult Applicants' education and previous employment in Nigeria and found it reasonable to believe that they would secure similar employment.

[39] There is extensive jurisprudence regarding whether a decision-maker's reliance on extrinsic evidence—or evidence not provided by an applicant—and not specifically disclosed to an applicant is a breach of procedural fairness.

[40] In *Mancia v Canada (Minister of Citizenship and Immigration*), [1998] 3 FC 461, 1998 CanLII 9066 [*Mancia*], the Federal Court of Appeal explained, at para 22:

> . . . Where the immigration officer intends to rely on evidence which is not normally found, or was not available at the time the applicant filed his submissions, in documentation centres, fairness dictates that the applicant be informed of any novel and significant information which evidences a change in the general country conditions that may affect the disposition of the case.

[41] In *De Vazquez v Canada (Minister of Citizenship and Immigration)*, 2014 FC 530, Justice de Montigny noted the guidance of the Federal Court of Appeal in *Mancia* and elaborated, at para 28:

> That being said, it is not the document itself which dictates whether it is "extrinsic" evidence which must be disclosed to an applicant in advance, but whether the information itself contained in that document is information that would be known by an applicant, in light of the nature of the submissions made: *Jiminez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1078 at para 19; *Stephenson v Canada (Minister of Citizenship and Immigration)*, 2011 FC 932 at paras 38-39.

[42] Justice de Montigny applied the "test" in *Mancia* and concluded that the information at issue, concerning the Argentinian school system, could not be characterized as "novel and significant information which evidences a change in the general country conditions that may affect the disposition of the case."

[43] In *Joseph v Canada (Minister of Citizenship and Immigration)*, 2015 FC 904, Justice Brown considered whether a breach of procedural fairness occurred where the officer, in assessing the applicants' H&C submissions and more specifically the BIOC, considered a UN report regarding the availability of specialized programs for the applicants' child. In that case, the UN document predated the H&C submissions. However, Justice Brown's analysis of the issue and identification of the tests applied by the Court remains instructive.

[44] Justice Brown noted at para 38:

> One test to determine what constitutes allowable extrinsic evidence is whether it was sufficiently known or otherwise "reasonably available" to the Applicants: *Azida v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1163 at paras 18-19.

[45] Justice Brown also noted, at para 39, the test set out in *Lopez Arteaga v Canada (Minister of Citizenship and Immigration)*, 2013 FC 778 at para 24, where the Court held that "novel and significant" information an applicant could not "reasonably anticipate" requires disclosure.

[46] In *Ahmed v Canada (Minister of Public Safety and Emergency Preparedness)*, 2018 FC 471, Justice Brown considered whether the decision-maker's reference to a UN document, in formulating a danger opinion in the context of assessing Mr. Ahmed's inadmissibility to Canada, was a breach of procedural fairness. Justice Brown considered the extensive jurisprudence, including that which reiterated *Mancia*, and stated at para 27:

> In 1999, the Federal Court of Appeal held that documents such as this are "'extrinsic evidence' and must be disclosed by the Officer only if they are novel and significant and demonstrate changes in general country conditions that may affect the decision": *Nadarajah v Canada (Minister of Citizenship and Immigration)*, (1999), 237 NR 15 (FCA). In this connection, the

> general rule is that such officers must disclose extrinsic evidence relied upon and give the applicant an opportunity to respond if two conditions are met: first, where the evidence is truly extrinsic, i.e. "novel and significant", and second, where it is information the applicant could not reasonably have been expected to have knowledge of: *Joseph v Canada (Minister of Citizenship and Immigration)*, 2015 FC 904; *Toma v Canada (Minister of Citizenship and Immigration)*, 2006 FC 780 at para 14, citing Rothstein J in *Dasent v Canada (Minister of Citizenship and Immigration)*, [1995] 1 FC 720 (TD) at pages 730 and 731 where Justice Rothstein concluded extrinsic evidence is that of which an applicant "could not reasonably be expected to have knowledge."

[47] In *Bradshaw v Canada (Minister of Citizenship and Immigration)*, 2018 FC 632, which was the judicial review of an H&C decision, I referred to the jurisprudence regarding the treatment of extrinsic evidence that has evolved to favour a more contextual approach. Although the "novel and significant" approach continues to be applied, the considerations may be broader, as I noted at para 64:

> In *Majdalani v Canada (Minister of Citizenship and Immigration)*, 2015 FC 294, 472 FTR 285 [*Majdalani*], Justice Bédard analyzed the prevailing jurisprudence regarding reliance on websites and publicly available documentation in the context of an H&C application. Justice Bédard noted that the pre-*Baker* jurisprudence generally took the approach that the applicant should be informed of novel and significant information which shows a change in country conditions that would affect the disposition. Justice Bédard noted that in the post-*Baker* jurisprudence, the courts have generally taken a more contextual approach, which considers, *inter alia*, the nature of the decision and the possible impact of the evidence on the decision.

[48] In the present case, whether the Court applies the jurisprudence that establishes that extrinsic evidence should be disclosed if it is "novel and significant and demonstrate changes in general country conditions that may affect the decision" or the jurisprudence that supports a broader contextual approach, which includes consideration of the nature of the Applicants'

allegations, the nature of the evidence, and the possible impact, the result would be the same. There was no duty on the Officer to disclose the information found in the RIR. The information was not novel and was not a significant factor in the Officer's findings. The Applicants could have anticipated that information about education, employment and healthcare would be considered, given their submissions. The information in the RIR, in particular about employment prospects of educated and skilled persons, does not demonstrate a change in the country condition evidence. In addition, the sources of the information in the RIR were in country condition documents that were accessible and/or otherwise within the knowledge or awareness of the Applicants.

VII. The Decision Is Not Reasonable

[49] Section 25 of the Act provides that an exemption from the criteria or obligations of the Act may be granted on the basis of H&C considerations, "taking into account the best interests of a child directly affected." In the present case, the exemption, if granted, would permit the Applicants to apply for permanent residence while remaining in Canada rather than returning to Nigeria and seeking to immigrate to Canada in accordance with applicable eligibility criteria in the Act. This is discretionary relief and often referred to as exceptional, including because it is not an alternative immigration process (*Kanthasamy* at para 23).

[50] In *Kanthasamy,* the Supreme Court of Canada explained that what will warrant relief under section 25 varies depending on the facts and context of each case. The Court directed decision makers to avoid imposing a threshold of unusual, undeserved or disproportionate hardship, to consider and weigh all of the relevant facts and factors, and

to “give weight to all relevant humanitarian and compassionate considerations in a particular case” (at para 33; see also para 25) [emphasis in original].

[51] However, the Court also acknowledged, at para 23, that some hardship associated with leaving Canada is inevitable.

[52] With respect to the BIOC, which is an important factor in an H&C application where children are directly affected, the principles established in *Baker* continue to apply (*Kanthasamy* at paras 38–39).

[53] In *Baker* at para 75, the Supreme Court of Canada noted:

> . . . for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children’s best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children’s best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children’s interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada’s humanitarian and compassionate tradition and the Minister’s guidelines, the decision will be unreasonable.
>
> [Emphasis added].

[54] The jurisprudence also establishes that the fact that Canada may be a better place to live than the country of origin does not determine that it is in the child’s best interest to remain in Canada, nor does a positive BIOC necessarily result in an H&C exemption (see for example, *Landazuri Moreno v Canada (Citizenship and Immigration)*, 2014 FC 481 at paras 36–37).

[55] On judicial review, the Court's role is to assess whether the decision-maker reached a reasonable decision based on the decision-maker's assessment of the evidence on the record and the application of the relevant statutory provisions and the jurisprudence.

[56] Officers tasked with making H&C determinations have expertise and the Court should defer to their assessments unless there are "sufficiently serious shortcomings in the decision" that are "sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100).

[57] In *Vavilov*, at para 101, the Supreme Court of Canada identified two types of fundamental flaws that will render a decision unreasonable: "[t]he first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it".

[58] The determination of whether an H&C exemption will be granted is a global assessment of the relevant factors. An Officer could find several positive factors or all positive factors and still find that the exemption is not warranted. There is no rigid formula or score assigned to each factor. The weight given to each factor or consideration is within the Officer's discretion and it is not the role of the Court to reweigh. This makes it all the more difficult to identify how unreasonable findings have influenced the global assessment. In the present case, the Officer made several findings that were reasonably supported by the evidence. However, other findings were not.

[59] Although the Officer's reasons are not held to a standard of perfection, some of the Officer's findings are not tied to a rational reasoning process. These findings would have had some impact on the Officer's overall assessment of whether there were sufficient positive factors to warrant granting the H&C exemption. In other words, these findings are sufficiently central or significant to the outcome.

[60] First, with respect to the Applicants' establishment in Canada, the Officer found:

> While I acknowledge the adult applicants' efforts to improve their employment qualifications, I find that the PA and her spouse are already well-educated individuals and hold degrees from Nigeria in business administration and accountancy. Therefore, I find that given their high level of education, the courses taken in Canada hold less value to what they already have.

This refers to the courses taken by the adult Applicants to become personal support workers [PSW]. This finding overlooks that the Applicants took these courses in order to obtain employment in Canada, and succeeded. Both Applicants have been working continuously since their arrival, except for a period of maternity leave. While the PSW course may not result in another university degree, it provides valuable, and "in demand" skills and demonstrates the adult Applicants' initiative to pursue a skill in order to obtain immediate employment. This is a relevant establishment factor that the Officer discounted without justification. On the other hand, the Officer inconsistently found that the new skills would assist the Applicants in finding employment in Nigeria, while also concluding that despite high unemployment, it was reasonable to believe that the Applicants would find employment similar to their previous occupations in Nigeria (which were in finance).

[61] Second, with respect to the Officer's assessment of the BIOC, in particular the children's education, the Officer stated:

> Although corporal punishment is a method of discipline used in Nigeria, based on the evidence provided, I find that this is a common method of discipline in Nigeria. I am not of the opinion that this form of learning and discipline would inflict hardship on the children.

[62] The Officer could have considered whether there was evidence to link the general practice of corporal punishment to the circumstances of these children, and made a determination about whether they were likely to be subjected or exposed to it. However, the Officer did not take this approach. Although the Respondent suggests that the Officer's reasons should be read in this manner, I cannot rewrite the Officer's finding.

[63] I agree with the Respondent that a customary—and seemingly accepted—practice of corporal punishment cannot become a basis on its own to routinely grant H&C applications based on BIOC with respect to Nigeria. This is not the Court's finding. First, even if a BIOC assessment favours remaining in Canada, this is not determinative of an H&C exemption. Second, it is trite law that an applicant cannot rely on country condition documents and assert that they will face the same situation, without some evidence of how they will personally be affected. The onus is on an applicant to link an adverse country condition to their specific circumstances. However, the Officer's finding in this case is not that the Applicants failed to show how their children would be adversely affected by corporal punishment, for example, because they would be required to attend certain schools where this is practiced. The Officer's finding is general and blunt: the Officer "was not of the opinion" that corporal punishment would inflict hardship on the children.

[64] The jurisprudence on BIOC has established that ideally children should not suffer any hardship but also recognizes that there will inevitably be hardship associated with removal from Canada. In a BIOC analysis, it may be impossible to guard against every possible hardship associated with a return to the country of origin. However, the particular finding in this case—that exposure to corporal punishment in school will not be a hardship—is lacking in a reasonable foundation. Again, the Officer's reasoning leading to this finding is not rational or apparent.

[65] To reiterate, I am not making a general finding that corporal punishment as a culturally acceptable practice in Nigeria is a reason to find that the BIOC favours remaining in Canada or that it favours granting an H&C exemption. An H&C determination is more complex and requires consideration of all relevant factors. I find that in these particular circumstances, the Officer erred by not focussing on whether the evidence supported a finding that these children would face such hardship and by categorically finding that corporal punishment ("this form of learning and discipline") would not be a hardship.

[66] Again, it is not possible to determine how the Officer's finding factored into the overall assessment of the BIOC and, in turn, the overall assessment of the H&C application.

[67] As a result, the H&C application must be redetermined by a different decision-maker.

JUDGMENT in file IMM-1533-21

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is granted.

2. No question for certification was proposed or arises.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1533-21
STYLE OF CAUSE:	ADERIYIKE TEMITOPE ASHIRU, OLAIDE OPEYEMI ASHIRU, FAVOUR ENIOLA ASHIRU, CHRISTIANAH OLAMIDE ASHIRU v THE MINISTER OF CITIZENSHIP, AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	NOVEMBER 16, 2021
JUDGMENT AND REASONS:	KANE J.
DATED:	NOVEMBER 26, 2021

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