Federal Court  Cour fédérale

Date: 20220121

Docket: IMM-550-21

Citation: 2022 FC 70

Ottawa, Ontario, January 21, 2022

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

ELKANAH KUZAHYET-BUKI SHEKARI
LAITU ELKANAH SHEKARI
SAGWAZA-ELYON SHEKARI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants in this judicial review application are members of the same family. They are from Nigeria and challenge the decision of a Senior Immigration Officer who declined to grant their attempt to seek to gain permanent residence from within Canada, as opposed to having to apply from outside Canada as provided by section 11 of the *Immigration and Refugee Protection Ac*t, SC 2001, c. 27 [IRPA].

[2] Pursuant to section 25 of the IRPA the Minister is allowed to grant an exemption from any criteria or obligation, including granting a foreign national permanent resident status, if "the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected." In effect, a member of the executive branch of Government is given by law the power to ignore the law and to exempt from the application of the law a foreign national. This is evidently a heavy responsibility in a country governed by the rule of law. The Applicants seek in this case the relief available through a Humanitarian and Compassionate (H&C) application.

[3] The judicial review application is presented to this Court on the basis of section 72 of the IRPA.

I. The facts

[4] The Senior Immigration Officer, the decision maker who holds their authority from the Minister, advises at the beginning of the decision that it is for the Applicants to discharge the burden of justifying that they are deserving of being granted an H&C application. In this case, the Applicants are raising three grounds in their H&C application (para 2): their establishment in Canada, the best interests of the children (BIOC) and the hardship they would suffer if they had to return to Nigeria in order to seek to become permanent resident to Canada from there.

[5] The Applicants are citizens of Nigeria. The parents have two other children who were born in Canada. The Principal Applicant came to Canada to visit, in January 2001, but soon after,

in January 2012, in the words of their memorandum of facts and law, “the whole family started living in the country since the Applicant worked in Canada as a Pastor” (para 6).

[6] The Principal Applicant graduated in 2013 in biblical studies at Acadia University, in Nova Scotia. He then went to McGill University for a Master of Arts in Religious studies; he graduated in 2015. In 2016, he obtained a “professional diploma in Ministry” and then studied at the Presbyterian College in Montréal, following which he was ordained and inducted in April 2018.

[7] The Principal Applicant became without any immigration status in this country when the visitor visa was not renewed. The Applicants submitted their H&C application on July 1, 2020. They have not sought refugee status in this country.

[8] The establishment of the Applicants is based on a history of stable employment, a sound financial situation, integration in communities in Nova Scotia and Montreal through involvement in community organizations and voluntary service, learning to speak French, paying taxes and no involvement with law enforcement.

[9] On the best interests of the children, the Applicants considered their three children as benefitting from being raised in Canada. Even the older child who was not born in Canada knows very little about his native Nigeria, as he came with his parents to Canada when he was only three years old. The older child is fully integrated in Canadian culture: he has received his education in this country, his friends are here, he speaks Canada’s official languages, he has

good grades, compared to a transition back in Nigeria where the child would have to suffer intellectually, socially and emotionally. In fact, the degree of establishment of the child is a very relevant consideration, argue the Applicants.

[10] The third ground raised is the hardship awaiting the Applicants if they were to move back to Nigeria. The Applicants insist that what must be considered is hardships and difficulties, not persecution. Thus, there are significant safety issues in Nigeria because of the country's instability. The general violence in the country is argued by the Applicants as evidence that the authorities do not have control over the security of the country. Terrorism and kidnappings are said to be rampant. The police is ineffective and does not enjoy the trust of the population. In fact, there is a measure of corruption within police forces. The Applicants raise issues concerning conflicts involving large groups like the Fulani Herdsmen or Boko Haram, generating ethnic and religious tensions. The Applicants raised the specter of Nigerian cults.

II. The decision under review

[11] The Senior Immigration Officer notes that the Applicants contend that "the health care system or program is not good in Nigeria", with an infant mortality rate that is high. The existence of random acts of violence is acknowledged, together with sectarian and terrorist violence. Nevertheless, these are circumstances faced by all citizens in Nigeria. The Officer finds that country conditions in general must be linked to their personal situation, such that the risk incurred is greater than that of other citizens in Nigeria.

[12] From here (page 3 of 7) until the end of the decision, the decision maker repeats 15 times, on various items, that there is "insufficient objective evidence", or a variation on that theme, to accept a proposition or another made by the Applicants: here are a few examples:

- "I am not satisfied that the applicant has provided sufficient objective evidence in support of his allegation that he will be targeted or face mistreatment upon his return to Nigeria."
- "… I have insufficient objective evidence before me to establish that the applicant has suffered hardship or that he will suffer hardship owing to the country conditions in Nigeria."
- "I have insufficient evidence before me that the applicant's family/siblings would not be able to assist them in Nigeria emotionally or financially, if required."
- "Nevertheless, should the applicant's family require medical services, insufficient evidence was provided to indicate that he or his family would be unable to access support, treatment and medication should the need arise."
- "While the applicant fears that his older child will struggle to fit into the culture of Nassarawa, I have not been provided sufficient evidence to persuade me that the children are assimilated or integrated in Canada to such an extent that if this application were to be refused that they would not be able to re-integrate or readjust to Nigeria."
- "Insufficient evidence has been presented that relationships with these friends could not be resumed."
- "While I appreciate that children in Canada may have access to more opportunities and services, there is insufficient persuasive evidence before me to suggest that the children's welfare would be compromised by relocation to Nigeria."
- "I find that insufficient evidence has been adduced to satisfy me that the children could not return to Nigeria and attend school and I am not satisfied that returning to Nigeria will deprive the children of the basic necessities of their lives."
- "I do not find sufficient evidence before me that suggests that the best interests of the child would be negatively impacted to such an extent that warrants humanitarian and compassionate relief for the applicant when weighed against all other factors."

[13] Out of a decision that covers six pages, the decision maker spends at least 1 ½ page quoting from documentary evidence (U.S. Department of State, Nigeria, 2019 Country Reports on Human Rights; World Education News and Reviews, Education in Nigeria, Baseline Assessment of the Nigerian Pharmaceutical Sector and Drug Supply in Nigeria). What is noteworthy is how much the documents lack granularity.

[14] On the educational front, we learn that the law requires tuition-free and compulsory education for children of primary and junior secondary school age. Despite this, girls suffer extensive discrimination and impediments. Furthermore, the document cited by the Senior Immigration Officer indicates that the compulsory education covers a total of nine years (6 + 3). There is after these nine years a total of three years of senior secondary education. One has to understand that senior secondary education is neither compulsory nor tuition-free. A third level consists of a university sector and a non-university sector education. There is no indication as to the availability of programs. Nevertheless, the decision maker declares that Nigeria offers educational opportunities.

[15] On the health front, the decision maker speaks of the structure of the health system in Nigeria by quoting from the publications. It is of little assistance if availability is not addressed. Rather, the decision maker refers to evidence that Nigeria can treat medical conditions, but that medical services are not provided by government, although there seems to exist a new national health insurance system which "will help to take care of health expenses for many people". No details are supplied. Nothing about costs or availability. On the other hand, drugs are said to be available but expensive and an agency of government now regulates pharmacies so that they sell genuine medicines to the Nigerian public.

[16] On the basis of some documentary evidence that is not particularly eloquent, and a number of statements by the decision maker that declare the insufficiency of (persuasive) evidence, the officer concludes:

> "I am not satisfied that the applicants have presented sufficient humanitarian and compassionate grounds to warrant an exemption

> from the immigrant visa requirement. Based on cumulative assessment of the evidence submitted, I have considered the applicants' personal circumstances, establishment, employment, best interests of the children and after conducting a global assessment of all the relevant factors put forth by the applicants, it is determined that their cited factors do not support that relief from the requirement to apply for permanent residence from abroad is justified in this case."

III. Arguments and Analysis

[17] As stated before, the Applicants challenged the Officer's decision on various grounds before this Court. The finding on the establishment of the Applicants was defective to the point of making the decision unreasonable; the same is said of the assessment of the country conditions in Nigeria; as for the best interests of the children, the Applicants raise that the decision maker did not give sufficient weight to their establishment in Canada. Furthermore, it is not enough to state that one is alive, alert and attentive to the children's interest. The "decision must show how the agent is being sensible [*sic*] to the children situation and how the agent is considering their best interest" (Applicants' memorandum of fact and law, para 35).

[18] At times, it appeared that the Applicants were in effect merely disagreeing with the assessment of the evidence made by the decision maker. The Supreme Court in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] stated emphatically that "(i)t 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"" (para 125). That could be a formidable obstacle for the Applicants. They may have to show a fundamental misapprehension of the facts, or that the

decision maker failed to account for the evidence before it, or the decision is unreasonable because the conclusions were not based on the evidence before the decision maker.

[19] However, the Applicants are raising a different argument. They say that the reasons for the decision do not allow the Applicants to understand how the decision maker reached a decision. I share that view.

[20] The *Vavilov* decision actually insists not only on the outcome of the administrative decision, but it calls for a culture of justification to be adopted by administrative decision makers (para 14). Reasonableness review by a court focuses on the decision by the administrative tribunal, but that includes the justification offered for that decision.

[21] The approach to performing reasonableness review focuses on justification which is seen as the lynchpin of institutional legitimacy. A culture of justification surely requires that decisions be justified so that it can be shown that they are transparent and intelligible. I do no doubt that the Senior Immigration Officer had to motivate his decision. The factors to consider for determining if a decision satisfies the concept of procedural fairness in a given case were elaborated on in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [*Baker*]. They were helpfully summarized in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48, [2004] 2 SCR 650. Here is paragraph 5:

> [5] The content of the duty of fairness on a public body varies according to five factors: (1) the nature of the decision and the decision-making process employed by the public organ; (2) the nature of the statutory scheme and the precise statutory provisions

> pursuant to which the public body operates; (3) the importance of the decision to the individuals affected; (4) the legitimate expectations of the party challenging the decision; and (5) the nature of the deference accorded to the body: Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817. In my view and having regard to the facts and legislation in this appeal, these considerations require the Municipality to articulate reasons for refusing the Congregation's second and third rezoning applications
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> [Emphasis added.]

[22] The majority in *Vavilov* explains the importance of reasons:

> [79] Notwithstanding the important differences between the administrative context and the judicial context, reasons generally serve many of the same purposes in the former as in the latter: R. v. Sheppard, 2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 15 and 22-23. Reasons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate that the decision was made in a fair and lawful manner. Reasons shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power: Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine, at paras. 12-13. As L'Heureux-Dubé J. noted in Baker, "[t]hose affected may be more likely to feel they were treated fairly and appropriately if reasons are given": para. 39, citing S.A. de Smith, J. Jowell and Lord Woolf, Judicial Review of Administrative Action (5th ed. 1995), at pp. 459-60. And as Jocelyn Stacey and the Hon. Alice Woolley persuasively write, "public decisions gain their democratic and legal authority through a process of public justification" which includes reasons "that justify [the] decisions [of public decision makers] in light of the constitutional, statutory and common law context in which they operate": "Can Pragmatism Function in Administrative Law?" (2016), 74 S.C.L.R. (2d) 211, at p. 220.
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> [Emphasis added.]

The reasons have also their usefulness in demonstrating justification, transparency and intelligibility, the hallmarks of reasonableness (*Vavilov*, para 99). They shed light on the

rationale as a reviewing court is concerned not only with the outcome, but also the decision-making process:

> [83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also Ryan, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.
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> …
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> [86] Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process: see *Dunsmuir*, at paras. 47-49. In *Dunsmuir*, this Court explicitly stated that the court conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes": para. 47. Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *ibid*. In short, 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. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.
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> [Emphasis added.]

[23] In my estimation, the decision under review lacks in intelligibility, because of the quality of the reasons given.

[24] The decision under review repeatedly rejects submissions on the basis that there is insufficient evidence. As a matter of fact, I have read the decision a number of times without being able to decipher what may explain how the evidence is insufficient. It may be that it is insufficient, but one does not know why. It seems to me that in the context of the decision under review, “insufficient evidence” without more is the equivalent of simply saying “no”. I fail to see how that can be said to be a justification.

[25] The *Vavilov* majority quoted with approval the article “Reasons for Decision in Administrative Law”, by R. A. Macdonald and D. Lametti, (1990), 3 CJALP 123, at p. 139, where one reads that reasons that “simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion” .. “are no substitute for statements of fact, analysis, inference and judgment”. The majority stated that they “will rarely assist a reviewing court in understanding the rationale underlying a decision” (Vavilov, para 102). That is, it seems to me, the situation encountered in this case. The issue here is not to require a standard of perfection, but rather to satisfy the reasonableness review that there is “an understanding of the reasoning that led to the administrative decision”, thus enabling “a reviewing court to assess whether the decision as a whole is reasonable” (Vavilov, para 85). The reviewing court is tasked with reviewing the reasons, not with attempting to substitute its own reasons (Vavilov, para 96).

[26] There is no doubt that the application of section 25 of the IRPA requires that the Minister operate with a significant measure of discretion, and reviewing courts must show deference to administrative decisions (*Vavilov*, para 85). But deference is not abdication. The reviewing court has the duty to consider carefully the reasons given. In *Vavilov*, the majority even went so far as requiring that the reasons be at the forefront:

> [84] As explained above, where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. 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 its conclusion: see *Dunsmuir*, at para. 48, quoting D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.
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> [Emphasis added.]

[27] If, as here, the decision maker resorts to "insufficient evidence" repeatedly, the person affected by the decision, for whom the decision is important as it may result eventually in a removal from Canada, is entitled to an intelligible decision. The *Vavilov* majority made the requirement explicit:

> [95] That being said, reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it. It would therefore be unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party.

[28] Whether the outcome reached by the decision maker might be seen as reasonable is not relevant. The *Vavilov* majority could not have been clearer as it states that, "(e)ven if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome" (para 96). It is for the administrative decision maker to justify to the affected party the basis for the conclusion reached in a transparent and intelligible manner. Here, the decision made does not satisfy the requirement.

IV. Conclusion

[29] As a result, the judicial review application is successful and must be granted. The matter is returned to a different immigration officer for a new determination.

[30] There is no question to be certified pursuant to section 74 of the IRPA.

JUDGMENT in IMM-550-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the matter is sent back for redetermination by a different immigration officer.

2. There is no question to be certified.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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