Federal Court  Cour fédérale

Date: 20220121

Docket: IMM-3225-20

Citation: 2022 FC 15

Ottawa, Ontario, January 21, 2022

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

BELINDA KIFUNGO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Ms. Belinda Kifungo (the Applicant) seeks the judicial review of the decision of an Immigration Officer who declined to grant her an application to seek permanent residence in Canada without having to make her application from outside Canada, as required by section 11 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. In order to avoid the legal requirement, Ms. Kifungo seeks to resort to section 25 of the IRPA, which requires that Humanitarian and Compassionate (H&C) considerations be examined in order that the Minister

"may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act" (s. 25(1) of the IRPA).

I. Facts

[2] The Applicant and her brother (who is not involved in this judicial review application) entered Canada in August 2010. She is a citizen of the Democratic Republic of the Congo.

[3] The circumstances of her arrival in Canada are not completely clear. It appears that the Applicant, her younger brother and an older sister came to the United States / Canada border together with their mother. She went back to the Congo. The three children crossed the border in order to seek refugee status in Canada; however, the older sister was the subject of "refoulement", as she was not allowed to enter Canada, in view of the fact that she was an adult. The Applicant was 16 years old (born on October 6, 1993) and her brother was 13.

[4] The Applicant's parents' situation in the Congo was also rather nebulous. It is reported in this Court's decision on the judicial review application of the refusal to grant asylum to the Applicant that, following a complaint to the Congolese police about an alleged attempted sexual assault suffered by the Applicant, in May 2010, her father was detained for approximately 6 months (2016 FC 599, para 3). It appears that the complaint was not made against the father but rather by him. According, to submissions made before the Immigration Officer, the Applicant's father was detained again after filing another complaint to the Congolese police for arbitrary detention in 2012. He left Congo for Gabon thereafter. The Applicant's mother appears to have stayed in the Congo.

[5] The judicial review application concerning the asylum sought by the Applicant was dismissed by our Court. The Refugee Protection Division's (RPD) decision had originally dismissed the asylum request for lack of credibility, which was largely confirmed by our Court. The Federal Court concluded that the Applicant had failed to discharge her burden of showing that the RPD decision was unreasonable. The Court wrote at paragraph 23:

> [23] The RPD is also entitled to draw conclusions concerning the credibility of a refugee protection claimant based on implausibilities, common sense and rationality, and to reject evidence if it is inconsistent with the probabilities affecting the case as a whole …

Our Court also found that the Applicant did not establish a fear of persecution: the RPD's conclusion did not suffer from being unreasonable, as the Applicant had the burden of proof to show that the decision was unreasonable.

[6] The submissions before the Immigration Officer were not more elaborate as to how the Applicant and her brother were able to survive from the time they arrived in Canada and the date of the submissions, October 23, 2019. Rather, they focused on the Applicant's establishment in Canada, the length of time spent in the country, the impossibility to return to the Democratic Republic of the Congo and the anticipated prejudice she could suffer if sent back to her country of nationality.

II. The decision under review

[7] The Senior Immigration Officer considered the arguments offered by the Applicant. The Officer examined first the establishment. Given that by the time the application was made, the

Applicant had spent close to 10 years in Canada, the establishment of this Applicant lacked substance. The Officer referred to *Irimie v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16640 (FC) [*Irimie*] where Justice Pelletier, then of this Court, observed that the test on an H&C application is not whether a person would be a welcome addition to the Canadian community: the process is not to be an *ex post facto* screening device for immigration purpose because that would have the perverse effect to "encourage gambling on refugee claims in the belief that if someone can stay in Canada long enough to demonstrate that they are the kind of persons Canada wants, they will be allowed to stay" (para 26).

[8] The Senior Immigration Officer reminds the reader of the inexorable fact that there is "some hardship associated with being required to leave Canada" (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 [*Kanthasamy*], para 23) with that alone being insufficient to warrant relief under section 25(1) of the IRPA (indeed, the Supreme Court in *Kanthasamy* refers to *Irimie*, at paragraph 12). Still at paragraph 23 of *Kanthasamy*, the Court notes that section 25(1) was not "intended to be an alternative immigration scheme". The Officer continues by citing also paragraph 25 of the *Kanthasamy* decision:

> [25] What does warrant relief will clearly vary depending on the facts and context of the case, but officers making humanitarian and compassionate determinations must substantively consider and weigh all the relevant facts and factors before them: Baker, at paras. 74-75.

[9] It is in that context that the Officer disposes of the argument made by the Applicant that she was incapable of leaving Canada for the Congo because of a moratorium imposed on removals. That, says the Officer, does not create a constraint, or an obligation, to remain in

Canada; the moratorium does not create a sword. It is meant as a shield as Canada will not remove someone to such a country. But foreign nationals are not prevented from going back if they so wish. Indeed some have voluntarily returned.

[10] That finding is made because the Applicant argued that the length of her stay was because she was incapable to return, which would argue for the recognition of the establishment in Canada. She did not have to stay in Canada. There was no such obligation and the Senior Immigration Officer merely corrected the impression conveyed by the Applicant.

[11] In terms of establishment, the Senior Immigration Officer noted an income tax statement for year 2016. Financial information for 2019 was supplied later. It remains that there is a paucity of financial information. The Officer notes in particular that there is no information between 2010 and 2016 as to how the Applicant was able to subsist during all these years. Indeed the means of subsistence remained largely unknown since being in Canada.

[12] As was a recurring theme throughout the Officer's decision, there is little evidence that was offered by the Applicant on a number of fronts. Thus, little is provided on the education front, what the Officer refers to as the "non-dit". Similarly, there is very little to support implication in the community or in her church. The Officer concludes on establishment in the following fashion:

> Ce sont donc là globalement des aspects positifs, sachant surtout qu'elle est arrivée au Canada avec son jeune frère quand elle avait presque dix-sept ans seulement. Peut-être que depuis août 2010, elle a après tout beaucoup accompli en termes de liens et d'établissement. Mais sa preuve à cet égard ne le dit pas. Comme détaillé plus haut, les non-dits empêchent de saisir tout son

> contexte de vie, donc son niveau établissement [*sic*] et la force de ses liens au Canada.
>
> [TRANSLATION] These are generally positive aspects, especially knowing that she arrived in Canada with her young brother when she was only almost 17. Maybe since August 2010, she accomplished a lot after all in terms of connections and establishment. However, her evidence in this respect does not say so. As stated above, what was not said prevents us from grasping her full living environment (i.e., her degree of establishment) and the strength of her connections in Canada.

[13] The Senior Immigration Officer then proceeded to examine the country conditions in the Congo. It is argued that violence against women is prevalent in the Congo, which is a part of the various difficulties one encounters in that country: the education and health systems are underfunded, there is a social crisis throughout various sectors in the country, pandemics such as Ebola and Covid-19 are present. There are economic, social, sanitary and safety concerns that are worrying. In the words of the Officer, the situation in the Congo cannot be compared to that of Canada. Nevertheless, the Officer states that the findings of the RPD on her attempt at being granted refugee status cannot be ignored. Thus, the Senior Immigration Officer notes the complete lack of information concerning her father where she indicates not knowing anything about his fate. As for her mother, while the RPD described her mother as being involved in 2015 in the government of the "Bas Congo", the Applicant now contends that at the time of the H&C application, she was not working, is separated from her husband, is without income and struggles to get by. If that were the case, that would appear to constitute a major change in her circumstances. The point of the matter is that this required an explanation that never came. The situation in the Applicant's own country, which ought to be at the heart of her application, has remained vague. There is no way for the Officer to guess or figure out the situation ("contexte de vie") and what would happen if the applicant had to go back, something that is hypothetical in

view of the temporary suspension of removal (TSR). The Officer relies on *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 FCR 635 [*Owusu*], at paragraph 8, to claim that the lack of evidence is the responsibility of the Applicant:

> [8] H & C applicants have no right or legitimate expectation that they will be interviewed. And, since applicants have the onus of establishing the facts on which their claim rests, they omit pertinent information from their written submissions at their peril. In our view, Mr. Owusu's H & C application did not adequately raise the impact of his potential deportation on the best interests of his children so as to require the officer to consider them.

In a word, there may be evidence and explanation of the difficulties, challenges or uncertainties if she were hypothetically to return to Congo (“advenant un hypothétique retour en RDC”). But the evidence was never submitted. The burden was on the Applicant to bring all relevant evidence. The Officer concludes on the conditions Congo:

> Quitte à me répéter, le fait est que je ne peux, pour son compte, faire le montage de sa preuve et son argumentation et saisir tout ou partie des difficultés auxquelles elle pourrait être exposée. Je suis donc d’opinion que les conditions défavorables en RDC jouent en faveur de la requérante sans pour autant justifier la dispense ici demandée.
>
> [TRANSLATION] At the risk of repeating myself, the fact is that I cannot put together her evidence or her arguments for her or grasp, in whole or in part, any difficulties to which she may be exposed. I am therefore of the opinion that the poor conditions in the DRC are in the applicant’s favour without warranting the relief for which she is applying here.

[14] The last argument addressed by the Senior Immigration Officer is that of the best interests of her nephew. He is the Applicant’s brother’s child. According to the record, the Applicant now lives in Toronto and her brother is in Montréal. He has the custody of the child on

weekends. The Applicant is said to come to Montréal once a month and she contributes some financial assistance to help raise the child.

[15] The Senior Immigration Officer notes that barely nothing is known about the child. No one disputes the affection for her nephew. But with a complete lack of information, other than the name, the date of birth and where he was born, it is impossible to expand on the best interests of the child. After all, the Applicant herself reckons that she sees the child once per month which can hardly be said , as the Applicant contends, that she assists in a significant fashion in raising her nephew:

> Au regard de la preuve soumise, je suis ainsi d'avis que l'intérêt supérieur de l'enfant ne justifie pas la mesure d'exception qu'est la demande de dispense.
>
> En fin de compte, l'effet combiné des trois motifs discutés ne justifie pas non plus l'octroi de la dispense demandée.
>
> [TRANSLATION] With regard to the evidence submitted, I am also of the opinion that the best interests of the child do not warrant the exemption in the form of the application for relief.
>
> In the end, the combined effect of the three grounds discussed does not warrant granting the relief that is the subject of the application.

III. Arguments and Analysis

[16] I have some sympathy for the Applicant. In spite of the valiant effort made by her counsel on this judicial review application, who was not the Applicant's counsel on the H&C application, the evidence presented in favour of the application before the Senior Immigration Officer was fatally defective. As has been said on numerous occasions, the reviewing court deals with the reasonableness of the decision made. Such review is conducted on the basis of the

record before the administrative decision maker (*Bernard v Canada (Revenue Agency)*, 2015 FCA 263). The dominant issue in this case was the lack of evidence concerning the factors raised by the Applicant before the Senior Immigration Officer. That is what the Officer found. Unless this was unreasonable, the Applicant cannot succeed on this record.

[17] It is worth reminding the parties that the standard of review of reasonableness carries constraints. Here, the parties are in agreement that such is the standard of review as recognized throughout our jurisprudence. I share that view. Furthermore the Supreme Court of Canada, in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] confirmed that there exists a presumption "that reasonableness is the applicable standard in all cases" (para 10).

[18] *Vavilov* defines the requirements in our law where reasonableness constitutes the standard of review by which reviewing courts abide. Thus, the burden is on the shoulders of an applicant who challenges a decision to show that it is unreasonable (*Vavilov*, para 100). The hallmarks of reasonableness continue to be justification, transparency and intelligibility in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov*, para 99). Two types of fundamental flaws are identified by the Supreme Court as making a decision unreasonable: a decision that is internally incoherent such as based on circular reasoning, false dilemmas, unfounded generalization or absurd premise (*Vavilov*, para 104). Where the conclusion reached cannot follow from the analysis, the decision will be unreasonable. It should be noted that the reasons in the decision are "read in light of the record and with due sensitivity

to the administrative regime" (*Vavilov*, para 103). The other type of flaw consists of decisions that are not justified in light of the legal and factual constraints.

[19] The reviewing court operates on the basis of the principle of judicial restraint in view of the different roles played by the courts and administrative decision makers (*Vavilov*, para 13). The reviewing court seeks to safeguard the legality, rationality and fairness of the administrative process. It adopts a posture of respect (*Vavilov*, para 14). It will not come as a surprise that the courts are not to reweigh the evidence before the decision maker or accept that new evidence be presented on review. The record is that which was before the administrative tribunal:

> [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.
>
> [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.

[20] In the case at bar, the Applicant argues that the decision maker fettered his discretion by refusing to examine the hardship that would face the Applicant if she returned to the Congo. That is not what the record shows.

[21] As part of her attempt to show establishment in Canada, the Applicant argued that she was incapable of leaving Canada for Congo in view of the moratorium imposed by Canada. The Senior Immigration Officer seemed to have taken the argument to be that the Applicant was prevented by Canada from returning to her country of nationality, which should be credited to her.

[22] Not only did the Senior Immigration Officer correct the record, as a moratorium does not prevent someone from voluntarily going to the country subject to a moratorium, but the decision maker refers specifically to a hypothetical return to the Congo. Indeed, the Senior Immigration Officer did not ignore the existence of the temporary suspension of removal: there was a direct reference to it (p. 5 of 6) and it was also linked directly to the hypothetical return to the Congo.

[23] The decision maker was directly responding to the argument raised before the Officer that the length of time spent in Canada and the incapacity to return to the Congo favour the existence of establishment as part of an H&C application. The decision maker was addressing an unfounded argument (Decision of Officer, bottom of page 3 of 6) made by the Applicant on her establishment in Canada based in part on the moratorium (para 17 of the submissions of October

23, 2019). The existence of a moratorium is a neutral factor, not to be taken advantage of as such. An applicant could certainly take advantage of the opportunity offered by a longer period of time in Canada to better establish herself. But that cannot go any further as the evidence shows that the Applicant did not intend to go back to the Congo. The moratorium cannot be used as a form of excuse to suggest that she cannot be faulted for not having returned to seek to apply from abroad to gain permanent residence in Canada, as required by law. That said, it cannot be held against the Applicant either. The moratorium does not prevent from going: it is rather that Canada will not remove someone to the country subject to the moratorium while it continues to be in effect.

[24] Contrary to the Applicant's assertion, far from ignoring the TSR, the decision maker directly speaks in terms of a hypothetical return, simply because of the TSR. In other words, if and when the moratorium is lifted, the Applicant would have to apply for permanent residence from outside Canada because of the Minister's refusal to apply section 25 of the IRPA to the Applicant's situation.

[25] Similarly, the Applicant argues that the Officer failed to assess hardship in the Congo. Such is not the case. Rather, the Officer concludes that the evidence is missing to make an assessment. The Officer laments the lack of information to support the difficulties, challenges and uncertainties that the Applicant could face in case of a hypothetical return. As pointed out before, the Officer had cited *Owusu* where the Court of Appeal remarked that it is for an applicant to adduce proof and that applicants "omit pertinent information from their written submissions at their peril" (para 8).

[26] In view of the TSR the Senior Immigration Officer is not considering the Applicant at risk of being returned to the Congo to seek permanent residence in Canada. The circumstances in the Congo would obviously have to improve for the moratorium to be lifted. At any rate, the situation is that the Applicant chose not to submit any evidence on the issue. There was nothing to engage with. It is not for the decision maker to make arguments and offer evidence on behalf of an applicant.

[27] The Applicant claims that the analysis on establishment is unintelligible. She in fact goes back to the length of time she has been in Canada as being of prime importance. Part of the difficulty for her stems from a lack of information offered by the Applicant about her stay in Canada. What was done with her time and how she was able to sustain herself continued to be largely missing. It is said by the Officer that perhaps much was accomplished, such that establishment can be proven; however nothing is known of the activities, or the substance of them that perhaps could have shown results of high quality. There was nothing of the sort. What is not said prevents an understanding of the “contexte de vie”, and thus it is not possible to have a sense of the level of establishment and the strength of the ties in Canada. It must be remembered that it is for the Applicant to show that the decision is unreasonable, that is that it is not justified, intelligible or transparent. It is not sufficient to hope that the reviewing court will be of a different view and will see merit where the tribunal tasked with the duty to decide the matter has reached a different conclusion. Much more is needed. As indicated earlier, the evidence was clearly lacking and an affidavit *ex post facto* will not help on judicial review.

[28] As for the best interests of her nephew that the Applicant allegedly sees once a month, to claim that she helps to raise the child, without any evidence, is overly enthusiastic. Indeed the Senior Immigration Officer noted that basically nothing is known about the child.

[29] Contrary to what was asserted by the Applicant, the Officer did not require evidence of hardship. The Officer required evidence about the child. Once again, it is the lack of evidence that is troubling and, ultimately, fatal.

IV. Conclusion

[30] As a result, the Applicant failed to show that the decision under review was unreasonable, largely from a lack of evidence. Stating is not proving. The *Kanthasamy* court quoted at paragraph 13 the first Chair of the Immigration Appeal Board who spoke of the humanitarian and compassionate considerations as "those facts, established by the evidence, which would excite in a reasonable man [*sic*] in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the Immigration Act" (*Chirwa v Canada (Minister of Citizenship and Immigration) (1970)*, 4 IAC 338, Emphasis added).

[31] The parties did not ask the Court to certify a question in accordance with section 74 of the IRPA. I agree that no such question emerged from this case.

JUDGMENT in IMM-3225-20

THIS COURT'S JUDGMENT is that:

1. The judicial review application must be dismissed.

2. There is no question to be certified.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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