Federal Court  Cour fédérale

Date: 20211112

Docket: IMM-260-21

Citation: 2021 FC 1201

Ottawa, Ontario, November 12, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

BILE SHEIKH OMAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This application seeks judicial review of a decision dated January 2, 2020 [the Decision], in which a Senior Immigration Officer [the Officer] rejected the Applicant's application for permanent residence on humanitarian and compassionate [H&C] grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] As explained in more detail below, this application is allowed because, based on an applicable Administrative Deferral of Removals [ADR], the Officer failed to reasonably analyze the country conditions in Somalia and did not consider the fact that, in the absence of relief on H&C grounds, the Applicant has no choice but to leave Canada for Somalia if he wishes to apply for permanent residence.

II. **Background**

[3] The Applicant is a citizen of Somalia, who applied for H&C relief from subsection 11(1) *IRPA*, which requires that foreign nationals apply for permanent residence from outside of Canada.

[4] The Applicant describes his family as belonging to a minority clan that was regularly taken advantage of by larger clans. He also describes experiencing frequent attacks by the terrorist group Al Shabaab. After his second wife was killed in a bombing in a market in Mogadishu in 2014, the Applicant travelled to the United States and made an asylum claim, which was ultimately rejected. The Applicant then travelled to Canada and made a refugee claim.

[5] In September 2015, the Refugee Protection Division refused the Applicant's claim, finding that he lacked credibility. The Refugee Appeal Division [RAD] dismissed his appeal in March 2016, and his subsequent application for leave for judicial review of the RAD's decision was denied. Due to an ADR implemented under subsection 230(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, removals to several regions of Somalia,

including Mogadishu where the Applicant is from, are currently suspended. As such, while the Applicant is subject to a removal order, it is unenforceable until the ADR is lifted.

[6] In March 2019, the Applicant submitted the H&C application, the Decision in which is the subject of this application for judicial review. His H&C application identified that he currently lives in Toronto and works as a shuttle bus driver at the airport. He has a large family who he says count on him for financial support, including his first wife who is a refugee in Kenya, their son who is now 21 years old and lives in Turkey, his brother and his child from his second marriage, and two orphaned children who live with his brother in Somalia and whom the Applicant considers his own. The H&C application also explained that the Applicant fears returning to Somalia, based on anxiety associated with his upbringing in Somali, concern he will be unable to find work and to continue to support his family, and overall country conditions including the violence wrought by Al Shabaab.

III. **Decision Under Review**

[7] In reference to adverse country conditions, the Officer acknowledged that country conditions in Somalia are unstable but noted that the ADR covered Mogadishu, where the Applicant is originally from, meaning that he cannot be removed to Mogadishu until the situation improves. The Officer therefore assigned the adverse country conditions little weight and noted that, should conditions improve to the point that the ADR is lifted, the Applicant would at that point be entitled to a pre-removal risk assessment.

[8] The Officer gave some weight to the Applicant's establishment in Canada—including his volunteer activities, employment history, English studies and letters of support—but noted that this factor alone was not enough to grant an H&C exemption. The Officer considered the Applicant's claims that he needed to remain in Canada in order to provide for his family outside Canada. However, the Officer stated that there was nothing to prevent the Applicant from continuing to provide support while he remains in Canada and that, although the Applicant may find it a challenge to secure employment in Mogadishu, he would not be removed there until conditions improved and the ADR is lifted.

[9] In relation to the best interests of the Applicant's children [BIOC], the Officer repeated his observations that the Applicant can continue to support his family, including his children, while in Canada on an unenforceable removal order, and that he would not be returned until the situation in Mogadishu stabilized. The Officer concluded that the children's interests would not be directly compromised by the absence of an H&C exemption.

[10] Finally, the Officer assessed the Applicant's mental health evidence and concluded that the report of a psychotherapist provided to support the Applicant's claims was worthy of little weight. The Officer noted that the psychotherapist is not a medical doctor or a registered psychologist and that her conclusions are not a clinical diagnosis. Although the psychotherapist stated that the symptoms the Applicant exhibited during her assessment are consistent with post-traumatic stress, generalized anxiety and depression, the Officer noted that she had not indicated that she received specialized training in these psychological illnesses. The Officer acknowledged that leaving Canada would create anxiety for the Applicant. However, the Officer noted that the

psychotherapist taught him breathing exercises to help with his stress and referred him for counselling, concluding he could continue to access medical services and mental health treatment while in Canada.

[11] In conclusion, the Officer found that the H&C considerations did not justify an exemption and refused the application.

IV. **Issues and Standard of Review**

[12] The Applicant raise four issues for the Court's consideration:

A. Whether the Officer erred by invoking the ADR designation in order to avoid considering the hardship the Applicant would face if returned to Somalia;

B. Whether the Officer erred in the treatment of the psychotherapist's report and, more generally, the Applicant's mental health evidence;

C. Whether the Officer erred by failing to provide adequate reasons as they relate to the Applicant's level of establishment; and

D. Whether the Officer erred by failing to consider BIOC.

[13] The parties agree, and I concur, that the standard of review applicable to the Decision is reasonableness.

V. **Analysis**

[14] My decision to allow this application for judicial review turns on the first issue raised by the Applicant, surrounding the Officer's reliance on the ADR. The Officer noted the adverse country conditions in Somalia but assigned them little weight because the ADR currently prevents the Applicant from being removed there. The Applicant argues that the Officer erred by relying on the ADR in this manner and thereby failing to properly consider the hardship he would suffer if he returned to Somalia.

[15] The Applicant relies significantly on *Bawazir v Canada (Citizenship and Immigration)*, 2019 FC 623 [*Bawazir*], which he submits addressed circumstances very similar to those in the case at hand. *Bawazir* involved an application for judicial review challenging an unsuccessful H&C application by a citizen of Yemen, which was subject to an ADR. The officer considering the H&C application noted that the situation in Yemen was dire. However, reasoning that the situation had little to no impact on the applicant's personal circumstances as long as the ADR remained in place, the officer gave the situation in Yemen little weight. Justice Norris found this decision unreasonable, explaining the officer's error as follows (at paras 16-17):

> 16 It is true that Mr. Bawazir did not face removal to Yemen if his H&C application was refused, at least not for as long as the ADR is in place. In this respect, his circumstances are unlike those of many applicants for H&C relief, such as Mr. Kanthasamy himself (see *Kanthasamy* at para 5). But this was not why he sought H&C relief. Rather, Mr. Bawazir argued that H&C considerations warranted an exception being made in his case from the requirement that he leave Canada to submit his application for permanent residence. Ordinarily, section 11 of the IRPA requires a prospective permanent resident to apply for a permanent resident visa before entering Canada. If an exception to this requirement is not made, Mr. Bawazir could not apply for permanent residence

> unless he returned to Yemen (there being no suggestion that he could go anywhere else). Mr. Bawazir also contended that conditions in Yemen should be considered (along with other circumstances) with respect to the merits of his application for permanent residence.
>
> 17 One can certainly understand why Mr. Bawazir would like to secure his status in Canada by obtaining permanent residence here. In my view, a reasonable and fair-minded person would judge the requirement that he leave Canada and go to a war zone where a dire humanitarian crisis prevails so that he could apply for permanent residence as a misfortune potentially deserving of amelioration. The existence of the ADR demonstrates that Canada views the conditions in Yemen as a result of the civil war to "pose a generalized risk to the entire civilian population." The conditions are so dire there that, with a few exceptions, Canada will not remove nationals to that country. Applying the usual requirements of the law in such circumstances clearly engages the equitable underlying purpose of section 25(1) of the *IRPA* (cf. *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 at para 43) yet the officer finds that the conditions prevailing in Yemen and the "extreme hardship" Mr. Bawazir would face there deserve "little weight" in the analysis. This was because Mr. Bawazir is not facing the threat of imminent, involuntary removal. However, the officer did not consider that Mr. Bawazir has no choice but to leave Canada for Yemen if he wishes to apply for permanent residence unless an exception is made for him. The officer erred in effectively dismissing a factor which is clearly relevant to the equitable underlying purpose of section 25(1) of the *IRPA*.

[16] I see no basis to distinguish the facts of the present case from those in *Bawazir*. As in *Bawazir*, the Applicant's H&C application submitted, based significantly on the adverse conditions in his home country, that it would be a hardship for him to return to there to apply for permanent residence in Canada as is ordinarily required by section 11 of *IRPA*. As in *Bawazir*, the Officer assigned little weight to the country conditions because of the effect of the ADR and did not consider the fact that, in the absence of relief on H&C grounds, the Applicant has no choice but to leave Canada for his home country if he wishes to apply for permanent residence.

[17] The Respondent refers the Court to Justice Norris' explanation that the crux of the case in *Bawazir* was that the applicant could not apply for permanent residence without going to a place where he would face extreme hardship, unless he was granted an exemption from the usual requirement to apply from outside Canada (at para 18). The Respondent argues that *Bawazir* is distinguishable because, in the case at hand, the Applicant is not being required to return to Somalia to apply for permanent residence. Rather, he is presently entitled to remain in Canada because of the effect of the ADR.

[18] With respect, I find no merit to the Respondent's effort to distinguish *Bawazir.* In my view, the crux of the present case is effectively identical to that described by Justice Norris. While the Applicant cannot presently be forced to leave Somalia, he cannot apply for permanent residence in Canada without returning there.

[19] I have also considered other authorities upon which the Respondent relies. The Respondent refers the Court to jurisprudence to the effect that the mere presence of an ADR applicable to a given country does not mean that H&C applications from citizens of that country will automatically be allowed (see *Nkitabungi v Canada (Citizenship and Immigration)*, 2007 FC 331 at para 12; *Lalane v Canada (Citizenship and Immigration)*, 2009 FC 6 at para 41; *Emhemed v Canada (Citizenship and Immigration)*, 2018 FC 167 at para 9). I accept this line of authority but find that it has little application to the issue in the present case. The Applicant did not submit to the Officer, and does not argue before the Court, that the existence of the ADR necessitated that his H&C application be approved.

[20] The Respondent also cites Justice Roy's conclusion in *Mubiayi v Canada (Citizenship and Immigration)*, 2017 FC 1010 at para 13:

> 13 It is acceptable for a permanent residence application to be submitted even though the applicants are not at immediate risk of being deported from Canada. However, it is entirely different to allege that humanitarian and compassionate considerations should carry significant weight because the applicants cannot be deported from Canada given the moratorium that was imposed. While I am not suggesting that these considerations are irrelevant, I do not see how giving them minimal weight could constitute an unreasonable decision in this case. The applicants failed to discharge their burden.

[21] Again, I find this authority to provide little assistance to the Respondent, as the Applicant is not arguing that the fact he cannot be deported from Canada due to the ADR should be weighed in his favour. To the extent he relies on the ADR in support of his H&C application, it is only as corroboration of his submission as to the adverse country conditions currently existing in Somalia.

[22] Finally, the Respondent refers the Court to *Ndikumana v Canada (Citizenship and Immigration)*, 2017 FC 328 [*Ndikumana*], a case involving an applicant from Burundi. The Respondent emphasizes the Court's statement in *Ndikumana* that it would not be unreasonable to find that the applicant will continue to benefit from the ADR applicable to that country and that she will not have to deal with current conditions in Burundi (at para 19). However, that statement must be understood in the context of the surrounding paragraphs of the decision and the authorities relied upon therein.

[23] As in authorities cited above, *Ndikumana* noted the principle that, in the context of an H&C Application, the existence of an ADR with regard to a specific country cannot automatically lead to specific outcome, whether positive or negative (at para 18). It accurately cited *Likale v Canada (Citizenship and Immigration)*, 2015 FC 43 at para 40 [*Likale*] and *Alcin v Canada (Citizenship and Immigration)*, 2013 FC 1242 at para 55 as support for that principle. To the extent *Ndikumana* provides additional guidance as to the role of an ADR in the consideration of an H&C application, that guidance can be understood from its reliance (in para 20) upon the reasoning in *Likale*:

> 20 In *Likale*, the officer's decision was found to be reasonable because the applicant did not demonstrate that returning to his country would cause him hardship that would be unusual or disproportionate, "once the TSR is lifted" (*Likale* at para. 36). The Court concluded that it was reasonable to note that "the applicant can continue to avail himself of the TSR and remain in Canada," and that this analysis is consistent with humanitarian values (*Likale* at para. 38).

[24] Again, *Ndikumana* accurately captures the conclusion in *Likale*. However, as I read *Likale*, the applicant therein was asserting that it was likely that he would remain in Canada without status indefinitely because of a Temporary Suspension of Removal [TSR] applicable to the Congo. The officer analyzed the hardship he would have to face if he had to file his application for permanent residence from outside Canada <u>once the TSR was lifted</u> (at para 13). As such, it appears that, in *Likale,* neither the officer nor the Court was considering the argument presented by the Applicant in the present case (and similarly presented and considered by the Court in *Bawazir)* that, based on <u>current</u> conditions in the home country where an ADR is in place, it would be a hardship to return to apply for permanent residence in Canada, as is ordinarily required by section 11 of *IRPA*.

[25] I also note that, as emphasized by the Applicant in oral argument, both *Ndikumana* (at paras 24-25) and *Likale* (at para 39) concluded that the officers in those cases had not erred in finding that, despite the adverse country conditions, the applicants had not demonstrated personalized risk or hardship. The Applicant argues that those authorities are distinguishable, because the evidence presented in the case at hand was relevant to the Applicant's personal circumstances. I will not analyze that particular question, as the Court does not have the benefit of analysis by the Officer of the application of the country conditions in Somali to the Applicant's personal circumstances. Indeed, the error by the Officer, which results in this application for judicial review being allowed, arises from the Officer's failure to perform that analysis.

[26] Having identified this reviewable error, this application for judicial review will be allowed, and it is unnecessary for the Court to consider the Applicant's other arguments. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-260-21

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, and the matter is returned to a different decision-maker for re-determination. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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