Federal Court  Cour fédérale

Date: 20211119

Docket: IMM-2203-20

Citation: 2021 FC 1271

Ottawa, Ontario, November 19, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

PRIMARE INTERNATIONAL LTD
AND NADA AL ZAYED

Applicants

and

THE MINISTER OF IMMIGRATION,
REFUGEES, AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants seek judicial review of a decision of an immigration officer [the Officer], received by the Applicants on February 28, 2020, refusing an application for sponsorship for permanent residence under the community sponsorship program for refugees [the Decision]. The Officer concluded that the application did not meet the requirement under paragraph 153(1)(b) of

the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the *Regulations*] to provide a document issued by the United Nations High Commissioner for Refugees [UNHCR] or a foreign state certifying the principal Applicant as a refugee. The Officer also rejected the Applicants' request for relief on humanitarian and compassionate [H&C] considerations.

[2] As explained in more detail below, this application is allowed, because the Officer failed to consider the Applicants' argument that paragraph 153(1)(b) of the *Regulations* is unenforceable and failed to conduct an intelligible analysis of the best interests of the Principal Applicant's children [BIOC].

II. **Background**

[3] The Applicants in this matter are Nada Al Zayed [the Principal Applicant] and Primare International Ltd [Primare]. The Principal Applicant, her husband and their three children are Syrian nationals who, in December 2012, fled Syria and travelled to Egypt to escape the violence and upheaval during the Syrian uprising and civil war. Primare is a company owned by the Principal Applicant's brother, a Canadian citizen, who is seeking to sponsor her and her family to come to Canada as refugees.

[4] The Principal Applicant and her family currently live in Cairo, Egypt. They assert that they cannot return to Syria, because the country remains unsafe and still experiences attacks by rebel groups and extremists. The Principal Applicant also explains that the education system has collapsed and that she is concerned her children will not be able to attend school. Further, she is concerned that, if they are returned to Syria, her husband's textile business will not survive, as

most of its business is with customers in Europe, who will no longer be able to buy from his company due to economic sanctions against Syria. The Principal Applicant also fears that her son, who turned 18 in June 2021, will be subjected to compulsory military service if he returns to Syria.

[5] The Principal Applicant and her family also assert continued hardship living in Egypt. The family has to renew their status every 12 months, and they fear that the Egyptian government may begin to take status away from Syrians. They assert there is no path to secure permanent residence or citizenship available to the family in Egypt. The Principal Applicant says that her children have trouble accessing post-secondary education and that they have no right to pursue employment as they near adulthood. She also explains that the COVID-19 pandemic has forced the closure of her husband's business.

[6] From 2012 to 2018, the family was staying in Egypt as temporary residents on non-tourist visas. In October 2018, they registered with the UNHCR and obtained so-called "yellow-cards," documents issued by the UNHCR indicating registration as asylum-seekers. The Principal Applicant and her family have attempted to obtain "blue cards", more formally known as Refugee Status Documents [RSDs]. However, due to an agreement between UNHCR and the Egyptian government entered into in 2018, RSDs are not routinely being issued to Syrian nationals registered with UNHCR in Egypt. UNHCR conducts refugee status determinations for all nationalities in Egypt except Syrians, who undergo status determination assessments only when they are being considered by the UNHCR for resettlement under a government-assisted initiative.

[7] In August 2018, the Principal Applicant and her family submitted an application to immigrate to Canada as refugees under the community sponsorship stream, with Primare as the proposed sponsor. Under this stream, paragraph 153(1)(b) of the *Regulations* requires that a sponsorship application include "…a document issued by the United Nations High Commissioner for Refugees or a foreign state certifying the status of the foreign national as a refugee under the rules applicable to the United Nations High Commissioner for Refugees or the applicable laws of the foreign state …". The application was refused, because the Principal Applicant did not have an RSD. The Applicants requested an exemption from this requirement on H&C grounds, but this was also refused on the basis that H&C relief was not available in the Applicants' circumstances.

[8] The Applicants filed an application for leave and judicial review, following which the decision-maker agreed to reconsider the decision and provide the Applicants an opportunity to make further submissions. The Applicants' counsel provided such submissions in a letter dated January 29, 2020 [the Applicants' Submissions]. In the Decision that is the subject of the current application for judicial review, the Officer again rejected the sponsorship application, including a second request for H&C relief.

III. **Decision Under Review**

[9] The Officer's letter conveying the Decision states that, because the sponsorship application does not include the RSD as required by paragraph 153(1)(b) of the *Regulations*, the Officer was not satisfied that the requirements of the *Regulations* were met. The Officer's Global Case Management System [GCMS] notes related to the Decision also reflect that the application

failed due to lack of valid RSDs. In considering the request for an H&C exemption under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], the Officer notes the following factors raised for consideration:

A. The Principal Applicant and her family members have temporary resident status in Egypt that they should renew, with practical difficulties, every 6 months, and there is no path to permanent residence or citizenship;

B. Post-secondary education for their children is not possible in Egypt due to their temporary status in the country;

C. They are unable to obtain RSDs in Egypt due to their Syrian nationality and the fact that RSDs are completed by the UNHCR for resettlement purposes only;

D. They are unable to return to Syria due to the ongoing instability and the fear that their son might be conscripted in the Syrian army;

E. They are facing social and economic hurdles in Egypt;

F. The Principal Applicant's spouse has a smaller textile manufacturing company in Egypt than in Syria and he cannot expand his business activities due to his temporary status in Egypt; and

G. The Principal Applicant has one brother, who is the owner of the company sponsoring them, and one sister in Canada.

[10] The Officer then engages in the following analysis of the H&C request:

> There is no doubt that there is still an ongoing conflict in Syria and I recognize the fear of conscription in Syria for their son Ghaith who is going to turn 18 years old in June 2021. I note that while two family members are in Canada, the applicant has her parents in Syria, one sister in Lebanon and one sister in Turkey and her spouse has her [sic] mother and five siblings in Syria and one brother in Cairo, so they are not without family support in the region and in Egypt. The applicant and her family members are currently in a similar situation than the other Syrians who fled Syria for other Middle East countries. The applicant's children are also in a similar situation than the other children who fled Syria with their parents. Among other things, they are facing social and economic hurdles, they have no path to permanent residence or citizenship, the children are not allowed to attend public post-secondary education and they are unable to obtain an RSD from the UNHCR or the host government. However, the applicant and her family members were able to renew their temporary resident status in Egypt since December 2012 and the applicant's husband was allowed to work and transfer his textile manufacturing company from Syria to Egypt and is able to financially support the applicant and their children. Moreover, the applicant has another viable option to explore for resettlement which is the possibility of being sponsored by a SAH where an RSD is not required to submit a sponsorship application.

[11] The Officer concluded that there were not sufficient H&C grounds to warrant an exemption from having to produce a valid RSD with a community sponsorship application.

IV. **Issues**

[12] The Applicants identify the following issues for the Court's consideration:

A. Whether the Officer erred in law by failing to recognize the Principal Applicant as a refugee, based on the agreement between UNHCR and Egypt and the presumption of inclusion in mass refugee movements;

B. Whether the Officer erred in law by requiring the Principal Applicant to produce an RSD despite the fact that such a requirement could not be met by her or any other Syrian national in Egypt seeking to become a permanent resident in Canada under the community sponsor stream; and

C. Whether the Officer acted unreasonably or made an error of fact or law in determining that the Applicants did not raise sufficient H&C considerations to exempt them from the requirements of the *Regulations*.

V. **Standard of Review**

[13] The Applicants submit that the Court should review the first two issues above, relating to statutory interpretation of the *Regulations*, on a correctness standard. Citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], they argue that these questions fall into one of the limited exceptions identified by Supreme Court of Canada as demanding a heightened level of scrutiny, because they are questions of law of central importance to the legal system as a whole. They frame these issues as extending beyond the scope of solely immigration law, involving general principles of fair treatment and equity, warranting the application of the correctness standard. The Applicants acknowledge that the third issue is subject to the standard of reasonableness.

[14] The Respondent argues that all issues in this application are subject to the default standard of reasonableness as set out in *Vavilov*.

[15] *Vavilov* explains the presumption that the reasonableness standard applies to judicial review of administrative decision-making (at para 16). This presumption can be rebutted where the legislature has indicated that it intends a different standard to apply or where the rule of law requires that the correctness standard apply. The latter will be the case for certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole, and questions related to the jurisdictional boundaries between two or more administrative bodies (at para 17).

[16] *Vavilov* further explains that the fact that a question is of wider public concern or touches on an important issue is not sufficient for the question to be characterized as one of central importance to the legal system as a whole. Rather, this category involves questions that require a single determinative answer, such as when an administrative proceeding will be barred by the doctrines of *res judicata* and abuse of process, the scope of the state's duty of religious neutrality, the appropriateness of limits on solicitor-client privilege, and the scope of parliamentary privilege (at paras 60-62).

[17] The first two issues raised by the Applicants relate to the interpretation of paragraph 153(1)(b) of the *Regulations*, its application to the facts of this case, and arguments surrounding principles of statutory interpretation, including the effect of the legal maxim "*lex non cogit ad impossibilia ant in utilia*" (which, roughly translated, means that the law does not compel one to do that which is impossible) [the Impossibility Principle]. The Applicants raise these arguments in the context of Canada's international obligations under the 1951 United Nations *Convention Relating to the Status of Refugees*, Can TS 1969 No 6 [the *Convention*].

[18] I find that the presumption that the standard of reasonableness applies to these issues is not displaced. These issues involve matters of statutory interpretation by an administrative decision-maker, which is presumed to be evaluated on the reasonableness standard (see *Vavilov* at para 115). In my view, the fact that the Applicants invoke the Impossibility Principle, Canada's obligations under the *Convention*, and principles of fairness or equity as tools informing the issue of statutory interpretation before the decision-maker does not support a conclusion that the issues raised are of general importance to the legal system as a whole.

[19] I therefore find that the reasonableness standard applies to all the issues raised in this application.

VI. **Analysis**

A. *Whether the Officer erred in law by failing to recognize the Principal Applicant as a refugee, based on the agreement between UNHCR and Egypt and the presumption of inclusion in mass refugee movements*

[20] In raising this issue, the Applicants rely on the fact that that they hold yellow cards, documenting their registration with the UNHCR, in combination with the approach taken to the issuance of RSDs for Syrian nationals in Egypt pursuant to an informal agreement between the UNHCR and the Government of Egypt. As expressed in the Fact Sheet issued by the UNHCR in June 2018:

> UNHCR conducts Refugee Status Determination (RSD) for all nationalities but for Syrians. Syrian nationals are considered refugees and only undergo RSD when they are being considered for resettlement, as per a regional approach, and in line with an informal agreement between UNHCR and the Government of Egypt.

[21] In essence, the Applicants argue that, because all registered Syria nationals in Egypt are considered refugees, the yellow cards issued to the Principal Applicant and her family satisfy the requirements of paragraph 153(1)(b) of the *Regulations*.

[22] The Officer's letter conveying the Decision and the related GCMS notes demonstrate no consideration of this argument. However, I cannot conclude that the Decision is therefore unreasonable, because the record does not demonstrate that this argument was raised before the Officer.

[23] The Applicants submit that the Officer is expected to be knowledgeable of the applicable law and the conditions in the region, including the particular circumstances faced by Syrian nationals, and was therefore obliged to consider whether, in the context of those circumstances, the yellow cards satisfied paragraph 153(1)(b), even without the Applicants expressly raising an argument to that effect. In considering this submission, I have taken into account the guidance in *Vavilov* of the importance of conducting reasonableness review in the context of the particular arguments raised by the parties before the administrative decision-maker (at paras 106, 127-128).

[24] The Applicants' Submissions raise two principal arguments in support of their position that the application for permanent residence should be approved. First, they assert that that the RSD requirement of paragraph 153(1)(b) of the *Regulations* is invalid at law because it cannot be met by Syrian refugees in Egypt. Second, they assert that this requirement can be overcome on H&C grounds. As the Applicants' positions are premised on the inability of the Principal Applicant's family to meet the requirement of paragraph 153(1)(b) of the *Regulations*, I cannot

conclude that it was unreasonable for the Officer to fail to consider an alternative position, not raised by the Applicants, that this requirement was indeed met by virtue of the issuance of yellow cards to the family.

[25] I therefore find that the first issue raised by the Applicants does not undermine the reasonableness of the Decision.

B. *Whether the Officer erred in law by requiring the Principal Applicant to produce an RSD despite the fact that such a requirement could not be met by her or any other Syrian national in Egypt seeking to become a permanent resident in Canada under the community sponsor stream*

[26] Under this second issue, the Applicants argue that the Officer erred by requiring that the Principal Applicant's family satisfy paragraph 153(1)(b) of the *Regulations* as a condition to processing their applications for permanent residence. Based on what the Applicants assert to be the impossibility of similarly situated refugee claimants satisfying this requirement, the Applicants rely on principles of statutory interpretation, including reference to Canada's international obligations, to argue that paragraph 153(1)(b) is invalid and unenforceable.

[27] As with the first issue, the Officer's letter conveying the Decision and the related GCMS notes demonstrate no consideration of this argument. The Officer simply states that the Principal Applicant and her family do not have valid RSDs and therefore do not meet the requirements of paragraph 153(1)(b). However, unlike the first issue, the second issue raised by the Applicants in this application for judicial review was squarely raised before the Officer in the Applicants'

Submissions. Again relying on the principles in *Vavilov* cited above, I find the Decision unreasonable because of its failure to engage with one of the Applicants' principal arguments.

[28] In arriving at this conclusion, I have considered the Respondent's position that that the Decision must be understood in the context in which the application was presented to the Officer. As noted earlier in these Reasons, the Applicants had previously submitted an unsuccessful application for H&C relief. As I understand the background, that application was erroneously rejected on the basis that H&C relief was not legally available, as a result of which the negative decision was set aside and the Applicants were afforded an opportunity to make further submissions. I accept the Respondent's position that, in the Applicant's Submissions following these events, the Applicants supplemented their H&C arguments and added the argument that paragraph 153(1)(b) was unenforceable. However, the Respondent has not identified anything in this factual background that I would consider to preclude the Applicants' expansion upon their arguments or to justify the Officer declining to consider the new argument advanced.

[29] I decline to comment upon the merits of the Applicants' argument. As taught by *Vavilov*, reasonableness review of administrative decision-making is informed by the decision-maker's justification for the decision under review. In the absence of any analysis by the Officer of the argument advanced by the Applicants, the Court will not weigh in on this argument.

C. *Whether the Officer acted unreasonably or made an error of fact or law in determining that the Applicants did not raise sufficient H&C considerations to exempt them from the requirements of the Regulations*

[30] My decision to allow this application for judicial review turns principally on the issue canvassed immediately above. It is therefore unnecessary to address in any detail the Applicants' arguments surrounding the Officer's H&C analysis. However, I do wish to note briefly that I also agree with the Applicants' argument that the Officer's BIOC analysis is wanting.

[31] The GCMS notes record a number of factors cited by the Applicants relevant to BIOC and, in concluding that there are not sufficient H&C grounds to warrant an exemption from paragraph 153(1)(b), the Officer refers to having taken BIOC into consideration. However, the Decision discloses no analysis that demonstrates what the Officer considered the best interests of the Principal Applicant's children to be or how those interests were weighed or otherwise taken into account. The absence of an intelligible BIOC analysis represents an additional basis for my conclusion that the Decision is unreasonable.

VII. **Proposed Certified Questions**

[32] The Applicants propose the following three questions for certification:

A. Where refugee protection is afforded to a class of individuals, in this case Syrians in Egypt, pursuant to an agreement between the UNHCR and the state of temporary settlement, is a visa officer required to treat the UNHCR registration document as a "document issued by the United Nations High Commissioner for Refugees certifying the status of the foreign national as a

refugee under the rules applicable to the United Nations High Commissioner for Refugees" in agreement with the country of temporary settlement, absent any conclusion that the person is not a refugee?

B. Does the doctrine of impossibility oblige the visa officer to dispense with the requirement set forth in subsection 31(1) of *IRPA* and paragraph 153(1)(b) of the *Regulations* of an applicant and sponsor (in this case Community Sponsor but similarly in Group of Five Sponsorships) to produce a UNHCR RSD when an RSD is publicly known to not be available to a class of persons of which the Applicant is a part of? Alternatively, if it is impossible for an applicant to meet the requirements of producing an RSD as required under in subsection 31(1) of *IRPA* and paragraph 153(1)(b) of the *Regulations* because this is not available to the class to which the applicant belongs, even though the applicant and members of her class are deemed refugees, is a visa officer obliged, on request by the applicant, to take this into account as a determinative factor in considering a request for an exemption from these requirements under subsection 25(1) of *IRPA*?

C. Did the immigration officer err in law in misapplying the humanitarian and compassionate discretion under subsection 25(1) of *IRPA* by diminishing the Principal Applicant's and her children's individual experiences through the use of a comparative assessment, grounded in no facts whatsoever, to the many other Syrians who fled the conflict in their home country contrary to the Supreme Court's reasoning in *Kanthasamy v MCI*, 2015 SCC 61; by dismissing family reunification in Canada in favour of family support outside

> of Canada, contrary to the objectives set out in section 3 of the Act; and, by justifying a rejection on H&C grounds due to the purported existence of another illusory remedy which the Applicants had tried unsuccessfully to access?

[33] The Respondent opposes certification of these questions.

[34] The law provides that the Court should not certify a question for appeal if the answer to that question would not be determinative of an appeal of the Court's decision. In the case at hand, the decision to allow the application for judicial review does not turn on the substantive answer to any of the proposed questions. The Court therefore declines to certify any of these questions.

JUDGMENT IN IMM-2203-20

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, the Decision is set aside, and the matter is returned to another decision-maker for redetermination. No question is certified for appeal.

" Richard F. Southcott "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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