Federal Court Cour fédérale

Date: 20220502

Docket: IMM-3634-21

Citation: 2022 FC 630

Ottawa, Ontario, May 2, 2022

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

TAOFEEK ABAYOMI ADEKOLA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Taofeek Abayomi Adekola, seeks judicial review of a decision rendered by a Senior Immigration Officer [Officer] of Immigration, Refugees and Citizenship of Canada dated May 18, 2021, refusing his 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] For the reasons that follow, this application for judicial review is dismissed.

I. Background

[3] The Applicant is a citizen of Nigeria. He was born and raised, then studied and worked, in Nigeria until 2016, except for two months he spent studying in Germany between June and August 2014. Save for his common law spouse and two children, all his family live in Nigeria.

[4] The Applicant arrived in the United States in January 2016 on a visitor's visa. The Applicant remained there and was married in 2017, but then divorced shortly thereafter the same year. While in the United States, the Applicant also met his current common-law partner, Ms. Tolulope Alle. Ms. Alle entered the United States on a study permit in September 2017. Save for the Applicant and their two children, all of her close family remain in Nigeria.

[5] The Applicant and Ms. Alle arrived in Canada on February 5, 2018 and made separate refugee claims, because they did not yet consider themselves to be common-law partners due to the length of their relationship. At the time they entered Canada, Ms. Alle was pregnant with their first child, Khalid Kingsley Adekola. Khalid was born in Toronto on October 6, 2018, and is a Canadian citizen. The Applicant and Ms. Alle had a second child, Aliah Kayla, on August 21, 2020. Aliah is also a Canadian citizen.

[6] The Applicant's refugee claim was refused on April 4, 2019. The Refugee Protection Division [RPD] found the claim to be fictitious and have no credible basis. On March 23, 2020, the Applicant submitted his application for permanent residence on H&C grounds, the refusal of

which forms the basis for the present judicial review. In addition to the original submissions, the Applicant submitted further submissions on May 20, 2020, and on February 11, 2021.

[7] Ms. Alle's refugee claim was refused on April 19, 2019, in which the RPD found that Ms. Alle was not credible regarding the core and central allegation and her reasons for leaving Nigeria, and that she lacked subjective fear. Ms. Alle appealed to the Refugee Appeal Division, who determined on July 27, 2020, that the RPD had failed to apply the Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution, and thus referred the matter back to the RPD for redetermination. At the time that the Applicant's H&C decision was rendered, Ms. Alle's refugee claim had not yet been redetermined.

[8] As to the Applicant's H&C application, the Officer concluded that "[h]aving considered the circumstances of the applicant and having examined all of the submitted documentation, I find that while there are some positive factors, I am not satisfied that the humanitarian and compassionate considerations before me justify an exemption under section 25(1) of the Act." Consequently, the H&C application was refused on May 18, 2021 [Decision].

[9] The Applicant submits that the Officer (a) erred in its hardship assessment; (b) failed to properly assess the establishment of the Applicant in Canada; (c) failed to weigh the best interests of the children against the other factors; and (d) erred in not giving the Applicant an interview.

[10] The Respondent submits that the Officer reasonably decided, given the evidence submitted, that a positive decision was not warranted under the circumstances, and that the Applicant's submissions amount to an impermissible request to this Court to re-weigh and reassess the evidence.

II. Issues and Standard of Review

[11] As noted above, the Applicant raises a number of issues. Save for one, the allegation that the Officer erred by not convening a hearing, the remainder of the issues are to be addressed under the standard of reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[12] A reasonable decision is one that is justified in relation to the facts and the law that constrain the decision maker (*Vavilov* at para 85). *Vavilov* instructs that the reviewing court must be satisfied that there is a line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived (*Vavilov* at para 102, citing *Law Society of New Brunswick v Ryan*, 2003 SCC 20 at para 55).

[13] It is the Applicant, the party challenging the Decision, who bear the onus of demonstrating that the Decision is unreasonable (*Vavilov* at para 100). For the reviewing court to intervene, the challenging party must satisfy the court that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency", and that such alleged shortcomings or flaws "must be more than merely superficial or peripheral to the merits of the decision" (*Vavilov* at para 100).

[14] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). As such, the approach is one of deference, especially with respect to findings of fact and the weighing of evidence. A reviewing court should not interfere with factual findings, absent exceptional circumstances, and it is not the function of this Court on an application for judicial review to reweigh or reassess the evidence considered by the decision maker (*Vavilov* at para 125).

[15] As to the issue of procedural fairness, the Federal Court of Appeal has confirmed that, on judicial review, questions of procedural fairness are reviewed on the correctness standard (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 [*Canadian Association of Refugee Lawyers*] at para 35). Recently, my colleague Justice Manson opined that procedural fairness issues are reviewable with respect to fairness and fundamental justice, rather than reasonableness or correctness, noting that “while some courts have held that procedural fairness issues are reviewable on the correctness standard, others have stated that a more “doctrinally sound” approach is to determine the procedures and safeguards required in a particular situation and determine whether the decision-maker adhered to them” (*Mamand v Canada (Citizenship and Immigration)*, 2021 FC 818 at para 19) Ultimately, what matters at the end of the day is whether or not procedural fairness has been met (*Canadian Association of Refugee Lawyers* at para 35).

III. Analysis

[16] An exemption under subsection 25(1) of the IRPA is an exceptional and discretionary remedy (*Fatt Kok v Canada*, 2011 FC 741 at para 7; *Huang v Canada (Citizenship and*

Immigration), 2019 FC 265 at paras 19-20). Subsection 25(1) of the IRPA confers broad discretion on the Minister to exempt foreign nationals from the ordinary requirements of that statute and to grant permanent resident status to an applicant in Canada if the Minister is of the opinion that such relief is justified by H&C considerations. The H&C discretion is a flexible and responsive exception that provides equitable relief, namely to mitigate the rigidity of the law in an appropriate case (*Rainholz v Canada (Citizenship and Immigration)*, 2021 FC 121 at paras 13-14 [*Rainholz*]).

[17] H&C considerations are facts, established by evidence, that would excite in a reasonable person in a civilized community the desire to relieve the misfortunes of another provided these misfortunes warrant the granting of special relief from the otherwise applicable provisions of the IRPA (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 (CanLII), [2015] 3 SCR 909 at paras 13 and 21 [*Kanthasamy*]). As noted by my colleague Justice Little, "subsection 25(1) has been interpreted to require that the officer assess the hardship that the applicant(s) will experience on leaving Canada. Although not used in the statute itself, appellate case law has confirmed that the words 'unusual', 'undeserved' and 'disproportionate' describe the hardship contemplated by the provision that will give rise to an exemption" (*Rainholz* at para 15).

[18] Subsection 25(1) also refers to the need to take into account the best interests of a child [BIOC] directly affected. In considering the BIOC, an officer must be "alert, alive, and sensitive" to those interests (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75). Relevant considerations include the child's age and level of dependency; the degree

of the child's establishment in Canada; the child's links to the country in relation to which the H&C assessment is being considered; the impacts on the child's education; medical or special needs considerations; gender-based considerations; and the conditions of that country and the potential impacts on the child (*Kanthasamy* at para 40).

[19] It is the H&C applicant who bears the onus of establishing that an H&C exemption is warranted. Where there is a lack of evidence or a failure to adduce relevant information in support of such an application, this is at the peril of the applicant (*Rainholz* at para 18).

A. *Hardship*

[20] Turning to the Applicant's first argument, namely that the Officer erred in the hardship analysis. The Applicant highlights that the Officer used the word "risk" on a number of occasions, including in a section entitled "Risk and Adverse Country Conditions". Accordingly, the Applicant submits that the Officer erred by importing a generalized risk analysis as would be done under section 97 of IRPA, rather than conducting a hardship analysis under section 25 of IRPA.

[21] The Respondent submits that the Officer set out the correct test in the Decision, is presumed to know the law, and was addressing the very submissions that the Applicant made concerning the risks in Nigeria.

[22] I agree with the Respondent. Having reviewed the submissions made by the Applicant, the Officer's findings are responsive to the Applicant's submissions and the evidentiary record.

Three separate submissions, one on May 20, 2020, and two on February 11, 2021, each highlight the risks of violence, conflict, protest and civil unrest in Nigeria. While the Officer did address the risk of returning to Nigeria as raised by the Applicant, the Officer also addressed the hardship the Applicant would face as required under section 25 of IRPA. I am not satisfied that the Officer erred in this regard.

[23] The Applicant further submits that the Officer did not mention the personal risk profile of the Applicant when assessing hardship, including, the hardship that would be faced as a returnee in Nigeria and one who will suffer from unemployment. I disagree. The Officer noted that the Applicant had lived in Nigeria most of his life, is highly educated and has some history of employment in Nigeria. Furthermore, the Officer considered the Applicant's personal risk profile in relation to the country risks raised by the Applicant, ultimately finding that the Applicant does not have a history of protesting or living in the areas of interest to separatists, such that he would be at risk. The Respondent pleads that the Applicant has simply failed to show a link between the hardship alleged and his circumstances, by failing to adduce evidence that the Applicant would fall into the category of people who would face those risks. In this regard, the Applicant's own submissions in his H&C application state "it is conceded that Mr. Adekola is not directly involved in the communities engaged in or vulnerable to these outbreaks of violence….".

[24] The Applicant submits that the Officer failed to consider the Applicant's personal profile in that he comes from a family who promote Female Genital Mutilation [FGM] and that he now has a daughter, Aliah, born in 2020. The Respondent submits that one must consider the context of this matter. The Applicant's claim that he was at risk from his family was found by the RPD

to be fictitious and have no credible basis, and the RPD further found that in any event there was an internal flight alternative [IFA] in Port Harcourt or Abuja. The Respondent argues that the Officer reasonably found that the Applicant did not support FGM, that the alleged risk to Aliah is through the Applicant's family, and that in this respect there were flight alternatives.

[25] I do not find that the Officer erred with respect to the Applicant's personal profile concerning his family and his daughter. The Officer addressed the Applicant's concerns regarding FGM, noted the Applicant's opposition to it, the fact that the Applicant stated that the children would stay in Canada, the fact that FGM is illegal in Nigeria, and that if returned to Nigeria there is an IFA. Accordingly, the Officer gave this factor no weight, and I see no reason to intervene.

[26] The Applicant submits that there are a number of factors that the Officer failed to consider when assessing the hardship of returning to Nigeria. The focus of the Applicant's argument in this respect was with regard to the mental health of the Applicant's common law spouse, Ms. Alle. The Applicant submits that Ms. Alle was diagnosed with depression and PTSD, and thus the hardship of coping with the two children without the Applicant and the support provided by him ought to have been considered. The Applicant states in his written submissions before this Court that the evidence includes "a psychiatrist report concluding that Ms. Alle suffers from PTSD, depression and anxiety".

[27] The Respondent submits that the Applicant is making arguments that are not supported by the record. The Respondent highlights that the letter from Dr. Chen, Ms. Alle's obstetrics and

pre-natal care doctor, provided in support of Ms. Alle's refugee claim, states that Dr. Chen was asked to provide a letter of support, that Ms. Alle has self-reported depression and possible PTSD, and that Ms. Alle reports that manages her symptoms without the aid of medication save for sleep disturbances.

[28] Having considered the record before the Officer, I note that in his H&C submissions, the Applicant highlighted the support that he provided to Ms. Alle. In his H&C application, there is an affidavit from Ms. Alle attesting to the financial and emotional support the Applicant provides to her, including providing childcare and going for walks with her when she needs a mental health break. Dr. Chen's letter of support, mentioned above, is also included. Contrary to the Applicant's submissions, I do not find that the Officer erred by failing to consider the support provided by the Applicant. Rather, the Officer gave this factor considerable weight. Under the heading "Other", the Officer noted that the Applicant had submitted that he provides support to his spouse, recognized the importance of family unity, and acknowledged the hardship that separation would cause. Furthermore, in the conclusion, the Officer again addressed the problem of family separation concluding "[w]hile this separation would be temporary I do find it would be difficult for the family. I give this factor considerable weight." Absent exceptional circumstances, it is not the role of this Court sitting in judicial review to reassess or reweigh the evidence considered by the Officer (*Vavilov* at para 125). Consequently, I decline to intervene.

B. *Establishment*

[29] The Applicant submits that the Officer failed to properly assess the Applicant's establishment. In particular, the Applicant focuses on the phrase "very little has been included in

the applicant's submissions to indicate high levels of integration in the community" and submits that the Officer was requiring "extraordinary" or "exceptional" levels of establishment. The Respondent submits that the Officer did not err, and was simply stating the facts of the case. The Respondent highlights that the Officer considered the evidence, being the participation in the community, his friends, and his work, and reasonably concluded that it was a modest amount of establishment and attributed a little positive weight to it.

[30] I find that the Officer did not require that the Applicant demonstrate an "exceptional" level of establishment. At no point does the Officer suggest that they did not consider the Applicant's establishment to be a positive factor because it did not rise to an exceptional level.

[31] The Applicant also argues that the Officer erred by discounting establishment in Canada while focusing on the Applicant's ability to acquire similar establishment in Nigeria. The Respondent submits that the Officer did not discount the establishment in Canada, but rather looked at everything that had been submitted and addressed it.

[32] While this Court has held that turning positive establishment factors on their head and using them against an applicant as a sword rather than a shield is unreasonable (*Alghanem v Canada (Citizenship and Immigration)*, 2021 FC 1137 at para 39), I am not satisfied that this occurred in the present matter. A holistic review of the Decision indicates that the Officer undertook a balancing exercise, wherein the Officer considered and attributed some positive weight to the Applicant's three years in Canada, his friends, community participation, and employment. The Officer then balanced this against the fact that the Applicant had spent most of

his life in Nigeria, was familiar with its culture and society, is highly educated and had a history of employment in Nigeria, and would be able to re-establish himself in Nigeria. The Applicant has not demonstrated that the Officer's balancing exercise is unreasonable.

[33] Finally, the Applicant submits that the evidence on the record out to have been sufficient to show an exceptional level of establishment. Again, this is an impermissible request to re-weigh the evidence considered by the Officer, which I decline to do.

C. *Best Interests of the Children*

[34] The Applicant pleads that the Officer erred by not giving proper weight to Ms. Alle's psychological state and how the children would be impacted by the removal of the Applicant. The Applicant further submits that the Officer erred by presuming that the Applicant would be removed and failed to consider the common-sense presumption that it is in the best interests of the children to be raised by both parents.

[35] The Respondent submits (i) that the Applicant's arguments as to Ms. Alle are not reflected in the record, and (ii) that the Officer considered the children remaining in Canada and returning to Nigeria. The Respondent highlights the context in the present matter where the evidence submitted said they would remain with their mother in Canada, and the Officer had to address a hypothetical, namely, if Ms. Alle's claim succeeds then the Applicant would be able to return to Canada, and if not, Ms. Alle, who is also Nigerian, would return to Nigeria.

[36] As to the first element of the Applicant's argument, I have addressed the Officer's consideration of the impact of separation, including with respect to the support of the Applicant's spouse, on the family, above in the section on hardship. I add to that that the Officer acknowledged this issue, and the hardship that it would cause, in the BIOC analysis, and ultimately gave it considerable weight in the Decision's conclusion. I decline to re-weigh the evidence.

[37] As to the second element of the Applicant's submission, I find that the Officer's consideration of the potential for family separation, in light of the record and the uncertainty arising from Ms. Alle's pending refugee claim, was reasonable. Moreover, the Officer did acknowledge that it is "reasonable to state that the children are wholly dependent on both their parents", "[i]t is generally understood that children do best with both parents", and "[i]t is generally agreed that children should live with both parents." Accordingly, I find no reviewable error.

D. *Procedural Fairness*

[38] The Applicant submits that the Officer breached procedural fairness by failing to interview the Applicant when a new risk was raised in his H&C application, being that of the risk of FGM to his daughter, who was born in 2020. The Applicant submits that this risk was never raised in the RPD proceedings, where the RPD determined there was no credible basis to the claim and that an IFA existed. The Applicant pleads that it was improper of the Officer to rely on the IFA for the risk to the Applicant's daughter.

[39] The Respondent submits that the Officer made no credibility findings, that procedural fairness did not require an interview, and that Officer took the Applicant's submissions at face value and considered the possibility that his daughter could return to Nigeria, and whether she would be exposed to FGM. Based on the evidence provided, the Officer found that she would not. The Respondent also submits that it was the Applicant's burden to demonstrate that an H&C exemption is warranted, which the Applicant failed to do.

[40] The Applicant has failed to persuade me that the Officer erred. As stated recently by my colleague Justice Diner, "H&C applicants are not entitled to expect an interview, and claimants bear the onus of including pertinent and sufficient evidence to support their submissions" (*Singh v Canada (Citizenship and Immigration)*, 2022 FC 339 at para 33). The Applicant submitted in a personal statement that he feared, if he returned to Nigeria and his daughter accompanied him, that she would be vulnerable to FGM because his family practices it and these practices are committed in secret at the behest of the family elders. The Officer noted the Applicant's concern and his opposition to FGM, the fact that the Applicant stated that the children would stay in Canada if he were to return, the fact that FGM is illegal in Nigeria, and that even if the children were to return to Nigeria, the RPD had found that there is an IFA where the Applicant may live. The Officer concluded that if the daughter were to return to Nigeria with the Applicant, it was reasonable to infer that she would be safe from the Applicant's family. The Officer further noted the Applicant's statement that the children would remain in Canada, and considered that should that be the case, his daughter would not be at risk of FGM as alleged by the Applicant.

[41] I find that the Officer's reasons were responsive to the submissions of the Applicant, and were justified based on the record before the Officer.

IV. Conclusion

[42] For the foregoing reasons, this judicial review is dismissed. No serious question of general importance for certification was proposed by the parties, and I agree that no such question arises.

JUDGMENT in IMM-3634-21

THIS COURT'S JUDGMENT is that:

1. The Applicant's application for judicial review is dismissed;
2. There is no question for certification arising.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3634-21
STYLE OF CAUSE:	TAOFEEK ABAYOMI ADEKOLA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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