Federal Court  Cour fédérale

Date: 20220712

Docket: IMM-2241-21

Citation: 2022 FC 1019

Montréal, Quebec, July 12, 2022

PRESENT: Madam Justice St-Louis

BETWEEN:

FITZ-GERALD CARTER
JOELEYNE KEISHA STAPLETON
DARIO RAWLSON CARTER
OTTEIVA KEISHA CARTER
KEIFA FITZ-GERALD CARTER

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants Mr. Fitz-Gerald Carter, his spouse Ms. Joeleyne Keisha Stapleton, their daughter Otteiva Keisha Carter, and their sons Dario Rawlson Carter and Keifa Fitz-Gerald Carter, citizens of Saint Vincent and the Grenadines, ask the Court to review the decision of a

Senior Immigration Officer [the Officer], dated March 22, 2021. The Officer refused the permanent residence application the Applicants filed based on humanitarian and compassionate [H&C] considerations [the Impugned Decision] per subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] For the reasons that follow, I will dismiss the application.

II. Context

[3] On July 1, 2011, the Applicants were admitted in Canada as visitors. On July 22, 2011, they claimed refugee status, alleging being threatened in their country of origin following the death of Mr. Fitz-Gerald Carter's brother. Their claim was denied, decision ultimately upheld by the Federal Court. Despite being the subjects of a removal order, the Applicants did not leave Canada. On February 11, 2016, warrants were issued for the two (2) adult Applicants due to the removal order.

[4] On November 20, 2019, the Applicants submitted their H&C application, and on October 6, 2020, they filed follow up submissions and additional documentation. On October 9, 2020, the warrants were executed and both adult Applicants were arrested, briefly detained and released the same day.

[5] On March 22, 2021, the Officer denied the Applicants' application for permanent residence under H&C grounds per subsection 25(1) of the Act.

[6] In their decision, the Officer examined the factors raised by the Applicants, hence Establishment-employment, Family in Canada, BIOC, and Fear of return to Saint Vincent. In conclusion, the Officer stated that there are some positive elements to remain in Canada, i.e., the time the Applicants spent in Canada. However, the Officer found that there is insufficient evidence before them to approve the application.

III. Submission and analysis

A. *Standard of review*

[7] The Applicants argue that the officer erred in (1) assessing each factor through a hardship lens; (2) in his assessment of the children's best interests and (3) in his assessment of establishment. The Applicants did not challenge the Officer's conclusion in regards to the allegations of risk upon return to Saint Vincent and the Grenadines.

[8] When reviewing an immigration officer's decision to deny H&C relief under subsection 25(1) of the Act, this Court applies the deferential standard of reasonableness (*Cezair v Canada (Citizenship and Immigration)*, 2019 FC 1510 at para 13; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44 [*Kanthasamy*]).

[9] As set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], before a decision can be set aside on the basis that it is unreasonable, the court must be satisfied 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" (*Vavilov* at

para 100). An assessment of the reasonableness of a decision must be robust, but must remain sensitive to and respectful of the administrative decision maker (*Vavilov* at paras 12–13). Reasonableness review is an approach anchored in the principle of judicial restraint and in a respect for the distinct role and specialized knowledge of administrative decision makers (*Vavilov* at paras 13, 75, 93). The decision must be responsive to the arguments raised by the parties (*Vavilov* at paras 127, 128).

[10] As always, the Applicants bear the burden to demonstrate that the decision under review is unreasonable.

B. *The Applicants have not established the Impugned Decision is unreasonable.*

(1) The Officer did not impermissibly assess each factor through a hardship lens

[11] The Applicants rely on the Supreme Court's *Kanthasamy* decision to submit that the Officer erred as they assessed each factor under a hardship lens, and particularly that they (1) minimized the markers of establishment; (2) confounded hardship and establishment; (3) failed to make a clear finding as to the weight given to each factor; (4) minimized the humanitarian factors; (5) wrongly filtered their analysis of the children's best interests through hardship; (6) substituted findings on hardship for assessing BIOC; and (7) wrongly imported a hardship assessment in the BIOC.

[12] The Minister of Citizenship and Immigration [Minister] responds that the Officer did not impermissibly assess the application through the "hardship lens" and that the Applicants misunderstand the impact of the Supreme Court's decision in *Kanthasamy*.

[13] I agree with the Minister for two (2) reasons. First, the Applicants mischaracterize the Supreme Court's teachings in *Kanthasamy* in regards to the assessment of hardship and second, in any event, in this case, the Officer had no option other than addressing the hardship issue under each factor because that is what the Applicants themselves had raised in their submissions filed in support of their application.

[14] First, as Justice Roy explained at paragraphs 11 to 13 of his decision in *Shackleford v Canada (Citizenship and Immigration)*, 2019 FC 1313, the Supreme Court has far from evacuated the hardship assessment from the H&C considerations:

> [11] However, the notion of hardship continues to be an important consideration in the review of applications on H&C grounds. It has not been evacuated from H&C considerations. That is clear from my reading of paragraph 33 of *Kanthasamy*. The Court is far from rejecting hardship as a consideration relevant to H&C based applications. Rather it finds that the three adjectives "unusual, undeserved, disproportionate" do not establish a threshold. They are said to be instructive but not determinative. I reproduce in its entirety paragraph 33:
>
> > [33] The words "unusual and undeserved or disproportionate hardship" should therefore be treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). As a result, what officers should not do, is look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds, and use the language of "unusual and undeserved or disproportionate hardship" in a way that limits their ability to consider and give weight to *all* relevant humanitarian and compassionate

> considerations in a particular case. The three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision.
>
> [Italics in original.]

> [12] In my view, it is an examination through the lens of the three adjectives so that a higher threshold is created that is objectionable. As the Court notes at paragraph 23, "(t)here will inevitably be some hardship associated with being required to leave Canada. This alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under s. 25(1)". The H&C application is not to be treated either as another way of immigrating to Canada: "Nor was s. 25(1) intended to be an alternative immigration scheme.

[15] Justice Diner confirmed as such in *Bhalla v Canada (Citizenship and Immigration)*, 2019 FC 1638 at paragraph 20:

> Certainly, considering hardship does not invalidate an H&C decision. Indeed, hardship forms an important component thereof. *Kanthasamy* does not excise it from the analysis, and officers cannot thus be faulted for undertaking a legitimate hardship analysis that forms one plank of the H&C edifice. Rather, what the Supreme Court criticizes are shortsighted H&C assessments, being those assessed through the myopic lens of "unusual and undeserved or disproportionate" hardship. Elements that speak to the compassionate part of the assessment must be considered (see Justice Brown's decisions in *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at paras 29-33; and *Lobjanidze v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1098 at paras 11-12).

[16] Likewise, the *Kanthasamy* decision does not support the Applicants' proposition that hardship should not be included in the assessment of the best interests of the children (*Kanthasamy* at para 38).

[17] Second, in this case, the Officer had to address and respond to the arguments raised by the Applicants who themselves relied heavily on allegations of hardship in support of their application. They submitted little in terms of humanitarian and compassionate considerations and limited submissions as a whole.

[18] A review of the record shows that the Applicants submitted their H&C application on November 20, 2019. They announced that detailed submissions would follow in order to outline the hardships that would be faced by the Applicants, including establishment, family reunification, and best interest of a child and of those who have a legal right to remain in Canada. It listed the documents attached, hence forms, copy of ID documents, photos and notably a joint statement from the two (2) adult Applicants. In these initial submissions, the Applicants requested an exemption pursuant to subsection 25(1) of the Act in view of their circumstances and of the tremendous amount of hardships they would face if removed from Canada.

[19] On October 6, 2020, the Applicants filed follow up submissions and additional documentation, including letters from Mr. Carter's mother, sister and brother who are all in Canada, and from his employer. The submissions contend essentially that, in light of the disclosure, there are undue and disproportionate hardships that the Applicants would undergo if they were required to leave Canada to apply in the normal manner and that there are extenuating humanitarian and compassionate circumstances that warrant consideration in this case. They detailed again what was outlined in Mr. Carter and Ms. Stapleton's joint statement already in the file, raised section 3 of the Act and addressed family relationships and reunification,

establishment and social integration, best interests of the child and assessment of hardship as factors.

[20] Under each of the first three (3) grounds, the Applicants raised their particular circumstances and argued their applications should be granted based on variations of severe impact, immense hardships, severe hardships, negative effects, should they have to leave Canada, and repeated these qualifiers under the distinct assessment of the hardship factor.

[21] The Officer cannot be faulted for being responsive to the Applicants' submissions, which again, relied heavily on hardship and limited their submissions and evidence in regards to compassionate and humanitarian considerations.

[22] As the Minister suggests, the Applicants did not argue that the Officer ignored an element of their application that went to compassion because of an insistence on hardship. Nor do they explain how the Officer could have sufficiently demonstrated compassion other than by approving their application. They mainly disagree with how the factors were weighed, but the role of the Court is not to reweigh the evidence on judicial review.

[23] The Officer reasonably and coherently responded to the Applicants' insistence on the hardships they would face. The Officer did not minimize the compassionate considerations in the process. The Applicants have not demonstrated that the Officer erred.

(2) The Officer did not err in their assessment of the children's best interests

[24] The Applicants submit that the assessment of the BIOC of the three (3) children as well as Mr. Carter's nephew Ayden was made again through a hardship lens. The Applicants add that the Officer erred by failing to identify the children's best interests and by failing to make a conclusion on whether it is in their best interests to remain in Canada or return to Saint Vincent. The Applicants allege that the Officer also erred by ignoring the evidence provided by Mr. Carter's mother, brother and sister and the close bond that unite them (*Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 [*Williams*]; *Faisal v Canada (Citizenship and Immigration)*, 2014 FC 1078; *Akyol v Canada (Citizenship and Immigration)*, 2014 FC 1252).

[25] The Minister responds that the Officer reasonably assessed the best interest of the children directly affected.

[26] Again, I agree with the Minister. The Officer acknowledged that factors affecting the children should be given substantial weight although the children's interests are not necessarily determinative of an H&C application, statement that is confirmed by the Court's jurisprudence (*Gomez v Canada (Citizenship and Immigration)*, 2015 FC 1054 at para 14; *Louissaint v Canada (Citizenship and Immigration)*, 2018 FC 1077 at para 17). Furthermore, a careful examination of the record confirms that the Officer properly noted that the Applicants provided (1) no evidence regarding the education system in Saint Vincent and the Grenadines to support their proposition that it is different and that it would cause hardship to the children to adapt; and (2) insufficient

evidence to support their allegation that the BIOC would be negatively affected if the children were removed.

[27] The errors identified by the Court in *Osun v Canada (Citizenship and Immigration)*, 2020 FC 295, *Williams and Kanthasamy* was the fact that the Officer only assessed whether a child's basic needs would be met, or required hardship to reach a certain level before determining that removal is not against their best interests. This is not at play here.

[28] The Officer's reasoning with regards to the letters from the family submitted with the application is clear and intelligible. The Officer mentioned them and examined them. The Court should not reweight the Officer's consideration given to these letters.

[29] Moreover, the analysis with regards to BIOC as a whole is clear and one is able to connect the dots of the reasoning. One can easily understand that the Officer noted that there was overall insufficient evidence with regards to the Applicants' allegations, which is a reasonable conclusion considering the record. As Justice Grammond noted in *Boukhanfra v Canada (Citizenship and Immigration)*, 2019 FC 4 at paragraph 24, "[o]ne must not forget that an H&C applicant has the burden of providing the relevant information, including information regarding the best interests of children".

[30] Paragraph 31 of Justice Diner's decision *Zlotosz v Canada (Citizenship and Immigration)*, 2017 FC 724 provides guidance on this aspect:

> Without evidence to substantiate that the exceptional remedy be granted, the Applicants do not meet the burden for the exceptional

> H&C remedy under section 25(1) of the Act. That burden is theirs to overcome, not vice versa: the law requires that applicants, subject to certain discreet programs, apply for permanent residence from abroad – rather than coming as visitors and deciding they want to stay permanently. The onus thus does not shift to the government to prove why the family must apply for immigration from abroad, when scant evidence is provided. Justice Simpson's conclusion in *Mack* at para 20 is instructive: "The BIOC analysis is brief, but I find it is reasonable in the circumstances of this case in which the Applicant is not a parent, does not reside with either Son, is not a full-time care giver and is not a source of financial support".

(3) The Officer did not err in their assessment of establishment

[31] The Applicants argue that the Officer confounded hardship and establishment: establishment needs to be assessed on its own as a factor to be weighed either for or against approving the application, not as a factor to be weighed against hardship. The Applicants cite *Singh v Canada (Citizenship and Immigration)*, 2019 FC 1633 at paragraph 24 to state that turning positive establishment factors on their head is unreasonable. Per the Applicants, the Officer erred by recognizing the skills acquired, but concluding that the Applicants can apply them in Saint Vincent and the Grenadines to obtain employment.

[32] The Applicants allege that the Officer imposed a requirement of "exceptional establishment" when they write that they "don't find the degree of their establishment to be exceptional". The Applicants argue that applicants do not have to show that their case is exceptional or that their establishment is exceptional *(Nagamany v Canada (Citizenship and Immigration)*, 2019 FC 187 at para 34).

[33] The Applicants submit that the Officer should not focus on an expected level of establishment. The Applicants argue that the Officer here, as it was done in *Ndlovu v Canada (Citizenship and Immigration)*, 2017 FC 878, concluded that the establishment the Applicants have achieved is no different then what other applicants in her circumstances achieve, without indicating what this means. The Applicants conclude that the Officer failed to consider most of the evidence.

[34] The Minister responds that it was open to the Officer to find that the Applicants' establishment in Canada did not merit exceptional relief. The Minister stress that the Officer did not impose an exceptionality test on the establishment factor as it was clear that the Officer used the term as descriptively rather than as a test. The Minister insists that it is not the Officer's role to define a hypothetical benchmark level of establishment.

[35] The Minister adds that the Applicants have not identified the alleged unmentioned evidence. The Minister also points out that the Officer weighed the Applicants' length of presence in Canada somewhat positively, but concluded it was insufficient to justify an exemption from the law. Finally, the Minister cites *Singh v Canada (Citizenship and Immigration)*, 2016 FC 1350 [*Singh*] to state that responding to the Applicants' submissions is not an error when the Officer states the upgraded skills allow to find work in Saint Vincent and the Grenadines. The Minister admits that the paragraph under "Establishment" may cause confusion, but argues that should the Court considers it an error, it is not one determinative.

[36] As cited by the Minister, the Court in *Singh* at paragraph 11 specified that "[…] unlike *Lauture* and *Sebbe*, the reason the Officer considered Mr. Singh's ability to establish himself in India was not to use his establishment in Canada against him. The analysis was in direct response to Mr. Singh's submission that he would be devastated and unable to find work in India and, as a result, his children would suffer". This is what happened here, as the Applicants themselves had raised the issue in their submissions.

[37] As explained earlier, the Officer cannot be faulted for being responsive to the Applicants' submissions which relied heavily on hardships considerations and which provided scarce allegation and evidence on humanitarian and compassionate grounds. Again, the Court must be mindful that the burden is on the Applicants. The Impugned Decision is reasonable on that regard.

IV. **Conclusion**

[38] Having considered the evidence before the Officer and the applicable law and jurisprudence, I can find no basis for overturning the Impugned Decision. The Impugned Decision is based on an internally coherent and rational chain of analysis and it is justified in relation to the facts and law that constrain the Officer.

JUDGMENT in IMM-2241-21

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed.

2. No costs are awarded.

3. No question is certified.

"Martine St-Louis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	FITZ-GERALD CARTER, JOELEYNE KEISHA STAPLETON, DARIO RAWLSON CARTER, OTTEIVA KEISHA CARTER, KEIFA FITZ-GERALD CARTER v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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