Federal Court  Cour fédérale

Date: 20220718

Docket: IMM-3824-21

Citation: 2022 FC 1061

Toronto, Ontario, July 18, 2022

PRESENT: Madam Justice Go

BETWEEN:

KINGSLEY NONSO AJAH
OLUCHI THERESA NONSO-AJAH
JOSIAH UCHECHUKWU KINGSLEY

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are Ms. Oluchi Theresa Nonso-Ajah, her husband Mr. Kingsley Nonso Ajah and their eight-year-old son Josiah Uchechukwu Kingsley Ajah. The couple are citizens of Nigeria and their son is a citizen of the U.S.A.

[2] The Applicants entered Canada in the fall of 2016 and made refugee claims, based on Ms. Nonso-Ajah's fear of her community after she refused to become the Chief Priestess. The Refugee Protection Division [RPD] rejected their claim in 2018, finding that Mr. Nonso Ajah was excluded pursuant to Article 1F(b) of the *Refugee Convention* and that Ms. Nonso-Ajah and her son had a viable internal flight alternative in Abuja. The Refugee Appeal Division [RAD] rejected their appeal in 2020.

[3] The couple had two more children while in Canada, in 2017 and 2019. At the time of their H&C application, they were expecting another child. Their oldest child, the minor Applicant, attends school in Canada.

[4] Before coming to Canada, Mr. Nonso Ajah worked in various parts of the world, including Brazil and South Africa, while Ms. Nonso-Ajah stayed in Nigeria for the most part where she obtained a bachelor's degree in economics. Since coming to Canada, the couple have both been employed as warehouse associates at Amazon. They have both upgraded their education and skills. In addition, Ms. Nonso-Ajah has been working as a casual temporary resident support aid for seniors. The couple also volunteer at their church and help the elderly in their community.

[5] Mr. Nonso Ajah suffers from several medical conditions, including pulmonary sarcoidosis, Type 2 diabetes, and concerns related to his liver and blood pressure. He receives ongoing medical treatment and takes various medications to manage his conditions.

[6] The Applicants applied for permanent residence on humanitarian and compassionate grounds [H&C application] under s. 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The H&C Application was refused on May 31, 2021 [Decision] by a Senior Officer of Immigration, Refugees and Citizenship Canada [Officer]. The Applicants seek judicial review of the refusal of their H&C application.

[7] I grant the application as I find the Officer erred with respect to their assessment of the Applicants' establishment and the country conditions evidence, most notably the evidence concerning available medical treatment for Mr. Nonso Ajah in Nigeria.

II. Issues and Standard of Review

[8] The Applicants argue that the Officer erred in assessing (1) establishment, (2) hardship in Nigeria, and (3) the best interests of the children.

[9] Both parties agree that the issues are reviewable on the reasonableness standard (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]).

[10] A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker": *Vavilov,* at para 85. The onus is on the Applicant to demonstrate that the decision is unreasonable: *Vavilov,* at para 100. To set aside a decision on this basis, "the reviewing 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.

III. Analysis

[11] My decision will focus on two issues: the Officer's assessment of the Applicants' establishment, and the Officer's findings on hardship arising from adverse country conditions.

A. *Was the Officer's assessment of establishment unreasonable?*

[12] In support of their H&C application, the Applicants submitted evidence about their establishment in Canada including their employment records, tax filing, bank statements, and the like. They also submitted 14 support letters from friends, landlord, community organizations, and a local Member of Parliament attesting to their establishment and ties in Canada.

[13] The Officer gave their establishment "some weight", noting that the Applicants are employed and are active in the community. However, the Officer found that their establishment was not "exceptional in relation to similarly situated individuals who have been in Canada for a comparable amount of time."

[14] The Applicants argue that the Officer set a high and impossible threshold by requiring them to demonstrate an exceptional level of establishment. In the Applicants' view, they have shown "exemplary commitment towards a speedy integration and becoming self-supporting", in addition to raising their children. They highlight their employment, financial stability, credit score, and friendships.

[15] The Applicants argue "it is unreasonable to require, without more explanation, an "extraordinary" level of establishment": *Sivalingam v Canada (Citizenship and Immigration)*, 2017 FC 1185 [*Sivalingam*] at para 13; *Apura v Canada (Citizenship and Immigration)*, 2018 FC 762 at para 23; and *Damian v Canada (Citizenship and Immigration)*, 2019 FC 1158 [*Damian*] at para 21. They argue that the Officer gave no indication of what other evidence would show "exceptional" establishment and failed to explain why all of the evidence did not warrant more weight.

[16] The Respondent submits that the Officer reasonably considered the Applicant's circumstances (including their efforts to work, upgrade their skills and their community involvement) and gave their establishment some weight. In the Respondent's view, the Officer justified their ultimate conclusion on establishment based on the evidence, which did "not support that they have integrated into Canadian society to the extent that their departure would cause hardship that was beyond their control and not anticipated by the IRPA." The Respondent argues that a disagreement with the weight given by the Officer to certain factors is insufficient to overturn the Decision.

[17] The Respondent also argues that the Officer did not require the Applicants to demonstrate "exceptional" establishment—rather, this term was used as a descriptor. In the Respondent's view, the Officer's reasons were similar to those upheld by Justice Favel in *Davis v Canada (Citizenship and Immigration)*, 2022 FC 238:

> [43] The mere use of the word "exceptional" is not proof that the Officer applied an unreasonably high threshold. As was stated in *Lopez Segura v Canada (Citizenship and Immigration)*, 2009 FC 894 at paragraph 29, "[i]t is not the use of particular words that is

> determinative; it is whether it can be said on a reading of the decision as a whole that the officer applied the correct test and conducted a proper analysis."

[18] The Respondent also cites Chief Justice Crampton's decision in *Huang v Canada (Citizenship and Immigration)*, 2019 FC 265 [*Huang*] at paras 19-20 and several cases following it including *Al-Abayechi v Canada (Citizenship and Immigration)*, 2021 FC 1280 at para 14.

[19] A distinction must be drawn, in my view, between demonstrating "the existence of misfortunes or other circumstances that are exceptional" (*Huang*, at para 20) on the one hand, and achieving an "exceptional" degree of establishment, on the other. The former analysis is consistent with the core purpose of the H&C provisions under *IRPA* to offer equitable relief in circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another": *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 21, citing *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338 at 350. The latter approach, in contrast, sets an artificial standard for establishment against which individual applicants are measured in order to obtain a positive H&C outcome.

[20] In appreciating the difference between the two approaches, I find instructive, the following quote from Justice Zinn in *Zhang v Canada (Citizenship and Immigration)*, 2021 FC 1482 [*Zhang*]:

> [23] There is a significant difference between observing that this exceptional relief is provided for <u>because</u> the personal circumstances of some are such that deportation falls with more force on them than others, and stating that the relief is available <u>only to those who demonstrate</u> the existence of misfortunes or other circumstances that are <u>exceptional relative to others</u>. The first explains why the exemption is there, while the second purports to

> identify those who may benefit from the exemption. The second imports a condition into the exception that is not there.
>
> [Emphasis in original]

[21] In other words, the issue is not so much whether the Applicants' establishment is "exceptional" or not, but whether the particular circumstances of the case, including the Applicants' establishment, are such that it would warrant a granting of the equitable relief on H&C grounds.

[22] An analysis of the officer's reasons, considered as a whole, will help determine whether the use of the word "exceptional" creates a higher threshold than that provided for in subsection 25(1) of the *IRPA*: *Jaramillo Zaragoza vs Canada (Citizenship and Immigration)*, 2020 FC 879 at para 22.

[23] Read as a whole, I find the Officer's use of the word "exceptional" was not merely used descriptively, but instead imported an additional legal standard into the H&C analysis: *Damian*, at para 21.

[24] The Officer began the analysis by noting that the Applicants "have resided in Canada for about 4.5 years and therefore, a measure of establishment is expected to have occurred." The Officer then noted the Applicants have demonstrated "some degree of establishment", before concluding that the Applicants' establishment was not "exceptional" "in relation to similarly situated individuals who have been in Canada for a comparable amount of time." This suggests that a certain standard was being adopted by the Officer to assess the Applicants' establishment

as compared to others with similar length of time in Canada. This signals the Officer was applying an exceptionality assessment in relation to the Applicants' establishment, and not in relation to whether the Applicants' circumstances, taken as whole, would warrant the granting of the exceptional H&C relief.

[25] I also find the Officer erred by concluding, without explaining, why the Applicants' evidence did not show that "they have integrated into Canadian society to the extent that their departure would cause hardship that was beyond their control", and why their degree of establishment was not "exceptional in relation to similarly situated individuals who have been in Canada for a comparable amount of time." The Officer's failure to provide an explanation was an error: *Sivalingam*, at para 13.

[26] The Officer's conclusion, in the absence of an explanation, was unreasonable given the amount of evidence before the Officer, not only about the adult Applicants' employment but also about involvement in their church and support for the elderly. This lack of explanation may be a further indication that the Officer was adopting an unspecified standard of exceptionality in their assessment of the establishment.

[27] This case can be distinguished from the cases cited by the Respondent including *Buitrago Rey v Canada (Minister of Citizenship and Immigration)*, 2021 FC 852. At paragraph 84, citing *Landazuri Moreno v Canada (Minister of Citizenship and Immigration)*, 2014 FC 481 at paras 36-37, the Court stated: "the fact that Canada is more desirable place to live is not determinative on an H&C application." I agree. However, in this case, the Applicants did provide personalized

evidence, and the Officer's failure to consider such evidence, or engage in a meaningful analysis of such evidence amounted to a reviewable error.

B. *Was the Officer's assessment of conditions in Nigeria unreasonable?*

[28] The Officer found that the Applicants had not provided more information on threats stemming from Ms. Nonso-Ajah's refusal to become Chief Priestess, and that the family could relocate within Nigeria. Based on the couple's work experience and educational credentials, the Officer found that the Applicants would be well suited to finding employment in Nigeria. The Officer also found that Mr. Nonso Ajah could get the necessary medications in Nigeria. As such, the Officer gave adverse country conditions "little weight."

[29] I do not find persuasive the Applicant's arguments that the Officer erred by incorrectly applying the higher threshold associated with proving risk, instead of the lower evidentiary threshold associated with hardship, and by ignoring an increased state of insecurity in Nigeria, as well as the differences between regions which would make relocating difficult. I agree with the Respondent that the Applicants' H&C submission was partially relying on the same ground as their refused refugee claim but failed to adduce evidence why, five years hence, hardship still exists. I also note that much of the Applicants' arguments before this Court in this respect were not advanced in the H&C submission and were thus inappropriately raised.

[30] However, I find merit in the Applicant's argument that the Officer ignored evidence, including evidence from the National Documentation Package [NDP] indicating that treatment for Mr. Nonso Ajah's medical conditions may not be accessible in Nigeria.

[31] The Applicants submitted voluminous medical documentation showing Mr. Nonso Ajah's frequent visits to hospitals, medical clinics and specialists in Canada and various assessments performed on him for not only sarcoidosis and diabetes, but a whole host of other related complications including neuropathic pain, Bell's palsy, and diabetes-hyperglycemia as a side effect of prednisone - a medication prescribed for sarcoidosis.

[32] In addition, based on country conditions reports from the NDP, the Applicants compiled a list of drugs that Mr. Nonso Ajah has been prescribed in Canada, along with the associated cost of the drug in Nigeria, and if not available, the cost of the alternative. According to the list, some of the drugs that the Applicant has been prescribed in Canada are not available in Nigeria, nor is there any alternative available.

[33] The Applicants also included, from the NDP, the 2020 UK Home Office Report on Nigeria: Medical and Healthcare Issues that states:

> There is no specific Institution designated to treat diabetes in Nigeria…available human resources and infrastructures are grossly insufficient for the country…The treatment is possible in public hospitals.
>
> ….
>
> There is no specific programme that gives patients access to diabetes care at a reduced cost. The International Diabetes Federation (IDF), in collaboration with specialists, provides free insulin and monitoring treatment devices for children with type 1 diabetes. This aid is subject to availability and local logistic issues.
>
> '…treatment for diabetes is not accessible in all the regions of the country. Asides from big urban areas, the skills/expertise and structured multidisciplinary care needed for the care of this complex disease is hardly ever sufficiently available. Remote regions in the country may not have access to all the drugs. Several medications

> especially insulin (which requires storage in low temperatures) may not be available.
>
> [Emphasis added]

[34] The Applicants submitted that the Officer ignored the objective country conditions with regard to healthcare in Nigeria. Further, the Officer stated that while medications may be expensive in Nigeria, the Applicants are also paying for their medications in Canada, This, the Applicant submits, directly contradicted the Officer's acknowledgment that finding a job may be challenging for the Applicants, but then the Officer completely ignored this conclusion when it came to the Applicant's health.

[35] I accept part of the Applicant's argument.

[36] The Decision read:

> The submissions show that [Mr. Nonso Ajah]'s medical conditions are being managed through medications. The submissions also show that most of the medications [Mr. Nonso Ajah] is taking are available in Nigeria and most of the ones that are not available, have suitable alternatives available. I grant the applicant's contention that the medications may be expensive however I find that the applicants are also paying for the medications in Canada. Additionally, I find that should applicants secure suitable employment in Nigeria, it would ease the financial burden of the medications. The applicants have also posited that [Mr. Nonso Ajah] will be unable to work due to his medical conditions however there is little to no evidence on file, from a medical professional, substantiating that claim. Overall, I am not satisfied that such adverse country conditions exist in Nigeria to create hardship for the applicants.

[37] With respect to the Applicant's ability to pay for medications, I find the Officer did not make any contradictory finding, as the Applicants submitted. I also agree with the Respondent

that it was open to the Officer to consider the Applicants' employment and skills in assessing their ability to secure employment in Nigeria and pay for medication, as these are part of the "personal circumstances that might reduce [their] hardship": *Arsu v Canada (Citizenship and Immigration)*, 2020 FC 617 at para 22.

[38] However, I do find unreasonable the Officer's conclusion with respect to the hardship caused by adverse country conditions in relation to available health care. As noted above, and as the Officer acknowledged, not all of the medications that Mr. Nonso Ajah requires are available in Nigeria. Most notably, as confirmed by the NDP, several medications for diabetes, especially insulin, may not be available. Thus, even if the Applicants were to re-establish themselves financially in Nigeria, they may still not be able to access the life-saving medication that Mr. Nonso Ajah may need. By focusing on the Applicants' ability to pay, and ignoring the country conditions evidence regarding the availability of the medications, I find the Officer erred.

[39] The Respondent argues that the onus was on the Applicants to show that the medications are not available in Nigeria, similar to *Adedeji v Canada (Citizenship and Immigration)*, 2014 FC 291 [*Adedeji*] at para 14, where Justice Zinn found:

> [14] The Applicant did not submit any evidence describing exactly what treatment would be necessary for her Parkinson's disease, and in fact, submitted inconsistent information about the medications she required. Further, she did not submit any evidence from the relevant health authorities in Nigeria or anyone else attesting to the fact that an acceptable treatment for Parkinson's is not available to her in Nigeria. She did not lead the evidence required to meet her burden.

[40] *Adedeji*, in my view, is not applicable. I note, first of all, adverse country condition evidence can come in different forms. It is not restricted only to evidence "from the relevant health authorities" in the home country. H&C applicants often rely on NDP documents as evidence with regard to the applicants' country of return, and such evidence can be and often is considered by immigration officers.

[41] More importantly, in this case, the Applicants did submit relevant health care evidence including Mr. Nonso Ajah's medical records, the list of drugs he relies on, and the NDP country condition reports regarding the availability of the medications. The Officer's conclusion that the existence of such adverse country conditions did not give rise to hardship, in light of Mr. Nonso Ajah's serious and complicated health issues and the adverse country condition evidence submitted, lacks transparency, intelligibility and justification and must be set aside.

IV. Conclusion

[42] The application for judicial review is granted.

[43] There is no question for certification.

JUDGMENT in IMM-3824-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the matter sent back for redetermination by a different officer.
2. There is no question for certification.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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