Federal Court  Cour fédérale

Date: 20230224

Docket: IMM-3952-21

Citation: 2023 FC 266

Toronto, Ontario, February 24, 2023

PRESENT: Madam Justice Go

BETWEEN:

Ibrahim Ramadan Hamad ELSHAFI
Nagia A H ELARBI
Awes Ibrahim Ramadan ELSHAFI
Ariam Ibrahim R ELSHAFI
Arinda Ibrahim ELSHAFI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Ibrahim Ramadan Hamad Elshafi [Principal Applicant], his spouse Ms. Nagia A H Elarbi, and three of their children Awes Ibrahim Ramadan Elshafi, Ariam Ibrahim R Elshafi, and Arinda Ibrahim Elshafi [together, the "Applicants"] are citizens of Libya. They arrived in

Canada in August 2019 and made claims for refugee protection, but were found ineligible as they previously claimed asylum in the United States [US]. The Principal Applicant and his spouse also have a child that was born in Canada. The Applicants were not removed at the time, as Libya was and is subject to an administrative deferral of removal [ADR] by the Canadian Border Services Agency [CBSA], as implemented under subsection 230(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*]. The Principal Applicant and his spouse were granted work permits in November 2019.

[2] The Applicants applied for permanent residence on humanitarian and compassionate [H&C] grounds on October 16, 2020 pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Applicants' H&C application relies on the best interests of all four children [BIOC], hardship arising from the Applicants removal to Libya, and establishment of the family in Canada. In a decision dated May 26, 2021, an immigration officer [Officer] refused the Applicants' H&C application [Decision].

[3] The Applicants seek judicial review of the Decision.

[4] For the reasons that follow, I allow this application as I find the Officer erred in their hardship and BIOC analysis by unreasonably relying on the existence of the ADR as the basis for rejecting the H&C application.

II. Background

A. *Factual Context*

[5] The Applicants have a complex immigration history.

[6] After obtaining a physiotherapy degree in Libya, the Principal Applicant met and married his spouse, and the couple had their first child, Awes, in 2003.

[7] The Principal Applicant resided in Canada between 2004 and 2006 with his spouse and Awes. The Principal Applicant obtained a study permit and took language courses at McGill University and Queen's University. The couple's second child, Aehm, was born in Canada.

[8] In 2006, the Principal Applicant obtained a study permit for the United Kingdom [UK] to complete a Master of Science in Applied Physiotherapy and the family moved there until 2010. The couple's third child, Ariam, was born in the UK.

[9] In 2010, the family moved back to Libya, where the Principal Applicant worked as a physiotherapist and university instructor. In 2011, the Libyan Revolution began and the resulting armed conflict caused the family to experience violence and fear.

[10] In June 2014, the family moved to the US on the Principal Applicant's study permit. The couple's fourth child, Arinda, was born at this time. The Applicants applied for refugee protection in the US in May 2015 after observing that the situation in Libya was worsening due to the civil war. After then-president Donald Trump was elected in 2016, the Applicants felt unsafe due to the administration's "Muslim ban" and decided to return to Canada, while their refugee protection application in the US was outstanding.

[11] The Applicants arrived in Canada through an unofficial border crossing, were detained, and made refugee claims (other than the Canadian child). Other than the US-born child, the Applicants were found ineligible due to their previous asylum claim made in the US. The Applicants did not become subject to removal proceedings due to the ADR against Libya. The Applicant and his spouse were issued work permits in November 2019, and their children began attending school.

B. *Decision under Review*

[12] The Officer refused the Applicants' H&C application, finding that their situation failed to justify an exemption from the law. The Officer relied heavily on the current ADR for Libya, noting among other things that unless the Applicants voluntarily returned to Libya, they would be unlikely to face hardship, and that should the ADR be lifted, the country conditions would have improved. The Officer applied the same rationale to their BIOC analysis, finding insufficient evidence that the children would face issues accessing education once the ADR is lifted.

[13] The Officer concluded their Decision as follows:

> Based on a cumulative assessment of the evidence submitted by the applicant, I have considered the extent to which they, given their particular circumstances, would face difficulties if an exemption is not granted. As noted above, although there will inevitably be some hardship associated with being required to leave Canada they are not required to do so imminently and they have not demonstrated that they will experience difficulties remaining in Canada without an exemption being granted to warrant relief on humanitarian and compassionate grounds under subsection 25(1). In making this humanitarian and compassionate determination, I have

> substantively considered and weighed all the relevant facts and factors before me.
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> I find that the cumulative balance of the factors raised in this application do not favour the applicant. I give more weight in this application to the immigration laws as they exist in Canada and do not find that the applicant's personal circumstances justify an exemption from the law.

III. Issues and Standard of Review

[14] The Applicants raise two arguments in support of their application:

a. Did the Officer err in their hardship analysis?

b. Did the Officer fail to conduct an analysis of the BIOC?

[15] The parties agree that the standard of review is reasonableness, in accordance with *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[16] Reasonableness is a deferential, but robust, standard of review: *Vavilov* at paras 12-13. The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified: *Vavilov* at para 15. 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-make: *Vavilov* at para 85. Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences: *Vavilov* at paras 88-90, 94 and 133-135.

IV. Analysis

[17] In my view, the determinative issue here is the Officer's unreasonable reliance on the ADR as a shortcut to reach their conclusions. As a result, the Officer failed to conduct the necessary analysis mandated by the Supreme Court of Canada for an H&C analysis, namely, whether there are reasons 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[*Kanthasamy*] at para 21.

[18] The Officer's reliance on the ADR tainted their analysis, or lack thereof, with respect to hardship as well as BIOC.

[19] On the issue of hardship, the Decision reads in part as follows:

> As noted above I accept that the situation in Libya at this time is far from perfect and has resulted in enforcement of removal orders not being undertaken by the CBSA.
>
> With respect to the applicant, they are not facing the imminent enforced possibility of hardship in Libya due to the ADR in place and would not be required to return to Libya until, or if the situation in the country stabilizes. Only if they seek to voluntarily return to Libya at this time is there the likelihood that they would face a degree of hardship related to these issues. I find it unlikely that the applicants would choose to return unless ordered to do so and; therefore, give the cited hardships in Libya little weight with respect to this application. The fact that the applicant has submitted this application indicates a lack of desire to return to Libya so unless required to through enforcement of the removal orders against them, return to Libya is not a present or likely imminent reality for the applicant that would result in hardship to warrant an exemption. In the event that the country conditions stabilize and the ADR is lifted the factors cited by the applicants as those to cause hardship may also no longer to exist.
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> Evidence does not support that the applicant or any family member would be an exception to the stay through the ADR and the CBSA has not taken steps toward enforcement of the removal order against the applicant's six year old daughter, a citizen of the United States,

> nor is it likely to be the case for any child to be required to leave without an adult accompanying them unless they reached the age of majority. Should that be the case in similar circumstances, then return would more likely than not be to the United States for that individual. As a result the applicant and his family benefit from being able to reside in Canada. The choice to return to Libya is one they could choose to make voluntarily. If they were to make this choice they would approach the CBSA requesting to leave voluntarily and the enforcement of the removal orders against the family members would be facilitated, including purchasing tickets if the family are unable to do so themselves.

[20] These reasons suggest, in my view, that the Officer filtered the hardship analysis through a lens that disproportionately focused on the ADR, without considering the country conditions and other personal evidence regarding hardship should the Applicants return to Libya.

[21] I agree with the Applicants that the Officer's lack of hardship analysis is contrary to the instructions provided by Immigration, Refugees and Citizenship Canada [IRCC instructions]. The IRCC instructions urge officers to consider factors such as the adverse country conditions of the country of origin and state that decision-makers "must consider the conditions in that country and balance these factors into the hardship assessment."

[22] In addition, as set out in *Kanthasamy* at para 25: "officers making humanitarian and compassionate determinations must substantively consider and weigh ***all*** the relevant factors before them" [emphasis added]. The Officer, in my view, simply failed to do so.

[23] There appears to be conflicting jurisprudence from this Court as to the reasonableness of decisions not to grant H&C relief where an ADR is in place. In some cases, including those cited by the Respondent, the Court has upheld these decisions as reasonable: see *Ndikumana v Canada*

(Citizenship and Immigration), 2017 FC 328 [*Ndikumana*]; *Likale v Canada (Citizenship and Immigration)*, 2015 FC 43 [*Likale*].

[24] On the other hand, there is the approach taken by Justice Norris in *Bawazir v Canada (Citizenship and Immigration)*, 2019 FC 623 [*Bawazir*], as reiterated by him in *Shaka v Canada (Citizenship and Immigration)*, 2019 FC 798, which finds that an officer erred by failing to consider that the applicant had to return to a war zone to apply for permanent residence without an exemption granted under H&C grounds: *Bawazir* at para 17.

[25] The Respondent cites several cases stating that the existence of an ADR or a Temporary Suspension of Removal does not establish that an application under section 25 of *IRPA* should be granted, but is rather a factor to be considered, as was done in this case: *Leteyi v Canada (Citizenship and Immigration)*, 2022 FC 572 at paras 25-26; *Likale* at para 40; *Emhemed v Canada (Citizenship and Immigration)*, 2018 FC 167 at para 11; *Ndikumana* at paras 17-21.

[26] The Respondent notes that the Applicants do not dispute their lack of intention to return to Libya, nor have they shown that they could be forcibly removed while the ADR remains in place. The Respondent submits accordingly that it was open for the Officer to afford little weight to the conditions in Libya.

[27] While I agree with the Respondent that the existence of an ADR is one factor to be considered, an officer cannot use the existence of an ADR to sidestep the hardship analysis altogether. I also find it speculative for the Officer to have concluded without actually engaging

with the evidence that once the ARD is lifted, the Applicants would not face hardship upon return to Libya.

[28] Further, while I acknowledge the seemingly conflicting case law on the reasonableness of H&C decisions that turn on the existence of ADRs, I agree with Justice Norris' comments in *Bawazir*:

> [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*.

[29] Justice O'Reilly reached the same conclusion in *Al-Abayechi v Canada (Citizenship and Immigration)*, 2022 FC 873 when he noted:

> [15] I agree with Justice Norris and with the applicants' submission that the officer's reasoning "leads to the perverse outcome that a policy designed to respond to a humanitarian crisis (the TSR) is being used as grounds to deny humanitarian relief" (Applicants Memorandum, para 51).

[30] The same comments apply to the Applicants' case. The Applicants submit that they seek permanent resident status on H&C grounds now, so that they can remain in Canada without having to return to Libya to apply. I note that the two adult Applicants, unlike their children that were born outside of Libya, do not have dual citizenship. They would have no choice but to return to Libya to apply for permanent residence unless an exemption is made for them.

[31] While the Applicants did not advance these submissions to the Officer, the Officer ignored the legislative purpose behind the granting of H&C relief, as expressed by Justice Norris and Justice O'Reilly, when treating the ADR as an overriding factor to find that an exemption is not warranted. The consequence was a failure to analyse "*all* the relevant factors" in the H&C application: *Kanthasamy* at para 25.

[32] I find that the Officer made a similar error in their BIOC analysis:

> The applicant describes his pleasure in his children in Canada noting concerns for them in Libya in the current situation. The applicant describes the child as having a safe, stable and organized lifestyle and are able to live and enjoy life as children. The applicant has not demonstrated that if an exemption is not granted that what the children enjoy in Canada at present would likely cease imminently, or that their best interests are or would be adversely affected if an exemption is not granted considering their particular circumstances. Certainly, with the current lack of stability in Libya the applicant's concerns are understandable if return to Libya was imminent. **As considered earlier this possibility appears remote based on the lack of stability in Libya and the ADR imposed preventing the requirement to enforce the applicant's departure from Canada. Furthermore, evidence does not support that the applicant would choose to return voluntarily to Libya during the imposition of the ADR, which could affect the best interests of the children.** The applicant finds the fact that the children attend school in Canada a positive. The applicant has not provided evidence that school attendance could not continue as it has since their arrival in Canada in the absence of granting an exemption. Neither is there evidence to demonstrate that it would be contrary to the best interests of the children for them to continue with their studies and activities in the absence of an exemption being granted.
>
> [Emphasis added]

[33] The Applicants submit that *Kanthasamy* requires decision-makers to go beyond merely stating that the BIOC have been considered; these interests must be "well identified and defined" and examined "with a great deal of attention": at para 39.

[34] The Applicants argue that the Officer's BIOC analysis fails to meet this standard of definition and examination. The Applicants submit that the Officer essentially applied a test of whether the children's best interests *have been* or *would be* adversely impacted. Rather, the Applicants assert that the appropriate test is what are their best interests.

[35] I agree with the Applicants that the Officer failed to identify what the BIOC are, and instead focused on the children's immigration history and living circumstances in Canada to find that their best interests have not been adversely impacted by a lack of permanent status.

[36] Further, like the hardship analysis, I find that the Officer neglected to assess the country conditions when conducting the BIOC analysis. Specifically, the Officer acknowledged the current lack of stability in Libya but simply went on to state that removal to Libya was not imminent due to the ADR.

[37] The Respondent asserts that the Officer did identify what the BIOC are, as the Officer did not dispute the Applicants' claim that it was in the children's best interests to remain in Canada. The Respondent reiterates that the Officer merely found that they would remain in Canada until conditions in Libya changed in a material way. The Respondent submits that it was not the Officer's role to speculate on what conditions in Libya would look like once the ADR is lifted.

[38] With respect, the Officer did exactly that: the Officer speculated that the conditions in Libya would have sufficiently improved once the ADR is lifted, and on that basis, declined to grant an exemption in view of the ADR. In reaching that conclusion, I agree with the Applicants that the Officer did not consider the evidence put forward.

[39] The Respondent further argues that the Officer reasonably weighed the existence of the ADR and relied on it to find that there was no evidence that the children would be adversely affected by their lack of permanent status in Canada, and to afford little weight to the current

country conditions in Libya. The Respondent submits that it was the Applicants' onus to adduce evidence of how the children were affected by the lack of permanent status in Canada, and that they failed to do so: *Khan v Canada (Citizenship and Immigration)*, 2020 FC 202 at para 7; *Hamoush v Canada (Citizenship and Immigration)*, 2022 FC 1136 at para 16.

[40] The cases cited by the Respondent are distinguishable on the facts. Here, the Applicants provided substantial country condition evidence regarding the critical breakdown of the education system as a result of the civil unrest in Libya and the gender-based discrimination and violence against women and girls. The Applicants also made specific submissions detailing how the COVID-19 pandemic has augmented the barriers to education caused by the civil unrest, and has worsened the "imminent risk of death or abduction" of Libyan children.

[41] Instead of addressing these submissions, the Officer dismissed them by noting that "in Ontario where the [Applicants reside], schools have been closed for several months, women too face heightened difficulties as caregivers in an [*sic*] out of the home." Comparing the switch to online learning in Ontario, with the closure of schools due to civil war in Libya, was a stretch to say the least. Equating restrictions on women and girls' access to employment, education and social participation based on extremist ideology in Libya with systemic gender-based socio-economic inequities, however problematic in Canada, was perverse.

[42] The Officer's reasons minimized the evidence outlining the serious challenges the minor Applicants could face should they accompany their parents to Libya, signalling that the Officer was simply not alert, alive and sensitive to the BIOC in this case.

[43] For the reasons set out above, I find the Decision unreasonable. I do not need to address the remaining arguments raised by the Applicants.

V. Conclusion

[44] The application for judicial review is allowed and the matter is referred back for redetermination by a different decision-maker.

[45] There is no question for certification.

JUDGMENT in IMM-3952-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The matter is referred back for redetermination by a different decision-maker.

3. There is no question for certification.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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