Federal Court  Cour fédérale

Date: 20211203

Docket: IMM-2890-20

Citation: 2021 FC 1352

Toronto, Ontario, December 3, 2021

PRESENT: Madam Justice Go

BETWEEN:

HAMDA CHAMAS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Hamda Chamas [Applicant] is a 67-year-old widow and a citizen of Lebanon. She came to Canada on a multiple entry visitor's visa in November 2017 to look after one of her daughters – a victim of domestic violence – and her granddaughter. The Applicant submitted an application for permanent residence on humanitarian and compassionate grounds [H&C application] about six months after her arrival in Canada.

[2] In a decision dated June 24, 2020 [Decision], an Immigration Officer [Officer] dismissed the Applicant's H&C application, finding that the Applicant's establishment in Canada was "not significant beyond what any person residing in Canada for a length of time would be expected to do", that country conditions in Lebanon did not give rise to undue hardship, and that the best interests of the Applicant's three-year-old granddaughter would not be compromised if the Applicant returned to Lebanon.

[3] The Applicant argues that the Officer's assessment of establishment in Canada and best interests of the child was unreasonable and ignored critical evidence. The Respondent argues that the decision reasonably analyzed both the arguments and the evidence provided, and that H&C relief is discretionary, exceptional, and deserving of deference.

[4] As I find the decision to be unreasonable, I grant the Applicant's request for judicial review.

II. **Background**

[5] The Applicant has two daughters in Canada. Since coming to Canada, she has resided with her daughter M. and her young granddaughter H.

[6] The Applicant's daughter M. came to Canada in 2006. She was sponsored by her husband, but the relationship was physically and emotionally abusive. M. eventually escaped from the abuse of her husband and his family, and sought medical help. She suffers back and knee problems from the beatings she endured during the marriage, as well as nightmares, sudden

anxiety attacks, and depression. She remarried in 2011, but her new husband asked for a divorce because he had been threatened by her first husband. She gave birth to her daughter H. in 2014, and has been raising her as a single mother.

[7] M. does not have the means to sponsor the Applicant, because the extent of her physical and mental injuries from the abuse of her ex-husband prevent her from working. She has been receiving benefits under the Ontario Disability Support Program.

[8] Since coming here, the Applicant has spent her time helping M. with childcare, supporting M. in dealing with the aftermath of domestic abuse, and volunteering in a sewing and wellness group at a South Asian Women's Centre. She is financially self-sufficient as a result of a pension she receives from Lebanon.

[9] M.'s psychiatrist confirmed that having her mother present has benefitted M.'s mental health. For example, the Applicant holds and calms M. during ongoing night terrors. The Applicant's presence has also helped M. better care for her young daughter, which is difficult due to the physical and mental effects of her ex-husband's abuse. M. cannot bend down or play due to her knee and back problems, and so it is the Applicant who takes H. to the park. The Applicant also teaches H. Arabic and is generally involved in her day-to-day care.

III. **Issues**

[10] The Applicant challenges the Decision by submitting that both the Officer's assessment of establishment and the Best Interests of the Child (BIOC) assessment was unreasonable.

[11] With respect to the issue of establishment, the Applicant submits that the Officer's assessment was problematic in three respects:

I. The Officer's comments about "expected" establishment were improper;

II. The Officer ignored key medical evidence; and

III. The Officer engaged in baseless speculation about "offsetting" hardship.

[12] With respect to the BIOC analysis, the Applicant submits:

i. The Officer was not sufficiently "alive, alert, and sensitive" to H.'s interests;

ii. The Officer was unresponsive to a key part of the Applicant's BIOC submissions;

iii. The Officer failed to comment on the impact the Applicant's proposed continued temporary resident status would have on H.'s interests; and

iv. The Officer's conclusion on BIOC was unintelligible given their own findings of fact.

[13] The Applicant also submits that the Decision is generally unreasonable because it segments the analysis rather than assessing the factors globally.

[14] I do not find it necessary to address all the issues raised by the Applicant. Also, I am of the view that the issues raised by the Applicant regarding the medical evidence and hardship are not, strictly speaking, part of the establishment assessment. As such, I will rephrase the issues arising from this Application as follows:

A. *Did the Officer make an unreasonable decision by:*

i. ignoring the medical evidence; and

ii. by finding that media technologies could "offset" the hardship of separation?

B. *Was the Officer's BIOC analysis reasonable?*

IV. **Standard of Review**

[15] The parties agree that the standard of review for the substance of an H&C decision is reasonableness (see e.g. *Canada (Choi v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 494 at para 10, citing *Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65).

[16] 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 H&C decision is unreasonable. 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).

V. **Analysis**

[17] The operative statutory provision is section 25(1) of the *Immigration and Refugee Protection Act* (*IRPA*), which provides that the Minister of Citizenship and Immigration:

> …may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

[18] The leading case on H&C decisions is *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], which states that section 25 is intended to offer equitable relief where there are "facts, established by the evidence, which would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes 'warrant the granting of special relief'" (at paras 13, 21).

Issue 1(a) Did the Officer ignore medical evidence?

[19] In analyzing potential hardship stemming from the Applicant's separation from M., the Officer accepted the affidavit and medical evidence showing that M. had experienced abuse and that the Applicant was an emotional support to M. However, the Officer found that there was a lack of medical documentation indicating that M. is unable to care for her well-being without her mother.

[20] The Applicant concedes that technically, none of the medical evidence stated that M. is unable to reside on her own. However, there was a report before the Officer by M.'s psychiatrist stating that M.'s symptoms of post-traumatic stress disorder began to improve when her mother

came to Canada: her depression decreased, she was less isolated, and she felt more secure. As the Officer did not mention this medical letter in their reasons, the Applicant argues that the Officer overlooked key medical evidence, contrary to *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC).

[21] With respect, the psychiatrist report did not confirm that M. will be unable to care for her own wellbeing without her mother being physically present. As such, I agree with the Respondent who submits that the Officer was correct in finding no explicit statement in the medical evidence that M. would be unable to care for herself.

[22] However, I would not go so far as adopting the Respondent's position that this was a "specific insufficiency that lead to the conclusion that H&C relief was not warranted" or that the Applicant simply did not meet her onus in this respect according to *Owusu v Canada (Minister of Citizenship and Immigration*), 2004 FCA 38 at para 5. Instead, based on the presumption as set out in case law that an officer has considered all the evidence before them (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (QL) (FCA)), and given that the Officer's statement was not directly contradicted by the medical evidence, I reject the Applicant's argument here.

Issue 1(b): Was it unreasonable for the Officer to find that media technologies could "offset" the hardship of separation?

[23] The Officer found that "inexpensive media technologies" would allow the Applicant and M. to continue their close relationship and would "offset, to a degree" the impact of physical separation.

[24] The Applicant argues that this is baseless speculation, as the Officer cited no evidence that media technologies would ameliorate M.'s mental distress. The Applicant underscores that the evidence from her own affidavit, M.'s affidavit, and the psychiatrist all stressed the importance of the Applicant's physical presence in Canada and highlighted how dire M.'s mental health was before her mother's arrival, despite daily phone conversations.

[25] The Respondent states that no error arises from the Officer's reference to modern technologies, but provides little justification for this point other than to state that the Officer is owed deference.

[26] In my view, it is one thing to state that there is no explicit medical opinion to suggest M. would not be able to take care of her own well-being, it is quite another to suggest, as the Officer did, that media technologies would offset any hardship in this case. Apart from being speculative, this finding is contradicted by the evidence before the Officer, including both M.'s own affidavit that the Officer has referenced and the medical evidence that the Officer is presumed to have considered.

[27] After describing the horrendous abuse she had suffered at the hands of her former husband and his family, and the ongoing impact on her due to the abuse and the resulting stress, M. went on to state in her affidavit that the day the Applicant came to visit her in November 2017 was "the day when I finally felt alive." She talked about her plan to change her life with her mother here, and the possibility of pursuing her future plans through the strength and support her mother is providing her. She described her fear that she would never be whole without her

mother next to her, and asked who would be able to help her when she wakes up at night screaming from the memories of the abuse. The Officer acknowledged all of these points yet expected M. to somehow use the technology to soothe her night terrors or other psychological distress without her mother's presence.

[28] More critically, I note the psychiatrist opined in their report regarding M. as follow:

> Mrs. Chamas complained with respect to the hardship she is facing, living in Canada on her own, due to the different symptoms she had developed, which includes depression, anxiety, her isolation from people, her lack of friends, her lack of contact with her sister, who is married to her husband's brother, and is forbidden to communicate with her, the lack of socialization, as well as the intended threat from her husband.
>
> When her mother came to visit her, the patient started to improve. She become more animated, her depression started to decrease. She felt more secure, was getting out of the house, and tried to communicate with others. Her mother's presence makes her try to decrease of [*sic*] her isolation.

[29] The Respondent submits that the psychiatrist's report did not mandate the Applicant must reside in Canada to support her daughter. Although the psychiatrist did not – and could not – mandate the Applicant's presence in Canada, their report clearly indicates that the psychiatric conditions that M. has been suffering and continues to suffer – depression, anxiety, and social isolation – have all improved because of her mother's presence. It is for this reason the psychiatrist concluded at the end of the report that the presence of the Applicant would be beneficial to the overall mental health of not only M., but her granddaughter H.

[30] As the Applicant points out, the fact that the Officer accepted M.'s difficulties makes it even more problematic to ignore a medical professional's opinion that the Applicant's presence

benefits M., not to mention the help M. needs with the practical realities of raising a child while dealing with post traumatic stress disorder and physical disabilities.

[31] I therefore find the Officer reached an unreasonable conclusion by speculating that media technologies could offset the hardship faced by M. without the physical presence of the Applicant.

Issue 2: Was the Officer's assessment of best interests of the child reasonable?

[32] Section 25 mandates consideration of the best interests of the child, and *Kanthasamy* confirmed that this includes "such matters as children's rights, needs, and best interests; maintaining connections between family members; and averting the hardship a person would suffer on being sent to a place where he or she has no connections" (at para 34).

[33] The Officer concluded that the best interests of H. would not be compromised should the Applicant be returned to Lebanon, because the Applicant is not the child's primary guardian, the child's mother is able to care for her, and the child could stay in touch with her grandmother virtually.

[34] The Applicant submits that the Officer was not alert, alive and sensitive to H.'s interests, as their analysis was not nuanced or thorough, and there was no articulation of the suffering that H. would endure from a negative decision—despite the nine pages of submissions on BIOC that were before the Officer.

[35] Additionally, the Applicant submits that the question was not whether H. would be cared for in the Applicant's absence, but rather whether her best interests would be negatively impacted. Justice LeBlanc stated the following in *Motrichko v Canada (Citizenship and Immigration)*, 2017 FC 516 at para 27: "the analysis the Officer was called upon to undertake was not whether the grandchildren would manage or survive in the absence of their grandmother but how they would be impacted, both practically and emotionally, by the departure of the Applicant in the particular circumstances of the case".

[36] The Respondent counters by suggesting that the Officer fully considered all relevant factors and evidence. The Respondent states that the Officer accurately recognized that BIOC is not a determinative factor; however, it cites pre-*Kanthasamy* jurisprudence on this point: *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 5; *Ahmad v Canada (Citizenship and Immigration)*, 2008 FC 646 at paras 30-31.

[37] *Kanthasamy* states the following with respect to BIOC:

> [39] A decision under s. 25(1) will therefore be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered: *Baker*, at para. 75. This means that decision-makers must do more than simply state that the interests of a child have been taken into account: Hawthorne, at para. 32. Those interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence: *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 (CanLII), [2002] 4 F.C. 358 (C.A.), at paras. 12 and 31; *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 165 (CanLII), 323 F.T.R. 181, at paras. 9-12.
>
> [40] Where, as here, the legislation specifically directs that the best interests of a child who is "directly affected" be considered, those

> interests are a singularly significant focus and perspective: *A.C.*, at paras. 80-81.

[38] As a starting point, I would note that the Applicant does not have to be the primary caregiver of H. for this Court to consider H.'s best interests in the context of the Applicant's H&C application. This Court has found on many occasions that the best interests of children are engaged even when the applicant is not the child's parent or primary caregiver, as the focus is on the children "directly affected" by the application according to the express statutory language of section 25 of *IRPA*: *Momcilovic v Canada (Citizenship and Immigration)*, 2005 FC 79 at para 45, *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082. In particular, the Court has recognized the important role played by grandparents in the care of their grandchildren, especially in cases where the children's parents may not be able to care for them or where the children have additional needs: *Kwon v Canada (Citizenship and Immigration)*, 2012 FC 50; *Fernandes v Canada (Citizenship and Immigration)*, 2021 FC 997.

[39] I note the Applicant in this case has submitted extensive reports confirming the important role grandparents play. Among other things, these reports show that when grandparents are involved in their grandchildren's daily lives, the children are more social and more involved in school. They are also more likely to show care and compassion for people outside their immediate circle of friends and family.

[40] However, similar to their speculation about how media technologies could alleviate hardship faced by M., the Officer likewise concluded that "advanced social media", such as

"Facebook, Twitter, Skype, Zoom amongst others", could enable the Applicant to maintain relationships with her three-year-old granddaughter.

[41] Aside from it being a poor substitute for playing in the park – an activity that the Applicant and her granddaughter spend much time doing together – social media cannot replace the daily care and support that the Applicant provides to her granddaughter, like getting H. ready for school, taking her to school, going shopping together, and helping her with her problem or question whenever it arises. These activities could only be carried out if the Applicant is physically in Canada, and continues to be present in the lives of her daughter and granddaughter.

[42] Yet once having decided that the Applicant, her daughter and granddaughter can somehow live their lives and carry on their relationship online through social media, the Officer stopped asking what, if any, impact the departure of the Applicant would have on H. The Officer never identified what would be in the best interests of H. and how her best interests would be affected by the Applicant's departure. The Officer's failure to undertake such an analysis suggests that the Officer is not being alert, alive and sensitive to H.'s interests.

[43] Recently, in *Appiah v Canada (Citizenship and Immigration)* 2021 FC 1309, I echoed the concern raised by Justice Sadrehashemi in *Yu v Canada (Citizenship and Immigration)* 2021 FC 1236 about immigration officers' use of "boilerplate" language to assess BIOC by stating the child would be able to stay connected with their parent – or in this case, grandparent – through "letters or the internet with avenues such as email, instant messaging, or Facebook", without considering the specific facts of the case. That same concern applies in this case, in the face of

the substantive evidence demonstrating a strong bond between the Applicant and her grandchild, and the critical role she has played to care for H. which requires her physical presence in Canada.

[44] Moreover, given my finding that the Officer has unreasonably speculated about the impact of the Applicant's departure on her daughter, I agree with the Applicant that the Officer has failed to consider how her removal would increase M.'s anxiety, and how it would then trickle down to H.

[45] Here, I note the Applicant has included numerous academic studies in her H&C application about the adverse effects of maternal depression on the functioning and development of children, which together with the report from M.'s psychiatrist, lend support to the Applicant's position that her presence would mitigate the negative impact of her daughter's depression on H. These factors, in my view, should have been – but were not – considered by the Officer in their BIOC analysis. By failing to engage this argument, the Officer's reasons were not responsive to the Applicant's concerns, contrary to *Vavilov*'s requirement (at paras 127-128).

[46] The Applicant further argues that the Officer did not address the impact of the Applicant's continued temporary resident status on H.'s interests. In assessing establishment and country conditions, the Officer referenced the Applicant's ability to extend her visa or apply for another visa, but there is no reference to this factor in the BIOC analysis. The Applicant cites *Luciano v Canada (Citizenship and Immigration)*, 2019 FC 1557 at para 50, in which Justice Ahmed found that if an officer proposes temporary resident status as an alternative to an H&C

application, they must then consider the effects of continued temporary residence status on all the H&C factors put forward, including BIOC. I agree.

[47] As the above considerations are sufficient to determine that the decision is unreasonable, it is unnecessary for me to consider the remaining issues that arise in this case.

VI. **Certification**

[48] Counsel for both parties were asked if there were questions requiring certification. They each stated that there were no questions arising for certification and I concur.

VII. **Conclusion**

[49] The application for judicial review is allowed.

JUDGMENT in IMM-2890-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The decision under review is set aside and the matter referred back for redetermination by a different decision-maker.

3. There is no question to certify.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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