Federal Court  Cour fédérale

Date: 20220210

Docket: IMM-3177-20

Citation: 2022 FC 177

Toronto, Ontario, February 10, 2022

PRESENT: Justice Andrew D. Little

BETWEEN:

FABIO LUIS VITORIO
MARIA DA CONCEIÇAO ANDRADE DOS SANTOS VITORIO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants are Brazilian nationals who arrived in Canada on a visitor visa on May 17, 2003 and have remained here without status. They are the parents of two daughters born in Canada in 2006 and 2009.

[2] By application made on May 8, 2018, the applicants sought to regularize their status in Canada by seeking permanent residence and an exemption on humanitarian and compassionate ("H&C") grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *"IRPA"*).

[3] The H&C application raised two principal issues: the best interests of the children ("BIOC") and establishment in Canada. The applicants made written submissions and provided evidence to the officer to support their application.

[4] The H&C application focused on the applicants' establishment in Canada based on their many years in this country while maintaining employment and raising their two daughters. On the BIOC, the applicants' position was that the best interests of their Canadian-born daughters, Mariana and Olivia, were served by the whole family remaining in Canada because that is the only life the daughters have known. The applicants submitted that their daughters would suffer hardship, both if they stayed in Canada without their parents and if they moved to Brazil with them. In addition, the applicants filed evidence about two specific medical issues, including that Olivia has a congenital heart condition that necessitated surgery and requires monitoring throughout her life.

[5] By decision dated June 29, 2020, a senior immigration office denied their H&C application.

[6] On this application, the applicants ask this Court to set aside the officer's decision as unreasonable, applying the principles in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

[7] For the reasons below, I am not persuaded that the officer's H&C decision contained an error that permits this Court to intervene. The application will therefore be dismissed.

I. Legal Principles

[8] On this application for judicial review, the standard of review of the officer's H&C decision is reasonableness: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909, at para 44. The Supreme Court in *Vavilov* confirmed that reasonableness review is a deferential and disciplined evaluation of whether an administrative decision is transparent, intelligible and justified: *Vavilov*, at paras 12-13 and 15.

[9] The Court conducting a judicial review must read a decision maker's reasons holistically and contextually, and in conjunction with the record of evidence: *Vavilov*, at paras 91-96, 97, and 103; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, at paras 28-33. The Court's review considers both the reasoning process and the outcome: *Vavilov*, at paras 83 and 86. A reasonable decision is one that is based on an internally coherent and a rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker: *Vavilov*, esp. at paras 85, 99, 101, 105-106 and 194; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, at paras 24-35.

[10] For an H&C application under subsection 25(1) of the *IRPA*, humanitarian and compassionate considerations refer to "those 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' from the effect of the provisions of the [IRPA]": *Kanthasamy*, at paras 13 and 21, citing *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338, at p. 350. Under subsection 25(1) an officer often assesses any hardships that the applicant(s) will experience on leaving Canada and returning to their country of origin. The provision has equitable goals and is designed to mitigate the rigidity of the ordinary operation of the law in an appropriate case: *Kanthasamy*, at paras 33 and 45.

[11] On H&C applications, an officer must always be alert, alive and sensitive to the best interests of the children. Those interests must be well identified, defined and examined with a great deal of attention in light of all the evidence. The children's interests must be given substantial weight and be a significant factor in the H&C analysis, but are not necessarily determinative of an H&C application. See *Kanthasamy*, at para 35 and paras 38-41; *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2003] 2 FC 555 at paras 2, 5 and 10; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 FC 358 at paras 12-13 and 31; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 75.

[12] Children will rarely, if ever, be deserving of any hardship. While hardship may be considered, particularly if raised by an applicant, the concept of "undue hardship" is ill-suited

when assessing hardship on innocent children: *Kanthasamy*, at paras 41 and 59; *Hawthorne*, at paras 4-6 and 9. See also *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 (Russell J.), at paras 64-67, as cited in *Kanthasamy*, at para 59.

[13] On an H&C application, an officer must consider the impact of removal on the particular individuals, including any hardship the individuals may face: *Kanthasamy*, at paras 32-33, 45 and 48; *Zhang v Canada (Minister of Citizenship and Immigration)*, 2021 FC 1482 (Zinn J.), at paras 14, 24 and 25.

II. Analysis

[14] The applicants challenged the reasonableness of the officer's assessment of both the BIOC and their establishment in Canada. I will analyse their submissions in turn.

A. *Best Interests of the Children*

[15] The applicants' positions on the officer's reviewable errors can be gathered under two headings: alleged errors of law committed by the officer, and whether the officer gave unreasonable weight to the applicants' lack of status in Canada.

(1) Alleged Errors of Law in the Officer's BIOC Assessment

[16] The applicants submitted that the officer's decision was unreasonable because it did not apply the *Chirwa* approach to the BIOC as required by *Kanthasamy*, and instead focused on the hardship they would suffer if they were to accompany their parents to Brazil. They emphasize that while hardship may be a consideration in assessing the BIOC, hardship cannot serve as a

substitute for a valid analysis that considers the children's best interests (citing *Osun v Canada (Citizenship and Immigration)*, 2020 FC 295, at paras 20-21). Specifically, the applicants argued that the officer focused solely on the adaptability of the children and the availability of supports in Brazil, contrary to the decisions in *Nagamany v Canada (Citizenship and Immigration)*, 2019 FC 187, at para 38, and *Bautista v Canada (Citizenship and Immigration)*, 2014 FC 1008, at para 28. They further contended that the officer's BIOC assessment relied on a basic needs assessment, rather than focusing on the BIOC (citing *Williams*, at paras 65-67).

[17] The respondent submitted that the applicants' position, properly understood, simply disagreed with the outcome and the weight given by the officer to various factors affecting the H&C application. The respondent noted that the applicants raised hardship of the children and submitted that *Kanthasamy* did not prohibit consideration of hardship to children. The respondent maintained that the officer reasonably assessed the BIOC on the evidence filed, including the children's activities, their ties to the community, the younger daughter's heart condition and learning difficulties and need for support. The respondent noted that unlike *Bautista*, the officer in this case did not find that all children are adaptable but rather that these children would be able to adapt to, and re-establish themselves in the Brazilian society, culture and education system considering their young ages, that they would have the support of their parents (who had grown up in Brazil), that they have the ability to speak Portuguese and that they have extended family in Brazil.

[18] I agree substantially with the respondent's position. The officer's reasons must be placed in the context of the applicants' position on the H&C application. They filed written submissions

that raised both the undue and undeserved hardship that the children would suffer if they remained in Canada without their parents (given their ages and dependence on their parents), and the hardship they would face if they left Canada with their parents to move to Brazil. The latter included the disruption of their education and lives in Canada, plus "undue emotional hardship" because they have spent their entire lives in Canada and were only familiar with the Canadian education system and way of life. The applicants' H&C submissions also expressly argued that if the children left Canada with their parents, the daughters "would not be able to adjust to the very different educational system of Brazil" and would have an "extremely difficult time adjusting to the social life" as pre-teens, in Brazil.

[19] Given the applicants' position in their H&C application, the officer cannot be faulted for being responsive to their own submissions on hardship and the children's ability to adjust to a move to Brazil.

[20] I also do not believe that the officer approached the BIOC as the officer did in *Bautista*. In that case, the officer did not mention the child or what her best interests were; the officer focused the H&C assessment on the mother and paid "scant attention" to the child: *Bautista*, at para 25. That is not the case here.

[21] With respect to adaptability, Justice Diner observed in *Bautista* that starting the BIOC assessment with the question of whether a child could adapt will "almost invariably predetermine the outcome of the script, namely that the child will indeed overcome the normal hardships of departure, and adjust to a new life, including learning a new language …". He found that to

undertake the analysis through that lens rendered the BIOC requirement under subsection 25(1) "devoid of any meaning": *Bautista,* at para 28. My colleague found that there was "plenty of evidence about the impact of moving on the child herself" but the officer failed to conduct an appropriate analysis: *Bautista,* at para 30.

[22] In *Nagamany,* also cited by the applicants, Justice Gascon concluded that the officer had not studied the best interests of Mr Nagamany's daughters with a great deal of attention, as was required in law, including their worries about being separated from their father and the general impact of his removal on their lives. The decision also did not communicate any empathetic efforts by the officer to understand the evidence or demonstrate openness and sensitivity to their situation, but instead unreasonably discounted any adverse impact on them. Gascon J. referred to evidence that the officer ignored and to the officer's failure to consider the children's relationship with their father and the impact of his removal: *Nagamany,* at paras 39-41. The officer did not apply the legal standards established in *Kanthasamy* and *Baker*: *Nagamany,* at paras 37-38 and 44-45.

[23] In my view, the applicants have not shown that the officer committed a reviewable error by assessing the adaptability of the children to the education system and life in Brazil in response to the applicants' submissions on that very issue. Specifically, the officer did not commit the same kind of error as occurred in *Bautista* and *Nagamany*. The officer did engage with the BIOC submissions and evidence and did so partly in response to the applicants' own submissions on adaptability. The officer considered these children, not children in general.

[24] The applicants have also not persuaded me that the officer erred in law by failing to apply the *Chirwa* approach to H&C applications under subsection 25(1), as endorsed in *Kanthasamy*. The officer considered the applicants' submissions on the impact of removal. The officer considered the evidence related to Olivia's congenital heart condition and her medical care in both Canada and Brazil, as well as a psychological report about her learning challenges (the assessment of which was not challenged on this application).

[25] In *Williams*, Justice Russell held that a "threshold test of undeserved or undue hardship or a threshold 'basic needs' approach to a best interests analysis … does not adequately determine – in a way that is 'alert, alive and sensitive' – what is in the child's best interest": *Williams*, at para 66. In this case, I do not believe that the officer took such a threshold "basic needs" approach to the BIOC generally, or to Olivia's heart condition in particular. The officer considered the evidence that Olivia's medical needs would be optimally served in Canada but concluded that there was insufficient evidence adequate health care was not available or accessible in Brazil. The applicants have not demonstrated that this conclusion was not open to the officer on the record, for example through evidence about the inability to monitor or treat Olivia's heart condition in Brazil that the officer ignored.

[26] For these reasons, I conclude that the applicants have not shown that the officer's assessment of the BIOC contained a reviewable error as described in *Vavilov* and *Kanthasamy*.

(2) Did the officer give unreasonable weight in the BIOC assessment to the applicants' lack of status in Canada?

[27] The applicants contended that the present case was strikingly similar to the facts in *Bonnardel v Canada (Citizenship and Immigration)*, 2019 FC 712. The applicants contended that the officer's BIOC assessment was unreasonably constrained because it gave more weight to the applicants' violation of immigration laws and found, without justification, that "the cumulative balance of the factors raised in this application do not favour the applicants".

[28] In *Bonnardel*, the Court set aside an officer's H&C decision. After setting out extended excerpts from the officer's reasoning, Justice Campbell stated that the officer had found that the parents' immigration misconduct was "a factor that trumped" the children's best interests: *Bonnardel*, at para 12. He concluded that the officer's "extraordinary focus" on the children's parents' immigration misconduct caused the officer to effectively minimize the best interests of the children: *Bonnardel*, at para 13. Justice Campbell relied on and quoted a passage from *Baker*, in which the Supreme Court stated that if the "interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable": *Baker*, at para 75.

[29] I agree with the applicants that the underlying facts in *Bonnardel* and this case have considerable similarities and a few differences (including that the children here speak Portuguese, the principal language of Brazil). I also agree that the officer's overall conclusion in this case was influenced significantly by the applicants' 17 years in Canada without legal status. Comparing the two officers' BIOC assessments, neither officer relied on or mentioned the

respective applicants' lack of status or misconduct during their respective BIOC analyses (as excerpted in *Bonnardel*). The potential application of *Bonnardel* to this case resolves to whether the present officer's consideration of the applicants' lack of status in Canada was an "extraordinary focus" or a matter that trumped the proper assessment of the BIOC and in that connection, whether the children's best interests were minimized contrary to *Baker*, at para 75.

[30] The applicants raised a substantively similar issue as it concerns their position on establishment in Canada. I will therefore consider the point below.

B. ***Establishment in Canada***

[31] The applicants made two arguments to support their position that the officer's assessment of the applicants' establishment in Canada was unreasonable.

[32] First, the applicants submitted that the officer unreasonably held their adaptability, resilience and success in settling in Canada against them when the officer concluded that they would likely be able to re-establish themselves in Brazil. The applicants submitted that the success of an applicant in beating the odds, securing gainful employment and establishing themselves in Canada must not be viewed as a negative factor in an H&C application (citing *Kolade v Canada (Citizenship and Immigration),* 2019 FC 1513, at paras 23-24; *Singh v Canada (Citizenship and Immigration)*, 2019 FC 1142, at para 37; and *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336, at para 26).

[33] In my view, the officer did not make the reviewable error alleged by the applicants. The officer referred to the applicants' adaptability and resilience in an assessment of their submission that if they returned to Brazil, they would suffer a loss of employment and a loss of financial independence, and would be unable to support their daughters. The officer did not accept the applicant's position. The officer concluded that they would be able to re-establish themselves in Brazil, owing to their prior residence in Brazil, their personal characteristics, the support of their family in Brazil on return, their work experience in Canada (including courses taken) and the money they had saved which could be used during their search for employment. The officer's observation that the applicants were "extremely adaptable and resilient", taken in context, was responsive to their submission on their ability to find work in Brazil; the officer did not apply an improper Catch-22 by turning the applicants' own evidence of their establishment in Canada against them to diminish their position on the H&C application: see *Kolade*, at para 23-24.

[34] The applicants' second argument on establishment was that their lack of status in Canada was unreasonably given undue or "exclusive" weight, despite the evidence showing establishment, including that the applicants have been in Canada for 17 years, had two children, have established themselves through employment and friendships in the community, are self-supporting and are well-respected by their friends in Canada. The applicants focused on the statement in the officer's overall conclusion where the officer gave "more weight in this application to the immigration laws as they exist in Canada" and did not find that their personal circumstances justified an exemption from the law. The applicants referred to Justice Rennie's reasons in *Aboubacar v Canada (Citizenship and Immigration)*, 2014 FC 714, at para 20. They

argued that the officer heavily discounted their significant establishment on the basis they had not applied for work permits or remained without status and had engaged in unauthorized work.

[35] The respondent submitted that the applicants had remained in Canada for some 17 years before making any attempt to regularize their status. According to the respondent, this consideration was a relevant factor in assessing their establishment in Canada and the officer weighed it along with evidence of their work and ties to the community. The respondent submitted that if an applicant had no right to remain in Canada and did so absent circumstances beyond their control, they should not be rewarded for accumulating time in Canada. In this case, there was no suggestion that the applicants remained in Canada for circumstances beyond their control. The respondent submitted that the applicants' position was really that undue weight was given to their stay in Canada without legal status, but disagreement about the weight of evidence does not amount to a reviewable error. The respondent noted that H&C relief under subsection 25(1) was not intended to be an alternative immigration scheme: *Kanthasamy*, at para 23.

[36] I am not persuaded that the applicants have demonstrated that the officer made a reviewable error. The applicants submitted that the officer ignored some specific evidence, "heavily discounted" their overall evidence of establishment and gave "exclusive" weight to the applicants' lack of status. There are several answers to these arguments which cumulatively lead to my conclusion on this issue in this case:

a) First, the applicants did not contend that the officer erred in law by even considering the fact that the applicants have been in Canada since 2003 without legal status, and did not seek permission to remain in Canada until the H&C

application. In other words, they did not doubt the relevance of their lack of status to the officer's decision.

b) Second, the Court is not permitted to reassess or re-weigh the evidence before the officer; an intervention may be justified if the officer reached an untenable outcome or fundamentally misapprehended or failed to account for material evidence: *Vavilov*, at paras 125-126; *Gordillo v Canada (Attorney General)*, 2022 FCA 23, at para 62. Applying that standard, the applicants have not demonstrated a reviewable error.

c) Third, the officer noted that the applicants had been in Canada for 17 years without attempting to regularize their status in Canada and found that the evidence did not support that their failure to leave Canada was "outside their control". The applicants did not challenge the latter statement on the facts or the law, and correctly so given the decisions of the Court: see *Jaramillo Zaragoza v Canada (Citizenship and Immigration)*, 2020 FC 879, at para 36; *Lada v Canada (Citizenship and Immigration)*, 2020 FC 270, at para 30; *Bruce v Canada (Citizenship and Immigration)*, 2015 FC 1049, at para 14; *Singh v Canada (Citizenship and Immigration)*, 2012 FC 612, at paras 8-11; *Mann v Canada (Citizenship and Immigration)*, 2009 FC 126 at paras 12-15.

d) Fourth, the respondent is correct that the majority of the Supreme Court in *Kanthasamy* held that *IRPA* subsection 25(1) was not intended to be an alternative immigration scheme and was not designed to duplicate refugee proceedings under section 96 or subsection 97(1): *Kanthasamy, per* Abella J., at paras 23-24. Similarly, Justice Moldaver's dissenting opinion characterized subsection 25(1) as

> a safety valve that supplements the two normal streams by which foreign nationals can come to Canada permanently, i.e., the immigration and refugee processes in the *IRPA: Kanthasamy*, at paras 63, 85 and 88-90. In this case, the applicants remained in the country from 2003 until their H&C application without filing any application for legal status in Canada through either of the two available alternatives (immigration or refugee protection). They also did not seek to regularize their employment status by obtaining work permits during those years. It was not unreasonable for the officer to consider both points. In my view, it was also not unreasonable for the officer to give these circumstances "more weight" than a situation in which an applicant had attempted but failed to regularize their legal status in Canada and spent time in Canada while doing so.

[37] With all of these considerations in mind, I do not believe that the officer's overall conclusion contained a reviewable error based on an "extraordinary" focus on the applicants' lack of status, or because the officer unlawfully minimized the BIOC, discounted the evidence of establishment, or failed to give sufficient consideration or effect to the applicants' submissions on those topics.

[38] For these reasons, I conclude that the applicants have not demonstrated that the officer's H&C decision contained a reviewable error in its assessment of their establishment in Canada.

III. Conclusion

[39] The application will therefore be dismissed. Neither party proposed a question for certification and none will be stated.

JUDGMENT in IMM-3177-20

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. No question is certified under paragraph 74(*d*) of the *Immigration and Refugee Protection Act*.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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