Federal Court  Cour fédérale

Date: 20220303

Docket: IMM-5365-20

Citation: 2022 FC 295

Ottawa, Ontario, March 3, 2022

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

AURELIA BERNABE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Bernabe, is challenging the decision of a Senior Immigration Officer ("Officer") at Immigration, Refugees and Citizenship Canada [IRCC], who refused her application for permanent residence based on humanitarian and compassionate grounds ("H & C Application").

[2] Ms. Bernabe was 80 years old at the time that her H & C Application was considered. Her request to remain in Canada was primarily based on three grounds: i) the best interests of her two grandchildren, one of whom has a severe disability; ii) the hardship of returning to her country of citizenship, the Philippines, where she no longer has any immediate family members; and iii) her establishment in Canada after living continuously as a visitor in the home of her only child and her family for approximately ten years.

[3] Ms. Bernabe argued that the Officer unreasonably considered irrelevant alternative immigration streams. Ms. Bernabe also argued that the Officer failed to sufficiently consider the best interests of her two grandchildren.

[4] I agree with Ms. Bernabe. The Officer's evaluation of the best interest of Ms. Bernabe's grandchildren was unduly narrow and failed to give sufficient consideration to their interests. I also find the Officer unreasonably considered a parental sponsorship application or super visa application as possible alternatives to an H & C Application, despite the clear evidence that the family would not meet the minimum income thresholds. Moreover, I find the Officer's reliance on the potential of continual extensions of temporary visitor status was an irrelevant consideration.

[5] For the reasons set out below, I am allowing this application for judicial review.

II. Background Facts

[6] Ms. Bernabe is a citizen of the Philippines. At the time the Officer was considering her H & C Application, she was 80 years old and had lived in Canada with her daughter, son-in-law and two grandchildren for approximately ten years.

[7] Ms. Bernabe has no remaining immediate family members in the Philippines. She has a sister who lives in the United States. Her brother died in 2015.

[8] Ms. Bernabe initially came to Canada as a visitor in 2010, primarily because her daughter was finding it difficult to continue to visit her now that she was working and had children. While Ms. Bernabe was in Canada, her daughter was going through a difficult third pregnancy that ultimately ended in a stillbirth. Ms. Bernabe initially extended her stay to support her daughter during this period.

[9] Ms. Bernabe's youngest grandchild, who at the time the application was considered was approximately ten years old, was diagnosed with cerebral palsy around this time. Over the next ten years, the family extended Ms. Bernabe's visitor record so that she could continue to stay with her family in their home in Canada.

[10] Ms. Bernabe provides care and support to her daughter's family. Ms. Bernabe's youngest grandchild needs significant support in doing his daily tasks safely. Both her daughter and son-in-law work in jobs—i.e. construction and food service at the airport—where the hours do not

correspond to the children's school hours. In particular, Ms. Bernabe's daughter has to work night shifts and on the weekend. The family does not earn a sufficient income to meet the minimum income threshold required to be eligible to sponsor Ms. Bernabe through the parental sponsorship stream.

[11] In 2016, Ms. Bernabe's visitor record extension included a remark from IRCC which stated, "For further extensions to be considered, provide proof that application for permanent residence has been submitted." This remark led the family to make an H & C Application—the only permanent residence application for which she would be eligible to apply. In her next application for a subsequent visitor record extension, Ms. Bernabe indicated that she was in the process of preparing an H & C application.

[12] In December 2018, Ms. Bernabe submitted an H & C application. In a decision dated October 6, 2020, this application was refused.

III. Issues and Standard of Review

[13] Ms. Bernabe challenges the decision on the basis of the Officer's analysis of the best interests of the children ("BIOC") and their consideration of irrelevant alternative immigration streams.

[14] The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] confirmed that reasonableness is the presumptive standard of

review when reviewing administrative decisions on their merits. This case raises no issue that would justify a departure from that presumption.

[15] In *Vavilov*, the Supreme Court of Canada described the reasonableness standard as a deferential but nonetheless "robust form of review," where the starting point of the analysis begins with the decision-maker's reasons (at para 13). A decision-maker's formal reasons are assessed "in light of the record and with due sensitivity to the administrative regime in which they were given" (*Vavilov* at para 103).

[16] The Court described a reasonable decision as "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). Administrative decision-makers, in exercising public power, must ensure that their decisions are "justified, intelligible and transparent, not in the abstract, but to the individuals subject to it" (*Vavilov* at para 95).

[17] In *Vavilov*, the Supreme Court of Canada explained that the impact of a decision on an individual could be a relevant contextual consideration in evaluating the reasonableness of a decision-maker's reasons: "Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes" (*Vavilov* at para 133). The underlying decision is about whether Ms. Bernabe, who is over 80 years old, can continue to live with her only remaining daughter and her family and assist in caring for her grandchildren, who she has lived with for the last ten years. The interests at stake for Ms. Bernabe, her daughter,

son-in-law and two grandchildren—who are all affected by this decision—are significant (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 31 [*Baker*]).

IV. Analysis

A. *H & C Applications*

[18] Foreign nationals applying for permanent residence in Canada can ask the Minister to use their discretion to relieve them from requirements in the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] because of humanitarian and compassionate factors, including the best interests of any child directly affected (*IRPA*, s 25(1)). The Supreme Court of Canada in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], citing *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338, confirmed that the purpose of this humanitarian and compassionate discretion is "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'" (at para 21).

[19] Given that the purpose of humanitarian and compassionate discretion is to "mitigate the rigidity of the law in an appropriate case", there is no proscribed and limited set of factors that warrant relief (*Kanthasamy* at para 19). The factors warranting relief will vary depending on the circumstances, but "officers making humanitarian and compassionate determinations must substantively consider and weigh all the relevant facts and factors before them" (*Kanthasamy* at para 25; *Baker* at paras 74-75).

B. *Unreasonable assessment of the best interests of the children*

[20] Subsection 25(1) of the *IRPA* directs officers considering applications for humanitarian and compassionate relief to consider "the best interests of the child directly impacted." In considering this requirement, the Supreme Court of Canada in *Kanthasamy* found: "Where, as here, the legislation specifically directs that the best interests of the child who is 'directly affected' be considered, those interests are a singularly significant focus and perspective" (*Kanthasamy* at para 40).

[21] The Officer's analysis of the BIOC was unduly narrow. The assessment focused on answering two limiting questions that were certainly not determinative of the issue before them: i) was Ms. Bernabe the primary caregiver for her two grandchildren; and ii) was Ms. Bernabe the only one who could provide care to her youngest grandchild who had a severe disability. Instead of a holistic assessment of the children's interests, the Officer limited their analysis to answering these questions, and then, given the negative answers to these two questions, found that the BIOC was not a determinative factor in this assessment.

[22] I find the Officer's unduly narrow focus limited their view of the evidence. This evidence was viewed through a lens of determining whether Ms. Bernabe and her family had provided sufficient evidence to demonstrate that she was a primary caregiver or that she was the only feasible option who could provide care to her grandson. The Officer concluded the evidence was insufficient to establish either of these points. Yet, the family never made these claims, nor is the Officer's discretion limited to consider the application in this narrow way.

[23] The evidence was that Ms. Bernabe was an integral part of the family, having lived in the family home for the last ten years, and that she assisted with childcare, including the added level of supervision that the family's youngest son required with his daily activities. Medical evidence and an affidavit from Ms. Bernabe's daughter was filed to support this contention. The medical evidence described the exceptional needs that the youngest grandchild, who is 12 years old, requires.

[24] The youngest son has been diagnosed, among other issues, with cerebral palsy, extreme prematurity, a seizure disorder, and global development delays. His doctor explained that he requires "close supervision when descending stairs, dressing and supervision in the shower." Both letters from doctors, confirm the need for extra-parental childcare assistance: "The child's family will need all the help they can get at home to provide the proper care that this child requires"; and that Ms. Bernabe, specifically, "is a great support for [the child's] activities of daily living and safety and care." Ms. Bernabe's daughter explains that her mother assists her child with his "day-to-day activities of getting dressed, taking a shower, descending stairs, picking him up from the bus stop, and assisting him with homework." She notes, "as a parent with a son who has special needs, I need all the help I can get."

[25] In addition, the family provided evidence that both parents' work hours do not correspond to the school day, with Ms. Bernabe's daughter working odd-hour shifts over the weekend and evenings at the airport. As noted above, evidence of the family's limited financial means was also before the Officer.

[26] The Officer's treatment of this compelling evidence was distorted by their focus on narrow issues, inconsistent with the compassionate approach required. The Officer's analysis is devoid of a real consideration of how the two children "would be impacted, both practically and emotionally, by the departure of the Applicant in the particular circumstances of the case" (*Motrichko v Canada (Minister of Citizenship and Immigration)*, 2017 FC 516 at para 27). The Officer's decision falls well short of the requirement that the children's interests be "'well-identified and defined' and examined 'with a great deal of attention' in light of all the evidence" (*Kanthasamy* at para 39, citing *Legault v Canada (Minister of Citizenship and Immigration)*, [2002] 4 FC 358 (CA) at paras 12, 31; *Kolosovs v Canada (Minister of Citizenship and Immigration)*, 323 FTR 181 at paras 9-12).

C. *Proposed alternative immigration routes are irrelevant considerations*

[27] The Officer factored into their assessment that there was a possibility that other immigration options were available to Ms. Bernabe through a parental sponsorship application and visitor visas. Neither are relevant options for Ms. Bernabe. Accordingly, it was unreasonable for the Officer to factor these irrelevant considerations into their analysis.

[28] Parental sponsorship is not a real and viable alternative for this family. Ms. Bernabe provided evidence in her H & C Application that her daughter did not meet the necessary minimum income cut-off for the program. The Officer was aware of this and acknowledged that the family did not financially qualify to apply for the program. Nonetheless, the Officer considered that this may be a program which may someday be available if the family's income increases. This is an irrelevant consideration.

[29] Suggesting the family could simply wait until they might earn enough money to apply is also demonstrative of an approach that is lacking in compassion for the situation of this family. In practical terms, what does it mean to wait in these circumstances? To put it bluntly, grandparents die and children grow up. The family was seeking relief in their current circumstances, where they were not eligible for the parental sponsorship program.

[30] The Officer accepted that the family could not currently apply for the sponsorship program. Yet, without any evidence to suggest this could change in the near future, the Officer concluded “the applicant has provided insufficient evidence to demonstrate that they are unable to apply for permanent residence in the normal manner or that they would endure hardship in doing so.” The Officer claimed that while it may be “more convenient” for the family to apply for permanent residence through the H & C stream, the objective of the program is not convenience. This statement mischaracterizes the situation of Ms. Bernabe and her family. This is not a situation of preference or convenience; the family does not qualify for any other permanent residence program, as has already been accepted by the Officer.

[31] The Officer’s consideration of temporary visitor programs is also an irrelevant consideration. First, the family does not financially qualify for the parent super visa multiple-entry program, as mentioned by the Officer. But, more importantly, the super visa or regular visitor visas are requests for temporary relief and not the equivalent to what the Applicant is seeking — permanent residence in Canada.

[32] The parties spent a considerable amount of time on the issue of whether it was unreasonable for the Officer to not consider the last notation on the visitor visa record, which indicated that Ms. Bernabe would have to demonstrate that she had applied for permanent residence, on her next request for an extension. The Applicant argued that this notation was significant because it could mean that subsequent applications for visitor visas would not be approved without any further application for permanent residence. The Respondent argued that it can be presumed that the Officer considered it even if it was not mentioned and that the notation did not have the significance ascribed to it by the Applicant.

[33] In my view, the more significant issue is that the consideration of these avenues for temporary relief are irrelevant to the question that was actually before the Officer—whether there were exceptional circumstances to grant permanent status in Canada, not whether Ms. Bernabe could stay temporarily. As noted by this Court in *Greene v Canada (Minister of Citizenship and Immigration)*, 2014 FC 18 at paragraph 10, and more recently by Justice Zinn in *Rocha v Canada (Minister of Citizenship and Immigration)*, 2022 FC 84 at paragraph 31, it is an error to suggest temporary residency is "a suitable alternative to permanent residency."

V. Conclusion

[34] For the above reasons, the application for judicial review is granted and the matter is sent back to be re-determined by a different officer. Neither party proposed a question for certification and none arises.

JUDGMENT IN IMM-5365-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the matter is sent back to be re-determined by a different officer;

2. No question for certification was proposed and none arose.

"Lobat Sadrehashemi"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-5365-20
STYLE OF CAUSE:	AURELIA BERNABE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 15, 2021
JUDGMENT AND REASONS:	SADREHASHEMI J.
DATED:	MARCH 3, 2022

APPEARANCES:

Luke McRae	FOR THE APPLICANT
Norah Dorcine	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Bondy Immigration Law Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT