Federal Court  Cour fédérale

**Date: 20220303**

**Docket: IMM-1042-20**

**Citation: 2022 FC 299**

**Toronto, Ontario, March 03, 2022**

**PRESENT: Justice Andrew D. Little**

**BETWEEN:**

**NIGEL RAYMOND WEDDERBURN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision on January 15, 2020, by an officer denying the applicant's request for permanent residence with exemptions based on humanitarian and compassionate ("H&C") grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "*IRPA"*).

[2] For the reasons below, the application is allowed.

## I. Facts and Events Leading to this Application

[3] The applicant is a citizen of Jamaica. He lives in Oshawa, Ontario, with his common-law partner, their son aged five, and his partner's son aged 15.

[4] The applicant came to Canada as a worker in June 2014 on a work permit valid until June 2016. While in Canada, he reconnected with a childhood friend, Kenisha Simms, who is now his wife. They married in a ceremony in Canada on March 31, 2015. Their son was born on March 16, 2016. Ms Simms (who was also called Mrs Simms-Wedderburn in the materials) also has a 15-year-old son, who is the applicant's stepson.

[5] At the time the applicant arrived in Canada, he was seeking a divorce from his former spouse in Jamaica. When Mr. Wedderburn and Ms Simms married in March 2015, his divorce in Jamaica had apparently been finalized.

[6] In June 2016, the applicant submitted his application for permanent residence, sponsored by his wife. He submitted the legal paperwork from the court in Jamaica to demonstrate that he was divorced.

[7] The applicant received a "procedural fairness" letter dated March 2, 2018, advising him that Immigration, Refugees and Citizenship Canada ("IRCC") was not satisfied that he was free to marry his sponsor. The letter advised that IRCC had received information from the visa office in Kingston, Jamaica, indicating from the Deputy Registrar of the Jamaican court that it had no evidence that a petition for dissolution of his marriage had been filed in the Supreme Court of Jamaica. The letter advised that the copy of the Decree Absolute filed with his application for

permanent residence was “not authentic”. Therefore, his marriage to his sponsor was “not valid”. The letter requested that the applicant send any information and/or documents that may respond to this issue within 30 days.

[8] The applicant did not respond to the procedural fairness letter within 30 days. But he took other steps. He obtained a court order from the Ontario Superior Court dated September 14, 2018, to effect a divorce from his Jamaican spouse. In October 2018, he filed a supplementary information package to support his request for permanent residence on H&C grounds.

[9] In his supplementary information, the applicant stated that his former wife in Jamaica provided him with a Decree Absolute that she alleged to have obtained from the Jamaican Registrar General’s Department. He also stated:

- “[u]nknowing to me, my ex-wife contacted Canadian immigration and informed them that the divorce was done fraudulently…” ;
- he “did not know that my ex-wife provided me with a fraudulent Divorce document”;
- “[u]nknowing to me that this divorce document was fake, I proposed to and married the love of my life Kenisha Simms”.

[10] Mr. Wedderburn also requested an exemption under subsection 25(1) from a number of provisions in the *IRPA* and the *Immigration and Refugee Protection Regulations*, SOR/2002-227, including *IRPA* subsection 16(1). In seeking those exemptions, he specifically stated: “I did not knowingly misrepresent my marital status” to his former Jamaican spouse.

[11] In an affidavit filed in this Court (to which the respondent made no objection), the applicant advised his understanding that certain individuals in Jamaica had engaged in a fraudulent scheme to prepare fake and invalid "divorce decrees" that appeared to be issued by the Supreme Court of Jamaica. Several people had been charged, including the individual in the law office he had retained to obtain the divorce. In other words, the applicant was the victim of a fraudulent scheme that occurred in Jamaica while he was in Canada.

[12] By letter dated May 13, 2019, IRCC advised the applicant that he had submitted a fraudulent divorce decree and that the time of his marriage to his sponsor, Ms Simms, on March 31, 2015, he was still married to his Jamaican wife. IRCC's letter advised that his marriage to his sponsor was therefore invalid and illegal in the eyes of Canadian law and he was not considered a spouse of the sponsor under subparagraph 125(1)(*c*)(i) of the *Regulations*. Mr. Wedderburn's application for permanent residence under the spouse or common-law partner in Canada class was therefore refused.

[13] In addition, IRCC's letter stated that the act of uttering a fraudulent document material to his application contravened *IRPA* paragraph 40(1)(*a*) and that there was sufficient information and evidence to establish that the applicant had engaged in misrepresentation with the intent to circumvent Canadian law. The applicant was therefore a person inadmissible to Canada under *IRPA* paragraph 40(1)(*a*). The letter advised that the "inadmissibility will be reported pursuant to [subsection] 44(1) of the Act".

[14] The applicant did not update the H&C application by filing the May 13, 2019 letter and did not make any further submissions for his H&C application in response to it.

## II. The Decision under Review

[15] By decision dated January 15, 2020, an officer denied the applicant's H&C application. The officer's reasons are also dated January 15, 2020.

[16] Describing the "history" of the application for H&C relief, the officer stated that the applicant's sponsorship application was refused on May 13, 2019 because the marriage that took place on March 31, 2015 was not valid as the applicant was not divorced from his previous marriage at the time. The officer noted that the previous marriage was dissolved on September 14, 2018 by a Canadian court order. The officer made no reference to the applicant's statements about the fraudulent divorce decree nor to the applicant's statement about an unknowing misrepresentation.

[17] The officer considered three main topics related to the substance of the H&C application: Establishment, Family Ties/Family Separation, and Best Interests of the Children ("BIOC").

[18] In considering Family Ties/Family Separation, the officer recognized that the *IRPA* anticipated the need for family reunification and that sponsorship applications were available for both spouses and common-law partners of permanent residents and Canadian citizens. Acknowledging that Ms Simms's sponsorship application was rejected, the officer noted that "the reason for why it was rejected has been resolved as the applicant obtained a Canadian court order dissolving his previous marriage. It is unclear if they are re-married again, however, even if they are not re-married they can re-apply under common-law partnership sponsorship".

[19] The officer further noted that there was "little evidence provided to suggest [the applicant's Canadian wife] cannot submit another in-Canada sponsorship application", that "even if [she chose] to submit an outside of Canada sponsorship application, there [was] little evidence provided to suggest the separation would be permanent", or that Ms Simms could not live in Jamaica with the applicant while the sponsorship application took place. (There was no mention of the children here.)

[20] With respect to the BIOC, the officer recognized that the applicant lived with his spouse, son and stepson and that he played an active part in their lives. The officer compared a positive decision for the applicant on the lives of the two sons, and a negative decision in which the applicant "might have to leave Canada, depending if Mrs Simms–Wedderburn submits another in-Canada sponsorship application". If she did, there was "little evidence submitted to suggest Mr. Wedderburn will have to leave Canada while the application takes place". After considering various other factors, including the possibility of relocation of the whole family to Jamaica, the officer found as follows:

> Having said that, I acknowledge it is hard to suggest it is in the children's best interest to remove their capable, loving father from their life. Therefore, I find that it is in the best interests of Daniel and Aaron for Mr. Wedderburn to continue to reside in Canada. I find the best interests of the children considerations favours a positive decision. However, I do not find it to be the determinative factor, as I do not find Mr. Wedderburn's presence to be a necessity for the children's well-being.

[21] In the result, the officer was not convinced on the evidence that the applicant's particular circumstances warranted an exemption under subsection 25(1) of the *IRPA*. The officer dismissed the application for H&C relief.

## III. Analysis

[22] The applicant raised a number of issues related to both procedural fairness and the reasonableness of the officer's substantive H&C decision. In my view, the application turns on a single issue.

[23] The standard of review for the substantive H&C decision is reasonableness, as described in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65. 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. The reviewing court must read the reasons provided by the decision maker holistically and contextually, and in conjunction with the record: *Vavilov*, at paras 91-96, 97, and 103; *Canada Post Corp v Canadian Union of Postal Workers,* 2019 SCC 67, at paras 28-33.

[24] Considering both the reasoning process and the outcome, a decision must be reasonable in relation to the facts and law that constrain the decision maker: *Vavilov*, esp. at paras 83-86, 99, 101, 105-106 and 194. For factual constraints in the record, the question is whether the officer fundamentally misapprehended the evidence, reached an untenable result, or ignored or failed to account for critical evidence in the record that runs counter to the conclusion: *Vavilov*, at paras 101 and 125-126; *Canada (Attorney General) v Best Buy Canada Ltd*, 2021 FCA 161, at paras 122-123 (quoting *Cepeda-Gutierrez,* at paras 14-17); *Federal Courts Act*, RSC 1985, c F-7, paragraph 18.1(4)(*d*).

[25] 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 and 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 v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909, at para 35 and paras 38-41. On an H&C application, an officer must consider the impact of removal on the particular individuals affected, including any hardship the individuals may face. Children will rarely, if ever, be deserving of any hardship: *Kanthasamy*, at paras 32-33, 41, 45, 48 and 59.

[26] For the reasons that follow, I conclude that the officer's decision did not respect the legal and factual constraints in the H&C application.

[27] The officer's reasons for the H&C decision disclose that the officer was aware that the applicant's divorce certificate was "fraudulent". In addition, the officer's reasons recognized that on May 13, 2019, the applicant's sponsor was found to be ineligible as the applicant was still married when he married her, and therefore, the marriage was not valid.

[28] The officer did not state the source of the information about the negative decision on May 13, 2019. The applicant submitted that the officer's reasons imply that the information came from the May 13, 2019 letter to the applicant. However, that letter was not produced in the Certified Tribunal Record and the applicant did not update his application to include that letter.

[29] The respondent submitted that it was the applicant's responsibility to update his H&C application to ensure that it included IRCC's letter dated May 13, 2019, and to draw the impact of his inadmissibility under *IRPA* section 40 to the officer's attention. The respondent noted that the applicant had an onus to provide all the evidence to support his application, including by way of update, and that his failure to provide additional information was at his peril (citing *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 FCR 635, at para 8). If he had, and if he had filed submissions on the impact of the inadmissibility finding under section 40, it might have avoided the issues raised on this judicial review application.

[30] In response to that position, the applicant submitted that the officer should have understood the legal implications of the statements in his H&C application and should have obtained a copy of the May 13, 2019 letter.

[31] At the hearing in this Court, the parties agreed that the officer must have consulted the Global Case Management System when making the H&C decision. Otherwise, the officer could not have known that the sponsorship application was refused on May 13, 2019, which the officer expressly mentioned twice. It stands to reason that an important matter like the inadmissibility of an individual under *IRPA* section 40 would likely be entered in the GCMS. Unfortunately, the GCMS entries were not in the Certified Tribunal Record, nor were they filed in the Application Record. The officer also did not provide an affidavit on this application, as is customary. As a result of the absence of information, we do not know whether the GCMS entries for May 13, 2019, included any reference to the inadmissibility finding under section 40, or whether the officer inadvertently may have overlooked the contents of an entry.

[32] It is not necessary to resolve the question of whether it was (solely) the applicant's responsibility to update the H&C application, or whether the officer should have inquired further in the GCMS and/or obtained a copy of the May 13, 2019 letter either internally or from the applicant (as the applicant argued was required for procedural fairness). Nor do I need to determine whether the applicant and the officer both should have taken such actions.

[33] Instead, the key question is whether all of the critical evidence was taken into account. The applicant submitted that the officer did not account for evidence that was important to the outcome of the H&C application. IRCC's procedural fairness letter dated March 2, 2018 was in the Certified Tribunal Record and stated that the copy of the Jamaican Decree Absolute filed with his prior application for permanent residence was "not authentic" and therefore his marriage to his sponsor was "not valid". The letter referred to several provisions of the *IRPA*, including subsection 16(1). In the supplementary information provided after the procedural fairness letter, the applicant expressly referred three times to the "fraudulent" or "fake" divorce decree in his application for H&C relief and to his admitted (inadvertent) prior misrepresentation about his marital status. He also requested an exemption from all of the *IRPA* provisions mentioned in the procedural fairness letter, including subsection 16(1) expressly because of that misrepresentation.

[34] I agree that the officer failed to account for the applicant's candid admissions about submitting a fraudulent document, making a misrepresentation about his marital status and his requests for exemptions including under *IRPA* subsection 16(1).

[35] The importance of this evidence was borne out in two ways in the officer's H&C reasoning. First, the officer concluded that the reason for the sponsorship application's rejection had been "resolved" because the applicant obtained the Canadian court order dissolving his former marriage. The officer found that the applicant and his wife could therefore re-apply for his permanent residence with her as sponsor. Second, the evidence was important to the two critical issues in the H&C application: Family Ties/Family Separation, and the BIOC. In effect, the premise of the officer's stated reasoning on both issues was that Mrs Simms–Wedderburn could re-apply to sponsor the applicant, that it was not clear that the family would have to be separated (including the applicant from his two sons) and in any event, any separation would not be for a significant period of time. Alternatively, the family could move to Jamaica as a unit, where Mrs Simms–Wedderburn could re-apply to sponsor the applicant. With respect to the two sons, the officer concluded that the bests interests of the children favoured a positive decision on the H&C application (i.e., that the family would stay in Canada together), although it was not a decisive factor.

[36] In that context, consideration of the critical facts relating to the applicant unknowingly filing a fraudulent document and making a misrepresentation about his marital status could have affected the officer's H&C assessment and possibly the broader outcome. Concerns under subsection 16(1) or a finding of inadmissibility based on misrepresentation under section 40 would have materially changed the key factual premises on which the officer assessed family separation and the BIOC as H&C factors. Inadmissibility would significantly prolong the potential separation of the family (and, specifically, the separation of the applicant from his five-year-old son and 15-year-old stepson) for at least five years under *IRPA* section 40 and would

also affect Mrs Simms–Wedderburn's ability to sponsor the applicant for permanent residence. Even in the absence of additional submissions from the applicant on hardship, the consequences of inadmissibility based on such a misrepresentation arose directly from the language in section 40 of the *IRPA*. I note that the applicant requested an exemption from subsection 16(1) in the H&C application, which also addresses the obligation of applicants to answer truthfully all questions put to them.

[37] In order to properly assess key issues raised in this H&C application, the officer had to consider the impact of all the critical evidence on the H&C factors raised by the application and to account for evidence that ran counter to the conclusions reached or that would undermine the premises on which the H&C decision was made: *Vavilov*, at paras 126 and 128; *Best Buy*, at paras 122-123. In reaching several critical conclusions, the officer did not consider important facts sourced from both IRCC itself and from the applicant's statements in his H&C application.

[38] Reading the decision as a whole in light of the record, and considering the officer's existing conclusion on the best interests of the applicant's sons, I conclude that the circumstances related to the filing and misrepresentation were of sufficient salience to require the officer to consider and account for them. Given the possibility for an impact on the overall outcome, the officer's failure to do so in these unusual circumstances rendered the decision unreasonable.

## IV. Conclusion

[39] The application is therefore allowed. This application turned on its specific facts and accordingly, neither party proposed a question for certification.

**JUDGMENT in IMM-1042-20**

**THIS COURT'S JUDGMENT is that**:

1. The application is allowed. The decision dated January 15, 2020 is set aside. The application is remitted for re-determination by another officer. The applicant shall be permitted to submit additional evidence and/or submissions for the purposes of the re-determination of his application.
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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| **DOCKET:** | IMM-1042-20 |
| **STYLE OF CAUSE:** | NIGEL RAYMOND WEDDERBURN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | OCTOBER 5, 2021 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | A.D. LITTLE J. |
| **DATED:** | MARCH 3, 2022 |

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| James Todd | FOR THE RESPONDENT |

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