Federal Court Cour fédérale

Date: 20220603

Docket: IMM-739-21

Citation: 2022 FC 816

Toronto, Ontario, June 3, 2022

PRESENT: Justice Andrew D. Little

BETWEEN:

JUAN GERMAN MARTINEZ MENDEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant asks the Court to set aside a decision of a senior immigration officer dated January 28, 2021, made under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "*IRPA*"). The officer refused the applicant's request for permanent residence in Canada with an exemption on humanitarian and compassionate ("H&C") grounds.

[2] The applicant is a citizen of Mexico. He currently lives in Calgary and is approximately 42 years of age. He has four children from past relationships, two of whom are Canadian citizens

and reside in Canada. He has no contact with his Canadian daughter. He is close with his Canadian son, Sebastian, who was born in 2012 and is now 9 years old.

[3] In May 2017, he submitted his first application for permanent residence with H&C relief. It was refused but the decision was later set aside on consent and remitted for redetermination. His application was again refused.

[4] In December 2019, the applicant submitted a second application for permanent residence with an exemption on H&C grounds. He filed evidence and made written submissions about the hardships he would face on a return to Mexico, the best interests of the child (“BIOC”), and his establishment in Canada.

[5] By decision dated January 28, 2021, with reasons dated the same day, the officer refused his request. This decision is the subject of the present application for judicial review.

[6] The applicant raised several issues to support his position that the decision was unreasonable under the principles described by the Supreme Court in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

[7] In my view, the determinative issue on this application is whether the officer’s decision lawfully assessed the best interests of Sebastian, the applicant’s son.

I. The Officer's BIOC Assessment

[8] The officer's H&C reasons recognized the applicant's position that he was very close with Sebastian and that his removal from Canada would be devastating for his son. The officer referred to a statutory declaration from Sebastian's mother, Anita, dated February 20, 2019. The officer mentioned that the applicant and Sebastian "have a deeply loving relationship" and that the applicant takes Sebastian "shopping, to movies, to sports, swimming, soccer, Chuck E. Cheese, and generally anywhere he wishes to go". The officer also noted that the applicant was well known at Sebastian's school, helped him with school work and was the emergency contact for his school and after-school care.

[9] However, the officer found that the H&C application included "no other evidence of the applicant's relationship with Sebastian, such as photographs or other letters of support that discuss their relationship". The officer found it was reasonable to believe that the applicant would have at least one photograph of Sebastian at some point and that the application would include a letter of support from someone other than Sebastian's mother that outlined the applicant's relationship with Sebastian in some way, such as a teacher. The officer mentioned that there were numerous letters of support from other individuals. While the officer "acknowledge[d] the contents" of Anita's affidavit, the officer found "the complete lack of any other evidence in this regard precludes a satisfactory understanding of the extent and nature of the applicant's relationship with Sebastian".

[10] The officer recognized the applicant's position that he supports Sebastian financially and would be unable to do so adequately in Mexico. The officer referred to the contents of Anita's

statutory declaration that the applicant pays child support “on time and without any issues and has always done so” and that it was normally done through cash. The officer referred to receipts for cash child support in the record, including handwritten notes and several cheque receipts. The officer found this evidence unsatisfactory, particularly because the cheque receipts were hard to read. The officer found there was “insufficient persuasive evidence that the applicant is currently supporting his son financially” and that even if he was doing so, there was insufficient persuasive evidence that he would face challenges securing work in Mexico or been unable to adequately support himself financially.

[11] The officer’s overall conclusion on the BIOC acknowledged that the applicant “may care for and see his son”, but found that there was “insufficient evidence to determine the current nature of their relationship, particularly since the application includes no evidence, such as photographs, that shows them together, or other evidence, such as letters of support from anyone other than Sebastian’s mother, that describes their relationship in some detail”.

[12] The officer therefore gave “only modest positive weight” to the BIOC.

[13] At the conclusion of the reasons, the officer stated that the BIOC received “somewhat more favourable consideration” than hardship in Mexico and establishment as factors on the applicant’s H&C application. The weight given to the BIOC “did not rise to a significant level” and that favourable weight was largely driven by evidence from Sebastian’s mother because there was very little other evidence to establish the nature of their relationship.

II. **Legal Principles**

[14] The standard of review of the officer's decision is reasonableness: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909, at para 44.

[15] The reasonableness standard was described in *Vavilov*. 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 starts with the reasons of the decision maker, which are read holistically and contextually with the record that was before the decision maker: *Vavilov*, at paras 84, 91-96, 97, and 103; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, at paras 28-33.

[16] 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.

[17] Subsection 25(1) of the *IRPA* gives the Minister discretion to exempt foreign nationals from the ordinary requirements of that statute and grant permanent resident status in Canada, if the Minister is of the opinion that such relief is justified by humanitarian and compassionate considerations. The H&C discretion in subsection 25(1) is a flexible and responsive exception to the ordinary operation of the *IRPA*, to mitigate the rigidity of the law in an appropriate case: *Kanthasamy*, at para 19.

[18] The discretion in subsection 25(1) must be exercised reasonably. Officers making humanitarian and compassionate determinations must substantively consider and weigh all the relevant facts and factors before them: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at paras 74-75; *Kanthasamy*, at paras 25 and 33.

[19] It is well established that when assessing 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. See *Kanthasamy*, at paras 35 and 38-40; *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2003] 2 FC 555, at paras 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*, at para 75. 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: *Kanthasamy*, at para 41; *Hawthorne*, at para 2.

[20] The onus of establishing that an H&C exemption is warranted lies with the applicant: *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2010] 1 FCR 360, at paras 35, 45 and 61. Lack of evidence or failure to adduce relevant information in support of an H&C application is at the peril of the applicant: *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 FCR 635, at paras 5 and 8.

III. Analysis

[21] The applicant's argument on the unreasonableness of the BIOC assessment focused on the officer's failure to consider the evidence and the errors in doing so. A primary concern was the officer's conclusion that there was insufficient evidence to determine the current nature of the applicant's relationship with his son.

[22] The applicant submitted that the officer's conclusions on the supporting evidence relating to his relationship with Sebastian were demonstrably incorrect. The applicant contended that Anita's statutory declaration provided many specifics on why Sebastian was dependent on the applicant. In addition, there were nine letters of support, plus a pre-sentence report about the applicant, that referenced the applicant's involvement with Sebastian, all of which were in the record before the officer. According to the applicant, this evidence contradicted the officer's statement that there was a "complete lack of any other evidence" to consider to understand the relationship between the applicant and his son.

[23] In addition, the applicant argued that the officer did not consider most of the contents of Anita's statutory declaration and did not consider the contents of any of the nine letters of support, and the pre-sentence report.

[24] The applicant further submitted that the officer did not reasonably consider the financial impact of his removal to Mexico on Sebastian and his mother. He pointed to evidence from Anita confirming that he had been regularly providing her with money to support Sebastian, in addition to buying him food, clothing and other items such as a tablet. The officer cast doubt on the applicant's provision of financial support and disregarded Anita's sworn declaration that he

provided financial support. In addition, the applicant's position in submissions to the officer was that if he were removed to Mexico, he would be unable to find work, or comparable work, that would allow him to continue to send financial support for Sebastian. The applicant submitted that the officer misinterpreted the evidence about his prospects for income in Mexico.

[25] Finally on the BIOC, the applicant referred to objective evidence before the officer about the impact of the loss of a father in a child's life. The applicant argued that there would be clear prejudice to Sebastian's life if his connection to his father, who has been involved in his life since birth, were relegated to a connection through a computer or telephone. The officer concluded that such a connection was satisfactory. In the H&C reasons, the officer noted that the applicant could "continue to maintain a relationship with his son, both remotely through different technologies like Zoom/Skype, text, email, or phone, and through possible future visits".

[26] Overall, the applicant submitted that the officer failed to make any finding about what would actually be in Sebastian's best interests. The applicant submitted that it was quite clear that it was in Sebastian's best interests that he remain in Canada as a permanent resident.

[27] The respondent's position was that the officer reasonably reviewed and assessed the documents provided by the applicant in detail. The respondent emphasized that the onus was on the applicant to provide evidence to support his H&C application. Taken as a whole, the officer was clear that the applicant had not provided sufficient information about his relationship with his son. He did not file his own statement or declaration. According to the respondent, while the

evidence from Sebastian's mother was a "good start", the officer reasonably expected that there would be more substantive evidence to support an H&C application.

[28] The respondent contended that the officer did not ignore the evidence in the statutory declaration provided by Sebastian's mother; rather, the officer's reasons reflected that the officer read it and the supporting letters as well as the documents regarding financial support. The respondent noted that the letters of support tended to refer to the applicant and Sebastian in only one or two sentences, consistent with the officer's concerns about insufficient evidence.

[29] For the following reasons, I agree with the applicant that the decision must be set aside.

[30] The officer made a critical (and likely determinative) conclusion that there was insufficient evidence in the record about the relationship between the applicant and his son for the purposes of assessing the BIOC. Before concluding that there was insufficient evidence on this issue, it was incumbent on the officer to consider all of the material evidence that was in the record: *Kanthasamy*, at paras 25, 33, 35 and 38-40; *Baker,* at paras 74-75. In addition, if the officer ignored or failed to give effect to important evidence that runs against one or more significant conclusions in the decision, the Court may conclude that the officer failed to respect the factual constraints in the record: *Vavilov*, at paras 125-126; *Canada (Attorney General) v Best Buy Canada Ltd*, 2021 FCA 161, at paras 122-123; *D Souza v Canada (Citizenship and Immigration)*, 2021 FC 1430, at paras 23-24 and 30; Aghaalikhani v Canada (Citizenship and Immigration), 2019 FC 1080, at para 24. See also the discussion in *Khir v Canada (Citizenship and Immigration)*, 2021 FC 160, at paras 36-50.

[31] The officer ignored substantially all of the evidence in Anita's statutory declaration about the applicant's relationship with their son. The officer referred expressly to evidence from only three of the 31 substantive paragraphs in Anita's statutory declaration. As the respondent properly acknowledged at the hearing in this Court, nothing in the reasons shows that the officer actually assessed the rest of the contents of the affidavit, which were clearly relevant to the issue on which the officer found "insufficient" evidence.

[32] Anita and the applicant were not in a romantic relationship and did not live in the same residence. In that context, Anita's statutory declaration included the following evidence that the officer did not mention or account for:

- the applicant was an "integral" and "critical" part of Sebastian's life;
- the applicant had provided financial support for Sebastian during his whole life. He pays for Sebastian's extracurricular activities (a long list was provided) and for food and clothing. He bought a tablet for Sebastian and "has daily contact with him through that";
- the applicant sees Sebastian every weekend for the full weekend, or longer if the applicant is not working days around the weekend. Shortly after Anita provided an earlier letter dated August 29, 2016, they switched from the applicant having Sebastian alternative weekends to this current arrangement of every weekend because Sebastian wanted more time with his father;
- the applicant does all the driving, picking up and dropping off for Sebastian at Anita's residence;

- when Anita is on vacation, the applicant has Sebastian for the entire time she is away;
- the applicant is "instrumental in Sebastian's social and cognitive development". He helps Sebastian with his homework and with social issues. He helps him with his Spanish as Sebastian is in a bilingual school learning English and Spanish;
- the applicant attends all of Sebastian's school events and helps him maintain his grades;
- the applicant is the only male role model that Sebastian has. He is a good role model for Sebastian and works hard to provide for his family. The applicant had overcome substance abuse issues and maintained his sobriety for years. Anita believed he was committed to ensuring Sebastian never sees difficulties like the applicant experienced in childhood;
- the applicant teaches Sebastian life lessons "in the special way only a father can do", giving him a different perspective on issues and helping him grow up with issues such as bullying, feeling overwhelmed, respecting others and anything else that arises. "Sebastian sees [the applicant] as a different person from [Anita] and knows he can go to him to discuss things or be with him when Sebastian and [Anita] have difficulty on any given issue";
- the applicant helps build Sebastian's self-esteem and confidence and gives him true unconditional love;
- the applicant teaches Sebastian about male hygiene issues;
- the applicant teaches Sebastian to respect Anita as a mother;

- the applicant teaches Sebastian to do chores and about disciplinary consequences, and sets boundaries and expectations for Sebastian;
- he lavishes all his extra attention on Sebastian;
- he takes Sebastian to and from medical appointments;
- he is involved in Sebastian's religious upbringing. The applicant participates in both parents' churches and the applicant helps Sebastian with Bible study;
- the applicant pays child support to Anita "on time and without any issue and has always done so". The parents have a child support arrangement based on cash payments rather than a court order;
- deporting the applicant would have "life-altering and irreparable harm on my son". The applicant "is an excellent father and is in no way an optional presence for Sebastian";
- "Being a single mother sometimes I am overwhelmed and the applicant is always ready to step up and help me with Sebastian. He has never been absent or missing when I needed him. He is the only person I have to rely on for Sebastian. I cannot simply order or grow another father figure or person Sebastian loves. [The applicant] is irreplaceable in Sebastian's life."

[33] This evidence was not only material to the BIOC analysis and to the impact of the applicant's removal on his son. Read and considered carefully on its own and with the objective evidence filed by the applicant (discussed below), it was potentially highly influential to the overall weight of the BIOC in the broader H&C assessment.

[34] The officer also did not mention or assess objective evidence in the record that was directly related to the BIOC and the impact of the applicant's removal on his son. The applicant filed six articles about the impact on a child of the loss of a father, or father figure, from a child's life. The applicant's written H&C submissions to the officer referred to the articles, stating that they confirmed that "removing fathers from children's lives [is] wholly prejudicial to their development".

[35] If this objective evidence had been considered, together with all of the evidence from Sebastian's mother, the officer could have fully assessed the impact of the applicant's removal on Sebastian's best interests on the basis of the record. Unfortunately, the objective evidence was also ignored.

[36] The applicant argued that the officer also did not account for the references to Sebastian in numerous letters of support in the record, even to say that they would be given less weight owing to their contents. While that is true, I agree with the respondent that the impact of the oversight was modest because the evidence in these letters was thin and revealed relatively little about the relationship between the applicant and his son.

[37] In my view, the officer's selective mention of only a very small part of the material evidence and failure to consider the balance of BIOC evidence in Anita's statutory declaration and the related objective evidence, rendered the H&C decision unreasonable. The decision failed to respect the legal standards required for a lawful H&C assessment described in *Kanthasamy* and ignored, fundamentally misapprehended, and failed to account for material evidence in the

record: *Kanthasamy*, at paras 45-51; *Vavilov*, at para 126; *Best Buy*, at paras 122-123; *Federal Courts Act*, RSC 1985, c F-7, paragraph 18.1(4)(*d*).

[38] There are additional concerns that support the conclusion to set aside the decision. The officer's reasons also used apparent boilerplate language in the assessment of the BIOC. The reasons stated that the applicant could "continue to maintain a relationship with his son, both remotely through different technologies like Zoom/Skype, text, email, or phone, and through possible future visits". This statement contained errors that undermined the reasonableness of the officer's decision.

[39] This Court has expressed concerns about such statements when they fail to account for the specific circumstances of the individuals affected: see *Lopez Alvarez v Canada (Citizenship and Immigration)*, 2022 FC 130, at para 38; *Chamas v Canada (Citizenship and Immigration)*, 2021 FC 1352, at para 43; *Yu v Canada (Citizenship and Immigration)*, 2021 FC 1236, at para 30. Statements about the use of technology to maintain relationships must be sensitive to the particular circumstances – for example, an adult's ability to use technology to keep up with adult friends from afar is quite different from a parent and a child attempting to maintain a meaningful relationship as the child grows up. Concerns may arise if the reasons do not reflect the circumstances of those affected, particularly a child's best interests. In the present case, the officer's belief that technology could serve as a substitute for the applicant's physical presence with his son was insensitive to the relationship between this father and this son. The officer's statement also did not consider Sebastian's ability to maintain his relationship with his father remotely, using technology, as a 9-year-old boy and soon, as a young man.

[40] The officer also stated that the applicant could continue to maintain a relationship with his son through “possible future visits”. This statement ignored evidence to the contrary. Anita’s statutory declaration dated December 6, 2019, stated that she did “not have the money to fly Sebastian to Mexico on any meaningful basis”. That point was fully justified (if not understated) by her financial circumstances, and those of the applicant, as disclosed in the record.

[41] These additional flaws in reasoning reinforce the conclusion that the officer failed to appreciate and consider the evidence in the record related to the BIOC.

IV. Conclusion

[42] For these reasons, I conclude that the officer’s H&C decision must be set aside. I do not need to analyze the rest of the parties’ submissions.

[43] Neither party proposed a question to certify for appeal and none will be stated.

JUDGMENT in IMM-739-21

THIS COURT'S JUDGMENT is that:

1. The application is allowed. The decision dated January 28, 2021 is set aside and the matter is remitted to another officer for redetermination. The applicant shall be permitted to file updated and/or additional evidence and submissions on the redetermination.
2. No question is certified for appeal under paragraph 74(*d*) of the *Immigration and Refugee Protection Act*.

"Andrew D. Little"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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