Federal Court  Cour fédérale

**Date: 20220815**

**Docket: IMM-899-21**

**Citation: 2022 FC 1199**

**Ottawa, Ontario, August 15, 2022**

**PRESENT: The Honourable Mr. Justice Mosley**

**BETWEEN:**

**ISMAEL DE JUESUS JUAREZ CHAVEZ**
**ILSIA ANDREA ELIBO VALERIO**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Introduction

[1] This is an application for judicial review of the decision of an Immigration Officer (Officer) who denied the Applicants' application for permanent residence on humanitarian and compassionate (H&C) grounds on December 9, 2020.

[2] For the reasons that follow the application is granted.

## II. **Background**

[3] Mr. Chavez is a citizen of El Salvador and Ms. Valerio is a citizen of the United States and the Dominican Republic. They met and married in Canada in 2015. They have three children, two of the marriage and the oldest, Esmeralda, who is Ms. Valerio's child from a previous relationship. Esmeralda is a dual Canadian-American citizen and is subject to an order from the Ontario Court of Justice requiring consent from both parents for her to be removed from the Province of Ontario.

[4] Mr. Chavez sought refugee protection in Canada in 2005 after a brief sojourn in the United States where he was detained. His claim was denied and a Pre-Removal Risk Assessment (PRRA) in 2006 was negative. He failed to appear for removal in August 2006 and a warrant was issued for his arrest.

[5] The H&C application was submitted on December 19, 2018. In November 2019, Mr. Chavez was arrested and following an unsuccessful stay motion and second PRRA he was removed in February 2020. He now resides in El Salvador where he has three children from a prior relationship. In addition to his wife and two children, he has two siblings in Canada.

[6] Ms. Valerio was born in the Dominican Republic and moved to Puerto Rico at the age of 20 where she became an American citizen. In 2007 she met Esmeralda's father, a Canadian. Esmeralda was born in Puerto Rico in 2008. Ms. Valerio came to Canada with Esmeralda for a

vacation in 2010 and travelled back and forth to Puerto Rico over the next few years. She has remained in Canada since 2013 without status. Esmeralda's father arranged for her to have Canadian citizenship and she was enrolled in school here. The relationship between Ms. Valerio and Esmeralda's father ended in February 2014. In September 2018, the Ontario Court of Justice granted joint custody of Esmeralda to both parents with the child to live with her mother and the father given access. The Court ordered that neither parent could remove Esmeralda from the province without written permission of the other parent.

[7] Both Applicants remained and worked in Canada without status. In their H&C submissions made prior to Mr. Chavez's removal, they described how they had managed to get by with informal work arrangements. They also provided information about their involvement in a church and letters of support from family members. The Officer gave little weight to the Applicants' establishment.

[8] The Officer noted that the Applicants' two biological children are Canadian citizens and that Esmerelda is a dual Canadian-American citizen. Esmerelda's custody arrangements and her schooling were described. Ms. Valerio stated in her affidavit filed in support of the application that if required to leave Canada she would take the couple's two children with her but expected to encounter difficulties due to the custody arrangement with Esmerelda's father.

[9] The Officer found that it was in the best interest of the children to remain in Canada with their mother. However, given that Mr. Chavez had been removed to El Salvador, the Officer found that there was little information that relocation of Ms. Valerio and her children to the

United States “would be substantially detrimental to the children’s best interests.” Mr. Chavez, it was stated, could apply for visas to visit his family in the United States and apply for status there as Ms. Valerio’s spouse. The two younger children would be eligible for status through their mother.

[10] With regard to the custody arrangement respecting Esmeralda, the Officer wrote:

> Esmeralda is an American citizen, and as such can reside in the United States indefinitely. However, as noted by the secondary applicant, she may have to come to an agreement with Esmeralda's father to take her outside of Canada due to their custody agreement. However, l find it would not be a hardship for Esmeralda to split time between Canada and the United States.

[11] The Officer noted that international relocation can cause a “small degree of hardship” but concluded that it would be temporary and that the Applicants and their children would have similar opportunities as was provided to them in Canada. Little weight was therefore given to the best interests of the children.

## III. **Issues and Standard of Review**

[12] The H&C application was grounded primarily on the best interests of the children (BIOC). The sole issue before the Court is whether the Officer’s decision in that respect is reasonable. The Officer’s findings on establishment and adverse country conditions were not challenged.

[13] There is no dispute that reasonableness is the applicable standard in accordance with the presumption discussed in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. There are no grounds to depart from that presumption on this application.

[14] In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified (*Vavilov* at para 15). Further, a reasonable decision should be coherently justifiable to the affected party (*Vavilov* at paras 95-96, 134).

[15] "Justifiable" has to be considered in the context. As stated by the Supreme Court at para 133 of *Vavilov,* the reasons provided must reflect the stakes where the impact of a decision on an individual's rights and interests is severe. If a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention.

## IV. **Analysis**

[16] The Applicants presented the following arguments: (1) that the BIOC analysis has internal contradictions; (2) that the Officer failed to grapple with the severe consequences of the decision on the children involved; and (3) that the Officer used a hardship analysis when the proper test is showing that the decision maker was "alert, alive and sensitive" to the children's interests.

[17] The Respondent submits that relief for H&C under s. 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) is an exceptional remedy, and is not a back door for immigration: *Kanthasamy v Canada (Minister of Citizenship and Immigration),* 2015 SCC 61 at para 23. The Officer did not err, the Respondent submits, in finding that the children's circumstances would largely be the same if they were to reside in the US. It is a developed country on a par with Canada, and the children would have access to equivalent resources and opportunities.

[18] I agree with the Applicants that there appears to be a contradiction between the Officer's findings that the best interests of the children would be to remain in Canada yet they would not be compromised by relocating to the US. Apart from the separation of the younger children from the only country they have known including their extended family members in Canada, the Officer was required to assess the effects of uprooting a 12 year old girl from her Canadian life and what that would do to her well-being.

[19] Of particular concern is that the Officer appears to have blithely assumed that Ms. Valerio and Esmeralda's biological father could arrive at an agreement that she be taken out of the country. The father's consent is a mandatory element of the court order and the submissions before the Officer confirmed that a dispute would arise should such consent be sought. It is speculative to assume that the parents could arrive at an agreement on consent to amend the order.

[20] While there is little in the record about Esmeralda's relationship with her biological father, it is clear that he arranged for her to have Canadian citizenship, enrolled her in a Canadian school and obtained dual custody with a non-removal order. In Canada, she has access to both parents and to her paternal grandparents and it seems from the record that she is doing well in school.

[21] In considering the best interests of a child in a H&C application, the focus must be on the child. Even if the father agreed to her departure from the jurisdiction of the Ontario Court, there is no assessment in the decision of the possible negative effects this would have on Esmeralda.

## V. **Conclusion**

[22] I am persuaded that the decision in this instance did not adequately assess the best interests of the children concerned. The reasons provided do not coherently and intelligibly justify the impact the decision would have on the family and it is not, therefore, reasonable.

[23] The application will be granted and the matter remitted for reconsideration by another Officer. No serious questions of general importance were proposed and none will be certified.

**JUDGMENT IN IMM-899-21**

**THIS COURT'S JUDGMENT is that** the application is granted and the matter is remitted for reconsideration by a different officer. No questions are certified.

"Richard G. Mosley"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-899-21 |
| **STYLE OF CAUSE:** | ISMAEL De JUESUS JUAREZ CHAVEZ, ILSIA ANDREA ELIBO VALERIO V THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | HEARD VIA VIDEOCONFERENCE |
| **DATE OF HEARING:** | FEBRUARY 1, 2022 |
| **JUDGMENT AND REASONS:** | MOSLEY J. |
| **DATED:** | AUGUST 15, 2022 |

**APPEARANCES:**

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| Susan Gans | FOR THE RESPONDENT |

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