

Federal Court



Cour fédérale

Date: 20221110

Docket: IMM-1568-21

Citation: 2022 FC 1540

Ottawa, Ontario, November 10, 2022

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

AB

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review pursuant to s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] of two decisions rendered by a Senior Immigration Officer (the “Officer”) dated February 19, 2021 and March 23, 2021, respectively. In the first application, AB (the “Applicant”) challenges the Officer’s determination that he is not eligible to be granted permanent residence on Humanitarian and Compassionate grounds

(“H&C”) pursuant to s. 25(1) of the *IRPA*. In the second application, the Applicant challenges the Officer’s refusal to grant his request for reconsideration.

[2] The Applicant is a 40-year-old male citizen of Vietnam who entered Canada as a visitor on January 27, 2018. In December 2019, he requested that his application for permanent residence in Canada, based upon H&C considerations, be processed from within Canada. The H&C considerations advanced by the Applicant relate to his establishment and family ties in Canada; the best interests of his 8-year-old niece, Wendy, and his 13-year-old nephew Randy; and hardship upon return to Vietnam due to his HIV-positive diagnosis.

[3] I have decided to grant the application for judicial review on the first issue, namely, whether the decision is reasonable as it relates to the decision regarding H&C considerations. It follows that I need not address the reasonableness of the Officer’s refusal to grant the request for reconsideration.

II. Decision Under Review

A. *Negative H&C Determination*

[4] On February 19, 2021, the Officer refused the Applicant’s application for permanent residence based upon H&C considerations. Upon a global review of the Applicant’s circumstances and of the evidence presented, the Officer concluded there existed insufficient H&C considerations to justify an exemption under s. 25(1) of the *IRPA*. Specifically, the Officer considered the following in his H&C analysis:

- (a) the hardship caused by a return to Vietnam for the Applicant and his family;
- (b) the Applicant's level of establishment and financial self-sufficiency;
- (c) the Applicant's relationship with his niece Wendy and his nephew Randy as well as the best interests of those children;
- (d) the impact of the Applicant's HIV-positive status (quality of life in Vietnam, access to treatment, country conditions and discrimination).

(a) *Hardship*

[5] The Officer acknowledged that the Applicant's entire immediate family resides in Canada permanently. The Officer found that the Applicant and his family will experience some hardship if he is forced to return to Vietnam, but such hardship is anticipated when family members choose to emigrate, or are forced to separate. The Officer noted that the Applicant and his family have lived apart for over ten (10) years and have been able to stay connected via visits and various electronic modes of communication. The Officer found that the hardship associated with being separated once again may be mitigated through these same modes of communication.

(b) *Level of establishment and self-sufficiency*

[6] With respect to establishment, the Officer observed that the Applicant has resided in Canada for three years and is not financially self-sufficient. This lack of financial self-sufficiency is understandable given that the Applicant is not authorized to work in Canada. From the record, it appears that the Applicant is complying with Canadian law in this regard. While his sisters in Canada have stated that they would support him financially, there is no evidence that the Applicant's family could provide long-term financial support. The Officer recognized the Applicant's efforts to integrate into his community, but found the evidence did not demonstrate

that he has developed relationships in Canada that would result in more than a modest degree of hardship if he were to return to Vietnam.

(c) *Best Interests of the Children*

[7] With respect to the best interests of the children (“BIOC”) directly affected, the Officer found that the Applicant had a close and special relationship with his niece, Wendy and nephew, Randy. The Applicant is an important source of support to his sister, the children’s mother. The Officer ultimately found that the children’s best interests may be moderately impacted [emphasis mine] by the Applicant’s departure. The Officer nonetheless found that the stability in other areas of the children’s lives and the extensive family presence in Canada, would ensure they would receive the necessary care and support. The Officer noted that, while not ideal, the Applicant could continue to offer Randy and Wendy guidance and support through modern technology and visits.

(d) *Impact of the Applicant’s HIV-positive status*

[8] The Officer considered the Applicant’s contentions that his quality of life as a person living with HIV is higher in Canada than in Vietnam, that he has access to better medications here, and that in Vietnam, he would have to pay a bribe to doctors in order to access good quality treatment and medication. The Officer reviewed the country conditions documentation and found that HIV treatment is available in Vietnam and is expanding. The Officer found that the Applicant did not corroborate his allegation that he needed to bribe doctors. He noted that an article submitted by the Applicant states that Vietnam provides “free treatment services”. Unsure

whether this statement extended to medication, the Officer noted that, in any event, it was unclear why the Applicant's sister – who is helping to cover the Applicant's medical expenses in Canada – could not offer similar financial support upon his return to Vietnam. The Officer correctly observed that the Applicant was receiving HIV treatment in Vietnam, prior to his arrival in Canada, and that that treatment would continue to be available in Vietnam.

[9] The Officer also considered the evidence of discrimination against people with HIV in Vietnam. The Officer noted that while the situation is improving, HIV-related stigma in Vietnam “remains high and the power and negative impact of stigma should not be undervalued...”. The Officer found that the Applicant did not assert that he was directly impacted by discrimination in Vietnam, nor that his condition prevented him from finding and maintaining employment and housing. The Officer acknowledged that the Applicant would face some hardship because of his HIV-positive status, upon his return to Vietnam.

[10] The Officer considered the above factors on a global basis and concluded that H&C relief was not appropriate in the circumstances.

III. Relevant Provision(s)

[11] The relevant provision is s. 25(1) of the *IRPA*:

***Immigration and Refugee
Protection Act, SC 2001, c 27***

**Humanitarian and
compassionate**

***Loi sur l'immigration et la
protection des réfugiés, LC
2001, c 27***

**Séjour pour motif d'ordre
humanitaire à la demande
de l'étranger**

considerations — request of foreign national

25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

25 (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

IV. Issues and Standard of Review

[12] The Officer's negative H&C decision is subject to review on the reasonableness standard

(*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 CSC 65, 441 DLR (4th) 1

[*Vavilov*] at para 25). None of the exceptions to the presumption of reasonableness review apply in the case at bar (*Vavilov* at para 17).

[13] “A reasonable decision is 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). To set aside a decision, the reviewing court must be convinced that there are sufficiently serious shortcomings in the decision, such that any superficial or peripheral flaw will not suffice to overturn the decision (*Vavilov* at para 100). Most importantly, the reviewing court must consider the decision as a whole, and must refrain from conducting a line-by-line search for error (*Vavilov* at paras 85, 102).

[14] The Applicant contends that the Officer improperly measured each consideration against a hardship analysis, inappropriately sought exceptionality, failed to properly assess the best interest of the children, and in relation to the HIV diagnosis, unreasonably applied the facts related to the discrimination and stigma and access to health care in Vietnam.

V. Submissions of the Parties and Analysis

A. *Reasonableness of the Negative H&C Decision*

- (1) Did the Officer apply the wrong legal tests as they relate to hardship and exceptionality?

[15] The Applicant acknowledges that the Supreme Court’s decision in *Kanthisamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthisamy*] did not eliminate the concept of

hardship from H&C assessments. However, he contends the Officer conducted a hardship-centric analysis by focusing on the mitigating measures available to the Applicant and failed to consider his H&C circumstances as a whole. The Applicant relies upon *Ali v Canada (Citizenship and Immigration)*, 2018 FC 824 at paras 15–17 to support his reasoning that a global assessment of all the relevant factors, is a necessity.

[16] The Respondent contends that the Officer did not apply a “hardship test”; rather, he considered all of the evidence in accordance with the principles set out in *Kanhasamy*. He points out that the consideration of hardship in an H&C application is appropriate (*Alexander v Canada (Citizenship and Immigration)*, 2019 FC 881 at para 17) and says that the Officer’s approach was not hardship-centric, as alleged by the Applicant.

[17] An officer considering a request for H&C relief pursuant to s. 25(1) of the *IRPA* must take into account all the relevant H&C considerations advanced by the applicant. It was incumbent upon the Officer to assess whether, considered globally, these considerations “would excite in a reasonable man in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes warrant the granting of special relief” (*Kanhasamy* at para 13; *Ahmed v Canada (Citizenship and Immigration)*, 2021 FC 1251 [*Ahmed*] at para 13). H&C determinations are fact-driven exercises of discretion (*Arshad v Canada (Citizenship and Immigration)*, 2018 FC 510 [*Arshad*] at para 10). *Kanhasamy* did not reject the concept of “hardship” in H&C applications (*Miyir v Canada (Citizenship and Immigration)*, 2018 FC 73 at paras 16–20). To the contrary, assessing the hardship an applicant will face on return to its

country of nationality in conjunction with the applicant's circumstances as a whole, remains an important part of an H&C assessment.

[18] I cannot conclude that the Officer considered hardship to the exclusion of all relevant H&C considerations in the circumstances. By considering the potential hardship upon the Applicant's return to Vietnam, the Officer did not commit a reviewable error. As Justice Roy stated in *Turovsci v Canada (Citizenship and Immigration)*, 2021 FC 1369 at para 30, "But in order to excite a desire to relieve the misfortunes of another, there must be misfortunes that are sufficiently severe in view of the recognition that there is inevitably some hardship in having to leave Canada, and that the availability of an H&C relief is not intended to be an alternative immigration scheme". The Officer's consideration of hardship is consistent with this principle.

[19] With respect to the issue of "exceptionality", the Applicant contends that the Officer applied an elevated test when assessing the effects of family separation. The Applicant particularly takes umbrage with the Officer's observation that "H&C is meant to provide relief in exceptional circumstances not anticipated by the IRPA". He says the Officer erred by requiring him to prove that his circumstances were exceptional and compelling.

[20] The Applicant essentially disagrees with the Officer's choice of words. However, administrative decision-makers' reasons must not be assessed against a standard of perfection (*Vavilov* at para 91). As I have stated on several occasions, H&C relief is, in my view, exceptional (see *Meniuk v Canada (Citizenship and Immigration)*, 2021 FC 1374 at para 43; *Ylanan v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1063 at para 32).

Something more than a sympathetic case is required to justify relief on H&C grounds (*Canada (Public Safety and Emergency Preparedness) v Nizami*, 2016 FC 1177 at para 16; *Shackleford v Canada (Citizenship and Immigration)*, 2019 FC 1313 at para 16).

- (2) Was the Officer's assessment of the best interests of the children, and by extension, family ties in general, reasonable in the circumstances?

[21] The Applicant contends that the Officer's BIOC assessment was unreasonable because he failed to identify the children's best interests. The Applicant says the Officer engaged in a hardship analysis yet, "there is no hardship threshold, such that if the circumstances of the child reach a certain point on that hardship scale only then will a child's best interests be so significantly "negatively impacted" as to warrant positive consideration" (*Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 [*Williams*] at para 64). He says that the Officer improperly focused on mitigating measures, such as the care the children could expect to receive from other family members and the ability to maintain contact with the Applicant through technology. According to *Williams*, "the question is not: "is the child suffering enough that his "best interests" are not being "met"? The question at the initial stage of the assessment is: "what is in the child's best interests?" [*Williams, supra* at para 64].

[22] There is no rigid formula that must be used in considering the BIOC: see, *Zlotosz v Canada (Citizenship and Immigration)*, 2017 FC 724 [*Zlotosz*] at paras 21, 23–24; *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at para 25. An officer must ultimately show that he or she was "alert, alive and sensitive" to the best interests of the children in conducting a BIOC analysis (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999]

2 SCR 817, 174 DLR (4th) 193 at para 75). A decision under subsection 25(1) of the *IRPA* will be unreasonable if the best interests of the children affected by it are not sufficiently considered. However, what constitutes sufficient consideration of the best interests of an affected child will depend on the evidence presented on the application (*Jones v Canada (Citizenship and Immigration)*, 2022 FC 655 [*Jones*] at para 39).

[23] In my view, the Officer attempted to show that he was alert, alive and sensitive to Randy and Wendy's best interests. However, when I consider the considerable submissions made on this issue from the children, the Applicant and, most importantly from the children's mother, I am not satisfied that the Officer fully engaged with the evidence presented (see *Jones*, supra). On this issue alone, the decision, in my view is not internally coherent. Furthermore, it fails to demonstrate a rational chain of analysis that is justified in relation to the facts and the law that constrain the decision maker. To be clear, I do not consider an evaluation for internal coherence to constitute a microscopic evaluation. I will explain.

[24] The Officer considered the love between the Applicant and the children. The Officer considered some aspects of the support the Applicant provides to the children's mother. The Officer noted that the children received adequate care prior to the Applicant's arrival in Canada. The Officer noted that "Wendy and Randy's father left them when Wendy was one month old". The Officer noted that the Applicant has become a father figure to the children; the Applicant often "helps with the children's daily care, including waking them up in the morning, feeding them, taking them for walks and bike rides, and takes them to school and picks them up" and that the Applicant has been charged with their care on weekends when the children's mother is

otherwise engaged. The Officer acknowledged that the Applicant's presence in the lives of the children relieves the aging grandmother of responsibilities she used to bear. This evidence appears to have been largely ignored by the Officer when he concluded that the best interests of the children "may [my emphasis] be moderately impacted" by the Applicant's departure. By use of the qualifier "may" the Officer demonstrates uncertainty about whether the children might even be "moderately" impacted by the Applicant's departure. Words matter. Had the Officer categorically concluded the children would only be "moderately" impacted by the Applicant's departure, I would conclude this aspect of the decision lacks coherence and fails to respond to the evidence. The use of the qualifier "may" by the Officer reinforces my view of a lack of coherence, and a failure to respond to the evidence. However, there is more.

[25] The Officer notes that the children's father left them when Wendy was one month old. The reality is that the children's father did not leave and take up residence elsewhere in Ontario or Canada in an effort to maintain some contact with them. To the contrary, he showed no sign of responsibility toward them; it appears that the father left Canada, returned to Vietnam and has not had any communication with the children since that time. The Officer does not mention these significant facts. Another very significant fact not mentioned by the Officer is that the mother (the Applicant's sister) and her children traveled to Vietnam in search of the children's father. While there, the Applicant was a source of strength and encouragement to his sister and his niece and nephew. I can do no better than quote the unedited statement from the children's mother:

I have two children – Randy is 12 and Wendy is 7. Their father has left three of us since Wendy was one month old. I have tried to find their dad but I had no luck. I had a lot of difficulties as a single mother. In 2015, I heard their father was in Vietnam. I decided to take my kids to Vietnam to look for him; Wendy was three years old at that time. I was desperate. I did not care how far the trip

was; half of the globe, I was alone with two small babies, to search for my children's father. I was not able to locate him either in Vietnam. I have been exhausted, desperate. Fortunately, [the Applicant] has been there all times for three of us. [The Applicant] picked us at the airport, took us home with him, accommodated us as much as he could afford, especially [the Applicant] has given the special love, and care for Randy and Wendy. [The Applicant] understood the purpose of my trip. [The Applicant] was sad; I felt him while we were sitting down sometimes. I wanted to cry many times in front of [The Applicant] because of my pitiful life; more also, because [The Applicant] has kept consoling me "có em đây rồi, Trang cứ yên tâm, lo gì, thôi đừng suy nghĩ nhiều nữa" "don't worry sister, I am here for you, don't think too much". When [The Applicant] was small, I was always with him in every circumstance. Now I am in difficulty, [The Applicant] is there for me vice versa. I am grateful to [The Applicant].

[The Applicant] has been very close to Randy and Wendy as much as he is needing a family; moreover Randy and Wendy are needing a father; [The Applicant] has taken the role of their father. [The Applicant] has assured me many times "ba nó không nuôi tui nó thì em nuôi, Trang không có phải lo lắng gì hết" "their (Randy and Wendy) father rejected them, I am adopting them and raising them up as my own children, why you are worried too much sister". I have been blessed of [The Applicant]'s precious heart and his works on three of us.

[The Applicant] has lifted up a lot of burdens off my shoulder since I entrusted Randy and Wendy on him. The kids were able to speak better in Vietnamese from [The Applicant]'s assistance; they have been more active, joyful because [The Applicant] have interacted and engaged them in multiple activities - [The Applicant] took them to the swimming pool, Randy attended the karate course, Wendy joined the kids art class, [The Applicant] took us out in the weekends for dinner, [The Applicant] bought them the roller skating shoes and patiently taught them to skate, [The Applicant] took them to the Church every Sunday, [The Applicant] took them with him when he had parties. [The Applicant] has fed them; done their dishes; helped fold their clothes, etc. Wendy has a special passion to [The Applicant]; I bet when grandmother connected her with [The Applicant] via internet video chat, she got used to [The Applicant]'s face, voice, smiles; additionally, [The Applicant] often sent toys to the kids, so they know [The Applicant] loves and likes to spoil them. Most importantly, Wendy did not meet her father since she was born; with [The Applicant]'s presence, his love and care, in her mind [The Applicant] has been her real father. At the first day we

arrived Vietnam, while we headed out to meet [The Applicant], Wendy ran to [The Applicant] just because of his voice calling “Wendy Wendy, cậu [The Applicant] nè” “Wendy Wendy, uncle [The Applicant] here”. [The Applicant] has been very happy being with my children; the joy [The Applicant] receives because he has a family again. Wendy has clung on [The Applicant] most of the time. Even late evening, Wendy insisted to take a ride around the city, [The Applicant] did not hesitate to please her. Wendy often asked [The Applicant] to buy toys for her at the shopping mall, while I refused, [The Applicant] never let Wendy down lest she would cry; [The Applicant] always defended Wendy saying “đâu có sao đâu, không thôi Wendy nó khóc bây giờ” “just buy her toys, it’s ok, don’t make Wendy cry”. [The Applicant] has always carried her on his hands on the street; he did not mind her weight; although I saw his face was covered with sweat, Wendy insisted to be on his arms and [The Applicant] did everything to make her happy. Few times I observed Wendy has called [The Applicant] from the toilet after she finished, [The Applicant] has never been reluctant to assist her. [The Applicant] is selfless person. I and my children have been in peace living with [The Applicant]. He has provided us his best care. One day I heard [The Applicant] was playing and singing with Wendy, [The Applicant] said “Wendy là niềm vui, hạnh phúc của cậu [The Applicant]” “Wendy is uncle [The Applicant]’s life and happiness”; they were both laughing. Although [The Applicant] was busy at his daily workplace, [The Applicant] has made himself available anytime I needed his help to look after Randy and Wendy when I had to go out for some works. [The Applicant] is the only person I have entrusted in custody my children. At bedtime, my kids often tell me how good [The Applicant] is and how much they love [The Applicant]; they want [The Applicant] to be with them every day. I have not known what to do without [The Applicant]. [The Applicant] has been a wonderful father figure to my children; as much as he has done his best to nurture them and give them his love as their father.

There was one evening, [The Applicant] sadly shared with me his personal medical record; [The Applicant] unfortunately got infected with hiv virus. I could not hold my tears; we were crying a lot. Why such terrible things happened to my brother [The Applicant] – being separated from family out of his will, living in loneliness for many years, and now with the virus in his body. I love [The Applicant] more and more. I have tried all my best to accommodate more time for Randy and Wendy to spend with [The Applicant]; because I want them to have as much beautiful memory with [The Applicant] as possible. I felt owing [The Applicant] so much; I have not yet succeeded to sponsor [The Applicant] to Canada with us; I have not yet been able to bring him home with

our parents as I promised many years ago; as much I don't want to lose [The Applicant] forever. I have been praying for the cure to save my brother every day.

It was time for me to take Randy and Wendy back Canada. I spoke to [The Applicant] about the news. [The Applicant] began to fall sick. He was admitted to the hospital for few weeks. [The Applicant] has been depressed knowingly he would not see Randy and Wendy again. I went to the hospital every day to take care of [The Applicant] after picking up the kids from school and dropping them to a babysitter. They kept asking about [The Applicant] since they have not seen [The Applicant] for weeks. His health got worsen. I felt [The Applicant]. I was very sad too. The doctors told me they could not do anything to save [The Applicant] after few weeks; [The Applicant] was quiet on bed; closed his eyes; his face was very sad; [The Applicant] did not say a word to anyone including me; he did not even eat nor drink; the doctors used the fluids to keep him alive every day, until they gave up because [The Applicant]'s health did not improve. I was crying; I arranged to bring him home and contacted my mother and siblings in Canada that [The Applicant] would die any moment. My mother put everything on the side to return to Vietnam to see [The Applicant]. We were crying a lot at the airport, especially [The Applicant] seeing our mother the first time after more than 12 years. [The Applicant] was very ill; but he persistently went with me to pick our mom at the airport. That was the very first time [The Applicant] communicated to me since I had informed [The Applicant] our departure back Canada to the day our mom arrived Vietnam. I eventually had to help [The Applicant] every step from home to the airport platform for him to see our mom. [The Applicant] was very weak. People in the neighbourhood had to show pity on [The Applicant]. [The Applicant] saw our mom at the airport. He has been crying like a child; it was understandable since [The Applicant] has lost our mother for more than a decade; three of us were lamenting that made people around emotional too.

It is a miracle since our mother has been staying with [The Applicant], he has become better and better every day by her love, care, nurturing, protection. I have been very happy, and I also decided for me and my children to stay with [The Applicant] few more months to help [The Applicant] recover his health and strength. I remembered Wendy asked [The Applicant] “câu [The Applicant] đi đâu lâu vậy, con nhớ câu [The Applicant]” “where have you been for so long uncle [The Applicant], I have missed you every day”. I have continued praying a lot for [The Applicant]'s health, that God saves him and brings hi home with

family in Canada. I have not forgotten my promise to have [The Applicant] reunite with all of us in Canada.

[Unreadable] I had to take Randy and Wendy to return Canada. [The Applicant] has been very depressed because he would soon lose Randy and Wendy; they are [The Applicant]'s life; his sad and emotional face has been so obvious everybody could tell. At the airport, Randy and Wendy have refused to go with me; Wendy said to me, "I will not go to Canada without uncle [The Applicant], mommy". She has clung on [The Applicant]; [The Applicant] has held her on his hands and Wendy held him tight lest she could lose him. Later Randy and Wendy have insisted me "mom, please let uncle [The Applicant] go with us home in Canada". Wendy kept insisting [The Applicant] "câu [The Applicant] đi về nhà Canada với con đi, tại sao câu [The Applicant] không đi với con" "uncle [The Applicant] go home with Wendy in Canada please, why uncle [The Applicant] don't go with Wendy"; [The Applicant] answered "câu [The Applicant] muốn đi với con, nhưng câu [The Applicant] không có giấy tờ" "yes uncle [The Applicant] want to go with Wendy but uncle [The Applicant] does not have the papers". [The Applicant] was then in tears. I did not know what to do although my heart has been scattered. Randy asked me "mom, why can't uncle [The Applicant] go with us? I want uncle [The Applicant] go home with us in Canada". Later I had to take Randy and Wendy inside for the check-in; the kids began crying louder and screaming "I will not go without uncle [The Applicant], I want to stay here with uncle [The Applicant]". I was helpless; I felt heartbroken and very sad. Since then, I have been more anxious because how my children's life will be without [The Applicant]. I have seen Randy and Wendy sad, lost every day since we returned to Canada. Wendy has asked about [The Applicant] every day. They were not active anymore; they were less talking; they just sat at the couch every day quiet. I have felt them, their thought of losing [The Applicant] has overwhelmed them. They have asked me multiple times "mom, when uncle [The Applicant] will come to Canada to live with us again, is it soon? Can you buy a flight ticket for uncle [The Applicant] mom? I want to see him, I miss him mom"; every day they have questioned me the same concerns about [The Applicant]; they did not want to wake up in the morning; they did not want to go to school; they began to eat less food and did not touch their lunch I put in their backpacks; they cried sometimes saying they have missed [The Applicant] so much; they felt sad every day. I do need [The Applicant] in our life too; more for my children; they are so attached to [The Applicant]; they can't live without him; they have been sick missing [The Applicant].

In 2018, [The Applicant] came to Canada for our younger sister's wedding. I was trying all my best to accommodate his staying, knowing the time he arrived in winter, I was very worried if [The Applicant] could cope with the cold. But he was doing very well, I was thinking possibly the love he received from everyone in our family has given him strength, especially seeing Randy and Wendy again. [The Applicant] has always been very happy living with us here. [The Applicant] has appreciated every single second spending with our parents, siblings, especially with Wendy, Randy as his treasures. I often took [The Applicant] and family for dinners every weekend.

Wendy and Randy are very happy to live with [The Applicant] again. Since [The Applicant] has been staying with us in Canada, they are very active again; they talk a lot with [The Applicant]; they joke with [The Applicant]; they play with [The Applicant]; [The Applicant] tugs them in at bedtime; they wake up happily every morning because [The Applicant] comes to their room wakes them up; [The Applicant] dresses them up and prepares lunch in their backpack; [The Applicant] makes sure their homework available in their binders; [The Applicant] rides them to school every morning on an electrical scooter and the same in the afternoon when school finishes; [The Applicant] makes sure food is available when they get home from school; [The Applicant] reminds them to finish homework, take the shower, etc.; [The Applicant] takes them to the Church on the weekend; [The Applicant] takes them an evening walk or biking during warm weather; [The Applicant] has fixed their bicycles; [The Applicant] looks for Wendy's shoes when she can't find them, etc. A lot of works [The Applicant] has been carrying on every day in nurturing Randy and Wendy; although they are no-name jobs, but [The Applicant] deserves all merits. I am grateful of having [The Applicant] especially for Randy and Wendy; [The Applicant] has taken a lot of burden off my shoulders to upbringing my children. Randy and Wendy are happier living with [The Applicant]. I have seen their school reports result a lot of excellent marks and many compliments from their teachers about their school works and engagement in classroom; [The Applicant] has enabled and encouraged Randy and Wendy to be more active and involving in school and Church; for example Randy is now a member of the school's band, Randy plays trumbones, Randy is currently an altar server at Church, Wendy joins dancing class, [The Applicant] has made Randy and Wendy more confident in school and certainly in our society. I have continually entrusted my children and their future in [The Applicant]'s hands; even when I am busy during the weekends, [The Applicant] has been charged to custody Randy and

Wendy; [The Applicant] *has offered me a peaceful life with my children.*

I usually get home very late every weekday even on Saturday, but seeing my children joyful, happy, safe, clean, well-take care, having food in stomach, homework ready for tomorrow school, having a wonderful day with [The Applicant], my exhaustiveness caused by a hard-working day is gone away. Wendy often tells me “today I was playing hide and seek with uncle [The Applicant] mom, I have a lot of fun, I was screaming a lot too”. I have heard Wendy asks [The Applicant] “uncle [The Applicant] can you take me to Walmart and please buy me a toy”; [The Applicant] has always accepted Wendy’s requests to make her happy. Randy and Wendy have a very strong relationship with [The Applicant] that they cannot be detached, nor they can live healthy, happy productive without [The Applicant] next to them; [The Applicant], Randy and Wendy are inseparable. I am needing [The Applicant], as much as Randy and Wendy are needing him every day as their own father. I know Randy and Wendy will be lost again if [The Applicant] is forced to leave us again; in my children’s heart and mind, they have embraced [The Applicant] their daddy because [The Applicant] has taken over the role of their father; to [The Applicant], Randy and Wendy are a precious gift of his life that [The Applicant] never wanted to lose.

[The Applicant] has been helping our mother a lot every day too; our mother is getting older and weaker. She often tells me she is able to rest on her bed few hours in the afternoon because [The Applicant] is working on her chorus and housework such as cooking, cleaning the floor, the bathroom, washroom, laundry. [The Applicant] is very responsible person; [The Applicant] takes an initiative on every work he understands and does very well.

[all sic]

[26] As I have already stated, in my view the above excerpt and other evidence demonstrates that the Officer’s conclusion that the children “may” be “moderately” impacted by the Applicant’s departure is simply inconsistent with all of the evidence regarding the BIOC. The decision lacks coherence in this regard.

[27] In addition to the BIOC considerations, it was incumbent upon the Officer to consider family ties. I acknowledge he did consider them. However, I am once again troubled by what I perceive to be a lack of coherence between the evidence and the Officer's findings in that regard. Woven throughout the evidence before the Officer was proof of extremely close and important family ties. Those ties are not limited to BIOC. The Applicant comes from a poor rural family in Vietnam. His eldest sister escaped her homeland as one of the infamous "boat people". With the exception of the Applicant and one of his sisters whose whereabouts are unknown, all of the Applicant's immediate family members eventually made their way to Canada. One cannot discount the following considerations: Compelling evidence of the parents' departure from Vietnam; the mother's hesitancy to leave her young son alone; the tragic circumstances of the eldest daughter's escape from Vietnam; the support afforded the Applicant by his sister from the time of his birth to the present; the support afforded to the sister by the Applicant during her sojourn in Vietnam, in search of her children's father; the BIOC factors already discussed; and, the support the whole family receives from the Applicant's presence in Canada. These compelling factors all appear to have been lost on the Officer when, in discussing family ties, he concludes that "... the hardships associated with being separated again may be mitigated by their ability to nurture relationships through phone calls, visits and by using more modern technology such as email and video calls". I believe the Officer failed to acknowledge that in Vietnamese culture, the family unit is much more interdependent and tightly knit than in Western cultures. In the circumstances, I question whether the positive and negative aspects of technology were adequately assessed by the Officer. Similar to my concerns expressed in the BIOC analysis, I am not satisfied the decision under review, as it relates to family ties, demonstrates coherence and responds to the evidence.

[28] I announced at the outset of these reasons that I intended to grant this application for judicial review. While my analysis demonstrates I have done so largely based upon the lack of coherence in the decision as it relates to BIOC and family ties, I am cognizant that it is not the Court's role to re-weigh individual grounds, which form the basis of an H&C application (*Arshad* at para 10; *Vavilov* at para 125). The Officer was required to take a global approach to his or her consideration of the H&C grounds. It follows that a reviewing court should also conduct its review from a global perspective. While the Officer correctly states the law as it relates to hardship and exceptionality, the failure to engage with the strong evidence of family ties and the compelling BIOC evidence lead to an incoherence, which in my view, cannot save the decision.

[29] Because of my conclusion that the incoherence in the analysis as it relates to family ties and the BIOC is sufficient to impact any global assessment, I need not consider the arguments advanced by either party on the issue of care for HIV patients in Vietnam.

VI. Conclusion

[30] I am not satisfied the decision is reasonable in the circumstances. The Officer must assess whether, considered globally, the evidence “would excite in a reasonable man in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes warrant the granting of special relief” (*Kanthasamy* at para 13; *Ahmed* at para 13). In the circumstances, I find there to be an incoherence between the evidence as it relates to family ties and the BIOC and the Officer's findings. That incoherence is sufficient to adversely impact the global assessment

that was undertaken. The Application for judicial review is allowed. The decision is quashed and the matter is remitted to another officer for re-determination.

JUDGMENT in IMM-1568-21

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is allowed;
2. The decision is quashed and the matter is remitted to another officer for re-determination;
3. All without costs.

“B. Richard Bell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1568-21

STYLE OF CAUSE: AB v THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: HEARD VIA VIDEOCONFERENCE

DATE OF HEARING: JUNE 20, 2022

JUDGMENT AND REASONS: BELL J.

DATED: NOVEMBER 10, 2022

APPEARANCES:

Annie O'Dell FOR THE APPLICANT

Catherine Vasilaors FOR THE RESPONDENT

SOLICITORS OF RECORD:

Annie O'Dell, Barrister & Solicitor FOR THE APPLICANT
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario