Federal Court  Cour fédérale

Date: 20230116

Docket: IMM-7049-21

Citation: 2023 FC 59

Ottawa, Ontario, January 16, 2023

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

JIMMY PIERRE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review of a Senior Immigration Officer's [the Officer] decision [the Decision] to refuse his application for permanent residence on humanitarian and compassionate grounds [H&C] under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] For the reasons that follow, I find the Officer's decision is unreasonable. This application for judicial review is allowed.

II. **Background**

[3] The Applicant is a 35-year-old Haitian national who first entered Canada in May 2016 with a temporary resident visa. His spouse, a Canadian citizen, subsequently submitted a spousal sponsorship application to sponsor him.

[4] The spousal sponsorship application was ultimately withdrawn following the couple's separation in 2017.

[5] The Applicant has two Canadian born children. The breakdown of the marital relationship has also led to struggles over access and decision-making responsibility with respect to the children.

[6] In August 2018, the Applicant applied for permanent residence on H&C grounds based on his establishment in Canada, the best interests of his two children, and hardship in Haiti.

[7] The Applicant provided lengthy submissions and evidence to demonstrate his ongoing relationship with his children, despite the difficulties associated with the marital breakdown. The evidence included among other things, the Applicant's affidavit, numerous photographs, detailed notes of his supervised visits with his children, and a letter from a clinician engaged by the Office of the Children's lawyer.

[8] On July 9th, 2021, the Officer sent the Applicant a procedural fairness letter (PFL) requesting "updated information on custody agreements; visitation agreements, and any other information that you would like to have considered as of September 8, 2021."

[9] In response, on September 8, 2021, the Applicant provided a letter from his family lawyer attaching the most recent Superior Court endorsement. The lawyer explained in the letter that the Applicant's ability to exercise parenting time through Access for Parents and Children in Ontario was hampered by the cessation of their operations in March 2020 due to the COVID 19 pandemic.

[10] The Officer refused the application on September 29, 2021.

III. **Style of Cause**

[11] As required by subsection 4(1) of the *IRPA*, the name of the Respondent is changed to Minister of Citizenship and Immigration, effective immediately.

IV. **Issues and Standard of Review**

[12] The Applicant submits that the Decision is unreasonable, raising the following issues: (i) the Officer failed to consider how the country conditions in Haiti impact him personally; (ii) the Officer failed to conduct a proper assessment of the best interests of the children (BIOC) affected by the application, and, iii) the Officer erred in their analysis of an H&C assessment pursuant to subsection 25(1) of the *IRPA*.

[13] I find it is only necessary to address the second issue, which is determinative and includes a faulty analysis of the best interest of the children.

[14] The Supreme Court of Canada has established that when conducting judicial review of the merits of an administrative decision, other than a review related to a breach of natural justice and/or the duty of procedural fairness, the presumptive standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23. While this presumption is rebuttable, no exception to the presumption is present here.

[15] 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. The reasonableness standard *requires* a reviewing court defer to such a decision: *Vavilov* at para 85.

[16] The decision maker may assess and evaluate the evidence before it. Absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *Vavilov* at para 125.

V. **Analysis**

[17] The treatment of the children's interests is the determinative issue in this judicial review. I find the Officer ignored critical facts, made conclusions not supported by the evidence, and failed to address key evidence in the record.

[18] Subsection 25(1) of the *IRPA* directs officers assessing applications for humanitarian and compassionate relief to consider "the best interests of the child directly impacted." In *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 (*Kanthasamy*), the Supreme Court of Canada considered the subsection 25(1) best interests of the child requirement, finding: "Where, as here, the legislation specifically directs that the best interests of the child who is 'directly affected' be considered, those interests are a singularly significant focus and perspective": *Kanthasamy* at para 40.

[19] Given the importance of the principle, a decision under subsection 25(1) of the *IRPA* will be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered: *Kanthasamy* at para 39. Those interests must be "'well identified and defined' and examined 'with a great deal of attention' in light of all the evidence": *Kanthasamy* at para 39.

[20] The Applicant argues that the Officer failed to adhere to the above principles in finding that "the applicant provided an incomplete and unclear demonstration of the children's current situation to conduct a meaningful assessment of their best interests".

[21] The Applicant submits that the Officer ignored the bulk of the evidentiary record and exclusively relied on the evidence submitted in response to the PFL, which indicated that COVID-19 had adversely impacted the Applicant's access to his children. The Applicant submits this was a selective review of the evidence, which resulted in an incomplete BIOC assessment.

[22] The Respondent counters that the Applicant's arguments are simply a disagreement with the weighing of the evidence and the Officer was alert, alive and sensitive to the children's best interests.

[23] I disagree.

[24] A thorough review of the record reveals that the Officer ignored critical evidence that necessitated a meaningful BIOC assessment, something that the Officer in their own words, failed to do.

[25] Detailed submissions were provided regarding the Applicant's relationship with his children and his extensive efforts to maintain those relationships through difficult circumstances, including a global pandemic.

[26] As noted above, the evidence included the Applicant's affidavit, the Court's recommendation that the Applicant be allowed supervised access, and a report from a clinician which noted that the Applicant showed "sincere attunement to the children" and that the children displayed clear signs of "secure attachment".

[27] The clinician's report also stated that the Applicant showed "unconditional positive regard for both Joshua and Nathan through the visit" and that they "deserve an opportunity to build a positive relationship with their father" in recommending supervised access.

[28] The Officer did acknowledge the existence of this evidence, along with the many photographs, and notes from the Applicant's supervised visits. The Officer also noted that due to the COVID-19 pandemic, the supervised access facility ceased its operations, and stated that all of this evidence would be considered "as part of the global assessment".

[29] However, under the subheading "Global Assessment and Conclusion" the Officer states the Applicant provided "an incomplete and unclear demonstration of the children's current situation to conduct a meaningful assessment of their best interests". This finding is both factually and legally flawed.

[30] Contradicting the Officer's finding is the fact that the Applicant's family lawyer provided a very clear picture of the situation as it stood less than two months prior to the Decision. This information included the details of the last family court appearance, and the next scheduled appearance for a Trial Management Conference. The lawyer set out the Applicant's intended position at the conference would be for shared decision-making responsibility. The lawyer also stated that despite the access challenges posed by COVID-19, "Mr. Pierre continues to fight vigorously for a transfer from supervised to unsupervised parenting time."

[31] The lawyer's statements above were not merely hypothetical. Indeed a holistic review of the record shows that the Applicant was unwavering in his pursuit of a relationship with his children and took all opportunities available to him to maintain those relationships.

[32] At the hearing of this application, the Respondent argued that the onus is on the Applicant to identify and define the children's interests, and that the Officer was responsive to the record before them. Again, I disagree.

[33] The Officer was wrong to suggest that a meaningful BIOC could not or should not have been done in these circumstances. In addition to the evidence described above, I note that many detailed submissions were made by the Applicant with respect to how removal would impact the well-being of his children. As just one example, the Applicant raised that the telecommunication infrastructure in Haiti "remains among the least developed in Latin America and the Caribbean". The Applicant submitted that this reality would threaten to exclude him entirely from his children's lives.

[34] I agree with the Applicant that, at a minimum, the Officer ought to have considered how the children's best interests would be impacted by losing the opportunity to develop a relationship with their father in Canada.

[35] Overall, I find the interests of the children were not given the sufficient and careful attention required. As this error is sufficient to require that the Decision be set aside and the application be redetermined, I need not address the remaining issue relating to the hardship analysis.

VI. **Conclusion**

[36] For all the foregoing reasons, the Decision is set aside and the application is remitted for redetermination by a different officer.

[37] There is no serious question of general importance on these facts.

[38] The name of the Respondent is changed to Minister of Citizenship and Immigration, effective immediately.

JUDGMENT in IMM-7049-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The Decision is set aside and the matter is remitted for redetermination by a different officer.

3. There is no serious question of general importance on these facts.

4. The name of the Respondent is changed to Minister of Citizenship and Immigration, effective immediately.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7049-21
STYLE OF CAUSE:	JIMMY PIERRE v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
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