Date: 20231207

Docket: IMM-7288-22

Citation: 2023 FC 1654

Toronto, Ontario, December 7, 2023

PRESENT: Madam Justice Go

BETWEEN:

SADIA FAZAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Sadia Fazal, [Applicant] is a citizen of Pakistan. She and her husband, Fazalullah Bhatti, have four children; the three older children (now aged 23, 21 and 17) were included in the Applicant's and her husband's application for permanent residence on humanitarian and compassionate [H&C] grounds pursuant to subsection 25(1) the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. While the Applicant's three older children acquired

Pakistani citizenship through their parents, all were born in Kuwait, and have never set foot in Pakistan.

[2] The Applicant and her children came to Canada in 2017. Her husband lives in Saudi Arabia where he works to support the family. The Applicant and her husband also have a Canadian born child, Alesha, who is now 7 years old and living with her siblings and the Applicant in Canada. At the time of the H&C application, the Applicant and all her three Kuwaiti-born children held a study permit in Canada.

[3] The Applicant's H&C application was based on hers and her children's establishment in Canada, best interests of the child [BIOC], and adverse country conditions.

[4] In a decision dated July 19, 2020, a senior officer [Officer] denied the Applicant's (and her family's) H&C application. The Applicant seeks judicial review of the Decision.

[5] I find the Decision unreasonable because of the Officer's flawed BIOC analysis. I therefore grant the application.

II. Issues and Standard of Review

[6] The main issue in this judicial review is whether the Officer's decision to deny the Applicant and her family H&C relief was reasonable.

[7] The parties agree that the presumptive standard of review for the Decision is the reasonableness standard, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[8] 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. The onus is on the Applicants to demonstrate that the Decision is unreasonable: *Vavilov* at para 100. To set aside a decision on this basis, "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency": *Vavilov* at para 100.

III. Analysis

[9] The Applicant challenges the Decision in part on the basis that its BIOC analysis was flawed. The Applicant raises several arguments, noting the Officer's failure to consider the children's roots in Canada, how their removal will limit their education and future opportunities, and the Officer's failure to consider the evidence at hand. The Applicant further claims that the Officer overlooked parts of the evidence, such as the significant duration of the children's residency in Canada and their establishment in Canada.

[10] The Applicant also argues that access to education for girls in Pakistan is an issue, citing a document from the Immigration and Refugee Board of Canada's National Document Package

on Pakistan. I note, however, that the argument on inadequate access to education for girls in Pakistan was not made in the H&C application; as such I will not consider it.

[11] In coming to the Decision, the Officer noted:

> I accept that in Canada there are different standards of security and human rights supports than there are in many places in the world, including in Pakistan. However, Parliament did not intend for the purpose of s.25 of IRPA to make up for the differences in standards of living between countries. Rather, the purpose of this section is so that the Minister has the flexibility to deal with extraordinary situations which are unforeseen by the Act where humanitarian and compassionate considerations compel the Minister to act.

[12] The Applicant submits that in concluding there were insufficient H&C considerations to warrant an exemption, the Officer failed to explain why forcing the four children to relocate to a country they have no commonality to, except for their parents' nationality, is not one of these "extraordinary situations" unforeseen by the *IRPA* that may compel the Minister to act.

[13] The Respondent asserts that the Officer engaged in a proper BIOC analysis and gave it positive weight, but ultimately found that this factor alone was not determinative: *Leung v Canada (Citizenship and Immigration)*, 2017 FC 636 at para 35-36. The Respondent also submits that the Applicant's submissions amount to asking this Court to reweigh the evidence.

[14] I agree with the Respondent that, as a legal principle, BIOC is not necessarily determinative of the outcome of an H&C application, and my role is not to weigh the evidence.

[15] However, it is uncontested in law that a child's best interest is an important factor that is to be given substantial weight by a decision-maker: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at para 38 and *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75 [*Baker*]. This is particularly true in the context of section 25 of the *IRPA*, which expressly states that the Officer must "tak[e] into account the best interests of a child directly affected." In assessing the BIOC, the decision-maker should consider children's best interests as an important factor and be "alert, alive and sensitive" to them: *Baker* at para 75. The Court may intervene if the Officer failed to conduct a BIOC analysis in accordance with this principle.

[16] As the Supreme Court stated at para 39 of *Kanthasamy*:

> [39] A decision under s. 25(1) will therefore be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered: *Baker*, at para. 75. This means that decision-makers must do more than simply state that the interests of a child have been taken into account: *Hawthorne*, at para. 32. Those interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence: *Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358 (C.A.), at paras. 12 and 31; *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 323 F.T.R. 181, at paras. 9-12.
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> [Emphasis added]

[17] As noted in the Applicant's H&C submission, while the Applicant's three older children were born in Kuwait, and have lived in Saudi Arabia, they only have citizenship for Pakistan. This is because Kuwait and Saudi Arabia would not grant their family citizenship. The only alternative they would have, if asked to leave Canada, is to move to Pakistan, a country where

they have never resided nor set foot in. Of the three children included in the H&C application, only one, Sarah, is still a minor.

[18] In the BIOC analysis, the Officer only referred to Sarah and Alesha, the Canadian-born child. The Officer noted the Applicant's submission that the children will "need to find a new identity in a country (Pakistan) where they've never resided nor have roots in." The Officer then went on to note that while "transition to Pakistan" may be "difficult" for the children, considering they have not resided in Pakistan, the Applicant and the Applicant's sister, who lives in Pakistan, will aid in their adjustment to life in Pakistan. I pause to note, as the Applicant points out, she herself has not lived in Pakistan for 18 years, since she was 24.

[19] In making these findings, I agree with the Applicant that the Officer was not sufficiently alert, alive and sensitive to the children's best interests.

[20] The Applicant cites *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 [*Williams*] for the proposition that an Officer must establish first what is in the child's best interest, second, the degree to which the child's interests are compromised, and finally, whether the BIOC factor should play in the ultimate balancing of positive and negative factors assessed in the application: *Williams*, at para 64. The Applicant also submits that the Officer inappropriately applied a "hardship" test, and did not adequately determine what is in the children's best interests.

[21] I note that this Court has since confirmed there is no rigid formula in assessing BIOC. However, I find that the factors set out in *Williams* may still be relevant in assessing the reasonableness of the BIOC analysis, on a case-by-case basis.

[22] In this case, the Officer found that it would be in the best interests of Alesha, the Canadian-born child, to remain with the Applicant, but that there is insufficient evidence that Alesha will be unable to adapt to life in Pakistan or that her best interest will be "ultimately compromised by moving to Pakistan." The Officer also found that children's interests (presumably including Sarah's) would not be comprised if they go to Pakistan.

[23] Yet throughout the decision, the Officer never once established what would be in the best interests of Sarah. I find it curious that the Officer would identify the best interests of Alesha, yet failed to do the same for Sarah, before finding that her interests would also not be comprised should she go to Pakistan, when she had spent her first fifteen (and now seventeen) years of her life outside of that country.

[24] The Respondent noted at the hearing that the Officer considered the relationship between the Applicant and both Sarah and Alesha, but could not point to any specific passage in the Decision that spoke to Sarah's relationship with the Applicant, as part of the BIOC analysis.

[25] The Officer's failure to first establish what would be in the best interests of Sarah, before deciding that her interests would not be "compromised" suggests that Officer did not sufficiently consider Sarah's best interests.

[26] As I have noted in *Eluwole v Canada (Minister of Citizenship and Immigration)*, 2023 FC 1165 [*Eluwole*] at para 18, it is a reviewable error when an officer focuses their analysis on why departing from Canada would not compromise a child's best interests, without once identifying what would be in the child's best interests.

[27] Further, the fact that the children have never been to Pakistan in their entire life, and the challenges that the children would face in Pakistan, was a key BIOC factor identified by the Applicant in her H&C application. In assessing this factor, the Officer adopted a "hardship" lens when he described the challenges that the children would face in relocating to a country where they have never set foot, as being "difficult" for them to "transition." In other parts of the Decision, the Officer talked about the "inherent hardships ahead for the children" to leave Canada and establish themselves in Pakistan, further reflecting a "hardship" analysis.

[28] In *Eluwole*, I quoted Justice Diner in *Osun v Canada (Citizenship and Immigration)*, 2020 FC 295 , where he warned against interweaving a hardship analysis into a BIOC analysis:

> [23] This is not to say that the hardship (or lack thereof) of leaving Canada and returning to one's home country cannot be a central consideration in an H&C analysis. Indeed, it is often one of the key factors mixed into the H&C recipe. However, those ingredients must be identified when it goes into the mix and not disguised or conflated with others - particularly BIOC. As Justice Abella wrote in *Kanthasamy*, since "'[c]hildren will rarely, if ever, be deserving of any hardship', the concept of 'unusual and undeserved hardship' is presumptively inapplicable to the assessment of the hardship invoked by a child to support his or her application for humanitarian and compassionate relief: *Hawthorne*, at para. 9" (at para 41). Clearer delineation is needed to allow a Court to confirm a decision maker reasonably considered all relevant factors.

> [24] To summarize, while hardship can be a weighty element of an H&C outcome, to justify the outcome, it must be explained. <u>A hardship analysis interwoven with - and indistinguishable from - BIOC analysis is not transparent, because the Court cannot assess the weight afforded to these factors</u>.
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> [Emphasis added]

[29] By failing to identify Sarah's best interests, and by integrating a hardship analysis to assess one of the key BIOC factors affecting her interests, namely, whether she should move to a country where she has never set foot on, the Officer has conducted a flawed BIOC analysis. As such, the Decision cannot be allowed to stand.

[30] Finally, as an *obiter*, I note that instead of seeking judicial review on behalf of the Applicant, her husband, and their three Kuwaiti-born children, counsel admitted at the hearing that it was an oversight on his part to file the judicial review only in the Applicant's name. Since the Applicant filed the H&C application on behalf of her husband and children, it would only make sense that on redetermination, the new officer review the H&C application for the entire family, and not only that of the Applicant.

IV. <u>Conclusion</u>

[31] The application for judicial review is allowed.

[32] There is no question for certification.

JUDGMENT in IMM-7288-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the matter sent back for redetermination by a different officer.
2. There is no question for certification.

"Avvy Yao-Yao Go"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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