Federal Court Cour fédérale

Date: 20240109

Docket: IMM-8735-22

Citation: 2024 FC 29

Ottawa, Ontario, January 9, 2024

PRESENT: The Honourable Madam Justice Turley

BETWEEN:

ANDREA STACEY GAYLE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS FOR JUDGMENT

I. Overview

[1] The Applicant seeks judicial review of a decision of a Senior Immigration Officer [Officer] dated August 24, 2022 [Decision] denying her application for permanent residence on humanitarian and compassionate [H&C] grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] I am allowing the application because the Officer made two reviewable errors. First, they failed to properly assess the best interests of the Applicant's child, who was seventeen years old at the time of the H&C application. Instead, the Officer erroneously concluded that the best interest of the child [BIOC] analysis was inapplicable because the Applicant's daughter had turned eighteen by the time the matter came before the Officer. Second, the Officer failed to consider the Applicant's most recent incidents of domestic violence by her former partner, in assessing her application and weighing the relevant factors. Given this determination, it is unnecessary for me to address the other legal issues raised by the Applicant.

II. Background

[3] The Applicant, a Jamaican national, came to Canada on December 31, 2019, to care for her Canadian daughter, who was fifteen years old at the time. Prior to this, the Applicant had travelled back and forth between Jamaica and Canada to supervise her daughter's care under a Canadian guardian, as her daughter's father is deceased.

[4] The Applicant filed an application for permanent residence on H&C grounds on January 10, 2022 based on her establishment and ties to Canada, the best interests of her child and the hardship she would face if she returned to Jamaica.

[5] On August 24, 2022, the Officer refused the Applicant's H&C application. While the Officer granted positive weight to various considerations, in assessing the application globally and weighing the factors cumulatively, the Officer was not satisfied that the Applicant's circumstances warranted an H&C exemption.

[6] The Officer assigned "little weight" to the best interests of the Applicant's daughter consideration. They determined that the daughter was "no longer considered to be a child" because she was eighteen years old. The Officer further found that there was "little evidence submitted to suggest that she cannot take care of herself" and "little evidence to suggest that she has any psychological, physical or mental impairments that would make her dependent" on her mother: Officer's Reasons for Decision dated August 24, 2022 at p 4 [Officer's Reasons].

[7] The Officer acknowledged the Applicant's history with sexual and domestic violence at the hands of her stepfather and her eldest daughter's father when she was young, and assigned positive weight to this consideration: Officer's Reasons at pp 3-4. The Officer's Reasons, however, do not refer to the Applicant's most recent evidence about the violence she suffered in Jamaica at the hands of another man (her partner at the time). While the Applicant obtained a restraining order against him in 2018, she stated that it was not "strictly enforced": Applicant's Statutory Declaration dated December 16, 2021 at para 17 [Statutory Declaration], Certified Tribunal Record [CTR], p 47.

III. Issues and Standard of Review

[8] In my view, the following two issues are determinative of this application: (i) whether the Officer erred in assessing the BIOC; and (ii) whether the Officer failed to consider and assess the hardship caused by the most recent incidents of domestic violence faced by the Applicant in Jamaica.

[9] The parties agree that the standard of review applicable to an immigration officer's decision to grant an H&C application is that of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 16-17 [*Vavilov*]; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 43-44 [*Kanthasamy*].

[10] 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; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 8.

[11] A reviewing court does not assess a decision-maker's reasons against the standard of perfection: *Vavilov* at para 91. A decision should not be set aside unless there are "sufficiently serious shortcomings" such that it does not exhibit the requisite attributes of "justification, intelligibility and transparency". Furthermore, a reviewing court "must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable": *Vavilov* at para 100.

[12] I do not agree with the Applicant that the applicable standard of review with respect to whether the Officer applied the correct legal test in assessing the BIOC is correctness. Significantly, the jurisprudence relied on by the Applicant pre-date the Supreme Court's decision in *Vavilov*. This Court has consistently applied the standard of reasonableness as set out in *Vavilov* in considering whether the wrong legal test was applied by the decision-maker: *Sobhan v Canada (Citizenship and Immigration)*, 2023 FC 1540 at paras 8, 15-16; *Kalappurakkal v Canada (Citizenship and Immigration)*, 2022 FC 1133 at para 8; *Lamont v Canada (Citizenship and*

Immigration), 2022 FC 590 at paras 8-9; *Service d'administration P.C.R. Ltée v Reyes*, 2020 FC 659 at paras 9, 16, 18, 25.

[13] Here, the standard of review applicable to the Officer's BIOC analysis has no impact on the outcome. As discussed below, the Officer clearly erred in their analysis of the BIOC.

IV. Analysis

A. *The Officer erred in assessing the BIOC*

[14] I agree with the Applicant that the Officer failed to properly assess the BIOC. When the Applicant submitted her H&C application, her daughter was seventeen years old. The relevant Immigration, Refugees and Citizenship Canada Guidelines entitled "Humanitarian and compassionate assessment: Best interests of a child" [Guidelines] make clear that "BIOC must be considered when a child is under 18 years of age at the time the application is received" [emphasis added].

[15] As a result, the Guidelines "lock-in" the age of the dependents at the time of the H&C application. This ensures fairness such that delays in the processing of applications do not "age out" children.

[16] This Court has held that the Guidelines create a legitimate expectation that BIOC will be considered when a child is under eighteen years of age at the time of the H&C application: *Deng v Canada (Citizenship and Immigration)*, 2019 FC 338 at para 22; *Charles v Canada (Citizenship*

and Immigration), 2014 FC 772 at para 31; *Noh v Canada (Minister of Citizenship and Immigration)*, 2012 FC 529 at paras 65-66.

[17] By finding that the Applicant's daughter was "no longer considered to be a child" because she was eighteen years old at the time of the Decision, the Officer failed to undertake the required robust BIOC analysis in accordance with well-established jurisprudence: *Kanthasamy* at paras 34-44. This highly contextual analysis is responsive to each child's age, capacity, needs, maturity and level of development: *Kanthasamy* at para 35.

[18] Furthermore, a BIOC assessment must give due weight and consideration to the child's views, in accordance with their age and maturity: *Hawthorne v Canada (Minister of Citizenship and Immigration) (C.A.)*, 2002 FCA 475 at para 48; *Lin v Canada (Citizenship and Immigration)*, 2021 FC 1452 at para 65; *Buitrago Rey v Canada (Citizenship and Immigration)*, 2021 FC 852 at para 85; *Huang v Canada (Citizenship and Immigration)*, 2019 FC 265 at para 25.

[19] Here, the Applicant's daughter submitted a letter in support of her mother's H&C application addressing the support and stability her mother had provided since coming to Canada. She attributed her academic success to her mother's emotional support. The Officer, however, gave little weight to the daughter's views. While the Officer acknowledged that the daughter would prefer to have her mother in Canada, the Officer determined that there was little evidence to suggest it was "necessary": Officer's Reasons at p 4.

[20] The Officer erroneously confined their analysis to whether there was evidence that the Applicant's daughter could not take care of herself and/or had any psychological, physical or

mental impairments that made her dependent on her mother. These limited considerations are apt in assessing whether children over eighteen years of age may still be considered children for the purposes of an H&C application: *Nahrendorf v Canada (Citizenship and Immigration)*, 2022 FC 190 at para 10; *Choi v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 494 at paras 13-15; *Chaudhary v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 128 at paras 34-35; *Yoo v Canada (Minister of Citizenship and Immigration)*, 2009 FC 343 at para 32. However, these are not the appropriate factors to consider when the child was under eighteen at the time of the H&C application. The Officer erred in applying the wrong legal test.

[21] Based on insufficient evidence to support any type of special needs or significant dependency, the Officer assigned "little weight" to the BIOC consideration in their global analysis of the H&C application. In the circumstances, however, it was incumbent on the Officer to engage in a fulsome BIOC analysis and to consider and assess the totality of the relevant evidence.

[22] For these reasons, I find that the Officer's failure to properly assess the BIOC is a reviewable error that, in and of itself, justifies setting aside the Officer's Decision. As stated by the Supreme Court, an H&C decision is "unreasonable if the interests of children affected by the decision are not sufficiently considered": *Kanthasamy* at para 39. This is the case here.

B. *The Officer erred in failing to consider the recent evidence of domestic violence*

[23] The Officer further erred in failing to consider the Applicant's recent relevant evidence of domestic violence in Jamaica, referring only to the abuse she had suffered when she was younger.

[24] While a decision-maker is not required to mention every piece of evidence or argument bearing on an issue, the more significant the unmentioned evidence is, the more willing the reviewing court is to infer that an officer unreasonably failed to account for the evidence: *Vavilov* at paras 125-127. Here, the overlooked evidence figured prominently in the Applicant's H&C application under the hardship analysis. The Officer's failure to mention and grapple with this key evidence vitiates the decision.

[25] The Applicant claimed that she would face hardship if she returned to Jamaica as she had been the subject of domestic violence and did not receive adequate state protection. The Applicant's Statutory Declaration filed in support of her H&C application details the more recent abuse by her partner between 2016 and 2018: Statutory Declaration at paras 17-18, CTR, p 47. In support, the Applicant tendered significant evidence about this abusive relationship, including a police incident report dated February 27, 2016, and an application for a protection order in October 2017.

[26] Despite reporting various incidents of violence to the police, authorities took no action against the Applicant's former partner. In the affidavit filed in support of her application for a protection order in Jamaica, the Applicant stated that her former partner was very abusive towards her physically, verbally and mentally, and that he had attacked her with a knife: Affidavit sworn October 11, 2017, para 4, CTR, p 106.

[27] Ultimately, the Applicant obtained a restraining order in 2018 against this former partner. However, according to the Applicant, the order was not "strictly enforced" and she "lived in fear" of running into him. The Applicant stated that she "tried her best to get on with [her] life as best

[she] could while trying to remain safe despite this constant danger of violence": Statutory Declaration at para 18, CTR, p 47.

[28] I recognize that the Officer did assign "positive weight" to the "sexual and domestic abuse considerations": Officer's Reasons at p 4. The assignment of positive weight, however, does not mean the Officer had the requisite attentiveness and consideration of the Applicant's situation as a whole to withstand the reasonableness standard: *Izumi v Canada (Citizenship and Immigration)*, 2023 FC 1 at para 38.

[29] Indeed, the assignment of positive weight was solely based on the abuse suffered by the Applicant when she was young at the hands of her stepfather and her eldest daughter's father. Notably, while acknowledging this abuse, the Officer found that there was little evidence to suggest the abuse by either man would continue: Officer's Reasons at p 3. However, the reasons fail to mention the Applicant's most recent abusive partner and the evidence that she continues to fear him.

[30] Ultimately, the Officer's rejection of the Applicant's H&C application was based on a global assessment and weighing of "all the factors submitted cumulatively": Officer's Reasons at p 5. Had the Officer properly engaged with and assessed the Applicant's evidence of more recent domestic abuse, they may have come to a different conclusion, finding that this recent evidence tipped the balance in favour of granting an H&C exemption. Because the Officer makes no mention of the most recent incidents of domestic abuse, the Court can only speculate as to their conclusions on that point.

[31] In the circumstances of this case, I find that the Officer's failure to engage with this significant, recent evidence undermines the Decision and renders it unreasonable.

C. *Conclusion*

[32] Based on the foregoing, there are serious shortcomings in the Officer's Decision. The Officer failed to engage in a proper BIOC analysis and overlooked key evidence relevant to the hardship analysis. The Decision is therefore set aside and the matter is remitted for redetermination to another officer.

[33] The parties did not raise a question for certification and none arises in this case.

JUDGMENT in IMM-8735-22

THIS COURT'S JUDGMENT is that:

1. The application is allowed.
2. The Officer's decision dated August 24, 2022 is set aside and the matter is remitted for redetermination by another officer.
3. There is no question for certification.

"Anne M. Turley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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