Federal Court Cour fédérale

Date: 20240724

Docket: IMM-7845-23

Citation: 2024 FC 1166

Toronto, Ontario, July 24, 2024

PRESENT: The Honourable Justice Battista

BETWEEN:

JAMAICA NALZARO
FRANZCIS JEAKE VILLAMOR

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a refused family class application for permanent residence supported by humanitarian and compassionate (H&C) submissions. The Applicants had requested that H&C factors be used to overcome the obstacle they faced by virtue of R. 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR], which blocked membership in the family class. For the reasons below, the application will be granted because the decision of the Visa Officer is unreasonable.

II. Background

[2] The Applicant Jamaica Nalzaro (Applicant Mother) is a citizen of the Philippines and a permanent resident of Canada. She acquired Canadian permanent residence on June 20, 2017, as a dependent child on her father's permanent residence application. Her father became a permanent resident as a provincial nominee within the economic class.

[3] The Applicant Franzcis Jeake Villamor (Applicant Son) is the eight-year-old son of Applicant Mother who resides in the Philippines. He was two years old when his mother acquired Canadian permanent residence, but he did not receive that status because he was not declared on her application. He was left behind in the Philippines in the care of his biological father and maternal aunt.

[4] R. 117(9)(d) of the IRPR permanently prevents family members who were not declared on permanent resident applications from being sponsored later as members of the family class. For this reason, the Applicant Mother applied to sponsor her son in August 2022, and requested an exemption from R. 117(9)(d) on H&C grounds. She provided evidence that it was in her son's best interests to acquire Canadian permanent residence and join her in Canada. This application was refused on May 26, 2023. Two study permit applications were also filed for the Applicant Son, which were also refused.

III. The Officer's decision

[5] In the Global Case Management System notes accompanying the decision, the Officer found that the Applicant Mother and her parents knew they had to disclose the Applicant Son at the time of their permanent residence application but chose not to do so out of fear it would

jeopardize the application. The Officer found that this "is circumventing Canada's immigration law."

[6] With respect to the best interests of the minor Applicant Son, the Officer determined that there were insufficient H&C factors to overcome R. 117(9)(d) of the IRPR. The Officer specifically found that:

- the Applicant Son was two years old when his mother immigrated to Canada and is now eight years old;
- the information and documents on file show he is in "a loving and nurturing environment";
- there is little evidence to support that the status quo has had "a lasting negative impact" on the Applicant Son's well-being and development; and
- the Applicants can maintain contact through online communications and visits in the Philippines and the mother can continue to send financial support.

IV. Issues and Standard of Review

[7] This application for judicial review raises two issues:

A. Did the Officer breach procedural fairness by failing to meaningfully apprise the Applicants of the Officer's concerns?

B. Did the Officer make reasonable findings regarding the evidence of H&C grounds, including the best interests of the Applicant Son?

[8] Resolving issues of procedural fairness raises the question of whether the decision making process was fair in all the circumstances. The Federal Court of Appeal in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 succinctly described the issue of

fairness as a question of whether the applicant knew the case they had to meet, and had a full and fair chance to respond (para 56).

[9] By contrast, substantive decisions are reviewable on a standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]. A reasonable decision is one that is internally coherent, rational, and transparent, and is justified in relation to the facts, evidence, and law: *Vavilov* at para 101.

V. Analysis

A. *Issue one: Procedural fairness*

[10] On January 25, 2023, a procedural fairness letter (PFL) was sent to the Applicant Mother. The letter was intended to raise concerns about the success of the application, and to provide an opportunity for the Applicants to respond to those concerns.

[11] The Applicants submit that the PFL did not really describe any specific concerns and therefore failed to advert them to the case that they had to meet. According to the Applicants, the eventual refusal was based on credibility concerns with the explanation provided by the Applicant Mother, and the PFL should have described these credibility issues explicitly or a subsequent PFL and/or interview should have been provided in order to provide a meaningful opportunity to respond.

[12] It is true that the PFL mostly restated what the Applicants already knew: that the Applicant Son could not be processed as a member of the family class because he had not been declared on his mother's application for permanent residence. This obstacle was in fact the basis for the H&C evidence and submissions they had already made in the application.

[13] If the R. 117(9)(d) obstacle had been the only concern described in the PFL, I would be inclined to find a breach of fairness based on a lack of sufficient detail revealing the concerns which eventually led to the refusal of the application. However, the PFL did go further, requesting "a detailed explanation of why Franzcis was not declared in your application." Admittedly, this request was brief and it was buried among the description of concerns related to R. 117(9)(d). But it did reveal the Officer's concerns about the motivation of the Applicant Mother in not declaring her son—a motivation the Officer later found to involve the circumvention of Canada's immigration legislation, which resulted in the refusal of the application.

[14] In response to the PFL, the Applicant Mother provided a detailed letter explaining the circumstances of non-disclosure, specifically, that her father decided not to declare her son because he was worried about negative consequences for his application. She described the fact that the non-disclosure was not her decision but her father's, and that she didn't know anything about the application processing requirements but she did expect that she would later be able to sponsor her son. Her response to the PFL indicates that she was aware of the nature of the Officer's concern. For this reason, I agree with the Respondent that the requirements of procedural fairness were met by the PFL in this case, although minimally.

B. *Issue two: Reasonableness of the decision*

[15] I find the Officer's decision unreasonable because of its internal irrationality and because of its unreasonable treatment of the evidence supporting the best interests of the minor child, the Applicant Son.

[16] The Supreme Court of Canada in *Vavilov* described two types of fundamental flaws which are apparent in unreasonable decisions. The first type concerns the internal coherence of reasons:

are they rational, intelligible, and clear? The second type concerns the connection of the reasons to the external legal and evidentiary landscape before the decision maker. Reasons must be respectful and responsive to these legal and factual "constraints": *Vavilov* at paras 101–135.

(1) Unintelligible reasons regarding the Applicant Mother's motivation

[17] I find the Officer's reasoning unintelligible in relation to the motivation of the Applicant Mother.

[18] The jurisprudence of this Court is clear that when H&C factors are raised to overcome an obstacle to status under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and Regulations, the mere presence of the obstacle cannot be used to overpower those H&C factors: *Lopez Bidart v Canada (Citizenship and Immigration)*, 2020 FC 307 at para 32. When a decision maker identifies an obstacle in the legislation, then identifies H&C factors advanced to get around the obstacle, then uses the obstacle to extinguish those H&C factors, the result is circular reasoning. Circular reasoning is identified as a hallmark of unreasonableness in *Vavilov* at paragraph 104.

[19] In the present application, the obstacle is R. 117(9)(d) of the IRPR, which blocks family class sponsorship for the Applicants. To the Officer's credit, they did not merely rely upon the existence of R. 117(9)(d) to counter the H&C arguments, but determined that R. 117(9)(d) was necessary in this particular case to prevent a planned and realized circumvention of Canada's immigration law.

[20] At multiple points in its decision, the Officer expressed its view that the Applicant Mother circumvented Canada's immigration law. The Officer begins their reasons by quoting from the Federal Court of Appeal in *De Guzman v Canada (Minister of Citizenship and Immigration)*, 2005

FCA 436 [*De Guzman*] about the role of R. 117(9)(d) in preventing the circumvention of Canada's immigration laws. The Officer then finds that the Applicant Mother "chose not to disclose PA [the Applicant Son] for fear of jeopardizing her PR application. This is circumventing Canada's immigration law." The Officer concludes their decision by justifying it in light of the "realized and planned circumvention of Canada's immigration system."

[21] Clearly, therefore, the Officer's theory that the Applicant Mother circumvented Canada's immigration system was central to the reasoning in the decision. But the Officer never explains how the circumvention occurred. This is a logical flaw in the Officer's analysis.

[22] Circumvention implies that a strategic advantage is pursued by, or accrued to the perpetrator of the circumvention. In the Applicants' circumstances, however, there is no evidence indicating any potential benefit to the Applicants of the non-disclosure. For example, there is no evidence that the Applicant Son was inadmissible, potentially jeopardizing his mother's admissibility by virtue of section 42 of the IRPA. To the contrary, the evidence before the Officer indicated that the non-disclosure was to the Applicants' great disadvantage, resulting in their separation for over six years.

[23] The Officer relied on *De Guzman* to emphasize the role of R. 117(9)(d) in preventing the circumvention of Canada's immigration law. However, in *De Guzman*, the Appellant would not have received permanent residence if she had declared her sons: *De Guzman* at paras 13, 19. Moreover, the Federal Court of Appeal found that the Appellant's misrepresentations were not innocent: para 20. These factors could logically support a theory of circumvention in that case.

[24] By contrast with *De Guzman*, in the present case there is no evidence that the disclosure of her son would have jeopardized permanent residence for the Applicant Mother. Furthermore, the

evidence was that the Applicant Mother had limited control over the non-disclosure; she was merely a dependent child within her father's application [Response to PFL, CTR pp 497–502].

[25] R. 117(9)(d) may capture circumvention of Canada's immigration law, or it may capture situations involving mistakes, poor judgment, or lack of information about Canada's immigration requirements. The Officer characterized the present case as one of planned and realized circumvention. The Officer had a duty to fully explain why, because the evidence indicated otherwise.

[26] If the Applicant Mother had no strategic advantage in the non-disclosure of her son, and/or if the non-disclosure was the primary responsibility of her father, there was no "realized and planned circumvention of Canada's immigration laws" on her part and the Officer's reasons collapse. The only other basis for the decision is the mistreated evidence related to the best interests of the minor child, which I describe below.

[27] The principle of responsive justification requires that when a decision has harsh consequences, the reasons provided must reflect the stakes: *Vavilov* at para 133. Harsh consequences and high stakes are present here, given that exclusion from the family class under R. 117(9)(d) of the IRPR permanently bars the Applicants from reunification. The failure of the Officer to fully explain the theory that the Applicant Mother circumvented Canada's immigration laws renders the decision unreasonable.

(2) Unreasonable treatment of evidence supporting the best interests of the Applicant Son

[28] The Officer ignored and mischaracterized evidence that it is in the best interests of the minor child to be with his mother. The Officer found that the Applicant Son "is in a loving and

nurturing environment." In fact, the evidence on record revealed that the Applicant Son's father is an alcoholic who misappropriated money sent for the Applicant Son and blackmailed the Applicant Mother.

[29] In contrast to the Officer's characterization of the Applicant Son's environment as nurturing and loving, this is how the Applicant Mother described her son's living conditions which she witnessed during a visit to the Philippines:

> I can't barely walk thru the hallway from the stairs how much trash they left. Pizza boxes got molded and much worst my room where my son sleep stink a lot like an adult sweat. The bed, pillows and blankets were brown stained with something I can't figure out. I was upset and mad but there's nothing I can do but to clean the whole house. Our appliances are all broken already. No rice cooker I can use, no stove, no electric kettle even the fridge won't get cold anymore.
>
> [CTR, pp 498-499]

[30] The Officer mentioned that the Applicant Son was in private school but neglected to mention that he could not attend public school because of his struggles with language capacity.

[31] The Officer concluded that "[t]here is little evidence to support that the status quo has had a lasting negative impact on PA's well-being and development." Even if this was a reasonable characterization of the evidence, it is a misapplication of the test for assessing the best interests of a child. That test requires the choice of an option that best supports a child's well-being and development rather than avoidance of insurmountable difficulties: *Osun v Canada (Citizenship and Immigration)*, 2020 FC 295.

VI. Conclusion

[32] In summary, the Officer erred by providing unintelligible reasons and distorting evidence supporting the best interests of the Applicant Son. The decision is therefore unreasonable and will be set aside.

JUDGMENT in IMM-7845-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter is returned for redetermination by a different visa officer.

3. There are no questions to certify.

"Michael Battista"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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