Federal Court Cour fédérale

Date: 20240925

Docket: IMM-9420-23

Citation: 2024 FC 1511

Toronto, Ontario, September 25, 2024

PRESENT: Mr. Justice Diner

BETWEEN:

MARCOS ALEXANDRE PEREIRA DA SILVA
VILMA MARCIANA PEREIRA DA SILVA

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

(Delivered from the Bench at Toronto, Ontario, on September 25, 2024)

[1] The Applicants seek judicial review of a decision made by an immigration officer [Officer] refusing their permanent residence [PR] application on humanitarian and compassionate grounds [H&C]. For the reasons that follow, this application is granted.

[2] The Applicants are a married couple and are Brazilian citizens who first entered Canada with their daughter through an irregular border crossing in July 2003, after their Temporary

Resident Visa [TRV] applications were refused. Their first refugee claim was made shortly after and refused in March 2004. After the refusal of their refugee claim in 2004, the Applicants filed their first H&C application. The Applicants had a son in 2005 while still in Canada. They then complied with their removal orders and left Canada in 2006 with their two children. The Applicants then received the negative decision on their 2004 H&C application, in 2012.

[3] They subsequently entered Canada again through an irregular border crossing with their Canadian son in 2017 after their TRV applications were refused once again. The Applicants had further removal orders issued against them. Canada Border Services Agency believed that the Applicants had departed Canada around February 2020, but this was a mistaken belief: they remained in Canada and submitted a second H&C application in May 2021, which was refused in February 2022.

[4] The Applicants then submitted their third H&C application on May 24, 2022, which was refused on July 7, 2023, and is the subject of the current application for judicial review [Decision].

[5] In the current H&C under review, they based their application on their establishment and ties in Canada, their contribution to Canada as essential workers during COVID-19, the best interest of their minor child, and the personalized hardship they would face if removed from Canada.

[6] The Officer, in considering all of the factors presented by the Applicants, gave some positive weight to their establishment in Canada as well as the best interests of the child [BIOC] factors relating to the Applicants' son, who was 17 years old at the time of the application. The Officer also gave minimal weight to the adverse country conditions.

[7] The Applicants raise three main arguments, namely that the Officer did not reasonably (i) assess BIOC, (ii) address hardship, and (iii) consider all relevant H&C factors. Ultimately, I must decide whether this Decision was reasonable (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 99 [*Vavilov*]).

[8] I agree with the Applicants that the Officer's BIOC analysis was unreasonable. I acknowledge that the Respondent feels strongly about the wrongs of the Applicants in failing to comply with the law at various points during their long and tortured history to obtain status in Canada. However, those wrongs do not supersede the obligation of departmental officials or those delegated with the responsibility of standing in the stead of the Minister when rendering decisions including on H&C applications, to follow the constraints of the law (see for instance *Henry-Okiusama v Canada (Citizenship and Immigration)*, 2024 FC 1160 at paras 38–39). Of course, the legislation itself sets out little to guide the officers in how they are to adjudicate H&C applications, but the Courts have provided ample commentary on the subject area over the years, including the Supreme Court of Canada.

[9] First, as explained recently in *Francis v Canada (Citizenship and Immigration)*, 2024 FC 1287 at para 7 [***Francis***], BIOC is an important aspect of any H&C analysis. When

conducting their BIOC assessment, the officer "should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them" (*Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 at para 75 (SCC) [*Baker*]). Furthermore, as Justice Norris previously found, "it is perverse to suggest that a child's interests in remaining in Canada are somehow lessened if the alternative meets their basic needs" (*Ganaden v Canada (Citizenship and Immigration)*, 2023 FC 325 at para 22).

[10] In short, as noted in *Francis*, both *Baker* and *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] state that the humanitarian and compassionate component must be central in the officer's assessment: given its central importance, the failure of an officer to have properly considered BIOC goes beyond a minor misstep or peripheral issue that can be overlooked in favour of the other factors considered.

[11] In this case, I agree with the Applicants that the Officer failed to consider the child's perspective, failed to grapple with the impact of a negative decision on his life, and unreasonably focused on his basic needs. Notably, the Officer stated:

> While I note that the applicants fully support Gabriel financially, the applicants have shown an ability to support and care for Gabriel in Brazil. This could continue if the applicant is to live abroad with his sister, who is attending post-secondary school, or if Gabriel returns with the applicants to Brazil. I also note that Gabriel is familiar with the language in Brazil, having grown up there, and would likely still have friendships, as well as the previously mentioned family formed while in Brazil. Overall, I acknowledge the applicants' desire to stay in Canada, as that is where Gabriel was born, however, there has been little evidence provided to show that Gabriel would personally be effected by returning to Brazil. I also note that Gabriel is of the age where many children enter post-secondary school, and many students every year live abroad in Canada. It is entirely possible, as Gabriel

> is a Canadian citizen, he could study in Canada, and return to Brazil during study breaks, or after his studying is complete.

[12] The Officer's conclusion on BIOC was:

> Overall, I do grant some positive weight due to the desire to live in Canada, as that is where Gabriel was born, however, I ultimately am not able to give full weight as Gabriel has shown an ability to live in Brazil in the past, and also has options open to him regarding staying in Canada, either temporarily for school, or on a permanent basis due to his citizenship.

[13] This is not a reasonable BIOC assessment given the constraints of the law as set out by the Supreme Court noted above. The Officer simply – and fundamentally – failed to acknowledge what would be in the best interests of the child, and rather focused on the child's financial needs. In canvassing the child's options (i.e. remaining in Canada without his parents or returning to Brazil with them) and concluding that they were both valid, the Officer failed to evaluate and actually make a finding of what would be in the child's "best interests". Moreover, the Officer erroneously considered that because other children are leaving their parents to pursue their studies, the Applicants' child should be able to do the same. Again, while that may be true, the Officer's analysis does not attempt to grapple with the balancing exercise that lies at the heart of any H&C adjudication in which a child is involved.

[14] Although I agree with the Respondent that the BIOC assessment is not necessarily determinative of an H&C application (*Baker* at para 75; *Kanthasamy* at paras 34–38), the question is not one of paramountcy here. Rather, it is one of justifiability. Had the Officer made a finding on the point, the outcome may well have been different.

[15] I also acknowledge the other authorities that the Respondent's counsel, Mr. Siddall, pointed me to in his very complete arguments on this point (including *De Oliveira Goncalves v Canada (Citizenship and Immigration)*, 2022 FC 225 at paras 22-28 and *Vitorio v Canada (Citizenship and Immigration)*, 2022 FC 177 at paras 16-26, 33). However, this Decision suffered from BIOC analysis shortfalls that were not present in either *Goncalves* or *Vitorio* – which I note also both involved H&C applications from Brazilian nationals including children. Without clearly pronouncing on the BIOC factor here, the Court cannot determine on review what the decision would have been should that analysis have indeed been done, without stepping into the shoes of the decision maker and reweighing the evidence.

[16] In conclusion, given the lack of transparency and intelligibly in the BIOC analysis, the Decision cannot stand as being a reasonable one.

JUDGMENT in IMM-9420-23

THIS COURT'S JUDGMENT is that:

1. The judicial review is granted.

2. There is no question to certify.

3. No costs will issue.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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