Federal Court Cour fédérale

Date: 20241030

Docket: IMM-3482-23

Citation: 2024 FC 1724

Toronto, Ontario, October 30, 2024

PRESENT: The Honourable Mr. Justice A. Grant

BETWEEN:

QADEER AHMED

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] Ms. Jameela Qadeer was found to be a Convention refugee in Canada. She included her spouse, Mr. Qadeer Ahmed, in her application for permanent residence. However, a Visa Officer found that Mr. Ahmed did not meet the requirements for immigration to Canada, as the Officer was not satisfied that his marriage to Ms. Qadeer was valid. This was primarily because Mr.

Ahmed was also legally married to another woman in South Africa, where he has resided for many years.

[2] The Officer also found that the couple were not in a common-law or conjugal relationship, and as such, the Applicant could not be considered a family member of his spouse in Canada. In rejecting the application, the Officer also considered humanitarian and compassionate factors, but concluded that the Applicant's situation did not warrant an exemption from the *Immigration and Refugee Protection Act*.

[3] For the reasons that follow, I will allow this application for judicial review.

II. BACKGROUND

A. *Facts*

[4] The facts of this case are somewhat unusual. They are also important for the purposes of this application, and so I set them out in some detail below.

[5] The Applicant – Qadeer Ahmed – is a citizen of Pakistan and a resident of South Africa. He is an Ahmadi Muslim, and fled Pakistan for South Africa in 2003 due to the well-documented persecution of Ahmadis in Pakistan.

[6] In South Africa, the Applicant initiated a claim for asylum, and not long after his arrival, he met Ms. Johanna Lindiwe Masemola, his first wife. Despite being of different faiths, the two were married in a civil ceremony on July 19, 2004. The Applicant cancelled his asylum permit

and instead applied for and received a spousal permit. According to the Applicant, this relationship ended shortly after it began, in February 2005. Nevertheless, the Applicant continued to reside in South Africa on the spousal permit, and he did not file for divorce until January 2022. The Applicant acknowledges that he did not file for a legal divorce sooner because he had cancelled his asylum status, because he remained fearful of returning to Pakistan, and because his immigration status was dependent on the marriage. According to the Applicant, he has had zero contact or relationship with his first wife since February 2005, beyond the formalizing of their divorce in January 2022.

[7] In 2006, the Applicant's family in Pakistan arranged his marriage to Jameela Qadeer, his second wife. Ms. Qadeer is also an Ahmadi Muslim from Pakistan.

[8] The legal wedding (or Nikah) was conducted by proxy on July 14, 2006, as the Applicant was still living and working in South Africa. At the time, Ms. Qadeer and her mother were unaware that the Applicant remained in a civil marriage with Ms. Masemola. The Applicant told Ms. Qadeer about his existing marriage shortly after their in-person wedding festivities (or Shadi) in Pakistan on March 23, 2007. After the honeymoon, Mr. Ahmed returned to South Africa while Ms. Qadeer remained in Pakistan.

[9] The Applicant states that he visited Ms. Qadeer as often as he could, but could not return permanently due to his ongoing fears of persecution.

[10] In 2010, Alia Qadeer was born, who is the daughter of Applicant and Ms. Qadeer. In February 2012, Ms. Qadeer's sister died, and she became the caregiver, and eventually the

adoptive parent of her sister's children. The Applicant provided financial support to assist in the care of the children.

[11] In 2013, as a result of anti-Ahmadi violence and persecution, Ms. Qadeer and her children (including her adopted children) fled to Thailand, where they applied for refugee protection with the UNHCR. Mr. Ahmed was included in this application, and the family was supported financially by Ms. Qadeer's brother, as well as the Applicant.

[12] In 2015, Ms. Qadeer's brother passed away. As a result, she abandoned her refugee claim in Thailand and returned with her children to Pakistan.

[13] In 2016, Ms. Qadeer applied for visitor visas for herself and her daughter Alia, to visit the Applicant in South Africa. She was unable to apply for spousal sponsorship, because the Applicant remained legally married to his first wife. Her application was refused.

[14] In 2017, after further incidents of religious persecution experienced by Ms. Qadeer and her children, Ms. Qadeer was able to obtain a visitor visa to Canada for herself and her daughter Alia. They arrived in Canada on November 28, 2017, and initiated refugee claims. Not long after their arrival, on March 9, 2018, Abeer Ahmed was born, who is the son of the Applicant and Ms. Qadeer.

[15] The refugee claims of Ms. Qadeer and Alia were granted by the Immigration and Refugee Board, on the basis of their Ahmadi faith. In this period, the Applicant also applied for a Canadian visa to be reunited with his family, but this application was refused.

[16] Having been granted refugee protection, Ms. Qadeer included the Applicant in her application for permanent residence. In September 2022, the Applicant received a procedural fairness letter, which set out the concerns of an Officer with Immigration, Refugees, and Citizenship Canada [IRCC] regarding the validity of his marriage to Ms. Qadeer.

[17] The Applicant responded to the fairness letter, submitting that: i) his second marriage was valid under Pakistani law; ii) in the alternative, there were sufficient humanitarian and compassionate [H&C] grounds to justify an exception to any ineligibility arising from the previous marriage; and iii) in the further alternative, that there is a legitimate conjugal relationship between the Applicant and Ms. Qadeer and, as such, he is a valid member of the family class.

B. *The Initial Decision*

[18] The Applicant's application was refused. An Officer determined that Mr. Ahmed was not eligible for permanent residence as the family member of a protected person. In coming to that conclusion, the Officer found that they were not satisfied that the marriage was valid under both the laws of Canada and the laws of the jurisdiction where it took place – as the Applicant was already married to another woman at the time of the second wedding, and as the wedding took place by proxy. The Officer also determined that the Applicant did not meet the definition of a conjugal partner, as he had not combined his life with Ms. Qadeer and had been living apart from her in South Africa, on a spousal visa based on his first marriage. Finally, the Officer determined that there were insufficient H&C considerations, including the best interests of his biological and

adopted children, to warrant an exemption under the *Immigration and Refugee Protection Act* [IRPA].

[19] In addition to the decision letter that was sent to the Applicant, the Officer produced extensive notes, which were entered into the Global Case Management System [GCMS], and which form a part of the reasons for decision. In those notes, the Officer explained that the Applicant could not be considered a "spouse" of Ms. Qadeer, since he remained married to his first wife at the time of his marriage to Ms. Qadeer, making the marriage polygamous and thus not valid under Canadian law. The Applicant remained married to his first wife on both the date the Nikah Nama was signed (14 July 2006) and on the date the marriage certificate was registered (19 July 2007). The Officer acknowledged that the Applicant was separated from his first wife at the time of the Nikah with Ms. Qadeer, but concluded that "this does not constitute legal divorce" as they remained legally married until January 25, 2022.

[20] The Officer further found that the Applicant remained in South Africa on a spousal visa related to his first wife's citizenship and was thus aware that he remained legally married. Moreover, the Applicant's purported marriage to Ms. Qadeer did not create a monogamous marriage, as the Applicant continued to enjoy the immigration benefits of his first marriage through his status in South Africa. The Officer acknowledged and rejected the Applicant's submission that his first marriage was not seen as valid because it was not completed through Islamic traditions, noting that the first marriage was legally valid until the divorce in January 2022.

[21] The Officer additionally found that the Applicant's marriage to Ms. Qadeer was not valid, because the Nikah was conducted by proxy.

[22] The Officer further determined that the Applicant does not meet the definition of a "common-law partner" under the *Immigration and Refugee Protection Regulations* [IRPR], as he has not resided with Ms. Qadeer for a period of at least twelve months.

[23] Similarly, the Officer concluded that the Applicant does not meet the definition of a "conjugal partner" as he and Ms. Qadeer are not interdependent – they have not lived together for an extended period of time during their marriage and have not combined their lives physically, socially, etc. In making this determination, the Officer noted that the Applicant chose to live in a different country for the entirety of their marriage, and chose to remain married to another woman from 2006 to 2022.

[24] The Officer stated that the Applicant and Ms. Qadeer did not make any applications for permanent residence in South Africa so that they could reside together, and the Applicant only visited Ms. Qadeer and their daughter in Thailand rather than living with them in that country.

[25] The Officer also detailed concerns regarding the genuineness of the marriage, considering that Ms. Qadeer was allegedly unaware at the time of the Nikah that the Applicant was already legally married and intended to stay legally married. The Officer additionally noted that the Applicant has spent only limited time with Ms. Qadeer; and, although their shared biological children prove that they have been physically intimate on at least two occasions, that alone is not

sufficient to establish that their relationship is genuine and that they maintain a conjugal relationship.

[26] The Officer noted the Applicant's explanation that he could not reside with Ms. Qadeer partially due to religious persecution in Pakistan and partially due to his business in South Africa. However, the Officer also noted that the Applicant had returned to Pakistan on five occasions throughout the years. Therefore, it was unclear to the Officer a) why it was too dangerous for the Applicant to reside in Pakistan, but not for him to visit on those occasions; and b) why it was too dangerous for the Applicant to reside in Pakistan, but not too dangerous for Ms. Qadeer and their daughter to reside there until leaving for Thailand, and then again after returning. The Officer was satisfied that the Applicant simply preferred to live in South Africa, where he maintained his business.

[27] Finally, the Officer considered the best interests of the children [BIOC]. The Officer concluded that the Applicant's arrival in Canada would not necessarily be in the children's best interests, as it is unclear what relationship they have with the Applicant considering they have never resided with him. Indeed, the Officer concluded, the event could be disruptive or emotional for the children. In coming to that finding, the Officer noted that the Applicant had chosen to live apart from his family to continue to reap the benefits of his immigration status in South Africa, which he still held by virtue of his first marriage. Therefore, the Officer ultimately determined:

> I am satisfied that the PA and PA-CDA determined that it was in the children's best interests to be raised apart from the PA, which is why they have been raised apart from the PA. I am satisfied that this was determined to be in the children's best

> interests by their parents and accept this assessment that they have made. I am satisfied that if the PA and PA-CDA had determined that it was in the children's best interests to live with the PA, they would have made efforts to permanently reside together prior to this application received on 22 August 2019. This appears to be the first and only application or effort for permanent reunification made by the PA or PA-CDA.

[28] As a result of the foregoing, the Officer determined that the Applicant was not a family member of a protected person, and refused his application.

C. *The Reconsideration Decision*

[29] The Applicant requested a reconsideration of the denial, based on DNA test results confirming his paternity to Alia Qadeer and Abeer Ahmed, submitted as proof of his conjugal relationship with Ms. Qadeer. The reconsideration request was refused by letter dated March 1, 2023.

[30] In GCMS notes regarding the reconsideration request, the Officer notes that they considered the Applicant's DNA test submission, but that a conjugal partner is not a family member pursuant to s.1(3)(a) of the IRPR. S.1(3)(a) of the IRPR only recognizes a spouse or a common-law partner as a family member, not a conjugal partner. Further, the Officer stated that they had already accepted, in their prior decision, that Mr. Ahmed is the biological father of Alia Qadeer and Abeer Ahmed and the DNA results are not new information that would have influenced their final decision. As a result, the Officer concluded:

> As I am not satisfied that the DNA results affect the eligibility (as the DNA tests do not show that PA

> and PA-CDA are either legally married or common-law partners and I had already assessed H&C on this basis), I am not satisfied that there has been an error in law or in fact. Request to reopen denied.

[31] The Applicant submitted an application for judicial review of the initial decision. Later, however, the Applicant submitted a second application in respect of the reconsideration decision, and withdrew the first application. The decision under review in this application relates to the reconsideration determination, though what precisely is to be reviewed in this matter is the source of disagreement between the parties, as discussed in greater detail below.

III. ISSUES AND STANDARD OF REVIEW

[32] The broad issue that arises on this application is whether the Officer's decision, and the reasons provided in support of that decision, were reasonable.

[33] In arguing that the Officer's decision was unreasonable, the Applicant makes three distinct arguments:

A. The Officer erred in the analysis of the Applicant's conjugal partnership;

B. The Officer erred in ignoring the DNA test results proving the Applicant's paternity in respect of his biological children; and

C. The Officer erred in consideration of the best interests of the child (BIOC).

[34] The parties do not dispute that the appropriate standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 16, 23, 25 [*Vavilov*].

IV. ANALYSIS

A. *Preliminary Issue – Collateral Attack and the Reconsideration Decision*

[35] As a preliminary matter, the Respondent submits that much of the Applicant's argument on this application is inappropriate, because it constitutes a "collateral" challenge to the Officer's initial decision rejecting his application - rather than the reconsideration decision, which is the decision under review in this application.

[36] The Applicant responds by noting that the assessment of a reconsideration request involves a two-step process, and two distinct decisions: the first is whether to reconsider the initial decision; and the second (which occurs only after an affirmative decision at the first stage) involves the actual, substantive reconsideration of the matter. The Applicant argues that the Officer's reconsideration determination was clearly (if implicitly) a second stage decision because it involved a reassessment of the matter on its merits, rather than a simple decision as to whether to consider the reopening request.

[37] As a result, the Applicant argues that the initial decision was effectively subsumed into the reconsideration decision, and this Court should therefore consider both on this application. Indeed, the Applicant argues that he discontinued his initial application out of concern for judicial resources, to help avoid a multiplicity of proceedings, and out of confidence that the matter could be dealt with in its entirety under the reconsideration application.

[38] To avoid any confusion, it may have been preferable for the Applicant in this case to have pursued both applications for judicial review, and to have requested that they be heard

jointly. That said, I agree with the Applicant that the content of the reconsideration decision does suggest that the Officer considered the request on its merits and, as such, implicitly reconsidered the larger application on its merits as well: *Thangappan v Canada (Citizenship and Immigration)*, 2012 FC 1266 at para 3.

[39] Moreover, to the extent that there may be some ambiguity as to what the Officer actually intended to decide in addressing the reconsideration request, I find that it is in the interests of justice to assess the reconsideration decision as incorporating the initial decision. In *Naderika v Canada (Citizenship and Immigration)* 2015 FC 788 [*Naderika*], my colleague Justice Gascon considered a similar, but inverted, issue – in that case, the applicant challenged the initial decision, but sought to also incorporate the reconsideration decision into the application. In permitting the matter to proceed on the basis of both decisions, Justice Gascon stated (at para 29):

> In any event, I am satisfied that the interests of justice demand that the Court reviews the determination on the reconsideration request as part of the judicial review of the initial decision refusing Mr. Naderika's application for permanent residence (*Marr v Canada (Citizenship and Immigration)*, 2011 FC 367, at para 56 [*Marr*]; *Thangappan v Canada (Citizenship and Immigration)*, 2012 FC 1266, at para 3). The refusal to reconsider refers to the same decision, is part of the same immigration file and was issued before Mr. Naderika filed his application for judicial review. Further, the evidence placed before the Officer conclusively answered the concern that had led to the initial decision. As such, no useful purpose would be served by requiring Mr. Naderika to file a separate application for judicial review and to bifurcate the proceedings, and it would be contrary to the interests of justice to do so.

[40] As in *Naderika*, the initial and reconsideration decisions in this matter related to the same application, bore the same file number, and involved the same evidentiary record. Indeed, the

intersection of these determinations is affirmed by the Respondent's production of both the initial decision (and all of the evidence related to that decision) and the reconsideration decision in the Certified Tribunal Record.

B. *Legal Framework*

[41] In order to properly understand the issues that arise in this matter, a number of Regulatory provisions and guidelines are worth mentioning.

[42] First, subsection 1(3) of the IRPR defines "family member":

> For the purposes of the Act…***family member*** in respect of a person means
>
> > **(a)** the spouse or common-law partner of the person;

[43] Having established that a family member includes a common-law partner, the Regulations also provide a definition of that term. Subsection 1(1) of the IRPR states:

> ***Common-law partner*** means, in relation to a person, an individual who is cohabiting with the person in a conjugal relationship, having so cohabited for a period of at least one year.

[44] Subsection 1(2) of the IRPR then expands the definition of 'common-law partner', under certain circumstances, to include conjugal relationships:

> For the purposes of the Act and these Regulations, an individual who has been in a conjugal relationship with a person for at least one year but is unable to cohabit with the person, due to persecution or any form of penal control, shall be considered a common-law partner of the person.

[45] The term “conjugal” is not specifically defined in the Regulations; however, section 2 of the IRPR goes on to define “conjugal partner” as follows:

> ***conjugal partner*** means, in relation to a sponsor, a foreign national residing outside Canada who is in a conjugal relationship with the sponsor and has been in that relationship for a period of at least one year.

[46] Finally, while there is no legislative definition of “conjugal,” the Respondent’s immigration processing manuals do provide detailed guidance on the term, most of which derives from the jurisprudence. Such manuals do not, on their own, have the force of law. That said, to the extent that they represent distillations of the applicable case law, they do set out legally binding principles. Beyond this, the manuals provide helpful insights into the Department’s own interpretation of its enabling legislation. With this in mind, paragraph 5.25 of IRCC’s *OP2: Processing Members of the Family Class, Immigration Processing Manual for CIC* [Manual OP2] states as follows:

> The word “conjugal” does not mean “sexual relations” alone. It signifies that there is a significant degree of attachment between two partners…
>
> In the *M. v. H.* decision, the Supreme Court adopts the list of factors that must be considered in determining whether any two individuals are actually in a conjugal relationship...They include:
>
> - shared shelter (e.g., sleeping arrangements);
> - sexual and personal behaviour (e.g., fidelity, commitment, feelings towards each other);
> - services (e.g., conduct and habit with respect to the sharing of household chores)
> - social activities (e.g., their attitude and conduct as a couple in the community and with their families);
> - economic support (e.g., financial arrangements, ownership of property);

> • children (e.g., attitude and conduct concerning children)
>
> • the societal perception of the two as a couple.
>
> From the language used by the Supreme Court throughout *M. v. H.*, it is clear that a conjugal relationship is one of some permanence, where individuals are interdependent – financially, socially, emotionally, and physically – where they share household and related responsibilities, and where they have made a serious commitment to one another.
>
> Based on this, the following characteristics should be present to some degree in all conjugal relationships, married and unmarried:
>
> • mutual commitment to a shared life;
>
> • exclusive – cannot be in more than one conjugal relationship at a time;
>
> • intimate – commitment to sexual exclusivity
>
> • interdependent – physically, emotionally, financially, socially;
>
> • permanent – long-term, genuine and continuing relationship;
>
> • present themselves as a couple;
>
> • regarded by others as a couple;
>
> • caring for children (if there are children)
>
> …
>
> In a common-law or conjugal partner relationship, there is not necessarily a single point in time at which a commitment is made, and there is no one legal document attesting to the commitment. Instead, there is the passage of time together, the building of intimacy and emotional ties and the accumulation of other types of evidence, such as naming one another as beneficiaries of insurance policies or estates, joint ownership of possessions, joint decision-making with consequences for one partner affecting the other, and financial support of one another (joint expenses or sharing of income, etc). When taken together, these facts indicate that the couple has come to a similar point as that of a married couple – there is significant commitment and mutual interdependence in a monogamous relationship of some permanence.

[47] To sum up the above for the purposes of this case, to be an eligible ‘family member’, the Applicant was required to establish that he met the definition of ‘spouse’ or ‘common-law partner’. The Applicant could meet the definition of ‘common-law partner’ if he and Ms. Qadeer

had been in a conjugal relationship for at least one year, but had been unable to cohabit due to persecution or any form of penal control.

[48] There remains, however, a further regulatory wrinkle arising from the Applicant's first marriage, which relates to concerns over polygamy. Subparagraph 117(1)(c)(i) of the IRPR states:

> **117(9)** A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if
>
> …
>
> **(c)** the foreign national is the sponsor's spouse and
>
> **(i)** the sponsor or the foreign national was, at the time of their marriage, the spouse of another person…

This will be discussed in greater detail, below.

C. *The Applicant's Conjugal Relationship*

[49] On a certain register, it is easy to understand the Officer's concerns in this matter: the Applicant was legally married to his first wife - and he benefitted from this marriage, as it conferred him status in South Africa. In this same period, the Applicant considered himself to be married to Ms. Qadeer, and once she obtained refugee protection in Canada, he also sought to benefit from her status. If we were to remain on this register, the Officer's decision would appear reasonable.

[50] I find, however, that both the regulatory framework outlined above, and the evidence before the Officer, demanded more.

[51] On the evidence, it is unassailably clear that the Applicant has been in a monogamous relationship with Ms. Qadeer for many years; one defined by the intertwining of their lives, the birth of their children, and the co-mingling of their families and finances. While they have not lived together for significant periods, the evidence before the Officer explained with convincing clarity, why this was the case. While the Applicant was not in imminent danger in Pakistan, as an Ahmadi Muslim he feared persecution in that country – this was why he originally left the country, and it was on this same basis that Canada recognized Ms. Qadeer as a Convention refugee. Ms. Qadeer was also not in Pakistan for a significant period during their relationship, as she was seeking refugee protection in Thailand, and had included the Applicant as her spouse in that application. Given the uncertainty of Ms. Qadeer's status in Thailand, it is not particularly surprising that the Applicant did not move there, though he did visit her while she was there. Furthermore, the couple's efforts to be together were foiled on two occasions by visa refusals – one South African, and one Canadian.

[52] Beyond the issue of cohabitation, the evidence before the Officer comprehensively addressed all the other indicators of a conjugal relationship – there was evidence of monogamous intimacy between the Applicant and Ms. Qadeer; there was evidence of financial support; there was extensive evidence of their commitment to each other; and most importantly, there was the existence of two children, born of their relationship, and the close bonds between the Applicant and his children, despite their physical separation. In otherwise detailed reasons, the Officer's consideration of the question of conjugality was relatively brief:

> I am not satisfied that you have been in a conjugal relationship with the applicant in Canada, as I am not satisfied that you have combined your lives together. You have chosen to live apart from the applicant in Canada in South Africa on a spousal visa based on

> your marriage to your first spouse. As such, I am not satisfied that you are the family member of the applicant in Canada.

[53] In the GCMS notes, the Officer provided greater detail, but no clearer rationale for the finding that the Applicant and Ms. Qadeer are not in a conjugal relationship. In reviewing these notes, it is clear that a preoccupying concern for the Officer was the Applicant's legal marriage to Ms. Masemola and the benefit that the Applicant derived from that marriage. I understand that concern. However, in considering this issue, it would have been helpful for the Officer to have considered OP2, which specifically addresses it as follows (at para 5.49):

> **What happens if the conjugal partner (principal applicant) is married to another person?**
>
> Persons who are married to third parties can be considered conjugal partners provided their marriage has broken down and they have lived separate and apart from their spouse for long enough to establish a conjugal relationship with another person. In this case, they must have separated from the legally married spouse and established a conjugal relationship with the conjugal partner and been in that relationship for at least one year.

[54] In the circumstances of this case, I find that the Officer's concern was met with overwhelming evidence detailing: i) the almost immediate breakdown of the Applicant's marriage to Ms. Masemola; and ii) the long, committed, and clearly conjugal relationship that has developed between the Applicant and Ms. Qadeer over the years.

[55] In the end, I have concluded that the Officer's failure to meaningfully engage with this evidence was unreasonable. I also find that the Officer's statement that the Applicant has "chosen to live apart" from Ms. Qadeer (and his children) to be a concerning distortion of the evidence in the record. As noted above, the evidence illustrates the numerous efforts that the Applicant and Ms. Qadeer have made to spend time together, all within the very real constraints

of persecutory treatment (in Pakistan), life circumstances (requiring Ms. Qadeer to abandon her asylum claim in Thailand), visa controls (in Canada and South Africa), and financial limitations.

[56] This brings me to my final point on this issue, which relates to the Officer's engagement with subsection 1(2) of the IRPR – the provision that expands the definition of common-law relationships to those in which a couple have been unable to cohabit due to persecution or penal control. The Officer did not explicitly mention this section of the IRPR, but indirectly addressed it by concluding that the couple's separation was entirely within their control. The Officer stated:

> I am not satisfied that they are in a conjugal relationship. They have chosen to remain living in separate countries for the duration of their marriage; this was the direct product of their personal choices and decisions. I am not satisfied that they have combined their lives together as a result.

[57] The documentary evidence flatly contradicts these findings. To reiterate from above, the Applicant and Ms. Qadeer assert a well-founded fear of persecution in Pakistan - claims that have been accepted by Canada, in respect of Ms. Qadeer. The Canadian government has therefore affirmed that the Applicant and Ms. Qadeer cannot cohabit in Pakistan for reasons related to persecution, irrespective of previous, temporary visits that may have taken place. The Applicant and Ms. Qadeer attempted to be reunited in Thailand, but could not pursue this for reasons that they claim (and were not disputed), were out of their control. They also attempted to be reunited, albeit temporarily, in South Africa, but this effort was unsuccessful. On my review of the evidence, it is clear that the Applicant's separation from his spouse and his children was not due to his own agency, but to circumstances largely (if not entirely) outside of his control.

[58] To sum up my findings on this issue, I have concluded that the Officer's determination that the Applicant is not in a conjugal relationship with Ms. Qadeer was unreasonable, as the evidence provided in support of the relationship contradicted that conclusion. Reading between the lines, I would suggest that the understandable concern with the Applicant's first marriage distracted the Officer from the core determination, which was whether the Applicant had established that he was in a genuine, conjugal relationship with Ms. Qadeer.

[59] While the above finding is sufficient to grant this application, I will briefly address the second and third issues raised by the Applicant.

D. *The DNA Test Results*

[60] On the significance of the DNA results, I will say little, as I agree with the Respondent – the initial decision accepted that the Applicant was the biological father of Alia and Abeer.

[61] In reconsidering the matter, the Officer reiterated that the Applicant's paternity of these children was accepted, and I therefore see nothing unreasonable in the Officer's determination that little turned on the DNA results.

E. *The Best Interests of the Applicant's Children*

[62] I will also refrain from significant commentary on the Officer's assessment of the best interests of Alia and Abeer, as these interests will again have to be considered on the redetermination of this matter.

[63] For the sake of that reconsideration, however, I will say the following. For the reasons outlined above, it was unreasonable for the Officer to suggest that the Applicant and Ms. Qadeer have decided to live apart. It was correspondingly unreasonable for the Officer to conclude that they have "determined that it was in the best interests of the children to be raised by [Ms. Qadeer] as their sole caregiver." This finding was simply not responsive to the evidence in the Record, which outlined the efforts that the Applicant and Ms. Qadeer have made to spend time together, despite their constraints, and to their ongoing desire to be together. Indeed, the Officer's finding in this regard is contradicted by the very application submitted by the Applicant, which demonstrated his subjective desire to be reunited with his family. To this extent, the Officer's reasons lacked a rational chain of analysis, as required by *Vavilov*.

[64] But, irrespective of the Officer's unreasonable assessment of the Applicant's life decisions vis-à-vis his children, there was evidence in the record, completely ignored by the Officer, which spoke directly to the best interests of the children. That evidence came from Alia herself, who, at the age of 12, provided her own statement in support of her father's application. In that statement, Alia provided strong evidence of her bond with her father, and a heartfelt desire to be reunited with him. She stated in part:

> My parents love me very much. You would not guess this stuff so how much do I love my father? My father has always sacrificed for me. I miss my father a lot since I came to Canada. Not a day goes by when I don't miss my father. l keep praying for my father's health. My brother and I often miss our father in Canada, and I hope my father will come to Canada soon. When I get more sad, I talk to my father on WhatsApp and send messages. l talk to my father everyday and I miss them so much and I pray to God that my father comes back soon Canada and we all can live as a complete family. Father, I miss you so much. My heart wants my father to fly and come to me in Canada, and then we all can live together as a family. We all miss our lovely father very much.

[65] A child's wishes are not necessarily always aligned with, or determinative of, their best interests. However, a child's views should be considered, particularly as they become older: see, from a different context, s. 16(3) of the *Divorce Act*. Upon reviewing the statement of Alia, I see no basis for the Officer's conclusions with respect to the best interests of either her, or her brother.

V. CONCLUSION

[66] For the above reasons, this application for judicial review is granted. The parties did not propose a question for certification and I agree that none arises.

JUDGMENT in IMM-3482-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter is remitted for redetermination, in accordance with these reasons, by a different Officer.

3. No question is certified for appeal.

"Angus G. Grant"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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