Federal Court Cour fédérale

Date: 20220317

Docket: IMM-158-21

Citation: 2022 FC 362

Ottawa, Ontario, March 17, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

DANIJEL IVANUS
ADRIANA IVANUS
LEONA IVANUS
ANDREJ IVANUS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by a Senior Immigration Officer [Officer], dated January 5, 2021, refusing the Applicants' application for permanent residence on humanitarian and compassionate [H&C] grounds. [Decision] The Officer found the Applicants did

not have sufficient H&C considerations to grant an exemption under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [*IRPA*].

II. Facts

[2] The Applicants are citizens of Croatia. The Principal Applicant (age 34) is a professional soccer player for the "Toronto Croatia" soccer club, as well as a full time drywaller. His spouse (age 38) works as an Administrative Assistant and together they have a son (age 9), a daughter (age 11) [the Minor Applicants], and a Canadian-born child (age 2).

[3] The Principal Applicant first arrived in Canada in June 2014 as a visitor. His spouse and the Minor Applicants entered Canada in July 2015. The Principal Applicant was issued a work permit before his family's arrival in July 2014 and obtained several extensions with the latest work permit being valid until July 2021. The Applicants applied for permanent residence on H&C grounds on October 21, 2019. A daughter was born in Canada November 12, 2019, a fact brought to the attention of the Officer by correspondence dated September 12, 2020.

III. Decision under review

[4] The Officer was not satisfied the Applicants' H&C considerations justified an exemption under s. 25(1) of the *IRPA* and dismissed their application on January 5, 2021. The H&C grounds raised were establishment, best interests of the child, and hardship upon return.

[5] Regarding establishment, the Officer gave some positive consideration to the Applicants' establishment. The Officer acknowledged:

- the Principal Applicant has been living in Canada for 6 years while the rest of the Applicants have been living in Canada for 5 years;
- many letters of support were submitted attesting to the Applicants' good character and hardworking work ethic;
- the adult Applicants have been working since arriving in Canada; and
- the Applicants have shown sound financial management and have lived within status during their time in Canada while also maintaining clean and civil records both in Canada and Croatia.

[6] Regarding hardship upon return, the Officer recognized the Applicants would face challenges if removed from Canada, namely they would lose their jobs and be forced to find new employment in a country with a poor economy and high unemployment rates. However, the Officer found the adult Applicants have gained valuable work experience while living in Canada, which they can use to obtain similar occupations in Croatia. The Officer noted the Principal Applicant lost his job in Croatia in 2013 and were unable to support themselves thereafter, but found they had not provided sufficient evidence to establish they will be unable to obtain employment and support themselves upon their return to Croatia.

[7] The Officer further found:

- while COVID-19 has had severe economic consequences within Croatia's tourism industry, the Applicants'

occupations do not generally rely on the tourism industry and given the global advances regarding the vaccine, the Officer only assigned some weight to this aspect;

- the Applicants have the option of being on social welfare in Croatia which can reduce their hardship upon return to Croatia (citing to the European Commission 2020);

- the Applicants have family in Croatia and have not provided evidence to support they would not be able to create a new social network;

- the Applicants can maintain relationships formed in Canada through phone, social medial, etc. and will be able to travel to Canada as visitors to visit their friends in Canada;

- the general standard of living is more favourable in Canada compared to Croatia; however, aside from the armed robbery that occurred at the female Applicant's workplace, the Applicants have not indicated that they have dealt with any other issues related to criminality in Croatia;

- the Applicants provided the 2018 Human Rights report on Croatia which identify corruption issues; however, the Applicants have not indicated how their personal circumstances would put them at increased risk of corruption and assigned some weight to this aspect; and

- the female Applicant indicates she endured psychological trauma during the armed robbery of her workplace and suffered from panic attacks, fear and stress following the incident; however, cited to the European Observatory to find resources are available in Croatia and assigned some weight to this aspect.

[8] Regarding the best interests of the children [BIOC], the Officer only considered the best interests of the first two children. Nothing at all is said about the third child notwithstanding the H&C Officer was given notice of it, in connection with which the Applicants also made brief submissions.

[9] The Officer acknowledged the first two children are in school, they have "clearly begun to establish themselves both educationally and socially", both children have spent the majority of their lives in Canada and they have little ties to Croatia. The Officer found it was in the best interests of the two children to remain in Canada. The Officer noted other factors that may minimize the impacts of being removed from Canada but ultimately recognized the children will need to re-establish themselves in a mostly foreign country and once again found it would be their best interest to remain in Canada and continue to establish themselves socially and educationally.

[10] Notably, later in the reasons, the Officer stated it would only be "somewhat in the children's best interests" to remain in Canada.

[11] Very notably, the Officer at no time acknowledged, considered or assessed the best interests of the Canadian child born November 12, 2019. This was obviously an oversight by the Officer given specific notice and brief submissions were made in relation to this Canadian child in their counsel's letter of September 12, 2020.

[12] Overall, the Officer gave the Applicants submissions on establishment in Canada "some positive weight", and gave the Hardship factor "some weight". No such weighing was made in respect of BIOC, however the Officer stated it was "somewhat in the children's best interests" to remain in Canada. The Officer found the option of granting the requested exemption not justified by humanitarian and compassionate considerations and refused the application.

IV. Issues

[13] The Applicants submit the issues are as follows:

A. The respondent made key errors of fact in assessing the best interests of the children directly affected, therefore he was not "alert, alive and sensitive to the interests of the children".

B. The officer failed to adopt an empathetic approach to assess the application and failed to consider the matter globally as instructed by the Supreme Court in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*]. Instead, the officer considered each factor in isolation from the rest and without an empathetic approach and ultimately the officer exhibited a profound misunderstanding of the case before them.

C. The Respondent's decision was unreasonable and erroneous in law in that it breached the principles established in *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 and *Sebbe v Canada (Minister of Citizenship & Immigration)*, 2012 FC 813.

D. The decision maker erred in his assessment of "hardship/risk".

[14] The Respondent submits the issue is whether the Applicants demonstrated that there is an arguable issue of law upon which the proposed application for judicial review may succeed.

[15] Respectfully the only issue in this application is whether the Decision is reasonable.

V. Standard of Review

[16] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*], issued at the same time as the Supreme Court of Canada's decision in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] 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). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
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> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*,

> at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
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> [Emphasis added]

[17] The Supreme Court of Canada in *Vavilov* at para 86 states, "it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision-maker to those to whom the decision applies," and provides guidance that the reviewing court decide based on the record before them:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.
>
> [Emphasis added]

[18] Moreover, *Vavilov* requires the reviewing court to assess whether the decision subject to judicial review meaningfully grapples with the key issues:

> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker,* at para. 39.
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> [Emphasis added]

VI. Analysis

A. *Is the Decision reasonable?*

(1) Best Interest of the Children

[19] The Applicants submit the Officer erred in refusing the application after finding the best interests of the children would be to remain in Canada. The Applicants further submit the Officer erred in only referring to two out of their three children in the BIOC assessment. As noted, the Applicants had a third child born in Canada on November 12, 2019, of which the Applicants notified the Officer prior to the Decision being rendered. Therefore, they conclude – as do I – that the Officer was not "alert, alive and sensitive" to the interests of the three children.

[20] The Respondent acknowledges the Officer's failure to mention the Applicants' third child and says that was an "oversight." The Respondent notes the third child was not referred to in the Applicants' original application, the Applicants submitted their application on October 21, 2019, the third child was born November 12, 2019, but it was not until September 12, 2020 that the Applicants advised the Minister of the third child. However the Decision did not come out for another four months.

[21] In my view the failure of the Officer to acknowledge, consider or assess in any way the best interests of the Canadian child is a fatal flaw in the Decision, thus contravening *Vavilov* at para 102. The failure to deal with the third child also fails to account for the evidence in the case, thus depriving the Decision of the required degree of justification per *Vavilov* at para 126. Ignoring the best interests of this child (Canadian-born) offends the statutory duty on H&C Officers imposed by section 25 of *IRPA* to consider "the best interests of a child directly affected" by the decision, and in addition disregards the Supreme Court of Canada's decision in *Kanthasamy*.

[22] In addition, even without the oversight, and in my respectful view, the Decision lacks intelligibility because while it twice finds remaining in Canada to be in the best interests of the two children, in its conclusions it inexplicably downgrades BIOC to only being "somewhat in the children's best interests" to remain in Canada. With respect it cannot be both. As such I am not satisfied the Decision is intelligible as per *Vavilov* at para 32.

[23] Given the foregoing, the Decision must be set aside. It is not necessary to consider the issues of establishment or hardship.

VII. Conclusion

[24] In my view, the Decision is not justified or intelligible per *Vavilov* and *Canada Post*. Therefore it must be set aside and I will so Order.

VIII. Certified Question

[25] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-158-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.

2. The decision is set aside and the matter is referred back for redetermination by a different decision-maker.

3. There is no question of general importance to certify.

4. No costs are awarded.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-158-21
STYLE OF CAUSE:	DANIJEL IVANUS, ADRIANA IVANUS, LEONA IVANUS AND ANDREJ IVANUS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
DATE OF HEARING:	MARCH 10, 2022
JUDGMENT AND REASONS:	BROWN J.
DATED:	MARCH 17, 2022

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