Federal Court  Cour fédérale

Date: 20220425

Docket: IMM-2759-20

Citation: 2022 FC 599

Ottawa, Ontario, April 25, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

ROCIO MATEOS DE LA LUZ
JAIME ALBERTO LEON AVELINO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] *"... Despite the positive attributes in their application, I am unable to avert my attention away from the applicants' immigration record in Canada, which proves less than spotless."*

[2] If an immigration officer cannot avert their attention from an applicant's immigration history, how can they be said to have approached an application with clear-sightedness, and weighed the facts of a decision rationally?

[3] The Applicants, Rocio Mateos de la Luz and Jaime Alberto Leon Avelino, seek judicial review of a decision by a senior immigration officer (the "Officer") of Immigration, Refugees and Citizenship Canada, dated May 19, 2020, refusing their application for permanent residence from within Canada on humanitarian and compassionate grounds ("H&C"), pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[4] The Applicants submit that the Officer's decision is unreasonable. They argue that the Officer's reliance on the Applicants' non-compliance with Canadian immigration laws caused the Officer to lose sight of the positive factors identified in their H&C application, in particular with respect to the Best Interest of the Child ("BIOC").

[5] For the reasons set out below, I find the Officer's judgment was clouded by a fixation on a breach of Canada's immigration scheme, irrespective of any H&C circumstances. I find that this fixation cast a shadow on the Officer's entire decision, rendering it unreasonable. I therefore allow this application for judicial review.

II. Facts

A. *The Applicants*

[6] The Applicants are both 38 years old, and citizens of Mexico. They have a six-year-old son named Bruno ("Bruno"). Bruno was born in Canada on February 18, 2014.

[7] On June 13, 2006, the Applicants arrived in Canada on visitor visas. The Applicants settled in Canada and remained beyond the expiration of their temporary visas.

[8] On February 22, 2018, the Applicants submitted an application for permanent residence based on H&C grounds.

B. *Decision Under Review*

[9] By letter dated May 19, 2020, the Officer refused the Applicants' H&C application, finding that the H&C factors did not justify an exemption under subsection 25(1) of the *IRPA*.

[10] In considering the BIOC with respect to Bruno, the Officer concluded that it is in Bruno's best interest to remain united with his parents in Canada. The Officer found that it would be difficult for Bruno to adjust in an unfamiliar country, given his parents' extended absence from Mexico. The Officer noted that while Bruno's parents would be able to provide him with care and love wherever they may live, the Applicants' opportunities in Mexico might be limited because of their profile. In Canada, however, Bruno would continue to benefit from the stability and safety he is accustomed to in Toronto. The Officer noted how Bruno is unfamiliar with life in Mexico, how his schooling and activities would be disrupted, and how a relocation would have an emotional impact on both Bruno and his parents. However, the Officer determined that

Bruno is familiar with Mexican society, language and culture, and also has an extensive network of relatives in Mexico.

[11] With respect to the Applicants' establishment in Canada, the Officer noted the considerable amount of time the Applicants have been in Canada. The Officer also gave positive consideration to the fact that the Applicants did not rely on social assistance while in Canada, do not have a criminal history in Canada, and have a large and supportive community in Toronto, as well as distant relatives in both Toronto and British Columbia.

[12] Nonetheless, the Officer gave negative consideration to the fact that, for nearly twelve years since the expiry of their visitor visas, the Applicants had not attempted to apply to remain in Canada permanently. The Officer noted that the Applicants had contravened their visitor status in Canada by overstaying their visas, pursuing employment opportunities soon after arriving in Canada, and continuing to work without status. The Officer found this extensive history of disregarding Canada's immigration system to be "a significant counterweight to the positive factors observed in this application."

[13] Upon weighing all of the H&C factors, the Officer's conclusion states:

> I acknowledge that the applicants have a measureable degree of establishment, given their extensive time in Canada. At the same time, they only recently applied for more permanent status. Despite the positive attributes in their application, I am unable to avert my attention away from the applicants' immigration record in Canada, which proves less than spotless.

III. Issue and Standard of Review

[14] The sole issue in this application for judicial review is whether the Officer's decision is reasonable.

[15] Both parties submit that the Officer's decision is to be reviewed on the standard of reasonableness. I agree (*Rannatshe v Canada (Citizenship and Immigration),* 2021 FC 1377 at para 4; *Kanthasamy v Canada (Citizenship and Immigration),* 2015 SCC 61 ("*Kanthasamy*") at paras 8, 44-45). I find no reasons to depart from the presumption of reasonableness established by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paragraphs 16-17.

[16] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). 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). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[17] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns

about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36).

IV. Analysis

A. *The Applicants' Position*

[18] The Applicants submit that while the Officer's decision describes numerous positive factors to be considered, the Officer made an impermissible inference that non-compliance with Canada's immigration laws is sufficient to outweigh all the positive factors in their H&C application. Specifically, the Applicants maintain that by focusing on a history of non-compliance with immigration law as the determinative factor in the decision, the Officer erred by losing sight of the BIOC. As such, the Applicants maintain that the Officer's reasons fail to justify their conclusion and lack a rational chain of analysis (*Vavilov* at para 85).

[19] The Applicants argue that the language used by the Officer to refuse their H&C application implies that only applications from applicants with "spotless" immigration records will warrant H&C relief, when in fact, the very purpose of H&C relief is to overcome these "spots" of non-compliance. The Applicants submit that subsection 25(1) of the *IRPA* and H&C relief relies on the presupposition that an applicant has failed to comply with provisions of the *IRPA (Aboubacar v Canada (Citizenship and Immigration)*, 2014 FC 714 ("*Aboubacar*") at para

20; see also *Mitchell v Canada (Citizenship and Immigration)*, 2019 FC 190 ("*Mitchell*") at para 23; *Bhalla v Canada (Citizenship and Immigration)*, 2019 FC 1638 at para 26). As noted by this Court at paragraph 20 of *Aboubacar*:

> Section 25 is directed to whether an exception should be made to the unusual application of the IRPA laws and regulations. If the usual laws and regulations are considered to be dispositive of the outcome of a section 25 application, section 25 becomes a hollow exercise.

[20] The Applicants further submit that the Officer's justification for their decision is particularly important, given the Officer's acknowledgement that a refusal of the H&C application would go against Bruno's best interest, which are to remain in Canada. As noted by the Supreme Court of Canada in *Kanthasamy*, "[c]hildren will rarely, if ever, be deserving of any hardship" (at paras 41 and 59, citing *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 9). The Applicants stress that to hold the actions of a child's parents against that child is counter to the H&C approach (*Mulholland v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 597 (CanLII) at para 29).

B. *The Respondent's Position*

[21] The Respondent submits that the Officer's decision bears the hallmarks of reasonableness, as the Officer carefully considered the evidence of the BIOC, the Applicants' establishment, the risks and adverse country conditions in Mexico, and balanced these factors against the Applicants' history of non-compliance with Canada's immigration laws. The Respondent maintains that, in refusing to grant H&C relief under subsection 25(1) of the *IRPA*,

the Officer appropriately exercised their discretion to give more weight to the Applicants' negative immigration history, and it is not the role of the Court to reweigh the factors in this case (*Lin v Canada (Citizenship and Immigration)*, 2021 FC 1452 at para 38).

[22] The Respondent further submits that nothing in the Officer's reasons suggests that the Officer considered the Applicants' "less than spotless" immigration records to be determinative of the H&C application. Rather, this language was simply used to describe the Applicants' history of overstaying their visas and working without authorization in Canada for over a decade. The Respondent asserts that it is well established that an officer must consider how an applicant's conduct will affect the integrity of the Canadian immigration system (*Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 19, as affirmed in *Choi v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 494 ("*Choi*") at paras 22-23).

[23] Thus, the Respondent maintains that the Officer did not err by attributing significant negative weight to the Applicants' immigration record, nor should the Applicants be "rewarded" for their decision to reside and work in Canada without valid status (*Madera v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 108 at para 9). The Respondent argues that the Officer reasonably assessed the particular circumstances of the Applicants' unlawful presence in Canada and explained why the Applicant's establishment should not be "rewarded" (*Xu v Canada (Citizenship and Immigration)*, 2021 FC 1102 at para 75).

[24] Finally, with regard to the Officer's BIOC analysis, the Respondent contends that the BIOC does not always outweigh other considerations and must be weighed alongside other

factors in favour or against the granting of H&C relief (*Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) at para 75 ("*Baker*"). The Respondent maintains that the Officer addressed the concerns and information put forward by the Applicants with respect to Bruno's interests and was alert, alive and sensitive to the BIOC.

C. *Analysis: Reasonableness of the Officer's decision*

[25] I do not find that the Officer's decision was reasonable.

[26] In assessing the BIOC, the Officer's reasons clearly state that, while Bruno's parents would be able to provide him with love and care wherever they may live, it would be in Bruno's best interest to remain united with his parents in Canada. This includes the benefits of the stability and security that comes with his life in Toronto, and not having to face the disruption of his schooling and activities. Consideration was also given to the adverse country conditions in Mexico, the emotional turmoil that would come with adjusting to an unfamiliar country, and the fact that Bruno's opportunities in Mexico may be limited because of his parents' profile.

[27] I accept that the BIOC must not always outweigh other H&C considerations, yet it must still be a *primary* consideration when assessing an H&C application (*Baker* at para 75; *Kanthasamy* at para 37). Despite the Officer's determination that it would be in Bruno's best interest to remain in Canada, and the positive weight given to the Applicants' long period of establishment in Canada, the Officer still placed more weight on the Applicants' non-compliance with Canada's immigration laws, concluding: "Despite the positive attributes in their application,

I am unable to avert my attention away from the applicants' immigration record in Canada, which proves less than spotless." [Emphasis added.]

[28] While an officer can consider a negative immigration history in their decision (*Choi* at para 21), I agree with the Applicants' position that the Officer placed an unreasonable emphasis on the Applicants' non-compliance with Canada's immigration laws and minimized Bruno's best interests. As noted in *Mitchell*, an application for relief under subsection 25(1) of the *IRPA* "presupposes that the applicant has failed to comply with one or more of the provision of the *IRPA*. Therefore, a decision-maker must assess the nature of the non-compliance and its relevance and weight against the applicant's H&C factors in each case" (at para 23). The very purpose of H&C application is to offer relief to those who have not complied with Canada's immigration scheme. I therefore find that there is a disconnect in the Officer's decision between the positive weight given to the BIOC and establishment factors, and the decision to refuse the application solely because of a disregard of Canada's immigration laws.

[29] As an aside, I am also troubled by the Officer's assumption that Bruno is "[…] familiar with Mexican society, language, and culture. His parents are proficient in the Spanish language and may communicate with him in that language at home." As I recently noted in *Kaur v Canada (Citizenship and Immigration)*, 2022 FC 220 at paragraph 39: "The expectation that a child of immigrant parents has developed a cultural familiarity or connection with her parents' country of nationality is presumptuous, baseless and plays into harmful stereotypes."

[30] The language used by the Officer in their conclusion suggests that, regardless of the positive H&C factors in this case, relief cannot be granted because of the Applicants' immigration history. This type of reasoning does not follow a rational chain of analysis and cannot stand. This is particularly so given the Officer's failure to explain why the Applicants' establishment and the BIOC were afforded less weight, in spite of the Officer's clear recognition that it is in Bruno's best interest that he "[…] remain united with his parents in Canada." While the Officer may have been alert, alive and sensitive to Bruno's interests, the Officer's conclusion does not flow from their findings regarding Bruno's best interests.

[31] As noted by the Applicants' counsel during the hearing, the Officer's over-reliance on the Applicants' non-compliance with Canada's immigration laws shows an overall disregard for the BIOC; the Officer failed to consider Bruno's interests as being "a singularly significant focus and perspective", as required by the Supreme Court in *Kanthasamy* (at para 40).

[32] I find that the reasons for this decision suggest that the Officer's mind was clouded, and do not conform to the requirements under subsection 25(1) of the *IRPA.*

V. Conclusion

[33] Based on the above analysis, I find that the Officer's decision to be unreasonable. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-2759-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed. The decision under review is set aside and the matter is referred back for redetermination by a different officer.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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