Federal Court  Cour fédérale

Date: 20220714

Docket: IMM-1927-21

Citation: 2022 FC 1045

Montréal, Quebec, July 14, 2022

PRESENT: Madam Justice St-Louis

BETWEEN:

JERRY ALVAREZ VISAYA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Jerry Alvarez Visaya [the Applicant] seeks judicial review of the decision of a Senior Immigration Officer [the Officer] dated March 17, 2021, refusing the application for permanent residence he filed from within Canada, based on humanitarian and compassionate [H&C] considerations per subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] For the reasons that follow, I will dismiss the application for judicial review.

II. Factual Background

[3] Mr. Visaya is a citizen of the Philippines. On November 6, 2009, he entered Canada and obtained a work permit. His wife and their two children remained in the Philippines. From 2009 to 2016, Mr. Visaya held a work permit and worked in Canada. In 2016, Mr. Visaya's application for a new work permit was denied. He applied for and obtained a visitor's record, valid until 2019, and has since remained in Canada without status. Although not authorized to do so, Mr. Visaya worked in Canada intermittently since 2016.

[4] Around 2013, Mr. Visaya met Ms. Lyn Liwag, also a citizen of the Philippines. In 2016, their daughter, Ava Sophia, was born in Canada and is thus a Canadian citizen. In 2017, Ms. Liwag and Ava Sophia left Canada for the Philippines.

[5] In January 2020, Ava Sophia came back to Canada, while her mother remained in the Philippines, to live with her father and his sister's family. On April 26, 2020, Ms. Liwag signed a letter of consent granting responsibility of her daughter to Mr. Visaya. In the context of this letter of consent, Ms. Liwag is not identified, she was not sworn and the document is not a formal custody document.

[6] Per the psychotherapy assessment report dated April 1, 2020, Mr. Visaya has been diagnosed with mild depression, moderate anxiety and chronic insomnia and particular therapy

has been prescribed to him. There is no indication in the record that he pursued the prescribed therapy.

[7] On June 5, 2020, Mr. Visaya applied for permanent residence from within Canada, raising H&C considerations per subsection 25(1) of the Act.

[8] In support of his application, Mr. Visaya filed a number of documents and raised (1) the best interest of his daughter Ava Sophia; (2) his current emotional state; (3) the consequences of the separation from his Canadian family; and (4) the reliance on him for financial support.

[9] On March 17, 2021, the Officer denied his application.

III. The Impugned Decision

[10] In their decision, the Officer examined (1) establishment; (2) the best interest of the child [BIOC]; and (3) other factors for consideration.

[11] With regards to establishment, the Officer noted that (1) Mr. Visaya had been in Canada since November 2009, a period of almost 11 years; (2) Mr. Visaya had no valid temporary resident status, and since 2016, had no work permit; and (3) no section 44 report was written against him. The Officer found that there is little evidence from Mr. Visaya to demonstrate why he was prevented from leaving Canada or that his stay in Canada was due to circumstances beyond his control. The Officer found that failure to depart Canada was due to Mr. Visaya's own

unwillingness to leave and gave it some negative weight. The Officer found Mr. Visaya's establishment to be modest.

[12] With regards to the BIOC, the Officer noted (1) that Mr. Visaya referred to his Canadian daughter Ava Sophia who is currently living with him;(2) that Mr. Visaya also has an adult daughter and a BIOC aged son in the Philippines; (3) the letter written by Ava Sophia's mother stating that she is unable to take care of her daughter due to permanent hospitalization; (4) that Mr. Visaya had stressed the negative impact of children growing up without father, although the Officer signaled their awareness to reports on negative impact of children growing up without their mother. The Officer stated that the BIOC is for a child to grow up with both parents, and as the mother is unable to come to Canada, the father can return to the Philippines.

[13] The Officer found that there was a lack of details surrounding Ava Sophia's mother, such as the details of her permanent presence in the hospital, and of who was taking care of Ava Sophia during that time. The Officer concluded that clearly someone was looking after the child while her mother could not do so, with no noticeable negative impact on her. The Officer also noted the psychotherapist letter describing Mr. Visaya's symptoms, and found that it raised an issue with respect to Ava Sophia's long-term care.

[14] The Officer stated their concerns regarding the letter written by Ava Sophia's mother indicating that she gives consent for her daughter coming to live with Mr. Visaya as: (1) the letter is only signed without identification; (2) it is not an affidavit; (3) given the hospitalization's description, it is unclear whether Ava Sophia's mother understood the content

of the letter; and (4) Ava Sophia's mother appeared to have merely signed the letter, not written it. The Officer found that such important decision to have her daughter live permanently separated from her should be accompanied by legal documents in regards to custody. The Officer noted that Ava Sophia is not in need of health care and that there is free and compulsory education in the Philippines.

[15] The Officer found that Mr. Visaya was not remitting money back home at this time, noted that Mr. Visaya's return to the Philippines could favour his son's best interests and that he could resume his relationship with his son and his adult daughter.

[16] With regards to other factors for consideration, more particularly Mr. Visaya's mental health, the Officer found little evidence that demonstrates that he went to therapy and understood that Mr. Visaya's source of high stress and anxiety arose from his status as an undocumented migrant. The Officer agreed that separation from family can be a hardship, but noted that Mr. Visaya still has close family in the Philippines, notably his children.

[17] The Officer noted that although Mr. Visaya lived for an extended period of time in Canada, he spent most of his life in the Philippines, there was little evidence to establish why he would not be able to find gainful employment back in the Philippines, especially as he has demonstrated his resourcefulness in coming to Canada.

IV. Issues and standard of review

[18] Mr. Visaya submits that the Officer erred in (1) properly failing to consider the hardships that he would face; (2) failing to take a global assessment of the H&C factors he put forward; and (3) failing to properly consider the best interest of the children.

[19] Reasonableness is the presumptive standard of review of the merits of an administrative decision and the circumstances do not warrant a departure from this presumption. The Court must thus determine if Mr. Visaya has shown the decision to be unreasonable per the teachings of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]).

V. Submission by the parties and analysis

A. *The Impugned decision has not been shown to be unreasonable*

(1) Submissions by Mr. Visaya

[20] Mr. Visaya submits that the Officer incorrectly stated that he has not demonstrated a significant degree of establishment in Canada and that the Officer erred in not giving any weight to his psychological report. He adds that the Officer erred in failing to take global assessment of the H&C factors, arguing that a global assessment would have properly considered his establishment in Canada, which was over eleven years, his relatives in Canada, his psychological condition, his girlfriend's ongoing medical condition, the best interest of his minor daughter, his

siblings, nieces and nephews in Canada as well as slim current prospects for employment in the Philippines.

[21] Mr. Visaya adds that the Officer erred in (1) giving little weight to the numerous letters; (2) failing to consider the poor country conditions in the Philippines; (3) assessing hardship factors separately and not in a global manner and not properly assessing the BIOC; (4) not accepting the fact that the mother of his child cannot properly care for the child; and (5) not giving weight to the fact that he supports his minor son and ex-wife in the Philippines.

[22] Mr. Visaya cites *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 to state that the best interests of the child should be treated as a significant factor.

(2) Submissions by the Minister

[23] The Minister of Citizenship and Immigration [the Minister] responds that Mr. Visaya is essentially making the argument that he should be allowed to stay in Canada to apply for permanent resident status because he has become accustomed to living in Canada over the past 11 years and also because his and his children's future economic and academic prospects are better here than in the Philippines (*Hee Lee v Canada (Citizenship and Immigration)*, 2008 FC 368 at paras 1-2).

[24] The Minister adds that the principles applicable to the Immigration Appeal Division decision of *Canada (Public Safety and Emergency Preparedness) v Nizami*, 2016 FC 1177 at paragraph 16 [*Nizami*] are applicable to the present case and that Mr. Visaya appears to be

attempting to use the H&C application process as an alternate avenue for a visitor record extension which was refused in March 2019.

[25] With regards to Mr. Visaya's argument on establishment, the Minister responds that the Immigration Manual, however, does not suggest that establishment is the only issue to be considered in an H&C application. The Minister alleges that the Officer examined Mr. Visaya establishment and that there is not an aspect of his narrative that could reasonably be described as "exceptional".

[26] With regards to the Officer's analysis on the BIOC, the Minister submits that the Officer devoted a great deal of attention to the BIOC factor. The Minister argues that a consistent theme of the Officer's BIOC assessment was that Mr. Visaya had provided insufficient evidence to substantiate his assertions about his continued presence in Canada was in his children's best interests. The Minister argues that the Applicant's assumption that his daughter would be better off in Canada is not the basis of a BIOC analysis (*Garraway v Canada (Citizenship and Immigration)*, 2017 FC 286 at paras 38-39).

[27] With regards to the Officer's assessment of Mr. Visaya's psychotherapy report, the Minister alleges that taking the psychotherapy report at face value would restrict the H&C Officer to approve the H&C application and that the Court warned against this situation in *Czesak v Canada (Citizenship and Immigration)*, 2013 FC 1149. The Minister adds that there is little evidence that Mr. Visaya followed the treatment regimen set out in the report, other than taking medication for insomnia. The Minister concludes by reminding the Court that there is a

long line of jurisprudence that stands for the proposition that the H&C process is not intended to be an “alternate stream of immigration”.

(3) Analysis

[28] It is important to outline, as the Court did in *Garcia Diaz v Canada (Citizenship and Immigration)*, 2021 FC 321 at paragraph 42, that “[s]ubsection 25(1) of the *IRPA* gives the Minister discretion to exempt foreign nationals from the ordinary requirements of that statute and grant permanent resident status in Canada, if the Minister is of the opinion that such relief is justified by humanitarian and compassionate considerations. Those considerations are to include the best interests of a child directly affected. The H&C discretion in subs. 25(1) is a flexible and responsive exception to the ordinary operation of the *IRPA* and the *IRPR*, to mitigate the rigidity of the law in an appropriate case: *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 (Abella J.), at para 19.” Moreover, the H&C exemption is “an exceptional and discretionary remedy” (*Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at para 15). In this regard, see also *Santiago v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 91 at paragraphs 27 and 28, *Nizami* at paragraph 16 and *Joseph v Canada (Citizenship and Immigration)*, 2015 FC 904 at paragraph 24.

[29] I note that throughout his memorandum, Mr. Visaya states that the Officer has “erred” in reaching this or that conclusion but without much detail. It is Mr. Visaya’s burden to demonstrate to the Court how the Officer’s decision is unreasonable. Simply stating that the Officer erred is not enough. As the Supreme Court of Canada held in *Vavilov* at paragraph 100, “[t]he burden is on the party challenging the decision to show that it is unreasonable”. More

recently, this Court stated that "[t]he burden on an applicant who must show that the unreasonableness of decision of an immigration officer in an H&C application is not insignificant" (*Turovsci v Canada (Citizenship and Immigration)*, 2021 FC 1369 at para 32).

[30] With regards to establishment, the elements cited by Mr. Visaya at paragraph 32 of his memorandum were considered by the Officer. Mr. Visaya appears to simply disagree with the Officer's assessment of the evidence, as he would have preferred a different conclusion himself. Mr. Visaya failed to establish that the Officer's decision in that regard is unreasonable. The Officer's reasoning on that aspect was intelligible, coherent and consequently reasonable.

[31] With regards to the psychological report, the Officer gave the mental health factor little weight due to the fact that Mr. Visaya did not follow the prescribed therapy although the report indicated that likelihood of recovery without professional help as prescribed makes recovery unlikely with or without family. Given the circumstances, the Officer's finding has not been shown to be unreasonable.

[32] Mr. Visaya argues that there should have been a global assessment. However, the Officer clearly examined the different considerations and then proceeded to summarize and analyze them jointly under the heading "Analysis" by weighing them as indicated by the guidelines. The Officer did not limit their assessment of the considerations each in isolation. Mr. Visaya cites no jurisprudence for the proposition that the Officer must assess the application again globally after having assessed and weighted the considerations as they did, and he does not describe what this global assessment means or entails.

[33] With regards to Mr. Visaya's argument that the Officer did not analyze the letters he provided, I will simply mention that the Officer is not required to refer to every piece of evidence (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 (TD) at para 16) and that the Officer did mention the letters at the first paragraph under the heading "Establishment". The Officer also mentioned and made a finding relating to the letter of support from Mr. Visaya's sister. This argument cannot succeed.

[34] With regards to the Officer's analysis on the BIOC, the decision under review is not unreasonable. The Officer assessed the Applicant's family situation, the partner's situation and the impact of moving to the Philippines on Mr. Visaya and his daughter. The Officer considered the children Mr. Visaya still has in the Philippines, namely his son, of BIOC age who would benefit from his father's presence, and the fact that Ava Sophia would benefit from having her mother and father close.

[35] I share the Officer's concerns regarding the letter written by Ava Sophia's mother. Mr. Visaya failed to address this concern and to explain how the Officer's analysis was unreasonable. Furthermore, I am satisfied even without this finding, that the Officer provided justification for their conclusions regarding BIOC, considering *inter alia* the mental health of Mr. Visaya, his other children that are in the Philippines and the benefit for Ava Sophia of growing with her two parents.

[36] Finally, the Officer correctly noted that the last remittance Mr. Visaya sent to his ex-wife and children in the Philippines was in 2018.

[37] I find the Officer's analysis coherent, transparent and intelligible and their conclusions reasonable, given the record and the law.

VI. Conclusion

[38] Mr. Visaya failed to establish how the Officer's decision is unreasonable. The application for judicial review will be dismissed.

JUDGMENT in IMM-1927-21

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. No question is certified.

3. No costs are awarded.

"Martine St-Louis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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