Federal Court  Cour fédérale

Date: 20220729

Docket: IMM-3712-21

Citation: 2022 FC 1140

Ottawa, Ontario, July 29, 2022

PRESENT: Mr. Justice Norris

BETWEEN:

GUISSELLE MILENA ROZO BASTO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] Guisselle Milena Rozo Basto, the applicant, is a citizen of Colombia and Spain. She has lived in Canada for extended periods of time since 2011. In September 2020, Ms. Rozo Basto applied for permanent residence on humanitarian and compassionate ("H&C") grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). The

application was based primarily on the best interests of her then two-year-old daughter Sofia. In a decision dated May 17, 2021, a Senior Immigration Officer refused the application.

[2] Ms. Rozo Basto now applies for judicial review of this decision under subsection 72(1) of the *IRPA*. She contends that the decision is unreasonable in its assessment of Sofia's best interests and its assessment of the evidence generally. As I explain in the reasons that follow, I do not agree. This application must, therefore, be dismissed.

II. BACKGROUND

[3] Ms. Rozo Basto was born in Bogota, Colombia, in April 1986. In December 2000, she sought refugee protection in Spain along with her mother and two sisters. Her refugee claim was accepted and Ms. Rozo Basto eventually became a naturalized citizen of Spain. Ms. Rozo Basto's mother has remained in Spain. One of her sisters now resides in the Vancouver area with her own family.

[4] Ms. Rozo Basto first came to Canada in June 2011 to study English. Since then, she visited Canada frequently and has lived here for extended periods of time. At different times, she has been working and has been a student.

[5] In 2015, Ms. Rozo Basto met Alejandro Cervantes, a citizen of Mexico who was living in Vancouver. A romantic relationship between the two developed and they were married in Vancouver in July 2016. According to Ms. Rozo Basto, however, the relationship was a very difficult one, with Mr. Cervantes having been emotionally, verbally, financially, and physically

abusive towards her. As a result of his treatment of her, in or around March 2018, Ms. Rozo Basto separated from Mr. Cervantes and moved in with her sister.

[6] In April 2018, Ms. Rozo Basto discovered she was pregnant. She and Mr. Cervantes reconciled and began living together again, although Mr. Cervantes's abusive behaviour continued. Ms. Rozo Basto decided to return to Spain (where she had family support) and give birth there. Her daughter Sofia was born in Spain in October 2018.

[7] Ms. Rozo Basto had remained in contact with Mr. Cervantes while she was in Spain and the two decided to try to reconcile once again. Ms. Rozo Basto returned to Canada with Sofia in February 2019 and moved in with Mr. Cervantes. The plan was for Mr. Cervantes to apply for permanent residence in Canada on the basis of his Canadian work experience and to include Ms. Rozo Basto and Sofia on his application. However, Mr. Cervantes's abusive behaviour continued. Eventually, Ms. Rozo Basto moved out, taking Sofia with her. Ms. Rozo Basto and Mr. Cervantes formally separated on September 3, 2019.

[8] On March 9, 2020, the Provincial Court of British Columbia issued an interim consent order dealing with Mr. Cervantes's right to parenting time with Sofia and his child support obligations. In material part, the order provided that Mr. Cervantes would have parenting time with Sofia on Saturdays and Sundays from 9:00 a.m. to 5:00 p.m. and that he was required to pay child support of $612.00 per month. On May 21, 2020, following a Family Case Conference held that day, the interim order was amended on consent to add a term requiring Mr. Cervantes to pay spousal support of $500.00 per month commencing on June 15, 2020.

[9] In a statutory declaration dated September 14, 2020, provided in support of the H&C application, Ms. Rozo Basto states: "Since the separation, Sofia has lived with me and my ex-husband has short visits with Sofia between two and four times each week. I do my best to avoid seeing or communicating with him." As noted above, the separation occurred on September 3, 2019. Ms. Rozo Basto does not provide any details concerning how or to what extent Mr. Cervantes has been exercising the right to parenting time granted by the March 9, 2020, order.

[10] Ms. Rozo Basto also states in her statutory declaration that between September 2019 and March 2020, "other than one payment of $400, my ex-husband did not pay me child support despite earning approximately $63,000 per year. He owes me approximately $1500 in past child support payments." Ms. Rozo Basto does not specifically address whether or to what extent Mr. Cervantes has complied with the March 9, 2020, and May 21, 2020, interim orders regarding child and spousal support.

[11] According to Ms. Rozo Basto, at the May 21, 2020, Family Case Conference, Mr. Cervantes "brought up that he wanted to make sure I did not leave the country with Sofia." Ms. Rozo Basto relates that the family court judge "told us that I could not leave the country with Sofia without [Mr. Cervantes's] or the judge's permission."

[12] In written submissions in support of the H&C application, counsel for Ms. Rozo Basto submitted that Ms. Rozo Basto "may face limited success in successfully convincing the courts in British Columbia that Sofia should leave [Canada] with her" given that she is habitually

resident in Canada and given that her father lives here. Thus, if Ms. Rozo Basto were required to leave Canada, Sofia would be "robbed of her mother's care," which would not be in her best interests.

[13] Counsel also submitted that, in any event, it would not be in Sofia's best interests to leave Canada with Ms. Rozo Basto given that she has closely bonded with her extended family here, she has "established strong relationships in Canada" and the two would face unstable economic prospects elsewhere. Counsel further submitted that if Mr. Rozo Basto were to leave Canada with Sofia, they would not be eligible to continue receiving child or spousal support from Mr. Cervantes.

III. DECISION UNDER REVIEW

[14] The Officer noted that the H&C application was based on four grounds: the best interests of the child, establishment in Canada, family violence, and hardship if removed from Canada. In refusing the application, the Officer made the following key findings in each of these respects:

- *Best interests of the child.* Ms. Rozo Basto had not demonstrated that Mr. Cervantes had been a dependable presence in Sofia's life such that she would face hardship if they were required to leave Canada. Further, Ms. Rozo Basto had not provided sufficient evidence that Mr. Cervantes had kept up with court-ordered spousal and child support payments. As well, Ms. Rozo Basto had not provided sufficient evidence that her economic prospects in Spain would be any different than they are in Canada (e.g. having to return to work once Sofia was old enough for daycare). With respect to Sofia's relationship with her cousins and other family in Canada, her return to Spain would not be "overly

disruptive" to the children and the relationship could continue in other ways. Similarly, while Ms. Rozo Basto has played an important role in the lives of her sister's two children in Canada and separation would pose initial difficulties for them, given the ages of the children, these difficulties were not such as to justify an exemption. In sum, there was insufficient evidence demonstrating a negative impact on Sofia if Ms. Rozo Basto left Canada.

- *Establishment in Canada*. Ms. Rozo Basto had established a strong network of friends and other supports in Canada. However, these relationships are not "characterized by a degree of interdependency and reliance to such an extent that if separation were to occur that it would amount to challenges to the applicant, her family, friends, or local community." Overall, Ms. Rozo Basto's establishment in Canada was judged to be modest and moderate weight was attributed to this factor.

- *Family Violence.* Ms. Rozo Basto suffered domestic abuse while married to Mr. Cervantes. While she needed support during and following her difficult marriage and has received that support in Canada, there was little if any evidence that similar supports would not be available for her in Spain.

- *Hardship if removed from Canada.* Ms. Rozo Basto provided insufficient evidence that she had been receiving court-ordered child and spousal support payments from Mr. Cervantes. As well, there was little if any evidence that Mr. Cervantes would oppose Sofia moving to Spain with Ms. Rozo Basto and, if he did, that a court would not permit this. In any event, there was evidence suggesting that Mr. Cervantes himself was unsure about whether he would remain in Canada or return to Mexico. Nevertheless, moderate

> weight was attributed to this factor. Furthermore, insufficient evidence had been provided that Ms. Rozo Basto would be unable to build a life for herself and her daughter in Spain, especially considering her mother lives there and has supported her in the past.

[15] Weighing all of the relevant factors, the Officer concluded that the difficulties Ms. Rozo Basto would face if she had to leave Canada in order to apply for permanent residence in the normal manner from abroad were insufficient to warrant an exemption from the usual requirements of the law. Accordingly, the H&C application was refused.

IV. STANDARD OF REVIEW

[16] The parties agree, as do I, that the Officer's decision is to be reviewed on a reasonableness standard: see *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44. That this is the appropriate standard has been reinforced by *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10.

[17] 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). A decision that displays these qualities is entitled to deference from the reviewing court (*ibid.*). When applying the reasonableness standard, it is not the role of the reviewing court to reweigh or reassess the evidence considered by the decision maker or to interfere with factual findings unless there are exceptional circumstances: see *Vavilov* at para 125. At the same time, reasonableness review is not a rubber-stamping process; it remains a robust form of review: see *Vavilov* at para 13.

[18] The onus is on Ms. Rozo Basto to demonstrate that the Officer's decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). The court "must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable" (*ibid.*).

V. ANALYSIS

[19] As noted, Ms. Rozo Basto challenges the reasonableness of the Officer's assessment of Sofia's best interests and the assessment of the evidence generally.

[20] Subsection 25(1) of the *IRPA* authorizes the Minister to grant relief to a foreign national seeking permanent resident status who is inadmissible or otherwise does not meet the requirements of the Act. The Minister may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations under the Act. As the provision states, relief of this nature will only be granted if the Minister "is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national." Whether relief is warranted in a given case depends on the specific circumstances of that case: see *Kanthasamy* at para 25.

[21] When subsection 25(1) of the *IRPA* is invoked, the decision maker must determine whether an exception ought to be made to the usual operation of the law: see *Damian v Canada (Citizenship and Immigration)*, 2019 FC 1158 at paras 16-22. This discretion to make an

exception provides flexibility to mitigate the effects of a rigid application of the law in appropriate cases: see *Kanthasamy* at para 19. It should be exercised in light of the equitable underlying purpose of the provision: *Kanthasamy* at para 31. Thus, decision makers should understand that H&C considerations refer to "those facts, established by the evidence, which would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another – so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the *Immigration Act*" (*Kanthasamy* at para 13, adopting the approach articulated in *Chirwa v Canada (Minister of Manpower & Immigration)* (1970), 4 IAC 338). Subsection 25(1) should therefore be interpreted by decision makers to allow it "to respond flexibly to the equitable goals of the provision" (*Kanthasamy* at para 33). At the same time, it is not intended to be an alternative immigration scheme: see *Kanthasamy* at para 23.

[22] As Justice Abella observed in *Kanthasamy*, "[t]here will inevitably be some hardship associated with being required to leave Canada. This alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under s. 25(1)" (at para 23). What does warrant relief will vary depending on the facts and context of the case (*Kanthasamy* at para 25).

[23] H&C relief is an exceptional and highly discretionary measure: see *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 15; and *Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4. The onus is on an applicant to present sufficient evidence to warrant the exercise of such discretion in his or her case: see *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 45; *Owusu v Canada (Minister of*

Citizenship and Immigration), 2004 FCA 38 at para 5; *Ahmad v Canada (Minister of Citizenship and Immigration)*, 2008 FC 646 at para 31; and *Zlotosz v Canada (Citizenship and Immigration)*, 2017 FC 724 at para 22.

[24] Subsection 25(1) expressly requires a decision maker to take into account the best interests of a child directly affected by a decision made under that provision. The "best interests" principle is "highly contextual" because of the "multitude of factors that may impinge on the child's best interests" (*Kanthasamy* at para 35, quoting *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 11 and *Gordon v Goertz*, [1996] 2 SCR 27 at para 20). As a result, it must be applied "in a manner responsive to each child's particular age, capacity, needs and maturity" (*Kanthasamy* at para 35). Protecting children through the application of this principle means "[d]eciding what . . . appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention" (*Kanthasamy* at para 36, quoting *MacGyver v Richards* (1995), 22 OR (3d) 481 (CA) at p 489).

[25] When deciding an H&C request that engages the best interests of a child, the decision maker must do more than simply state that the interests of the child have been taken into account. A child's best interests must be "'well identified and defined' and examined 'with a great deal of attention' in light of all the evidence" (*Kanthasamy* at para 39, quoting *Legault* at paras 12 and 31 and referencing *Kolosovs v Canada (Citizenship and Immigration)*, 2008 FC 165 at paras 9-12). A decision under subsection 25(1) of the *IRPA* will be found to be unreasonable if the interests of children affected by it are not sufficiently considered (*Baker v Canada*

(Minister of Citizenship and Immigration), [1999] 2 SCR 817 at para 75). However, what constitutes sufficient consideration of the best interests of an affected child will depend on the evidence presented on the application.

[26] On this application, Ms. Rozo Basto contends that the Officer erred by failing to well-identify and define Sofia's best interests, particularly as they relate to the implications for her relationship with her father if she is required to leave Canada, and by reducing the best interests analysis to a hardship analysis.

[27] I do not agree. The Officer's finding that Ms. Rozo Basto "has not demonstrated that Sofia's father has been a dependable presence in her life, such that she would face hardship if they were to leave" is entirely reasonable. Given the fact-specific nature of the inquiry into the best interests of a child affected by the decision, evidence to support one's reliance on those interests must be provided: see *Zlotosz* at para 22; and *Lovera v Canada (Minister of Citizenship and Immigration)*, 2016 FC 786 at para 38. Ms. Rozo Basto provided very little evidence of Mr. Cervantes's ongoing involvement in Sofia's life, whether through exercising his parenting rights under the interim orders or meeting his child support obligations. Against the backdrop of the very detailed evidence of prolonged domestic abuse set out by Ms. Rozo Basto in her statutory declaration, and in the absence of evidence suggesting otherwise, it was open to the Officer to conclude that it had not been established that Mr. Cervantes's continued involvement in Sofia's life was in her best interests. The Officer also reasonably determined that Ms. Rozo Basto had not established that she would suffer economically if she were required to return to Spain.

[28] Furthermore, the Officer reasonably determined that Ms. Rozo Basto had not established that she would be unable to bring Sofia with her if she were required to leave Canada. The only support for this contention was a cursory assertion by counsel for Ms. Rozo Basto in her written submissions in support of the H&C application (quoted in paragraph 12, above). I agree with Ms. Rozo Basto that the Officer appears to have overlooked the evidence that Mr. Cervantes expressly stated that he opposed her taking Sofia to Spain with her. The important point, however, is that she provided little reason to think that the family court would not permit this even if Mr. Cervantes objected.

[29] The balance of Ms. Rozo Basto's arguments on this application are simply disagreements with the weight the Officer attributed to the factors she relied on in seeking H&C relief. The discretionary nature of decisions under subsection 25(1) of the *IRPA* entails that generally the administrative decision maker's determinations will be accorded a considerable degree of deference by a reviewing court: see *Williams* at para 4; and *Legault* at para 15. It is the Officer's responsibility to determine the weight to be attributed to the factors relied on in the H&C application and whether they warrant making an exception from the usual operation of the law. As long as this weighing is explained in a transparent and intelligible manner and is justified in relation to the relevant factual and legal constraints, it is not for a reviewing court to interfere: see *Vavilov* at para 59; see also *Alzaher v Canada (Citizenship and Immigration)*, 2022 FC 1099 at paras 4-5. I am not persuaded that any grounds for intervention have been established.

VI. CONCLUSION

[30] For these reasons, the application for judicial review must be dismissed.

[31] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-3712-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3712-21
STYLE OF CAUSE:	GUISSELLE MILENA ROZO BASTO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	NOVEMBER 15, 2021
JUDGMENT AND REASONS:	NORRIS J.
DATED:	JULY 29, 2022

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