Federal Court Cour fédérale

Date: 20230417

Docket: IMM-8051-21

Citation: 2023 FC 553

Ottawa, Ontario, April 17, 2023

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

RAFAEL SOUSA ABREU
NIDIA SOFIA SOUSA ANDRADE ABREU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Principal Applicant [PA], Mr Rafael Sousa Abreu, and his spouse Ms. Nidia Sofia Sousa Andrade Abreu are citizens of Portugal. A Senior Immigration Officer [Officer] refused their application for permanent residence from within Canada on Humanitarian and Compassionate [H&C] grounds.

[2] The Applicants apply under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for judicial review of the Officer's October 29, 2021 decision. They submit the Officer acted unfairly and that the decision is unreasonable.

[3] For the reasons set out below, I am not persuaded there was any breach of procedural fairness. However, I am satisfied the Applicants have demonstrated the Officer's consideration and analysis of the best interests of their children [BIOC] was unreasonable. For this reason, the Application is granted.

II. Background

[4] The PA and his spouse entered Canada as visitors in April 2014. The PA's spouse has two brothers who reside in Canada and the Applicants have two children who are Canadian citizens. The remainder of the Applicants' family are in Portugal.

[5] The Applicants' oldest child, their son, was diagnosed with Autism Spectrum Disorder [ASD] at the age of two. He is enrolled in a number of therapy programs and has been provided with special education support that has included an Individual Education Plan [IEP] developed in Junior Kindergarten. The IEP provides for a modified curriculum.

[6] An April 2021 Psychological Services Report [Report], prepared by the Professional Support Services of the Toronto District School Board for the purposes of assessing the child's areas of strengths and needs, describes the child as having benefitted from the special education support provided. However, the Report also states neither the child's mother nor the school staff

consider him “ready for a regular grade 1 program.” The Report notes the child’s ASD diagnosis and states:

> Results indicate that [the child] has an **Unspecified Developmental Disability** (DSM 5 Code: 319 Intellectual Disability). His intellectual functioning such as reasoning, problem solving, academic skills, and communication could not be formally evaluated but it is clear from his limited verbal nature that his ability to adapt to situations and function independently in a variety of situations are much lower than expected for his age. His difficulties have been present from an early age and continue to affect his learning and socialization. As a result, his learning will occur at a slower pace and he will require intensive support to further develop his thinking, teaming, daily functioning, and social skills. Given his young age and difficulties with completing formal testing, Lorenzo should be reassessed once his language skills improve and he receives support for his learning and adaptive behaviours. [Emphasis in original.]

[7] The ASD diagnosis is confirmed in a diagnostic letter from a pediatrician dated March 5, 2019. The letter states the child demonstrates “persistent deficits in social communication and social interaction across multiple contexts…[the child] meets DSM-5 criteria for Autism Spectrum Disorder (ASD), in the moderate (level 2) range, with social communication requiring substantial support, and restrictive repetitive behaviours requiring substantial support.”

III. Decision under review

[8] In considering establishment, the Officer first addressed the time the PA’s spouse had spent in Canada as a teenager. The Officer highlighted that she overstayed her visa, was briefly detained and was required to leave the country, which she did after an application for a Pre-removal Risk Assessment was refused. The Officer noted the “lack of evidence explaining why

she failed to extend her visitor visa in order to maintain her legal status in Canada" and gave this circumstance some degree of negative consideration.

[9] The Officer then noted both Applicants had overstayed their visitor visas in 2014. In the absence of sufficient evidence to indicate they had applied to either extend their stay, obtain work permits, or demonstrate the stay was due to circumstances beyond their control, the Officer also assigned negative weight to the length of time spent in Canada.

[10] The Officer noted the Applicants had engaged in work without authorization and gave negative consideration to their employment history. Turning to the Applicants' financial circumstances, the Officer noted that their income, as demonstrated by a 2019 income tax document, did "not represent a substantial amount to support a family of four." The Officer observed an absence of additional documentary evidence relating to the family's financial circumstances and on this basis gave little weight to financial independence as a component of establishment.

[11] In considering ties to Canada, the Officer noted that although the majority of the Applicants' family members resided in Portugal, the PA's spouse has two brothers in Canada and that a close relationship existed with one of them. The Officer granted some weight to familial relationships as a component of establishment. The Officer also acknowledged that the Applicants had formed some close connections within their community, noting, "[…] and they are viewed with much respect." The Officer gave this factor some favourable consideration but noted the lack of evidence demonstrating a level of dependency between the Applicants and their

community ties that would cause undue hardships for those involved if the Applicants were to leave Canada. The Officer concluded their establishment was the result of their irregular status in Canada and their disregard for immigration laws, and gave little weight to this factor.

[12] In considering the best interests of the two children, the Officer acknowledged there was a need to be alert, alive and sensitive. The Officer also acknowledged that this factor deserved substantial weight but was one of many important factors in considering an H&C application and not determinative.

[13] The Officer summarized the evidence as it related to the oldest child's medical condition and history and found that his condition had improved through various therapies and that he was able to virtually access and continue therapy from home during the pandemic lockdown period. On this basis, the Officer concluded, "there is insufficient evidence that he could not continue his virtual therapy" if his parents returned to Portugal, and that the Applicants could opt to continue with the same organizations by paying for the services. The Officer wrote: "There is insufficient evidence to suggest that they are unable or unwilling to do so for the benefit of [their son]" and that "the applicants have not provided sufficient evidence to demonstrate that similar or comparable programs or services are not available in Portugal." The Officer undertook independent research and further concluded that services and resources, including schooling, are available in Portugal. The Officer found the child had proved to be adaptable during the pandemic, and that there is "little evidence" that the move from Canada to Portugal and Portuguese services will have a detrimental impact on his development after a period of

adjustment. The Officer further concluded the Applicants' younger daughter would be minimally impacted because she was not yet in Kindergarten.

[14] The Officer considered the children's relationship with their uncles, giving this factor some positive consideration, but concluded there was insufficient objective evidence that separation or departure from Canada "would adversely impact the children's social, emotional, psychological, or physical welfare as well as their development." The Officer expressed the view that it is "in the best interest of every child to gain an education, have access to good health care and to have the constant love and support of their parents as they grow." The Officer found this could be achieved by the family in Portugal. The Officer therefore granted "some weight to BIOC."

[15] The Officer was not convinced the hardship of having to re-establish the family in Portugal warranted humanitarian relief.

IV. Issues and Standard of Review

[16] I have framed the issues arising from this Application as follows:

A. Did the Officer breach procedural fairness in undertaking and relying on independent online research?

B. Was the Officer's analysis unreasonable?

[17] The issue of fairness (issue A) is to be reviewed based on whether the procedure was fair having regard to all of the circumstances, with a focus on the substantive rights engaged by the

impugned process and the consequences for an individual. This is akin to review using the correctness standard (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 para 54).

[18] It is not disputed that the Officer's decision (issues B) is to be reviewed against the presumptive standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*]).

[19] In conducting a reasonableness review, the Court asks "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). A reasonable decision is one that is internally coherent, and displays a rational chain of analysis (*Vavilov* at para 85).

V. Analysis

A. *No breach of procedural fairness*

[20] The Applicants argue it was procedurally unfair for the Officer to undertake independent research and rely on the results of that research to support a conclusion that services and resources for those diagnosed with autism were available in Portugal without first providing the Applicants an opportunity to respond.

[21] Where a decision maker consults and relies on extrinsic sources of information, the possibility of unfairness arises. However, such a finding is not automatic. The scope of the duty of fairness varies with the context (*Alves v Canada (Citizenship and Immigration)*, 2022 FC 672 at paras 29–30, citing *Shah v Canada (Citizenship and Immigration)*, 2018 FC 537 at paras 34–42).

[22] *Alves* and *Shah* both involved a decision maker engaging in internet research with regard to the availability of support services to children with ASD, similar to the circumstances in this case. Justice Nicholas McHaffie states the following at paragraph 30 of *Alves*:

> In assessing whether the duty of fairness requires the disclosure of such documents, the Court will consider factors such as (i) the source, including its reputability; (ii) the public availability of the documents and the extent to which the applicant could be reasonably expected to know of them; (iii) the novelty and significance of the information, including the extent to which it differs from other evidence; and (iv) the nature of the decision, including the applicant's allegations and the evidentiary burden: *Shah* at paras 35–38; *Majdalani v Canada (Citizenship and Immigration),* 2015 FC 294 at paras 29–37; *Rutayisire v Canada (Citizenship and Immigration),* 2021 FC 970 at paras 80–88. In considering such factors, the ultimate question remains whether the procedure was fair having regard to all of the circumstances: *Canadian Pacific* at para 54.

[23] In this instance, unfairness does not arise. The Applicants' H&C submissions relied upon their eldest child's ASD diagnosis, yet little evidence was provided to indicate what, if any, services were available for the treatment of ASD in Portugal. As was the case in *Shah*, the information gathered and cited by the Officer was easily accessible to the Applicants and was not controversial. The Officer's research in this instance was consistent with the obligation to be

alert, alive and sensitive to the child's best interest and the requirement that BIOC be given significant weight in the H&C analysis.

[24] In these circumstances, the Officer was under no obligation to share the information or provide the Applicants an opportunity to respond.

B. *The decision is unreasonable*

[25] The Applicants submit the Officer's consideration of establishment and BIOC was unreasonable.

(1) Establishment

[26] First, the Applicants submit the Officer unreasonably discounted their establishment and employment in Canada because they were living and working without status. They criticize the Officer's conclusion that they can re-establish in Portugal easily, because the Officer failed to address their motivation for leaving the country in the first place – the inability to find work due to the economic crisis. Relying on *Fidel Baeza v Canada (Citizenship and Immigration)*, 2010 FC 362 at paragraphs 17–18, *Samuel v Canada (Citizenship and Immigration)*, 2019 FC 227 at paragraphs 17–19 [*Samuel*] and the purpose of section 25 IRPA, the Applicants submit the Officer failed to assess establishment with compassion, given the evidence of their positive contribution to the community. Instead, they submit, the Officer fixated on their non-compliance with immigration requirements. This fixation, they submitted, is reflected in the Officer's

consideration of the PA spouse's non-compliance with immigration laws during her first stay in Canada as a minor.

[27] It is not the role of this Court to reweigh the evidence or impose its own judgement on judicial review (*Vavilov* at para 125). The Officer's establishment assessment is owed significant deference.

[28] The Officer identified non-compliance as a factor when assessing the different aspects of the Applicants' establishment and when assessing establishment as a whole. However, I am not persuaded that the Officer's treatment of the issue reflects an unreasonable fixation on the Applicants' non-compliance.

[29] As mentioned, the Applicants take particular issue with the Officer's consideration of non-compliance by the PA's spouse during the period of time she spent in Canada as a teenager many years ago. Where a decision maker focuses on prior and isolated non-compliance as a teenager, it might well reflect an unreasonable fixation. However, this is not what occurred in this instance. Non-compliance was not isolated, but was ongoing, the Applicants having failed to extend their visa after arriving in the country in 2014. More importantly, the Officer indicated the concern was not with the Applicants' non-compliance with immigration laws per se, but rather the absence of any evidence to explain the non-compliance. As the Officer noted, it was the Applicants' onus to submit evidence in support of their request for H&C relief. Prior non-compliance with immigration laws is a relevant consideration and, as such, it was reasonable for the Officer to expect some explanation from the Applicants.

[30] With respect to the Officer's failure to address the reason for the Applicants having departed Portugal in the first place, I note there was no evidence advanced relating to current economic conditions in Portugal. An Officer cannot be faulted on judicial review for failing to address an issue alleged to be relevant to establishment or hardship when neither evidence nor submissions were provided.

[31] The Officer did not err in considering the Applicants' establishment.

(2) BIOC

[32] Turning to the issue of BIOC, the Applicants submit the Officer was not alert, alive and sensitive to the best interests of their six-year-old son diagnosed with ASD. Instead, they submit the Officer adopted an unusual, undeserved and disproportionate hardship or basic needs standard.

[33] In *Kanthasamy,* the Supreme Court reaffirmed that assessing a child's best interest involves a consideration of "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" (at para 36, citing *MacGyver v Richards* (1995), 22 OR (3d) 481 (CA)). The Supreme Court further affirmed that although BIOC will not outweigh other factors in the H&C context, it is an important part of an H&C evaluation and that a decision will be found unreasonable where the interests of a child are not sufficiently considered, (*Kanthasamy* at paras 37–39). The Officer was required to be alert, alive and sensitive to the children's best interests which involves more than a basic needs assessment (*Kanthasamy* at para 59, *Kolosovs v*

Canada (Citizenship and Immigration), 2008 FC 165 at paras 9–12; *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 at paras 64–65).

[34] The Officer accepted the six-year-old child's ASD diagnosis, noted the evidence that the child was involved in numerous therapy programs that were proving to be beneficial. However, the Officer found virtual therapy services, which had been pursued during the pandemic and resulted in some demonstrated improvement of the child's condition over that period, could continue remotely from Portugal. The Officer was also satisfied services and schools programs similar to those in Canada could be accessed in Portugal.

[35] However, as reflected in the jurisprudence cited above, the Officer was required to do more than assess the availability of education, health care and family support. The Officer was required to engage in a meaningful consideration of what was in the child's best interests, recognizing his specific circumstances.

[36] There was evidence of the child's specific circumstances before the Officer. This included the April 2021 Psychological Services Report. That Report described the child's ability to adapt as much lower than expected for his age; that learning will occur at a slower pace; and that intensive support was required to develop his daily functioning and social skills. The ASD diagnosis provided by the pediatrician highlights deficits in social communication skills and social intervention. These specific needs are in turn consistent with the view expressed by Surrey Place, stating "how important it is for [the child] to continue with therapy and specialized education here in Ontario…disruption of these programs may impact his ability to develop to his

potential." Surrey Place provides specialized clinical services to persons with ASD and has treated the child since 2017.

[37] This evidence speaks directly to the child's circumstances and the potential impact of relocation to Portugal, but this was not addressed in the Officer's BIOC analysis. It is not apparent that the interests of a child were sufficiently considered and, for that reason, the Officer's H&C decision is unreasonable.

VI. Conclusion

[38] The Application is granted. The parties have not identified a question of general importance and none arises.

JUDGMENT IN IMM-8051-21

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is granted, and the Officer's October 29, 2021 decision is set aside.
2. The Applicant's permanent residence application on Humanitarian and Compassionate grounds is remitted to a different decision maker to be redetermined.
3. No question of general importance is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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