Federal Court  Cour fédérale

Date: 20240705

Docket: IMM-9267-23

Citation: 2024 FC 1055

Ottawa, Ontario, July 5, 2024

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

LIUDMILA OSIPOVA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, a 73-year old mother and grandmother of Russian citizenship, seeks judicial review of a reconsideration decision dated May 26, 2023, made by a Senior Immigration Officer [Officer] at Immigration, Refugees and Citizenship Canada, refusing the Applicant's application for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The Applicant asserts that the Officer's decision was unreasonable on the basis that the Officer: (a) failed to conduct a proper assessment of hardship relating to a potential return to Russia based on the Applicant's personal characteristics and her establishment in Canada; (b) erred in their assessment of the best interests of the child [BIOC] as they failed to be alert, alive and sensitive to the best interests of the Applicant's grandchild; and (c) failed to give proper consideration to the evidence provided by the Applicant with respect to adverse country conditions in Russia and the hardship she would face in her home country.

[3] The sole issue for determination by this Court is whether the Officer's decision was reasonable.

[4] The parties agree and I concur that the applicable standard of review of an H&C decision is reasonableness [see *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44 [*Kanthasamy*]]. When reviewing for reasonableness, the Court must take a "reasons first" approach and determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified [see *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 8, 59]. 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 [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 15, 85]. The Court will intervene only if it is satisfied there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency [see *Adeniji-Adele v Canada (Citizenship and Immigration)*, 2020 FC 418 at para 11].

[5] Subsection 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 H&C considerations. An H&C determination under subsection 25(1) of the *IRPA* is a global one, where all the relevant considerations are to be weighed cumulatively in order to determine if relief is justified in the circumstances. Relief is considered justified if the circumstances would excite in a reasonable person in a civilized community a desire to relieve the misfortunes of another [see *Kanthasamy, supra* at paras 13, 28; *Caleb v Canada (Citizenship and Immigration),* 2020 FC 1018 at para 10].

[6] While the Applicant has asserted a number of grounds of review, I am satisfied that the Officer's BIOC analysis was sufficiently flawed so as to render their decision unreasonable.

[7] Subsection 25(1) of the *IRPA* mandates that officers consider the BIOC. In *Kanthasamy*, the Supreme Court of Canada states the following with respect to the BIOC:

> [35] The "best interests" principle is "highly contextual" because of the "multitude of factors that may impinge on the child's best interest": *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 (CanLII), [2004] 1 S.C.R. 76, at para. 11; *Gordon v. Goertz*, 1996 CanLII 191 (SCC), [1996] 2 S.C.R. 27, at para. 20. It must therefore be applied in a manner responsive to each child's particular age, capacity, needs and maturity: see *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30 (CanLII), [2009] 2 S.C.R. 181, at para. 89. The child's level of development will guide its precise application in the context of a particular case.
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> […]
>
> [39] A decision under s. 25(1) will therefore be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered: *Baker*, at para. 75. This means that decision-makers must do more than simply *state* that the interests of a child have been taken into account: *Hawthorne*, at para. 32. Those

> interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence: *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 (CanLII), [2002] 4 F.C. 358 (C.A.), at paras. 12 and 31; *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 165 (CanLII), 323 F.T.R. 181, at paras. 9-12.
>
> [40] Where, as here, the legislation specifically directs that the best interests of a child who is "directly affected" be considered, those interests are a singularly significant focus and perspective: *A.C.*, at paras. 80-81. […]

[8] The BIOC includes "such matters as children's rights, needs, and best interests; maintaining connections between family members," among other factors [see *Kanthasamy, supra* at para 34 citing *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 (CanLII), [2013] 2 SCR 559 at para 41]. Although there is no "specific formula" for assessing the BIOC factor, the test above, as articulated in *Kanthasamy*, must be met [see *Motrichko v Canada (Citizenship and Immigration)*, 2017 FC 516 at para 22 [*Motrichko*]].

[9] The issue, therefore, is whether the interests of the Applicant's granddaughter were "well identified and defined" by the Officer and examined "with a great deal of attention," in light of all the evidence. If not, then the Officer's decision is unreasonable.

[10] The evidence before the Officer was that the Applicant had been residing with her daughter and her son-in-law in Canada as a visitor since 2017. When the Applicant submitted her H&C application, her daughter was pregnant. The Applicant updated her application following the birth of her granddaughter in February of 2022; evidence was provided that the Applicant is involved in the upbringing of her infant granddaughter and will take on an increasingly important role in

caring for her when her daughter's maternity leave ends and both parents are working on a full-time basis.

[11] The Officer's reasons for decision related to the best interests of the Applicant's granddaughter provide, in their entirety, as follows:

> A factor to be considered in assessing a child's welfare is the level of dependency between the child and the applicant. With regard to this factor, the applicant submits that during the time she has been present in Canada, she has assisted in the care and upbringing of Sophie. Undoubtedly, the applicant has forged an emotional attachment to her.
>
> Notwithstanding, Sophie does not appear to be wholly dependent on the applicant. It would be reasonable to expect that Sophie will continue to live in Canada with her parents as her primary caregivers. While I do not doubt that the interaction and support the applicant has provided to Sophie is of value, there is insufficient objective evidence to establish that the applicant's return to Russia would compromise Sophie's best interests.
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> [Emphasis added.]

[12] I find that the Officer's highly generalized BIOC assessment renders the Officer's decision unreasonable [see *Motrichko, supra* at para 26]. It was incumbent on the Officer to properly identify and define the granddaughter's needs and to examine them "with a great deal of attention," as *Kanthasamy* requires. The Officer's BIOC analysis falls short of this standard. As in *Chamas v Canada (Citizenship and Immigration)*, 2021 FC 1352 [*Chamas*], the Officer never identified what was in the child's best interest, or how the granddaughter would be affected by the Applicant's departure. The Officer merely acknowledged that the Applicant has been involved in her granddaughter's care and upbringing, and that "the [A]pplicant has forged an emotional attachment to her," without addressing the granddaughter's attachment to the Applicant. The Officer fails to

consider what needs the granddaughter might have, or how the Applicant's return to Russia might impact the granddaughter. In particular, the emotional and practical hardships the Applicant's granddaughter would face if the Applicant is forced to leave the country are not addressed in detail, despite there being evidence of hardship on the record [see *Motrichko*, *supra* at para 27]. For example, the Applicant's daughter provided a letter stating that she would be returning to work after her maternity leave and that she needed the Applicant's help to raise and care for the child. This is a very practical form of support that the Applicant cannot provide from Russia, yet the Officer fails to grapple with this evidence and address whether it is in the best interests of the granddaughter for the Applicant to provide this care.

[13] Further, the Officer failed to properly apply the test set out in *Kanthasamy* by placing undue emphasis on the degree to which the granddaughter depends on the Applicant. The Officer concluded that the granddaughter "does not appear to be wholly dependent on the [A]pplicant," and that she would "continue to live in Canada with her parents as her primary caregivers." As *Chamas* and *Motrichko* make clear, the fact that an applicant is not a primary caregiver is not determinative. In *Motrichko*, this Court noted that "the analysis the Officer was called upon to undertake was not whether the grandchildren would manage or survive in the absence of their grandmother but how they would be impacted, both practically and emotionally, by the departure of the [a]pplicant in the particular circumstances of the case" [see *Motrichko*, *supra* at para 27]. The same is true here. However, much like in *Chamas*, the Officer stopped asking what, if any, impact the Applicant's departure would have on her granddaughter after determining that the Applicant was not her primary caregiver [see *Chamas*, *supra* at para 42].

[14] The Respondent asserts that while the Applicant and her daughter provided letters stating that the daughter will be returning to work upon completion of her maternity leave, the Applicant failed to provide sufficient evidence to demonstrate that her removal would undermine the granddaughter's best interests, such as the inability to seek alternative childcare arrangements or the degree of the Applicant's involvement in her granddaughter's day-to-day needs. The Respondent asserts that absent this evidence, it was open to the Officer to find that separation between the Applicant and her grandchild alone is insufficient to warrant H&C relief. However, the Respondent's explanation constitutes an impermissible attempt to supplement the reasons of the Officer [see *Ehigiator v Canada (Citizenship and Immigration)*, 2023 FC 308 at para 53]. Although it was open to the Officer to conclude that the Applicant's evidence was insufficient because she failed to demonstrate an inability to seek alternative childcare arrangements or the degree of involvement she has in her granddaughter's day-to-day needs, the Officer did not provide any such justification for their decision.

[15] Accordingly, I find that the Officer's BIOC analysis was unreasonable, which rendered the decision as a whole unreasonable. As such, I need not go on to consider the other grounds of review raised by the Applicant.

[16] The application for judicial review is allowed, the decision is set aside and the matter is remitted to a different officer for redetermination. Prior to the redetermination, the Applicant shall be given an opportunity to provide updated submissions and documentation in support of her application.

[17] Neither party proposed a question for certification and I agree that none arises.

JUDGMENT in IMM-9267-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The decision of the Senior Immigration Officer dated May 26, 2023, refusing the Applicant's application for permanent residence based on humanitarian and compassionate grounds is set aside and the matter is remitted back to a different officer for redetermination. Prior to the redetermination, the Applicant shall be given an opportunity to provide updated submissions and documentation in support of her application.

3. The parties proposed no question for certification and none arises.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	LIUDMILA OSIPOVA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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