Federal Court Cour fédérale

**Date: 20240809**

**Docket: IMM-6398-23**

**Citation: 2024 FC 1244**

**Toronto, Ontario, August 9, 2024**

**PRESENT: The Honourable Justice Battista**

**BETWEEN:**

**ARMANDO PAJA and ARMELA ZENELAJ**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] This is an application for judicial review of a decision to refuse the Applicants' application for permanent residence on Humanitarian and Compassionate ["H&C"] grounds pursuant to s. 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The H&C application was based on a number of grounds, including the mental health condition of one of the Applicants, and the best interests of the Applicants' Canadian born minor children.

[2] For the reasons that follow, I find the decision to be unreasonable due to its mistreatment of the evidence and its misapplication of the test for the best interests of the children, and I grant the application for judicial review.

## II. Background

[3] The Applicants are married citizens of Albania, and have been in Canada since 2016. They have two minor Canadian children, aged seven and three years old.

[4] The Applicants made an asylum claim upon entering Canada, which was rejected. The Applicant Armando was excluded based on Article lE of the *Refugee Convention*, while the Applicant Armela's claim was found to be manifestly unfounded.

[5] The appeal to the Refugee Appeal Division [RAD] for the male Applicant was rejected, as were the Applicants' applications for leave to apply for judicial review in the Federal Court. They later made an H&C application and a Pre-Removal Risk Assessment which were refused.

[6] This application is the review of the negative decision on the second H&C application they submitted. The second H&C application was based on the following grounds:

i) Adverse country conditions in Albania,

ii) The family's establishment in Canada,

iii) The mental health condition of the Applicant Armela, and the anticipated lack of support for her mental health in Albania,

iv) The best interests of the Applicants' two minor Canadian children.

## III. Issue and Standard of Review

[7] The sole issue is whether the Officer's decision is reasonable according to the test described by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*]. Overall, a reasonable decision is one that is based on an internally coherent and rational chain of analysis but is also justified in relation to the facts and law that "constrain" the decision maker: *Vavilov* at para 85.

[8] The factual "constraints" mentioned in *Vavilov* include the evidentiary record before the decision maker. The reasons and outcome of the decision must be respectful of the facts advanced by the parties through their own testimony and through documentary evidence such as expert reports and other relevant evidence. The submissions of the parties based upon those facts are also part of the context constraining a decision: *Vavilov*, paras 125-127.

[9] The legal constraints mentioned in *Vavilov* include the statutory and/or common law basis for the decision, binding precedent, and principles of statutory interpretation.

## IV. Analysis

[10] The Officer made positive findings about the Applicants' establishment in Canada and assigned this factor "medium" weight in the assessment. However, the Officer found that the conditions in Albania, the mental health condition of Armela, and the best interests of the Applicants' Canadian children did not warrant approval of the application on H&C grounds.

[11] The Officer's decision is commendable for its thoroughness, with substantive reasons totalling 12 pages. However, the decision's evidentiary and legal missteps render the decision unreasonable. Specifically, the Officer's treatment of the evidence documenting the mental health

condition of the Applicant Armela was not reasonable and the Officer misapplied the test for assessing the best interests of the children.

A. *The Applicant Armela's mental health condition*

[12] The Applicant Armela was diagnosed with major depressive disorder of moderate severity and post-traumatic stress disorder with dissociative symptoms in 2016. A psychological report confirming this diagnosis was submitted with the Applicants' first H&C application [the Devins report] and re-filed in the second H&C application.

[13] In addition, the second H&C application included a 2021 report from a psychotherapist [the Petrova report] confirming symptoms consistent with complex post-traumatic stress disorder, generalized anxiety and mild to moderate depression. This report stipulated that it did not constitute a diagnosis; it was meant to describe symptoms current to the date it was written.

[14] Combined, the two reports were intended to establish the existence of a serious mental health condition professionally diagnosed by a psychologist, and the existence of debilitating symptoms flowing from that diagnosis (sleep disorder, anxiety, loss of interest in activities).

[15] Combined, the two reports formed part of the factual "constraints" around the Officer's decision. They were the basis for further evidence and submissions establishing the difficulties the Applicant Armela would face in relocating to Albania, including the worsening of her mental health as a result of the relocation and the lack of appropriate treatment and support in Albania. This issue also formed the basis of a successful judicial review application of the decision to refuse deferral of the Applicants' removal: *Paja v. Canada (Public Safety and Emergency Preparedness)* 2023 FC 737. The Officer's decision had to reasonably deal with the facts these documents were

intended to establish and the Officer had to be clear regarding the role which these reports played in its ultimate decision.

[16] The Officer's conclusions regarding the Devins report are not clear. The Officer states:

> Overall, I am satisfied that the applicant got this diagnosis at the time, but do consider that she appears to have not received further diagnosis or sought treatment thereafter, making it difficult to gather what her situation has been since.

[17] The Officer appears to find the report dated, but it is not clear whether the Officer accepts the report and the diagnosis, or whether the Officer believes that the condition has diminished or disappeared. Given the centrality of the Devins report in the Applicants' application, the Officer was unreasonably unclear about its role in the ultimate decision.

[18] By contrast, the Officer was clear about its assignment of "little weight" to the Petrova report. The basis for this level of weight was that the report appeared based on "self-reporting", and that it did not describe the potential mental health effects of the Applicant Armela's return to Albania.

[19] The Officer was unreasonable in assigning little weight to the Petrova report because it was based on "self-reporting". As stated by the Supreme Court of Canada in *Kanthasamy v. Canada (Citizenship and Immigration)* 2015 SCC 61 at para 49:

> Only rarely will a mental health professional personally witness the events for which a patient seeks professional assistance. To suggest that applicants for relief on humanitarian and compassionate grounds may only file expert reports from professionals who have witnessed the facts or events underlying their findings, is unrealistic and results in the absence of significant evidence.

[20] The Officer was also unreasonable in assigning little weight to the Petrova report because it did not describe the impact of the Applicant Armela's return to Albania on her mental health. In fact, the purpose of the report was described as follows:

> The purpose of the assessment was to determine the nature of, and the extent to which she is suffering from psychological or emotional difficulties, and to make recommendations for treatment. [Petrova report, Certified Tribunal Record, p. 358]

[21] Clearly, the Petrova report's purpose was to determine current symptoms and recommend treatment, not to speculate on future harm. The discounting of evidence based on what it does not say rather than what the evidence says, as the Officer did in this case, is unreasonable: *Magonza v. Canada (Citizenship and Immigration)* 2019 FC 14, paras 49-50.

B. *Best interests of the minor Canadian children*

[22] The Applicants argued that it was in the best interests of their Canadian-born minor children that they receive Canadian permanent residence. They pointed out, and the Officer accepted, that if they did not receive permanent residence, the children would be forced to return to Albania with them. The children do not speak Albanian and are not familiar with Albanian culture. The evidence revealed that their eldest child has strong relationships in Canada and is doing well at school.

[23] The jurisprudence regarding the interpretation and application of the test for the best interests of a child formed part of the legal constraints around the Officer's decision. The Officer was required to apply the test in a manner consistent with the legal test established by the jurisprudence, but did not do so. That failure renders the decision unreasonable.

[24] First, the Officer made a determination of what was in the children's best interest but failed to assign it substantial weight, as required by the Supreme Court of Canada.

[25] After reviewing the evidence related to the children, the Officer concluded:

> While I consider that it would probably be in their best interest to not to have to go through with a move to Albania for immigration purposes for their parents, the weight I can give this is limited considering that little has been demonstrated regarding what would await them there. [Emphasis added]

[26] The Officer made a clear finding that it was more likely than not that remaining in Canada was in the children's best interest, but assigned little weight to that finding. In *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817, the Supreme Court of Canada stated at para 75:

> The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. [Emphasis added]

[27] Beyond the assignment of improper weight to the best interests of the children, it is clear that the application of the test was incorrect. Jurisprudence establishes that an assessment of the best interests of a child requires the selection of the best option available for the well-being and development of a child, not merely the avoidance of difficulties or hardship: *Osun v. Canada (Citizenship and Immigration),* 2020 FC 295; *Natesan v. Canada (Citizenship and Immigration),* 2022 FC 540; *Fazal v. Canada (Citizenship and Immigration)* 2023 FC 1654.

[28] The following findings in the decision make it clear that the Officer unreasonably applied a hardship analysis rather than a best interests of the child analysis:

> … There is also little indication that the level of instruction in Albania would impair them in the future.
>
> … the submissions are insufficient for me to find that their wellbeing would be impacted by this.
>
> … I find insufficient evidence before me that the wellbeing of these children would be compromised should they leave for Albania.
>
> … I am unable to conclude that their departure from Canada would directly compromise the best interest of either of their children.

## V. Conclusion

[29] The Officer's findings were unreasonable given the factual and legal constraints in the Applicants' case, and the decision will be set aside.

**JUDGMENT in IMM-6398-23**

**THIS COURT'S JUDGMENT is that**:

1. The application for judicial review is granted, and the decision refusing the Applicants' application for permanent residence on humanitarian and compassionate grounds is quashed.
2. The matter shall be redetermined by a different Officer.
3. There is no question of general importance for certification.

"Michael Battista"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-6398-23 |
| **STYLE OF CAUSE:** | ARMANDO PAJA and ARMELA ZENELAJ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | JULY 24, 2024 |
| **JUDGMENT AND REASONS:** | BATTISTA J. |
| **DATED:** | AUGUST 9, 2024 |

**APPEARANCES:**

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| Prathima Prashad | FOR THE RESPONDENT |

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