Federal Court Cour fédérale

Date: 20241025

Docket: IMM-9905-23

Citation: 2024 FC 1691

Toronto, Ontario, October 25, 2024

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

ANA CRISTINA RAPOSO ARRUDA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant is a citizen of Portugal who arrived in Canada as a visitor in 2014. In March 2021, she applied for permanent residence on humanitarian and compassionate [H&C] grounds pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. The H&C application was refused, but was later re-opened for re-determination. The Applicant cited her establishment, the best interests of her then six-year old Canadian born son, and adverse country conditions in Portugal, including fear of her ex-spouse from whom she had allegedly suffered domestic abuse while in Canada. The application was dismissed by a senior

immigration officer [Officer] in a decision dated May 18, 2023 [Decision]. This is a judicial review of that Decision.

[2] Before this Court, the Applicant argues that the Officer erred in their analysis of the best interests of the child [BIOC] and also failed to consider the Applicant's establishment. However, for the reasons set out further below, I find that the Officer's analysis of the BIOC is determinative of the application. As such, my analysis will focus on this issue.

I. **Analysis**

[3] There is no dispute that the standard of review is reasonableness. None of the situations that would rebut the presumption that all administrative decisions are reviewable on a standard of reasonableness are present in this case: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 16-17 and 25. A reasonable decision is "based on an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker": *Vavilov* at paras 85-86; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2, 31. A decision will be reasonable if when read as a whole and taking into account the administrative setting, it bears the hallmarks of justification, transparency, and intelligibility: *Vavilov* at paras 91-95, 99-100.

[4] In *Buitrago Rey v Canada (Citizenship and Immigration)*, 2021 FC 852 [*Buitrago Rey*], Justice Kane set out the principles relevant to a BIOC analysis in the context of an H&C determination, citing to the Supreme Court of Canada's decisions in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] and *Kanthasamy v Canada*

(Citizenship and Immigration), 2015 SCC 61 [*Kanthasamy*], among other decisions. As stated in *Buitrago Rey*:

> [81] With respect to the BIOC, which is an important factor in an H&C application where children are directly affected, the principles established in *Baker* continue to apply (*Kanthasamy* at paras 38–39).
>
> […]
>
> [83] The jurisprudence has noted that the general approach is to identify the child's best interests; determine the degree to which those interests would be compromised by one decision over the other; and, finally, to determine the weight that should be attached to the BIOC in the overall H&C application (*Egwuonwu v Canada (Minister of Citizenship and Immigration)*, 2020 FC 231 at para 64).
>
> [84] The jurisprudence also establishes that the fact that Canada may be a better place to live than the country of origin does not determine that it is in the child's best interest to remain in Canada, nor does a positive BIOC necessarily result in an H&C exemption. …
>
> […]
>
> [86] The post-*Kanthasamy* jurisprudence confirms the following principles, among others:
>
> - An H&C exemption is discretionary and exceptional relief;
> - Reviewing courts must not substitute their discretion for that of the Officer;
> - While undue, undeserved and disproportionate hardship is not required, hardship can be considered;
> - Some hardship is the normal consequence of removal and, on its own, does not support the exemption;
> - Applicants must demonstrate with sufficient evidence that the misfortunes or hardships they will face are relatively greater than those typically faced by others seeking permanent residence in Canada;

> - The BIOC is an important consideration but is not necessarily determinative of an H&C application; and
> - All relevant factors must be considered and weighed.
>
> As Justice Roy noted in *Shackleford*, more than a sympathetic case is required.

[5] The Applicant argues that the Officer failed to indicate how much weight was given to the BIOC in the H&C analysis and erred by considering the BIOC from a hardship lens. The Applicant asserts that the Officer relied too heavily on the premise that the child's best interests would be met so long as he remained with his mother, irrespective of where that might be, particularly in view of shortcomings noted with the educational system in the Azores, Portugal. They assert that the Officer's analysis is inconsistent and unintelligible.

[6] In the Decision, the Officer begins their analysis of the BIOC by noting that it must be given "substantial weight" in the assessment of the application, although it is only one of many important factors that must be considered. However, when conducting the analysis, the Officer assigns different, lower weight attributions to many of the aspects affecting the child's best interests – *i.e.*, affording the quality of education in Portugal "low weight" on the basis that the Applicant could relocate to other areas of Portugal to access better quality education for her child, while acknowledging that the child's adjustment to his school in Canada and his development of social bonds, are positive factors that would be given "weight".

[7] I agree with the Applicant, the manner in which the assessment is conducted makes it unclear as to how these evaluations come together, and as to the overall weight given to the BIOC in the H&C analysis. In *De Oliveira Borges v Canada (Minister of Citizenship and*

Immigration), 2021 FC 193 at paragraph 6, a similar approach was found to lack clarity and to be a departure from the teachings in *Baker*:

> [6] Turning to the issue of the children's best interests, in my view the Officer erred in several respects rendering the decision unreasonable. First, while the Officer acknowledged at the outset of the assessment that the best interests of the child considerations should be given significant weight, the Officer concluded the assessment by giving them only "some positive weight" in this case. The Officer is correct that the children's best interests are not necessarily determinative in the assessment of a humanitarian and compassionate application. I nonetheless find that to accord them only "some positive weight" is unintelligible and contrary to the Supreme Court of Canada's instruction that 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]: *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 [*Baker*] at page 864.

[8] The Applicant asserts that the Officer improperly approached the analysis from a hardship lens, concluding that "the best interest of the child would not be negatively impacted should he return to Portugal with his mother".

[9] While I agree with the Respondent that there were some constraints on the Officer because of the submissions made by the Applicant and the limited evidence provided, the Decision must nonetheless indicate that the Officer turned their mind to the correct approach for the analysis.

[10] The assessment must include an analysis of the benefits of the child remaining in Canada (the only place they have ever known) as well as the hardship the child would suffer if their parent were removed: *Hawthorne v Canada (Minister of Citizenship and Immigration),* 2002

FCA 475 at para 4; *Buitrago Rey* at para 78; *De Oliveira Borges* at para 7. Here the Officer does not consider the degree to which the child's interests would be compromised by one decision over the other. Rather, as highlighted by the Applicant, the Officer takes removal as the starting point and then spends the analysis justifying why removal will not compromise the child's best interests.

[11] The Officer stresses that "the best interest of the child is to remain under the primary care of his mother, regardless of the outcome of the decision". Thus, implying that it does not matter where the child lives as long as they are with their mother. This does not engage the balancing approach mandated by *Kanthasamy* and reiterated in *De Oliveira Borges* at paragraph 9:

> [9] Further, to the extent the Officer was of the view there was no objective evidence that the children would be unable to attend school, obtain health care and participate in extra-curricular activities, I find this highlights the Officer's failure "to ask the question the Officer is mandated to ask: What is in [each] child's best interest?": *Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813 [*Sebbe*] at para 16. This is especially so in the case of the 7-year old child who came here at 1 year and essentially has known no other life other than the one in Canada. As noted in the same paragraph of *Sebbe*, it is perverse to suggest that a child's interests in remaining in Canada are balanced if the alternative meets their basic needs.

[12] It is accepted that at six years old, the child in question should remain with his mother. However, the BIOC analysis requires that the Officer conduct an individualized analysis to fully consider the child's particular circumstances and the effect that the decision will have on the child's interests: *De Oliveira Borges* at para 7, citing to *Kanthasamy* at para 35.

[13] Here, there is no acknowledgment that Canada is the only home that the child has ever known. Further, the only positive aspect identified for the child in Azores, Portugal (the unification of the child with additional family members in the Azores, Portugal) is subject to contradiction. The Officer indicates that the child will benefit from the support he will receive from his sisters, grandparents and extended family members in the Azores, but also notes that the educational system in the Azores faces some challenges, and that the Applicant and her child might need to relocate to other areas of Portugal to gain access to better quality education. In reaching the latter conclusion, the Officer does not grapple with the effect that relocation would have on the ability of the child to receive the benefits of the additional family support identified. Further, it suggests that there is some hardship to the child that necessitates the possibility of an alternative location in Portugal.

[14] While the Respondent argues that the Officer's analysis is intended to address various alternatives, I do not find this explanation sufficient. In my view, these shortfalls in the Decision and those earlier noted render it unintelligible.

[15] For all of these reasons, this application will be allowed and the matter returned for redetermination.

[16] There was no question for certification proposed by the parties and I agree none arises in this case.

JUDGMENT IN IMM-9905-23

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed, the May 18, 2023 Decision is set aside, and the matter is sent back to be redetermined by a different Officer.

2. No question of general importance is certified.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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