Federal Court  Cour fédérale

Date: 20180530

Docket: IMM-4497-17

Citation: 2018 FC 560

Ottawa, Ontario, May 30, 2018

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

SIRAJUL ISLAM
MUSAMMAT SURAIA AKTER
RESHAD ISLAM
REEHAN ISLAM

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] On his own behalf and on behalf of his wife and two sons, Mr. Sirajul Islam seeks judicial review of a decision of an immigration officer [Officer] denying their application for

permanent residence on humanitarian and compassionate grounds [H&C] application, pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] He raises several issues amongst which only one, the best interests of the minor child Reehan Islam, warrants the intervention of the Court.

II. Facts

[3] Mr. Islam and Ms. Musammat Suraia Akter are citizens of Bangladesh. They arrived in Canada in 2003 after living in the United States [US] for fifteen years. Their two sons, Reshad (21 years old) and Reehan (15 years old) were born in the US and are citizens of that country. They have never lived in Bangladesh and although Reshad speaks Bengali as a second language, Reehan only speaks English.

[4] Mr. Islam originally entered the US on a work visa, but remained there after it expired. He was arrested by US officials for immigration violations in 2003, and ordered to be removed from the country *in absentia* in 2004.

[5] Upon arrival to Canada, Mr. Islam made a claim for refugee protection for himself and his family. Fearing that it would be rejected given their lengthy stay in the US, Mr. Islam falsely claimed that they had only been in the US for six months prior to their arrival in Canada. He also failed to reveal that the children were born in the US. He presented fraudulent documents in order to facilitate this misrepresentation.

[6] The refugee claim was rejected on credibility grounds, though Mr. Islam's misrepresentation about the family's time in the US went undetected. Mr. Islam initiated an application for a pre-removal risk assessment [PRRA] in August 2006 but before a determination had been made on that application, he filed his H&C application. As part of this application, he repeated the false claim that the family had only lived in the US for six months. In November 2008, the Applicants received a positive Stage 1 H&C decision (which assesses the H&C grounds of the request), resulting in the PRRA application being abandoned.

[7] In February 2010, before the Stage 2 H&C decision was made (where a final decision on the permanent residence application is rendered), Mr. Islam and his wife submitted an affidavit which revealed that their children were born in the US, and that they had lived in the US for fifteen years before coming to Canada. Mr. Islam claims that he revealed the truth because he regretted having misrepresented the facts.

[8] The Applicants were subsequently reported as inadmissible to Canada as a result of the misrepresentation. On August 28, 2013, their H&C application was rejected at Stage 2 on two grounds: their misrepresentation and a finding that Reehan may pose an excessive demand on the healthcare system and was therefore medically inadmissible. Reehan had been diagnosed with Autism Spectrum Disorder in 2006, but was reassessed one year later as not meeting the criteria for this condition. In 2009, he was diagnosed with Mixed Receptive Expressive Language Disorder and continues to receive treatment and support to this day.

III. Decision Under Review

[9] The Officer requested that Reehan undergo a medical examination, in order to determine if he was still medically inadmissible. He noted that Reehan successfully passed the medical examination and was no longer considered medically inadmissible to Canada.

[10] The Officer then proceeded to review the Applicants' H&C application on the basis of i) the misrepresentation, ii) the family's establishment in Canada, and iii) the best interests of the child [BIOC]. The Officer noted that these factors were to be assessed globally.

[11] The Applicants argued that the misrepresentation was not material to the H&C determination. The Officer disagreed, noting that an H&C determination requires a holistic assessment of the claimants' background, which is thwarted when false information is provided. He noted that the Applicants went so far as to provide fraudulent documents to support the false information given in their application.

[12] The Applicants submitted that their decision to correct the misrepresentation should be viewed as a positive factor. In rejecting this submission, the Officer found that it was logical to believe that the Applicants misrepresented their history in order to be successful in their H&C application. The Officer further found that they were only motivated to correct the record when they had to renew their passports and could not use the false information in order to become permanent residents. The Officer implicitly rejected the Applicants' submission that they regretted having misrepresented their situation. He stressed that the Applicants had an unusual

opportunity to apply for H&C relief from within Canada, and that they were required to be honest in the process. Because they were not, the Officer found that the misrepresentation was material.

[13] He further found that the Applicants' misrepresentation facilitated their establishment in Canada, since the family was able to remain in Canada between the successful Stage 1 H&C decision and the failed Stage 2 decision – from November 2008 until August 2013.

[14] He further noted that the Applicants' evidence regarding establishment was not very strong. Besides the fact that Mr. Islam and his wife were consistently employed, there was "little evidence…to show community support; volunteer work; fiscal management; or ties to the community".

[15] The Officer then turned to the BIOC, noting that this factor had to be given substantial weight. Most of the analysis focused on Reehan's Mixed Receptive Expressive Language Disorder. The Applicants submitted that there was no treatment available for this condition in Bangladesh, and stressed that Reehan only speaks English.

[16] The Officer began by referring to the medical evidence, including the report from the immigration medical officer, which described Reehan's condition as "developmental", and which indicated that he will "continue to have problems with language skills and progress slower than his peers." The Officer thought it significant that the immigration medical officer found Reehan's condition did not require the kind of support that would cause "excessive demand on

health or social services". The Officer also noted that he or she had not been provided with a prognosis for Reehan. The Officer speculated that Reehan may have "normal or higher than normal intelligence", based upon an undated letter of support from Ms. Alexandra Shea – a childcare worker who has worked with Reehan on his language issues – wherein Ms. Shea states that Reehan is "sure to become a responsible, contributing member of society". Lastly, the Officer noted a letter from the Applicants' counsel indicating that Reehan had been showing developmental progress, and would continue to do so.

[17] The Officer then turned to the availability of treatment in Bangladesh. He quoted at length from a US Department of State report on human rights in Bangladesh, which details the difficulties in accessing education in Bangladesh, especially given its prohibitive costs and other financial pressures on families. The report also notes that certain resources are available for students with disabilities, but that ninety percent of children with disabilities do not attend public school. The Officer also noted the Applicants' evidence indicating that, as of April 30, 2014, there was "no institution reported to specialize in Mixed Receptive Expressive Language Disorder" in Dhaka (the Applicants' city of origin). Further, the Officer noted evidence indicating that autism awareness is "newly developing" in Bangladesh, though there are organizations committed to working with autistic children.

[18] With respect to Reshad, the Officer noted that no submission had been made with respect to him. The Officer noted that both children are US citizens, and that Reshad would be legally able to travel alone to the US if he wanted to attend college there.

[19] The Officer found that both children benefitted from the Canadian education system, and would likely continue to benefit if permitted to remain in Canada. The Officer found that this was especially true for Reehan, who has access to support for his language condition here. The Officer also noted that the children have already experienced one "disruption" in their lives when they were moved from the US to Canada and accepted that it was in the children's best interests to remain in Canada.

[20] The Officer then weighed the cumulative effect of the factors. After quoting from the Supreme Court's decision in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, the Officer again acknowledged that the BIOC favoured remaining in Canada. However, he noted that Bangladesh is "at the forefront of learning more about autism, even though as of 2014 there was no institution specializing in Reehan's condition". Ultimately, the Officer concluded: "It is not a perfect situation for Reehan to go to a country where he has never lived, but it is an option in these circumstances." The Officer again noted that Reehan was not medically inadmissible to Canada, and that the family could therefore apply for permanent residence "in the normal manner", rather than "stepping ahead" of the system via an H&C application.

[21] In conclusion, the Officer found that the positive factors did not outweigh the "fundamental misrepresentation" made by the Applicants, which showed disregard for the laws of Canada. Accordingly, the Officer denied the H&C application.

IV. Issues and Standard of Review

[22] In their written submissions and at the hearing, the Applicants raised the following issues:

A. *Did the Officer err in his analysis of the best interests of Reehan?*

B. *Was the Officer's treatment of the misrepresentation, or the establishment factor, unreasonable?*

C. *Did the Officer breach procedural fairness obligations by not disclosing the immigration medical officer's report?*

D. *Did the Officer err by suggesting that the Applicants could apply for permanent residence in the "normal way"?*

[23] As I am of the view that only the first issue raised by the Applicants is well-founded and determinative, these reasons will only consider the Officer's analysis of Reehan's best interests.

[24] H&C decisions, including those which assess the BIOC, are reviewed on the standard of reasonableness (*Aguilar Sarmiento v Canada (Citizenship and Immigration)*, 2017 FC 481 at para 10). On the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

V. Analysis

[25] In order for an H&C decision to be reasonable, the Officer must give the BIOC substantial weight, and be "alert, alive and sensitive" to those interests (*Kanthasamy*, above at para 38, citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75). A child's best interests must be "well identified and defined" and examined "with a

great deal of attention" (*Kanthasamy*, above at para 39). This does not mean that the BIOC will always outweigh other considerations, but where those interests are unfairly minimized in a manner inconsistent with Canada's H&C tradition, the decision will be unreasonable (*Kanthasamy*, above at para 38, citing *Baker*, above at paras 74-75).

[26] In this case, the Officer purported to afford substantial weight to the BIOC. He acknowledged that the children's best interests were to remain in Canada, given Canada's superior education system, and the "support" available for Reehan here. Nonetheless, I am of the view that the Officer failed to be sufficiently "alert, alive and sensitive" to Reehan's best interests. In particular, the Officer failed to adequately engage with the fact that Reehan does not speak Bengali. Relatedly, the Officer failed to consider whether Reehan's ability to learn a new language would be impacted by his condition.

[27] In their submissions to the Officer, the Applicants stressed that Reehan has lived almost his whole life in Canada, and only speaks English. The Officer acknowledged this when summarizing the Applicants' position, but at no point is it addressed in the course of the BIOC analysis. The very fact that Reehan, at 15 years old, will likely have to learn a new language may itself be seen as a hardship with which the Officer failed to grapple. In order to be sufficiently sensitive, an immigration officer must, among other things, demonstrate a "full understanding of the real life impact of a negative H&C decision" on a child's interests (*Kolosovs v Canada (Citizenship and Immigration)*, 2008 FC 165 at para 12). By failing to address the combined effect of Reehan's inability to speak Bengali and his special condition, the Officer failed to display a "full understanding" of the circumstances.

[28] In similar contexts, this Court has recognized that a child's inability to speak a language of the country where the child may be sent is a factor deserving of attention in the course of a BIOC analysis. In *Begum v Canada (Citizenship and Immigration)*, 2013 FC 824, the child applicant submitted that he only spoke English, and could not speak Bengali. The Court found that the immigration officer erred by ignoring this evidence, and assuming that the child had "some grasp" of Bengali. While the Court framed the error in terms of ignoring evidence, it also recognized more generally that the immigration officer's analysis regarding best interests was "insufficient given that the minor Applicant has been in Canada since he was one year old and stated that he does not … speak the language" (at para 63).

[29] Similarly, in *Bautista v Canada (Citizenship and Immigration)*, 2014 FC 1008, the Court described the adolescent applicant's inability to speak Tagalog as a "compelling factor" given that it was "not obvious that she would be able in her adolescent years to cope with learning a new language, school system, and culture" (at para 21). Again, however, the precise error in that case was the immigration officer's overall approach to the BIOC analysis, not the treatment of the applicant's language abilities specifically.

[30] Finally, in *Ali v Canada (Citizenship and Immigration)*, 2014 FC 469, the Court ruled that the immigration officer was not sufficiently alert, alive and sensitive to the BIOC, including the fact that the children could not speak Urdu. In that case, the applicants had submitted a report from a psychologist, confirming that they could not speak Urdu, and detailing the difficulties they would face if returned to Pakistan. Despite this, the immigration officer concluded that it was "reasonable to expect that the children have been exposed to … the Urdu language" (at

para 6). The Court ruled that the immigration officer erred by neglecting the applicants' evidence regarding their language abilities, and therefore by failing to address the "impact on these boys of interrupting their education by having to learn a foreign language and the harm that will inevitably occur if that happens" (at para 15).

[31] In this case, Reehan's inability to speak Bengali is certainly complicated by his condition, which specifically impacts his language and communication skills. Reehan's most recent "Speech and Language Assessment", conducted by a speech language pathologist, indicates that he has "severe difficulty following oral directions", and a language memory in the "severely delayed range". Admittedly, this report does not specifically address whether Reehan's condition would hinder his ability to learn Bengali. However, a letter from Ms. Shea who has provided treatment to Reehan, makes that connection:

> To send them back to Bangladesh, where Reehan has little experience with the culture and none of the language skills necessary in Bangla [*sic*], the skills that were so hard won for him in English, would be like throwing a roadblock in front of the family that would be the most unfair to Reehan.
>
> (Applicants' Record at 57).

[32] In other words, Ms. Shea suggests that the same challenges faced by Reehan when learning English will confront him when learning Bengali.

[33] The Officer was not obliged to find that Reehan's language difficulties should dictate the outcome of the H&C application. Further, the Officer could have taken issue with the sufficiency or persuasiveness of the evidence regarding Reehan's difficulties – for instance, unlike in the case of *Ali*, above, where there is no report from a medical professional specifically addressing

the extent to which learning a new language will present a challenge for Reehan. However, in light of the evidence on the record, the Officer should have at least addressed the issue. Given that Reehan will most certainly have to learn Bengali in order to live in Bangladesh, this was an interest that should have been considered as part of the BIOC analysis. On this basis, I find the Officer's analysis to be unreasonable.

VI. Conclusion

[34] For the reasons expressed above, this application for judicial review is granted. The parties have not suggested any question of general importance for certification and none arise from this case.

JUDGMENT in IMM-4497-17

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted;
2. The style of cause is amended to replace the "Minister of Immigration, Refugees and Citizenship" with the "Minister of Citizenship and Immigration";
3. No question of general importance is certified.

"Jocelyne Gagné"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mitchell Goldberg	FOR THE APPLICANTS
Lisa Maziade	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Goldberg Berger Montréal, Quebec	FOR THE APPLICANTS
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT