Federal Court Cour fédérale

Date: 20211109

Docket: IMM-7885-19

Citation: 2021 FC 1210

Ottawa, Ontario, November 9, 2021

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

NGOC THIEN HUONG (AKA NGOC THIEN HUONG NGUYEN)

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Ngoc Thien Huong Nguyen, is a citizen of Vietnam. She has a son who is a citizen of Vietnam and three Canadian-born daughters.

[2] In a decision dated December 4, 2019, a Senior Immigration Officer [Officer] refused Ms. Huong's application for permanent residence from within Canada on Humanitarian and Compassionate [H&C] grounds. Pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], she has brought this Application for judicial review of that decision.

[3] Ms. Huong's Application raises two issues: 1) did the Officer misconstrue the test to be applied in determining an H&C application; and 2) did the Officer err in assessing establishment, the best interests of the children [BIOC] and the hardship that would result if Ms. Huong and her children were required to relocate to Vietnam.

[4] For the reasons that follow, the Application is dismissed.

II. Background

[5] In 2013, Ms. Huong travelled to Canada for business reasons. She entered into a relationship with a Canadian citizen and they married in 2014. She moved to Canada with her son from a previous relationship to live with her husband in July 2015. Ms. Huong's second child, a daughter, was born in Canada in September 2015. Due to marital difficulties, Ms. Huong returned to Vietnam in October 2015, but continued to travel between the two countries. In May 2017, the couple divorced.

[6] After the divorce, Ms. Huong continued to travel between Canada and Vietnam. She reports the purpose of these trips was to follow-up on the status of an H&C application she had

instructed counsel to submit on her behalf in 2016. Fearing that an overstay in Canada might negatively affect her ability to return to or remain in Canada, she returned to Vietnam after each visit. Ms. Huong gave birth to her third child in September 2017 and her fourth in August 2019. Both of the children were born while she was visiting Canada.

[7] In 2018, Ms. Huong became concerned that the H&C application she had instructed be submitted in 2016 had not been. She retained new counsel and reports that her original counsel did not submit the H&C as instructed until October 2018, after inquiries were made. Her new counsel provided supplementary submissions on the H&C application. The application was denied in December 2019.

III. Decision under Review

[8] In refusing the H&C application, the Officer first noted that the onus is on an applicant to advance clear submissions as to what an applicant would face if the requested H&C exemption were not granted. Further, the Officer noted the onus is on the applicant to submit any H&C factors that are believed to be relevant. In considering an H&C application, the Officer recognized that decision makers are required to undertake a global assessment of the identified factors; the factors are not assessed in isolation.

[9] The Officer considered Ms. Huong's establishment in Canada, the best interests of the four children, the reported lost opportunity to obtain status in the United States, and that Ms. Huong reported having experienced domestic abuse while married.

[10] The Officer noted the lack of supporting evidence in respect of the reported lost opportunity to obtain status in the United States. In addressing the abusive relationship, the Officer noted that the details of Ms. Huong's marriage were sympathetic, but also noted the absence of any supporting documentation despite the reported involvement of the police and the Children's Aid Society.

[11] In addressing establishment, the Officer first noted that the concept of "establishment" is based upon the premise of a person being so established in Canada, due to an extended stay in the country beyond their control, that it would be a hardship for them to leave. The Officer acknowledged Ms. Huong was renting a home and had a driver's licence. The Officer noted her poor English language skills and lack of community involvement. The Officer also recognized that because of her marriage, Ms. Huong had had an expectation that she would be sponsored for permanent residence.

[12] The Officer reviewed Ms. Huong's multiple trips between Canada and Vietnam from 2016 to 2019 and concluded this demonstrated a freedom to move between countries. The Officer found Ms. Huong's freedom to move between countries coupled with her lack of community involvement demonstrated a lack of establishment in Canada.

[13] In considering the best interests of the children, the Officer reviewed the general circumstances of the children and noted that the application provided little information to work with. The Officer noted the children were all under 11 years of age and that Ms. Huong's oldest child remained in Vietnam. The Officer acknowledged Ms. Huong's evidence that when in

Vietnam her Canadian-born children were required to regularly leave the country to renew their status but also noted the absence of evidence addressing the ability of the children to access Vietnamese citizenship. The Officer concluded that living together with their mother in a single home and that remaining in Canada and having their mother's support were in the children's best interests. Despite this BIOC assessment, the Officer concluded that a global assessment of all of the factors did not lead to a positive conclusion.

IV. Standard of Review

[14] The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] teaches that reasonableness is the presumptive standard of review, a presumption that is subject to narrow exceptions, none of which arise here (*Vavilov* at para 32). The Officer's assessment of the H&C factors and whether the appropriate test was misconstrued are issues that are to be reviewed against a reasonableness standard (*Kim v Canada (Citizenship and Immigration)*, 2020 FC 581 at para 45).

[15] A decision will be reasonable where it is "based on an internally coherent and rational chain of analysis that is justified in relation to the facts and law" (*Vavilov* at para 85).

V. Procedural Protocol Regarding Allegations against Counsel

[16] Ms. Huong's submissions include allegations of misconduct on the part of her former counsel in respect of the timely submission of her H&C application and her rights in respect of a family law matter. The Respondent relies on *Canada (Citizenship and Immigration) v Singh*,

2016 FCA 96 at para 67 to argue these allegations cannot be upheld because Ms. Huong has not complied with the Court's procedural protocol – *Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court.* Specifically, there is no evidence to indicate counsel was provided notice or that a Law Society complaint was initiated.

[17] Ms. Huong acknowledges that the protocol was not complied with, but argues it need not be in this instance. She submits the reported misconduct does not relate to the issues before the Court or affect the main grounds of the Application. I agree.

[18] Compliance with the protocol at any time counsel misconduct is alleged is preferred. However, where the alleged misconduct is relied on to explain an applicant's conduct as opposed to, for example, demonstrating a breach of natural justice warranting intervention, non-compliance will not prevent the Court from fairly assessing the merits of the application. As was stated by Justice Shirzad Ahmed in *Singh v Canada (Citizenship and Immigration),* 2019 FC 1142:

> [43] According to the Protocol, its purpose is to ensure that notice is given where incompetence of counsel is alleged **"**as a grounds for relief in an application for leave and for judicial review under the [Act]" (ie. the applicant raises that incompetence of counsel gives rise to a breach of natural justice). Moreover, the second of three criteria that comprise the tripartite test for finding that former counsel's incompetence results in a breach of natural justice requires that: "[t]here was a miscarriage of justice in the sense that, but for the alleged conduct, there is a reasonable probability that the result of the original hearing [or application] would have been different" (*Abiobun v Canada (Citizenship and Immigration), 2019 FC 299 at para 13).* Here the original application was the Applicant's H&C application filed in January 2017 which was separate and distinct from the alleged incident of

> fraud. That incident, which occurred in the context of a previous (false) H&C application (which was never filed) amounted to an explanation given to the Officer in this case as to why the Applicant remained in Canada without status for nearly two years.

[19] In this instance, the alleged misconduct is not relied on as a ground for relief but rather to explain Ms. Huong's travel history and the vulnerability she reports she experienced in her relationship.

VI. Analysis

A. *The Officer did not misconstrue the test to be applied*

[20] Ms. Huong submits the test to be applied where H&C relief is sought is whether an exception to the requirement to apply for permanent residence from abroad is warranted. Ms. Huong argues that it is unclear whether the Officer considered the proper test. She submits that contrary to what is set out in the decision, H&C relief is not tied to an extended stay in Canada and that an applicant need not demonstrate exceptional circumstances.

[21] In *Lopez Bidart v Canada (Citizenship and Immigration),* 2020 FC 307, which Ms. Huong cites and relies upon, Justice William Pentney states at paragraph 31 that the one key lesson to be taken from the Supreme Court's jurisprudence is that officers err if they treat any particular form of words as a "magic formula" to be applied to H&C cases. The real question to be asked is whether the officer engaged in a consideration of all of the relevant factors that weigh in favour of – or against – the granting of relief (*Kanthasamy v. Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*]). To determine whether an officer has engaged in

a consideration of all relevant factors, a reviewing court must consider the decision as a whole, not focus on individual phrases or sentences without the benefit of their broader context.

[22] Doing so in this instance, I am satisfied that the Officer not only understood the requirement to consider all of the factors raised globally but in fact did so. The decision includes a lengthy section under the heading "Global Assessment." The analysis undertaken reflects a global consideration of the Officer's individual findings and conclusions that were arrived at with reference to the evidence and circumstances. The Officer also describes their approach to the application, which involved a global assessment in determining the outcome – "In considering this case, I looked at the individual elements and the cumulative effect of those elements to see if there are compelling grounds as described in the Immigration Legislation. Grounds for approval are assessed by weighing together all of the H&C considerations submitted by the Applicant to see if a positive conclusion is justified."

[23] I am satisfied that the Officer did not misconstrue or misapprehend the approach to be taken in considering the H&C application.

B. *The Officer's Establishment and BIOC assessments were reasonable*

[24] In taking issue with the Officer's analysis of her establishment, Ms. Huong submits that the Officer's assessment of the evidence was superficial. She submits the Officer failed to explain on what basis they concluded the evidence was insufficient, that relevant factors were ignored or minimized and that the Officer's global assessment of establishment was superficial.

[25] I am not persuaded by any of these arguments. The Officer did acknowledge and address Ms. Huong's circumstances, both those directly related to the question of establishment and the broader circumstances relating to the sale of her business in Vietnam, her marriage and her expectation of sponsorship. In doing so, the Officer concluded that the evidence did not demonstrate Ms. Huong had established herself in Canada. While Ms. Huong understandably disagrees with this conclusion, it was one that, in my view, was reasonably available based on the facts and the law and is justified in the reasons provided.

[26] Similarly, I can find no fault with the Officer's BIOC analysis when considered in the context of the evidence and submissions placed before the Officer. It is not controversial that a child's interests is an important factor that is to be given substantial weight by a decision maker, but a child's interests will not always be determinative of an underlying application (*Kanthasamy* at para 38 and *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75 [*Baker*]). An applicant bears the onus of establishing a child's circumstances and "the intensity and scope of a BIOC analysis …will depend on the length and strength of the applicant's submissions and on the evidence adduced" (*Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at para 37; see also para 16). The Officer's BIOC conclusions are justified, transparent and intelligible.

[27] Ms. Huong also argues that the Officer's conclusions in respect of what is in the children's best interest is inconsistent with the Officers' ultimate refusal decision and therefore unintelligible. In my opinion, the Officer's BIOC conclusions are not inconsistent with the refusal decision. The Officer's decision to refuse the H&C application reflects the principle cited

above from *Baker*; a BIOC analysis will not always be determinative of the underlying application. This, in my view, is particularly so where the interests of the children are not supported by substantive evidence and submissions. As the Officer noted, and a review of the record confirms, in this instance there was “not very much information about the children for me to work with.”

VII. Conclusion

[28] The Officer’s H&C decision was reasonable. The Application is dismissed. The parties have not identified a question of general importance for certification, and none arises.

JUDGMENT IN IMM-7885-19

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed.

2. No question certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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