Federal Court  Cour fédérale

Date: 20211115

Docket: IMM-1696-20

Citation: 2021 FC 1236

Ottawa, Ontario, November 15, 2021

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

XIAOQI YU

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Yu, challenges a decision denying her application for permanent residence based on humanitarian and compassionate grounds ("H & C Application"). At the time of the decision, Ms. Yu had lived in Canada for almost ten years, since she was 17 years old. She is married to a permanent resident of Canada, who is also the father of her Canadian-born one-year-old daughter. Ms. Yu was found to have misrepresented on a prior work permit application

and therefore was subject to an exclusion order. This means that once removed from Canada she cannot return, without special ministerial permission, for a period of five years.

[2] Ms. Yu argues on judicial review that the Senior Immigration Officer ("Officer") who refused her application unreasonably assessed her establishment in Canada and the best interests of her one-year-old child. I agree. In both areas, I find the Officer's reasoning is significantly flawed in light of the record, making the decision as a whole unreasonable. The Officer's assessment of Ms. Yu's establishment is not responsive to Ms. Yu's submissions or the evidence in the record. The best interests of the child ("BIOC") analysis minimizes the needs of the child and ultimately does not demonstrate that the Officer was alert, alive and sensitive to the child's needs, as is required.

[3] For the reasons set out below, I grant this judicial review.

II. Background Facts

[4] Ms. Yu is a citizen of China. Ms. Yu came to Canada when she was a minor at 17 years old to complete her final year of high school in Canada. After high school, she was accepted to study at a university in Ottawa where she studied for a period of time but did not complete the program.

[5] Ms. Yu married a permanent resident of Canada in March 2018 and gave birth to their daughter in September 2018. In January 2019, she filed the H & C Application.

[6] In April 2019, Ms. Yu was issued an exclusion order by the Immigration Division for misrepresenting that she had completed her bachelor degree program in an application for a post-graduate work permit. Ms. Yu was also charged criminally for the misrepresentation (*Immigration and Refugee Protection Act*, SC 2001, c 27, s 127(a) [*IRPA*]) and for failing to answer truthfully (*IRPA*, s 16(1)). The misrepresentation charge was dismissed by request of the Crown. Ms. Yu pled guilty to the criminal charge of failing to answer truthfully and received a conditional discharge followed by 12 months of probation.

[7] Ms. Yu filed an update to her H & C Application following the issuance of the exclusion order. The exclusion order meant that Ms. Yu would be inadmissible to Canada for a period of five years after she is removed from Canada (*IRPA*, s 40(2)). Ms. Yu asked the Officer to consider that if her H & C Application was not approved, she and her daughter, who she was breastfeeding at the time, would likely be separated from her husband—her daughter's father—for at least five years.

III. Issues and Standard of Review

[8] Ms. Yu raised two issues on judicial review:

i. whether the Officer's assessment of her establishment in Canada was reasonable; and

ii. whether the Officer's assessment of the best interests of her daughter was reasonable.

[9] Both parties agree that the standard of review that I should apply in evaluating the Officer's decision is reasonableness. The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] confirmed that reasonableness is

the presumptive standard of review when reviewing administrative decisions on their merits. This case raises no issue that would justify a departure from that presumption.

[10] In *Vavilov*, the Supreme Court of Canada described the reasonableness standard as a deferential but nonetheless "robust form of review," where the starting point of the analysis begins with the decision maker's reasons (at para 13). A decision-maker's formal reasons are assessed "in light of the record and with due sensitivity to the administrative regime in which they were given" (*Vavilov* at para 103).

[11] The Court described a reasonable decision as "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" (*Vavilov* at para 85). Administrative decision-makers, in exercising public power, must ensure that their decisions are "justified, intelligible and transparent, not in the abstract, but to the individuals subject to it" (*Vavilov* at para 95).

IV. Analysis

A. *H & C applications*

[12] Foreign nationals applying for permanent residence in Canada can ask the Minister to use their discretion to relieve them from requirements in *IRPA* because of humanitarian and compassionate factors, including the best interests of any child directly affected (*IRPA*, s 25(1)). The Supreme Court of Canada in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], citing *Chirwa v Canada (Minister of Citizenship and*

Immigration) (1970), 4 IAC 338, confirmed that the purpose of this humanitarian and compassionate discretion is "to offer equitable relief in circumstances that 'would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another'" (at para 21).

[13] Given that the purpose of humanitarian and compassionate discretion is to "mitigate the rigidity of the law in an appropriate case", there is no proscribed and limited set of factors that warrant relief (*Kanthasamy* at para 19). The factors warranting relief will vary depending on the circumstances, but "officers making humanitarian and compassionate determinations must substantively consider and weigh all the relevant facts and factors before them" (*Kanthasamy* at para 25; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 74-75 [*Baker*]).

B. *Relevant facts and factors raised in the application*

[14] At its core, Ms. Yu's request asks that the Officer consider that if she is not granted relief she will have to raise her one-year-old daughter as a single mother, separated from her husband and the father of her child, for at least five years. Ms. Yu asked the Officer to consider that she has lived the last nine years continuously in Canada—her entire adult life—and over the course of that time she had developed relationships in Canada. She also raised concerns about her daughter's ability to access services in China and fears about her own ability to practice her Christian faith.

[15] As noted above, I will be reviewing this decision on a reasonableness standard. In evaluating the reasons on this standard, I am mindful that the interests at stake in this decision are high for Ms. Yu and her family in Canada. In *Vavilov*, the Supreme Court of Canada explained that the impact of a decision on an individual could be a relevant contextual consideration in evaluating the reasonableness of a decision-maker's reasons: "Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes" (*Vavilov* at para 133). In *Baker*, the Supreme Court of Canada held, in the context of an H & C decision involving an applicant mother with minor children, that the interests at stake had "exceptional importance to the lives of those with an interest in its result – the claimant and his or her close family members" (at para 31). Similarly, here, I find that the H & C decision at issue is of significant importance to the lives of Ms. Yu, her husband and their minor daughter.

C. *Treatment of Applicant's establishment in Canada*

[16] The Officer's assessment of Ms. Yu's establishment fails to account for Ms. Yu's submissions and the evidence in the application. In particular, I find the Officer's evaluation of Ms. Yu's family ties in Canada as compared to those ties to China to be troubling.

[17] The Officer finds that Ms. Yu has not established that her "familial ties to Canada are greater than her familial ties to China." This determination is neither supported by the record, nor is it adequately explained.

[18] Other than referring to the existence of her parents, who remain living in China, the Officer does not explain how they came to the determination that Ms. Yu's ties to her parents could be greater than her ties to her husband and child in Canada with whom she lives.

[19] There is nothing in the record about the nature of Ms. Yu's relationship to her parents, with whom she has not lived in the same country for the last nine years. In contrast, there was evidence in the record from Ms. Yu's husband about the nature of his relationship to his wife and child and the impact of separation. Ms. Yu also described her ties to her husband and child. There are no negative findings about the nature or genuineness of Ms. Yu's relationship with her husband. The Officer's determination on these comparative family ties is at odds with Ms. Yu's request for relief, which is fundamentally based on her relationship to her husband and child in Canada.

[20] The Respondent argued that it was open to the Officer to come to this determination on establishment "so long as this decision fits within the spectrum of reasonableness." Reasonableness review concerns not only the outcome, but also the reasoning process (*Vavilov* at para 83). The problems identified are not about re-weighing the evidence, as was argued by the Respondent. These are the hallmarks of an unreasonable decision—a failure to meaningfully address key points in Ms. Yu's submissions (*Vavilov* at para 127); central determinations made without an evidentiary foundation (*Vavilov* at para 126); and important conclusions reached without explanation (*Vavilov* at para 103).

D. *Treatment of the best interests of the child*

[21] I find the Officer's BIOC assessment minimized the child's interests by failing to give sufficiently serious consideration to the impact of a five-year separation between an infant child and their father. As I explain below, I do not accept the Respondent's view that the Officer's BIOC analysis was "cogent" or that it "was sensitive to the specific context" of the child's circumstances.

[22] Ms. Yu, her husband and minor daughter live together as a family unit in Canada. The Officer accepts that the minor Canadian-born child will accompany Ms. Yu to China as she is still being breastfed. The Officer also does not dispute that the minor daughter's father will remain in Canada and that because of the five-year exclusion order, the family will likely be separated for at least five years.

[23] Subsection 25(1) of *IRPA* directs officers considering applications for humanitarian and compassionate relief to consider "the best interests of the child directly impacted." The Supreme Court of Canada in *Kanthasamy* considered the subsection 25(1) best interests of the child requirement, finding: "Where, as here, the legislation specifically directs that the best interests of the child who is 'directly affected' be considered, those interests are a singularly significant focus and perspective" (*Kanthasamy* at para 40).

[24] The Supreme Court of Canada re-affirmed its finding in *Baker*, finding that "where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and

compassionate tradition and the Minister's guidelines, the decision will be unreasonable" (*Kanthasamy* at para 38, citing *Baker* at para 74). The Court also re-affirmed that a reasonable BIOC analysis requires that a child's interests be "'well-identified and defined' and examined 'with a great deal of attention' in light of all the evidence" (*Kanthasamy* at para 39, citing *Legault v Canada (Minister of Citizenship and Immigration),* [2002] 4 FC 358 (CA) at paras 12, 31; *Kolosovs v Canada (Minister of Citizenship and Immigration),* 323 FTR 181 at paras 9-12).

[25] The Officer's consideration of the issue of the separation of the infant from their father is minimal. The Officer determines that although the separation between the infant and their father may cause emotional hardship, they are not satisfied that the separation "would sever the bonds that have been established." The Officer finds that these bonds with the minor daughter's father can be maintained from abroad "via letters or the internet with avenues such as email, instant messaging, or Facebook readily available."

[26] This type of reasoning is not indicative of a decision-maker having seriously considered the impact of a lengthy separation between a child and their parent. As referenced by this Court in several cases, "there is a common sense presumption that it is in the best interests of the child to be raised by both parents" (*Nagamany v Canada (Minister of Citizenship and Immigration),* 2019 FC 187 at para 41; *Sivalingam v Canada (Minister of Citizenship and Immigration),* 2017 FC 1185 at para 7; *Lopez Cobo v Canada (Minister of Citizenship and Immigration),* 2019 FC 349 at para 8). I am unable to conclude that the Officer's approach to this assessment gave sufficient consideration to this presumption. In focusing their assessment on whether separation

would sever the bond between the child and their father, the Officer fails to consider the consequences of a lengthy and geographically distant separation with a parent.

[27] The Applicant did not frame the potential harm as a severing of the bond between parent and child; rather, the harm to the child was described as the impact of not being together as a family unit for a five-year period. This sort of harm for an infant child is not mitigated by being able to use Facebook or write letters. Moreover, in any case, it is not clear how an infant could even engage in the methods of communication being suggested to them.

[28] Further illustrative of this problem is the Officer's use of identical language to examine the impact of the child's mother, Ms. Yu, leaving her friends in Canada: "While I acknowledge the applicant has formed many friendships in Canada, I am not satisfied that returning to China will result in having to sever these relationships. I am not satisfied that she could not maintain these relationships from abroad via letters or the internet with avenue such as email, instant messaging, or Facebook readily available."

[29] Justice Grammond considered the use of boilerplate language in the context of the "pressure of mass adjudication" and noted the practice is not forbidden as there was no requirement on decision-makers to be original (*Boukhanfra v Canada (Minister of Citizenship and Immigration*), 2019 FC 4 at para 9). The issue is not the use of the boilerplate language in and of itself but rather, whether the reasons are intelligible and responsive to the particular legal and factual context raised by the application. As explained by Justice Grammond: "If the conclusion does not flow from the premises, or if the use of boilerplate gives cause to doubt that

the decision-maker duly considered the specific facts of the case, the decision may well be unreasonable" (at para 9).

[30] The interests at stake for Ms. Yu in being separated from her friends remaining in Canada are of a different nature and magnitude than a separation between a child and one of their parents. Despite this, the Officer treats the harm and corresponding suggested mitigation strategy in the same way. I find that the Officer's use of the identical language to evaluate the loss of friendships for an adult to losing the day-to-day parent-child relationship for a child demonstrates a lack of care and sensitivity to the interests of this child. The Officer's reliance on a boilerplate statement about mitigating the severing of bonds through various written communication tools fails to grapple with the specific, real issues facing this child set out in this application, namely, a lengthy separation with their father.

[31] The Respondent pointed to the Officer's finding that there was "insufficient evidence presented to satisfy me that her young child would suffer emotionally, psychologically and educationally if the applicant were to apply for normal processing overseas." This too is a boilerplate statement that may be appropriate in some circumstances, but in this case, it is not clear what sort of evidence the Officer would be looking for with respect to the emotional or psychological impact of a five-year separation from a parent on a one-year-old child.

[32] This Court in *Magonza v Canada (Minister of Citizenship and Immigration)*, 2019 FC 14, explained "when we review a finding that the evidence was insufficient, it is useful to ask: what other evidence could reasonably have been brought?" (at para 58 [*Magonza*]). In *Sarker v*

Canada (Minister of Citizenship and Immigration), 2020 FC 154, this Court noted, in the context of an H & C application, citing to *Magonza*: “While the concept of sufficiency of evidence is an issue that will attract much deference on the part of the reviewing court (*Vavilov* at para 125), findings of insufficiency must be explained...” (at para 11).

[33] Simply declaring the evidence is insufficient fails to respond to the specific facts engaged here. The parents provided statements about their involvement with the child and the separation of the family unit. And as noted above, there is a common sense presumption that it is in a child’s interest to live with both of their parents. I find it unreasonable for the Officer to have concluded, without further explanation, that the evidence presented in this context was insufficient.

[34] Overall, I find that the Officer’s analysis falls well short of the requirement to examine the interests of the child directly impacted “with a great deal of attention.” Neither is it an approach that considers the child’s best interests from their perspective (*Etienne v Canada (Minister of Citizenship and Immigration)*, 2014 FC 937 at para 9). The failure to give due consideration to the interests of the child makes the decision an unreasonable one.

V. Conclusion

[35] Due to the identified deficiencies in the Officer’s reasons on establishment and on the best interests of the child analysis, I find the Officer’s decision unreasonable. The application for

judicial review is therefore allowed, and the matter referred back to another officer for redetermination.

[36] No question for certification was proposed by either party and I agree that none arise.

JUDGMENT IN IMM-1696-20

THIS COURT'S JUDGMENT is that:

1. The application is granted;

2. The matter is referred back to a new officer for redetermination;

3. There is no question for certification.

"Lobat Sadrehashemi"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Richard Wazana	FOR THE APPLICANT
Christopher Araujo	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Richard Wazana Wazana Law Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT