Federal Court  Cour fédérale

Date: 20211223

Docket: IMM-6070-19

Citation: 2021 FC 1459

Ottawa, Ontario, December 23, 2021

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

ROLAND RUSZO, KINGA VOLOPICH, ROLAND RUSZO JR, KINGA RUSZO JR, KETRIN DIANA RUSZO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are a family, Mr. and Ms. Ruszo, and their three minor children. They also have another minor child as part of the family unit, who is approximately four years old. The four-year-old child was not included in the application under review as he is a citizen of

Canada; his interests were nonetheless required to be considered as a child affected by the decision.

[2] The Applicants applied to be able to remain in Canada and become permanent residents on humanitarian and compassionate grounds ("H & C Application"). Their application was refused by a Senior Immigration Officer ("Officer") in July 2019. This is a judicial review of that refusal.

[3] The determinative issue in this judicial review is the Officer's evaluation of the best interests of the four children affected by this decision. I find the decision is unreasonable because the Officer did not give sufficient consideration to the best interests of the children.

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

II. Background Facts

[5] The Applicants are Hungarian citizens of Roma ethnicity. They came to Canada in 2012 and sought refugee protection based on their fear of discrimination and violence due to their ethnicity.

[6] The Applicants' refugee claims were heard in November 2017 and were dismissed the following month because the Board Member found parts of the claim not credible and that state protection was available to them. The Applicants attempted to challenge this refusal but their

judicial review was dismissed in 2018 (*Ruszo v Canada (Minister of Citizenship and Immigration)*, 2018 FC 943).

[7] In May 2018, the Applicants filed the H & C Application that is under review. The Officer refused the H & C Application in July 2019.

III. Issues and Standard of Review

[8] The Applicants raised a number of issues on judicial review. As I have found that the Officer's analysis of the best interests of the children ("BIOC") is the determinative issue, I will not address the Applicants' concerns with the Officer's establishment analysis. I will also not address the Applicants' argument that there was a breach of procedural fairness because the Officer failed to provide them with an interview to address the credibility findings that the Applicants are alleging were made.

[9] 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 Application*

[12] Foreign nationals applying for permanent residence in Canada can ask the Minister to use their discretion to relieve them from requirements in the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] because of humanitarian and compassionate factors, including the best interests of any child directly affected (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*]).

[14] 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 the present case, the family has been living continuously in Canada for approximately 10 years and have four minor children. The underlying decision is about whether this family can continue to live in Canada and obtain permanent residence status. The interests at stake for the parents and children affected by the decision under review are significant (*Baker* at para 31).

B. *Best interests of the child analysis*

[15] Subsection 25(1) of the *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).

[16] The Supreme Court of Canada re-affirmed its finding in *Baker*, 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 75). 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).

[17] The treatment of the children’s interests is the determinative issue in this judicial review. I find the Officer misapprehended critical facts, made conclusions not supported by the evidence, and failed to address key evidence in the record. Overall, the interests of the children were not given the sufficient and careful attention required.

[18] The Applicants came to Canada in 2012. At that time, the children were one, four and six years old. When the H & C Application was assessed, approximately seven years after the Applicants had arrived, the children were eight, eleven and thirteen years old and the youngest child, who was born in Canada, was three years old.

[19] The Officer determined that the minor Applicants have lived the majority of their lives in Hungary. This finding is not accurate. All of the minor Applicants have spent the majority of their lives in Canada, with the two youngest spending the vast majority of their lives in Canada. The minor child who was born in Canada has spent no time in Hungary. None of the children have been educated in the school system in Hungary. The eldest, who is now thirteen and arrived in Canada at the age of six, only attended a nursery program in Hungary.

[20] The Respondent acknowledged that the Officer erred in making this finding but asked the Court not to take a microscopic approach to the reasons by focusing on this misstatement of the evidence. There are two problems with this submission.

[21] First, this is not an example of a mere misstatement in one part of the decision, where there are indicia elsewhere in the reasons that demonstrate that the Officer was, in fact, cognizant of the extent that the children lived and were educated in Canada.

[22] Second, the Officer relied on this misstatement to draw a key conclusion on the impact of leaving Canada on the children and their transition in Hungary. The Officer stated: “Transition would be minimal considering the time they have been away from Hungary and the fact that they were born, raised and educated and lived the majority of their young lives in that country.” I do not view this misstatement of the evidence in evaluating the best interests of the children as a minor one. The Officer found that the children were raised and educated in Hungary. This is not true for any of the children.

[23] I find that the Officer's misapprehension about this key issue likely affected their overall findings on the best interests of the children. For example, the Officer determined, "I find that returning to Hungary with their parents would not significantly impact their lives." The Officer did not explain how they came to this conclusion except to rely on erroneous findings on the years the children were in Canada, and their education in Hungary. Given the age of the children, the number of years they have lived in Canada and not in Hungary, and that their entire education has been in the Canadian system, the finding that a move to Hungary would not significantly impact their lives does not have an air of reality to it.

[24] The Officer also took issue with the Applicants' submissions that the children would have "lost the ability of speaking Hungarian to the necessary level to attend school in Hungary." The Officer relied on a school psychologist report prepared in 2015 for the eldest child. This report was prepared four years prior to the Officer's assessment of the H & C Application. In the report, it is noted that the eldest child has "limited English language skills" and that a Hungarian interpreter was relied upon to assist the eldest child in communicating. From this notation in the report, the Officer concluded, "I have insufficient evidence before me [the eldest child] and his siblings have lost the ability of speaking Hungarian to the necessary level to attend school in Hungary."

[25] The Officer relied on a four-year-old report to draw conclusions about the children's language abilities. The Officer would have been aware that the children had been attending school in Canada in the English language during this four-year period. There is also no explanation why the evidence about the eldest child's use of a Hungarian interpreter for a

psychologist assessment was used to draw conclusions about the language abilities of his siblings.

[26] Further, the Officer did not engage with the findings in the psychologist assessment that set out a number of learning and social behaviour difficulties for the eldest child. The Officer only mentioned the psychologist report to draw conclusions about the language abilities of the children. There is no evaluation or mention of the learning difficulties the eldest child has experienced that are set out in the 2015 psychologist report as well as a 2017 Toronto District School Board Individual Education Plan ("Education Plan").

[27] The 2015 psychologist assessment was done "due to ongoing concerns about [the eldest child's] academic progress and in order to assist school staff and parents in determining how best to support his needs." The teacher in 2015, when the child was in grade 3, found that the eldest child "ha[d] a very difficult time retaining basic information such as letter number sounds and recalling basic sight words" and the psychologist found that he had "very elevated scores in several areas including defiant behaviours, academic difficulties and hyperactivity." The 2017 Education Plan for the same child, when he was in grade 6, noted he had a "mild intellectual disability" and that he was being placed in a "special education class full time." The report noted that a goal was for the child to "recognize high frequency words at a mid-senior kindergarten by the end of the school year."

[28] The Education Plan is detailed but the Officer made no mention of it or that the eldest child has been placed in a special education program because of an intellectual disability.

Therefore, there is also no evaluation about how his special needs would be met or how his education plan would be affected by a transition to a new school system in Hungary. The special education needs and intellectual disability of the eldest child were relevant factors in the application that were not assessed by the Officer.

[29] The Officer considered the education needs of the children together and found that it had not been shown that they would be denied educational opportunities. In reaching this conclusion, the Officer did not meaningfully engage with either the specific education needs of the eldest child, as set out above, or the country condition evidence about the quality of education available to Romani children in Hungary.

[30] The Officer referenced the following sentence in the US Department of State Report: "Although the law provides for free and compulsory education between the ages of three and 16 and prohibits school segregation, NGOs reported the segregation of Romani children in schools and frequent misdiagnosis of Romani children as mentally disabled, which limited their access to quality education and increased the gap between Romani and non-Romani society." Further down on the same page, the report goes on to note that the "UN Human Rights Committee Sixth Periodic Report expressed concerns that segregation in schools, especially through the rising number of church schools, remained prevalent and the number of Romani children placed in schools for children with mild disabilities remained disproportionately high." The Officer noted this evidence but instead of evaluating the significance of this information in their assessment of the children's best interests, the Officer concluded that there is insufficient evidence that the children would be denied their "fundamental right to attend school."

[31] The quality of education offered to Roma children is a relevant factor that was raised by this application. The Officer failed to meaningfully examine this issue by casting it as only about whether the children would be denied the ability to attend school. Justice Barnes explained that in order to give meaning to the requirement in *Kanthasamy* to "substantively consider and weigh all the relevant facts and factors" (at para 25), "[w]here a child is to be sent to a place where conditions are markedly inferior to Canadian standards and where the expected hardship is still found to be insufficient to support relief, there must be a meaningful engagement with the evidence" (*Aguirre Renteria v Canada (Minister of Citizenship and Immigration)*, 2019 FC 133 at para 8). The Officer's analysis on the quality of education available offends this general requirement to "substantively consider and weigh all the relevant facts and factors" as well as the requirement that children's interests must be "'well-identified and defined' and examined 'with a great deal of attention' in light of all the evidence" (*Kanthasamy* at para 39).

[32] The Respondent argues that the decision is reasonable given the limited record that was before the Officer. I do not agree. The Officer misapprehended critical facts, failed to address relevant factors raised by the application, and reached conclusions not supported by the record. While it is true that one can imagine a more fulsome record, with more information about the children's lives in Canada, this does not excuse the requirement that the Officer examine what is in front of them and provide reasons based on the evidence.

[33] I also find that the Officer made reference to an irrelevant consideration in the BIOC analysis. At two points in the BIOC analysis, the Officer commented on the parents' choice to bring their children to Canada: "It is noted that the adult applicants chose to bring their children

to Canada" and then in the next paragraph, "The decision to uproot the family was that of the applicant." These comments are irrelevant to the BIOC analysis. The repeated reference to the parents' "choice" to bring their children to Canada suggests that the Officer viewed the family as the author of their own misfortunes. This sort of reasoning has no place in the BIOC analysis. As was referenced by the Supreme Court of Canada in *Kanthasamy* and many times by this Court, "children will rarely, if ever, be deserving of any hardship" (at para 41).

[34] Overall, I find that the Officer's analysis falls well short of the requirement to examine the interests of the children directly affected "with a great deal of attention." Upon review of the record and the Officer's reasons, I am not satisfied that the Officer gave sufficient consideration, as is required, to the interests of the four children affected by their decision.

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

JUDGMENT IN IMM-6070-19

THIS COURT'S JUDGMENT is that:

1. The application is granted;

2. The matter is referred back to a different decision-maker for redetermination;

3. There is no question for certification.

"Lobat Sadrehashemi"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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