Federal Court Cour fédérale

Date: 20220215

Docket: IMM-4840-20

Citation: 2022 FC 201

Ottawa, Ontario, February 15, 2022

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

JOB PEREZ ROSALES
DAMARES DALILA BECERRA ARELLANO
JOSE PEREZ BECERRA
SINAI PEREZ BECERRA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] The Applicants seek judicial review of a decision rendered by a Senior Immigration Officer [Officer] of Immigration, Refugees and Citizenship of Canada dated September 18,

2020, refusing their application for permanent residence on humanitarian and compassionate [H&C] grounds under subsection 25(1) of the *Immigration and Refugee Protection Act* [IRPA].

[2] Mr. Rosales is the Principal Applicant in the present application. His wife, Ms. Becerra Arellano, and their two children, Jose and Sinai, are citizens of Mexico. The Applicants entered Canada at Pearson Airport in Toronto, on November 11, 2007, where they submitted a refugee claim. The claim was refused on September 4, 2008.

[3] Mr. Rosales and Ms. Becerra Arellano have three other children, who are not part the present application. Their eldest son, Job, is a permanent resident of Canada. Manuel, another son, is a citizen of Mexico who forms the subject of a separate H&C application. Their youngest child, Damaris, was born in Canada.

[4] Mr. Rosales and Ms. Becerra are both over the age of 50. With the exception of their youngest child, Damaris, who was born in 2008, all of Mr. Rosales and Ms. Becerra Arellano's children are over the age of 18. At the time of the Decision in 2020, Jose was 22 years old and Sinai was 20 years old.

[5] The application for H&C relief that is the subject of the present judicial review was filed on February 6, 2019.

[6] The Applicants submit that the Decision is unreasonable on the basis that the Officer (a) erred in his assessment of the children's best interests; (b) erred in his treatment of the medical

evidence; (c) erred in his assessment of the Applicants' establishment in Canada; and (d) erred in his treatment of the evidence of financial support provided by the Applicants to their family in Mexico.

[7] The Respondent submits that the Officer reasonably found that there was insufficient evidence to warrant a H&C exemption in the circumstances, and that the Applicants' submissions amount to an impermissible request to this Court to re-weigh the evidence.

II. Issue and Standard of Review

[8] It is common ground between the parties that the sole issue is whether the Officer's decision was reasonable. The parties submit and I agree, that the applicable standard of review is reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] (See also *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at para 44).

III. Analysis

[9] Subsection 25(1) of the IRPA provides the Minister with the discretion to exempt foreign nationals from the ordinary requirements of that statute and to grant permanent resident status to an applicant in Canada if the Minister is of the opinion that such relief is justified by H&C considerations. The H&C discretion is a flexible and responsive exception that provides equitable relief, namely to mitigate the rigidity of the law in an appropriate case (*Rainholz v Canada (Citizenship and Immigration)*, 2021 FC 121 at paras 13-14). H&C considerations are

facts, established by evidence, that would excite in a reasonable person in a civilized community the desire to relieve the misfortunes of another provided these misfortunes warrant the granting of special relief from the otherwise applicable provisions of IRPA (*Kanthasamy* at paras 13 and 21).

[10] An officer making H&C determinations must substantively consider and weigh all the relevant factors in an application for H&C relief (*Rainholz* at para 17, relying on *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] and *Kanthasamy*). Subsection 25(1) refers to the need to take into account the best interests of a child directly affected. The Supreme Court of Canada in *Kanthasamy* highlighted that "interests include 'such matters as children's rights, needs, and best interests; maintaining connections between family members; and averting the hardship a person would suffer on being sent to a place where he or she has no connections." (at para 34).

[11] In considering the best interests of a child [BIOC], an officer must be "alert, alive, and sensitive" to those interests (*Baker* at para 75). The Supreme Court of Canada in *Kanthasamy* has instructed:

> [39] A decision under s. 25(1) will therefore be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered. This means that decision-makers must do more than simply state that the interests of a child have been taken into account. Those interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence [citations omitted].

[12] Relevant considerations include the child's age and level of dependency; the degree of the child's establishment in Canada; the child's links to the country in relation to which the H&C

assessment is being considered; the impacts on the child's education; medical or special needs considerations; gender-based considerations; and the conditions of that country and the potential impacts on the child (*Kanthasamy* at para 40). As stated recently by my colleague Justice Kane, a "child's best interests need not be determinative nor necessarily outweigh other considerations, but a decision that inappropriately minimizes the child's interests will be unreasonable." (*Lin v Canada (Citizenship and Immigration)*, 2021 FC 1452 [*Lin*] at para 54, relying on *Baker*).

[13] In the matter at hand, the Officer noted that Damaris was born in Canada and, at the time of the Decision, was twelve years old. The Officer further noted Damaris has only attended school in Canada and concluded that, while the education system in Mexico has room for improvement, insufficient evidence was provided to demonstrate that Damaris would be unable to access adequate schooling in Mexico. The Officer then proceeded as follows:

> While it is acknowledged that Damaris has lived in Canada her entire life, it is reasonable to conclude, absent evidence to the contrary, that she has been exposed daily to the language, culture, and traditions of Mexico via her parents and would likely be able to adapt with minimal difficulty.

[14] The Officer considered that Damaris is legally able to reside in Mexico before concluding that the Applicants had "not established that the general consequences of returning to Mexico will have a negative impact on Damaris to the extent that an exemption is justified in this case."

[15] With respect to Damaris, the Applicants submit, relying on *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166, that the Officer erred by not adopting the approach of first identifying what was in Damaris' best interests and then weighing these interests against a refusal. The Applicants further submit that the Officer erred by assessing the best interests of

Damaris through a hardship lens. The Applicants also allege that the Officer erred by ignoring the impact of countrywide violence in Mexico and impoverished schooling conditions on Damaris' interests.

[16] The Respondent submits that this Court has now held on numerous occasions that H&C officers are not required to apply the specific formula articulated in *Williams* and that it would be contrary to *Kanthasamy* to require officers to follow a particular formula for such an inherently discretionary decision. The Respondent pleads that the task for an H&C officer is to consider to what degree a child's best interests would be affected by leaving Canada. The Respondent submits that the Officer reasonably assessed Damaris' interests and did not fail to address the evidence submitted by the Applicants on the country conditions.

[17] I agree with the Respondent that the approach set out in *Williams* is not a rigid or required formula (*Lin* at para 55-56, relying on *Ahmed v Canada (Citizenship and Immigration)*, 2020 FC 777 at para 22). Nevertheless, the assessment of the child's best interests "should be highly contextual and responsive to each child's particular age, capacity, needs, and maturity" (*Lin* at para 57).

[18] I am of the view that the Officer's consideration of Damaris' best interests was unreasonable.

[19] The evidence before the Officer addressed Damaris' temperament; her level of Spanish; her progress at school; her ability to adapt to living in Mexico; her life in Canada; and the activities to which she will not have access in Mexico.

[20] Damaris' interests, however, were neither mentioned nor addressed by the Officer in the Decision. Rather, the Officer focused on the hardship, or lack thereof, that Damaris could experience should she move to Mexico. This Court has cautioned that hardship should not be conflated with a BIOC analysis (*Osun v Canada (Citizenship and Immigration)*, 2020 FC 295 at para 23) or that an officer should not import a hardship threshold into their BIOC analysis (*Trach v Canada (Citizenship and Immigration)*, 2015 FC 282 at para 38). My colleague Justice Diner states that following *Kanthasamy*, "it is incorrect to consider [the child's] best interests in the context of hardship" (*Taylor v Canada (Minister of Citizenship and Immigration)*, 2016 FC 21 at para 24).

[21] I find that Damaris' circumstances were viewed and assessed through the lens of hardship, and thus the Officer failed to sufficiently consider Damaris' overall best interests as required by *Kanthasamy*. In doing so, the Officer also minimized Damaris' interests (*Lin* at para 54). Consequently, the Decision is unreasonable. Having so found, I find it is unnecessary for me to address the remaining issues raised by the Applicants.

IV. Conclusion

[22] For the foregoing reasons, this judicial review is allowed. The Decision is set aside and the matter is remitted to a different officer for reconsideration. No questions for certification were argued, and I agree that none arise.

JUDGMENT in IMM-4840-20

THIS COURT'S JUDGMENT is that :

1. The judicial review is allowed;
2. The Decision is set aside and the matter is remitted to a different officer for reconsideration;
3. No questions for certification were argued, and I agree that none arise.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4840-20
STYLE OF CAUSE:	JOB PEREZ ROSALES, DAMARES DALILA BECERRA ARELLANO, JOSE PEREZ BECERRA, SINAI PEREZ BECERRA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC BY WAY OF VIDEOCONFERENCE
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DATED:	FEBRUARY 15, 2022

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Me Kevin Doyle	FOR THE RESPONDENT

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