Federal Court  Cour fédérale

Date: 20220218

Docket: IMM-3530-21

Citation: 2022 FC 226

Ottawa, Ontario, February 18, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

MARCOS HANSEN AUGUSTO
MARIANA DUTRA DE LACERDA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants seek judicial review of the May 11, 2021 decision of a Senior Immigration Officer (the "Officer") of Immigration, Refugees and Citizenship Canada denying their application for permanent residence on humanitarian and compassionate ("H&C") grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] The Applicants submit that the Officer's decision is unreasonable because the Officer failed to adequately consider the compassionate factors in this case, selectively reviewed the evidence before them, and erred in the best interest of the child ("BIOC") analysis by failing to assess whether it would be in the children's best interests to remain in Canada.

[3] For the reasons that follow, I find the Officer's decision is unreasonable. This application for judicial review is allowed.

II. Facts

A. *The Applicants*

[4] The Applicants, Marcos Hansen Augusto (Mr. "Augusto") and his common-law partner Mariana Dutra de Lacerda (Ms. "Dutra de Lacerda") are citizens of Brazil. Ms. Dutra de Lacerda came to Canada in October 2013 as a student on a scholarship, and completed a biotechnology diploma at Centennial College. After graduating, she was granted a Post-Graduate Work Permit and started her own drywall business. Mr. Augusto arrived in Canada in February 2014 on a temporary resident visa and worked as a drywaller. The Applicants have two Canadian-born children: Nicholas, age 5, and Noah, age 2.

[5] Mr. Augusto's parents and two siblings remain in Rio de Janeiro, Brazil. Ms. Dutra de Lacerda's parents and brother also currently reside in Rio de Janeiro, Brazil. The Applicants provide financial support to both of their extended families in Brazil.

[6] The Applicants previously submitted an H&C application in June 2017. The application was refused, and after the Applicants applied for judicial review, the decision was overturned on consent and sent back for redetermination. That application was refused by a different officer in October 2019, and leave to seek judicial review was denied by this Court.

[7] The Applicants then submitted another H&C application on November 5, 2020.

B. *The H&C Decision*

[8] By letter dated May 11, 2021, the Applicants were informed that the Officer refused their H&C application. The Officer considered the Applicants' establishment in Canada, the BIOC, and adverse country conditions in Brazil.

[9] The Officer gave "low consideration" to the Applicants' establishment in Canada. While the Officer noted that the Applicants had been self-sufficient in Canada, the Officer drew a negative inference from the fact that the Applicants have worked without a valid work permit since May 2018. The Officer also considered support letters from family and friends, but gave them little weight, and noted that the Applicants are familiar with the environment in Brazil, where they also have family, friends and other relatives.

[10] With respect to the BIOC, the Officer found it would be in the Applicants' children's best interest to remain with their parents in Brazil. The Officer held that because of their young age, "they would not experience the hardship of older children with greater ties to their community and their surroundings" and could "adapt to the change in country conditions with relative ease."

The Officer considered the argument that the children's safety and access to education would be compromised in Brazil, but found that the Applicants' children did not meet the profiles of those most at risk and some of the country conditions documentation was not applicable to their situation. Overall, the Officer concluded: "I do not find that the best interest of the children would be compromised in the event this H&C application is not approved."

[11] Finally, the Officer considered evidence of adverse country conditions in Brazil relating to gang violence and organized crime, the impacts of the COVID-19 pandemic, disproportionate hardship towards women, and economic hardship. The Officer concluded by acknowledging that while the Applicants may face some hardship upon return to Brazil, there was insufficient evidence to warrant an exemption on H&C grounds in this case.

III. Issue and Standard of Review

[12] The sole issue in this case is whether the Officer's decision is reasonable.

[13] The parties both submit that the applicable standard of review of the Officer's decision is reasonableness. I agree (*Rannatshe v Canada (Citizenship and Immigration)*, 2021 FC 1377 at para 4; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 ("*Kanthasamy*") at paras 8, 44-45; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paras 16-17).

[14] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13; 75; 85). The reviewing court must determine whether the decision under review, including both

its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at paras 15; 99). A reasonable decision is 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). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[15] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). A reviewing court must refrain from reweighing evidence before the decision maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125).

IV. Analysis

[16] Subsection 25(1) of the *IRPA* gives the Minister discretion to grant permanent residency to a foreign national who does not meet the requirements of the *IRPA* if the circumstances are justified under H&C considerations, including the BIOC directly affected. In determining whether a case warrants relief, the decision maker must "substantively consider and weigh all the relevant facts and factors before them" (*Kanthasamy* at para 25, citing *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) ("*Baker*") at paras 74-75).

A. *Establishment*

[17] The Applicants submit that the Officer's overall approach to the establishment factor fails to encapsulate the empathy and compassion required by the Supreme Court of Canada in *Kanthasamy*. Specifically, the Applicants argue that the Officer unreasonably discounted their establishment in Canada based on the overstaying of their student and work visas and failed to appreciate the financial support the Applicants provide to their extended family in Brazil.

[18] In the reasons for their decision, the Officer commended the Applicants for retaining employment and being financially independent throughout their time in Canada. However, the Officer drew a negative inference from the Applicants "unwillingness to abide by Canadian laws" based on the fact that they have worked without proper authorization since May 2018.

[19] The Respondent relies on this Court's decisions in *Zlotosz v Canada (Citizenship and Immigration)*, 2017 FC 724 ("*Zlotosz*") and *Mack v Canada (Citizenship and Immigration)*, 2017 FC 98 ("*Mack*") to submit that the Officer was entitled to draw a negative inference from the Applicants' non-compliance with immigration laws when weighing their establishment (*Zlotosz* at para 34; *Mack* at para 14).

[20] During the hearing, counsel for the Applicants appropriately distinguished these two cases from the Applicants' situation, noting that *Mack* involved a situation where an American citizen entered Canada in 2004 and had remained without status, and *Zlotosz* involved a citizen of Poland who worked without status for the majority of his stay. The Applicants' counsel noted

that neither of the applicants in these cases made attempts to regularize their status in Canada, as the Applicants have, nor were the United States or Poland characterized by the same levels of violence, poverty and economic insecurity that the Applicants would face in Brazil.

[21] To support their position, the Applicants rely on *Mitchell v Canada (Citizenship and Immigration)*, 2019 FC 190 at paragraph 23, in which this Court states:

> […] [subsection 25(1) of the *IRPA*] presupposes that an applicant has failed to comply with one or more of the provisions of the *IRPA*. Therefore, a decision-maker must assess the nature of the non-compliance and its relevance and weight against the applicant's H&C factors in each case.

[22] My colleague Justice Heneghan's recent decision in *Charles v Canada (Citizenship and Immigration)*, 2021 FC 682, also affirms at paragraph 7:

> […] the Officer unreasonably used the fact that the Applicant stayed in Canada since 1999 without status, in assessing her establishment in Canada since that time. The failure to regularize immigration status is not, per se, a factor that minimizes a person's establishing in Canada.

[23] I agree with the Applicants that the case at hand is distinguishable from those cases cited by the Respondent, and that the Officer failed to consider the Applicants' establishment factors in a broader sense, since an H&C application invariably involves some non-compliance with the *IRPA*. I also note that while the Applicants have not had status from 2018 onwards, they did have legal status to work and study in Canada from 2013 to 2018 and have continued to establish

themselves financially since their arrival. The Officer gave little consideration to the establishment lawfully gained during the Applicants' first five years in Canada.

[24] The Applicants further submit that the Officer failed to account for how their establishment in Canada allows them to provide necessary financial support to their families in Brazil. As is outlined in the Applicants' personal letters, since the beginning of Brazil's financial crisis in 2015, the Applicants have become the primary source of financial support for their parents and extended families in Brazil. In her personal letter of support, Mr. Augusto's mother writes about how her family struggled to pay their bills before her son began providing financial support. In another letter, Ms. Dutra de Lacerda's mother writes that while she usually works as a house-cleaner, she has stopped working due to the risk the pandemic posed to her husband's health condition. The Applicants send her money to help cover the high costs of her husband's medication. Additionally, Mr. Augusto's eldest brother writes that, despite having completed his secondary education, he has been unemployed for four years and relies on the Applicants for financial support. His letter states: "Here, we live in times of great anguish, waiting for opportunities, living in terrible insecurity."

[25] I agree with the Applicants that the Officer failed to adequately consider the significance of the Applicants' remittances to their families in Brazil as a major factor in their level of establishment in Canada. As discussed below, the Applicants' current financial situation is also inextricably linked to Nicholas and Noah's best interests and the Applicants' ability to support their children in Brazil.

B. *BIOC*

[26] With respect to the Officer's BIOC analysis, the Applicants first argue that the Officer erred by concluding that Nicholas and Noah were better off remaining in the care of their parents, without considering their best interests more globally. The Applicants rely on this Court's decision in *Li v Canada (Citizenship and Immigration),* 2020 FC 848 ("*Li*"), at paragraphs 33 and 34, in which Justice Pallotta reasoned:

> [33] With respect to BIOC, the Officer made a reviewable error in the overall assessment by failing to consider the *best* interests of the children. The Officer did not address the children's establishment in Canada, their limited connections to China, or the impact on their interests of requiring their father—who supports them financially—to leave his Canadian business and re-establish himself financially in China. The starting point for the Officer's analysis was that the children would likely relocate to China with their parents if the Applicant's H&C application were rejected. The Officer then considered the impact of relocation on the children's best interests by going through the points of hardship raised by the Applicant and finding, for each, that the Applicant had not met his burden. At the end of this process, the Officer stated, "I am unable to conclude that having to relocate to China with their parents would directly impact the best interests of the three children concerned." While a hardship analysis can be part of a BIOC analysis, it cannot replace a BIOC analysis. […]
>
> [34] […] The conclusion that it would be in the children's best interests to follow their parents to China "so as to remain in the care of their parents" effectively makes BIOC irrelevant to a global H&C analysis because it amounts to a statement that the children would be better off with their parents. […]
>
> [Emphasis added, citations omitted.]

[27] In support of their position, the Applicants also cite *Jimenez v Canada (Citizenship and Immigration),* 2015 FC 527 ("*Jimenez*"), and *Charles v Canada (Citizenship and Immigration),*

2014 FC 772 ("*Charles (2014)*"). In *Jimenez*, Justice Boswell held it was unreasonable for an officer to not consider a scenario "[…] by which it might be in the children's best interests to stay in Canada with their parents and maintain the status quo" (at para 27). Similarly, in *Charles (2014)*, at paragraph 61, Justice Russell agreed with this Court's finding in *Kobita v Canada (Citizenship and Immigration)*, 2012 FC 1479 ("*Kobita*"), that "the officer may weigh the pros and cons or the impacts of different scenarios, but the officer should not ignore or fail to consider one of those scenarios […]" (citing *Kobita* at para 53).

[28] I agree with the Applicants that the Officer has committed the same error here. The Officer's decision states:

> I find it would be in their best interest to remain in the care of their parents. Therefore, if the applicants were to return to Brazil then it would be reasonable to assume that the children will accompany them.
>
> […]
>
> I do not find that the best interest of the children would be compromised in the event this H&C application is not approved.

[29] Similar to *Li*, *Charles* and *Jimenez*, the Officer failed to consider whether it would be in the children's best interest to remain with their parents in Canada. Rather, the Officer started with the assumption that it was in their best interests to go to Brazil with their parents. Other than stating the obvious that it would be in the children's best interest to remain with their parents, I am not convinced that the Officer identified Nicholas and Noah's best interests (see also *Chandidas v Canada (Citizenship and Immigration)*, 2013 FC 258 at para 69).

[30] Second, the Applicants submit that the Officer erred in concluding that the children could adapt to life in Brazil due to their young age, as this Court has found similar reasoning to be deficient (*Singh v Canada (Citizenship and Immigration)*, 2019 FC 1633 ("*Singh*") at para 31). I agree. As was also outlined by this Court in *Bautista v Canada (Citizenship and Immigration),* 2014 FC 1008 at paragraph 28:

> To see everything through the lens of whether one reasonably can overcome the inevitable hardships that accompany a new life, as the Officer did in this case, resembles the H&C test that is applied to adults. Children are malleable – far more so than adults – and starting with the question of whether they can adapt will almost invariably predetermine the outcome of the script, namely that the child will indeed overcome the normal hardships of departure, and adjust to a new life, including learning a brand new language (Tagalog in this case). Undertaking the analysis through this lens renders the requirement to take into account the best interests of a child directly affected, as statutorily required in subsection 25(1) devoid of any meaning.
>
> [Emphasis added.]

[31] The Respondent relies on *Esahak-Shammas v Canada (Citizenship and Immigration),* 2018 FC 461 ("*Esahak-Shammas*"), where this Court held it was reasonable of the officer to consider that the children (4-year-old twins) were young and adaptable. In that case, the officer reasoned that the 4-year-old twins "lack awareness to distinguish and/or decipher their surroundings whether they are in Canada or Grenada", "are more resilient and adaptable to changing situations as they have not yet started in the school systems", and that "while leaving Canada would be difficult, they would do so with their mother and their best interests would be met […]" (*Esahak-Shammas* at para 6).

[32] The Respondent also maintains that *Singh* can be distinguished because the Officer conducted a fulsome analysis and did not simply find that Nicholas and Noah would be better off with their parents, or that their age dictated a particular result. I disagree with the Respondent's position as that is precisely what the Officer found when they wrote:

> Furthermore, children of Nicholas and Noah's age should be able to adapt to the change in country conditions with relative ease as they are accompanied by their primary caregivers, who account for [the] majority of their socialization.

[33] Further, I do not find it reasonable to decide that because the children are young, their lack of awareness or resiliency somehow diminishes the hardship they would face as young people in Brazil, a country with some of the highest rates of youth homicides and violence, as demonstrated by the objective country conditions evidence.

[34] I also agree with the Applicants' final submission that the Officer selectively reviewed the objective country condition evidence and the personal letters on the record. For example, the Officer wrote:

> Counsel states that the children and young adults are at a significantly higher risk of lethal violence and police brutality also extends to children. Counsel cites the report from the Igarape Institute which states that Brazil is the worst homicidal country in absolute terms and also exhibits some of the most prolific lethal violence against children and adolescents […] However, the same source also mentions that the geographical concentration of homicidal violence varies from state to state and the vast majority of the victims are black […] the applicants and their children do not meet this profile.

[35] The Officer noted that there has been an improvement in Brazil's homicide rate, yet also that urban violence and crime have been steadily increasing. Still, the Officer stated "I am persuaded that based on the applicants' time spent in Brazil, they would be able to identify less-at-risk areas to mitigate the potential risk from being victims of the high crime." This statement conflicts with the evidence on the record from a July 2020 report from the UK's Foreign, Commonwealth and Development Office which actually states:

> There are high levels of crime, particularly robberies, within Brazil's cities and the murder rate can be very high. This can vary greatly within a city […] Crime, including violent crime, can occur anywhere and often involves firearms or other weapons.
>
> [Emphasis added.]

[36] There was substantial evidence before the Officer demonstrating that violence and crime in Brazil are endemic and impact the population at large. To suggest that the Applicants would be able to mitigate these risks for their children based on their own experiences in the country is unintelligible.

[37] Additionally, I note that the Applicants' application included several photographs of their family in their home in Calgary, enjoying time outdoors, or playing outside. In Mr. Augusto's personal statement, he writes, "I do not have to worry letting my kids out for playing. I see my son [Nicholas] playing with his friends, running, singing, riding his bicycle, laughing loud, being happy, and being a kid at the fullest." While Nicholas and Noah have always lived in Canada, the Applicants' personal statements emphasize how they fear for the physical and psychological well-being of their children in Brazil, and contrast their children's lives with their own childhood

experiences: The Applicants describe how they were not allowed to play outside for fear of stray bullets, kidnappings, and drug traffickers who patrolled the streets to recruit young people. Ms. Dutra de Lacerda also wrote about losing her friend as a child to a stray bullet. Ms. Dutra de Lacerda's younger brother's personal letter describes the concerns he has for his family's safety, as people walk armed in the streets and there are often clashes with police, accompanied by a risk of stray bullets. He states that his son cannot play outside without being in constant danger, and that people have been murdered on the steps of his house.

[38] The support letters from the Applicants' family members also provide details of the challenges they have faced throughout their lives, including poverty and unemployment, high rates of violence, and precarious housing conditions. For instance, Mr. Augusto's mother writes, "Our government here does not support us satisfactorily with education, healthcare and housing, we need to fight hard for ourselves just to have the basics."

[39] In my view, the risks related to living in a community affected by violence, poverty and economic hardship, and the evidence of how these issues have affected the Applicants and their family members warranted more careful consideration.

[40] Finally, in their decision, the Officer concludes: "the applicants' employment history, their network of support, and their ability to successfully adapt to new environments demonstrates that they will be able to provide for their sons and re-establish themselves in Brazil." I do not find this conclusion intelligible. Given the ample information on the record that shows how the Applicants' extended family in Brazil rely primarily on the Applicants for

financial support, this statement shows a disregard for this family's current reality and the importance of the Applicants' financial stability in Canada.

[41] As the Applicants' counsel brought to my attention during the hearing, the Applicants have established a successful drywall business in Canada and are currently able to make enough money to support themselves and their family in Brazil. A return to Brazil, where approximately 40% of workers earn below minimum wage, would not only affect the Applicants and their children, but also cause undue hardship to their extended family who currently rely on the Applicants' remittances. Additionally, the Applicants' 'network of support' in Brazil will mean very little to Nicholas and Noah if they are forced to leave a safe and comfortable situation to face poor living conditions and economic insecurity. Emotional support from the Applicants' families will not be helpful if all family members are plunged into poverty.

[42] I find that the Officer's selectivity resulted in a misconstruing of the evidence that failed to account for the Applicants' specific situation. It is as if the Officer filtered through the record to find reasons to explain how the risks to the Applicants and their children could be mitigated, rather than considering the harsh reality they would face in Brazil. This approach fails to reflect the requirement that the Officer review the evidence as a whole through a compassionate and empathetic lens and strays from the proper question to be asked: what is in the children's best interests? I find that the Officer's conclusion that there was insufficient evidence demonstrating the children would be negatively impacted shows the Officer was not alert, alive and sensitive to their best interests (*Kanthasamy* at para 38; referencing *Baker* at paras 74-75).

[43] Overall, I agree with the Applicants that the decision shows the Officer failed to give proper consideration to all the compassionate factors present in this case (*Salde v Canada (Citizenship and Immigration),* 2019 FC 386 at paras 22-23; *Dayal v Canada (Citizenship and Immigration),* 2019 FC 1188 at paras 31-32).

V. Conclusion

[44] As outlined above, I find that the Officer's selective review of the evidence led to an unreasonable decision. I therefore allow this application for judicial review.

[45] No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-3530-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed. The decision under review is set aside and the matter returned for redetermination by a different decision-maker.

2. No question is certified.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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