Federal Court  Cour fédérale

Date: 20220819

Docket: IMM-5162-20

Citation: 2022 FC 1216

Ottawa, Ontario, August 19, 2022

PRESENT: Madam Justice McDonald

BETWEEN:

JOYCE ONOSE AGBAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of a Senior Immigration Officer (Officer), dated October 7, 2020, refusing the Applicant's application for permanent residence on humanitarian and compassionate (H&C) grounds.

[2] The Respondent argues the Court should decline to consider the judicial review application because the Applicant does not come to the Court with "clean hands", having failed to report for removal from Canada. While I agree the Applicant's failure to respect Canada's

immigration laws is a reasonable factor for consideration in an H&C application, I disagree that it is a determinative factor in this case.

[3] For the reasons that follow, I have concluded the Officer failed to properly consider the best interests of the Applicant's Canadian-born child. The judicial review is granted on that ground alone.

I. Background

[4] The Applicant is a citizen of Nigeria who arrived in Canada in 2013 on a visitor visa. She gave birth to her daughter in Canada in 2014.

[5] Her refugee claim was denied by the Refugee Protection Division and the Refugee Appeal Division. Her first H&C application was denied in 2015.

[6] In January 2019, the Applicant submitted a second H&C application based upon the best interests of her Canadian-born daughter, her establishment in Canada, and her hardship on return to Nigeria.

[7] In November 2019, the Applicant was scheduled to be removed from Canada. She failed to report for removal, resulting in an arrest warrant being issued. In October 2020, the Applicant self-reported to Canadian Border Services Agency.

A. *H&C Decision Under Review*

[8] In considering the second H&C application, the Officer gave some weight to the Applicant's establishment in Canada, acknowledging she volunteers at her church and works as an early childhood assistant. The Officer also noted her daughter attends school in Canada.

[9] With respect to hardship, the Officer considered the Applicant's submissions that she has no family support in Nigeria, will have no employment or housing, would suffer from a deficient healthcare system, and would be subject to gender-based violence - given her past abuse from her common-law partner in Nigeria. The Officer stated there was little objective evidence to support her claims regarding gender-based violence. In relation to employment difficulties, the Officer noted the Applicant was educated in English in Nigeria, was previously employed as a flight attendant in Nigeria, and had been employed in Canada.

[10] The Officer considered a psychological assessment from Dr. Gerald M. Devins and the major depressive disorder diagnosis. Dr. Devins concluded it was in the best interests of the Applicant's mental health, and that of her daughter, to stay in Canada. The Officer highlighted the assessment was "for the sole purpose of this application, since he was referred by the applicant's counsel to do so". The Officer also noted there was little information in the Applicant's submissions on her medical conditions, and there was no evidence that Dr. Devins had met with the Applicant more than once. Overall, the Officer gave some weight to this factor.

[11] The Officer also gave some weight to the best interests of the child (BIOC) factor, but was "not satisfied that there would be a negative impact on the child's best interests if the applicant returns to Nigeria." The Officer stated, "as the child is 6 years old, it is expected that she will adjust to life in Nigeria."

II. Issue and Standard of Review

[12] The Applicant raises a number of issues with the H&C decision. However, the BIOC issue is determinative of this judicial review, and I, therefore, decline to address the other issues.

[13] The parties agree the standard of review is reasonableness.

[14] As articulated in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], when reviewing a decision on the reasonableness standard "a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified" (at para 15). Further "[t]he reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it" (*Vavilov* at para 126).

III. Analysis - BIOC

[15] The Applicant argues the Officer's consideration of the BIOC was unreasonable as the Officer failed to consider the evidence and undertake the necessary analysis.

[16] In *Kanthasamy v Canada (Citizenship and Immigration*), 2015 SCC 61 [*Kanthasamy*], the Supreme Court of Canada held, quoting from *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, that: "for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them" (at para 38).

[17] The Court in *Kanthasamy* elaborated that "[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" (at para 39 [Emphasis in original]).

[18] Here, the Officer's BIOC consideration begins with a general recognition that the BIOC is an important factor that should be given significant weight. The Officer then notes the Applicant's 6-year-old child was born three months after the Applicant's arrival in Canada. The Officer concludes there was "insufficient objective evidence" to indicate the BIOC would be compromised if the Applicant returned to Nigeria. The Officer states as follows:

> I note that the child is currently residing in Canada with the applicant. I acknowledge that the applicant would like to remain in Canada in order to provide a better life for her daughter than what she believes she would have in Nigeria, however it is reasonable to expect that the applicant knew that not having status in Canada and subsequently being subject to removal order by CBSA since July 2018, that she would be returning to Nigeria at some point with her daughter. I note that there is no father listed on the child's

> Canadian birth certificate, nor did the applicant or counsel make any submissions on the role of the father in the child's life. It is in the best interests of the child to remain with her mother, and as the child is 6 years old, it is expected that she will adjust to life in Nigeria. Although I give this factor some weight, I am not satisfied that there would be a negative impact on the child's best interests if the applicant returns to Nigeria to the extent that it warrants an exemption.

[19] In my view, this analysis is lacking and not in keeping with direction from *Kanthasamy.* It is not possible to discern how the Officer identified and analyzed the BIOC factors. Apart from stating "[i]t is in the best interests of the child to remain with her mother", nowhere in the decision does the Officer identify what would be in the child's best interests. The Officer does not consider the issues of education, healthcare, or family support. Furthermore, the Officer appears to have placed emphasis on the Applicant's decision to have a child while she was without status in Canada. In my view, that is not a proper factor for consideration in the BIOC analysis.

[20] This case is similar to *Vieira Sebastiao Melo v Canada (Citizenship and Immigration),* 2022 FC 544 [*Melo*] where Justice Zinn commented "it is most perplexing to me that while the officer acknowledges that the best interests of the children 'should be given significant weight' the officer concludes that this factor was only given 'some weight'" (at para 75).

[21] The same situation noted in *Melo* arises here too. The Officer recognizes the BIOC factors should be given "significant" weight and then goes on to assign the factor "some" weight.

[22] In sum, the Officer's approach to the BIOC was superficial and completely lacking in the rigorous consideration of the BIOC factors as required by *Kanthasamy*.

[23] Finally, on the issue of non-compliance with Canada's immigration laws, this factor alone is not determinative of an H&C application. As noted by Justice Ahmed in *Mateos de la Luz v Canada (Citizenship and Immigration),* 2022 FC 599 at paras 28 and 31, the very purpose of an H&C application is to offer relief to those who have not complied with Canada's immigration scheme. Further, an Officer's over-reliance on the Applicant's disregard of Canada's immigration laws in the decision-making process – especially in relation to the BIOC analysis – may render a decision unreasonable.

IV. Conclusion

[24] For the reasons outlined above, the BIOC analysis is unreasonable and this judicial review is granted. The matter is remitted for redetermination by another Officer.

[25] The parties did not propose a question for certification.

JUDGMENT IN IMM-5162-20

THIS COURT'S JUDGMENT is that:

1. this judicial review is granted and the matter is remitted for redetermination before a different officer; and

2. there is no question for certification.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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