Federal Court  Cour fédérale

Date: 20220906

Docket: IMM-4567-21

Citation: 2022 FC 1259

Toronto, Ontario, September 6, 2022

PRESENT: Madam Justice Go

BETWEEN:

Md Lutfur RAHMAN et al

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Lutfur Rahman, his wife Nelofer Yeasmin, their son Mushfiqur (now aged 14), and daughter Moontwaha (now aged 6) [together the Applicants] applied for permanent residence on humanitarian and compassionate grounds [H&C application] pursuant to s. 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. They seek judicial review of the

decision dated June 29, 2021 of a Senior Immigration Officer [Officer] to refuse the application [the Decision].

[2] The Applicants are citizens of Bangladesh. Mr. Rahman and Ms. Yeasmin also have a Canadian born child, now aged 3, who would be impacted by the outcome of the application.

[3] Mr. Rahman lived in Spain from 2008 to 2017, where he became a permanent resident in 2012. He was joined by his wife and Mushfiqur in September 2012. Moontwaha was born in Spain and has never been to Bangladesh. Neither has their youngest child.

[4] The Applicants arrived in Canada on September 1, 2017. They submitted a refugee claim that was refused in April 2019 by the Refugee Protection Division. Their appeal was dismissed by the Refugee Appeal Division in 2020. The family has not retained their status in Spain.

[5] In the Decision, the Officer found that the Applicants have very little establishment in Canada; that the conditions of Bangladesh did not present an exceptional difficulty given the Applicants' prior residence; and that the evidence pertaining to the Best Interests of the Child [BIOC] is insufficient to demonstrate a negative impact on the children upon removal.

[6] I find the Decision unreasonable as the Officer conducted an inadequate analysis of the BIOC by ignoring evidence contrary to their findings and by applying an improper lens when assessing BIOC. I therefore grant the application.

II. Issues and Standard of Review

[7] The Applicants submit that the Decision was not reasonable on the following bases: (a) that the Officer was not sufficiently "alert, alive and sensitive" to the BIOC; (b) that the Officer unreasonably discounted Mr. Rahman's work in the food service industry; and (c) that the Officer's assessment of hardship due to gender-based violence was unreasonable.

[8] The Respondent submits that the Decision was reasonable.

[9] The parties agree that the Decision is reviewable on a reasonableness standard, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[10] 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. The onus is on the Applicants to demonstrate that the decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency": *Vavilov*, at para 100.

III. Analysis

[11] The determinative issue is the Officer's BIOC analysis.

[12] As the Supreme Court of Canada stated in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at para 34, s. 25(1) of the *IRPA* requires officers to take into account the best interests of a child directly affected. The Supreme Court of Canada

confirmed these 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.”

[13] In this case, I agree with the Applicant that the Officer committed two errors with respect to the BIOC analysis. First, the Officer ignored evidence indicating that the two minor Applicants, Mushfiqur and Moontwaha, have poor language skills in Bengali. Second, the Officer applied an improper lens in assessing BIOC.

i. *The Officer ignored evidence concerning the children’s limited language ability in Bengali*

[14] In support of their H&C application, the Applicants presented evidence disclosing that all of Mushfiqur’s primary education has been in Spain and Canada, and not in Bangladesh where he spent the first five years of his life. The Applicants also submitted a letter dated January 7, 2021, from Serajual Islam Kazi, a staff member of the Bangladesh Centre and Community Services [BCCS] where the Applicants have volunteered for more than three years. Mr. Kazi, who is Bangladeshi Canadian, wrote in his letter that when the children came with their parents to BCCS, Mr. Kazi chatted with the children in his mother tongue, Bangla (or Bengali, the anglicized name of the language). Mr. Kazi stated:

> During talking with [Mushfiqur and Moontwaha], I realized that they are fragile in the Bangla language. Both of them can hardly speak broken Bangla but can’t write. Both of them are comfortable talking and write in English instead of their native language Bangla.

[15] In the Decision, the Officer said this about the children’s language ability in Bengali:

> The letter from counsel indicates that the children do not speak Bengali well enough to integrate into Bangladeshi society. As a result, this will negatively impact them as it pertains to education and subsequently, employment. I accept that English or Spanish may be the children's first language. However, I note that Bengali is the primary language of their parents, who have indicated that they would require a Bengal interpreter for interviews. Naturally, the Bengali language would frequently be used in the household. In addition, the PA has preserved ties to the Bangladeshi community in Canada and provides volunteer services to events and activities for the community. As demonstrated in the photos provided by the applicants, the children appeared to attend these events and activities as well. As the children are relatively young, it is reasonable to expect that with the assistance of their parents, the children can improve their Bengali language skills. Consequently, I am unable to contribute significant weight to this factor.

[16] The Applicants argue that the Officer ignored Mr. Kazi's letter speaking to the two oldest children's limited ability to communicate in Bengali, and instead speculated that since the parents' first language is Bengali, the children should be expected to develop their Bengali accordingly. More specifically, the Applicants argue that the Officer unreasonably concluded that with the assistance of their parents, the children can improve their Bengali skills given their relatively young age. The Applicants argue the Officer's failure to account for contrary evidence as well as the impact upon the schooling of the children upon a return to Bangladesh was unreasonable.

[17] I agree with the Applicants.

[18] To start, a child's inability to speak the language of the country of return is a factor that needs to be considered as part of the BIOC assessment: *Bautista v Canada*, 2014 FC 1008 [*Bautista*], at para 28.

[19] Here, there was evidence before the Officer indicating that the children, in particular Mushfiqur and Moontwaha only speak “broken” Bengali and cannot write in that language. Nowhere in the Decision did the Officer mention Mr. Kazi’s letter. Instead, the Officer speculated that the children’s ability to speak Bengali would improve over time because it is their parents’ mother tongue. It is unclear how the Officer came to this conclusion given that Mushfiqur has had 14 years to learn Bengali from his parents and still has not, based on the evidence, acquired enough fluency.

[20] It is trite law that the more important the evidence that is not mentioned specifically and analyzed in the decision, the more willing a court may be to infer from the silence that the decision maker “made an erroneous finding of fact ‘without regard to the evidence.’”: *Cepeda-Gutierrez v Canada*, 1998 CanLII 8667 (FC) at para 17.

[21] I reject the Respondent’s argument that the BIOC assessment was reasonable because the Officer gave the children’s interests “considerable weight” and that the Officer took time to consider the potential impact of the Applicants’ return to Bangladesh. With respect, officers are duty-bound to consider the potential impact of the children’s return to their home country. In carrying out this duty, officers should consider the inability of the children to speak the language of the country of return: *Bautista*. Here the Officer failed to make this consideration.

[22] The Respondent also argues that it was open to the Officer to infer that Bengali would frequently be used at home given parents indicated that they would require a Bengali interpreter for interviews. The Respondent’s argument merely reiterates the speculative finding of the

Officer. There is simply no evidence before the Officer as to how the two adult Applicants communicate with their children at home and whether the children can acquire fluency in Bengali simply by communicating with their parents.

[23] Moreover, even if the Officer could infer the children were able to speak Bengali in order to communicate with their parents, the Officer still had no basis to infer that the children would also acquire the ability to read and write Bengali just by virtue of speaking to their parents at home.

[24] At the hearing the Respondent made several new arguments not stated in their written submission: a) the letter from Mr. Kazi was not written by an educator or an expert; b) the casual, limited interactions between Mr. Kazi and the children were not the type of evidence that was needed to demonstrate the children's language ability; c) the letter did not indicate when the observations were made by Mr. Kazi about the children's language ability, and d) the fact that a five or six-year-old who was just starting in school may have tentative ability to speak Bengali was not significant evidence.

[25] I reject all of these arguments, as they did not form the basis of the Officer's refusal. Since the Officer did not mention Mr. Kazi's letter at all, there is no way of knowing whether the Officer shared the Respondent's views about the letter. It is inappropriate for the Respondent to bolster the Decision by adding new reasons. It is worth noting that the Respondent's new arguments focused on the 6-year-old Moontwaha, without mentioning the 14-year-old

Mushfiqur. The argument that a child's ability to speak a language is expected to be tentative at an early age loses its edge when that child is 14 years old.

[26] The Respondent further argued at the hearing that the Officer did not have to specifically mention the letter as the issue of the children's ability to speak Bengali was put in place by different sources, including the parents. The Respondent argued that the children's parents are in the best position to give such evidence. I note, however, in this case, the parents of the children did not provide any evidence indicating that their children could speak, read or write Bengali.

[27] While the facts in *Bautista* are different, I note, as Justice Diner did in that case, the children's inability to speak the language of the country of return is a compelling factor, as it would impact on the children's ability to cope with learning a new language, school system and culture: *Bautista*, at para 21.

[28] As such, I find the Officer did not adequately engage with the evidence concerning Mushfiqur and Moontwaha's inability to speak Bengali, and the impact, if any, it has on the children's ability to integrate into the school system in Bangladesh and their future employment prospects. The Officer has thus failed to be sufficiently alert, alive and sensitive to the children's best interests, contrary to *Kanthasamy*.

ii. *The Officer applied the wrong test for assessing BIOC*

[29] In the Decision, the Officer acknowledged that the two older children "have adjusted well to school and life in general in Canada and that it may be difficult for them to move schools and

relocate to another place." The Officer went on to find: "However, there is insufficient evidence that the children will be severely impacted if they were to relocate and were required to join a novel education system." [Emphasis added].

[30] The Applicants argue that to the extent that the Officer accepted that the education of the children could be negatively impacted by a relocation to Bangladesh, the Officer applied the wrong standard by requiring the Applicants to demonstrate that the children would be "severely impacted." Citing *Jimenez v Canada*, 2015 FC 527 [*Jimenez*] at para 29; and *Dayal v Canada*, 2019 FC 1188 at para 39, the Applicants submit that no such "severe impact" standard is prescribed by the law. Even if there were, the Applicant argues that the Officer did not justify their conclusion that requiring then 13-year-old Mushfiqur to start Grade 8 in Bangladesh, when he cannot write in Bengali is not a "severe impact."

[31] The Applicants also add that the Officer applied the "hardship" test to children, which this Court has considered inappropriate: *Bautista*, at para 28.

[32] In response, the Respondent reiterates the Officer's finding that that there was indeed insufficient evidence that the children would be severely impacted upon removal. The Respondent cites *Kanthasamy* to argue that (1) while hardship is presumed inapplicable, it did not prohibit an officer from considering what hardship would be faced if a child were denied exemption; and (2) so long as the officer appropriately appreciates the child's circumstances as a whole and gives significant weight to the BIOC, the decision will be reasonable.

[33] I find the Respondent's argument unpersuasive.

[34] As the majority of the Supreme Court of Canada confirmed in *Kanthasamy* at para 41, children will rarely, if ever, be deserving of any hardship. As such, the concept of "unusual and undeserved hardship" is presumptively inapplicable to the assessment of the hardship invoked by a child to support his or her application for humanitarian and compassionate relief. Instead, officers are required to decide what "appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention": *Kanthasamy* at para 36.

[35] In this case, not only did the Officer err by explicitly requiring the Applicants to demonstrate that the children would be "severely impacted", the Officer also erred by focusing on the ability of the children to overcome difficulties so as to integrate into Bangladeshi society, and not on their best interests. This undue focus on overcoming difficulties was made evident by the Officer's findings throughout the decision, noting, for instance, "I am not satisfied that the RAHMAN children are so integrated into Canadian society nor that the country conditions in Bangladesh are so bad for their particular situation that accompanying the adult applicants to Bangladesh would greatly compromise their wellbeing", and "there is insufficient evidence that the children will have difficulties integrating into Bangladeshi society."

[36] More importantly, other than stating that "it is in the best interest of the children to remain in the care of their parents should they return to Bangladesh", the Officer never once determined what would in fact be in the best interests of the children affected.

[37] In so doing, the Officer adopted an approach to BIOC that is inconsistent with that set out in *Kanthasamy*.

[38] As this Court noted in *Jimenez*:

> [29] Furthermore, the Officer's reasons with respect to the BIOC are replete with references to whether the children would be subjected to a "significant negative impact" if the requested exemption was not granted, and he or she introduced a hardship threshold by requiring the Applicants to prove that "the best interest of the children in this application will be negatively affected to the extent that an exemption is warranted" (emphasis added). The Officer's focus on negative impacts and effects clouds and confuses the assessment of the BIOC, and nowhere in the reasons is there any clear identification of what really might be in the children's best interests other than to remain with their parents. [Emphasis added]

[39] The Respondent further argued that if officers cannot consider the temporary hardship associated with relocation, then one wonders whether any s.25 case can be refused based on BIOC. Essentially, the Respondent is making a "floodgate" argument, which I reject. As the Applicant concedes, BIOC is only one of several factors that officers need to consider in an H&C application. It is not determinative nor sufficient for an H&C exemption.

[40] I would however add that what constitutes "temporary" hardship in one case might not be as temporary in another. This is why officers must remain alert, alive and sensitive to a child's best interests when assessing the impact of theirs and their parents' removal from Canada.

[41] I also note that a similar argument was raised by the Respondent in *Narula v Minister of Citizenship and Immigration*, 2021 FC 1423 [*Narula*] but rejected by Justice Little:

> [36] I recognize the force of the respondent's submissions with respect to the officer's consideration of the inevitable or expected consequences of being required to leave Canada (as noted in *Kanthasamy*, at para 23). However, the reasons suggest that the officer improperly focused on whether the grandchildren would experience an undue degree of harm or hardship if separated from their grandmother, rather than identifying and considering what would be in their best interests as required by *Kanthasamy* and the cases cited above. The officer did not expressly identify the grandchildren's best interests, either generally or as individuals. As described at paragraph 14, above, the officer's discussion of the BIOC used language such as "jeopardize the best interests of the grandchildren", "insufficient evidence that these children are totally dependent upon the applicant", "insufficient evidence that these children were unable to function prior to the applicant's presence in Canada" and that there was "insufficient evidence that these children could not continue to function in her absence". In my view, the observations concerning whether the children were "totally dependent" on their grandmother, or could not "function" without her, were not consistent with the legal constraints established in the BIOC case law. They suggest that the officer erroneously imposed a burden on the applicant to show that the children would suffer undue harm (or worse) if separated from her.

[42] The same type of error, of focusing on undue hardship without properly identifying and analysing the children's best interests, as found in *Jimenez* and *Narula*, was committed by the Officer in this case.

[43] Given my finding that the Officer has erred with respect to the BIOC analysis, I need not address the other arguments raised by the Applicants.

IV. Conclusion

[44] The application for judicial review is allowed and the matter is returned for redetermination by a different officer.

[45] There is no question to certify.

JUDGMENT in IMM-4567-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter is returned for redetermination by a different officer.

3. There are no questions to certify.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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