Federal Court

Cour fédérale

Date: 20221121

Docket: IMM-2733-20

Citation: 2022 FC 1590

Toronto, Ontario, November 21, 2022

PRESENT: Justice Andrew D. Little

BETWEEN:

BRANKA VUJICIC

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

<u>JUDGMENT AND REASONS</u>

[1] The applicant asks the Court to set aside a decision of a senior immigration officer dated June 3, 2020, made under subsection 25(1) of the Immigration and Refugee Protection Act, SC 2001, c 27 (the *"IRPA"*). The officer refused the applicant's request for permanent residence in Canada with an exemption on humanitarian and compassionate ("H&C") grounds.

[2] The applicant submitted that the officer's decision was unreasonable under the principles described in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653.

[3] The focus of the applicant's challenge was the officer's assessment of the best interests of her child.

[4] For the reasons that follow, the application is dismissed.

I. Material Background Facts

[5] The applicant was born in Croatia to Serbian parents. She is a citizen of Croatia and Serbia. She entered Canada as a visitor in 2012.

[6] She lives in Alberta with her son, V. He was born in Canada in late 2013. At the time of the officer's H&C decision, V was 6 years old.

[7] The applicant and V do not live with V's father. The applicant and V's father are no longer in a personal relationship. V's father lives about five hours drive away in northern Alberta.

[8] In September 2018, the applicant submitted an application for permanent residence with an exemption on H&C grounds. The main factors advanced for consideration were the

applicant's establishment in Canada, best interests of the child ("BIOC") and hardship after departure from Canada arising from the conditions in Croatia and Serbia.

II. Decision under Review

[9] The officer's decision contained a section entitled "Factors for Consideration" which listed a series of points made in the H&C application under the headings "Establishment in Canada", "Best interest of the child" and "Risk and adverse country conditions". The decision then contained a section entitled "Decision and Reasons", which assessed the H&C factors under the same substantive headings.

[10] Given the focus of the applicant's submissions on this application, I will only summarize the officer's reasons in relation to the BIOC.

[11] The officer found that the child, V, was six years old and a Canadian citizen by birth. The applicant and V departed Canada for Serbia in November 2016 and returned to Canada in January 2017.

[12] V was very early in his education (kindergarten). With respect to language barriers and challenges if he goes to Serbia, the officer was not persuaded that a change in language instruction or location would be so difficult to overcome such that it would compromise his best interests. The officer noted that the applicant's native language is Serbian and Serbia is where she spent most of her life, including where her parents continue to live. It was not unreasonable that V would have been exposed to or be to some extent familiar with Serbian language and

culture. V’s father was also born in Serbia and he is from the same city as the applicant. The officer was not persuaded that V could not become familiar with or would be unable to obtain an education in Serbia or that he could not learn his mother’s native tongue.

[13] The officer considered V’s connections and ties with Canadian society, including his activities and his integration with and attachments to non-family members.

[14] The officer considered V’s relationship with his father, including the impact of removal on V. The officer recognized that it was generally in the best interests of the child to remain in the care of their parent(s). The officer recognized the applicant’s submission that V was very attached to his father and that relocation would have serious long-lasting psychological effects on V’s development. The officer noted the applicant’s statement that V “cried most of the time for his father” when they left Canada, so she decided to make Canada her permanent home and returned in January 2017.

[15] The officer noted that the applicant and V’s father had a relationship, but the father had then married someone else and had moved about five hours away from the applicant’s residence.

[16] The officer considered the contents of a letter from V’s father, including the father’s desire to have V live near to both parents. The officer accepted that the father has a relationship and “some degree of involvement” with V. However, the father’s statements were “brief and limited in detail concerning the extent of his relationship and involvement over the years”. They did not “adequately show the extent of his involvement, frequency and duration of the visits”.

The officer also noted the absence of evidence concerning the father's status in Canada and whether he is permitted to stay permanently or has Canadian citizenship.

[17] The officer noted that the applicant was the primary caregiver for V and he resided with her. The officer accepted that V would miss his father. However, "developments in modern technology can make it possible for [the father] to continue to watch his son grow and keep in contact with him and his mother." While the latter were not substitutes for one's physical presence, there was insufficient evidence before the officer that the father could not to some degree maintain and continue his relationship with V, albeit at a distance, including providing support to him from abroad.

[18] The officer found that the applicant and the father would provide V with love and support to the best of their ability, regardless of his country of residence. The officer recognized that it was in the best interests of every child to gain an education and to have their parents' continuous love and support.

[19] In view of the above, the officer found it was reasonable to expect that V would remain in the care of his mother. Consequently, the officer did not find the applicant has demonstrated a level of dependency by V on his father such that his removal would be counter to his best interests.

[20] The officer found little evidence that V would not retain his Canadian citizenship, regardless of country of residence, including the right to return to Canada at any time in his life.

[21] The officer found that V was of a “young enough age where the impact of relocation should be minimal, particularly since it is reasonable to expect that he would continue to remain in the care of his mother”. The officer was not persuaded that returning to Serbia would adversely impact V’s best interests.

[22] The officer found the objective evidence on the situation in Serbia as it concerned V’s future was lacking in the H&C application.

[23] The officer found insufficient objective evidence that V has any conditions or health issues for which he could not access or receive adequate medical care in Serbia. There was also insufficient objective evidence to suggest that V would not have access to adequate health care, education or other services and protection in Serbia such that his welfare would be compromised.

[24] Taking into account the information in the application as well as the potential impact on V should the applicant not be granted an exemption under s. 25, the officer acknowledged the unfortunate circumstances of the situation and that it may not be easy. However, the officer was not satisfied that there was sufficient evidence demonstrating that V’s best interests, including his emotional well-being thus far, had been or will be jeopardized should he accompany his mother back to Serbia and be separated from his father.

[25] While the officer gave the BIOC “favourable consideration”, it was not a determinative factor sufficient on its own to grant the H&C relief requested by the applicant.

[26] At the end of the reasons, the officer stated, in relation to the BIOC:

> I find that best interests of the child considerations weigh in the applicant's favour, however, I find insufficient evidence before me that the best interests of the child would be negatively impacted to an extent that warrants humanitarian and compassionate relief for the applicant when weighed with all other factors in terms of a global assessment.

III. Legal Principles

[27] The standard of review of the officer's decision is reasonableness: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909, at para 44.

[28] The Supreme Court described the reasonableness standard in *Vavilov*. Reasonableness review is a deferential and disciplined evaluation of whether an administrative decision is transparent, intelligible and justified: *Vavilov*, at paras 12-13 and 15. The reviewing court starts with the reasons of the decision maker, which are read holistically and contextually with the record that was before the decision maker: *Vavilov*, at paras 84, 91-96, 97, and 103; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 SCR 900, at paras 28-33.

[29] Reasonableness review considers both the reasoning process and the outcome: *Vavilov*, at paras 83 and 86. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker: *Vavilov*, esp. at paras 85, 99, 101, 105-106 and 194. To intervene, the reviewing court must be satisfied that there are "sufficiently serious shortcomings" in the decision such that it does not exhibit sufficient justification, intelligibility and transparency. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep".

The problem must be sufficiently central or significant to render the decision unreasonable: *Vavilov*, at para 100; *Canada Post*, at para 33.

[30] Subsection 25(1) of the *IRPA* gives the Minister discretion to exempt foreign nationals from the ordinary requirements of that statute and grant permanent resident status in Canada, if the Minister is of the opinion that such relief is justified by humanitarian and compassionate considerations. The H&C discretion in subsection 25(1) is a flexible and responsive exception to the ordinary operation of the *IRPA*, to mitigate the rigidity of the law in an appropriate case: *Kanthasamy*, at para 19.

[31] The discretion in subsection 25(1) must be exercised reasonably. Officers making humanitarian and compassionate determinations must substantively consider and weigh all the relevant facts and factors before them: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at paras 74-75; *Kanthasamy*, at paras 25 and 33.

[32] The applicant bears the onus of establishing that an H&C exemption is warranted: *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2010] 1 FCR 360, at paras 35, 45 and 61.

[33] When assessing H&C applications, an officer must be alert, alive and sensitive to the best interests of the children. Those interests must be well identified and defined, and examined with a great deal of attention in light of all the evidence: see *Kanthasamy*, at paras 35 and 38-40; *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2003] 2

FC 555, at paras 5 and 10; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 FC 358, at paras 12-13 and 31; *Baker*, at para 75.

[34] The children's interests must be given substantial weight and be a significant factor in the H&C analysis, but are not necessarily determinative of an H&C application: *Kanthasamy*, at para 41; *Hawthorne*, at para 2.

IV. Analysis

[35] The issue in this application is whether the officer's decision was unreasonable. The applicant submitted that the officer's consideration of the BIOC was too superficial to be alert, alive and sensitive to V's best interests. To support this position, the applicant made several submissions:

a) The officer improperly discounted or minimized the hardship arising from the separation of V from his father (citing *Garcia Balarezo v Canada (Citizenship and Immigration),* 2020 FC 841, at para 38).

b) The officer erred by relying on modern technology to keep up the relationship between father and son, and minimized the son's interests. The applicant submitted that a reasonable person certainly cannot accept that speaking to one's father on Skype and/or Zoom or any electronic means is the same as having a father present in one's life, in person, on a regular basis. The existing bond between V and his father, and the growth of that bond, would be diminished and reduced, so that the father would become pixels on a screen or a mere voice, rather than a parent. The applicant referred to *AB v Canada (Citizenship and Immigration),* 2017 FC 1170, at paragraph 29.

c) The officer did not consider the specific circumstances of this case (citing *Pryce v Canada (Citizenship and Immigration),* 2020 FC 377, at para 54) and did not

render a meaningful analysis, given that V is a Canadian citizen, and the applicant is a single mother who is not in a relationship with the father.

d) Referring to several passages in *Osun v Canada (Citizenship and Immigration),* 2020 FC 295, at paragraphs 18-27, the applicant submitted that an assessment of hardship cannot replace an understanding of the BIOC. Lack of hardship is not the same as the best interests of a child. The applicant argued that as a matter of law, children are rarely, if ever, deserving of any hardship (citing *Hawthorne,* at para 9; see also *Kanthasamy*, at para 59).

e) The applicant argued that in the present case, the choice is between V remaining in Canada with both his parents present in his life, versus V moving to Serbia and growing up only with his mother. The result reached by the officer in this case shows that the officer missed the point of the application: that the applicant's removal from Canada with V would end the bond V has with his father and prevent future bonds from developing.

[36] The respondent emphasized that the officer provided a long assessment of the BIOC, considered all the evidence, and gave favourable weight to the BIOC in the global assessment of the H&C application. The respondent argued that the applicant's submissions in substance went to the weight that should be assigned to the evidence – something this Court cannot consider on judicial review.

[37] The respondent also referred to a number of cases. The respondent noted that even with the need to give the affected child's best interests "a singularly significant focus and perspective" in the H&C analysis, it does not follow that the affected children's best interests must outweigh other considerations in the analysis (citing *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130, [2018] 2 FCR 229, at para 73). All H&C factors must be considered and an applicant is not entitled to an affirmative result on an H&C application simply because the BIOC favour that result (referring to *Garraway v Canada (Immigration, Refugees*

and Citizenship), 2017 FC 286, at paras 57-58). While the best interests of the children is an important factor, it is generally not determinative in and of itself, as it is almost always the case that a child's best interests weigh in favour of the continued presence of both parents in Canada; as such, this factor must be weighed together with the others (citing *Gill v Canada (Citizenship and Immigration)*, 2019 FC 772, at para 48).

[38] The respondent also noted that an officer is not precluded from examining hardship, including country conditions where the child may live after departing from Canada, in relation to the BIOC (citing *Kanthasamy,* at para 40; *Osun*, at para 19).

[39] After careful consideration of the applicant's arguments and the officer's reasons, as well as the case law, I conclude that the applicant has not demonstrated that the BIOC assessment in the officer's decision contained a reviewable error as described in *Vavilov* and *Canada Post*.

[40] As the applicant correctly observed, the officer must be "alert, alive and sensitive" to, and must not minimize, the best interests of the child(ren): *Kanthasamy*, at para 38, quoting *Baker*, at para 75; *Owusu v Canada (Minister of Citizenship and Immigration),* 2004 FCA 38, [2004] 2 FCR 635, at para 5. Often, as in this case, there is an implicit premise to the BIOC analysis that the non-removal of the parent (applicant) from Canada is in the child's best interests. The assessment of the child's best interests necessarily involves an analysis of the evidence of the hardship that could be suffered by the child arising from removal from Canada. The Federal Court of Appeal in *Hawthorne* remarked, at paragraph 4:

> The "best interests of the child" are determined by considering the benefit to the child of the parent's non-removal from Canada as

> well as the hardship the child would suffer from either her parent's removal from Canada or her own voluntary departure should she wish to accompany her parent abroad. Such benefits and hardship are two sides of the same coin, the coin being the best interests of the child.

[41] This Court held in *Osun* that the focus of the BIOC analysis cannot be solely on the hardship a child may suffer. Although hardships (or lack thereof) on return to a country of origin may be considered on an H&C application, the Court held that a hardship analysis cannot supplant or substitute for a proper BIOC assessment, owing to concerns about transparency and justification: *Osun*, at paras 19, 21, 23-24.

[42] At the same time, the onus on the applicant to present H&C evidence generally, and to provide evidence to support the BIOC in particular, is well established: *Owusu,* at paras 5 and 8; *Kisana*, at paras 35, 45 and 61.

[43] The applicant unified her submissions on this application by arguing that the officer’s reasons were too superficial to be alert, alive and sensitive to V’s best interests. This position must be analyzed not only with the reasons expressed by the officer, but also in light of the evidentiary record on the H&C application itself. In some circumstances, a thin record on BIOC issues may affect the assessment of a child’s best interests at a level of detail. An absence of BIOC evidence in the H&C record has been noted on judicial review applications in this Court: *Rozo Basto v Canada (Citizenship and Immigration),* 2022 FC 1140, at para 27; *Jones v Canada (Citizenship and Immigration),* 2022 FC 655, at paras 15-17, 40-42; *Rong v Canada (Citizenship and Immigration),* 2021 FC 690, at paras 24-30; *Zlotosz v Canada (Citizenship and Immigration),* 2017 FC 724, at para 22; *Lovera v Canada (Citizenship and Immigration),* 2016

FC 786, at para 38; *Celise v Canada (Citizenship and Immigration),* 2015 FC 642, [2015] 4 FCR 728, at paras 35-36. See also *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082, at paras 37-42.

[44] The present case contains issues that are similar to those in *Celise* and *Lovera*. In *Lovera*, Justice Roy stated at paragraph 38:

> In this case, the evidence presented in support of the children's best interests is itself fairly thin. The senior immigration officer did not merely mention the children's best interests, and she could do no better than to examine what had been identified and defined by the applicant. In this regard, the applicant has an onus. Based on what was before the senior immigration officer, the decision-maker was alert, alive and sensitive to the children's best interests. What the decision-maker must not do is minimize them; in this case, the evidence was far from dominant, and the senior immigration officer's attitude cannot be criticized. Minimization always depends on the evidence presented. In this case, there was no minimization given the thinness of the evidence.

[45] This passage is substantially applicable to the present case. As the officer noted, the BIOC evidence in the record before the officer did not provide much detail about the relationship between V and his father. The officer recognized the applicant's statement that they had a close bond, but found that it was not supported by additional details that could reasonably be expected, given that V's mother and father are not in a relationship and his father lives five hours drive away from V in northern Alberta.

[46] I do not agree with the applicant's submission that the officer minimized or discounted the hardship arising from the possible separation of V from his father. The officer considered the relevant evidence in the H&C application, in particular the statements from the applicant and the

handwritten letter from V's father. Having reviewed them myself, I find that the officer's reasons sufficiently accounted for their contents. In my view, it was open to the officer to find that the father's statements were "brief and limited in detail concerning the extent of his relationship and involvement over the years" with V and that they did not "adequately show the extent of his involvement, frequency and duration of the visits".

[47] While the applicant clearly disagreed with the officer's weighing of the evidence, the applicant's submissions did not identify any material facts that the officer overlooked, that were incompatible with the officer's BIOC findings, or that otherwise constrained the BIOC analysis. This Court cannot re-weigh or reassess the evidence on an application for judicial review: *Vavilov*, at para 125; *Canada Post*, at para 61.

[48] The officer did not make the same error as occurred in *Garcia Balarezo*, at paragraph 38. The officer did not find that V's relocation to Serbia or his separation from his father would be good for him or help his coping skills.

[49] The applicant relied on a passage from *Pryce,* at paragraph 54, that requires an assessment of the "specific circumstances" of the case. Although the Federal Court's reasoning in *Pryce* was not endorsed on appeal by the Federal Court of Appeal (*sub nom. Canada (Citizenship and Immigration) v Laing,* 2021 FCA 194, at para 14), that particular proposition in *Pryce* came from the majority opinion in *Kanthasamy*, at para 32. The applicant also likened this case to *AB*, in which Justice Ahmed noted that the decision maker conducted a "cursory analysis of the children". My colleague found several reasoning errors in the officer's assessment of the

evidence: the reasoning in *AB* was unduly restrictive and assumed that the bonds between the grandparents and the young children (who did not reside together) would not grow stronger. The decision also relied on the absence of physical presence between them to imply that the children would not remember their grandparents due to their ages, which the Court found to be problematic reasoning: *AB*, at paras 28-29.

[50] In this case, looking at the officer's reasons and the contents of the record, I find no reviewable error. The officer's reasons were not cursory and demonstrate a satisfactory understanding of the particular circumstances arising in relation to the BIOC in this H&C application. The reasons assessed V's particular circumstances, including the evidence of the existing relationship between the father and V. I am not persuaded that the reasoning in the present case mirrors the impugned decision in *AB*.

[51] The applicant contended that the officer made an implicit negative credibility finding by questioning V's father's status in Canada and noting that he did not provide any personal identity documents with the letter, including pertaining to his residential address. While the officer's comments appear to be gratuitous, the substantive issue with the father's letter was its lack of details about his relationship with V. As already noted, the officer made no reviewable error on that issue.

[52] At the hearing of this application, the applicant raised a question about why the officer did not seek additional information from the applicant. The applicant, who was self represented when she submitted the H&C application, offered to provide additional information. In my view,

the principles in the cases on the applicant's onus, including *Owusu* and *Kisana*, answer that argument.

[53] Relying on *Osun*, the applicant submitted that the officer assessed hardship to V, rather than V's best interests as required for a lawful assessment of the BIOC. The officer in *Osun* found insufficient evidence that the children's "welfare would be compromised should they depart Canada and go to Nigeria" and used erroneous reasoning that was "very resonant of a hardship analysis" as the starting point for the BIOC analysis as to whether it would be difficult to leave Canada: *Osun*, at paras 20-21. The officer's analysis focused solely on lack of hardship in substitution for a best interests assessment: *Osun*, at para 21. Justice Diner recognized that hardship (or lack thereof) of leaving Canada and returning to one's home country can be a key factor in the H&C analysis, so long as it is not conflated or "interwoven with – and indistinguishable from" the BIOC: *Osun*, at paras 23-24.

[54] In this case, and on this record, I find no similar error in the officer's analysis of the evidence. The officer addressed the key factors related to V's best interests if he were to stay in Canada as raised by the applicant's H&C application – including V's continued relationship with his father, his education and language ability, access to health care, and his friends and activities in Canada.

[55] It is true that the reasons in this case included language similar to the impugned decision in *Osun.* However, I agree with the respondent that the phrases used in the officer's reasoning are relevant but not necessarily determinative of the reasonableness of the BIOC assessment on a

judicial review application. The issue is whether the officer's reasons failed to respect the applicable legal or factual constraints bearing on the decision, by making a substantive legal error or by fundamentally misunderstanding or failing to account for the evidence concerning the BIOC. Analyzing that issue, I find that the substance of the officer's reasoning – when viewed with the limited evidence on the details of V's relationship with his father and the applicant's comments about hardship to V if he were to live in Serbia – was responsive to and accounted for the applicant's statements, the father's letter and the limited remaining evidence in the record. In addition, this case does not raise the concerns about transparency and justification that were identified in *Osun.* Using the language of *Osun*, a hardship assessment did not substitute for or supplant a lawful BIOC analysis. The applicant has not shown that the officer made a substantive error of law.

[56] The applicant also contended that the officer erred by relying on modern technology to keep up the relationship between father and son. The applicant submitted that a reasonable person certainly cannot accept that speaking to one's father on Skype and/or Zoom or any electronic means is the same as having a father present in one's life, in person, on a regular basis.

[57] The applicant's submission must be considered against the officer's reasons. After noting that the applicant was the primary caregiver and that V resided with her, the officer accepted that V would miss his father and vice versa. The officer then noted:

> … developments in modern technology can make it possible for [the father] to continue to watch his son grow and keep in contact with him and his mother. While the latter are not substitutes for one's physical presence, there is insufficient evidence before me that [the father] cannot to some degree maintain and continue his

> relationship with [V]; albeit at a distance, including providing support to him from abroad should this application be refused.

[58] The passage goes on to discuss the parents' ability to provide V with continuing love and support.

[59] The applicant is correct that in several decisions, the Court has cautioned against using boilerplate language about the use of technology to attenuate the hardship of separation. The Court has noted that reasoning involving the use of technology needs to account for the specific facts in the evidence, including the relationship between the people. See *Lopez Alvarez v Canada (Citizenship and Immigration)*, 2022 FC 130, at para 38; *Chamas v Canada (Citizenship and Immigration)*, 2021 FC 1352, at para 43; *Yu v Canada (Citizenship and Immigration)*, 2021 FC 1236, at para 30; and my reasons in *Martinez Mendez v Canada (Citizenship and Immigration)*, 2022 FC 816, at paras 38-39 (released after the argument in this application).

[60] In this case, the officer did not find that the use of "modern technology" would replace the father-son relationship. The reasons recognized expressly that modern technology was not a substitute for physical presence and that it would help the father continue the relationship with V at a distance. In the context of the officer's reasoning and the record, I find no reviewable error as claimed by the applicant. I am aware that the officer's reasoning did not go on to consider the use of technology from V's perspective. After some reflection, including on the reasons in *AB*, I find this omission does not, in the specific circumstances of this case as already discussed, disclose an error central to the officer's reasoning that warrants setting aside the H&C decision overall: *Vavilov*, at para 100.

V. <u>Conclusion</u>

[61] The application is therefore dismissed. Neither party proposed a question for certification and none will be stated.

JUDGMENT in IMM-2733-20

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. No question is certified for appeal under paragraph 74(*d*) of the *Immigration and Refugee Protection Act.*

"Andrew D. Little"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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