Federal Court  Cour fédérale

Date: 20231019

Docket: IMM-2129-22

Citation: 2023 FC 1383

Toronto, Ontario, October 19, 2023

PRESENT: Justice Andrew D. Little

BETWEEN:

DELROY ANTHONY DENNIS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant asks the Court to set aside a decision of a senior immigration officer dated February 22, 2022, 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 should be set aside as unreasonable under the principles set out by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 SCR 653.

[3] For the reasons set out in detail below, I agree that the decision was unreasonable. The application will therefore be allowed.

I. Facts and Events Leading to this Application

[4] The applicant is a citizen of Jamaica. He has been living in Canada since 2013 and was a regular visitor for several years before. His wife, from whom he is now separated, and his young daughter live in Canada. He has an adult son, born in Jamaica but living in Trinidad and Tobago. He also has an adult daughter and four grandchildren who live together in Jamaica.

[5] The applicant's first wife was killed by unknown assailants in September 2001, and his son moved to Trinidad and Tobago to escape the violence.

[6] Since his 2013 arrival in Canada, the applicant worked as a construction worker, mechanic and factory worker in cash jobs to support himself and later his second wife, V, and their daughter, and to send money back to Jamaica to support his family there.

[7] In 2016, the applicant's youngest son died, aged 15, in a fire in Jamaica.

[8] The applicant and V were married in April 2017 and in 2018, she applied to sponsor him as her spouse. On April 25, 2019, this application was denied on the basis that V had received (without the applicant's knowledge) Ontario Works benefits, and she was therefore ineligible to sponsor him.

[9] In April 2019, the applicant and V stopped living together. In November 2019, the applicant learned, to his surprise, that she had given birth to their biological daughter.

[10] The applicant sees his daughter multiple times a week and provides financial support for his daughter every month.

[11] In September 2020, the applicant filed an application for permanent residence on H&C grounds under *IRPA* subsection 25(1). The application included his own affidavit and an affidavit of his daughter in Jamaica. He filed lengthy and detailed written submissions supporting his application.

[12] By decision dated February 22, 2022, the officer denied the application. The officer's reasons for the decision were 9 paragraphs in length. Four paragraphs addressed Establishment in Canada; two paragraphs concerned the Best Interests of the Children; two paragraphs concerned Adverse Country Conditions; and there was a two-sentence conclusion paragraph dismissing the application under *IRPA* subsection 25(1).

[13] The applicant challenged the officer's H&C decision in this judicial review proceeding.

II. Analysis

[14] The parties both submitted that the standard of review of the officer's decision is reasonableness, as described in *Vavilov.* I agree: *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909, at para 44.

[15] 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; *Mason v. Canada (Citizenship and Immigration),* 2023 SCC 21, at paras 8, 63. The starting point is the reasons provided by the decision maker, which are read holistically and contextually, and in conjunction with the record that was before the decision maker. A reasonable decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrained the decision maker: *Vavilov,* esp. at paras 85, 91-97, 103, 105-106 and 194; *Canada Post Corp v. Canadian Union of Postal Workers,* 2019 SCC 67, [2019] 4 SCR 900, at paras 2, 28-33, 61; *Mason,* at paras 8, 59-61, 66.

[16] The reviewing court focuses on the reasoning process used by the decision maker: *Vavilov,* at paras 83, 84 and 87. The court does not consider whether the decision maker's decision was correct, or what the court would do if it were deciding the matter itself: *Vavilov,* at para 83; *Canada (Justice) v. D.V.,* 2022 FCA 181, at paras 15, 23.

[17] Reasons are "the means by which the decision maker communicates the rationale for its decision" and demonstrate that the decision is reasonable: *Mason,* at para 59; *Vavilov,* at paras 81, 84. The Supreme Court in *Mason* and *Vavilov* emphasized that "it is not enough for the

outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be *justified,* by way of those reasons, by the decision maker to those to whom the decision applies": *Mason,* at para 59, quoting *Vavilov,* at para 86 [original emphasis]. A decision will be unreasonable when the reasons "fail to provide a transparent and intelligible justification" for the result: *Mason,* at para 60, quoting *Vavilov,* at para 136.

[18] The written reasons given by a decision maker "must not be assessed against a standard of perfection", and need not "include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred": *Mason,* at para 61; *Vavilov,* at para 91.

[19] However, if a decision maker fails to provide a responsive justification for its decision – that is, there has been a significant failure to account for or meaningfully grapple with a party's key issues or central arguments – a reviewing court may lose confidence in the reasonableness of the decision: *Mason,* paras 10, 86, 97, 98, 118; *Vavilov,* at para 127-128.

[20] In this case, the applicant raised several issues to challenge the reasonableness of the decision. The first issue is of central concern, but I will address three points made by the applicant.

A. ***Best Interests of the Children***

[21] Subsection 25(1) enables the Minister to grant a foreign national permanent resident status or an exemption from any applicable criteria or obligations of the *IRPA*, if the Minister is

of the opinion that it is justified by H&C considerations relating to the foreign national, "taking into account the best interests of a child directly affected".

[22] The applicant submitted that reviewable errors in the officer's assessment of the best interests of the children ("BIOC") rendered the H&C decision unreasonable. He argued that the BIOC assessment was incomplete because it failed to state what would be in the best interests of his Canadian daughter, S, and instead focused on the evidence that was missing from the application (citing *Sebbe v. Canada (Citizenship and Immigration)*, 2012 FC 813, at paras 13, 16; *Shubar v. Canada (Citizenship and Immigration)*, 2022 FC 186, at paras 8, 13). According to the applicant, the officer ignored the evidence and his submissions related to his financial support and regular visits with S. Even if the evidence were sparse – which the applicant denied it was – the officer still had to engage with it: *Malave Turmero v. Canada (Citizenship and Immigration)*, 2022 FC 402, at para 31.

[23] In addition, the applicant submitted that the officer did not conduct a BIOC analysis with respect to the applicant's grandchildren and incorrectly mentioned that the applicant has two grandchildren, when in fact he has four. The applicant argued that the decision did not analyze the sole argument about the best interests of his four grandchildren: that that they greatly rely on him for financial support for their basic needs and education and they would lose this critical support if he returns to Jamaica (citing *Vavilov*, at paras 127-128; *Subar v. Canada (Citizenship and Immigration)*, 2022 FC 340, at para 13).

[24] In sum, the applicant argued that the officer did not engage with the evidence and the reasons did not disclose what the officer thought about the BIOC, or the weight of those interests in the H&C assessment – apart from the negative weight from the absence of a letter from the applicant's wife. To the applicant, the officer's reasons raised both transparency and justification issues in a *Vavilov* reasonableness review.

[25] The respondent referred to the onus on the applicant to establish the facts through evidence on an H&C application (citing several cases, including *Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 FCR 635, at para 8; *Campbell-Service v. Canada (Citizenship and Immigration)*, 2022 FC 1050). The respondent submitted that the decision reasonably assessed the BIOC, given the evidence that was before the officer (citing, amongst other cases, *Owusu*, at para 8; *Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 1295, at para 18). The respondent argued that the applicant was unhappy with the outcome of the application and was microscopically challenging the officer's reasons. The reasons reflected the nature of the evidence filed by the applicant.

[26] For the reasons below, I agree with the applicant that the H&C decision did not reasonably assess the BIOC.

[27] 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. 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 the application: *Kanthasamy*, at para 41; *Kisana v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2010] 1 FCR 360, at para 24.

[28] As the respondent observed, 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.

[29] Here, the decision did not reasonably assess the evidence and submissions and did not provide a responsive justification relating to the BIOC.

[30] The officer considered the applicant's "narrative and the photos included" but did "not know any detail regarding his situation beyond some kind of financial commitments", or whether there was a custody arrangement. There was "no detailed statement from the mother" which the officer expected. The officer considered this negatively in the assessment. I am inclined to agree with the applicant that, with respect to the best interests of S, the applicant's Canadian daughter, the reasons seem to be concerned more with what was purportedly not in evidence, rather than what was in the record.

[31] More to the point, however, the officer's reasons did not engage with the affidavit evidence filed on the H&C application. In relation to S, the applicant's affidavit stated:

> After I found out about [S] I started financially supporting [V]. I wired money to her account and have been regularly sending her money since then, about $400/month. I also buy essentials and supplies for the baby. I also see [S] very regularly and spend time

> with her, nowadays I see her multiple times a week. Sometimes I am alone with [S] caring for her, other times [V] is there with us. However we are NOT in a romantic relationship and we are civil as co-parents. But still I know that [V] can try to manipulate me; for example she refused to give me a copy of [S]'s birth certificate until I give her money for the crib and the car seat. It is really frustrating to be treated that way but my priority is always making sure that [S] is taken care of, which means I also have to deal with her mother.

The applicant's affidavit also stated that he knew he would not be able to financially support his Canadian daughter if he returned to Jamaica "because there is no work for me there". I will return to this important topic shortly.

[32] In my view, this was sufficiently probative evidence that the officer had to address during the BIOC assessment, particularly before coming to the conclusion reached. Although S is a very young child, the applicant's evidence goes to his relationship with her, including their time together and his financial and other support for S.

[33] The quoted passage, and others in the applicant's affidavit, were also relevant to whether his wife could reasonably be expected to provide a supporting affidavit or letter for the H&C application. The applicant is also correct that the officer also did not engage with related social science evidence filed by the applicant related to the influence of a father on the longer-term well-being of a child, a topic that occupied several pages in the applicant's submissions on the H&C application. Whether the latter evidence would have had a significant influence on the BIOC is not for this Court to determine.

[34] Neither the officer nor the respondent doubted that the applicant's grandchildren in Jamaica were "directly affected" children under *IRPA* subsection 25(1). The officer addressed the BIOC of the grandchildren as follows:

> The applicant supplies some interest to children to whom he is the grandfather ([name] and [name]). They are the children of his daughter [name]. He submits that his remittance payments to Jamaica help support their continued education and stability. Evidence is shown that these payments did take place, and I take it to be a likely truth. As an alternative if the applicant were to be returned to Jamaica, it is not offered to me why he could not continue this relationship upon return to Jamaica or that his proximal presence to his grandchildren in Jamaica would be less beneficial than his income in Canada.

[35] This passage reflects an understanding that the applicant sent money to his daughter in Jamaica for two grandchildren's education and "stability".

[36] However, as the applicant fairly noted, the applicant has four, not two, grandchildren in Jamaica. The applicant's affidavit stated that he was financially supporting his grandchildren to go to school in Jamaica, and provided details about all four. He advised that he sent between $120 to $200 per month to cover school fees. He stated that if he were to stop sending this money, the children would probably no longer be able to attend school. He explained that his daughter does not have a stable source of income and most of the time works temporary jobs. The evidence from his daughter in Jamaica stated that she worked in a store three days per week and made the equivalent of approximately $43 a week. She stated:

> This is not enough to send my children to school and buy food. I do not receive any financial support from the fathers of my kids. I depend a lot on the financial support from my father. He sends about $150.00 to $200.00 monthly. I use the money he sends to buy food to serve for the month and send them my children to

> school. Without my father's help, my children would literally be unable to go to school and would not have food to eat.
>
> [Emphasis added.]

[37] Important to the applicant's evidence and position on the BIOC was whether he would be employed on his return to Jamaica. Consistent with the applicant's evidence, his daughter's affidavit advised that he would not be employable in Jamaica. She stated that "there are no jobs and he would have no way to support himself", he would have nowhere to live and he "would struggle to survive". The applicant's written submissions argued that as a then 56-year-old man who has worked his entire life as a "low-skilled" labourer, it was highly unlikely that he would find a job to earn an adequate living in the conditions in Jamaica to support himself, let alone his child and grandchildren. The applicant also filed country condition evidence and made written submissions to support that position including materials describing economic fallout and increased unemployment rates following the COVID-19 crisis and ongoing gun and gang violence in Jamaica.

[38] The officer's observation that it was "not offered to me why he could not continue this relationship upon return to Jamaica" did not meaningfully engage with the applicant's evidence, the evidence of the grandchildren's circumstances and needs, relevant country condition evidence, or the submissions made to the officer.

[39] The evidence related to the interests of S and of the applicant's grandchildren, and the detailed submissions that went with it, were significant to the applicant's H&C application as a whole and to his position on the BIOC: see *Mason*, at paras 91, 95. The evidence concerned the

extent of the children's interests in the applicant's presence in Canada (in the case of S) and in his financial support and the impact of his removal from Canada and return to Jamaica on his ability to continue to provide support for them all. This evidence and the related submissions had to be assessed meaningfully as part of the BIOC analysis, and had to be adequately explained if the officer were to reach a conclusion inconsistent with it. While it is not inherently unreasonable for a decision maker to prefer some evidence over other evidence, the absence of analysis in the reasons suggests that the officer ignored or failed to account for material evidence and did not meaningfully grapple with the applicant's submissions. The reasons did not provide a responsive justification for the conclusion on the BIOC – a singularly important component of the H&C application: see *Kanthasamy*, at paras 35, 38-41.

[40] As the Supreme Court held in *Vavilov*, and reinforced in *Mason*, these failures may cause a reviewing court to lose confidence in the overall decision: *Vavilov*, at paras 125-128; *Mason*, at paras 10, 86, 97-98, 118. That is the case here.

[41] There are two additional concerns that support the conclusion to set aside the officer's H&C decision, which I will now address.

B. ***Additional Concerns raised by the Applicant***

[42] The applicant argued that that the officer failed to address the hardship he would suffer on return to Jamaica and that the officer's consideration of establishment in Canada was flawed due to over-emphasis on non-compliance with Canadian immigration laws. The respondent

argued that the office conducted a thorough and complete analysis of the claimed hardships and the applicant's level of establishment in Canada.

(1) Hardship after removal from Canada

[43] On an H&C application, an officer must consider the impact of removal on the particular individuals to be removed, including the alleged hardships they may face on return to the country of origin: *Kanthasamy*, at paras 32-33, 45 and 48; *Zhang v. Canada (Minister of Citizenship and Immigration)*, 2021 FC 1482, at paras 14, 24-29.

[44] The applicant contended that the decision did not adequately engage with all of his circumstances, and failed in particular to do so in the context of the country condition evidence he filed relating to his return to Jamaica, unemployment, housing insecurity, a heightened risk of poverty and crime, and his inability to provide for himself and his many dependents. He relied on the principle that "officers making humanitarian and compassionate determinations must substantively consider and weigh *all* the relevant facts and factors before them" (*Kanthasamy*, at para 25) and referred to *Antoun v. Canada (Citizenship and Immigration)*, 2022 FC 612, at paras 11-12; *Nassry v. Canada (Citizenship and Immigration)*, 2022 FC 593, at paras 11, 16; *Subar*, at paras 25, 41; *Juan v. Canada (Citizenship and Immigration)*, 2020 FC 988, at paras 12-13, 15-16, 24.

[45] The officer's reasons acknowledged the applicant's position on living in dangerous circumstances in Jamaica, but found that any danger to him had passed. The reasons also referred to "some kind of psychological problem that could arise" and the applicant's negative emotions

about returning to Jamaica related to his experiences there, concluding that there was little to suggest that he will "face psychological circumstances that will prevent him from leading a fruitful life in Jamaica". The applicant noted that these comments were tied to the death of his first wife in 2001 and addressed issues that were not raised by the applicant in his H&C application.

[46] The reasons did not address potential hardships stated in the applicant's own evidence (discussed above) and did not assess the country condition evidence relating to the applicant's possible unemployment or living in poverty if he returned to Jamaica, or his exposure to violence and dangers as with everyone living there: see *Majkowski v. Canada (Citizenship and Immigration),* 2021 FC 582, at para 21; *Caleb v. Canada (Citizenship and Immigration),* 2020 FC 1018, at para 11. The applicant's written submissions contained a section on hardship and the impact of country conditions, which specifically addressed unemployment, poverty and crime over several pages of argument.

[47] These omissions in the reasons raise additional concerns going to the reasonableness of the decision, related to whether the officer was sufficiently alert to the evidence and issues raised by the applicant.

(2) Establishment in Canada

[48] The applicant submitted that 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": *Mitchell v. Canada (Minister of Citizenship and Immigration)*, 2019 FC 190, at para 23; see recently, e.g., *Trinidad v. Canada (Minister of Citizenship and Immigration)*, 2023 FC 65, at paras 27-41; and *Aboubacar v. Canada (Citizenship and Immigration)*, 2014 FC 714, at para 20.

[49] I agree that an officer may consider non-compliance with Canadian immigration laws as a (negative) factor with other factors on an H&C application: see e.g., *Browne v. Canada (Citizenship and Immigration)*, 2022 FC 514, at paras 26-27; *Lin v. Canada (Citizenship and Immigration)*, 2021 FC 1452, at para 46; *Choi v. Canada (Immigration, Refugees and Citizenship)*, 2020 FC 494, at para 21. However, as the applicant submitted, if disproportionate or undue weight is placed on an applicant's non-compliance, the decision may be unreasonable: see *Mateos de la Luz v. Canada (Citizenship and Immigration)*, 2022 FC 599, at para 28 (citing *Mitchell*) and the cases cited in *Ajtai v. Canada (Citizenship and Immigration)*, 2022 FC 963, at paragraph 46.

[50] In this case, the officer's reasons under the heading "Establishment" included two paragraphs on the impact of the applicant's non-compliance with immigration laws, including a finding that there was "little in the submissions that suggests [the applicant] understands working without status as a major violation of Canadian law that could result in his removal from Canada". The reasons stated that the applicant did not have a "well grounded legal expectation that he could stay in Canada prior to his sponsorship".

[51] By contrast, there was a single sentence advising that the officer considered “the letters and elements of his narrative submitting community service and community relationships to be satisfactory for a person who has spent nearly a decade in Canada”. While the officer then stated that “this” would be considered “positively” in the assessment, the reasons are at best unclear how that positive treatment could have factored into the officer’s overall H&C conclusion and, realistically, how much more weight was given to non-compliance with immigration laws. After the section on Establishment, the reasons made no other reference to either one, as the officer did not provide any reasoning that assessed all of the H&C factors together (as is common at the end of a decision under subsection 25(1)).

[52] The lack of transparency and justification in the reasoning related to establishment in Canada does not engender confidence in the outcome of the H&C decision.

[53] The additional concerns about the reasonableness of the assessment of evidence and submissions related to establishment and hardship both support the return of this H&C application for redetermination.

III. Conclusion

[54] For these reasons, I conclude that the application must be allowed.

[55] For clarity, I add that the conclusion to set aside the H&C decision in this case does not rest on the length of the officer’s reasons, although undue brevity may be an inherent factor when assessing responsiveness and justification, and may raise transparency concerns. In this

case, the decision in substance did not pass muster under the requirements for established by the Supreme Court in *Mason*, *Vavilov* and *Kanthasamy*. Consistent with *Vavilov*, I make no comment on the merits of the H&C application.

[56] Neither party raised a question for certification and none arises.

JUDGMENT in IMM-2129-22

THIS COURT'S JUDGMENT is that:

1. The application is allowed. The decision of the senior immigration officer dated February 22, 2022, is set aside and the matter remitted for redetermination by another officer. The applicant shall be permitted to update his application under subsection 25(1) of the *Immigration and Refugee Protection Act*.
2. No question is certified under paragraph 74(*d*) of the *Immigration and Refugee Protection Act*.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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