Federal Court Cour fédérale

Date: 20231208

Docket: IMM-3875-22

Citation: 2023 FC 1662

Toronto, Ontario, December 8, 2023

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

Zaafir Ahmed Munir

Applicant

and

The Minister of Citizenship and Immigration, Canada

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Zaafir Ahmed Munir, is originally from Pakistan. He currently holds British citizenship, and his last place of permanent residence was the United Kingdom, where he worked as an Uber driver.

[2] The Applicant has two sons. His ex-spouse had sole custody of the children, one of whom now is an adult, until a recent variation of the custodial arrangement. The Ontario Court of Justice awarded the Applicant joint parenting time for the younger, minor child (who is a teenager) in July 2022.

[3] While the custody decision was pending, the Applicant applied for permanent residence in Canada on humanitarian and compassionate [H&C] grounds. The case processing officer [Officer] refused the application on April 20, 2022 [Decision]. The Applicant, who is self-represented, seeks judicial review of the Decision.

[4] There is no dispute that the main issue before the Court is whether the Decision is reasonable. Stated another way, the Court must determine whether the Decision is intelligible, transparent and justified, further to the applicable, presumptive reasonableness standard of review: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 15, 25, 99.

[5] Contrary to the Applicant's understanding, however, it is not the role of the reviewing Court to reweigh the evidence that was before the decision maker, nor to ask itself what decision the Court would have made instead: *Vavilov*, above at paras 15, 83, 125.

[6] Although the Applicant raises several granular issues, I find he has met his onus of showing that the Decision is unreasonable in two respects. First, the Officer misapprehended or failed to account for central evidence submitted by the Applicant: *Vavilov*, above at paras 100,

126. The three incomplete versions of the certified tribunal record [CTR] submitted to the Court underscore the Officer's misapprehension. Second, as explained below, the Officer's analysis of the best interests of the child [BIOC] was unintelligible and unjustified. The Court finds it unnecessary to consider any other issues.

[7] For the more detailed reasons that follow, the Decision will be set aside and remitted to a different officer for redetermination.

II. Analysis

A. *The Office misapprehended or overlooked central evidence*

[8] I am satisfied that the evidence misapprehended or overlooked by the Officer is sufficiently central to warrant the Court's intervention.

[9] During the pendency of the H&C application, the Applicant provided Immigration, Refugees and Citizenship Canada [IRCC] with several updates regarding his situation, including the status of his motion to vary the custodial arrangements pertaining to his younger son [Custodial Motion] and his living arrangements in Canada, i.e. his address.

[10] None of the Applicant's email messages conveying this information was in the original CTR submitted to the Court. In addition, among other things, the CTR was missing certain Ontario court documents, a confirmation regarding the Applicant's prescription medication, and a biometric instruction letter that had been sent to the Applicant.

[11] As a further example, the second amended CTR submitted to the Court the day before the oral hearing contained a copy of a residential tenancy agreement at the end. The Applicant had attached the agreement to a November 1, 2021 email. In this email, he informed IRCC that he had changed his address because he sought more suitable living arrangements for his son. Until then, the Applicant had been living with his sister. The email also provided an update regarding the status of the Custodial Motion, which was anticipated to conclude with a hearing in January 2022.

[12] While the first amended CTR added several email communications from the Applicant, the second amended CTR still does not contain the November 1, 2021 email. Further, the Decision specifically says: "Zaafir stated he is living at his sister's house…" At the date of the Decision, the Applicant's evidence indicated that this no longer was the case.

[13] Accordingly, the second amended CTR, in particular, gives the Court the impression of an unacceptable attempt, without the benefit of an affidavit from the Officer, to bootstrap the record in terms of what the Officer is presumed to have considered.

[14] I add that these incomplete CTRs give rise to the specter of procedural unfairness, having regard to this Court's decision in *Togtokh v Canada (Citizenship and Immigration)*, 2018 FC 581 at para 16. Procedural unfairness will flow from a deficient CTR where a document is known to have been submitted by an applicant but is not in the CTR, and it is not clear whether it was before the decision maker. See also this Court's decision in *Rasasoori v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 207 at paras 13-14.

[15] Although this issue is sufficient in my view to dispose of the judicial review application, I turn next briefly to the BIOC analysis.

B. *The Officer erred when assessing the BIOC*

[16] I am persuaded that the BIOC analysis is unreasonable in at least three respects.

[17] First, the Officer's articulation of the analysis to be performed fails to take into account the Supreme Court of Canada's guidance that the best interests of a child who is directly affected are a "singularly significant focus" and must be treated as such: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 40-41.

[18] The Officer's general observation—that the best interests of a child are satisfied in most cases by being around their primary caregiver(s) and having their basic requirements met—is not consistent with the Supreme Court's guidance, nor does it address, at a minimum, what is in the specific child's best interests.

[19] While the Court does not disagree with the Officer's observation that a child's best interests are not necessarily determinative in considering an H&C application, nonetheless the Officer unreasonably fails to explain why it was considered a neutral factor in this case and how it was weighed cumulatively.

[20] Second, as alluded to above, at least one of the Applicant's email updates regarding the status of the Custodial Motion and the Applicant's change of address, the November 1, 2021

email, was not in any of the CTRs submitted to the Court. The original CTR did not contain any of the Applicant's email updates. While the Officer acknowledged the Custodial Motion, the Officer also indicated that "[t]here is little updates [*sic*] provided by [the Applicant]." It is unclear to the Court what updates, if any, the Officer considered. Mindful of the Supreme Court's guidance that judicial review is not a "line-by-line treasure hunt for error" (*Vavilov*, above at para 102), the incomplete CTRs nonetheless make it difficult for the Court to consider the reasonableness of the Officer's statement in the context of its review of the overall redetermination decision.

[21] Further, there is no indication that the Officer took into account the Applicant's changed living arrangements in the BIOC analysis and, hence, whether this could have had a bearing on it.

[22] Third, while the Officer acknowledges that the Applicant's younger son has a good relationship with his father and wants to see and live with his father, it is unintelligible, and hence unreasonable, to suggest, as the Officer here did, that these interactions could occur even if the Applicant were to return to the United Kingdom.

[23] In my view, these cumulative errors in the BIOC analysis also warrant the Court's intervention.

III. Conclusion

[24] For the above reasons, the Applicant's judicial review application is granted. The April 20, 2022 decision of the Officer refusing the Applicant's application for permanent residence in Canada on H&C grounds is set aside. The matter will be remitted to a different officer for redetermination.

[25] The Court declines, however, the Applicant's invitation to certify a question pursuant to paragraph 74(d) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Applicant made submissions at the hearing about the limited discretion of the Officer under section 25 of the *IRPA*, and urged the Court to certify a question about such discretion. The Applicant admitted that he did not submit a proposed question to the Respondent's counsel at least five (5) days prior to the oral hearing, or at all, contrary to the Court's guidance on certified questions in the *Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings*, dated June 24, 2022 (last amended October 31, 2023).

[26] In the circumstances, it is clear to the Court that there was no consensus regarding the language of a possible proposed question, nor was the Applicant's concern about the Officer's discretion presented in such a manner that would permit the Court to consider a question for certification. Further, the Court is of the view that, while the Minister's discretion to **examine** an H&C applicant's circumstances, including the BIOC, is limited because of the mandatory language "must" in subsection 25(1) of the *IRPA*, the Minister's discretion to **grant** permanent residence is not limited in the same manner, having regard to the permissive "may" in this provision on a plain reading of it.

[27] The above legislative provisions are reproduced in Annex “A” below.

JUDGMENT in IMM-3875-22

THIS COURT'S JUDGMENT is that:

1. The Applicant's judicial review application is granted.
2. The April 20, 2022 decision of the case processing officer refusing the Applicant's application for permanent residence in Canada on humanitarian and compassionate grounds is set aside.
3. The matter will be remitted to a different officer for redetermination.
4. There is no question for certification.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27.**
***Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27.**

Humanitarian and compassionate considerations — request of foreign national **25 (1)** Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35, 35.1 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35, 35.1 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger** **25 (1)** Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35, 35.1 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35, 35.1 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.
Judicial review **74** Judicial review is subject to the following provisions: … **(d)** subject to section 87.01, an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.	**Demande de contrôle judiciaire** **74** Les règles suivantes s'appliquent à la demande de contrôle judiciaire : … **d)** sous réserve de l'article 87.01, le jugement consécutif au contrôle judiciaire n'est susceptible d'appel en Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci.

FEDERAL COURT

SOLICITORS OF RECORD

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