Federal Court  Cour fédérale

Date: 20210303

Docket: IMM-5424-19

Citation: 2021 FC 193

Ottawa, Ontario, March 3, 2021

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

BRUNO DE OLIVEIRA BORGES
CLAUDIA CECILIA MACEDO DE ARAUJO

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are spouses. They and their two minor children are citizens of Portugal. The family has lived in Canada for about eight years. Both Applicants have worked in Canada and integrated into their community, while their children have lived most of their lives in Canada. Having been refused a work permit and visitor status extensions, the Applicants applied

for permanent residence within Canada, seeking exemption from the in-Canada selection criteria on humanitarian and compassionate grounds. A Senior Immigration Officer refused the application. The Applicants now seek judicial review of that decision.

[2] There is no dispute that the presumptive reasonableness standard of review is applicable to the matter before me: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10. I find that none of the situations rebutting such presumption is present in this matter. To avoid judicial intervention, the decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility: *Vavilov*, at para 99. The party challenging the decision has the onus of demonstrating that the decision is unreasonable: *Vavilov*, at para 100.

[3] The main issue for determination thus is the reasonableness of the Officer's decision in two respects, namely: (i) the best interests of the children, and (ii) the Applicants' establishment in Canada. The Applicants also object to the segmented approach they say the Officer adopted in assessing their application.

[4] For the more detailed reasons below, I find that the Officer's assessment of the children's best interests unreasonable and as such, the issue is determinative in the circumstances of this case. I therefore grant the Applicants' judicial review application.

II. Analysis

[5] As a preliminary matter, the documentary evidence contained in the certified tribunal record, including passport and birth certificate documentation, discloses that the male Applicant's full name is Bruno de Oliveira Borges. At the hearing, I drew the parties' attention to the omission of the word Borges from the male Applicant's name in the style of cause. They agreed an amendment is warranted to add it. Because the omission appears to be clerical in nature on the face of the record, I thus order the style of cause amended accordingly.

[6] Turning to the issue of the children's best interests, in my view the Officer erred in several respects rendering the decision unreasonable. First, while the Officer acknowledged at the outset of the assessment that the best interests of the child considerations should be given significant weight, the Officer concluded the assessment by giving them only "some positive weight" in this case. The Officer is correct that the children's best interests are not necessarily determinative in the assessment of a humanitarian and compassionate application. I nonetheless find that to accord them only "some positive weight" is unintelligible and contrary to the Supreme Court of Canada's instruction that 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" [emphasis added]: *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 [*Baker*] at page 864.

[7] Second, I find the Officer failed to apply the highly contextual, best interests principle in a manner responsive to each child's particular age, capacity, needs, maturity and level of

development: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 (CanLII), [2015] 3 SCR 909 [*Kanthasamy*] at para 35. Rather, the Officer focused unduly on the "care and support" provided by the parents. This is exemplified in my view by the Officer's finding that "**whatever adjustments their children will have to make**, they will do so with the care and support of both [their] parents." [Emphasis added.] On its face, this finding evinces a failure to identify and define the children's interests and needs, and to examine them with a great deal of attention: *Kanthasamy*, above at para 39. Further, this finding does not demonstrate that the Officer determined the likely degree of hardship to each child in this case caused by the parents' removal and weighed such degree of hardship, together with other factors favouring or disfavouring the removal of the parents: *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 6.

[8] Contrary to the Respondent's argument, I find the Officer neither framed nor identified the interests and needs of the children in any meaningful way. Instead, the Officers' reasons are premised on the assumption that the family would be returning to Portugal, and that the children's best interests would be served with their parents' care and support, rather than identifying and giving those interests significant weight: *Zima v Canada (Citizenship and Immigration)*, 2019 FC 986 at para 22.

[9] Further, to the extent the Officer was of the view there was no objective evidence that the children would be unable to attend school, obtain health care and participate in extra-curricular activities, I find this highlights the Officer's failure "to ask the question the Officer is mandated to ask: What is in [each] child's best interest?": *Sebbe v Canada (Citizenship and Immigration)*,

2012 FC 813 [*Sebbe*] at para 16. This is especially so in the case of the 7-year old child who came here at 1 year and essentially has known no other life other than the one in Canada. As noted in the same paragraph of *Sebbe*, it is perverse to suggest that a child's interests in remaining in Canada are balanced if the alternative meets their basic needs.

[10] Third, I find there is no justification or intelligibility in equating the adaptability of 4- and 1-year olds to that of children who are 10 and 7 years of age.

[11] Fourth, I also find the Officer's opinion that it would be in the best interests of the children to be reunited with their family in Portugal lacks transparency. The evidence on record indicates that the male Applicant, during his formative years, was separated from his father and two older brothers when they moved to another country for about twelve years; hence, he was never close to them. It thus is unclear what family the Officer had in mind regarding reunification and how this would be in the children's best interests.

III. Conclusion

[12] For the above reasons, I therefore grant the Applicants' judicial review application. The Officer's decision is set aside, including the reasons, for redetermination by a different Officer.

[13] Neither party raised a serious question of general importance for certification and I find that none arises.

JUDGMENT in IMM-5424-19

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to add the word Borges to the male Applicant's name so that it reads: Bruno de Oliveira Borges.
2. The Applicants' judicial review application is granted.
3. The Senior Immigration Officer's decision is set aside, including the reasons, for redetermination by a different Officer.
4. There is no question for certification.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

***Immigration and Refugee Protection Act,* SC 2001, c 27**

Application before entering Canada **11 (1)** A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**Visa et documents** **11 (1)** L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
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 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 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 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 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.

Immigration and Refugee Protection Regulations, **SOR-2002-227**

Permanent resident	**Résident permanent**
6 A foreign national may not enter Canada to remain on a permanent basis without first obtaining a permanent resident visa.	**6** L’étranger ne peut entrer au Canada pour s’y établir en permanence que s’il a préalablement obtenu un visa de résident permanent.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5424-19
STYLE OF CAUSE:	BRUNO DE OLIVEIRA BORGES, CLAUDIA CECILIA MACEDO DE ARAUJO v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO (VIA TELECONFERENCE)
DATE OF HEARING:	DECEMBER 7, 2020
JUDGMENT AND REASONS:	FUHRER J.
DATED:	MARCH 3, 2021

APPEARANCES:

Naseem Mithoowani	FOR THE APPLICANTS
James Todd	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Naseem Mithoowani Mithoowani Waldman Immigration Law Group Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT