Federal Court  Cour fédérale

Date: 20230612

Docket: IMM-4581-20

Citation: 2023 FC 827

Ottawa, Ontario, June 12, 2023

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

MICHEL CAROLINA ORTIZ DE LA CRUZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This Applicant seeks judicial review of a decision made by a Senior Immigration Officer [Officer] on September 18, 2020 denying her application for permanent residence based on humanitarian and compassionate (H&C) grounds.

[2] For the reasons that follow, I will allow this application.

II. **Background**

[3] The Applicant is a citizen of the Dominican Republic. Prior to arriving in Canada, she experienced severe domestic violence at the hands of her former partner. After the Applicant became pregnant, she tried to leave the relationship but remained fearful for her safety.

[4] Leaving behind her five month-old child in the care of her mother, the Applicant ultimately decided to leave for Canada, where her sister is a permanent resident.

[5] The Applicant arrived in Canada in May 2014 on a study permit. Following her arrival, she completed a diploma in travel and tourism and worked as a floral designer.

[6] The Applicant had a second child in January 2017. She is raising that child as a single mother.

[7] The Applicant continued to work odd jobs until March 27, 2019 when her temporary residence status expired.

[8] The Applicant has also been engaged in litigation with her ex partner with respect to custody of her first child, who remains in the Dominican Republic.

[9] In February 2019, the Applicant applied for permanent residence on H&C grounds citing the best interests of her 3-year-old child (BIOC), establishment, and the hardship she would face upon returning to the Dominican Republic.

III. **Decision under Review**

[10] In assessing establishment, the Officer acknowledged the level of establishment achieved by the Applicant through her employment, education, volunteering, and friendships in her community. The Officer weighed those factors positively, but ultimately found that the Applicant's level of establishment was not out of the ordinary for an individual in the Applicant's circumstance. The Officer also found that the Applicant's ties to Canada were no greater than the Applicant's ties to the Dominican Republic.

[11] The Officer concluded that the Applicant did not put forward enough information to demonstrate that the circumstances for her extended residence in Canada were "beyond her control" and weighed this factor negatively against the Applicant.

[12] With respect to the BIOC, the Officer agreed that it was in the best interests of Eric that he remain with his mother. The Officer also acknowledged that Eric has made friends and established emotional connections in Canada. However, the Officer maintained that accompanying his mother to the Dominican Republic would not adversely affect him. The Officer reasoned that although the Applicant's son would face some difficulties in adapting to life in the Dominican Republic, children are "resilient when it comes to change".

[13] The Officer also noted that Eric has a half-brother and grandmother in the Dominican Republic who may be able to assist and support him. The Officer concluded that the Applicant had not demonstrated that living conditions in the Dominican Republic would be of "such a substandard nature such as to place his wellbeing in jeopardy".

[14] In considering hardship, the Officer found the Applicant would not face economic hardship or gender discrimination in the Dominican Republic because their was a lack of evidence on file demonstrating the Applicant personally experienced poverty, unemployment or gender discrimination while previously in the Dominican Republic. The Officer stated that the combination of having grown up in the Dominican and the skills she acquired in Canada would help the Applicant in re-establishing herself in the Dominican.

[15] Finally, the Officer acknowledged the submissions put forth by the Applicant stating that she could not be supported by her mother. However, the Officer concluded that this may still be possible given that the Applicant had placed her mother's address as her last known address in the Dominican Republic.

IV. **Issues and Standard of Review**

[16] The Applicant submits the Decision is unreasonable, asserting the following issues: (i) the Officer's establishment analysis failed to properly engage with the Applicant's level of establishment, (ii) the Officer ignored material evidence with respect to adverse country conditions resulting in a flawed hardship analysis, and (iii) the Officer failed to conduct a proper BIOC analysis.

[17] The standard of review presumptively is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]. While there are certain exceptions to this presumption, they are not present in this application.

[18] The Decision as a whole is to be considered when assessing reasonableness. Any shortcoming in the Decision must be serious; it must be more than merely superficial or peripheral to the merits of the decision: *Vavilov* at para 100.

[19] For the reasons below, I am persuaded that the Applicant has met her onus. I find that the determinative issue is the unreasonableness of the BIOC analysis, which is therefore the only issue I will address.

V. **Analysis**

[20] The treatment of Eric's best interests is the determinative issue in this judicial review.

[21] The Applicant submits that the Officer's BIOC analysis contains a number of reviewable errors. Based on the record and submissions before this Court, I agree, and find the BIOC analysis was not given the sufficient and careful attention required.

[22] Subsection 25(1) of the *Immigration and Refugee Protection Act* ("*IRPA*") directs officers considering applications for humanitarian and compassionate relief to consider "the best interests of the child directly impacted."

[23] The Applicant's submissions on this issue are primarily, that the Officer erroneously conflated a lack of hardship with a BIOC analysis and failed to adequately consider Eric's best interests.

[24] As asserted by the Applicants, a lack of hardship cannot serve as a valid substitute for a BIOC analysis: *Singh v Canada (Citizenship and Immigration),* 2019 FC 1633 [*Singh*] at para 30.

[25] Based on a review of the Officer's BIOC analysis and conclusions, I am persuaded that the Officer undertook a significantly hardship-centric approach. This is evident from the several times the Officer cites a lack of hardship in the context of the BIOC analysis.

[26] First, the Officer stated that they were not satisfied that returning to the Dominican Republic would "adversely impact" the best interests of the child in this case and that any initial difficulties in adapting would be mitigated by the resiliency associated with his young age.

[27] The Officer then acknowledged the difference in the standard of living between Canada and the Dominican Republic stating that, "the applicant has not demonstrated that living conditions in the Dominican Republic are so serious as to directly compromise the best interests of this child".

[28] Finally, under the subheading "Conclusion" the Officer summarized their BIOC findings as follows:

> I am alive, alert and sensitive to Eric's situation and his best interests. I acknowledge that he is happy and comfortable in Canada and the applicant does not believe he will have the same quality of life in the Dominican Republic, **however, from the evidence before me I am not of the position to accept that the quality of life Eric would have in the Dominican Republic would be of such a substandard nature such as to place his wellbeing in jeopardy**. I acknowledge that Eric may encounter initial difficulty adapting to life in the Dominican Republic, socially and economically, and I sympathise with his situation. However, I do not find that these initial difficulties would directly compromise the best interests of this child.
>
> [my emphasis].

[29] The Respondent counters that "context matters", and the Officer was merely responding to the submissions raised by the Applicant, the bulk of which were about the hardship her child would face in the Dominican Republic and otherwise, engaged in a BIOC assessment as delineated by the Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration*), 2015 SCC 61.

[30] I am persuaded however, that the Officer's flawed BIOC analysis mirrors the one in *Li v Canada (Minister of Citizenship and Immigration),* 2020 FC 848 where the Officer replaced the BIOC analysis with a hardship analysis and failed to consider the H&C factors in a broader sense. Madam Justice Pallotta held:

> While a hardship analysis can be part of a BIOC analysis, it cannot replace a BIOC analysis: *Osun v Canada (Citizenship and Immigration),* 2020 FC 295 at para 21, citing *Singh v Canada (Citizenship and Immigration),* 2019 FC 1633 at para 30 and *Patousia v Canada (Citizenship and Immigration),* 2017 FC 876 at paras 53-56. On judicial review, the Court should be satisfied that the decision-maker considered not only hardship, but also the H&C factors in the broader sense: *Marshall v Canada (Citizenship and Immigration),* 2017 FC 72 at para 33. I am not

> satisfied that the Officer did so here when considering the best interests of the children.

[31] As was the case in *Osun v Canada (Citizenship and Immigration)*, 2020 FC 295, [*Osun*] the Officer here rendered a BIOC analysis so closely tied to a hardship analysis that the two are practically indistinguishable to this Court, undermining the transparency of the Decision as a whole.

[32] In *Osun*, Justice Diner succinctly summarized the importance of delineating between hardship and other factors in a BIOC analysis:

> [23] This is not to say that the hardship (or lack thereof) of leaving Canada and returning to one's home country cannot be a central consideration in an H&C analysis. Indeed, it is often one of the key factors mixed into the H&C recipe. However, those ingredients must be identified when it goes into the mix and not disguised or conflated with others – particularly BIOC. As Justice Abella wrote in *Kanthasamy*, since "[c]hildren will rarely, if ever, be deserving of any hardship', 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": *Hawthorne*, at para 9 (at para 41) Clearer delineation is needed to allow a Court to confirm a decision maker reasonably considered all relevant factors.

[33] The BIOC analysis is also undermined by other errors.

[34] I find it was an error for the Officer to speculate that any difficulties Eric would face would be mitigated by his young age alone: *Singh v Canada (Citizenship and Immigration)*, 2019 FC 1633 at para 31; *Edo-Osagie v Canada (Citizenship and Immigration)*, 2017 FC 1084 at paras 27-29.

[35] Further, rather than explaining how removal to the Dominican Republic was in Eric's best interests, the Officer speculates that his six-year-old half-brother and grandmother may be able to "assist and support him and the related linguistic, social and emotional challenges that he may experience upon his integration into his new community".

[36] There was no evidence in the record to suggest that the Applicant's mother or her six-year old son would be able to provide Eric any material support. On the contrary, the submissions before the Officer were that the Applicant's mother lives in a small home and would be unable to accommodate her and Eric.

[37] As these errors are sufficient to require the Decision be set aside and the application be redetermined, I need not address the remaining issues relating to the Applicant's establishment in Canada and the hardship she would face if returned to the Dominican Republic.

VI. **Conclusion**

[38] For all the foregoing reasons, the Decision is set aside and the application is remitted for redetermination by a different officer.

[39] No serious question of general importance was proposed by the parties for certification and none arise on the facts of this case.

JUDGMENT in IMM-4581-20

THIS COURT'S JUDGMENT is that:

1. This application for leave and judicial review is allowed.

2. The decision is to be returned to a different officer for redetermination.

3. There is no serious question of general importance to certify.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4581-20
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