

Federal Court



Cour fédérale

**Date: 20230616**

**Docket: IMM-7039-22**

**Citation: 2023 FC 848**

**Toronto, Ontario, June 16, 2023**

**PRESENT: The Honourable Mr. Justice Southcott**

**BETWEEN:**

**PRASHANT MONGA  
KANU MONGA  
VIRAAJ MONGA  
YUVRAAJ MONGA**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGEMENT AND REASONS**

**I. Overview**

[1] This is an application for judicial review of a decision of a Senior Immigration Officer [Officer], dated June 20, 2022 [the Decision], in which the Officer refused the Applicants'

application for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds.

[2] As explained in greater detail below, this application is allowed, because I find that the Officer performed an unreasonable analysis of the best interests of the children [BIOC].

## II. **Background**

[3] The Applicants are a family of four including two children, all citizens of India. The Principal Applicant [PA] entered Canada as a visitor in July 2018, with the rest of the Applicants joining him in September 2018. They all made a claim for refugee protection in November 2018, after they determined that the situation in India, which they claimed was jeopardizing the PA's safety, was not improving.

[4] The Applicants' refugee claim centred on the fact that they faced persecution by the Rashtriya Swayamsevak Sangh [RSS], which is a right-wing Hindu nationalist group; the Bharatiya Janata Party [BJP], which is the political arm of the RSS and the ruling party in India; and the police in Haryana where they lived. The Applicants alleged they faced persecution from these groups based on the PA's political opinion and activism as a member of the Indian National Lok Dal [INLD] party and his anti-BJP political activism.

[5] The PA claimed that he had been pressured and harassed to cease his political activism, that his business was targeted and regularly sabotaged, that he was unlawfully apprehended by

the police and kept in captivity for three days during which he was badly beaten and starved, and that his family was threatened if he refused to publicly apologize and join the BJP.

[6] The Applicants further claimed that they continued to be threatened and harassed, after the PA fled their home in Haryana to New Delhi, and that the Haryana police came looking for him in New Delhi. They claimed that this harassment continued even after the PA left India and that those looking for the Applicants in India continued to do so after they all arrived in Canada.

[7] The Applicants' claim for refugee protection was denied by both the RPD and the RAD. While the RPD and RAD accepted that the PA was a member of the INLD and that he was harassed and arrested for his political opinion and activism, the determinative issue was that a viable internal flight alternative [IFA] existed in Kolkata.

[8] After their refugee claim was denied, the Applicants filed an H&C application. They based their application on establishment in Canada, the hardship faced by the PA as a political activist in India, and the BIOC.

### III. **Decision under Review**

[9] In assessing the merits of the H&C application, the Officer first analyzed the country conditions and hardship that the Applicants would face in India. While accepting that there are political differences in India, the Officer concluded that the evidence did not demonstrate that the PA is still a member of the INLD, that he is currently being sought in India, or that he would continue to be targeted upon returning to India.

[10] The Applicants submitted that they would have a difficult time establishing themselves in Kolkata (the IFA identified by the RPD and RAD) due to the language and culture there differing from that in Haryana. They submitted that they do not speak, read, or write in the Bengali language, which is the native language in Kolkata, and that English is not widely used there. While the Officer accepted that Bengali is the native language in Kolkata and that learning the language may take some effort, the Officer concluded that the evidence did not demonstrate that the Applicants would be unable to attend Bengali language classes upon their return to India.

[11] The Applicants' next submission related to hardship was that the PA would only be able to earn a meagre income in Kolkata. The Officer found that the evidence provided did not demonstrate how the Applicants' conclusion on this point was reached and that, while the PA did not currently have employment prospects waiting for him in India, the evidence did not demonstrate that he would be unable to secure suitable employment upon his return. Further, after reviewing the PA's and his wife's work history in India and Canada, the Officer determined that, absent evidence to the contrary, it was reasonable to conclude that they would be able to utilize their skills and work experience to assist them with gaining employment in Kolkata.

[12] The Officer also noted that the PA and his wife have a combined total of three parents and five siblings residing in India and concluded that, while none of them reside in Kolkata, the evidence provided did not demonstrate that these family members were unable or unwilling to assist the Applicants in their return to India, if only emotionally. The Officer also noted that there was no evidence to suggest that the Applicants could not obtain assistance from a community-based organization to assist with their re-integration efforts.

[13] Turning to the BIOC, the Officer first considered the Applicants' submission that the children would have to attend a government school in India, because they could not afford a private school, and that the education there would be poor. The Officer observed that one article submitted by the Applicants discussed the quality of primary education in India, but the Officer noted that at least one, and possibly both, minor applicants (aged 17 and 13, respectively) would be of secondary school age. As such, the Officer found that the evidence did not demonstrate that they would be unable to obtain adequate secondary school educations in India.

[14] The Officer accepted that the language of instruction at schools in Kolkata is Bengali, which the children do not speak. However, the Officer concluded that the evidence provided did not demonstrate that the children would be unable to attend Bengali language classes to help them adjust.

[15] The Applicants also submitted that the children would suffer from significant social isolation in Kolkata, because it would be difficult for them to establish social groups due to the language barrier, and that there would be deleterious mental and physical health impacts on the children. However, the Officer found there to be insufficient evidence to demonstrate how these conclusions were reached, beyond mere speculation.

[16] Finally with respect to BIOC, the Officer addressed the eldest child's submission that he aspires to become a plumber. The Officer found that there was no evidence to demonstrate that he must be trained and become a plumber in Canada and that, absent evidence to the contrary, it

was reasonable to conclude that the child could obtain the adequate training and be able to become a plumber in India.

[17] The last factor analyzed by the Officer was establishment. As the Applicants had been in Canada for more than three years, the Officer noted that it was expected that they would have achieved some level of establishment during that time. However, the Officer found that the evidence did not demonstrate that they would be unable to re-establish themselves in India.

[18] Overall, the Officer found that the Applicants' circumstances did not support an H&C exemption.

#### IV. **Issues**

[19] Based on the parties' submissions, this application for judicial review raises the following issues (re-articulated somewhat from the Applicants' formulation):

- A. Did the Officer err in failing to reasonably assess the BIOC?
- B. Did the Officer err in their hardship analysis?
- C. Did the Officer unreasonably discount the Applicants' level of establishment?

[20] As all of these issues challenge the reasonableness of the Decision, the parties agree (and I concur) that the applicable standard of review is reasonableness (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65).

V. Analysis

[21] My decision to allow this application for judicial review turns on the Officer's BIOC analysis, in particular in relation to the evidence and submissions surrounding the fact that the minor Applicants do not speak Bengali, the principal language in the IFA of Kolkata.

[22] As the Applicants note, the Officer's analysis of the impact of the language barrier upon the minor Applicants' education is limited to the following paragraph:

The applicants stated that the language of instruction at schools in Kolkata is Bengali, which the children do not speak. While this may be accurate, the evidence provided does not demonstrate that the children would be unable to attend Bengali language classes to help them adjust.

[23] The Applicants argue that this reasoning is unintelligible, as it would not be realistic to expect a child with no knowledge of the language to be able to successfully attend school in that language at a secondary and post-secondary level (the children being 13 and 17 years old at the time of the H&C application) simply because they are enrolled in introductory Bengali language classes. The Applicants submit that it would realistically take years of study in the language to be able to successfully take courses at the secondary or post-secondary level in that language.

[24] As noted in *Rahman v Canada (Citizenship and Immigration)*, 2022 FC 1259, a child's inability to speak the language of the country of return is a compelling factor in a BIOC analysis, as it impacts the child's ability to cope with learning a new language, school system and culture (at para 27, citing *Bautista v Canada (Citizenship and Immigration)*, 2014 FC 1008 at para 21). However, the Officer disregards this factor's impact upon the minor Applicants' education

because the Applicants failed to adduce evidence that they would be unable to attend Bengali language classes. The Officer's reasoning appears to be that the availability of language classes would sufficiently mitigate the impact of this factor such that it required no further consideration. I find compelling the Applicants' argument that this reasoning is not realistic and therefore agree with the Applicants' submission that the Officer's treatment of this factor is unintelligible.

[25] I also find the Officer's analysis of the impact of language on the children's ability to socially integrate in Kolkata to be problematic. The Applicants argued that the children would suffer from significant social isolation in Kolkata, because it would be difficult for them to establish social groups due to the language barrier. In rejecting this submission, the Officer reasoned as follows:

... insufficient evidence has been provided to demonstrate how the applicants came to this conclusion, beyond mere speculation. While it may be accurate that the children currently do not have friends in Kolkata, the evidence provided does not demonstrate that they would be isolated, unable to make friends, unable to join sports teams or community groups in an effort to establish relationships, or that their best interests would be compromised.

[26] However, the Applicants provided as evidence in support of their argument a study that concluded, among other things, that language fluency is a major determinant of successful social integration. The Officer's finding, that the Applicant had provided insufficient evidence beyond mere speculation to support their submission that the children's language barrier would result in significant social isolation, suggests that the officer overlooked this evidence, which is a reviewable error (see *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1999] 1 FC 53, 1998 CanLII 8667 (FC)).



[27] BIOC considerations are not determinative of an H&C application. However, they are sufficiently important that the Officer's flawed treatment of the effects of the children's language barrier (which, as noted above, is in turn a compelling factor in a BIOC analysis) renders the Decision unreasonable. This application for judicial review will therefore be allowed, the Decision set aside, and the H&C application remitted to another officer for redetermination. It is therefore unnecessary for the Court to consider the Applicants' other arguments challenging the Decision.

[28] Neither party proposed any question for certification for appeal, and none is stated.

**JUDGMENT in IMM-7039-22**

**THIS COURT'S JUDGMENT is that** this application for judicial review is allowed, the Decision is set aside, and the matter is remitted to another officer for redetermination. No question is certified for appeal.

"Richard F. Southcott"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-7039-22

**STYLE OF CAUSE:** PRASHANT MONGA KANU MONGA VIRAAJ  
MONGA YUVRAAJ MONGA v. THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JUNE 14, 2023

**JUDGMENT AND REASONS:** SOUTHCOTT J.

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