Federal Court  Cour fédérale

Date: 20230822

Docket: IMM-9744-22

Citation: 2023 FC 1127

Toronto, Ontario, August 22, 2023

PRESENT: Mr. Justice Diner

BETWEEN:

RENBIN WEN
ZHIZHEN WANG

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] The Applicants challenge the denial of their application for permanent residence under a humanitarian and compassionate [H&C] exemption pursuant to section 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, which I granted from the bench, promising these reasons to follow.

[2] The Applicants are from China, and came to Canada in December 2019 to visit their grandson. They had intended to stay only for a few months, but were delayed with the onset of Covid-19. They primarily provided care for their grandson after his mother left the family home in March 2021. They have maintained their status as visitors throughout their stay, ultimately filing their H&C application in December 2021 so they could live with their son and continue to care for their grandson, while their son worked.

[3] The Officer found a lack of exceptional circumstances to grant the H&C, noting little evidence of establishment beyond the Applicants' relationship with their immediate family. While acknowledging the psychologist's report [Report], which found that the Applicants were essential to the well-being of their grandson, the Officer found little evidence that their son (his father) would be unable to care for their grandson – both financially and otherwise. Finally, the Officer rejected submissions regarding adverse post-Covid and general country conditions in China.

II. Analysis

[4] The standard of review for the Decision is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). The Applicants argue that the Decision was unreasonable for its failure to be alert, alive or sensitive to their grandson's best interests: a single paragraph was not sufficiently responsive to the significant evidence presented, including the Report that concluded that they "are essential to the well-being of their grandson".

[5] The Minister counters that the Officer reasonably considered the best interest of the child [BIOC], balancing it with other considerations in the Applicants' H&C application, relying primarily on *Gao v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1238 at para 31 [*Gao*] for the proposition that (i) the grandparents are not his primary caregivers though they may claim to be, and (ii) separation between a child and extended family is undeniably difficult, but that this hardship alone does not render the refusal of H&C relief unreasonable. The Minister contends the Applicants have not submitted evidence of "a highly interdependent relationship" between them and their grandson, as required by this Court's jurisprudence for the BIOC involving grandparents (*Toor v Canada (Citizenship and Immigration)*, 2022 FC 773 at paras 29-30 [*Toor*]).

[6] This finding, however, does not account for compelling evidence of a highly interdependent relationship noted in the Report, which the Officer failed to reasonably consider. Although the Officer accepted that the psychologist was an expert and acknowledged the Report's statement that the Applicants are essential to the well-being of their grandson, the Officer's decision to nonetheless give the BIOC little weight because "the [a]pplicants' removal would not compromise the best interests of their grandson" is problematic in light of the findings of that Report, and – in the absence of an analysis of the BIOC elements raised – failed to justify the Decision in favour of this and other merely conclusory statements.

[7] To take another example of one such conclusory statement about the child's interests, the Officer notes "this child will still have his father to support his emotional, financial and other needs and to take care of him". This statement, similar to that quoted in the paragraph above, lies

in direct contradiction to the Report, which indicates that the child's healthy development could be at risk if his father, the only remaining parent, were left "stressed and preoccupied with caregiving, working, and managing the household" without his grandparents. The Report rather indicates the child's development is already at risk as a result of his mother's absence, and that the Applicants' presence and caregiving is essential to mitigate this impact, thus showing that the child has special needs necessitating the additional care provided by a grandparent.

[8] Of course, the Officer did not need to take at face value or adopt the findings of the Report. However, given that the BIOC was the central aspect to the H&C in this case, the Officer had to sufficiently address the evidence and explain why he disagreed with or placed little weight on it. The Officer failed to do this. Failure to deal with these issues in H&C applications involving grandparents have been found to be reviewable errors (see, for instance *Toor* at para 29, citing *Le v Canada (Citizenship and Immigration)*, 2022 FC 427 at paras 18, 22).

[9] The limited discussion of the BIOC acknowledges that the child has greatly benefitted from the Applicants' presence in Canada so far, but fails to consider whether it would be in the child's best interests that his grandparents now remain with him in Canada (*Jimenez v Canada (Citizenship and Immigration)*, 2015 FC 527 at para 27). Indeed, the Officer's comments that the Applicants can still pursue "regular immigration streams" such as Family Class sponsorship or a super visa – all uncertain replacements at best – are indicative of the fundamental flaw.

[10] Again, that error occurred when the Officer failed to address the proposed solution submitted as being in the child's best interests, choosing rather to look at others, which were not

the subject of the application. In deflecting from the application that had been submitted and pointing out other avenues that could have been pursued, the Officer failed to properly analyse the impact of the Applicants' removal on the child's best interests, given his particular circumstances, as supported by the application at hand, and the evidence submitted with it (*Charles v Canada (Citizenship and Immigration)*, 2014 FC 772 at paras 32 and 60).

[11] To turn to one further instance of this issue, the psychologist writes that the child "is already sensitized to loss given his mother's precipitous disappearance. Should [the Applicants] likewise depart from his daily life, he will suffer greatly as this will feel precipitous and catastrophic to him. He is likely to become depressed."

[12] In the same vein, the psychologist's Report emphasizes the grandparent's role as the primary caregiver of the child, by namely "provid[ing] essential support and security" at an early stage of the child's development. None of these elements were discussed, in favour of the finding that the father will be able to care for him. Ultimately, the Officer's BIOC analysis shows it failed to examine the child's interests "with a great deal of attention" (*Legault v Canada (Citizenship and Immigration)*, 2002 FCA 125 at paras 12 and 31; see also *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 39).

[13] At the hearing, the Respondent raised the argument that there was insufficient evidence before the Officer. That argument simply cannot be sustained. The Applicant provided a extensive documentation package as part of the H&C submissions, which included the lengthy and thorough Report, along with a subsequent addendum from the psychologist, containing

further details on the psychological impact on the child. The application also included evidence addressing why alternate immigration streams were not viable.

[14] Moreover, the Respondent raised *Luciano v Canada (Citizenship and Immigration)*, 2019 FC 1557 at paras 41, 43 [*Luciano*] to highlight the exceptional nature of H&C applications. However, in *Luciano*, the Court found the suggestion of alternative immigration streams unreasonable, especially because the assessment of these alternatives alone appeared to outweigh the Applicant's evidence on their family ties and the BIOC (*Luciano* at para 44).

[15] While it is well established that a BIOC analysis is not determinative of the outcome of an H&C application (*Li v Canada (Citizenship and Immigration)*, 2020 FC 754 at para 56), a flawed analysis of the BIOC can render a decision unreasonable (*Monga v Canada (Citizenship and Immigration)*, 2023 FC 848 at para 27). In this case, the Officer's consideration of the best interests of the Applicants' grandson was unreasonable and constitutes a fatal flaw that is sufficiently serious to set aside the Decision (*Vavilov* at para 100).

III. Conclusion

[16] In sum, the evidence submitted by way of the Report pointed to interdependency between the child and his grandparents, their primary caregiving role in the child's life, and the serious risk of psychological harm to the child should they be separated. The Officer failed to engage with this evidence in his decision. Given that the BIOC was the key issue raised in the application, and its analysis was fundamentally flawed, I will return the matter for redetermination. The parties agree that the case raises no question for certification.

JUDGMENT in file IMM-9744-22

THIS COURT'S JUDGMENT is that:

1. The judicial review is allowed.

2. No question for certification arises.

3. There is no award as to costs.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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