Federal Court  Cour fédérale

Date: 20200210

Docket: IMM-1544-19

Citation: 2020 FC 223

Toronto, Ontario, February 10, 2020

PRESENT: Mr. Justice Diner

BETWEEN:

VESNA GALUSIC AND KRISTIAN GREENE (BY HIS LITIGATION GUARDIAN VESNA GALUSIC)

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] This application judicially reviews a decision [Decision] of an Inland Enforcement Officer [Officer] of the Canada Border Services Agency [CBSA] refusing the Applicants' request to defer their removal from Canada to Croatia. While the Officer wrote a relatively lengthy Decision as far as deferral decisions go, he failed to properly engage with the evidence

regarding the short-term best interests of the child. The specifics of that evidence, and why the Decision is unreasonable, are set out below.

I. Background

[2] The Applicants are dual citizens of Croatia and Bosnia and Herzegovina. They arrived in Canada and claimed refugee status in 2011. The principal Applicant, Ms. Galusic, is 46 years old and employed as a hostess at a restaurant in Niagara Falls, Ontario. Kristian, her son and the minor Applicant, is now ten years old and enrolled in school.

[3] In May 2018, the Refugee Protection Division [RPD] refused their claim. In August 2018, they submitted an application for permanent residence on humanitarian and compassionate grounds [H&C]. At the time of the Decision, that H&C application had yet to be decided. In December 2018, the Applicants requested a deferral of their removal. On February 18, 2019, they were served with a Direction to Report for removal to Croatia on March 13, 2019. On February 21, 2019, the Applicants submitted a further request for deferral. On March 2, 2019, the Applicants submitted additional written submissions and documents in support of their request.

[4] The Applicants argued in the deferral requests that removal would disrupt Kristian's school year and that, as he arrived in Canada at the age of two, he had insufficient proficiency in Croatia's languages (Croatian, Bosnian, and Serbian) to continue school there. The Applicants

also argued that he has been diagnosed with anxiety related to their denial of refugee status and that, as a result of this and other factors, deportation is not in his best interest.

[5] In terms of Kristian's mental heath, the Applicants' documents included a letter from a Primary Health Care Nurse Practitioner detailing his anxiety and stress. In addition, a report from a pediatric psychiatrist states the child has "adjustment disorder with severe anxiety related to the immigration issues." The Applicants also included statistics showing that the likelihood of an H&C application's success is much lower if an applicant is removed prior to its processing.

[6] On March 6, 2019, the Officer refused the Applicants' deferral request. That Decision is now under review.

II. Decision under Review

[7] The Officer makes the following preliminary notes: the CBSA has an obligation to enforce removal orders as soon as possible; an enforcement officer has little discretion to defer removal; and when an officer exercises this discretion, he or she must still enforce the removal order as soon as possible.

[8] The Officer then refers to counsel's submission letter that seeks a five-month deferral to evaluate Kristian's mental health concerns and allow him to complete his school year or, in the alternative, a longer deferral to allow for the assessment of their H&C application.

[9] The Officer points to the relevant instruction guide and policy manual, noting both documents state that outstanding H&C applications alone do not form a basis to defer removal.

[10] The Officer then refers to the Immigration, Refugees and Citizenship Canada [IRCC] website stating that H&C applications may take up to 30 months to process. Based on this and the submission date, the Officer notes insufficient evidence to show that their H&C decision is imminent. The Officer acknowledges IRCC statistics provided by the Applicants regarding higher H&C approval rates for individuals still in Canada than those removed. However, the Officer notes that every H&C application is assessed individually and on its own merits, and that Applicants' counsel's statements in this regard are "speculative in nature." Ultimately, he notes that an H&C application is not an impediment to removal.

[11] The Officer acknowledges various facts demonstrating that the Applicants have established themselves, including having spent seven years in Canada, Ms. Galusic's full-time work as a hotel restaurant hostess, Kristian's schooling, their volunteerism and support from community members.

[12] The Officer then reviews Kristian's best interests, noting that he is used to the Canadian education system and wants to complete the fourth grade in Canada. The Officer acknowledges the claim that he has insufficient proficiency in the languages spoken in Croatia to start school there, but notes that he attends a Serbian school where he learns the language, which he also speaks with his mother, observing this may attenuate his adjustment to school in Croatia. Further, the Officer observes that he will remain with his mother, and be close to his extended

family, who may be able to provide support. The Officer quotes from the psychological assessment, which indicates that Kristian is “very fidgety” and “overly anxious,” but comments that some anxiety is inherent in the removal process.

[13] Turning to the hardships Ms. Galusic and Kristian will face upon removal, the Officer acknowledges socioeconomic struggles but characterizes these as general issues, finding insufficient evidence to show personal issues, particularly in light of the transferrable skills gained in Canada, including for employment. Finally, the Officer states that the Applicants have had time to prepare for their removal since receiving their RPD refusal in May 2018 and their July 2018 removal order.

[14] While acknowledging the hardships and adjustments associated with removal from Canada, the Officer concludes that removal to Croatia would not expose the Applicants to unusual or undeserved hardship, and refuses to defer removal.

III. Analysis

[15] The Applicants assert that the Officer erred in (i) fettering his discretion, (ii) considering Kristian’s best interests, and (iii) misconstruing the evidence. In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court established that administrative decisions are presumptively reviewable on a reasonableness standard, unless legislative or rule of law exceptions apply, none of which do in this matter. According to this standard, the Decision must be read as a whole taking into account the context (*Vavilov* at

paras 85 and 89). The Court must be satisfied that the reasons justify the outcome and display the "hallmarks of reasonableness," namely justification, transparency, and intelligibility (*Vavilov* at paras 86 and 99). Finally, as this is an early judicial review of a deferral officer's decision post-*Vavilov*, and as the standard of review remains as it was prior to *Vavilov*, I will examine how the past jurisprudence considered the issues raised.

A. *The Officer did not err by fettering his discretion*

[16] The Applicants argue the Officer fettered his discretion by unreasonably focusing on whether the H&C decision was "imminent." They submit that this Court has recognized that H&C decisions need not be imminent to warrant deferral. The Applicants also submit that other factors – such as whether deferral would allow the child to complete the school year – must be considered.

[17] I do not agree that the Officer inappropriately focused on whether the H&C decision was imminent. An enforcement officer is bound by section 48 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], to execute a valid removal order. Officers have only very limited discretion to defer removal (*Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 at paras 49-51 [*Baron*]).

[18] The Chief Justice of this Court recently affirmed this limited discretion to defer, and explained that officers may only defer removal where there are "special considerations" or a "threat to personal safety" (*Forde v Canada (Public Safety and Emergency Preparedness)*,

2018 FC 1029 at para 36 [*Forde*]). The Chief Justice further clarified that "a removals officer is not entitled to defer removal where a decision on an outstanding application is unlikely to be imminent" (*Forde* at para 40). Thus, in light of this jurisprudence, the Officer's consideration of whether the H&C decision was imminent was appropriate.

[19] The Applicants further submit that the Officer inappropriately focused on the statistic that H&C applications may take 30 months, despite the Applicants having submitted their application through a special category – namely paragraph 25(1.21)(b) of the Act, which, in broad terms, exempts cases "whose removal would have an adverse effect on the best interests of a child directly affected" from waiting a year after the rejection of their refugee claim before having their H&C application considered.

[20] Once again, I disagree that this indicated any fettering of discretion. Although their H&C application was timely (i.e., it was submitted over one year before the Decision), the Applicants submitted no evidence to indicate that their H&C decision was imminent or that it would be rendered sooner than usual when filed pursuant to the paragraph 25(1.21)(b) exemption. Certainly, on its face and absent any other evidence, this exemption does not require expedited processing. Rather, it simply allows qualifying H&C applicants to avoid the usual one-year statutory waiting period contained in paragraph 25(1.2)(c) of the Act.

[21] Furthermore, contrary to the Applicants' assertions, the Officer did not err in characterizing their statements regarding the drop in acceptance rates after removal as "speculative." The Officer's full sentence noted that "every application is assessed individually

and on its own merits and the statements provided to this office are speculative in nature." While the Officer acknowledged the statistics, he also referred to his duties under the Act, and "that submission of an H&C application to Immigration and Refugees Canada is not meant to be an impediment to removal." These statements, in and of themselves, are not unreasonable. As Justice Boswell recently stated in *Barco v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 421 at para 26:

> As to the Applicants' submissions concerning the success rates of H&C applicants inside and outside of Canada, I agree with the Respondent. The Applicants ignore a logical explanation for these outcomes, which is that applicants with strong H&C factors may be less likely to be removed from Canada in the first place if they have received stage one acceptance or have other sympathetic and compelling evidence to support their H&C application. The Applicants have offered no explanation as to why this would not be so, and the Respondent's submissions regarding the success rates of H&C applicants inside and outside of Canada are persuasive.

B. *The Officer did not reasonably consider Kristian's best interests*

[22] The Applicants have persuaded me that there are reviewable errors in other aspects of the Decision. The first arises from the Officer's failure to engage with the evidence – medical and otherwise – related to the detrimental impact of removing Kristian five months before the end of the school year. This evidence included, as mentioned above, a report from a child psychiatrist and letters from a nurse practitioner and a teacher. The jurisprudence teaches that officers must consider immediate, short-term interests of children, but are not required to conduct a full-blown H&C assessment. I will briefly review this case law.

[23] The most cited case in the area is the Federal Court of Appeal [FCA] decision in *Baron*, where Justice Nadon stated that there "are a range of factors that can validly influence the timing of removal on even the narrowest reading of section 48, such as those factors related to making effective travel arrangements and other factors affected by those arrangements, such as children's school years and pending births or deaths" (*Baron* at para 51, citing *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148 at para 44 [Emphasis added]). Justice Nadon further stated that "an enforcement officer has no obligation to substantially review the children's best interest before executing a removal order" (at para 57).

[24] Recently, the FCA once again looked at the issue of deferrals in the context of children being impacted by a parent's removal. In *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 [*Lewis*], the Court reinforced the principles established in *Baron*, but found that the enforcement officer's treatment of the best interests the child (a Canadian-born daughter, around the same age as Kristian) to have been unreasonable. In examining the key post-*Baron* jurisprudence, Justice Gleason wrote for the Court at para 74:

> … I disagree with Mr. Lewis and the intervener that *Kanthasamy* requires that a full-blown best interests of the child analysis be undertaken before a child's parent(s) may be removed from Canada or that such children's best interests must outweigh other considerations in the analysis. In my view, the holding in *Kanthasamy* applies only to H&C decisions made under section 25 of the IRPA and, even there, does not mandate that the affected children's best interests must necessarily be the priority consideration.

[25] In *Forde*, the Chief Justice considered the above two FCA decisions, as well as *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286. He noted that pending

H&Cs are not a bar to removal and, as discussed above, that any officer discretion to defer is very limited and restricted to deferring for short periods of time in situations where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment. The Chief Justice noted that temporal limits apply to an officer's discretion to defer, even where "special considerations" warrant deferral (*Forde* at para 36).

[26] The Chief Justice also referred to *Danyi v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 112 [*Danyi*]. In that case, Justice Boswell noted that when looking at immediate and short-term interests of the children, they must be dealt with fairly and with sensitivity before enforcing a removal order (*Danyi* at para 34). In *Danyi*, which shares certain similarities in profile to this one, the Applicants requested a six-month deferral, pending resolution of their H&C application, based in large part on a psychiatrist's report stating that the stress would cause a relapse of childhood Post-Traumatic Stress Disorder [PTSD]. Justice Boswell, while noting many of the limitations on the enforcement officer summarized above, nonetheless found the officer failed to reasonably assess the child's best interests (at para 36):

> In this case, the Officer's assessment of Alex's mental health condition is problematic. Because enforcement officers must assess the short-term BIOC, the Officer was required to reasonably consider the psychiatric evidence about Alex's short-term interests. The psychiatric assessment states that Alex's return to Hungary would deprive him of his current sense of safety and stability since his past experiences there were highly traumatizing and hostile. The assessment found that his return would cause a relapse of his PTSD symptoms and would compromise his parents' ability to meet his emotional and physical needs. Given the psychiatrist's findings, the Officer's conclusion that removal "may cause a period of adjustment" for Alex cannot be justified because it is not responsive to Alex's short-term and present emotional, social, and psychological interests.

[27] Acknowledging that their scope is limited, deferrals can and do occur in special, compelling, and narrow circumstances. Finishing a school year certainly can on occasion fall into this category. As Justice Grammond wrote in *Iheonye v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 375, "[t]his must mean that being forced to change schools in the middle of the year may cause sufficiently serious prejudice" (at para 19).

[28] Other recent cases have similarly deemed refusals of deferral requests based on minor children to be unreasonable. In *Toney v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1018 [*Toney*], Justice Walker found that the officer had not reasonably considered the timing of the underlying H&C request, and the surrounding circumstances, in the context of the request for a short-term deferral.

[29] In *Ismail v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 845 [*Ismail*], Justice McDonald found at paragraph 16 that the officer failed to analyze the evidence of the short-term best interests of the child, and that simply "acknowledging" or "noting" it was insufficient. Justice McDonald further stated that notwithstanding the Chief Justice's statement in *Forde* that a removals officer is not entitled to defer where a decision is unlikely to be imminent, the officer was nonetheless required to meaningfully assess the short-term BIOC (*Ismail* at para 20). Similarly, in *Douglas v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 1148 [*Douglas*], Justice Gleeson found that that the officer did not meaningfully address the evidence of the short-term best interests of the child, but rather simply summarized it.

[30] Finally, in *Douglas v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 902, in finding a refusal to defer removal unreasonable, Justice Elliott reasoned as follows: "The Officer's cursory BIOC assessment is not at all robust. An adequate BIOC analysis would have examined whether there might be special considerations which, when combined with the pending H&C application, may have warranted the requested short-term deferral" (at para 38).

[31] Indeed, even in *Lewis*, where Justice Gleason carefully retraced the limited scope of deferral discretion through the line of prior jurisprudence of the Federal Courts, she nonetheless held that the officer's decision was unreasonable for failing to take the Canadian child's short-term interests into account and for engaging in pure speculation (regarding the child's ability to return to Canada).

[32] These cases affirm the narrow discretion to defer. However, narrow does not mean nil; the fact that the door to deferral is slightly ajar does not mean that officers must close it behind them in every case. Indeed, they must be particularly sensitive when deferral requests are based on BIOC. Children are, by definition, in their tender years, prone to falling back into negative cycles wrought by disruption and dislocation. Officers' reasons must therefore be responsive and sensitive. Length of reasons, repetition of arguments, and enumeration of evidence do not equal responsiveness. Nor do boilerplate concepts such as having had time to prepare for removal, facing a period of adjustment, or staying in touch through telecommunications.

[33] Boilerplate phrases by definition apply to all cases. No one can deny that heartache and difficulty are part and parcel of removal. But they are not responsive to the issue of short-term BIOC. Every child who is removed or whose parent is removed – even toddlers – will have had at least some time to prepare (or have their parents prepare for them), will be forced to go through a period of adjustment, and will in this day and age be able to appear on a cell phone or other digital screen, even from the farthest corners of the earth.

[34] These realities are all axiomatic of removal, but nothing more than general truths. They do not alone satisfy the requirement to assess the short-term best interests. Responsiveness means actually having listened to the parties' submissions and responded to the evidence: "[t]he principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties" (*Vavilov* at para 127). Of course, *Vavilov* concerned a young man rather than a child, and thus did not address BIOC. *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], and *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*], on the other hand, both directly addressed BIOC. *Kanthasamy* states (at para 35):

> The "best interests" principle is "highly contextual" because of the "multitude of factors that may impinge on the child's best interest": *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, at para. 11; *Gordon v. Goertz*, [1996] 2 S.C.R. 27, at para. 20. It must therefore be applied in a manner responsive to each child's particular age, capacity, needs and maturity: see *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181, at para. 89. The child's level of development will guide its precise application in the context of a particular case.
>
> [My emphasis.]

[35] And while *Baker* does not address "responsiveness" per se, Justice L'Heureux-Dubé's signature phrase of being "alive, attentive, or sensitive" to BIOC factors targeted a lack of responsiveness in decision makers' reasons. As discussed above, the scope of analysis permitted of officers for deferral is far narrower than the full-blown BIOC assessments at issue in *Kanthasamy* and *Baker*. Rather, deferral officers must only consider short-term best interests (*Lewis* at para 82; *Toney* at para 46). That can include finishing a school year during the requested period of deferral.

[36] Deferral submissions should thus shine a light on a narrow slice of the BIOC kaleidoscope, and not the full spectrum of factors often submitted with a section 25(1) application. The enforcement officer does not have the delegated authority to consider the complete set of factors. Instead, the officer need only engage with those narrow factors which impact the very near term among the multitude of factors that may impinge on the child's best interest. To extend a *Kanthasamy* analogy, to assess short-term BIOC, the officer only needs to focus through a telephoto lens, rather than the wide angle needed to assess the multitude of factors in a full H&C.

[37] Turning back from the law to its application to the circumstances under review, the Applicants requested a five-month deferral until the end of the school year. The Officer paid lip service to the documentation presented: he mentioned the assessments of the child psychiatrist and the nurse practitioner, and quoted certain passages from the evidence. He also cited a significant portion of counsel's cover letter to the deferral request. As we have seen in the comments on "responsiveness" in *Vavilov*, decisions must do more than pay lip service to the

evidence. As the *Vavilov* majority observes, "Reasons that 'simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion' will rarely assist a reviewing court in understanding the rationale underlying a decision and 'are no substitute for statements of fact, analysis, inference and judgment'. … A decision will also be unreasonable … if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point" (*Vavilov* at paras 102 and 103, citations omitted).

[38] The Officer acknowledged several times that removal may cause a "period of adjustments" and, after selectively citing certain passages from the evidence, explained that some anxiety was a natural result of the removal process and that it would be stressful to return to a country in which Kristian had not lived for many years.

[39] These are all true, tried and trite aphorisms. They are boilerplate. They may very well be apt in deciding not to grant a short-term deferral, but should only be considered after having actually addressed the issues. It is simply not enough to observe that anxiety and stress are inherent in the removal process. Rather, the Officer should have engaged with the specific evidence provided to support the benefits of staying to the end of the school year and avoiding further mental health issues. To take one example, the psychiatrist's report addressed both the diagnosis of "adjustment disorder with severe anxiety" along with the symptoms (head and stomach aches). The Officer, after quoting one small paragraph of the report, concludes as follows:

> I have considered all the statements within the report. I also note that while the doctor has some concerns about Kristian GREENE's anxiety and psychological issues, some anxiety is inherent yet

> natural result of removal process. Moreover, insufficient evidence was submitted to this office to show Kristian GREENE is not suitable to travel by air.

[40] Thus, the Officer simply states that he has read the report, but then ascribes the issues raised to "some anxiety," a natural outgrowth of removal. While it may be true that some anxiety is expected of a person facing deportation, this statement does not sufficiently consider the short-term BIOC in these circumstances, where the child has been diagnosed with adjustment disorder and severe anxiety and has asked to defer removal until the completion of the school term. Simply (i) stating that he has read the report, (ii) quoting a passage from the report, and (iii) stating that anxiety is natural does not connect the dots in the way that *Vavilov* requires, or demonstrate that the Officer has listened to the Applicants' concerns. Similarly, the Decision fails to address, in its entirety, the accompanying letter from the registered nurse practitioner, which corroborates the mental health concerns of the psychiatrist. The Officer also fails to acknowledge the evidence that Kristian was being treated by his family doctor for stomach issues and headaches. The failure to assess the evidence of exacerbation of mental health concerns and their effects is precisely the error recently noted by Justice Gleeson in *Douglas*.

[41] To summarize, enforcement officers do not have the delegated discretion or authority to conduct a full-blown H&C assessment, nor are they mandated to delay a removal order while a pending application is being processed. However, *Vavilov* makes it clear that administrative decisions must be justified in light of the legal and factual constraints and responsive to the central issues and concerns raised.

[42] In particular, *Vavilov* states that "a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it" (at para 128). Translated to the context of short-term deferral requests involving children, this requires officers to meaningfully address the evidence presented to demonstrate that deferring until the end of the school year is in the short-term interest of the child. Officers must do more than simply recite statutory language, summarize arguments and regurgitate boilerplate phrases. Here, the Officer failed to analyse Kristian's short-term best interests based on the unique circumstances of the case.

C. *The Officer misconstrued the evidence of family support and engaged in speculation*

[43] The Applicants assert that the Officer misconstrued the evidence in referring to their family abroad. The exact phrase the Applicants point to as problematic is the following statement: "I also note that Kristian has his extended family in his country who may be able to help if needed." The evidence indicated that Ms. Galusic's elderly mother lives in Bosnia and Herzegovina, which was not the country to which they were to be removed. There was nothing to indicate that any other member of their family lived in Croatia (or Bosnia and Herzegovina, for that matter). While this alone might not constitute a reviewable error, it aligns with the broader criticism of the failure to be responsive to the evidence presented in the context of BIOC arguments.

IV. Conclusion

[44] The Applicants have met their burden – significant as it is in the deferral context – to demonstrate that the Decision is unreasonable. For these reasons, I am granting this application for judicial review.

JUDGMENT in IMM-1544-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.
2. This matter is returned to CBSA for reconsideration by a different enforcement officer.
3. No questions for certification were argued, and I agree none arise.
4. There is no award as to costs.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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