Federal Court  Cour fédérale

Date: 20200320

Docket: IMM-1792-19

Citation: 2020 FC 395

Ottawa, Ontario, March 20, 2020

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

BRYANT DALINGAY BANATAO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case concerns the decision of an immigration officer (the "Officer") of Immigration, Refugees and Citizenship Canada ("IRCC") to refuse the Applicant's application for permanent residence on humanitarian and compassionate ("H&C") grounds. The Officer found that there were insufficient grounds to warrant granting H&C relief to the Applicant under section 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] The Applicant is a citizen of the Philippines. The Applicant first entered Canada in April 2014 on a temporary resident visa ("TRV")—also known as a visitor visa—and subsequently stayed through TRV renewals. Throughout his stay, the Applicant resided with his sister's family in Kelowna, British Columbia. The Applicant's niece is a child with special needs who was diagnosed with Autism Spectrum Disorder ("ASD"). The Applicant notes that he quickly formed a bond and a "strong connection" with his niece, which is unusual for a child on the autism spectrum.

[3] On July 11, 2017, the Applicant submitted an application for permanent residence on H&C grounds, primarily on the basis that it would be in the best interests of the Applicant's niece that the Applicant remain in Canada with his sister's family.

[4] By decision dated February 20, 2019, the Officer refused the Applicant's H&C application. This is the underlying decision of the application for judicial review.

[5] The Applicant submits that the Officer failed to properly assess the best interests of the child ("BIOC"), namely the Applicant's niece.

[6] For the reasons below, I find that the Officer's decision is reasonable. This application for judicial review is dismissed.

II. **Facts**

A. *The Applicant*

[7] Mr. Bryant Dalingay Banatao (the "Applicant") is a 51-year-old citizen of the Philippines. The Applicant's spouse and five children all reside in the Philippines. The

Applicant's sister, Chona Hazel Ortiz ("Ms. Ortiz"), and her family members are Canadian citizens who reside in Kelowna, British Columbia. One of Ms. Ortiz's daughters, Kezia-Janelle Ortiz ("Kezia"), is a 10-year-old child with special needs who was diagnosed with Autism Spectrum Disorder ("ASD") in September 2015. The Applicant noted in his H&C application that he first met his niece in 2013 when the Applicant's sister's family travelled to the Philippines for a family wedding, and that he built a "strong connection" with his niece right away.

[8] Upon the request of his sister, the Applicant came to Canada as a visitor on August 28, 2014, and stayed with his sister's family in Kelowna. Subsequently, the Applicant extended his TRV multiple times and stayed in Canada for several years.

[9] On July 11, 2017, the Applicant submitted an application for permanent residence on H&C grounds, on the basis that it would be in the best interests of Kezia for the Applicant to remain in Canada. The Applicant submitted that his sister needed his help and support with Kezia, and that he was one of the very few people that could reach out and connect to her.

[10] By letter dated February 20, 2019, the Officer refused the Applicant's H&C application.

B. *The H&C Decision*

[11] In considering the factor of establishment, the Officer found that the Applicant's accumulation of years in Canada was based on his choice. The Officer found insufficient evidence that the Applicant's establishment was a result of circumstances beyond his control or a prolonged inability to leave Canada. Although the Applicant had submitted that he supported himself through savings and investments, the Officer found that there was no evidence to

indicate the level of savings and investments. The Officer found that the Applicant provided insufficient evidence to show the level of financial assistance that Ms. Ortiz's family was providing the Applicant. Overall, the Officer gave minimal weight to the Applicant's establishment in Canada.

[12] On the BIOC, the Officer acknowledged that the Applicant had been of assistance to Kezia and her family while living in Canada, and that there would inevitably be a period of adjustment for the family if the Applicant were to return to the Philippines. However, based on the evidence, the Officer found that Kezia, at almost ten years old, attended school full-time. Moreover, the Officer noted that Kezia and her family had been provided provincial funding and community resources. The Officer also found that Kezia's parents could consider using ASD funding to access services to support Kezia in her social and communication skills development.

[13] The Officer concluded that if the Applicant were to return to the Philippines, Kezia would continue to have the love and support of both of her primary caregivers, her sibling, and extended family. The Officer also noted that there would be community and educational resources available to the family. Based on the official documentation regarding Kezia's autism, including the "Confidential Psychological Assessment", the Officer was unable to find reference of the Applicant or his role in Kezia's well-being. After careful examination of Kezia's best interests, the Officer concluded that the circumstances did not justify an exemption under H&C considerations.

[14] Furthermore, the Officer noted that the Applicant's spouse and his five children are in the Philippines, and gave consideration to the best interests of the Applicant's own children. The Officer found that it was reasonable to believe that the Applicant's children in the Philippines

would benefit from their father's presence in their lives after an absence of several years, and assigned significant weight to this factor in the overall decision.

III. **Preliminary Issues**

A. *Style of Cause*

[15] The proper name of the Respondent is the "Minister of Citizenship and Immigration", and not the "Minister of Immigration, Refugees and Citizenship Canada".

[16] The style of cause is hereby amended with immediate effect.

B. *Admissibility of Fresh Evidence*

[17] The Applicant has attempted to introduce fresh evidence through an affidavit and its attaching exhibits. However, as the Respondent noted, such exhibits are inadmissible on judicial review, as they were not properly before the decision-maker.

[18] Therefore, I find that the exhibits containing Ms. Ortiz's passport, Ms. Ortiz's marriage certificate, and Kezia's Individual Education Plans are inadmissible.

IV. **Issue and Standard of Review**

[19] The issue arising on this application for judicial review is whether the Officer's BIOC assessment is reasonable.

[20] Prior to the Supreme Court's recent decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) [*Vavilov*], the reasonableness standard applied to the review of an immigration officer's decision on H&C applications under section 25 of the

IRPA: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 (CanLII) at para 44 [*Kanthasamy*]; *Douti v Canada (Citizenship and Immigration)*, 2018 FC 1042 (CanLII) at para 4; *Chen v Canada (Citizenship and Immigration)*, 2019 FC 988 (CanLII) at para 24. There is no need to depart from the standard of review followed in previous jurisprudence, as the application of the *Vavilov* framework results in the same standard of review: reasonableness.

[21] As noted by the majority in *Vavilov*, "a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker," (*Vavilov* at para 85). Furthermore, "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency," (*Vavilov* at para 100).

V. **Analysis**

[22] The Applicant submits that the Officer erred in the BIOC assessment by failing to adequately consider the best interests of the Applicant's niece, Kezia. The Applicant notes that "a key factor in any diagnosis of ASD is the affected person's difficulty in forming meaningful social relationships", and submits that it was an exceptional situation for Kezia to bond with the Applicant.

[23] The Applicant submits that although there was significant evidence that the Applicant provided great assistance to Kezia, the Officer erred by failing to properly consider the relevant evidence, and by focusing instead on the support that would be available after the Applicant's departure from Canada. The Applicant takes the position that the bond between him and his niece is unique and cannot be replicated by other service providers. The Applicant relies on

Hawthorne v Canada (Minister of Citizenship and Immigration), 2002 FCA 475 (CanLII) at para 4 [*Hawthorne*] for the proposition that in assessing the BIOC, a key issue is the suffering that a child will experience as a result of the removal of a person from Canada. The Applicant submits that Kezia will suffer hardship from the Applicant's removal due to her ASD and that the Officer failed to properly consider this aspect, contrary to the principles in *Kanthasamy*.

[24] The Applicant argues that the Officer erred by placing excessive weight on the Confidential Psychological Assessment, in which the Applicant was not mentioned. The Applicant submits that the lack of mention of the Applicant in the report "is not evidence that it is not in Kezia's best interest for [the Applicant] to remain in Canada".

[25] Lastly, the Applicant submits that the Officer erred by putting significant weight on the best interests of the Applicant's children despite the fact that there was little or no evidence. The Applicant submits that this is perverse and unreasonable. The Applicant also takes the position that the Officer failed to consider the possibility that it may be in the best interests of the Applicant's children for the Applicant to sponsor his whole family after he obtains his permanent residence.

[26] The Respondent submits that the Officer's decision is reasonable, as the Officer appropriately appreciated the children's circumstances as a whole and gave significant weight to the BIOC. The Respondent relies on *Gayle v Canada (Citizenship and Immigration)*, 2017 FC 867 (CanLII) at para 45, where this Court provided a summary of assessing BIOC in the context of an H&C analysis. The Respondent also cites *Hawthorne* at paras 4 to 7, where the Federal Court of Appeal held that while the BIOC must be taken into account, it is not necessarily a determinative factor.

[27] The Respondent submits that while the Officer considered the Applicant's contributions to Kezia's mental, emotional, and spiritual growth, the Officer also found that Kezia attended full-time school and her family would have other resources to rely on after the Applicant's return to the Philippines.

[28] Furthermore, the Respondent argues that the Officer did not err in considering the Applicant's five children in the Philippines, as they, too, are directly affected by the decision. The Respondent submits that it was reasonable for the Officer to consider the current circumstances and find that the children would benefit from their father's presence.

[29] In my view, the Officer did not err in the BIOC assessment. The Officer reasonably appreciated Kezia's circumstances as a whole and gave significant weight to the BIOC. The Officer certainly recognized the connection that the Applicant had formed with his niece, however, based on the evidence, reasonably concluded that there would be other means of support for Kezia, through her primary caregivers, community resources, as well as financial support.

[30] It was not unreasonable for the Officer to consider the Confidential Psychological Assessment, given that it was official documentation concerning Kezia's ASD diagnosis. I am not persuaded by the Applicant's submission that the Officer placed excessive weight on this particular documentation. In my view, it was simply one piece of evidence that the Officer considered in their BIOC assessment.

[31] Lastly, the Officer did not err in assessing the best interests of the Applicant's children. The Applicant has five children of his own, the youngest of whom is the same age as Kezia—10 years old. It was not unreasonable for the Officer to conclude that the Applicant's own children

would benefit from their father's presence at home. Certainly, these children are also directly affected by the Applicant's permanent residence application. Moreover, the Applicant himself had admitted that he missed his family and that he "sacrificed to be away from them just to help Kezia".

[32] Therefore, I find that the Officer's decision is reasonable, and is "justified in relation to the facts and law that constrain the decision maker," (*Vavilov* at para 85).

VI. **Certified Question**

[33] Counsel for each party was asked if there were any questions requiring certification. They each stated that there were no questions for certification and I concur.

VII. **Conclusion**

[34] For the foregoing reasons, I find that the Officer's decision is reasonable. This application for judicial review is dismissed.

JUDGMENT in IMM-1792-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. There is no question to certify.
3. The style of cause is hereby amended to reflect "The Minister of Citizenship and Immigration" as the proper Respondent.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1792-19
STYLE OF CAUSE:	BRYANT DALINGAY BANATAO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	SEPTEMBER 24, 2019
JUDGMENT AND REASONS:	AHMED J.
DATED:	MARCH 20, 2020

APPEARANCES:

Sandra Hakanson	FOR THE APPLICANT
Hilla Aharon	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Ocana Law Group Barrister and Solicitor Kelowna, British Columbia	FOR THE APPLICANT
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT