Federal Court  Cour fédérale

Date: 20220308

Docket: IMM-626-21

Citation: 2022 FC 320

Ottawa, Ontario, March 8, 2022

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

TANIA MARISA FORTUNA ALVES COELHO
MARCELO MARCOS DE MORAIS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicants seek judicial review of a decision of a Senior Immigration Officer of Immigration, Refugees and Citizenship Canada [IRCC] on January 14, 2021 to refuse their application for permanent residence on humanitarian and compassionate grounds (H&C application).

[2] For the reasons that follow, the application is dismissed.

II. **Background**

[3] Ms. Fortuna Alves Coelho is a citizen of Portugal. She entered Canada on a visitor visa on December 3, 2005 to visit her family. Mr. De Morais is a citizen of Brazil. He came to Canada on March 5, 2005 as a student. The Applicants met in Canada in December 2005 and subsequently began a relationship and started a family. They have two children born in Canada who were, at the time of the decision, 11 and 9 years old respectively. Their first child was still born and the family regularly visits the grave site in Toronto.

[4] Neither of the Applicants have status in Canada. They managed to live and work here for over thirteen years without coming to the attention of the immigration authorities. Most of Ms. Fortuna Alves Coelho's family reside in Canada—four of her siblings are in Canada and one sibling lives in Portugal. Mr. De Morais' extended family reside in Brazil.

[5] On May 16, 2019, the Applicants submitted an H&C application pursuant to s 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. IRCC returned the application on July 8, 2019 because it was incomplete. On July 23, 2019, the Applicants made another H&C application, the denial of which is the subject of this application for judicial review.

[6] The Officer accepted that the Applicants did not have criminal records, had never applied for social assistance and had worked hard to provide for their family, albeit without valid work

permits, and there was no evidence that tax had been paid on their income. The Officer also accepted that the Applicants were involved with their church, had improved their English skills and made donations to the Sick Kids Foundation. Letters submitted in support of the application referenced their good character and positive community contributions. Positive consideration was given to their family ties and friendships in Canada.

[7] While the Officer accepted that the Applicants were remorseful for their non-compliance with immigration requirements, it was noted that they had failed to explain why they had not attempted to regulate their status earlier.

[8] The Officer gave consideration to the country conditions in Portugal and Brazil and the respective rights of the Applicants to relocate in either country through their spousal relationship. The Officer found that the two children are eligible for Brazil or Portuguese citizenship through their parents. The Officer concluded that the Applicants would face limited hardship if they were to relocate to Portugal.

[9] With regard to the best interests of the children (BIOC), the Officer acknowledged that they had spent their entire lives in Canada and had strong ties here with family, classmates and friends and feared leaving them behind. Due to their young ages, however, the Officer found that it was unlikely that they had forged deep and meaningful relationships outside their immediate family that would be severed should they leave Canada. While the best interests of the children were to remain with their parents and that their interests were better served in Canada, the Officer was not satisfied that the children were so integrated into Canadian society that

relocating to Portugal or Brazil would greatly compromise their wellbeing or development. Both children's maternal language is Portuguese. The Officer found that while they may not be fluent in the language at the moment and there may be a period of adjustment in attending a new school, they are in their earlier years of education and will likely be able to improve their proficiency.

[10] In the result, the Officer concluded that the weight accorded to the best interests of the children was not enough to justify an exemption because there was insufficient evidence to demonstrate that relocation would have a negative impact on the children.

III. **Issues and Standard of Review**

[11] The Applicants have raised several issues with the Officer's analysis of the relevant H&C factors including the best interests of the children (BIOC), the assessment of the family's establishment in Canada and the hardship they would face if required to return to either Portugal or Brazil.

[12] The issues can be summed up as whether the decision as a whole was reasonable. The determinative issue, in my view, is whether the Officer's BIOC assessment was reasonable.

[13] Reasonableness is the presumptive standard of review of administrative decisions on their merits: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. There is no basis for departure from that presumption in this matter.

[14] To determine whether the decision is reasonable, the reviewing court must ask "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at paras 86 and 99). Thus, a decision-maker's findings should not be disturbed as long as the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick,* 2008 SCC 9 at para 47).

[15] In conducting a reasonableness review of factual findings, deference is warranted and it is not the role of the Court to reweigh the evidence or the relative importance given by the decision-maker to any relevant factor: *Kanthasamy v Canada (Minister of Citizenship and Immigration*), 2015 SCC 61 [*Kanthasamy*] at para 112; *Vavilov* at para 96. Perfection is not the standard. The party challenging the decision bears the burden of showing that it is unreasonable: *Vavilov* at para 100. Respect for the role of the administrative decision maker requires a reviewing court to adopt a posture of restraint on review: *Vavilov* at paras 24, 75.

[16] In applying the reasonableness standard, the Federal Court of Appeal has cautioned that a reviewing court should not engage in a disguised correctness review: *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 37, per Stratas JA:

> In *Vavilov*, the Supreme Court tells us that we should not be too hasty to find [material] flaws. *Vavilov's* requirement of a reasoned explanation cannot be applied in a way that transforms reasonableness review into correctness review. If reviewing courts are too fussy and adopt the attitude of a literary critic all too willing to find shortcomings, they will be conducting correctness review, not reasonableness review. That would return us to the bad old days in the 1960's and 1970's when reviewing courts would

> come up with any old excuse to strike down decisions they disliked—and often did.

IV. **Analysis**

[17] An H&C exemption can be granted when applicants have no status in Canada and no other means to acquire permanent residence. It is the very purpose for which s 25 exists. But it is not unreasonable for an Officer considering the matter to give significant negative weight to the Applicants having resided in Canada without authorization for more than 13 years.

[18] During the hearing, it was conceded that the Officer's assessment of establishment met the reasonableness standard and that it was not speculative for the Officer to assume that the Applicants had undisclosed income and assets for which they likely did not pay tax during their prolonged sojourn in Canada. In light of that, and their work histories, it was not unreasonable for the Officer to find that there was insufficient evidence that the parents would not be able to provide for their children if required to relocate abroad.

[19] The case was not made out that the family could not permanently resettle in Brazil or Portugal as a family unit, as the Applicants argued. Among the sources to which the Officer referred were documents on the immigration and citizenship laws of both countries. The Applicants did not address this in their H&C submissions and bore the onus to provide evidence to the contrary, if it existed, which they failed to do.

[20] The Applicants raised concerns about crime in both countries. While that, based on the country condition evidence, is a significant concern with respect to Brazil, the same can not be

said of Portugal. The crime rate in Portugal was not highlighted as a concern in the H&C submissions. Rather, the submissions cited the austerity measures adopted to deal with economic problems facing the country and their effect on employment rates. Aside from that, there was little evidence of adverse conditions in Portugal and the family is in the fortunate position of being able to choose to return there rather than to Brazil.

[21] But did the Officer adequately take the children's best interests into account? The starting point for any BIOC analysis is that a decision-maker must be "alert, alive and sensitive" to the best interests of the children affected in determining if H&C relief is warranted and must not minimize the best interests of a child who may be adversely affected by their decision: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*]. In *Kanthasamy*, at para 39, the Supreme Court held that a reasonable BIOC analysis requires that a child's interests be well-identified and defined, and examined with a great deal of attention in light of all the evidence. Children will rarely, if ever, be deserving of any hardship and may experience greater hardship than adults faced with a comparable situation: *Baker* at para 74; *Kanthasamy* at para 41.

[22] The controversy in respect of the BIOC analysis in this matter is whether the Officer failed to be alert, alive and sensitive to the children's interests and minimized their best interests. The Applicants contend that the Officer was insensitive and dismissive towards the children's best interests and perspectives. The position of the Respondent is that the Applicants' arguments do not establish that the Officer was insensitive in considering the children's best interests but

amount to a disagreement with the weighing of this factor when considering the application as a whole.

[23] The Officer considered the children's relationships with their friends, teachers and community, but found that these ties were not a sufficient basis for granting H&C discretion. This was not to diminish the importance of those relationships or to dismiss the impact of their severance but to recognize that the children's most significant relationships consisted of those with their immediate family. The Officer took into account how the impact could be mitigated through the use of modern communication technologies. In my view, this was not an unreasonable conclusion.

[24] In my view, it was not unreasonable for the Officer to conclude that the depth of the children's relationships and ties to Canada were not strong because of their young ages and stages within the educational system. It was also not unreasonable for the Officer to find that the children could adapt to relocation to countries where their maternal language was spoken. The Officer acknowledged that they would need a period of adjustment in order to become proficient in Portuguese. It was not unreasonable to conclude that this was not a sufficient basis on which to grant H&C relief.

[25] The Officer acknowledged that it would be in the children's best interests to remain in Canada with their parents, but ultimately concluded that there was insufficient evidence to support the alleged difficulties the children would face in Portugal and Brazil. This assessment

did not incorporate a threshold standard of “unusual, undeserved or disproportionate hardship” into the BIOC assessment as the Applicants contend.

[26] The Officer gave weight to the factor that the children’s best interests would be to remain in Canada with their parents but it was insufficient to overcome the other factors which did not support the granting of the exemption.

[27] I agree with the Applicants that it was speculative for the Officer to assume that the children would receive an adequate education in Brazil because the father had not indicated that he received a poor education there. If the sole option was a return to Brazil, that error would be of greater concern. But that is not the case here.

V. **Conclusion**

[28] While the situation of this family invokes sympathy because of the predicament in which they now find themselves and the children are not to blame for their parents’ failure to regulate their status earlier, their best interests do not outweigh all other factors in an H&C assessment. The Applicants have failed to meet their burden to demonstrate that the Officer’s decision overall is unreasonable. For that reason, the application is dismissed.

[29] No serious questions of general importance were proposed and none will be certified.

JUDGMENT IN IMM-626-21

THIS COURT'S JUDGMENT is that the application is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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