Federal Court  Cour fédérale

Date: 20221123

Docket: IMM-2580-21

Citation: 2022 FC 1605

Ottawa, Ontario, November 23, 2022

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

CLARA INES RIVAS HERRERA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are a family of five being a husband, wife (PA) and three minor children. Two of the children were born in Guatemala and one was born in Canada. The husband lives in Guatemala.

[2] They seek judicial review of a decision made by a Senior Immigration Officer (Officer) on March 31, 2021 denying their application for permanent residence made on Humanitarian and Compassionate (H&C) grounds.

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

II. **Background**

[4] Two prior H&C applications were refused, one in 2018 and one in 2019.

[5] The grounds put forward to support this H&C application were the best interests of their minor children (BIOC), establishment and hardships caused by country conditions in Guatemala. They also allege a personal threat was made against the husband by gang members who were extorting the family's beauty salon business.

[6] Fearing for the safety of their relatives and employees in Guatemala, in December of 2016 the Applicants decided to close the business temporarily.

III. **Decision under Review**

[7] The Officer noted the family stated they were being supported by the husband who worked as a military pilot in Guatemala but there was no proof of any funds transfers. The Officer also noted there was no evidence filed to show the wife was working, taking educational classes or volunteering before or after her work permit expired.

[8] As a result of the lack of such evidence, the Officer assigned little weight to the Applicant's establishment in Canada.

[9] Regarding the BIOC, the PA stated "I wish to obtain a positive response from Canada migration, so that my children are in a safe country, with food, education and physical and mental health."

[10] The Officer noted the two eldest children arrived in Canada in October 2014. The Officer found no evidence was submitted that the children were unable to attend school or have access to physical or mental health requirements in Guatemala.

[11] The Officer assigned some positive weight to the fact that the children had incorporated themselves into the Canadian educational system. However, the Officer noted again that the PA had not provided evidence to show the children would not have access to education or health services if they returned to Guatemala.

[12] The police report was given little weight with respect to establishing a fear of return to Guatemala. The Officer found there was no proof to indicate the beauty salon was owned or operated by either the husband or the PA nor was there evidence to link either of them to the incident referred to in the police report.

[13] The PA had submitted general country condition documents relating to crime and safety, natural disasters, and health from a US Department of State travel advisory for Guatemala.

[14] No evidence was submitted to establish the Applicants would personally be affected by the conditions listed in the articles or that the Applicants would not personally receive protection from Guatemala. The Officer gave little weight to the submissions of the Applicants and to the country condition articles.

[15] The application was refused for the above-noted reasons.

IV. **Preliminary Issue**

[16] The Respondent noted in their submissions that some of the exhibits in the Applicant's affidavit in this judicial review were not before the decision-maker. The Applicant conceded that they were submitted in the first H&C application but, due to an oversight, they were not submitted in this H&C application.

[17] The Applicants subsequently filed a new affidavit with the contested exhibits removed. Nonetheless, because they say it is central to the case of their personalized risk, the Applicants sought an exemption from the requirement to translate the Spanish business licence to English. In support, they relied on *Torres v Canada* (*Minister of Citizenship and Immigration*) 2011 FC 818 [*Torres*] at paragraph 8.

[18] I note the translation exemption in *Torres* was granted by the Immigration Program Manager, not the reviewing Court.

[19] The Court of Appeal established in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, (*Access Copyright*) that evidence which was not before an original decision-maker should not be considered in judicial review of the resulting decision. While there are recognized exceptions to this principle, none are present in this application.

[20] The Applicant also submits that the Court should take judicial notice of the country condition articles about rampant gang violence and police corruption in Guatemala.

[21] One purpose of judicial notice is to dispense with proof of facts that are uncontroversial or beyond reasonable dispute. The Supreme Court of Canada has said that "the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy [citations removed]": *R v Find*, 2001 SCC 32 at para 48.

[22] The Applicant has stated that the untranslated evidence they wish to tender is capable of disposing of the appeal and that the meaning of the document, specifically as it relates to the address of the salon, is clear even without translation.

[23] On the other hand, I note that context is important when reviewing a document. To take judicial notice of a fraction of an untranslated document, without any understanding of the

balance of the document, would in my view be a futile, haphazard and irresponsible exercise that is best avoided.

[24] I see no basis upon which to accept the untranslated Spanish document. It runs contrary to the principles established in *Access Copyright* and it would not assist the review process. The Officer was not obliged to review the document without an English translation, which is required by the legislation.

[25] For the foregoing reasons, the Spanish document is not accepted into evidence nor will I take judicial notice of general country condition articles addressing "rampant gang violence and police corruption." To take such notice would serve no purpose as the Applicants claim a personalized risk of gang violence to extort their beauty salon.

V. **Issues**

[26] The Applicant submits the Decision is not reasonable because the Officer erred in assessing the BIOC of the Canadian born child.

[27] The Applicant also submits they were denied procedural fairness because the Officer was not actually alert and sensitive to the matter before them.

[28] The Respondent submits the Decision is reasonable and the Officer can only assess a child's best interests in light of the evidence they receive. In this case, that evidence was generic

country condition information for Guatemala but no specific evidence about the children's needs, capacity or maturity.

VI. **Standard of Review**

[29] The Supreme Court of Canada has established that when conducting judicial review of the merits of an administrative decision, other than a review related to a breach of natural justice and/or the duty of procedural fairness, the presumptive standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23. While this presumption is rebuttable, no exception to the presumption is present here.

[30] A reasonable decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision: *Vavilov* at para 85.

[31] To set a decision aside, a 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. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision: *Vavilov* at para 100.

[32] Issues involving procedural fairness are reviewable on a different basis than reasonableness.

[33] Mr. Justice Rennie reviewed and confirmed the core principles of procedural fairness in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPR*]. He concluded that whether there has been procedural fairness does not require a standard of review analysis but "a court must be satisfied that the right to procedural fairness has been met." In that respect, the ultimate question is whether the Applicant knew the case to be met and had a full and fair chance to respond: *CPR* at paras 49-50, 56.

[34] In that respect, it has also been said that judicial review of procedural fairness is "best reflected in the correctness standard": *CPR* at para 54 and *Oleynik v Canada (Attorney General)*, 2020 FCA 5, at para 39.

VII. **Analysis**

A. *BIOC*

[35] The Applicants submit that the Officer did not give the BIOC factors proper consideration and, unlike a prior H&C decision, they did not make a specific statement that they were "alert, alive and sensitive" to the BIOC factors. The Applicants complain that the BIOC discussion was brief which of its own accord should render the Decision unreasonable.

[36] The Respondent points out that the Applicants challenged the weight that the Officer gave to the BIOC factors and the brevity of the reasons instead of pointing to any error showing the Decision is unreasonable.

[37] The Respondent also reminded the Court that Officers are presumed to understand that remaining in Canada is in the best interests of a child directly affected and Officers are not required to specifically state that premise in their decisions: *Caleb v Canada (Minister of Citizenship and Immigration)*, FC 1018 at para 31, citing the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Hawthorne*, 2002 FCA 475 at para 5.

[38] The best interests of a child or children are an important factor but they are not determinative. They are to be weighed together with other factors.

[39] The Applicants failed to raise arguments concerning the specific interests of their children. No evidence was submitted in support of their BIOC apart from letters of support from teachers and a family friend attesting to the integration of the children into the Canadian educational system. The Officer acknowledged and discussed those factors, assigning them positive weight.

[40] The Applicant appears to be requesting a reweighing and reassessment of the evidence considered by the decision-maker in exercising their delegated ministerial discretion. That is not the function of this Court on judicial review: *Kisana v Canada (Citizenship and Immigration)*, 2008 FC 307, at para 24.

[41] In *Suresh v Canada* (*Minister of Citizenship and Immigration)*, 2002 SCC 1 at paras 37-38, the Supreme Court discussed the roles of Parliament, the Minister and a reviewing Court in the context of an application to review the exercise of a ministerial discretion:

> 37 The passages in *Baker* referring to the "weight" of particular factors (see paras. 68 and 73-75) must be read in this context. It is the Minister who was obliged to give proper weight to the relevant factors and none other. *Baker* does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process, but draws on an established line of cases concerning the failure of ministerial delegates to consider and weigh implied limitations and/or patently relevant factors. (internal citations omitted)
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> 38 This standard appropriately reflects the different obligations of Parliament, the Minister and the reviewing court. Parliament's task is to establish the criteria and procedures governing deportation, within the limits of the Constitution. The Minister's task is to make a decision that conforms to Parliament's criteria and procedures as well as the Constitution. The court's task, if called upon to review the Minister's decision, is to determine whether the Minister has exercised her decision-making power within the constraints imposed by Parliament's legislation and the Constitution. If the Minister has considered the appropriate factors in conformity with these constraints, the court must uphold his decision. It cannot set it aside even if it would have weighed the factors differently and arrived at a different conclusion.

[42] Having largely submitted evidence that was only general in nature and considering that the Officer did acknowledge and assign positive weight to the letters from teachers and a family friend, I find the Applicants failed to meet their onus to show how the children would specifically be impacted by substandard education and healthcare systems in Guatemala.

[43] The applicants have not shown there were "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.

[44] I conclude that the Officer reasonably addressed the evidence they had before them in determining that the H&C considerations put forward did not justify an exemption under subsection 25(1) of the *Immigration and Refugee Protection Act,* SC 2001 c 27.

B. *Procedural Fairness*

[45] In raising the question of whether there was a denial of procedural fairness, the Applicant asks "[w]as the decision-maker actually alert and sensitive to the matter before them?"

[46] The Applicant seems to suggest that the Officer made a number of adverse credibility findings couched in the language of insufficiency of evidence. The Applicant submits that the credibility concerns with respect to the ownership of Andrea's salon warranted the issuance of a procedural fairness letter and an opportunity for the Applicant to respond.

[47] I disagree.

[48] The Applicant continues to frame the documents they failed to put before the decision-maker as "documents missing from the second H&C application", seemingly with the expectation that the Officer should or would have reviewed evidence submitted in support of a previous application. The Applicant appears to suggest that a side-by-side comparison with previous applications and a letter alerting counsel to the errors that they in fact made due to their oversight is required by the principles of procedural fairness.

[49] In support of their argument, the Applicant cites *Zubova v Canada (Minister of Citizenship and Immigration*), 2019 FC 444 [*Zubova*] but it is not applicable to this case. In *Zubova*, the Officer did send a Procedural Fairness Letter requesting specific corroborating documents. Despite the Applicant's compliance with the request, the Officer gave the evidence little weight noting that only the first three pages of the work book had been submitted and failed to consider the employment certificates at all. Justice McDonald found that "[t]he Officer either failed to consider these documents or dismissed them because of credibility concerns": *Zubova* at para 16.

[50] Here, it is clear that the Officer is not concerned with the credibility of the documents the PA submitted, but rather the insufficiency of evidence to corroborate the Applicants' claim that they have and will continue to experience extortion and gang violence as owners of a local business in Guatemala.

[51] The principle of procedural fairness does not require that a visa officer provide an applicant with a "running score" of the weaknesses in their application: *Rahim v Canada (Minister of Citizenship and Immigration*), 2006 FC 1252 at para 14.

[52] The Officer noted accurately that there was no objective evidence corroborating the PA's claim that she and her spouse were in fact the owners of Andrea's salon. This is clearly an issue of sufficiency of evidence, for which the Applicant bears the burden. The Officer reiterated the allegations of the PA, noted a police report was submitted but that there was no evidence to indicate the salon was owned or operated by either the PA or her spouse at one time or another.

[53] For the above reasons, I find there was no breach of procedural fairness by the Officer.

VIII. **Conclusion**

[54] The Decision displays the requirements of justification, intelligibility and transparency.

[55] The Applicants have failed to show that the Decision was either unreasonable or procedurally unfair.

[56] For all the reasons set out above, this application is dismissed.

[57] No question for certification was proposed nor does one arise on these facts.

JUDGMENT in IMM-2580-22

THIS COURT'S JUDGMENT is that:

1. This application is dismissed.

2. No question for certification was proposed nor does one arise on these facts.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

David H. Davis	FOR THE APPLICANT
Cynthia Lau	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Davis Immigration Law Office Barrister and Solicitor Winnipeg, Manitoba	FOR THE APPLICANT
Attorney General of Canada Winnipeg, Manitoba	FOR THE RESPONDENT