

Federal Court



Cour fédérale

Date: 20230120

Docket: IMM-8783-21

Citation: 2023 FC 95

Ottawa, Ontario, January 20, 2023

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

AMANDEEP SINGH DHALIWAL

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of an immigration officer [Officer], dated November 12, 2021 [the Decision], in which the Officer refused the Applicant's application for a permanent resident visa as a member of the family class supported by a request for an exemption on humanitarian and compassionate [H&C] grounds.

[2] As explained in greater detail below, this application is allowed, because the Decision does not provide an intelligible explanation of the Officer's treatment of evidence that is inconsistent with the Officer's conclusion.

II. **Background**

[3] The Applicant is a citizen of India. He lives in India with his son who is a Canadian citizen. The Applicant's wife [the Sponsor] is his sponsor in his permanent resident application and the mother of his son. She is a Canadian citizen and currently lives in Canada.

[4] The Applicant and the Sponsor married for the first time in 2011. The Sponsor first tried to sponsor the Applicant in 2012. This application was refused, because the Sponsor was still married to her former husband. Although she had ended the relationship due to abuse and had separated from her former husband, that separation had not yet been legally recognized under Canadian law. As such, the Applicant's marriage to the Sponsor was considered invalid.

[5] In 2013, the Applicant re-married the Sponsor after she was able to secure a legal divorce from her former husband. A second spousal sponsorship application was submitted but refused. This decision was upheld by the Immigration Appeal Division [IAD], and an application for leave and judicial review was dismissed by this Court.

[6] In 2014, the Applicant and the Sponsor had a son together. When he was born, the Sponsor realized that she required more support in caring for the couple's son than she was able

to access in Canada, as she had no immediate family here. As a single parent alone in Canada, she was unable to manage raising her son and working a full-time job. As such, when her son was two-months-old, she took him back to India to live with the Applicant and his parents, who were able to provide full time care for the couple's son. The Sponsor remained living in Canada and working to contribute to his support.

[7] The Applicant and the Sponsor submitted a third sponsorship application in September 2016. This application was again refused based on concerns regarding the genuineness of the marriage. The IAD did not hold a hearing, but instead applied the doctrine of *res judicata* to uphold the refusal. This Court subsequently refused leave for judicial review.

[8] In July 2019, the Applicant and the Sponsor submitted a fourth sponsorship application, in the context of which he sought H&C relief, including based on the best interests of the child [BIOC]. The Officer refused the Applicant's fourth sponsorship application in November 2021, in the Decision challenged in his application for judicial review.

III. **Decision under Review**

[9] The Decision explained that the Officer was not satisfied of the genuineness of the Applicant's marriage to the Sponsor and therefore was not satisfied that the Applicant was a member of the family class. The Applicant appealed that aspect of the Decision to the IAD, which dismissed the appeal. That dismissal is the subject of a separate application for judicial review, leave for which has been granted.

[10] In the Decision, the Officer also found that there were not sufficient H&C grounds to grant him relief on that basis. As the IAD does not have jurisdiction to consider the H&C aspect of the Decision, the Applicant commenced this application for judicial review, in which he challenges only the Officer's H&C analysis. The portion of the Decision setting out this analysis, as found in the relevant Global Case Management System notes, reads as follows:

... I am aware that the applicant and the sponsor have declared a longstanding relationship. However, I am of the opinion that the couple can live together in India should they choose to. Sponsor has the option of returning to India and live with her family. She is educated and was gainfully employed in India in the past. [Applicant's and Sponsor's son] has an established social & personal life in India, having lived in the care of his grandparents and father in India since he was 2 months old. Other than the 21 days spent in Canada in 2019, the boy has had no contact or other exposure to life in Canada. I do not think it would be in the best interest of the child to uproot him from his natural and familiar surroundings. In my opinion separating the child from his grandparents, who have been parent figure in his life and who according to the Sponsor and applicant have taken good care of him throughout, would not be in the best interest of the child. The boy has equal chances of good education and quality of life in India as any other child of his age. Having considered the application holistically including genuineness of the marriage and BIOC, I am not satisfied that it would be justified by humanitarian or compassionate considerations to grant relief to the applicant and exempt the applicant/s from any applicable criteria or obligation of the Act. I am not satisfied that sufficient grounds exist to grant relief to the applicant in this case. Application is refused.

IV. Issues

[11] The Applicant submits that this application raises the following two issues:

A. Did the Officer err in assessing the best interests of the child?

B. Did the Officer err in assessing hardship?

[12] The parties agree (and I concur) that the applicable standard of review is reasonableness.

V. **Analysis**

[13] My decision to allow this application for judicial review turns on the Applicant's arguments surrounding the Officer's BIOC analysis.

[14] Relying on *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 [*Williams*] at paragraph 63, and related jurisprudence, the Applicant first argues that the Officer erred by failing to establish, at the first stage of the analysis, what the child's best interests are. I disagree with this submission. As the Respondent argues, this Court has held that H&C officers are not required to apply the specific formula articulated in *Williams* (see, e.g., *Boukhanfra v Canada (Citizenship and Immigration)*, 2019 FC 4 at paras 20-23; *Ahmed v Canada (Citizenship and Immigration)*, 2020 FC 777 at para 22; *Lin v Canada (Citizenship and Immigration)*, 2021 FC 1452 at paras 55-56).

[15] I also agree with the Respondent that it is implicit in the Decision that the Officer concluded it was in the child's best interests to remain in India, in familiar surroundings and with the support of his grandparents who had been instrumental in raising him. In so concluding, the Officer reasoned that the Sponsor has the option of returning to India to live with her family, observing that she is educated and was gainfully employed in India in the past, and found that the

child has equal chances of good education and quality of life in India as any other child of his age.

[16] However, I find merit to the Applicant's argument that the Decision does not demonstrate how the Officer arrived at this conclusion in light of evidence that is inconsistent with the Officer's analysis and resulting determination. The Applicant's submissions before the Officer, and now before the Court, emphasize the following evidence:

A. In a Statutory Declaration by the Sponsor, she explained the following:

- i. she does not have Indian citizenship and is entitled to live in India only for six months as a visitor;
- ii. living in India is not an option for her financially, she would not be able to secure a job that would pay enough to support her son and family;
- iii. when she visits her son in India, he does not leave her side, and he has a long period of sickness when it is time for her to leave;
- iv. the child's grandparents are getting more ill with age and having a harder time taking care of him when his father is not there; and

- v. as a minor child, her son is allowed to remain in India with his father for five years under a visa, but he is not a citizen and is not entitled to the same rights as a citizen;

- B. A letter from the child's family doctor explained that he becomes sick for weeks each time his mother leaves him to return to Canada, which the physician attributes to loneliness and anxiety.

[17] I agree with the Applicant's submission that it is difficult to reconcile this evidence with an analysis to the effect that the child's best interests lie with remaining in the care of his grandparents in India, where his mother could move and obtain employment, and where he would have the same opportunities as any other Indian child. As the Applicant acknowledges, it was available to the Officer to determine how much weight to attribute to this evidence, and the Court is not suggesting that the Officer was obliged to accept this evidence and arrive at a different BIOC conclusion. Rather, the Decision is unintelligible and therefore unreasonable, because it does not disclose an analysis of any of this evidence that would allow the Court to understand the Officer's reasoning.

[18] As such, this application for judicial review will be allowed, the Officer's H&C determination in the Decision set aside, and the matter remitted to a different officer for re-determination. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT in IMM-8783-21

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, the Officer's H&C determination in the Decision is set aside, and the matter is remitted to a different officer for re-determination. No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-8783-21

STYLE OF CAUSE: AMANDEEP SINGH DHALIWAL V THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: JANUARY 18, 2023

JUDGMENT AND REASONS: SOUTHCOTT J.

DATED: JANUARY 20, 2023

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