Federal Court  Cour fédérale

Date: 20230124

Docket: IMM-9085-21

Citation: 2023 FC 112

Ottawa, Ontario, January 24, 2023

PRESENT: Madam Justice McDonald

BETWEEN:

ALEXIS VILLA VIEJA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review of the November 18, 2021 decision of an Officer at the Canadian Embassy in Manila (Officer). The Officer refused the Applicant's application for permanent residence as a member of the family class under the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) and the Officer found insufficient humanitarian and compassionate (H&C) grounds to warrant an exemption under subsection 25(1) of the *IRPA*.

[2] For the following reasons, this judicial review is dismissed as the Officer's decision is reasonable.

I. Background

[3] The Applicant, Alexis Villa Vieja, is a 41-year-old citizen of the Philippines. His spouse, Reah Baldos, is a permanent resident of Canada and applied to sponsor the Applicant to come to Canada. I will refer to Ms. Baldos as the Sponsor.

[4] Both the Applicant and the Sponsor each have a child from previous relationships and both of those children reside in the Philippines.

[5] The Sponsor entered Canada in 2012 through the Live-in Caregiver Program and became a permanent resident of Canada on September 24, 2015.

[6] The Applicant and the Sponsor were married on August 3, 2015 in the Philippines. Following an argument on their honeymoon, they separated and the Applicant returned to Dubai, United Arab Emirates, and the Sponsor returned to Canada.

[7] In her permanent residence application, the Sponsor included her son as a Dependant, but did not include the Applicant as a family member because they were separated at that time.

[8] In December 2015, the Applicant and the Sponsor reunited and had a marriage ceremony in the Philippines in 2019.

[9] In April 2020, the Sponsor applied for the Applicant to become a permanent resident of Canada through the spousal sponsorship program.

[10] On June 17, 2021, the Applicant received a Procedural Fairness Letter (PFL) from the Canadian Embassy advising that he may be excluded from sponsorship as a member of the family class as he was not listed on the Sponsor's application for permanent residence.

[11] In response to the PFL, the Applicant's lawyer explained that the couple had been separated at the time of the Sponsor's application. The Applicant requested, if he did not qualify as a member of the Sponsor's family class, that his application be considered on H&C grounds.

[12] The H&C grounds relied upon included: family reunification, the best interests of their children (BIOC), the Sponsor's establishment in Canada, and hardship if the Sponsor were to return to the Philippines.

A. *Decision Under Review*

[13] The Officer noted that the Sponsor and Applicant married on August 3, 2015 but the Sponsor had not disclosed her marital status during the processing of her permanent residence application. As the Sponsor did not declare her marriage, the Officer found the Applicant was not a member of the family class pursuant to paragraph 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-27.

[14] The Officer's reasons, as detailed in the Global Case Management System (GCMS), note that the Sponsor considered herself separated from the Applicant when she applied for permanent residence. They note that she did not have legal representation at the time, and the failure to disclose the Applicant was an innocent mistake. The Officer noted the circumstances leading to their reunification and the Applicant's submissions that granting their application would achieve the *IRPA*'s goal of family reunification.

[15] The Officer considered the submissions that the Applicant and the Sponsor had become integrated in the lives of each other's children, that their families have bonded, and that approval would be in the BIOC.

[16] The Officer noted that the Sponsor has been in Canada for 9 years. Also noted is the Applicant's submissions regarding the Sponsor's establishment in Canada: that she has stable employment as a hotel housekeeping supervisor, and that her income allows her to support herself and her family in the Philippines.

[17] The Applicant also claimed that he could be employed in Canada because he has experience in the food industry, but he has been unemployed in the Philippines since his return from Dubai in 2020. The Officer stated no concerns regarding the genuineness of the couple's relationship. With regard to hardship to the Sponsor on return to the Philippines, the Officer found:

> Spr is not a Canadian citizen yet. She still has Philippines citizenship. As such, she could return to the Philippines to live with PA and their children. I acknowledge that she would have difficulty in finding employment when she returns and this would

> cause some economic hardship to the family. But I also note that she and PA have family here, so they would still have a normal social network if spr returns to the Philippines.

[18] On the issues of family reunification and BIOC, the Officer stated as follows:

> I note that PA's daughter is non-accompanying. I also note that spr has not submitted a sponsorship application for her son. The separation from their children will continue even if PA's application is allowed because their children are not joining them in Canada at this time. It was stated that their plan is to bring the children within 2 to 3 years after PA's arrival in Canada. This is to allow PA and spr to establish themselves in preparation for their children's move to Canada. This may be a reasonable plan but this also means the children's continued separation from their parents. I note that PA returned to the Philippines in June 2020 after 7 years of working in Dubai. During PA's absence, it was the biological mother (until 2017) and his parents who provided primary care to his daughter. On the other hand, spr has been away from her son since 2009 - she first worked in HK before going to Canada in 2012 under the LCP. Spr's parents have been the primary care-provider of her son. There is no intent at this point to bring their children to Canada. I find that family reunification and the BIOC would not be achieved as separation from their children would be continued.

[19] On the Sponsor's non-disclosure of her marriage to the Applicant, the Officer noted:

> Explanation regarding spr's non-disclosure of PA as her family member during the processing of her previous PR application from 23July2014 to 9Sept2015, and at her landing on 24Sept2015 – not satisfactory. Despite the indicated separation, spr was still obliged to declare any change/s in her personal information in her application form, i.e., she was obligation to disclose both her marriage and separation. By not doing so, she precluded the Migration Officer from making the decision on whether to examine or not examine PA in her previous application.
>
> Spr's non-disclosure with regards to having married and separated from PA is material and a serious offence since it is related to a requirement of the Act and Regs.

> I put a heavier weight on the last 2 factors which is a negative in my assessment of the H&C considerations. I have concluded that the negatives outweigh the positives.

[20] The Officer concluded:

> After a careful review of all the info before me, I find that PA is an excluded family member pursuant to R1179d. TPP on R1179d exemption does not apply because spr landed under the LC category. I have looked whether there are sufficient H&C elements to warrant a relief from R1179d. However, I find that H&C factors are insufficient to warrant the use of exceptional measure in order to overcome PA's exclusion under R1179d.
>
> Application is Refused. PA is not a member of the family class.

II. Issues

[21] The issue is if the decision of the Officer is reasonable. Although the issues raised by the Applicant are intertwined, I will address them as follows:

A. Did the Officer reasonably consider the H&C grounds?

B. Did the Officer conduct a proper BIOC evaluation?

C. Did the Officer place undue emphasis on the Sponsor's misrepresentation?

III. Standard of Review

[22] The parties agree the applicable standard of review is reasonableness, as articulated in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. In assessing the reasonableness of the decision, the Court "asks 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 para 99). Further "[t]he reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it" (*Vavilov* at para 126).

[23] As noted in *Torres v Canada (Citizenship and Immigration)*, 2019 FC 150 at paragraph 8, "[a]n exemption under s. 25(1) of IRPA is exceptional and discretionary relief. An officer's decision on an H&C application is highly fact-specific, and therefore deserves considerable deference from a court on an application for judicial review".

IV. Analysis

A. *Did the Officer Reasonably Consider the H&C Grounds?*

[24] The Applicant argues that the Officer failed to conduct a reasonable assessment of the H&C factors including that the Applicant has been unemployed in the Philippines since the summer of 2020 and that the Sponsor is financially supporting the Applicant, their children, and her own parents. The Applicant argues that there would be hardship if the Sponsor returned to the Philippines as her employment prospects will be limited because of age discrimination and the effects of the COVID-19 pandemic.

[25] The Applicant provided evidence that the employment rate in the Philippines for women aged 25-34 (younger than the Sponsor, who is currently 38) is 37.7%, and 83% of Overseas

Filipino Workers returning home during COVID-19 remained unemployed three months after returning to the Philippines.

[26] Although the Officer's reasons do not specifically reference employment prospects in the Philippines, that does not render the decision unreasonable as the Officer is presumed to have considered all of the evidence (*Thavaratnam v Canada (Citizenship and Immigration)*, 2022 FC 967 at para 18; *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598. Additionally to the extent that the Applicant relies on statistics and not direct evidence, it is not an error for the Officer to not specifically address the evidence.

[27] Further, the Officer acknowledged the Sponsor would face some difficulties finding employment in the Philippines if she were to return but found they were not insurmountable. As the Applicant's evidence was generalized, the Officer's analysis was reasonable. The Applicant's submissions on hardship focused on a comparative basis with opportunities in Canada and that is not sufficient to constitute hardship (*Shaban v Canada (Citizenship and Immigration)*, 2019 FC 247 at paras 29-33).

[28] As noted in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*]:

> 23 There will inevitably be some hardship associated with being required to leave Canada. This alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under s. 25(1) […] Nor was s. 25(1) intended to be an alternative immigration scheme….
>
> …

> 25 What *does* warrant relief will clearly vary depending on the facts and context of the case, but officers making humanitarian and compassionate determinations must substantively consider and weigh *all* the relevant facts and factors before them….
>
> [Citations omitted; emphasis in original.]

[29] The Officer was entitled to weigh the evidence in light of the considerations in paragraph 33 of *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 [*Kisana*].

[30] H&C relief is exceptional and is not intended to alleviate every hardship an applicant faces (*Huang v Canada (Citizenship and Immigration)*, 2019 FC 265 at para 19). Some hardship in being separated from family in Canada is inevitable and does not, on its own, warrant H&C relief (*Kanthasamy* at para 23; *Shah v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 1153 at paras 36-40).

B. *Did the Officer Conduct a Proper BIOC Evaluation?*

[31] The Applicant submits the Officer unreasonably assessed the BIOC considerations. The Officer noted the Applicant's submissions that he and the Sponsor intend to bring their children to Canada in 2-3 years when they are financially stable. The Applicant argues that he and his wife (the Sponsor) made the difficult decision to delay reunification with their children until they were financially stable in Canada, believing this to be in their children's best interests. He argues that this is within the sphere of parental decision-making protected under section 7 of the *Charter* (*B (R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, at p 368, para 80).

[32] In *Kanthasamy*, quoting from *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, the Supreme Court noted that: "for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them" (at para 38).

[33] The Officer noted that as the couple do not intend to bring their children to Canada, the BIOC and family reunification would not be achieved by granting the application. Although the Applicant challenges the Officer's consideration of BIOC and family reunification, that is how the Applicant framed their position.

[34] The Officer was asked to consider the BIOC in the unique circumstances where there is no request for the children to come to Canada. While I acknowledge the non-accompanying children will be affected by the decision, and thus need to be considered, the degree to which the Officer must consider this factor is dependant on the nature of the BIOC interests at stake. Here the Officer was asked to consider their interests in remaining in the Philippines while both parents are in Canada. As for the Applicant's child, it is not clear from the record that he can bring the child to Canada in any event. Accordingly, it was reasonable for the Officer to note, based upon the submissions before him, that family reunification is not achieved by granting the request to have only the Applicant come to Canada.

[35] The BIOC do not always guarantee a positive H&C decision or outweigh other factors (*Li v Canada (Citizenship and Immigration)*, 2020 FC 754 at para 56).

[36] Here the Officer weighed the BIOC and family reunification factors and noted that while it might be reasonable for the Applicant and Sponsor to delay bringing their children to Canada, family reunification and the BIOC would not be achieved by this plan. This was a reasonable conclusion for the Officer to draw, and does not amount to any interference with their parental rights.

C. *Did the Officer Place Undue Emphasis on the Sponsor's Misrepresentation?*

[37] The Applicant submits the Officer fettered their discretion by fixating unduly on the Sponsor's failure to declare the Applicant as her spouse in her permanent residence application.

[38] The Officer put heavier weight on the misrepresentation factor than on the H&C considerations. The Officer was entitled to consider the Sponsor's failure to declare the Applicant as a spouse when applying for permanent residence. The Officer was also entitled to find the Sponsor's non-disclosure outweighed the other H&C considerations. This falls reasonably within the Officer's exercise of discretion.

[39] As noted in *Kisana* (at para 27), family reunification does not always outweigh public policy concerns arising from misrepresentation.

JUDGMENT in IMM-9085-21

THIS COURT'S JUDGMENT is that this judicial review is dismissed and there is no question for certification.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-9085-21
STYLE OF CAUSE:	VIEJA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEO-CONFERENCE
DATE OF HEARING:	DECEMBER 7, 2022
JUDGMENT AND REASONS:	MCDONALD J.
DATED:	JANUARY 24, 2023

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