Federal Court  Cour fédérale

Date: 20230309

Docket: IMM-3780-21

Citation: 2023 FC 325

Ottawa, Ontario, March 9, 2023

PRESENT: Mr. Justice Norris

BETWEEN:

MYRA MARCELO GANADEN
FELMER URSUA GANADEN
AURIEL FELIX MARCELO GANADEN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants are citizens of the Philippines. The principal applicant, Myra Marcelo Ganaden, first entered Canada in 2013 on a work permit. When she was unable to renew her work permit, in 2016 she applied for and obtained a study permit to attend a program in Hospitality Management at Solomon College in Alberta. She did so (and completed the program) on the basis of advice from the college and her former immigration consultant that she

would be eligible to apply for a post-graduation work permit once she completed the program. This advice was incorrect.

[2] In 2017, the principal applicant's husband, Felmer Ursua Ganaden, entered Canada on an open work permit. Subsequently, he obtained a study permit.

[3] Meanwhile, their son Auriel, who was born in July 2007 (the minor applicant) had remained in the Philippines with his grandparents. The adult applicants' second child, Aureus, was born in Canada in February 2019.

[4] In October 2020, the applicants applied for permanent residence in Canada on humanitarian and compassionate ("H&C") grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). They based this application on their establishment in Canada, the hardship they would face if they were required to return to the Philippines, and the best interests of the children who would be directly affected by the decision.

[5] In a decision dated May 20, 2021, an Acting Senior Immigration Officer with Immigration, Refugees and Citizenship Canada refused the application.

[6] The applicants now apply for judicial review of this decision under subsection 72(1) of the *IRPA*. Their principal submission is that the officer's best interests of the children analysis is unreasonable. As I explain in the reasons that follow, I agree. This application must, therefore, be allowed and the matter remitted for redetermination by a different decision maker.

[7] Subsection 25(1) of the *IRPA* authorizes the Minister to grant relief to a foreign national seeking permanent resident status who is inadmissible or otherwise does not meet the requirements of the Act. The Minister may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations under the Act only if the Minister "is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national." This discretion to make an exception provides flexibility to mitigate the effects of a rigid application of the law in appropriate cases (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 19). Whether relief is warranted in a given case will depend on the specific circumstances of that case (*Kanthasamy* at para 25).

[8] Subsection 25(1) expressly requires a decision maker to take into account the best interests of a child ("BIOC") directly affected by a decision made under that provision. The "best interests" principle is "highly contextual" because of the "multitude of factors that may impinge on the child's best interests" (*Kanthasamy* at para 35, quoting *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 11 and *Gordon v Goertz*, [1996] 2 SCR 27 at para 20). As a result, it must be applied "in a manner responsive to each child's particular age, capacity, needs and maturity" (*Kanthasamy* at para 35). Protecting children through the application of this principle means "[d]eciding what . . . appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention" (*Kanthasamy* at para 36, quoting *MacGyver v Richards* (1995), 22 OR (3d) 481 (CA) at p 489).

[9] When the best interests of a child are engaged, decision makers must do more than simply state that they have been taken into account (*Kanthasamy* at para 39). Rather, those interests "must be well identified and defined and examined with a great deal of attention in light of all the evidence" (*Kanthasamy* at para 39, internal quotation marks and citations omitted). Furthermore, where (as is the case with subsection 25(1) of the *IRPA*) legislation specifically directs that the best interests of a child who is directly affected be considered, "those interests are a singularly significant focus and perspective" (*Kanthasamy* at para 40). Importantly, "Because children may experience greater hardship than adults faced with a comparable situation, circumstances which may not warrant humanitarian and compassionate relief when applied to an adult, may nonetheless entitle a child to relief" (*Kanthasamy* at para 41).

[10] It is well-established that the substance of an H&C decision should be reviewed on a reasonableness standard (*Kanthasamy* at para 44). That this is the appropriate standard has been reinforced by *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10.

[11] Judicial review on a reasonableness standard considers not only the outcome but also the justification for the result (where reasons are required) (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 29). 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). A decision that displays these qualities is entitled to deference from the reviewing court (*ibid.*). On the other hand, "where reasons are provided but they fail to provide a transparent and intelligible justification [. . .], the decision will be unreasonable" (*Vavilov* at para 136).

[12] When applying the reasonableness standard, it is not the role of the reviewing court to reweigh or reassess the evidence considered by the decision maker or to interfere with factual findings unless there are exceptional circumstances (*Vavilov* at para 125). Furthermore, it follows from the discretionary nature of decisions under subsection 25(1) of the *IRPA* that generally the administrative decision maker's determinations will be accorded a considerable degree of deference by a reviewing court (*Williams v Canada (Citizenship and Immigration),* 2016 FC 1303 at para 4). At the same time, reasonableness review is not a rubber-stamping process; it remains a robust form of review (*Vavilov* at para 13).

[13] The onus is on the applicants to demonstrate that the officer's decision is unreasonable. To set aside a decision on this basis, 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).

[14] When the H&C application was decided, the adult applicants' older son was almost 14 years of age and their younger son was 2 years of age. Written submissions provided in support of the application had emphasized the greater advantages Auriel (the minor applicant) would enjoy in Canada compared to the Philippines if the application was granted and the significant disadvantages Aureus (the Canadian-born child) would suffer if the application was refused and the family was required to return to the Philippines.

[15] In assessing the best interests of the children, the officer made the following determinations:

- In most cases, the best interests of a child "would be to be around his/her parents, to have all the basic requirements of life in food, shelter, clothing, to have education and medical systems to support his/her life, and to have social support from family and friends."

- If Auriel were to continue to live in the Philippines, he would continue to have the support of the Filipino education, medical, and social systems as well as that of his parents.

- Aureus is still "very young" and "there is little evidence submitted to suggest he will be unable to adjust" to life in the Philippines. There is also "little evidence submitted to suggest he will not have the support of the Filipino education, medical, and social systems" if the family were to return to the Philippines. Most importantly, he will continue to have the support of his parents as well as that of his older brother.

- The officer "acknowledge[d] that it is hard to suggest it will be better for Aureus to live in the Philippines instead of Canada, with Canada being one of the top countries to live in the world."

- The officer therefore accepted that the best interests of both children favoured a positive decision.

- Nevertheless, the officer concluded: "I do not find [the] BIOC to be the determinative factor, because while I find Auriel and Aureus residing in Canada to be more beneficial, I do not find it to be a necessity for their wellbeing."

[16] I agree with the applicants that the officer unreasonably focused on the whether the children's basic necessities would continue to be met in the Philippines in the event that the family had to return there. As this Court has pointed out on several occasions, it is perverse to suggest that a child's interests in remaining in Canada are somehow lessened if the alternative meets their basic needs. See, among other cases, *Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813 at 16; *De Oliveira Borges v Canada (Citizenship and Immigration)*, 2021 FC 193 at para 9; *Manriquez v Canada (Citizenship and Immigration)*, 2022 FC 298 at para 22; and *McDonald v Canada (Citizenship and Immigration)*, 2022 FC 394 at para 29. This is exactly what the officer did in this case.

[17] The respondent correctly points out that while the best interests of the children is an important factor, it is not necessarily determinative of an H&C application and the decision maker must weigh and balance all relevant considerations. Nevertheless, I am satisfied that the reasonableness of the overall balancing carried out in this case is called into question by the officer's unreasonable assessment of the best interests of the children, a critical consideration under subsection 25(1) of the *IRPA*.

[18] Since this is sufficient to require that the matter be reconsidered, it is not necessary to address the other grounds on which the applicants challenge the decision.

[19] For these reasons, the application for judicial review will be allowed, the decision dated May 20, 2021, is set aside, and the matter is remitted for reconsideration by a different decision maker.

[20] The parties have not suggested any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that no question arises.

[21] Finally, there is a spelling mistake in the first name of the minor applicant in the style of cause. As part of the Court's order, the style of cause will be amended to correct this error with immediate effect.

JUDGMENT IN IMM-3780-21

THIS COURT'S JUDGMENT is that

1. The style of cause is amended to reflect the correct spelling of the first name of the minor applicant.
2. The application for judicial review is allowed.
3. The decision dated May 20, 2021, is set aside and the matter is remitted for redetermination by a different decision maker.
4. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3780-21
STYLE OF CAUSE:	MYRA MARCELO GANADEN ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
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