Federal Court  Cour fédérale

**Date: 20230324**

**Docket: IMM-3261-21**

**Citation: 2023 FC 412**

**Toronto, Ontario, March 24, 2023**

**PRESENT: Justice Andrew D. Little**

**BETWEEN:**

**KULWINDER KAUR**
**GURKIRAT SINGH**
**RAJVIR SINGH**
**JASLEEN SINGH**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# CORRECTED JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by a senior immigration officer made under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *"IRPA"*). The applicant, Ms Kaur, applied for permanent residence in Canada, seeking an exemption based on humanitarian and compassionate ("H&C") considerations. By decision dated April 29, 2021, the officer refused the application.

[2] The applicant submitted that the officer's decision should be set aside as unreasonable under the principles set out by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653.

[3] For the following reasons, this application will be allowed and the matter returned for redetermination by another officer.

## I. Background and Events Leading to this Application

[4] The four applicants are a family of two parents and their two children. Ms Kaur and her husband, Mr Singh, were born in India and are citizens of Italy. Ms Kaur and Mr Singh lived in Italy starting in 2001 and 1995 respectively. Their two children, J and R, were born in Italy and are also Italian citizens.

[5] The applicants reside in Surrey, British Columbia. They live together with Ms Kaur's brother and his family and with Ms Kaur's parents.

[6] In November 2015, Ms Kaur and her children arrived in Canada as visitors. In January 2016, Mr Singh joined them as a visitor. Ms Kaur obtained a two-year work permit from April 2016 to April 2018 and worked on a farm during that period. In April 2018, she received a study permit, which was valid until August 2019. While she was studying, Mr Singh obtained an open work permit as the spouse of a student. The applicant faced health difficulties and was unable to complete her studies. An extension of her study permit was denied. The applicant and her family

subsequently restored their visitor status in Canada. In March 2020, Mr Singh received a work permit valid until March 2021. After March 2020, he worked to support the family.

[7] In November 2020, the applicant and her family applied for permanent residence from within Canada with an exemption on humanitarian and compassionate grounds under section 25 of the *IRPA*, based on the hardship they would face if required to return to Italy, the best interests of the two children and their personal ties to Canada.

[8] By letter to Ms Kaur dated April 29, 2021, and written reasons for decision dated April 26, 2021, the officer denied the H&C application.

## II. Analysis

### A. *Standard of Review*

[9] The standard of review of the officer's decision is reasonableness, as described in *Vavilov*. The onus is on the applicant to demonstrate that the decision is unreasonable: *Vavilov,* at paras 75 and 100.

[10] Reasonableness review is a deferential and disciplined evaluation of whether an administrative decision is transparent, intelligible and justified: *Vavilov,* at paras 12-13 and 15. The starting point is the reasons provided by the decision maker, which are read holistically and contextually, and in conjunction with the record that was before the decision maker. 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 constrained the decision maker: *Vavilov,* esp. at

paras 85, 91-97, 103, 105-106 and 194; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 SCR 900, at paras 2, 28-33, 61.

B. ***Was the officer's decision unreasonable?***

[11] In the present case, the applicants have demonstrated that the officer's decision was unreasonable, principally because the officer's reasons failed to consider and analyze the best interests of the children in accordance with the applicable legal standards.

[12] In assessing applications on H&C grounds, an officer must always be alert, alive and sensitive to the best interests of the children. Those interests must be well identified and defined, and examined with a great deal of attention in light of all the evidence. See *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909, at paras 35, 38-40; *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2003] 2 FC 555 at paras 5, 10; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 FC 358 at paras 12-13, 31; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 75; *Ganaden v Canada (Citizenship and Immigration)*, 2023 FC 325, at para 9; *Mebrahtom v Canada (Citizenship and Immigration)*, 2020 FC 821, at paras 7-8 and 14. The children's interests must be given substantial weight and be a significant factor in the H&C analysis, but are not necessarily determinative of an H&C application: *Kanthasamy*, at para 41; *Hawthorne*, at para 2.

[13] A decision under *IRPA* subsection 25(1) will be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered: *Kanthasamy*, at para 39, citing *Baker*, at para 75.

[14] The applicants submitted that the officer's decision failed to comply with this legal standard for assessing the BIOC, specifically by failing to expressly identify, define and analyze the children's best interests, by performing a hardship analysis, and by failing to properly consider the effects on the children of returning to Italy for education where they no longer speak the language and would have to adjust to an education system that is quite different from British Columbia. The respondent argued that the decision was reasonable: the officer reasonably addressed the issues related to the BIOC and the reasons were responsive overall to the evidence submitted by the applicants, who had the onus to show H&C reasons to justify an exemption under *IRPA* subsection 25(1).

[15] For the reasons below, I agree that the decision must be set aside. These reasons will consider three points.

[16] First, the children's best interests were not well identified and defined in the officer's reasons. In substance, the officer failed to articulate and assess the children's best interests and instead focused on discounting the hardships they would face on return to Italy.

[17] The officer's BIOC assessment found little evidence that would permit a conclusion that the children would be "unable to successfully re-integrate" into the Italian education system and

that re-integration, including re-familiarization their language of instruction for the first several years of their lives, "would not be more than a temporary disruption." The officer did not articulate or apparently assess the evidence or argument about why it was in the children's best interests to remain in Canada for their education.

[18] Similarly, when analyzing familial considerations, the officer found little evidence to conclude that the children's well-being would be "adversely impacted" if the family were required to exit Canada and apply for permanent residence from abroad. The officer acknowledged that "physical separation would cause a certain amount of disruption" but found that the applicants had not submitted "persuasive evidence" from which to conclude that their "familial relationships would not be able to continue any meaningful way by a written communication such as letters & emails, employing video calling technology, or other means of correspondence". Here, the officer again focused on adverse impacts or hardships to the children to the exclusion of an analysis of what was in their best interests.

[19] The "Analysis" section of the officer's BIOC assessment recognized that the applicants had been in Canada for approximately six years and that during that time, they had

> … invariably achieved a level of social, familial, and academic establishment and integration which though not unexpected, nonetheless attracts a degree of weight. However, there is little evidence from which I am able to conclude that the children would not be able to reintegrate into Italian society, culture, or academia, where they lived for the respective 12 and 8 years of their lives, nor that their health, education, security, or well-being would be adversely impacted where they to be required to return to Italy. While I am sensitive to issues of family unity, the [applicants] have not persuasively evidenced that the children's familial relationships with grandparents, aunts, uncles and cousins could not continue any meaningful way by means of written/digital

> correspondence, video & telephone calls, and other means of communication. While the best interests of the child receive careful and significant consideration, I have little basis to award the factors advance before me more than a modest amount of weight.

[20] The respondent submitted that this passage demonstrated that the officer properly considered the best interests of the children. I do not agree. This passage again reflects the focus of the officer on adverse impacts on the children on returning in Italy and hardship to them, rather than what was in their best interests. It is not enough merely to state that the best interests of the children must or should receive careful and significant consideration; the analysis must also reflect and implement that standard: *Kanthasamy*, at para 39; *Hawthorne,* at para 2.

[21] It is true that the hardships faced by the applicants, including the children, are relevant to the H&C analysis and appropriate for an officer to analyze for the BIOC. In some cases, applicants' submissions may only focus on the hardships they will face on return to another country. Here, the applicant's written submissions and evidence on the H&C application expressly raised factors related to both the children's best interests in remaining in British Columbia and the hardship they may suffer if they return to Italy. The error was to focus on hardship to the exclusion of an analysis of best interests – a focus on the negative impacts of returning to Italy without reference to the corresponding or independent positive benefits of remaining in Canada. As this Court has previously stated, a lack of hardship cannot serve as a valid substitute for a BIOC analysis: *Sheorattan v Canada (Citizenship and Immigration),* 2022 FC 1366, at para 34 (quoting Singh v Canada (Citizenship and Immigration), 2019 FC 1633, at para 30); *Teweldemedhn v Canada (Citizenship and Immigration),* 2022 FC 36, at para 34; *Patousia v Canada (Citizenship and Immigration),* 2017 FC 876, at paras 53-56.

[22] To adopt Justice McHaffie's words in *Mebratoum*, the officer's decision was required to "assess[] the situation the children would face in Italy, how that would compare to the family remaining in Canada, and the resulting impact on the children": *Mebratoum*, at para 16. In this case, the officer's analysis did not make a sufficient comparison to remaining in Canada and thus did not identify, define or articulate the best interests of the children. There was no basis in the evidence or the applicants' written H&C submissions to find that only hardships on return to Italy were relevant to or raised in the H&C application.

[23] This analysis demonstrates that the officer failed to analyze the BIOC in accordance with the legal requirements in the case law under *IRPA* subsection 25(1). The importance of the BIOC to a proper H&C decision and the shortcomings in the officer's analysis are sufficient for the Court to set aside the decision and remit it for redetermination by another officer: *Vavilov*, at paras 99-101; *Ganaden*, at para 17.

[24] Second, the applicant challenged the officer's finding that there was insufficient evidence that the children's relationships with their grandparents, aunts, uncles and cousins could not continue through other means of communications, including written/digital correspondence, video and telephone calls. The applicants submitted that "[t]here is a significant factual difference between living together and sharing day-to-day life and an occasional visit" (citing *Yu v Canada (Minister of Citizenship and Immigration)*, 2006 FC 956, at paragraph 30, and *Epstein v Canada (Citizenship and Immigration)*, 2015 FC 1201, at para 16).

[25] This line of analysis relating to other technology and means of communications appeared in both the “familial considerations” and “analysis” sections of the BIOC assessment, and appears to be boilerplate language.

[26] I set out my view in *Martinez Mendez v Canada (Citizenship and Immigration)*, 2022 FC 816, at paragraph 39 (which I believe is consistent with Justice LeBlanc’s statement in *Epstein* and Justice Shore’s in *Yu*):

> Statements about the use of technology to maintain relationships must be sensitive to the particular circumstances – for example, an adult’s ability to use technology to keep up with adult friends from afar is quite different from a parent and a child attempting to maintain a meaningful relationship as the child grows up. Concerns may arise if the reasons do not reflect the circumstances of those affected, particularly a child’s best interests.

See also *Dhaliwal v Canada (Citizenship and Immigration)*, 2022 FC 1270, at para 27.

[27] In this case, the children lived together in the same home with their grandparents as well as their auntie, uncle and cousins. There was evidence in the record from each of the children, their parents, their grandparents, the auntie and the uncle about the relationship of the family members living under the same roof over the previous years. The use of apparently boilerplate language about technology and communications in the reasons (twice) did not recognize the children’s daily relationships with all those people (and in particular their grandparents) over several years, did not display sensitivity to the evidence of those relationships, and failed to explain how those relationships could, purportedly, be maintained through these alternative means of communication. In my view, more explanation was required in the circumstances, beyond the boilerplate statements, before reaching a finding on this issue.

[28] Third, at the hearing in this Court, the applicants strongly challenged the officer's reliance on a "super visa" and sponsorship as purported alternative means of immigration to Canada, which would permit them to come to Canada for extended periods, thereby maintaining family unity in British Columbia. The applicants submitted that this consideration was simply erroneous: none of the applicants qualified for a super visa or for sponsorship. The respondent countered with the argument that the applicants' possible eligibility for a super visa or sponsorship was not central to the officer's H&C analysis.

[29] The officer's reliance on the availability of a super visa arose in two places. One was during the BIOC assessment, in which the officer found that it had not been "persuasively evidenced that refusing the present application would separate [Ms Kaur] from her family for a protracted period of time or permanently, given the availability of sponsorships and super visas, the client's self-assessed ineligibility for which has not been persuasively tested". In addition, the availability of a super visa arose in the "Establishment in Canada" section of the officer's reasons. The officer found that the applicants had not demonstrated that they would be ineligible or unable to obtain a super visa, as one aspect of the analysis about separation of the larger family.

[30] There is insufficient evidence on this application to reach a conclusion on the reasonableness of the officer's findings on sponsorship. On the super visa, I agree with the applicants that the officer's reasoning raises concerns on the facts (Ms Kaur was not eligible even to apply) and on the Court's case law: see *Akinkugbe v. Canada (Citizenship and Immigration)*, 2022 FC 819, at paras 12-15; *Antoun v Canada (Citizenship and*

*Immigration)*, 2022 FC 612, at para 13; *Bernabe v. Canada (Citizenship and Immigration)*, 2022 FC 295, at paras 4 and 33 (citing *Rocha v Canada (Minister of Citizenship and Immigration)*, 2022 FC 84, at para 31*; Greene v Canada (Minister of Citizenship and Immigration)*, 2014 FC 18, at paras 9-10); and my reasons in *Polinovskaia v. Canada (Citizenship and Immigration)*, 2022 FC 696, at para 28. However, reading the officer's analysis in this case, I cannot conclude that the officer relied on the super visa so heavily or materially as to render the decision unreasonable: *Vavilov,* at para 100. It is a factor that contributes to the overall conclusion on unreasonableness: *Antoun*, at para 13.

C. ***Remedy***

[31] I am aware that both children were teenagers at the time of the decision under review, and that the older child (R) is now over 18 years old. The latter fact is potentially relevant for the Court's decision on an appropriate remedy. However, the respondent did not raise this point and, in any event, I do not believe it materially affects the outcome of this case because J remains under 18.

[32] The appropriate remedy is therefore to set aside the decision and remit the matter for redetermination.

## III. Conclusion

[33] For the reasons above, the application will be allowed. The H&C decision will be set aside and the application returned for redetermination.

[34] Neither party proposed a question to certify for appeal and no question will be stated.

**JUDGMENT in IMM-3261-21**

**THIS COURT'S JUDGMENT is that**:

1. The application is allowed. The officer's decision is set aside and the applicants' request for permanent residence with an exemption under section 25 of the *Immigration and Refugee Protection Act* is remitted for redetermination by a different officer. The applicants shall be permitted an opportunity to update or supplement their evidence and submissions before the redetermination decision.
2. No question is certified for appeal under paragraph 74(*d*) of the *Immigration and Refugee Protection Act*.

"Andrew D. Little"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-3261-21 |
| **STYLE OF CAUSE:** | KULWINDER KAUR, GURKIRAT SINGH, RAJVIR SINGH, JASLEEN SINGH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
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| **REASONS FOR JUDGMENT AND JUDGMENT:** | A.D. LITTLE J. |
| **DATED:** | MARCH 24, 2023 |

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| Melissa Mathieu | FOR THE RESPONDENT |

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