Federal Court Cour fédérale

Date: 20230406

Docket: IMM-3615-21

Citation: 2023 FC 492

Ottawa, Ontario, April 6, 2023

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

HERNAN DARIO NEIRA GIRALDO
HEIDY YELYTHZA GOMES MARTINEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, citizens of Colombia, initially came to Canada in 2017. They have two Canadian-born children who are not parties to this proceeding.

[2] The Applicants made a claim for refugee protection that was denied, and their application for leave and judicial review was dismissed: *Giraldo v Canada (Citizenship and Immigration),* 2020 FC 1052.

[3] The Applicants are before the Court seeking judicial review of a May 17, 2021 decision [Decision] by a senior immigration officer [Officer] denying their application for permanent residence on humanitarian and compassionate [H&C] grounds pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act,* SC 2001 c 27 [*IRPA*]. This provision is reproduced in Annex "A" below.

[4] The sole issue for determination is the reasonableness of the Decision, that is whether it is intelligible, transparent and justified, further to the applicable, presumptive standard of review: *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 [*Vavilov*] at paras 10, 25, 99.

[5] For the reasons that follow, I am persuaded that the Applicants have met their onus (*Vavilov,* above at para 100), the determinative issue being the Officer's unreasonable analysis regarding the best interests of the Applicants' Canadian-born children. I therefore grant this judicial review application.

II. Analysis

[6] An H&C decision-maker is required to be alert, alive, and sensitive to the best interests of the child [BIOC] and give them substantial weight; a decision may be unreasonable where the

BIOC are minimized: *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para 75. The decision maker must consider the impact on the children's best interests if they remain in Canada and if they do not remain in Canada: *Vieira Sebastiao Melo v Canada (Citizenship and Immigration)*, 2022 FC 544 at para 57.

[7] Contrary to the Respondent's submission, I find the Officer's reasoning is not rooted in a lack of evidence but rather in speculation, resulting in an illogical chain of analysis. For example, regarding the Applicants' fear that their children may experience a higher risk of criminality and violent criminality in Colombia, the Officer commented first that the Applicants lived in Colombia before their arrival in Canada, and second that they did not describe how they experienced criminality growing up as children, or as adults.

[8] I find the Officer thus unreasonably focusses on what the evidence does not say instead of what it does: *Anshur v Canada (Citizenship and Immigration)*, 2018 FC 567 at para 21. Further, there is no justification or intelligibility, in my view, in attempting to compare the parents' past, lived experiences, especially many years ago growing up, to their children's present circumstances. In other words, the Officer's focus strays from the children to the parents and seeks to draw conclusions about what the children would face in moving to Colombia based on the absence of evidence about whether the parents faced criminality and violent criminality. This is not reasonable.

[9] I find the Officer also fails to specify what weight is given to the BIOC factor at all: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 25.

[10] In addition, the Officer presupposes that children are resilient in the face of change, despite accepting that the children in this case "will" face some difficulties adapting to life in Colombia. Children are rarely, if ever, deserving of hardship, and starting the analysis with the mindset of the resilience or adaptability of the children calls into question, in my view, whether the Officer was alert, alive, and sensitive to the children's best interests: *Hawthorne v Canada (Minister of Citizenship and Immigration) (CA),* 2002 FCA 475 (CanLII), [2003] 2 FC 555 at para 9; *Bautista v Canada (Citizenship and Immigration),* 2014 FC 1008 at para 28.

[11] I also note there was no evidence before the Officer regarding the circumstances of the children's relatives in Colombia, such as their paternal grandparents, uncle and aunt mentioned by the Officer, and whether they would be willing to support the children. The Officer thus again engages in unjustified speculation by assuming they will.

III. Conclusion

[12] For the above reasons, I therefore grant the Applicants' judicial review application. The Decision is set aside, with the matter to be redetermined by a different officer.

[13] Neither party proposed a serious question of general importance for certification. I find that none arises in the circumstances.

JUDGMENT in IMM-3615-21

THIS COURT'S JUDGMENT is that:

1. The Applicants' judicial review application is granted.
2. The May 17, 2021 rejection of the Applicants' application for permanent residence of humanitarian and compassionate grounds is set aside, with the matter to be redetermined by a different officer.
3. There is no question for certification.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

***Immigration and Refugee Protection Act* (S.C. 2001, c. 27)**
***Loi sur l'immigration et la protection des réfugiés* (L.C. 2001, ch. 27)**

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	**25 (1)** Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

FEDERAL COURT

SOLICITORS OF RECORD

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