Federal Court  Cour fédérale

Date: 20231121

Docket: IMM-7762-22

Citation: 2023 FC 1540

Ottawa, Ontario, November 21, 2023

PRESENT: Mr. Justice Pentney

BETWEEN:

MD ATIQUE SOBHAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, MD Atique Sobhan and his wife, Samina Atique, are citizens of Bangladesh [for ease of reference, I shall refer to them collectively as "the Applicants"]. They have two children, a son who lives in Australia and a married daughter who resides in Canada with her husband and one son (the Applicants' grandson).

[2] Since 2011, the Applicants have travelled frequently from Bangladesh to visit their daughter and her family. In 2018, their grandson was diagnosed with Autism Spectrum Disorder (ASD) and Pervasive Development Disorder (PDD). Since then, the Applicant's wife has spent approximately six months of the year in Canada to assist her daughter and son-in-law with caring for the grandson.

[3] The Applicants' daughter applied to sponsor them through the Parent/Grandparent Sponsorship Program, but was not selected in the lottery. The Applicants then applied for permanent residence from within Canada based on humanitarian and compassionate (H&C) grounds, pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27. Their application was based on three grounds: their strong family ties to Canada; the best interests of their grandson; and the hardship associated with having to leave to return to Bangladesh, in particular the difficulty such a disruption would cause them and their daughter and grandson.

[4] Their application was refused, for reasons that are discussed in more detail below. In summary, the Officer acknowledged the strong family ties, but was not persuaded that the Applicants' presence in Canada was essential to care for their grandson. The Officer had a number of unanswered questions arising from materials in the record, and overall was not persuaded that the Applicants had demonstrated that H&C relief should be granted.

[5] The Applicants seek judicial review of the refusal decision.

[6] The only issue is whether the Officer's decision is reasonable. This is assessed under the framework set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, and recently confirmed in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 2.

[7] The determinative issue in this case is the Officer's articulation and application of the test for assessing the best interests of the child in the context of an H&C application. That test was set out in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61. A decision-maker must do more than state that the interests of the child have been taken into account; their interests must be "well identified and defined" and examined "with a great deal of attention" in light of the evidence (*Kanthasamy* at para 39).

[8] I am persuaded by the Applicant's submission that the decision is unreasonable because the Officer's reasons repeatedly refer to a standard for assessing best interests of the child that departs from the guidance in *Kanthasamy*. While I accept the Respondent's argument that the decision is lengthy and detailed, that alone does not make it reasonable. In my view, in a case like this, the key question is whether the reasons demonstrate that the Officer applied the proper test when it counted – during the analysis of the best interests factor.

[9] The Applicants' submissions regarding best interests of their grandson rested on several key points:

- Their daughter and son-in-law were both employed full-time, and needed the income to be able to provide adequate supports to their child;

- Their daughter was profoundly affected by the diagnosis of ASD and PDD, and has experienced periods of anxiety and depression. They said their daughter remains in a fragile psychological state, and is fearful for her son's safety, in part because he has a tendency to bolt and thus needs constant supervision. She also has difficulty being happy knowing that her son is facing so many daily challenges;

- The medical evidence and clinical assessments of the grandson demonstrate the nature and extent of his needs:

> In another assessment conducted by Dr. Mailiza, a paediatric consultant, it was noted that [the grandson] experiences serious language deficits that 'severely limits his ability to express himself and convey his needs.' Moreover, it was noted that he is not able to carry out basic functional tasks such as dressing and feeding himself. She concluded that '[the grandson] lacks the ability to plan and perform daily tasks and acti[o]ns that are necessary to address his basic safety. …
>
> The above summary of medical, school documents indicate that [the grandson]… requires ongoing support with all basic life functions (dressing, feeding, toilet training, language development and communication, socializing with his peer group, navigating through space, task completion within a classroom environment). He requires constant adult supervision for self regulatory functions that most children his age are expected to perform.

- Although the grandson is non-verbal, he communicates primarily through touch and can sense the presence of the Applicants, in particular his grandmother. The Applicants submissions state: "Upon separation, [the grandson] displays physical and emotional signs of distress such as crying, and screaming. Mrs. Atique further noted that [the grandson] feels calm in her presence; 'he feels free and cared for by me'…";

- The Applicants both have a background in psychology: Mr. Atique obtained a masters degree in clinical psychology in 2004, and Mrs. Atique also has academic training in psychology. In addition, they both received specialized training in a treatment intervention known as Applied Behaviour Analysis [ABA] that was recommended for their grandson;

[10] The Applicants' H&C application ended with the following statement:

> Given the above consideration, Mr. & Mrs. Atique's presence offers much needed emotional and practical support for this family. Our clients are both willing and capable of offering meaningful and uplifting support to bolster the family system. Based on results of this clinical evaluation, it is in the best interests of this child to benefit from close proximity to his grandparents who are important attachment figures in his life.

[11] The Officer summarized the medical information and assessments concerning the grandson's diagnosis and needs, the vulnerable state of the daughter as well as the Applicants' backgrounds in psychology and the fact that they had undergone ABA training in Canada. Based on this, the Officer stated:

> I acknowledge the support the applicants have been contributing to their daughter's family and how their presence have (*sic*) improved the quality of life for both [their daughter and grandson] in the past year and during their short visits. I also acknowledge that over the years, the bond between the child and the applicants, especially for Atique who has visited almost every year, must have been strengthened and that in their absence, [the grandson] would face emotional hardship for some time.

[12] However, the Officer then found that the documentary evidence was insufficient to establish the precise needs of the daughter and grandson in regard to day-to-day assistance, the costs of obtaining the necessary supports and whether they had explored available government programs for children with autism (the Officer listed a number of such programs that they discovered through their own research). In addition, the Officer noted that documents submitted by the Applicants indicated that the daughter's mother-in-law also resides with the family, but there was no information provided about the type of assistance she was willing or able to provide. The Officer also noted the other options available to the family, including after-school programs and/or obtaining the assistance of a qualified babysitter.

[13] The Officer noted some gaps in the information provided (for example, regarding the daughter's family's financial resources and ability to support the Applicants and/or pay for additional supports for their child) as well as some inconsistencies (for example, regarding the daughter's employment, some records listed her as the owner of a small business while others indicated she was working as a medical administrator).

[14] Overall, the Officer concluded that there was insufficient information to justify granting the Applicants' request for H&C relief that was based on their claim that their presence was needed to provide essential supports to their daughter and grandson.

[15] The Applicants' main submission is that the Officer's decision is unreasonable because they applied the wrong test when examining the best interests of the child factor. Instead of determining what was in the best interests of the child, the Officer repeatedly asked whether the

Applicants' presence was absolutely necessary for the well-being and development of the grandson.

[16] I agree that the decision is unreasonable because the Officer applied the wrong test.

[17] The Officer's decision repeatedly refers to a test that seems to hinge on whether the Applicants' presence was vital to the daughter and grandson. The following excerpts, taken from the portion of the decision discussing the best interests of the child factor, demonstrate this point. The Officer stated:

- "However, I find insufficient documentary evidence has been put forth by the applicants that could demonstrate that their presence is essential for the development of [the grandson]…"

- "However, I find that there is a lack of information that explains why the applicants' presence is crucial in raising [the grandson] when both parents (and the paternal grandmother) are present in his life."

- "…I find there is insufficient evidence that the applicants are the family's only and last resort."

- "… I find there is little compelling evidence to prove that the child's developmental needs will be obstructed by the absence of the applicants."

- "…I find there is insufficient evidence to suggest that [the grandson's] unique needs could only be met by the care of the applicants and the family unit would function only in the presence of the applicants."

[18] I agree with the Respondent that in many respects, the decision is comprehensive, detailed and reflects an engagement with the facts in the record, as well as a discussion of facts that the Officer found to be missing. However, an essential component of a reasonable decision under the *Vavilov* framework is an indication that the decision-maker applied the proper legal test to the essential evidence in the record that was before them. On this score, I find the Officer's decision is lacking, because the repeated references set out above give rise to a serious concern that the Officer failed to apply the *Kanthasamy* test.

[19] The following statement is the clearest expression of what the Officer found to be in the child's best interests: "It is in the best interests of the child to be with a trained caretaker who understands his special ASD needs as well as the evolving needs of different developing stages – his parents." At one level, this statement merely states the obvious; it is clearly in the grandson's best interests to receive his parents' love and attention. That was never disputed. The Officer failed to explain, however, why it was not in the grandson's best interests to receive the ongoing care and assistance of his grandparents – who are both trained professionals, with specialized training in the very treatment program recommended for their grandson, and who understand his evolving developmental needs and have developed a close relationship with him.

[20] The core of the Applicants' H&C claim is that their continued presence in Canada would provide assistance to their daughter and son-in-law and was in their grandson's best interests. Instead, the Officer's analysis turned on the question of whether they were the "only and last resort." That is not the question the Officer was required to assess in examining the H&C application. The fact that this test, or a variation on the theme, was repeated at several different points in the analysis makes clear that this was not simply a slip of the pen. It calls into question the line of reasoning the Officer employed in examining the evidence in the record.

[21] As in *Motrichko v Canada (Citizenship and Immigration)*, 2017 FC 516, the analysis the Officer was called upon to undertake was not whether the grandson would manage or survive in the absence of his grandparents, but "how they would be impacted, both practically and emotionally, by the departure of the Applicant in the particular circumstances of the case" (at para 27).

[22] For all of the reasons set out above, despite the able submissions of counsel for the Respondent, I find the Officer's decision refusing the H&C application to be unreasonable. The matter will be remitted back for reconsideration by a different Officer, and the Applicants will be afforded an opportunity to provide updated submissions, should they wish to do so, before a new decision is taken.

[23] There is no question of general importance for certification.

JUDGMENT in IMM-7762-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter is remitted back for reconsideration by a different Officer.

3. The Applicants shall be afforded the opportunity to provide updated submissions, should they wish to do so, before a new decision is taken.

4. There is no question of general importance for certification.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7762-22
STYLE OF CAUSE:	MD ATIQUE SOBHAN v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 15, 2023
REASONS FOR JUDGMENT AND JUDGMENT:	PENTNEY J.
DATED:	NOVEMBER 21, 2023

APPEARANCES:

Michael Korman	FOR THE APPLICANT
Jake Boughs	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Korman & Korman Barristers & Solicitors	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT