Federal Court Cour fédérale

Date: 20141223

Docket: IMM-5507-13

Citation: 2014 FC 1252

Ottawa, Ontario, December 23, 2014

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

UGUR AKYOL
SENEM NUR AKYOL
TASKIN AKYOL
IREM NUR AKYOL

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants seek to set aside a decision of a Senior Immigration Officer (the Officer), dated July 31, 2013, refusing their application for permanent residence from within Canada on humanitarian and compassionate (H&C) grounds pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). For the reasons that follow the application is granted.

I. Facts

[2] The applicants are Mr. Ugar Akyol, Mrs. Senem Akyol, and their children Taskin (16 yrs), Irem (12 yrs). The principal applicant and his wife are citizens of Turkey. Taskin was born in Turkey but moved to the United States with his parents when he was 2 years old. Irem was born in the United States. Their third child, Sena (2 yrs), was born in Canada.

[3] The applicants entered Canada in March, 2010 from the United States where they had been living without status for 10 years after the extension of their visitor's visa expired. Upon arrival in Canada the applicants claimed refugee protection on the grounds that they were subject to risks associated with an ongoing family feud in Turkey. Specifically, the couple was targeted because their families had not approved of the adult applicants' marriage. The Refugee Protection Division (RPD) dismissed their refugee claim on March 8, 2012, after finding the applicants were not Convention refugees, nor persons in need of protection under sections 96 and 97 of *IRPA*.

[4] In May, 2012, the applicants requested that their application for permanent residence be considered on H&C grounds pursuant to subsection 25(1) of *IRPA*. The request cited the following elements for consideration: risk of discrimination and harassment in Turkey as Kurds; their relatives' opposition to the couple's mixed marriage; the best interests of the children (BIOC); and level of establishment in Canada.

[5] In terms of the best interests of the children, the applicants stated that they had no support systems in place in Turkey and would likely be targeted by their family members. The eldest

child, Taskin, fears the mandatory military service employed in Turkey. Additionally, none of the three children speak Turkish fluently, and none of them are able to read or write in Turkish. As a result of the children's limited Turkish language skills, they may lose several years of schooling in order to become fluent. The only English education option would be a private school which costs approximately $15,000-$30,000 a year per student, and this is financially unattainable given Mr. Akyol's salary. Falling behind in school is especially problematic in the case of Irem, who has significant learning disabilities. Finally, only one of the children has ever been to Turkey, and he left at the age of two. The children are not familiar with Turkish culture or environment.

II. Decision

A. *Risk of Discrimination and Harassment in Turkey and Family Opposition to the Applicants' Marriage*

[6] In assessing the applicants' risk of discrimination and harassment in Turkey, the Officer gave considerable weight to the negative credibility findings of the RPD. The Officer "considered all of the documentation submitted regarding the applicants' fear of returning to Turkey" and found that the documentation did not rebut the findings of the RPD. The Officer also noted that because the applicants have been outside of Turkey for over twelve years, she was not satisfied from the evidence that they are at risk from any family members in Turkey.

B. *The Best Interests of the Children*

[7] The Officer then considered the best interests of the children. The Officer found that it was reasonable to expect that the children would have been exposed to the Turkish language at

home, given that the adult applicants speak Turkish to each other. The Officer was not satisfied that a change in language would be difficult to overcome.

[8] The Officer also acknowledged that the eldest daughter, Irem, has learning disabilities, but noted that she was not attending special education classes and rather is currently placed in a regular class with assistance. The Officer relied on the US Department of State country report on Turkey to show that Turkish law provides that all public schools must accommodate disabled students, although "activists" reported instances of students with disabilities being refused admission or encouraged to drop out of school. The Officer concluded by finding there was insufficient evidence to show that Irem would not be able to access education and counselling in Turkey.

[9] The Officer considered support letters submitted on behalf of the children which described the family ties and friends they have made; however, she concluded that there was insufficient evidence to demonstrate that the friendships were characterized by a degree of interdependency such that if severed would "have a direct impact on their welfare". The Officer noted that the children will return to Turkey with their primary caregivers, who themselves will provide care and assistance in adapting to life in Turkey. As such, the Officer was "not satisfied that sufficient evidence has been presented to show that the children's level of dependence on family members in Canada is to the extent that their separation would result in unusual and undeserved or disproportionate hardship".

[10] The Officer acknowledged that military service is compulsory in Turkey, and that Taskin will be "required to complete his military service"; however, the Officer was not "satisfied that the requirement to comply with military service is a hardship that is unusual and undeserved or disproportionate".

[11] Finally, the Officer concluded that she was not satisfied that leaving Canada to return to Turkey in the company of their parents "would have a significant negative impact on the best interests of these three children".

C. *Degree of Establishment*

[12] In regards to establishment, the Officer noted that the adult applicants have been employed in Canada since 2010. The applicants volunteer at various events at their children's schools, and attend events at their local community centre, the Niagara Folk Arts Multicultural Centre. The male adult applicant is currently attending trade school. The Officer also noted the applicants provided letters of support from various individuals including the family physician, the applicants' employers, co-workers and family friends.

[13] The Officer recognized based on the information before her that the applicants are "considered reliable, hard-working, helpful, honest individuals who would contribute to and be a good addition to the Canadian community"; however, she explained that the test in an H&C application is "not whether the applicants are a welcome addition, an asset, deserving or worthy of staying in Canada, but rather whether an applicant will face unusual and undeserved or disproportionate hardship in being removed from Canada to apply for a permanent resident visa

from abroad". Therefore, the Officer did not give significant weight to the applicants' establishment in Canada.

III. Analysis

A. *The Standard of Review*

[14] The issue of the proper legal test in assessing the best interests of the child is a question of law reviewable on the correctness standard: *Judnarine v Canada (Minister of Citizenship and Immigration)*, 2013 FC 82 at para 15; *Joseph v Canada (Minister of Citizenship and Immigration)*, 2013 FC 993 at para 12. When applying the correctness standard the reviewing court "will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50.

B. *The Officer Applied an Incorrect Best Interest of the Child Test*

[15] In my view, this case distills to whether the Officer applied the incorrect legal test in analyzing the best interests of the child. That is, whether the Officer imported a hardship test into her BIOC analysis. A second issue is whether the Officer was "alert, alive and sensitive" to an element of Irem's best interests in light of the evidence before her. In this regard, the standard of review is reasonableness. Considerable deference will be paid to officers' decisions in respect of the assessment of humanitarian and compassionate exemption to the *IRPA*.

[16] It is incorrect to import an elevated hardship test into the best interests of the child analysis: *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 9; *Etienne v Canada (Minister of Citizenship and Immigration)*, 2014 FC 937; *Sahota v Canada*

(Minister of Citizenship and Immigration, 2011 FC 739 at para 8; *Beharry v Canada (Minister of Citizenship and Immigration)*, 2011 FC 110. The unusual and undeserved or disproportionate hardship test has no place in the BIOC analysis because children will rarely, if ever, be deserving of any type of hardship: *Hawthorne* at para 9; *Beharry* at para 11.

[17] The Court must examine the Officer's decision as a whole to determine whether the Officer applied an incorrect test. The substance of the Officer's analysis must prevail over the form: *Hawthorne* at para 3. The mere use of the words "undue or undeserved hardship" or similar language does not constitute a reversible error: *Bustamante Ruiz v Canada (Minister of Citizenship and Immigration*, 2009 FC 1175 at paras 27-28; *Lopez Segura v Canada (Minister of Citizenship and Immigration)*, 2009 FC 894 at paras 10, 28-39. The Officer's language, although important, is not determinative. What really matters is whether the reasons demonstrate that the Officer was "alert, alive and sensitive" to the interests of the child: *Baker* at para 75.

[18] As both the Supreme Court of Canada and the Federal Court of Appeal have stated, in considering an H&C application, an immigration officer must be "alert, alive and sensitive" to, and must not "minimize", the best interests of children: *Baker v Canada (Minister of Citizenship and Immigration*), [1999] 2 SCR 817; *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 5. Indeed the "essential question" for this Court is whether the officer was alert, alive and sensitive to the children's best interests: *Beggs v Canada (Minister of Citizenship and Immigration)*, 2013 FC 903 at para 11. In order for an officer to be properly "alert, alive and sensitive" to a child's best interests, the officer should have regard to

the child's circumstances, from the child's perspective: *Etienne* at para 9; *Segura v Canada (Minister of Citizenship and Immigration)*, 2009 FC 894.

[19] In this case, the Officer incorrectly, in substance and in form, elevated the test for the best interests of the child. The Officer used the specific language of "unusual and undeserved or disproportionate hardship" on several occasions. In reference to the eldest child's stated fear of military service, the Officer indicated that she was not satisfied that "the requirement to comply with military service is a hardship that is unusual and undeserved or disproportionate". Second, in reference to the children's family ties in Canada the Officer stated that she was not satisfied that sufficient evidence had been provided to "show that the children's level of dependence on family members in Canada is to the extent that their separation would result in unusual and undeserved or disproportionate hardship".

[20] As noted, the language or label used to express the test is not determinative. The focus is on the controlling consideration as to whether the Officer was demonstrably "alert, alive and sensitive" to the interests of the children. The analysis from *Baker* requires, therefore, an appreciation and articulation of the interests of the children. As Justice Russel Zinn explained in *Sebbe v Canada (Minister of Citizenship and Immigration)*, 2012 FC 813 at paragraph 16, the Officer is "mandated to ask: What is in this child's best interest?"

[21] To be faithful to *Baker*, it is only once the best interests of each child affected by the H&C application are identified and articulated can the Officer then weigh this against the other positive and negative elements in the H&C application: *Sebbe* at para 16. Further, the decision-

maker should consider children's best interests as an important factor in their analysis: *Baker* at para 75. As Justice James O'Reilly wrote in *Lewis v Canada (Citizenship and Immigration)*, 2008 FC 790 at paragraph 11, the best interests of the child must "be given substantial weight in H&C applications". That does not mean that the children's best interests must outweigh other considerations; however, practical meaning must be given to Article 3(1) of the *United Nations Convention on the Rights of the Child (Rights of the Child Convention)* 20 November 1989, Can TS 1992 No 3, which states:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

[22] The Officer in this case failed to identify what exactly would be in the best interests of each of the applicant children. Instead, the Officer stated that she "carefully considered all of the information" regarding the children. This brief reference to the children's interests does not, in any way, actually identify what those interests are.

[23] As noted, there is a secondary issue arising from the application of the test to an element of Irem's best interests. The evidence before the Officer demonstrated that Irem's learning challenges were significant. This was not a case where the evidence of learning disabilities consisted of a statement of a family physician or school teacher. Here, Irem's abilities were tested across a range of functions and skills by professionals using recognized methods and assessed against established norms. Given their conclusion as to the nature and extent of the disability the Officer's reasoning did not meet the *Baker* standard. The interests of the child, in the unique circumstances of this case, could not be disposed of by a mere reference in a single

country condition report to an obligation on the receiving country to accommodate disabled students. This is not to negate the empirical value of country condition reports. They are very often the best and most reliable source of information available. Here, however, the *Baker* standard was not satisfied.

[24] Finally, the Officer stated that she was "not satisfied that leaving Canada to return to Turkey in the company of their parents would have a significant negative impact on the best interests of these three children". Requiring evidence of severe harm or hardship to a child is incorrect in the analysis. The question is not: "is the child suffering enough that his 'best interests' are not being met?" Rather, the question is "what is in the child's best interests?" *Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166 at para 64. It is the child that must, first and foremost, be considered when conducting a BIOC analysis, rather than whether the child could adapt to another country, or accompany parents: *Bautista v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1008.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the matter is remitted to a different officer for re-consideration.
2. There is no question for certification.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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