

Federal Court



Cour fédérale

Date: 20221205

Docket: IMM-3997-20

Citation: 2022 FC 1677

Ottawa, Ontario, December 5, 2022

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

ZAURESH TUYEBEKOVA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Zauresh Tuyebekova (“Ms. Tuyebekova”), is a 74-year-old citizen of Kazakhstan. Her only child is a citizen of Canada. Ms. Tuyebekova applied for permanent residence from within Canada on humanitarian and compassionate grounds (“H & C Application”). At the time Immigration, Refugees and Citizenship Canada [IRCC] considered

this application, she had lived in Canada for approximately four years with her daughter, son-in-law, and three grandchildren. A Senior Immigration Officer at IRCC (“the Officer”) refused Ms. Tuyebekova’s H & C Application. Ms. Tuyebekova challenges this refusal on judicial review.

[2] Ms. Tuyebekova argues that the Officer failed to reasonably assess three issues: i) her hardship in returning to Kazakhstan; ii) the best interests of three grandchildren in Canada; and iii) the psychological harm to her daughter in Canada.

[3] I agree that the Officer’s hardship analysis is unreasonable. I also agree that the Officer’s assessment of the best interests of the children is minimal. These problems in the Officer’s analysis are sufficient to require that the H & C Application be redetermined. Accordingly, I have not addressed the remaining issue raised by Ms. Tuyebekova.

[4] For the reasons below, I grant the judicial review.

II. Background

[5] Ms. Tuyebekova is a citizen of Kazakhstan. She does not have a relationship with her remaining family members, namely her five siblings, in Kazakhstan. Ms. Tuyebekova was shunned by her family after she converted to Christianity over twenty-five years ago. Ms. Tuyebekova was part of the Evangelical Pentecostal Christian community in Kazakhstan.

[6] In 2012, Ms. Tuyebekova’s daughter moved to Canada with her family.

[7] In September 2016, Ms. Tuyebekova came to Canada as a visitor. She lived in her daughter's home with her daughter, son-in-law, and three grandchildren. At that time, her grandchildren were aged 8 months, 9 years, and 11 years old.

[8] In September 2018, Ms. Tuyebekova filed her H & C Application to remain in Canada with her family. This application was refused in August 2020.

III. Issues and Standard of Review

[9] The two determinative issues relate to the Officer's evaluation of Ms. Tuyebekova's hardship in returning to Kazakhstan and the best interests of her three grandchildren. Both parties agree that the applicable standard of review is reasonableness. The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] confirmed that reasonableness is the presumptive standard of review when reviewing administrative decisions on their merits. This case raises no issue that would justify a departure from that presumption.

IV. Analysis

A. *H & C Applications*

[10] Foreign nationals applying for permanent residence in Canada can ask the Minister to exercise Ministerial discretion to relieve them from requirements in the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] because of humanitarian and compassionate factors, including the best interests of any child directly affected (IRPA, s 25(1)). The Supreme Court of

Canada in *Kanhasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 [Kanthasamy], citing *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338, confirmed that the purpose of this humanitarian and compassionate discretion is “to offer equitable relief in circumstances that ‘would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another’” (*Kanhasamy* at para 21).

[11] Given that the purpose of humanitarian and compassionate discretion is to “mitigate the rigidity of the law in an appropriate case,” there is no limited set of factors that warrants relief (*Kanhasamy* at para 19). The factors warranting relief will vary depending on the circumstances, but “officers making humanitarian and compassionate determinations must substantively consider and weigh *all* the relevant facts and factors before them” (*Kanhasamy* at para 25 citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 74-75 [*Baker*]).

[12] In this case, Ms. Tuyebekova raised the following key factors: her establishment in Canada, the best interests of her three grandchildren in Canada, the adverse country conditions in Kazakhstan given her religious beliefs, and the hardship of separating from the only family members with whom she has a relationship.

(1) Unreasonable Assessment of the Hardship of Return

[13] The Officer’s hardship analysis is not responsive to Ms. Tuyebekova’s evidence and submissions. The Officer’s findings on hardship do not reflect a reasonable interpretation of the evidence; some evidence is distorted and central evidence is ignored.

[14] Ms. Tuyebekova's submissions and evidence describe the period between 2012 and 2016 when she was living in Kazakhstan as a difficult time primarily because her only family members with whom she has a relationship had moved to Canada. In support of her own statements regarding this difficult period, Ms. Tuyebekova provided a letter dated September 2016 from her doctor in Kazakhstan and a letter from her daughter in Canada describing what she knew of her mother's difficulties during that period.

[15] Ms. Tuyebekova's doctor in Kazakhstan provided a letter in September 2016 that indicated the following: Ms. Tuyebekova came to the doctor approximately four years prior (in or around 2012) with a number of symptoms, including depression, constant sadness, desperation, sleep disorder, and general fatigue. At that time, Ms. Tuyebekova was prescribed an anti-depressant medication. The doctor noted that the reason for Ms. Tuyebekova's depression could have been the loss of close contact with family who had moved to Canada. In August 2016, the same doctor re-examined Ms. Tuyebekova and increased the dosage for her anti-depressant medication.

[16] In their letters, Ms. Tuyebekova and her daughter also explained that being separated during that four-year period caused them stress, though they communicated frequently through Skype.

[17] The Officer makes no reference to Ms. Tuyebekova's doctor's letter, nor to the lengthy descriptions of the impact of the separation in Ms. Tuyebekova's letter and her daughter's letter. Instead, the Officer refers to this period of time, when Ms. Tuyebekova remained in Kazakhstan

while her daughter and family were in Canada, as evidence that Ms. Tuyebekova was able to live on her own in Kazakhstan without her family. This characterization turns the central basis for Ms. Tuyebekova's request for relief on its head. It is unreasonable for the Officer to refer to this period of separation but make no mention of evidence, including Ms. Tuyebekova's doctor's letter, that indicates this was in fact a difficult period for Ms. Tuyebekova that she does not want to repeat.

[18] The Officer failed to appreciate the overall and central thrust of Ms. Tuyebekova's request for relief. For example, the Officer notes: "However, the applicant's ability to successfully move to Canada and settle into life in a country that is unfamiliar, suggests to me that the applicant would be able to accomplish similar outcomes in the country in which she has lived many years of her life." This, again, ignores that the central reason Ms. Tuyebekova sought relief was so that she did not have to be separated from her family and her submissions and evidence highlighted the difficulty of that separation. There were no submissions about a difficult adjustment to Canada; Ms. Tuyebekova's submissions and evidence were about the difficulties of living in Kazakhstan without her family. The Officer's reasoning about readjustment to Kazakhstan does not make sense given this context.

[19] The failure to engage with central evidence and submissions renders the Officer's hardship assessment unreasonable (*Vavilov* at paras 126, 128).

(2) Unreasonable Assessment of the Best Interests of the Children

[20] Subsection 25(1) of *IRPA* directs officers deciding applications for humanitarian and compassionate relief to take into account “the best interests of a child directly affected.” In considering this requirement, the Supreme Court of Canada in *Kanhasamy* found: “Where, as here, the 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” (*Kanhasamy* at para 40).

[21] *Kanhasamy* affirmed the Supreme Court of Canada’s finding in *Baker*, that “where the interests of children are minimized, in a manner inconsistent with Canada’s humanitarian and compassionate tradition and the Minister’s guidelines, the decision will be unreasonable” (*Kanhasamy* at para 38, citing *Baker* at para 75). The Supreme Court of Canada also reaffirmed that a reasonable best interests of the child analysis requires that a child’s interests be “‘well identified and defined’ and examined ‘with a great deal of attention’ in light of all the evidence” (*Kanhasamy* at para 39, citing *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at paras 12, 31; *Kolosovs v Canada (Minister of Citizenship and Immigration)*, 2008 FC 165 at paras 9-12).

[22] There are three children (now aged 17, 15, and 6 years old) affected by the Officer’s decision. The Officer’s review of their interests is perfunctory. The Officer did not give the interests of these children the sufficient and careful attention required. The Officer acknowledged that the children may be negatively impacted by their grandmother’s absence but

ultimately found that their parents were their primary caregivers and they would be able to communicate with their grandmother through Skype.

[23] The evidence before the Officer was that one of the grandchildren has a language disability for which he needs additional support and that Ms. Tuyebekova is a key person in providing this additional support. The Officer acknowledged the child's grandmother played a significant role in providing this support. The Officer found that while it may be difficult to change the child's routine, there was insufficient evidence that the parents could not provide this educational and emotional support themselves or, if that is not possible, hire a private tutor. The evidence before the Officer is that the child's parents both work full-time, have modest incomes, and rely heavily on Ms. Tuyebekova for day to day care and support for their children. Moreover, the evidence described the special relationship between Ms. Tuyebekova and her grandchild with special needs and the particularized support she provides to him as his grandmother and as an experienced educator. The child's doctor described this special relationship and attachment, saying: "I am therefore of an opinion that a separation from his grandmother will have a detrimental effect on the boy, provided his existing condition and mental challenges, exhibited in frustration outburst. Such will potentially further affect and worsen the boy's educational challenges." The Officer made no reference to this letter from the child's doctor.

[24] Overall, the Officer's consideration of the children's interests was minimal; the children's interests were not examined with a "great deal of attention" as is required. This renders the Officer's decision unreasonable.

V. Conclusion

[25] The application for judicial review is granted. Neither party raised a question for certification and I agree none arises.

JUDGMENT IN IMM-3997-20

THIS COURT'S JUDGMENT is that:

1. The IRCC decision, dated August 11, 2020, is set aside;
2. The matter is sent back to be redetermined by a different officer at IRCC;
3. No serious question of general importance is certified.

"Lobat Sadrehashemi"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3997-20

STYLE OF CAUSE: ZAURESH TUYEBEKOVA V MCI

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: JUNE 30, 2022

JUDGMENT AND REASONS: SADREHASHEMI J.

DATED: DECEMBER 5, 2022

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