Federal Court Cour fédérale

**Date: 20240423**

**Docket: IMM-5855-23**

**Citation: 2024 FC 615**

**Toronto, Ontario, April 23, 2024**

**PRESENT: Madam Justice Go**

**BETWEEN:**

**Haci SETIREKLI**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] The Applicant, Haci Setirekli, seeks a judicial review of an inland enforcement officer's [Officer] decision dated May 10, 2023 refusing the Applicant's request to defer his removal [Decision].

[2] The Applicant, a citizen of Türkiye and an Alevi minority, was scheduled for removal on May 13, 2023. Justice Gleeson ordered the stay of the Applicant's removal until this judicial review is determined after finding that the Officer's failure to address the issue of Canada's international obligations raised a serious issue on an elevated standard.

[3] I too find that by failing to address the Applicant's submission with regard to Canada's international obligations concerning family reunification, the Officer committed a reviewable error. For that reason, I grant the application.

## II. Background

### A. *Facts*

[4] The Applicant entered Canada in April 2018 and claimed refugee protection on grounds of religion and political opinion. The Applicant joined his refugee claim with his wife, who entered Canada in October 2017 with their youngest daughter. The Applicant and his wife have four children.

[5] The Refugee Protection Division rejected their claim on February 19, 2019.

[6] The Applicant and his wife separated between 2018 and 2020, and pursued their claims separately before the Refugee Appeal Division [RAD]. The RAD refused the Applicant's appeal on August 11, 2020. His wife's claim was successful and she is now a permanent resident, as are the Applicant's children.

[7] The Applicant sought a judicial review of the RAD decision, which Justice Fuhrer granted and sent back for redetermination on November 24, 2021: *Setirekli v Canada (Citizenship and Immigration)*, 2021 FC 1287. Again, the RAD denied the Applicant's appeal in June 2022, but the Applicant did not seek further leave for judicial review.

[8] During his separation with his wife, the Applicant was charged with criminal harassment of his wife and was additionally convicted of impaired driving. A deportation order was issued on November 11, 2020.

[9] The Applicant and his wife reconciled and sought to withdraw the complaint underlying the pending criminal harassment charge, but the charge remains outstanding.

[10] The Applicant's wife included him in her permanent residence application in 2020 as a dependent. The Applicant's wife received permanent residence status on March 17, 2022. The Applicant was scheduled for removal in February 2023. He sought a deferral of his removal, which was deemed refused. After the Applicant failed to appear for his pre-removal interviews, a warrant was issued for his arrest on April 28, 2023, and it was discovered the Applicant was living with his family in a different home address than the one he had provided to immigration authorities. The Applicant was placed in detention.

B. *The Applicant's Deferral Request and the Decision Under Review*

[11] On May 5, 2023, the Applicant was served with a direction to report and his removal was scheduled for May 14, 2023.

[12] The Applicant requested for a deferral of his removal on May 8, 2023. As of the time of his deferral request, no decision has been made on the Applicant's permanent residence application. However, the Applicant submitted to the Officer that his application was in its final stage of processing. Additionally, the Applicant provided to the Officer a partial copy of his request for an exemption from criminal inadmissibility on humanitarian and compassionate grounds.

[13] The Applicant based his deferral request on the following submissions:

a. A decision on his permanent residence application was imminent.
b. Canada's international obligations regarding family reunification.
c. The short-term interests of his children.
d. The Applicant's hometown was destroyed by the 2023 earthquake.
e. The Applicant would face discrimination on account of his Alevi identity.
f. The "clean hands" doctrine should not be the basis for a refusal of deferral.

[14] The Officer refused the Applicant's deferral request, finding there was no evidence that the Applicant's permanent residence application was imminent. The Officer also rejected the Applicant's submissions to defer removal based on the best interests of his children, family separation, hardship upon return due to unemployment and earthquake in Türkiye. Finally, the Officer took into consideration the Applicant's failure to report for his pre-removal interviews and notify authorities of his change in address, as well as the Applicant's criminal conviction and outstanding criminal harassment charge, among other factors, to find deferral was not warranted in his case.

[15] The Officer did not address the Applicant's submission on Canada's international obligations concerning family reunification.

## III. Issues and Standard of Review

[16] The Applicant submits the following three issues with respect to the Officer's findings:

A. Did the Officer fail to engage with the issue of deferring removal to respect Canada's international obligations with respect to refugees and family reunification?

B. Did the Officer err in their conclusion that there is no evidence presented that a decision on his permanent residence application is imminent?

C. Did the Officer err in their analysis with respect to the compelling circumstances presented in the deferral request?

[17] The parties agree the standard of review for the Decision is reasonableness, as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

[18] A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker:" *Vavilov* at para 85. The onus is on the Applicant to demonstrate that the decision is unreasonable: *Vavilov* at para 100. To set aside a decision on this basis, "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency:" *Vavilov* at para 100.

## IV. Analysis

[19] I find the Officer's failure to consider Canada's international obligations to be determinative of the application, and thus focus my analysis on this issue only.

[20] In his deferral request, the Applicant argued that Canada has an obligation to respect family reunification under international law, including in the *Convention Relating to the Status of Refugees* [*Refugee Convention*]. The Applicant emphasized that if deported, he will face numerous barriers to entry, such as his criminal inadmissibility. Therefore, the Applicant will likely not see his wife or children for many years. Pointing to his wife and one of their children's refugee status, the Applicant stated they could not visit him in Türkiye. The Applicant also submitted his removal would constitute a serious breach of the *International Covenant on Civil and Political Rights* [*ICCPR*] and the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], paragraph 3(3)(f). Paragraph 3(3)(f) provides the *IRPA* is to be construed and applied in a manner that "complies with international human rights instruments to which Canada is signatory."

[21] The Officer acknowledged the barriers the Applicant will have to overcome, but noted the Applicant was represented by competent counsel who will help him navigate the process. The Officer also found that while the Applicant's removal will be difficult and stressful on the Applicant and his family, such is the nature of removal.

[22] Before this Court, the Applicant submits the Officer failed to engage with his arguments and was required to exercise his discretion in accordance with Canada's obligations toward refugees. The Applicant reiterates his removal will result in a lengthy, and perhaps, permanent separation. The Applicant submits the Officer's failure to address the issue of international obligations is a reviewable error and calls into question whether the Officer was alert, alive, and sensitive to the matter before them.

[23] The Applicant submits the jurisprudence supports the view that, pursuant to paragraph 3(3)(f) of the *IRPA*, an enforcement officer's discretion should be applied in a manner which complies with international human rights instruments to which Canada is signatory: *de Guzman v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 [*de Guzman*] at para 86. Also citing the Supreme Court of Canada's [SCC] decision in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 [*Mason*] at paras 104-117, the Applicant argues the *IRPA* must be interpreted in a manner consistent with Canada's international obligations.

[24] In response, the Respondent advances several arguments. First, the Respondent argues the rights of refugees, including the right to be with their families, are created by the *IRPA*, and are limited by other statutory provisions in the *IRPA*.

[25] Second, whether or not the Officer is required to explicitly address Canada's international obligations as per paragraph 3(3)(f) of the *IRPA*, the Respondent contends that the requirement is limited in that those obligations have to be relevant to the matter at hand, and they need to be obligations. The Respondent submits that none of the Applicant's above citations of international

law speak to family reunification, separation, or removal, and as such, the Officer was not under an obligation to address them. Specifically that:

A. The text the Applicant cites as the preamble does not actually form part of the *Refugee Convention*'s preamble, but is part of the recommendations adopted by the Conference on the Status of Refugees.

B. Article 12(2) of the *Refugee Convention* provides that rights acquired through marriage should be unaffected by refugee status conferral.

C. Article 17 of the *ICCPR* protects against arbitrary or unlawful interference with an individual's privacy, family home, or correspondence, as well as unlawful attacks to honour and reputation.

D. Article 23(1) of the *ICCPR* provides that the family is entitled to protection by society and the state.

E. Article 24 of the *ICCPR* speaks to a minor's rights to protection by family, society, and the state, and the right to birth registration and nationality.

F. Article 7 of the *ICCPR* protects against cruel, inhumane, or degrading treatment or punishment.

[26] The Respondent concludes that it is undisputed the Applicant is inadmissible to Canada and subject to a valid removal order. Therefore, the Respondent submits, the Minister of Public Safety and Emergency Preparedness is under a statutory obligation to remove the Applicant as soon as possible.

[27] I reject the Respondent's arguments. Instead, I agree with the Applicant that the Officer erred by failing to consider the Applicant's submissions with respect to international obligations regarding family reunification, for the following reasons.

[28] To start, as the SCC stated in *Mason*, "*Vavilov* highlighted that international law may be an 'important constraint on an administrative decision maker' including through the presumption

of statutory interpretation that 'legislation is presumed to operate in conformity with Canada's international obligations' (para. 114)." *Mason* at para 105. While the argument concerning international obligations was not presented to the Immigration Appeal Division [IAD], the SCC nevertheless found that "the IAD was required by its home statute to interpret and apply the *IRPA* in a manner that complies with Canada's international human rights obligations, including Canada's *non-refoulement* obligation under Article 33 of the *Refugee Convention*:" *Mason* at para 104. The SCC continued:

> [106] The presumption of conformity with international law assumes added force when interpreting the *IRPA*, because Parliament has made its "presumed intent to conform to Canada's international obligations explicit" through two provisions of the *IRPA* (*B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 S.C.R. 704, at para. 49). First, s. 3(2)(b) of the *IRPA* expressly identifies one of the *IRPA*'s objectives as being "to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement". Indeed, this Court has described the *IRPA* as the "main legislative vehicle for implementing Canada's international refugee obligations" (*Németh*, at para. 21). Second, s. 3(3)(f) of the *IRPA* instructs courts and administrative decision makers to construe and apply the *IRPA* in a manner that "complies with international human rights instruments to which Canada is signatory" (*B010*, at para. 49). This Court has stated that "[t]here can be no doubt that the *Refugee Convention* is such an instrument, building as it does on the right of persons to seek and to enjoy asylum from persecution in other countries as set out in art. 14 of the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948)" (para. 49). As a result, the *Refugee Convention* is "determinative of how the IRPA must be interpreted and applied, in the absence of a contrary legislative intention" (*de Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, [2006] 3 F.C.R. 655, at para. 87; *B010*, at para. 49).
>
> [Emphasis added]

[29] In the case at hand, the Applicant presented specific arguments on Canada's international obligations to the Officer including the *Refugee Convention*, and yet the Decision was completely silent in this respect. Applying *Mason*, I find that the Officer in this case was obligated to consider international law, when interpreting and applying the *IRPA*, as per paragraphs 3(2)(b) and 3(3)(f) of the *IRPA*.

[30] While I agree with the Respondent that officers need to only consider relevant international law as it applies to the decision in question, I disagree that the issue of Canada's international obligations concerning family reunification is not relevant to the case at hand.

[31] The Applicant tied his argument concerning the international obligation of family reunification with the status of his wife and one of his children as Convention Refugees, who cannot return to Türkiye even for a short visit. The Respondent's submission that there is a statutory obligation to remove the Applicant does not address the impact, if any, that the Applicant's removal may have on the rights of his wife and children under international law. To quote again from *Mason* at para 106, the SCC remarked:

> … [Section] 3(2)(b) of the *IRPA* expressly identifies one of the *IRPA*'s objectives as being "to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement". Indeed, this Court has described the *IRPA* as the "main legislative vehicle for implementing Canada's international refugee obligations" (*Németh*, at para. 21). Second, s. 3(3)(f) of the *IRPA* instructs courts and administrative decision makers to construe and apply the *IRPA* in a manner that "complies with international human rights instruments to which Canada is signatory" (*B010*, at para. 49). This Court has stated that "[t]here can be no doubt that the *Refugee Convention* is such an instrument, building as it does on the right of persons to seek and to enjoy asylum from persecution in other countries as set out in art. 14 of

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[32] *Mason* thus not only confirms that decision-makers are required to consider Canada's international obligations in general while interpreting the *IRPA*, but specifically, Canada's international obligations with respect to refugees, an issue that was squarely put before the Officer.

[33] As for the Respondent's submission that none of the Applicant's citations of international law speak to family reunification, I am not convinced that the Respondent's black letter approach to interpreting international law is consistent with the established jurisprudence. In general, when determining whether domestic law conforms with international law, Canadian Courts often consider not only the text of the international convention in question, but also other sources including, but not limited to, customary international law: see for instance, *Mason* at para 108.

[34] I further note that after stating in para 95 that Article 17 of the *ICCPR* speaks to cases of deportation, the Federal Court of Appeal in *de Guzman* observed at para 96 that "[d]eportation of a person from the country in which he or she has been residing with other family members is a direct attack by the state on family life." This lends some support to the Applicant's argument that his removal could amount to a breach of Canada's obligations under the *ICCPR*.

[35] In addition, while as the Respondent points out, the *Refugee Convention* itself does not refer to the family, the excerpt the Applicant cites offers a specific and strongly worded recommendation from the Conference at which the *Refugee Convention* was adopted:

> "Considering that the unity of the family […] is an essential right of the refugee and that such unity is constantly threatened, [it] [r]ecommends Governments to take the necessary measures for the protection of the refugee's family, especially with a view to ensuring that the unity of the family is maintained […] [and for] the protection of refugees who are minors, in particular unaccompanied children and girls, with the particular reference to guardianship and adoption."

[36] In any event, as the Officer never mentioned the Applicant's submissions on international law, let alone engaged in any analysis, I need not determine the extent to which the international obligation concerning family reunification would affect the Officer's discretion to defer removal. As the Applicant contended at the hearing, and I agree, this would be a question for another day.

[37] In sum, I find the Decision failed to meet the hallmarks of justification and transparency due to the Officer's failure to meaningfully account for the central issues and concerns the Applicant raised: *Vavilov* at para 127. I need not consider the other issues the Applicant raised. However, my silence on those issues should not be taken as my endorsement of the Officer's findings.

## V. Conclusion

[38] The application for judicial review is allowed.

[39] There is no question to certify.

**JUDGMENT in IMM-5855-23**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is granted.
2. The decision under review is set aside and the matter referred back for redetermination by a different decision-maker.
3. There is no question to certify.

"Avvy Yao-Yao Go"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **STYLE OF CAUSE:** | HACI SETIREKLI v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS |
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| **DATE OF HEARING:** | MARCH 7, 2024 |
| **JUDGMENT AND REASONS:** | GO J. |
| **DATED:** | APRIL 23, 2024 |

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