Federal Court  Cour fédérale

**Date: 20211210**

**Docket: IMM-2775-20**

**Citation: 2021 FC 1369**

**Ottawa, Ontario, December 10, 2021**

**PRESENT: The Honourable Mr. Justice Roy**

**BETWEEN:**

**SOFIA TUROVSCI**
**FIODOR TOROVSKY**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] An application for permanent residence to be sought from within Canada has been dismissed by a Senior Immigration Officer. As is well known, persons who wish to make an application for permanent residence in this country must make those applications from outside Canada. In order to avoid having to make the application from outside Canada, persons can invoke section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the

Law]. It is the refusal to allow that application that brings this matter before this Court, as the Applicants have launched a judicial review application, pursuant to section 72 of the Law.

[2] These Applicants are nationals of Israel. They are parents and grandparents of Canadian citizens. The Applicants have come to Canada on September 3rd, 2017; their temporary resident status has been maintained through various extensions of that status. Their application to seek permanent residence from within Canada based on Humanitarian and Compassionate (H&C) grounds was received on April 27, 2018.

[3] Before entering Canada, a foreign national must apply for a visa or any other document required by the regulations (s 11(1) of the *Act*). Relief is possible if the Minister is of the opinion that granting permanent resident status, or some exemption from applicable criteria or obligations, is "justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected" (s 25(1) of the *Act*). It is the refusal by a Senior Immigration Officer to grant the application for relief which is challenged through judicial review. The decision is dated June 4, 2020.

## I. The decision under review.

[4] The decision articulates why the application ought to be refused. In the words of the decision maker, there are not sufficient Humanitarian and Compassionate considerations to justify granting what is presented as an exceptional response where the circumstances warrant it. The burden is on the shoulders of the Applicants.

[5] The Applicants have invoked a set of circumstances in support of their application: the establishment in Canada of the Applicants; the best interests of the children directly affected (BIOC); the risk and adverse country conditions in Israel; and other factors.

[6] Establishment: the Senior Immigration Officer gives this factor "some weight", largely on account of the Applicants' family (their two adult children and their families) having immigrated to Canada a few years ago. As becomes quite obvious when one reads the application, the Applicants want to immigrate to Canada because their two children live in Canada. The Applicants had been in Canada for only three years at the time a decision was made to apply for permanent residence on the basis of H&C consideration. That will explain their shallow roots in this country. Other than living with their daughter, and the presence of their immediate family, there was little to report in terms of establishment. Two short "English as a second language" courses, some volunteering (not clear if the volunteering continued for long) are noted. The letters of support are largely from friends in Israel and the family in Canada. The Officer noted that "[t]here is one letter of support from a person whose parents the applicants help look after" (decision, p. 3 of 7). That makes the decision maker conclude that the establishment in Canada is "modest".

[7] Best interests of the children: the examination of the record shows the following. The Applicants have two children in Canada, each married with children. The son was 48 years old at the time of these proceedings while his sister was 43 years of age. She and her husband are hosting the Applicants.

[8] The daughter's children were around 24 and 17 in 2020, when the decision was taken. As for the son, he has two children, one of whom was 28 years old in 2020, with two children of her own, aged 6 and 2. For all intents and purposes, the Applicants' grandchildren are now all adults. As already noted, the Applicants live in the daughter's household.

[9] The Senior Immigration Officer notes that there is little evidence concerning the great-grandchildren, only anecdotal information about them. There does not seem to be doubt that this constitutes an emotionally close family and having the grandparents in Canada, involved in their lives, is very much hoped for by the Applicants' children and grandchildren. Nevertheless, the hope for the physical presence of the grandparents does not provide, in the view of the decision maker, sufficient evidence to justify the use of section 25 of the Act. The Applicants have been in Canada for three years. For all the years before, they managed to maintain a strong emotional bond despite the distance between Canada and Israel, thanks to modern technology. On the whole, the best interests of the children will not be negatively impacted if the Applicants have to go back to Israel. As I understand the reasons, the circumstances are not such that the best interests of the children, including the grandchildren, are not seen by the decision maker as rising above the wish to have their grandparents around them. Little weight, on the evidence present before the decision maker, is given to that factor.

[10] Risk and Adverse Country Conditions: here, the Senior Immigration Officer considers the evidence about Israel: it appears that the concern relates to a lack of Israeli social support and the lack of security in Israel. On the basis of the information presented to the decision maker, it was noted that there is a long list of services made available to the elderly. Rather the Applicants

contend that access to services will require attending numerous government agencies, instead of the services being fully integrated. Indeed, the decision maker notes that there does not appear to be a need for a significant degree of care for these Applicants; furthermore, the evidence shows that a friend of the daughter offered to check on them.

[11] As for the state of public security in Israel, it is acknowledged that it is less than ideal, given the situation in the Middle East. The decision maker assesses that "[t]here is little evidence before me to demonstrate these generalized country conditions have impacted on them directly, creating hardship for them despite all their years of living there" (decision, p. 5 of 7). Indeed, the letters of support in their case from Israel do not support an indication that random violence poses a tangible concern. Little weight is given to that factor.

[12] Other factor: the Applicants have referred to a heart attack suffered by Mr. Torovsky in August 2019. Not much is known about his condition other than he was returned to his daughter's home within 48 hours. The incident is used to show that Mr. Torovsky was saved, thanks to the daughter's quick intervention at the time of the heart attack. He was dealt with quickly and he was saved. The decision maker gave no weight to this incident, as it is noted that it was not raised as an argument for remaining in Canada and that, at any rate, these events are fortuitous; they can happen at any time, at any place. He was lucky that there was someone nearby who was able to assist at that time and in that place. But such occurrence does not as such justify staying in Canada.

[13] A Humanitarian and Compassionate application is an exceptional response to a particular set of circumstances, says the decision maker: it is not an alternate means to gain permanent residence in Canada. It is also a highly discretionary measure, as it constitutes a special grant of an exemption to allow flexibility for deserving cases not otherwise covered by the legislation. The factors and circumstances are not sufficiently compelling to allow for a requested exemption.

[14] Considering the factors advanced by the Applicants, the Senior Immigration Officer considers the family ties as being the strongest factor in this case. On the other hand, the factor of the best interests of the children (one grandchild and the two great-grandchildren) has not been shown to result in a detrimental impact on the lives of these children. That was the Applicants' burden to show the impact. Nevertheless, the relationship between the Applicants and the one grandchild and the two great-grandchildren deserves a little weight.

[15] The country conditions in Israel are raised to suggest that social services for the elderly would benefit from better coordination and better integration. However, the social services for the elderly are extensive. Similarly, there was a lack of articulation as to how the security concerns in Israel would become a hardship for these Applicants. The decision maker gives this consideration little weight.

[16] There was no specific issue raised concerning the circumstances of the heart attack suffered by Mr. Turovsky. The decision maker notes that "it was not raised as an argument for remaining in Canada" (decision, p. 6 or 7)

[17] Finally, the Senior Immigration Officer notes that the Applicants' daughter was unsuccessful in seeking to sponsor her parents to become permanent residents in Canada. The H&C avenue "is not meant to subvert existing avenues for permanent residence" (decision, p. 7 of 7). Here there are not sufficient and compassionate considerations to justify granting the exemption from making the application from outside Canada.

## II. Standard of review and legal framework

[18] The parties agree that this case calls for the standard of review to be that of reasonableness. I share the view.

[19] But there are consequences that flow from the application of that standard of review. First and foremost, the reviewing court must adopt of posture of respect towards the administrative tribunal (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], at para 14). There is the principle of judicial restraint that must be front and center. Deference is owed (*Vavilov*, para 13). Thus, the reviewing court does not substitute its own view of the merits of the case, but rather seeks to control the legality of the decision under review: the decision must be reasonable, which translates into a determination that "the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, para 99)

[20] It follows that shortcomings, if any, must be serious; it cannot be the "line-by-line treasure hunt for error" of *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, [2013] 2 SCR 458, para 54; *Vavilov*, para 102. A failure of

rationality in the reasoning process would make a decision unreasonable; if it is not internally coherent, the decision must be returned for a re-determination; similarly, a decision that cannot be justified will have to be sent back.

[21] Thus it is the burden of the Applicants not to claim that the decision ought to be otherwise, but rather that the decision is incoherent or it cannot be justified because the alleged shortcomings are be sufficiently serious that "it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov*, para 100).

[22] There are also some parameters to the H&C framework. They come from the Supreme Court of Canada decision in *Kanthasamy v Canada (Citizenship and Immigration*), 2015 SCC 61, [2015] 3 SCR 909 [*Kanthasamy*).

[23] *Kanthasamy* accepts that the essence of the remedy is that which was enunciated in *Chirwa v Canada (Minister of Citizenship and Immigration) (1970)*, 4 IAC 338 [*Chirwa*]. I reproduce paragraph 21 of *Kanthasamy*:

> [21] But as the legislative history suggests, the successive series of broadly worded "humanitarian and compassionate" provisions in various immigration statutes had a common purpose, namely, 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": *Chirwa*, at p. 350.

[24] Some seem to have suggested that the notion of hardship has disappeared since that case. I do not share that view. In my opinion, once read in context, *Kanthasamy* continues to refer to hardship as being relevant to the analysis of what constitutes Humanitarian and Compassionate

grounds. Indeed, if there is to be "a desire to relieve the misfortunes of another", surely the hardship suffered is a natural and relevant consideration. However, the "unusual and underserved" or "disproportionate" hardship test is not to be applied as a rigid test to be satisfied. The *Kanthasamy* Court speaks rather of the three adjectives as being descriptive rather than creating thresholds for relief. At paragraph 33 of *Kanthasamy*, one reads:

> [33] The words "unusual and undeserved or disproportionate hardship" should therefore be treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). As a result, what officers should not do, is look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds, and use the language of "unusual and undeserved or disproportionate hardship" in a way that limits their ability to consider and give weight to *all* relevant humanitarian and compassionate considerations in a particular case. The three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision.
>
> [Emphasis in original.]

[25] Hardship counts. The three adjectives are seen as instructive and descriptive, not determinative. There must be flexibility to allow for all relevant Humanitarian and Compassionate considerations to be taken into account. It will be for an applicant to raise these other considerations as part of the burden on the shoulders of an applicant who relies on section 25 of the Act.

[26] Some seek to suggest that a "hardship lens", or a "hardship centric" analysis, constitutes a reviewable error as such. Actually, what the Court frowns upon is for immigration officers to consider Humanitarian and Compassionate grounds only through the lens of the three adjectives as discrete and high thresholds, and use the language of "unusual and undeserved or

disproportionate hardship" in a way that limits their ability to consider and give weight to all relevant Humanitarian and Compassionate considerations in a particular case.

[27] It must be remembered that paragraph 33 of *Kanthasamy* came after the Court saw two schools of thought in our Court. One was seen as requiring the words "unusual and underserved or disproportionate hardship" as setting out the test that must be met. Another school saw these same words as providing assistance, but not as fettering the decision maker's discretion to consider other factors. The Supreme Court, at paragraph 30 of the majority reasons, cites with approval the Federal Court of Appeal's decision in *Hawthorne v Canada (Minister of Citizenship and Immigration) (CA)*, [2003] 2 FC 555 finding that "the Guidelines are "not meant as 'hard and fast' rules" and are, rather, "an attempt to provide guidance to decision makers when they exercise their discretion": para. 9" (*Kanthasamy*, para 30). Put another way, the H&C considerations are not limited to hardship which, at any rate is "not a term of art" (*Hawthorne*, para 9). The Supreme Court also noted with approval, at paragraph 30, that our Court in *Singh v Canada (Citizenship and Immigration)*, 2014 FC 621 [*Singh*] accepted that "humanitarian and compassionate considerations "are not limited … to hardship" and that the "Guidelines can only be of limited use because they cannot fetter the discretion given by Parliament": paras 10 and 12 (CanLII)." That does not suggest that "hardship" has disappeared. Rather, together with the three adjectives which are meant to be descriptive and instructive on the hardship to be considered (not determinative), the hardship needs to be of a certain level of severity, and other considerations will be considered.

[28] The *Kanthasamy* Court found the *Chirwa* test was also meant "to prevent its undue overbreadth" (para 14). The Court cites the Immigration Appeal Board at paragraph 14:

> It is clear that in enacting s. 15 (1) (b) (ii) Parliament intended to give this Court the power to mitigate the rigidity of the law in an appropriate case, but it is equally clear that Parliament did not intend s. 15 (1) (b) (ii) of the Immigration Appeal Board Act to be applied so widely as to destroy the essentially exclusionary nature of the Immigration Act and Regulations. [p. 350]

The Court confirms the discretionary nature of the remedy which is "seen as being a flexible and responsive exception to the ordinary operation of the Act, or, in the words of Janet Scott, a discretion "to mitigate the rigidity of the law in an appropriate case"" (*Kanthasamy*, para 19).

[29] The exceptional nature of the remedy is reiterated where the Court states that "[t]here will inevitably be some hardship associated with being required to leave Canada. This alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under s. 25(1)" (*Kanthasamy*, para 23). In that same paragraph, the Court adds that "[n]or was s. 25(1) intended to be an alternative immigration scheme" As stated by the Supreme Court in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 SCR 84, the reference to H&C consideration is "essentially a plea to the executive branch for special consideration which is not even explicitly envisioned by the Act" (para 64).

[30] In the end, s 25(1) was meant as an exceptional avenue of relief in circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes (in French, "les malheurs") of another" (*Kanthasamy*, para 21). It should not be limited to the unusual and undeserved or disproportionate hardship, as there could be other

Humanitarian and Compassionate considerations at play. But in order to excite a desire to relieve the misfortunes of another, there must be misfortunes that are sufficiently severe in view of the recognition that there is inevitably some hardship in having to leave Canada, and that the availability of an H&C relief is not intended to be an alternative immigration scheme. Hardship must by necessity be a relevant consideration, but it must not be the only consideration. The adjectives “unusual”, “undeserved” and “disproportionate” are not discrete and high thresholds, but rather they are descriptive and instructive as to the hardship that an Officer will consider in accordance with the guidelines in the exercise of discretion.

[31] With this in mind, we proceed to examine the decision of a Senior Immigration Officer to deny the relief sought in this case.

## III. Arguments and analysis

[32] The burden on an applicant who must show that the unreasonableness of decision of an immigration officer in an H&C application is not insignificant. It does not suffice that the reviewing court might have come to a different outcome were it seized of the matter on its merit. A disagreement will not do. In the view of the Court, the Applicants have not discharged their burden to show that the decision not to exercise the discretion was unreasonable.

[33] In this case, the Applicants contend that four reversible errors were committed:

- The primary ground for relief, the family ties, was assessed so inadequately that it makes the decision unreasonable;
- The assessment of the best interests of the children was also inadequate;

- The officer had to give weight to the circumstances surrounding the heart attack suffered by the Mr. Turovsky in August 2019;
- The overall approach is argued to have been unreasonable as being devoid of empathy or understanding.

[34] The Applicants focused their attention on the impact on them if their application on H&C grounds were to be denied, thus putting at the forefront their family ties. Contrary to what is asserted by the Applicants, the decision maker addressed the ground squarely. The family ties issue was addressed as part of the "establishment" section in the reasons of the decision maker. If it were only of the establishment of the Applicants without the family ties, there would have been very little to say on that account. It is just that the Senior Immigration Officer, once he considered the family ties, concluded that family attachment, or ties, was not sufficient to justify an H&C application.

[35] The Applicants complain bitterly that "family ties" did not get its own heading in the challenged decision. Not only is that mostly irrelevant, but it is rightly part of the establishment of the Applicants. The Applicants insist on having their "family ties" issue get its label. The fact that the issue did not get its own label is argued as being evidence of a lack of consideration and weighing. The tight emotional ties within the family are rather evident. But the Applicants elevate form over substance. They do not explain what in the assessment of the decision maker is missing: this is a simple issue, one where the Applicants express with great passion their wish to join their children who have immigrated to Canada many years ago. The Senior Immigration Officer would have granted some weight to that consideration. It has not been shown why this is inadequate or deserves more on the part of the decision maker. As the Supreme Court stated in

*Kanthasamy*, H&C applications are not intended to be an alternative immigration scheme. Similarly some hardship is inevitable for those who want to stay in Canada but cannot. That alone will not generally be sufficient to warrant relief. Here, the decision maker concluded that the family ties did not warrant relief on the H&C grounds. The Court cannot identify the serious shortcoming that could make the decision under review not reasonable as lacking in justification, transparency and intelligibility in view of the factual and legal constraints. I add that I share the view of my colleague, Pentney J., when he wrote in *Oladihinde v Canada (Citizenship and Immigration)*, 2019 FC 1246:

> [16] … on judicial review on the deferential standard of reasonableness, a key concern is whether the process and decision indicate that the decision-maker truly "engaged" with the evidence, applying the appropriate legal test. The standard is not perfection. It must be recalled that Parliament assigned the task of conducting the initial inquiry into the facts to the officer. Deference is due to a decision-maker in particular in a context where the inquiry is primarily factual, and it is within the decision-maker's area of expertise, in a situation where greater exposure to the nuances of evidence or a greater awareness of the policy context may provide an advantage. If the chain of reasoning of the decision-maker can be understood, and if it shows that this type of engagement occurred, the decision will generally be found to be reasonable [citation omitted ].
>
> [Emphasis added.]

[36] The best interests of the children is of course an important consideration. The decision maker must be alert, alive and sensitive to the child's interests. In this case, who are they? The Applicants' children are both in their forties. They left Israel for Canada in 2011 and 2005. They both have their own children, only one of whom is under 18. As for the son, he is himself the grandfather of two children. The Applicants live with their daughter who is not a grandmother.

[37] It is striking that, again, the Applicants do not engage with the merits of what would be the best interests of a child whose grandparents and great-grandparents have left the country, other than depriving them of affection and support. In *Khaira v Canada (Citizenship and Immigration)*, 2018 FC 950, our Court noted:

> [25] This Court has held that, without more, the separation between a child and an extended family member such as a grandparent is not sufficient to warrant H&C relief. This hardship is inherent in circumstances where families reside in two different countries (*Tran v Canada (Citizenship and Immigration)*, 2018 FC 210 at para 11).

In fact, the *Tran* decision appears to me to be on point:

> [11] Ms. Tran also argues that the IAD failed to properly take into account the best interests of her son, as mandated by section 67(1)(c) of IRPA. I disagree. The IAD considered the situation of the family globally. This is not a situation where a child would be separated from one of his parents or removed to a country with which he or she is unfamiliar. Rather, Ms. Tran's argument is that allowing her application would facilitate relationships between the grand-mother and her grand-son. However, a similar argument could be made in many, if not most, cases of family reunification. Even though IRPA's purposes include facilitating family reunification, this must be done in conformity with IRPA's detailed prescriptions, which include the MNI requirement. Without more, it was reasonable to decide that the relationship between grand-parent and grand-child is not sufficient to warrant H&C relief. Like the hardship inherent in a person's removal from Canada (*Kanthasamy* at para 23), the hardship inherent in the fact that members of a family reside in two different countries is not sufficient to warrant H&C relief.
>
> [Emphasis added.]

[38] The Applicants argue that the decision maker relied exclusively on a hardship analysis. I believe these two paragraphs from Hawthorne, a decision of the Federal Court of Appeal are apposite:

> [6] To simply require that the officer determine whether the child's best interests favour non-removal is somewhat artificial - such a finding will be a given in all but a very few, unusual cases. For all practical purposes, the officer's task is to determine, in the circumstances of each case, the likely degree of hardship to the child caused by the removal of the parent and to weigh this degree of hardship together with other factors, including public policy considerations, that militate in favour of or against the removal of the parent.
>
> [7] The administrative burden facing officers in humanitarian and compassionate assessments - as is illustrated by section 8.5 of Chapter IP 5 of the Immigration Manual reproduced at para. 30 of my colleague's reasons - is demanding enough without adding to it formal requirements as to the words to be used or the approach to be followed in their description and analysis of the relevant facts and factors. When this Court in Legault stated at paragraph 12 that the best interests of the child must be "well identified and defined", it was not attempting to impose a magic formula to be used by immigration officers in the exercise of their discretion.

I cannot see why an assessment of the hardship or benefits cannot be undertaken. Hardship and benefits are the two sides of the same coin (*Hawthorne*, para 4). The assessment is exactly what is expected of the officer. It is then for an applicant to show that the assessment is not reasonable. This is a burden that has not been discharged.

[39] The decision maker did not quarrel with the wish expressed to have the grandparents and great-grandparents stay in Canada. It is rather that the decision maker did not have enough evidence that the benefit, or hardship, was sufficient to lead him to conclude in favour of the Applicants. This kind of hardship is basically the hardship suffered in all cases of separation.

[40] The Applicants contend that the heart attack unfortunately suffered by Mr. Torovsky is evidence of the benefit of close proximity. One has to wonder how an unfortunate but fortuitous

event can be of assistance in this case. A health issue or some other incident will often happen in a haphazard fashion outside the presence of a family member who would be in a position to provide immediate assistance. There was not evidence that constant and close supervision is needed to prevent another incident, whatever it may be, and wherever or whenever it may occur. There was nothing unreasonable in the decision maker concluding that the Applicants did not raise "any specific issues as to how this enhances this application" (decision, p. 7 of 7).

[41] The Applicants raised the country conditions in Israel in their H&C application. The issue was dealt with by the decision maker. The Applicants appear to have dropped the issue.

[42] Instead they argued that the decision was generally unreasonable. Again, the Applicants complain that they should have received more extensive reasons, once their application was considered in a holistic fashion. They contend that the Senior Immigration Officer lacked empathy. There is no merit to these submissions.

[43] The analysis conducted by the decision maker amply justifies the conclusion reached on every element of the analysis. Looking at them collectively, or holistically, does not strengthen them. The decision has not been shown to be unreasonable as it is justified, transparent and intelligible.

## IV. Conclusion

[44] The judicial review application must be dismissed. The parties did not suggest that there be a question certified. This is certainly a view that is endorsed by this Court.

**JUDGMENT in IMM-2775-20**

**THIS COURT'S JUDGMENT is that**:

1. The judicial review application is dismissed.

2. There is no question of general importance to be certified.

"Yvan Roy"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-2775-20 |
| **STYLE OF CAUSE:** | SOFIA TUROVSCI and FIODOR TUROVSKY v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | HELD BY VIDEOCONFERENCE |
| **DATE OF HEARING:** | NOVEMBER 9, 2021 |
| **JUDGMENT AND REASONS:** | ROY J. |
| **DATED:** | DECEMBER 10, 2021 |

**APPEARANCES:**

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|---|---|
| Leo Rayner | FOR THE APPLICANTS |
| Kevin Spykerman | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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|---|---|
| Legally Canadian<br>Barrister & Solicitor<br>Mississauga, Ontario | FOR THE APPLICANTS |
| Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |