Federal Court  Cour fédérale

Date: 20220202

Docket: IMM-2230-21

Citation: 2022 FC 124

Ottawa, Ontario, February 2, 2022

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

MAIA KRIVYKH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant is an 81-year old Holocaust survivor and citizen of Israel. She seeks judicial review of a negative decision of a Senior Immigration Officer [Officer] dated March 19, 2021 refusing her application for permanent residence based on humanitarian and compassionate [H&C] grounds under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The Applicant asserts that the Officer: (a) erred in the consideration of the best interests of Daniel, her nine-year old grandson; (b) erred in the assessment of the Applicant's mental health considerations; (c) erred in the consideration of the factor of family separation; and (d) erred in not taking into consideration evidence concerning the psychological state of the Applicant and Daniel on the reconsideration request.

[3] For the reasons that follow, the application for judicial review is granted.

I. Preliminary Issue

[4] The Respondent objects to the Court considering the final alleged error, noting that this application is limited to a review of the March 19, 2021 decision and that any new materials before the Officer in relation to the Applicant's reconsideration request, as well as the reconsideration decision itself, are not properly before the Court. I agree with the Respondent. The reconsideration decision constitutes a separate decision that must be challenged through a separate application for judicial review [see *Harms-Barbour v Canada (Minister of Public Safety and Emergency Preparedness)*, 2021 FC 59 at para 64]. The Applicant did not bring such an application and leave of this Court was granted only in respect of the March 19, 2021 decision. As the new materials provided to the Officer in relation to reconsideration request were not before the Officer at the time that the Officer rendered the March 19, 2021 decision, they are not properly before the Court. Accordingly, I have not considered the affidavit of Noemi Paredes and the exhibits thereto.

II. Analysis

[5] Subsection 25(1) of the *IRPA* gives the Minister discretion to exempt foreign nationals from the ordinary requirements of that statute and grant permanent resident status in Canada if the Minister is of the opinion that such relief is justified by humanitarian and compassionate [H&C] considerations. An H&C determination under section 25(1) of the *IRPA* is a global one, where all the relevant considerations are to be weighed cumulatively in order to determine if relief is justified in the circumstances. Relief is considered justified if the circumstances would excite in a reasonable person in a civilized community a desire to relieve the misfortunes of another [see *Kanthasamy v Canada (Citizenship and Immigration*), 2015 SCC 61 at paras 13, 28; *Caleb v Canada (Citizenship and Immigration),* 2020 FC 1018 at para 10].

[6] The granting of an exemption for H&C reasons is deemed to be exceptional and highly discretionary and therefore "deserving of considerable deference by the Court" [see *Qureshi v Canada (Minister of Citizenship and Immigration),* 2012 FC 335 at para 30]. There is no "rigid formula" that determines the outcome [see *Sivalingam v Canada (Citizenship and Immigration*), 2017 FC 1185 at para 7].

[7] The applicable standard of review of an H&C decision is reasonableness [see *Kanthasamy, supra* at para 44]. In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale, in order to ensure that the decision as a whole is transparent, intelligible and justified [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 15].

A. ***Best Interests of the Child [BIOC]***

[8] In reviewing an H&C application, an officer must be "alert, alive and sensitive" to the interests of any children who may be impacted by the officer's decision [see *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75]. In this regard, the evidence with respect to the child's interests must be examined with care and attention in light of all of the evidence and in the context of the child's personal circumstances [see *Garraway v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 286 at para 33]. Once that is done, it is up to the officer to determine what weight those interests should be given in the circumstances [see *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 12].

[9] There was extensive evidence before the Officer regarding the relationship between the Applicant and Daniel. In addition to the Applicant's evidence, the Applicant provided letters from her son, her daughter-in-law, Daniel, her adult grandson, and Daniel's ballroom dance trainer. The Officer accepted that there was a close emotional bond between the Applicant and Daniel and that she was providing "some practical care for Daniel", noting the evidence before the Officer that the Applicant would drop Daniel off at school and pick him up, take him to competitive ballroom dance classes, cook for him, assist him with his homework, teach him Russian and teach him about family traditions.

[10] The Officer also noted that additional, more recent letters were provided attesting to new circumstances arising from the pandemic. Specifically, the Applicant's daughter-in-law works as a nurse in a hospital unit that treats COVID-19 patients. Due to the risk of infecting her family

with COVID-19, a decision was made to move the Applicant, Daniel and her adult grandson into separate housing. The Officer noted that the family is reliant on the Applicant's help taking care of Daniel, given that Daniel's parents are no longer living with him. The Officer noted that there was corroborating documentation demonstrating the daughter-in-law's status as a front-line worker and confirming that the Applicant and her grandsons are staying in a separate home until the pandemic is over. The Officer concluded that he accepted this evidence and that the Applicant is "providing some care" for Daniel. The Officer indicated that he gave this consideration weight.

[11] The Officer went on to examine Daniel's emotional well-being, as the Applicant asserted that his emotional well-being would be negatively impacted should the Applicant have to leave Canada. In the uncertain time of the pandemic and with the stress caused by fear of the deadly virus, separation from his parents and his peers and on-line schooling, the Applicant asserted that she is the only available and close relative who can help Daniel with his anxiety. The Officer held:

> I find that counsel provided little evidence to demonstrate that Daniel experienced profound stress and anxiety due to separation from his grandmother in 2016 or that Daniel is suffering from anxiety at this time. Therefore, I give this consideration little weight.
>
> I accept that the applicant has a close bond to Daniel and that she provides him with practical care. However, I note that the applicant has been away from Daniel for extended periods of time and it is not clear, based on the evidence before me, that such periods of separation have negatively impacted Daniel or that his parents were unable to provide him with practical care when the applicant was away. Nevertheless, I accept that there is a close connection between Daniel and the applicant. Therefore, I give this factor weight.

[12] Under the heading "Global Assessment and Conclusion", the Officer stated that they granted significant weight to the best interests of Daniel, noting that the Applicant "provides some care for him" and has a close emotional connection to him. However, the Officer concluded that

they did not find that Daniel's interests would be negatively impacted should the Applicant return to Israel.

[13] While I accept that the Officer undertook a detailed consideration of Daniel's best interests in assessing the Applicant's application, I find that the Officer misapprehended the Applicant's role in Daniel's life. The Officer repeatedly states that the Applicant provides Daniel with "some care" or "some practical care". However, the clear evidence before the Officer was that as a result of the pandemic, Daniel now resides solely with the Applicant. The Applicant is Daniel's primary caregiver. As stated by her daughter-in-law, the Applicant is "fully in charge" of both grandsons. The Applicant does not simply provide "some care" for Daniel – she provides all of his care – and will continue to do so until the pandemic is over according to the evidence of Daniel's parents (which was accepted by the Officer).

[14] The central aspect of the Applicant's BIOC claim was that the Applicant's relationship with Daniel evolved as a result of the pandemic, moving from the role of grandmother to *de facto* parent. While the Applicant and Daniel have always been close, the Applicant now plays an integral and indispensable role in Daniel's life as his primary caregiver. The Officer does not engage with this central issue, which is particularly evident in the Officer's failure to take into consideration that the other periods of time where the Applicant and Daniel were separated were before the pandemic and while he was still able to be cared for by his parents. Given the acknowledged significance of the BIOC factor to the Officer's assessment of the Applicant's H&C application, I find that the Officer's errors render the decision unreasonable.

[15] Having found the Officer's decision unreasonable, I find that it is unnecessary to address the remaining issues raised by the Applicant.

III. Conclusion

[16] As the Officer's reasons do not reasonably engage with the central aspect of the Applicant's BIOC claim and misstate the Applicant's role in Daniel's life, I find that the decision is unreasonable. The application for judicial review is therefore allowed, the decision is set aside and the matter is remitted to a different officer for redetermination.

[17] Neither party proposed a question for certification and I agree that none arises.

JUDGMENT in IMM-2230-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The decision of the Senior Immigration Officer dated March 19, 2021 refusing the Applicant's application for permanent residence based on humanitarian and compassionate grounds is set aside and the matter is remitted back to a different officer for redetermination.

3. The parties proposed no question for certification and none arises.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE
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