Federal Court Cour fédérale

Date: 20220603

Docket: IMM-4169-20

Citation: 2022 FC 818

Ottawa, Ontario, June 3, 2022

PRESENT: Mr. Justice Norris

BETWEEN:

FATIH BEYCAN SABUNCU
HAYRIYE OZTEKIN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants are citizens of Turkey. In June 2010, the Refugee Protection Division ("RPD") of the Immigration and Refugee Board of Canada found them to be Convention refugees on the basis of their fear of harm at the hands of Ms. Oztekin's family. The family was strongly opposed to Ms. Oztekin's relationship with Mr. Sabuncu due to their differing religious and ethnic backgrounds (she is a Sunni Muslim of Kurdish ethnicity and he is an Alevi Muslim of Arab ethnicity). The family was also motivated to avenge the shame they believed

Ms. Oztekin had brought on them by spurning an arranged marriage with another man and continuing her relationship with Mr. Sabuncu.

[2] Over the next few years after their refugee claims were accepted, the applicants returned to Turkey for extended stays for fertility treatment in Istanbul. This treatment was successful and their son was born in Canada in August 2013.

[3] These trips to Turkey also had another consequence, however. In June 2018, the RPD granted an application for cessation of the applicants' refugee status on the basis that they had reavailed themselves of the protection of their country of nationality: see subsection 108(2) and paragraph 108(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). As a result of this determination, the applicants' claims for refugee protection were deemed to be rejected: see *IRPA*, subsection 108(3). An application for judicial review of this decision was dismissed: see *Sabuncu v Canada (Citizenship and Immigration)*, 2019 FC 62.

[4] Shortly after the RPD's decision, on September 28, 2018, the applicants submitted an application for permanent residence in Canada on humanitarian and compassionate (H&C) grounds under subsection 25(1) of the *IRPA*. While ordinarily the applicants would be barred from submitting their H&C application at that time, they relied on the best interests of their son to be able to do so: see *IRPA*, paragraph 25(1.21)(b), which sets out this exception to the usual statutory bar. The applicants also relied on their son's best interests as well as their establishment in Canada and the risks they faced in Turkey in support of the merits of their application for permanent residence from within Canada.

[5] Subsection 25(1) of the *IRPA* authorizes the Minister to grant relief to a foreign national seeking permanent resident status who is inadmissible or otherwise does not meet the requirements of the Act. The Minister may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations under the Act. As the provision states, relief of this nature will only be granted if the Minister "is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national." This discretion to make an exception provides flexibility to mitigate the effects of a rigid application of the law in appropriate cases: see *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 19. It is to be exercised in light of the equitable underlying purpose of the provision: *Kanthasamy* at para 31. Whether relief is warranted in a given case depends on the specific circumstances of that case while also bearing in mind that this is not intended to be an alternative immigration scheme: see *Kanthasamy* at paras 23 and 25. The particular exemption sought by the applicants was from the usual requirement that someone in their position must apply for permanent residence from outside Canada.

[6] While their H&C application was still pending, on June 11, 2019, the applicants were removed from Canada and returned to Turkey. Naturally, their son accompanied them.

[7] Following their removal, the applicants' counsel provided supplementary submissions on several occasions updating Immigration, Refugees and Citizenship Canada on the applicants' circumstances in Turkey.

[8] In a decision dated August 24, 2020, a Senior Immigration Officer refused the H&C application. The Officer was not satisfied that the applicants had provided sufficient evidence to warrant an exemption from the usual requirements of the law in their case.

[9] The applicants have now applied for judicial review of this decision under subsection 72(1) of the *IRPA*. There is no issue that the substance of the decision should be reviewed on a reasonableness standard: see *Kanthasamy* at para 44; see also *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10.

[10] 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). A decision that displays these qualities is entitled to deference from the reviewing court (*ibid.*). When applying the reasonableness standard, it is not the role of the reviewing court to reweigh or reassess the evidence considered by the decision maker or to interfere with factual findings unless there are exceptional circumstances: see *Vavilov* at para 125. At the same time, reasonableness review is not a rubber-stamping process; it remains a robust form of review: see *Vavilov* at para 13.

[11] The onus is on the applicants to demonstrate that the Officer's decision is unreasonable. 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).

[12] The applicants have challenged the Officer's decision on several grounds but in my view it is necessary to address only one: the assessment of the best interests of the child.

[13] Subsection 25(1) expressly requires a decision maker to take into account the best interests of a child directly affected by a decision made under that provision. The "best interests" principle is "highly contextual" because of the "multitude of factors that may impinge on the child's best interests" (*Kanthasamy* at para 35, quoting *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 11 and *Gordon v Goertz*, [1996] 2 SCR 27 at para 20). As a result, it must be applied "in a manner responsive to each child's particular age, capacity, needs and maturity" (*Kanthasamy* at para 35). The child's level of development will guide the precise application of the principle in the context of a particular case (*ibid.*). Protecting children through the application of this principle means "[d]eciding what . . . appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention" (*Kanthasamy* at para 36, quoting *MacGyver v Richards* (1995), 22 OR (3d) 481 (CA) at p 489).

[14] The best interests of a child will not necessarily be a determinative consideration in a given H&C application: see *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75; see also *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at paras 2 and 8. Nevertheless, it is an important factor for the decision maker to consider. When doing so, the decision maker must do more than simply state that the interests of the child have been taken into account. A child's best interests must be "well identified and

defined and examined with a great deal of attention in light of all the evidence" (*Kanthasamy* at para 39, internal quotation marks removed). They must be given "substantial weight" (*Baker* at para 75). If "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" (*ibid.*).

[15] I find that this is the case here.

[16] The Officer concluded that the applicants' son's best interests did not favour granting relief for two reasons. First, the son is not attending school in Turkey because he cannot speak Turkish but he could always attend an English school. Second, since the applicants "will continue to provide love, support and guidance for him during this time of transition in his life," the son's best interests "will continue to be met by the love and support of his parents."

[17] In my view, these conclusions are untenable in light of the evidence before the Officer.

[18] The original submissions in support of the application (provided while the applicants were still in Canada) emphasized the following in arguing that the son's best interests weighed heavily in favour of granting the application:

- The son, who was five years of age at the time, has lived in Canada his entire life.
- He has no meaningful links to Turkey. He has no friends there or any connection to the culture. All his friends and social contacts are in Canada.

- He cannot speak or understand Turkish. This will impede his education and impair his ability to form friendships and participate in activities in the community.

- In sum, it is in the son's best interests "that he be allowed to remain in Canada and continue to benefit from his own friendships, cultural familiarity, community and academic and emotional stability."

[19] In further submissions provided after the applicants returned to Turkey, counsel for the applicants noted the following in connection with the son's best interests:

- The son cannot register for school because he is a Canadian citizen. If he obtains Turkish citizenship and registers for school, this could reveal the family's whereabouts to the agents of persecution.

- The son was placed in a private day care briefly but he was unable to function there because he cannot speak or understand Turkish. His inability to speak or understand Turkish has also prevented him from having any sort of social life.

- The son misses Canada and his life there terribly, he is experiencing emotional difficulties and had been seen by a clinical psychologist.

- The agents of persecution have been actively looking for the applicants. Mr. Sabuncu's brother had recently been beaten by members of Ms. Oztekin's family because he would not tell them where the applicants are.

- The applicants are afraid that they will be found by the agents of persecution so they have been moving frequently, staying in hotels, and even hiding in a friend's home. This life

of instability and insecurity has exacerbated the stresses and emotional upheaval the son was already experiencing.

[20] Apart from addressing the language issue and suggesting that the son could attend an English school, the Officer does not engage with the evidence concerning what has been happening in Turkey in a meaningful way. The Officer does not address at all the evidence that registering the son for school as a Turkish citizen could expose the family to the risk of being found by their agents of persecution. The Officer does not meaningfully address the evidence of the instability and insecurity the family was experiencing in Turkey, instead judging it to be simply a "period of adjustment" for the applicants. Contrary to what is required, the Officer fails to attentively consider the son's best interests in light of all the evidence. The conclusion that the son's best interests will "continue to be met by the love and support of his parents" suggests a complete failure to appreciate not only the son's interests but also the circumstances in which he and his family have found themselves.

[21] As stated above, when applying the reasonableness standard, it is not the role of the reviewing court to reweigh or reassess the evidence considered by the decision maker or to interfere with factual findings unless there are exceptional circumstances: see *Vavilov* at para 125. That being said, to be reasonable, a decision must be justified in light of the facts. The decision maker must take the evidentiary record and the general factual matrix that bears on the decision into account, and the decision must be reasonable in light of them. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it: see *Vavilov* at paras 125-26. Further, "a decision

maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it" (*Vavilov* at para 128). This is what has happened here.

[22] For these reasons, the application for judicial review must be allowed and the matter reconsidered by another decision maker.

[23] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-4169-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Senior Immigration Officer dated August 24, 2020, is set aside and the matter is remitted for reconsideration by a different decision maker.
3. No question of general importance is stated.

"John Norris"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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