Federal Court  Cour fédérale

**Date: 20190911**

**Docket: IMM-654-19**

**Citation: 2019 FC 1160**

**Ottawa, Ontario, September 11, 2019**

**PRESENT: The Honourable Madam Justice Kane**

**BETWEEN:**

**GALINA TAGHIYEVA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] The Applicant, Galina Taghiyeva, seeks judicial review of the decision of an Immigration Officer [the Officer] refusing her application for permanent residence in Canada based on an exemption from the requirements of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] on humanitarian and compassionate grounds [H&C] pursuant to section 25 of the Act.

[2] For the reasons that follow, the Application is granted.

## I. Background

[3] Ms. Taghiyeva is a widow from Azerbaijan. She arrived in Canada in June 2016 on a multiple entry visa, valid until 2021, to visit her daughter, son-in-law and grandchildren. The multiple entry visa permits her to visit for periods up to six months, with a possibility of extension. Her Temporary Visitor Visa (TRV) has been extended until November 30, 2019. Ms. Taghiyeva seeks to remain in Canada permanently, but notes that she is not eligible for a "grandparents' super visa" or for sponsorship by her daughter due to financial ineligibility. She applied for permanent resident status on Humanitarian and Compassionate [H&C] grounds in November 2016, based on family reunification and the best interests of her grandchildren.

## II. The Decision under Review

[4] The Officer acknowledged Ms. Taghiyeva's personal circumstances, including that she is a widow and living alone and without her family in Azerbaijan. The Officer noted the close relationship between Ms. Taghiyeva and her daughter, son-in-law and grandchildren, and the help she provides to the family given that her son-in-law is legally blind. The Officer also noted Ms. Taghiyeva' s desire to assist her daughter in her home to permit her daughter to upgrade her education and find a job as a teacher.

[5] The Officer expressed sympathy for the impact of family separation on Ms. Taghiyeva, but noted that this was the expected result of family members becoming residents of another country and would have been reasonably anticipated when Ms. Taghiyeva's daughter and granddaughter left Azerbaijan in 2011.

[6] The Officer acknowledged that Ms. Taghiyeva was not eligible for other immigration programs because her daughter and son-in-law do not meet the required financial threshold for sponsorship. The Officer noted that the H&C exemption is not intended to be an alternative means of immigration.

[7] The Officer observed that Ms. Taghiyeva's multiple entry visa permits her to travel to Canada and to extend her visitor's visa while in Canada, which in the Officer's view would permit her to assist her daughter to attend school or work while Ms. Taghiyeva visited Canada. The Officer noted that Ms. Taghiyeva did not state that she had difficulty travelling or that it was not feasible given her personal circumstances. The Officer suggested that Ms. Taghiyeva's daughter could sponsor her at a future date.

[8] The Officer acknowledged that family unification is one of the objectives of the Act, but found that Ms. Taghiyeva had not demonstrated that separation from her family would sever their bond. The Officer noted that regular contact could be maintained through other means of communication.

[9] The Officer noted that Ms. Taghiyeva would be returning to her home country where she was familiar with the language and culture and found that the evidence did not suggest that she could not re-establish herself. The Officer further found that [Ms. Taghiyeva] "has presumably established a network of support through friends and extended family that could assist her…"

[10] With respect to the economic conditions in Azerbaijan, the Officer acknowledged the devaluation of the currency and that economic factors were not as favourable as in Canada, but noted that this affected all citizens of Azerbaijan. The Officer further found that the comparative economic advantage in Canada is not a determinative factor.

[11] The Officer considered Ms. Taghiyeva' s financial situation, including her modest savings and her daughter and son-in-law's modest income, all of which was derived from the Ontario Disability Support Program and Trillium Benefit. The Officer placed significant weight on his finding that Ms. Taghiyeva would not be financially autonomous and that her family was not capable of supporting her in Canada.

[12] The Officer found that Ms. Taghiyeva's personal circumstances and the impact of family separation were not exceptional enough to justify an H&C exemption.

[13] The Officer gave substantial weight to the best interests of Ms. Taghiyeva's grandchildren [BIOC], but noted that the BIOC was only one of many important considerations in the H&C assessment.

[14] The Officer noted the vital role played by grandparents, the close relationship Ms. Taghiyeva has with her two granddaughters, and the mutual benefits of the relationship, including cultural exchange. The Officer agreed that the grandchildren would be negatively affected if she were to leave Canada. The Officer acknowledged that living apart from their grandmother could be difficult for the children and would require readjustment. However, the

Officer found that there was no evidence that the grandchildren's needs were not met by their parents. The Officer concluded that the grandchildren's best interests would not be compromised if Ms. Taghiyeva were to return to Azerbaijan.

[15] In conclusion, the Officer stated that he had weighed all the evidence and made a global assessment. He noted that he was sympathetic to some factors, but the factors were not sufficient to warrant an exemption on H&C grounds.

## III. The Issue and Standard of Review

[16] The issue is whether the decision is reasonable.

[17] The jurisprudence has clearly established that the standard of review of an Officer's decision with respect to an H&C application is reasonableness (*Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 at para 44, [2015] 3 SCR 909 [*Kanthasamy*]).

[18] To determine whether a decision is reasonable, the Court looks for "the existence of justification, transparency and intelligibility within the decision-making process" and considers "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190). Deference is owed to the decision-maker and the Court will not re-weigh the evidence.

## IV. The Applicant's Submissions

[19] Ms. Taghiyeva argues that the decision is not reasonable because the Officer ignored or misconstrued highly relevant evidence and made erroneous findings of fact and, the Officer erred in his assessment of the best interests of her grandchildren.

[20] Ms. Taghiyeva submits that she clearly attested that she did not have any family or friends remaining in Azerbaijan and that she was all alone, particularly since the death of her husband in 2014, and that her only living relative was her daughter in Canada. The Officer's finding that she "presumably" had a support network in Azerbaijan was contradicted by the evidence.

[21] Ms. Taghiyeva further submits that the Officer failed to consider the change in her personal circumstances since her husband's death in 2014, which has left her not simply alone, but isolated in her country.

[22] Ms. Taghiyeva argues that the Officer unreasonably concluded that she could use her multiple entry visa to travel back and forth. She submits that her financial situation, which the Officer acknowledged, clearly makes this impossible. Given that the Officer found that she would not be financially autonomous in Canada due to her modest savings and her daughter's inability to provide financial support, it was inconsistent and unreasonable to find that it would not be difficult or feasible for her to travel.

[23] Ms. Taghiyeva further argues that the Officer's analysis of the BIOC does not reflect the guidance of *Kanthasamy*. The Officer failed to assess how the interests of each of her grandchildren – aged 4 and 15 – would be affected. The Officer did not address the role she plays in their day-to-day care. Ms. Taghiyeva suggests that the Officer overlooked the impact on the grandchildren of separation by concluding that the children's basic needs are met by their parents, which is not in dispute.

## V. The Respondent's Submissions

[24] The Respondent submits that the Officer did not ignore or misconstrue any relevant evidence. Rather, the Officer considered all the evidence, noted the positive elements of the H&C application and explained why the positive elements did not warrant the exceptional relief from the requirements of the Act.

[25] The Respondent submits that the Officer acknowledged that Ms. Taghiyeva was alone without her family in Azerbaijan. The Officer noted that Ms. Taghiyeva's husband had passed away in 2014 and that other family members had also passed away or moved. The Respondent submits that Ms. Taghiyeva's unsworn affidavit states that "some" friends had moved or died, which suggests that other friends remain in Azerbaijan.

[26] The Respondent suggests that the Officer's finding that Ms. Taghiyeva had no difficulty travelling relates to the absence of health impediments rather than financial impediments. The Respondent submits that there was no compelling evidence before the Officer to show that Ms. Taghiyeva could not travel home and later return to Canada.

[27] The Respondent submits that the Officer did not err in his assessment of the best interests of the grandchildren. The Officer noted the mutually beneficial relationship between Ms. Taghiyeva and her granddaughters and the hands-on role she played in their care and the cultural exchange provided. The Respondent adds that the Officer did not err by noting that, although there would be disruption and sadness, the children's needs would be met by their parents.

[28] The Respondent disputes that a separate BIOC analysis was not conducted for each grandchild, noting that the Officer considered the evidence presented.

## VI. The Nature of an H&C Exemption

[29] Section 25 of the Act, which Ms. Taghiyeva seeks to rely on, provides that an exemption from the criteria or obligations of the Act – which in this case would otherwise require Ms. Taghiyeva to apply for permanent residence in Canada from her home country and meet all the necessary requirements – may be granted on the basis of humanitarian and compassionate considerations, "taking into account the best interests of a child directly affected".

[30] The Supreme Court of Canada has confirmed that an H&C application is not an alternative immigration stream (*Kanthasamy* at para 23). The onus is at all times on an applicant to establish with sufficient evidence that this exemption should be granted (*Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 45; *Liang v Canada (Minister of Citizenship and Immigration)* 2017 FC 287 at para 23, [2017] FCJ No 286 (QL)). Officers who

conduct H&C assessments must consider all the evidence presented and be satisfied that the relief is justified in the particular circumstances.

[31] In *Kanthasamy*, at para 33, the Supreme Court of Canada guides decision-makers to consider and weigh all relevant facts and factors and calls for a more liberal interpretation of H&C considerations, not limited to undue, undeserved or disproportionate hardship. However, the Court also acknowledged, at para 23, that some hardship associated with leaving Canada is inevitable, but that this hardship, on its own, will not generally warrant an H&C exemption.

## VII. The Officer's Decision is not Reasonable

[32] As noted above, a decision is reasonable where it is transparent, intelligible and justified and is defensible in accordance with the law and the facts. Although the Officer assessed each of the relevant considerations raised by Ms. Taghiyeva in support of her H&C application, including the BIOC of both grandchildren, and then made a global assessment, the Officer made one finding which was not supported by any evidence on the record and made another finding which was illogical and inconsistent with other findings.

[33] First, the Officer made an inconsistent conclusion regarding Ms. Taghiyeva's ability to travel back and forth between Canada and Azerbaijan, finding that the ability to travel with her multiple entry visa permits her to spend significant time with her family. The Officer found that Ms. Taghiyeva had limited savings and would not be financially autonomous in Canada, also noting that her daughter could not support her given that her daughter's income was derived from her husband's disability pension benefits. Financial autonomy is generally a relevant

consideration in assessing an applicant's establishment in Canada (*Bhatia v Canada (Citizenship and Immigration)*, 2017 FC 1000 at paras 25-27; *Trach v Canada (Citizenship and Immigration)*, 2019 FC 747 at para 5). However, the Officer then found that Ms. Taghiyeva had not demonstrated that she had any difficulty travelling given her personal circumstances. This is illogical and contradicted by the Officer's findings regarding the lack of financial means, which are also part of her personal circumstances. I disagree with the Respondent's speculation that the Officer's finding was only about medical fitness to travel.

[34] Second, the Officer erroneously found that "she has presumably established a network of support through friends and extended family that could assist her…" upon her return to Azerbaijan. The Officer's presumption is not supported by any evidence of a support network of friends or extended family and is clearly contradicted by Ms. Taghiyeva's narrative attached to her H&C application which states that she has "no friends" remaining in Azerbaijan, and adds that "some of them moved out and some had died". She also states, as does her application form, that her mother, only sister and husband have died. Her son-in-law's affidavit reiterates that all of Ms. Taghiyeva's family members have died and that Ms. Taghiyeva is now alone.

[35] The Officer's overall finding that Ms. Taghiyeva's personal circumstances and the impact of family separation were not exceptional enough to justify an H&C exemption was based to some extent on the two flawed findings.

[36] The Court acknowledges that H&C exemptions are, by their very nature and purpose, exceptional. The discretionary decisions of officers who have gained considerable expertise in

assessing H&C applications are owed deference. The weight attached to the relevant H&C considerations or factors will not be disturbed by the Court. However, in the present case, the erroneous and illogical findings of fact affected the Officer's findings regarding Ms. Taghiyeva's personal circumstances and the impact of family separation and affected the Officer's global assessment of all the H&C considerations. As a result, the H&C application must be redetermined with regard to all the evidence on the record.

[37] As noted in *Kanthasamy*, at para 25, "[w]hat *does* warrant relief will clearly vary depending on the facts and context of the case, but officers making humanitarian and compassionate determinations must substantively consider and weigh *all* the relevant facts and factors before them: *Baker*, at paras 74-75."

## VIII. The Applicant's Request for Costs

[38] At the conclusion of the hearing, Counsel for Ms. Taghiyeva asked to make submissions on costs. He noted that the Order granting leave for judicial review had directed the parties to discuss settlement, but that this did not occur. The Respondent objected to Counsel raising this issue for the first time at the hearing.

[39] The Court notes that Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 provides that "[n]o costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders." The Court also notes that the Order granting leave, which includes a paragraph indicating that within 15 days of the Order, the

parties shall discuss the possibility of settlement. This is standard wording for the Toronto Settlement Pilot Project. It is not intended to signal the Court's view of the likely outcome of the Application for Judicial Review. Rather it is intended to encourage the parties to consider whether the Application can be settled.

[40] However, the Court agrees that the Applicant may make written submissions, not to exceed three pages, on the issue of whether costs should be awarded. The Respondent may make written submissions in reply, not exceeding three pages. The submissions may be supported by an Affidavit to establish the facts relied on. Upon consideration of the submissions, the Court will make an Order limited to the issue of costs.

**JUDGMENT in file IMM-654-19**

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

1. The Application for Judicial Review is granted.

2. The Applicant's application for permanent residence based on H&C considerations shall be remitted to a different decision-maker for determination.

3. Within 10 days of this Judgment, the Applicant may make submissions on costs in writing, not to exceed three pages, and may file an Affidavit to establish the facts relied on. The Applicant's submissions on costs shall be served on the Respondent by email and filed with the Court.

4. Within 5 days of receipt of the Applicant's submissions on costs, the Respondent may make written submissions in reply, not to exceed three pages, and may file an Affidavit to establish the facts relied on. The Respondent's reply submissions shall be served on the Applicant by email and filed with the Court.

"Catherine M. Kane"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-654-19 |
| **STYLE OF CAUSE:** | GALINA TAGHIYEVA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | SEPTEMBER 4, 2019 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | KANE J. |
| **DATED:** | SEPTEMBER 11, 2019 |

**APPEARANCES:**

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