Federal Court  Cour fédérale

Date: 20221117

Docket: IMM-1137-21

Citation: 2022 FC 1574

Toronto, Ontario, November 17, 2022

PRESENT: Justice Andrew D. Little

BETWEEN:

ERHAN TUR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant asks the Court to set aside a decision senior immigration officer dated February 8, 2021, made under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *"IRPA"*). The officer refused the applicant's request for permanent residence in Canada with an exemption on humanitarian and compassionate ("H&C") grounds.

[2] The applicant submitted that the officer's decision was unreasonable under the principles described in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019]

4 SCR 653. The applicant also raised a concern about procedural fairness, owing to the officer's use of a document not found in the Certified Tribunal Record ("CTR").

I. Material Facts

[3] The applicant is a citizen of Turkey. He is of Kurdish ethnicity. He is currently in Canada. He has refugee status in the United States, where he lived from mid-2012 until September 2013, at which time he crossed into Canada irregularly.

[4] At the time of the officer's decision, the applicant resided with two of his sons in Ontario and worked in the construction industry. The applicant's elder son, F, was 20 years old and his second son, B, was 17 years old. Both had Convention refugee status in Canada. The applicant's spouse lived in Turkey with their third child, R, who was 11 years old. The applicant sent money to them on a regular basis to support them.

[5] The applicant's request for H&C relief under *IRPA* subsection 25(1) was based on several factors, including the best interests of the children ("BIOC"), his establishment in Canada, and the financial and other hardship his family would suffer if he were removed back to Turkey (which included country conditions affecting Kurdish persons).

II. H&C Decision under Review

[6] The officer's decision stated that the applicant arrived in Canada around September 14, 2013, after he crossed illegally from the United States. The officer noted that the applicant attempted to make a refugee claim in Canada but was found ineligible due to his status in the

United States. The officer recognized that while in the United States, after being released from immigration detention and being granted refugee status, the applicant was unable to find decent work and became homeless. At that point, he decided to come to Canada. The officer stated that the Global Case Management System ("GCMS") notes indicated that the applicant was denied visitor visas to both Canada and the United States, that his wife had been denied a visa in 2019, and his eldest son was denied a student visa to both Canada and the United States in 2016. The officer noted that from September 2013 until November 2018, the applicant was living in Canada without status. Since then, the two older sons had received visas to be in Canada and were granted Convention refugee status here.

[7] The officer recognized the applicant's position that he was the primary financial support for his family both in Canada and in Turkey and that if he returned to Turkey he would face limited employment prospects and undue harassment. The officer noted the applicant's position that his removal would cause his family undue emotional and financial burden and that his sons would not be able to pursue their postsecondary education dreams. He would be forced to sever ties with his extended family and friends in Canada. The officer recognized that the applicant is also politically active in the Kurdish community and he would be forced to give up his continued action for the rights of the Kurdish people.

[8] The officer considered the applicant's establishment in Canada, where he had lived continuously for eight years. The officer noted that five of those years were without status. The officer recognized the applicant's submission that he was integrated into Canadian society, was highly established and formed close relationships with Canadian citizens and permanent

residents. He was active in the Kurdish community and was gainfully employed in various jobs, including his current job where he earns approximately $80,000 per year. The officer gave some positive weight to the applicant's self-sufficiency, but some negative weight to the fact that he had been working in Canada while not authorized (having arrived in 2013 but not obtained a work permit until April 2019). The officer did not accept the applicant's explanation for the delay, which was that he was afraid of being sent back to the United States where his prospects were low.

[9] The officer found that because the applicant has been granted refugee protection by the United States, he did not face the realistic prospect of removal to his native Turkey. Therefore, the officer did not assess the adverse country conditions within Turkey as they related to the applicant. The officer found that as "a country similar to Canada, the applicant's return to the United States is not problematic".

[10] The officer addressed the applicant's employment in the United States after removal from Canada, first by noting that the unemployment rate in the United States was lower than Canada's. There was no submitted evidence to suggest that the applicant attempted to seek out assistance in the United States with regard to his employment, such as from an employment agency. The officer found that the applicant had not "detailed the types of jobs he held, nor how long he was in these positions". As he was able to find employment in Canada without status, the officer found it was "not unreasonable to assume that he would be able to find suitable employment with status in a country similar to this one". The officer gave little weight to letters stating that the applicant would face issues in the United States arising from his ethnicity. The

officer was persuaded that the applicant would be able to find employment in the United States and as a result, continue to support his family in Turkey and Canada. The officer found that the applicant's two elder sons would have access to "various resources" because of their status in Canada. The officer found that upon the applicant's return to the United States and securing employment, it was reasonable to believe he could continue to offer resources to his sons. The officer believed that the applicant could resume relationships he maintained with the Kurdish community in Chicago when he lived there and there were Kurdish communities across the United States that would provide the applicant with "many different avenues".

[11] With respect to the BIOC, the officer stated:

> Taking into account the best interests of the children, it will be noted that one of the applicant's children in Canada is a young adult, the other 17 years old which is at the far spectrum of BIOC consideration. The applicant states both his sons will be without crucial emotional and financial support in a country where they do not know the language well. He says that his support is vital to navigating an education system that is new to them. It will be noted that in the visa applications for both their sons, the applicant and his wife identified a custodial relationship of an uncle living in Woodbridge, Ontario. While not taking away from the relationship between the applicant and his sons, both would have a support system in Canada and could make use of technologies such as FaceTime and Skype to remain in contact with their father. As the applicant has been able to send money to his wife and youngest son in Turkey, it is not unreasonable to assume he would also be able to send money from the US to his sons in Canada.

[12] The officer recognized that the applicant was a hard-working individual who desires to live in Canada. The applicant had already been granted refugee protection by the United States and as a result would not face removal to Turkey. Although he had demonstrated the ability to be

self-sufficient, the applicant had been working illegally in Canada for nearly six years and only recently came forward to obtain status.

[13] The officer concluded there was insufficient reason to grant an exemption under *IRPA* subsection 25(1).

III. Legal Principles

[14] The standard of review of the officer's decision is reasonableness: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909, at para 44.

[15] The reasonableness standard was described in *Vavilov*. Reasonableness review is a deferential and disciplined evaluation of whether an administrative decision is transparent, intelligible and justified: *Vavilov*, at paras 12-13 and 15. The reviewing court starts with the reasons of the decision maker, which are read holistically and contextually with the record that was before the decision maker: *Vavilov*, at paras 84, 91-96, 97, and 103; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 SCR 900, at paras 28-33.

[16] Reasonableness review considers both the reasoning process and the outcome: *Vavilov*, at paras 83 and 86. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker: *Vavilov*, esp. at paras 85, 99, 101, 105-106 and 194. To intervene, the reviewing court must be satisfied that there are "sufficiently serious shortcomings" in the decision such that it does not exhibit sufficient justification, intelligibility and transparency. Flaws or shortcomings

must be more than superficial or peripheral to the merits of the decision, or a “minor misstep”. The problem must be sufficiently central or significant to render the decision unreasonable: *Vavilov*, at para 100; *Canada Post*, at para 33; *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157, at para 13.

[17] The Court’s analysis of procedural fairness issues involves no deference to the decision maker. The question is whether the procedure was fair having regard to all of the circumstances: *Gordillo v Canada (Attorney General)*, 2022 FCA 23, at para 63; *Canadian Pacific Railway Company v Canada (Transportation Agency)*, 2021 FCA 69, at paras 46-47; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, [2019] 1 FCR 121, esp. at paras 49 and 54; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

[18] 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 considerations. The H&C discretion in subsection 25(1) is a flexible and responsive exception to the ordinary operation of the *IRPA*, to mitigate the rigidity of the law in an appropriate case: *Kanthasamy*, at para 19.

[19] The discretion in subsection 25(1) must be exercised reasonably. Officers making humanitarian and compassionate determinations must substantively consider and weigh all the relevant facts and factors before them: *Baker*, at paras 74-75; *Kanthasamy*, at paras 25 and 33.

[20] When assessing H&C applications, an officer must be alert, alive and sensitive to the best interests of the children. Those interests must be well identified and defined, and examined with a great deal of attention in light of all the evidence: see *Kanthasamy*, at paras 35 and 38-40; *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2003] 2 FC 555, at paras 5 and 10; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 FC 358, at paras 12-13 and 31; *Baker*, at para 75. The children's interests must be given substantial weight and be a significant factor in the H&C analysis, but are not necessarily determinative of an H&C application: *Kanthasamy*, at para 41; *Hawthorne*, at para 2.

[21] The applicant bears the onus of establishing that an H&C exemption is warranted: *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2010] 1 FCR 360, at paras 35, 45 and 61.

IV. Analysis

[22] In his written submissions, the applicant raised the following arguments to support his position that the officer's decision should be set aside:

(a) the officer failed to conduct an analysis of the best interests of the applicant's third son, R;

(b) the officer made no clear finding to identify the best interests of the applicant's second son, B (aged 17), particularly that he would be separated indefinitely from his father if the applicant is removed from Canada, and that the officer incorrectly focused on hardship;

(c) the officer used extrinsic evidence, which also does not appear in the CTR, to find a "custodial" relationship between the two sons in Canada (F and B) and an uncle here. The applicant's written submissions noted that while there was evidence of two uncles living in Toronto, there was no evidence about custody. The applicant maintained that the officer's finding was both unreasonable (due to an absence of any evidence) and denied the applicant natural justice by relying on extrinsic evidence (citing *Majdalani v Canada (Citizenship and Immigration)*, 2015 FC 294 and *Ocampo v Canada (Citizenship and Immigration)*, 2015 FC 1290);

(d) the officer made no clear finding on the needs of F and B in Canada or that it was in their best interests to be together with their father, and how the uncle would mitigate the absence of their father. The applicant criticized the officer's reliance on boilerplate language about FaceTime and Skype to mitigate the impact of separation of father and sons, and made no findings on the particular hardships of separation;

(e) the officer made no clear findings on establishment, except that the applicant was "self-sufficient". The applicant argued that the officer's decision was not transparent and overemphasized his lack of status in Canada; and

(f) the officer disregarded evidence related to the financial hardship of removal, including the applicant's inability to find employment in the United States when he lived there. The applicant submitted that the officer erroneously turned his successful employment in Canada against him to find that he would be employed in the United States after removal, contrary to this Court's decision in *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336.

[23] It is not necessary to address all of the applicant's submissions on this application. For the following reasons, I conclude that the application must succeed.

[24] At the hearing of this application, the applicant focused considerable time on the absence of evidence in the CTR related to any custodial arrangements for his two sons in Canada, which he characterized as a "material deficiency" in the CTR. The applicant noted that he did not have an opportunity to comment on the alleged custodial arrangements on which the officer relied and that there was no evidentiary basis for that finding. If the officer's reference to information about custodial arrangements in the visa applications was immaterial (as the respondent maintained), the applicant submitted that reliance on irrelevant information constituted an abuse of discretion. Raising concerns about procedural fairness and natural justice, the applicant referred to a number of cases relating to the consequences of an incomplete CTR, including *Li v Canada (Citizenship and Immigration)*, 2006 FC 498 at paragraph 15; *Togtokh v Canada (Citizenship and Immigration)*, 2018 FC 581, at paragraph 16; and *Abu v Canada (Citizenship and Immigration)*, 2021 FC 1031, at paragraph 40.

[25] The respondent's written submissions confirmed that the applicant's sons' 2016 visa applications and corresponding GCMS notes were not in the CTR. The respondent's position was that no serious issue arose from the absence of the visa applications because they were not relevant to the present application, and not material to the officer's overall H&C decision. The respondent submitted that the custodial relationship with the uncle in 2016 was not relevant or determinative to whether the sons have a support system in Canada in February 2021 when the officer's decision was made. The respondent maintained that the applicant submitted

documentation that the two sons have six aunts and uncles who reside in Canada, five of whom reside near Toronto. Thus, according to the respondent, "regardless of the Officer's irrelevant reference (in 2021) to a custodial relationship with the uncle (in 2016), it can be reasonably assumed that [F and B] have a support system in Canada."

[26] The applicant's reply was that the officer effectively found that the uncle would replace the applicant as father for the two sons. The officer did not find that remaining family members would be a support system nor how anyone wold mitigate the hardship to the sons of their father's departure. The applicant noted that the officer's reasons had to be considered as they were written.

[27] I agree substantially with the applicant on this issue.

[28] The applicant based his argument on both procedural unfairness and the unreasonableness of the decision. In *Togtokh*, Justice Boswell stated, at paragraph 16:

> … the determinative issue in this case is whether the deficiencies in the CTR constitute a breach of procedural fairness. The case law in this Court has dealt with at least three distinct types of scenarios raised by a deficient CTR, including the following:
>
> > 1. A document does not appear in the CTR and it is unknown whether it was submitted by an applicant. In cases such as these, the Court will presume that the materials in the CTR were the materials before the immigration officer, barring some evidence to the contrary (see *Adewale v Canada (Citizenship and Immigration)*, 2007 FC 1190 at para 11; 161 ACWS (3d) 790; *Varadi v Canada (Citizenship and Immigration)*, 2013 FC 407 at paras 6 to 8, 431 FTR 198; *El Dor c Canada (Citoyenneté et de l'Immigration)*, 2015 FC 1406 at para 32, 263 ACWS (3d) 187; and *Ogbuchi v Canada*

> *(Citizenship and Immigration)*, 2016 FC 764 at paras 11 to 12, 268 ACWS (3d) 420).
>
> 2. A document is known to have been properly submitted by an applicant but is not in the CTR, and it is not clear whether that document, for reasons beyond an applicant's control, was before the decision-maker. In this situation, the case law suggests that the decision should be overturned (see *Parveen v Canada (Minister of Citizenship and Immigration)* (1999), 1999 CanLII 7833 (FC), 168 FTR 103 at para 8 to 9, 88 ACWS (3d) 452 (Fed TD) [*Parveen*]; *Vulevic* at para 6; *Agatha Jarvis c Canada (Citoyenneté et de l'Immigration)*, 2014 FC 405 at paras 18 to 24, 240 ACWS (3d) 955 [*Jarvis*]).
>
> 3. A document is known to have been before the tribunal but is not before the Court and cannot be reviewed. In such a case, unless the document is otherwise available to the Court, such as in an applicant's record (see *Torales Bolanos* at para 52; *Patel v Canada (Citizenship and Immigration)*, 2013 FC 804 at paras 29 to 32, 437 FTR 138; and *Aryaie v Canada (Citizenship and Immigration)*, 2013 FC 469 at paras 19 to 27, [2013] FCJ No 498), the Court will be unable to determine the legality of the decision and the decision will be set aside if the missing document was central to the finding under review (see *Kong v Canada (Minister of Employment & Immigration)*, [1994] FCJ No 101 at para 21, 73 FTR 204 (Fed TD); *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 180 at paras 24 and 25, 120 ACWS (3d) 1023; *Gill v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1003 at paras 8 and 9, 125 ACWS (3d) 130; *Machalikashvili v Canada (Minister of Citizenship and Immigration)*, 2006 FC 622 at para 9, 149 ACWS (3d) 482; *Li* at para 15).

Factually, the present case falls under the third scenario above.

[29] The absence of factual evidence to support a key conclusion may lead a reviewing court to determine that the decision should be set aside: *Walls v Canada (Attorney General)*, 2022

FCA 47, at para 41; *Canada (Attorney General) v Best Buy Canada Ltd*, 2021 FCA 161, at para 123; *Garvey v Canada (Attorney General)*, 2018 FCA 118, at para 6; *Federal Courts Act*, paragraph 18.1(4)(*d*). Before *Vavilov*, a decision could still be upheld if there were other facts on which the decision maker could reasonably base its ultimate conclusion: *Stelco Inc v British Steel Canada Inc*, [2000] 3 FC 282 (CA), at para 22. However, I find it unnecessary to analyze whether that statement still pertains. Neither party addressed that point of law. In addition, I am bound to apply by the principles in the appellate cases including *Vavilov* and *Canada Post* and, as I will explain, there is no other material evidence in the record.

[30] One of the applicant's central positions on his H&C application was that it was in the best interests of his sons F and B, in Canada, that they not be separated from him (and that they would suffer hardship if that occurred), because they need his emotional, practical and cultural support as recently-arrived refugees in Canada, and they need his financial support. The officer's reasoning on these related issues had two major elements: first, that the alleged custodial relationship with an uncle and a "support system" would meet the sons' non-financial needs, and second, that the applicant could find employment in the United States to continue his financial support. These associated issues related to the impact of removal were at the heart of the applicant's H&C application and were critical to the officer's reasoning on the BIOC and hardship after removal. As such, I do not agree with the respondent's submission that the conclusion on the custodial arrangements was irrelevant, or immaterial to the officer's decision.

[31] On the first element of the officer's reasoning, it is not contested that neither the CTR nor the application record in this Court contained the 2016 visa applications or any evidence of a

custodial arrangement with an uncle. The officer's reasons also did not identify the relevant uncle.

[32] I do not accept the respondent's argument that there was additional evidence in the record, on which it could be "reasonably assumed" that F and B would have a support system in Canada if their father has to leave. It is true that the officer's decision must be read with the record and that a reasoned explanation for a decision may sometimes be implied or implicit in it: *Vavilov*, at paras 94 and 96; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156, at paras 31 and 38. Those points do not assist the respondent in the present case. Under *Vavilov* principles, a reviewing court may not speculate as to what a decision maker was thinking and may not supply, supplement or "cooper up" the decision maker's reasons with its own reasoning: *Vavilov*, at paras 96-97; *Alexion Pharmaceuticals*, at para 10; *Canada (Attorney General) v Kattenburg*, 2021 FCA 86, at para 17. Here, the officer's reasons referred vaguely to the sons having access to "various resources" as refugees in Canada, which was not a reference to the support of family members. The reasons did not refer to the additional people mentioned in the respondent's submissions, or say that they would be part of a support system. The reasons only mentioned the custodial arrangement with an unnamed uncle who was apparently in the visa applications in 2016. The additional people did not file evidence on the H&C application about whether they would be willing to step into the applicant's parental shoes – which is no small responsibility – or otherwise support F and B if the applicant were to leave Canada. Neither of the letters from two uncles on the H&C application referred to a custody arrangement for the sons, nor did they discuss providing care and support for F and B if the applicant were to leave Canada. Considering the absence of both analysis and evidence on this issue, and accounting for

the burden of proof on the applicant, it remains a bridge too far for the Court to draw its own inference about a possible support system, at least when applying the reasonableness standard of review.

[33] The officer's H&C decision was therefore not properly justified or transparent on the first element of the officer's reasoning on BIOC and hardship to the applicant's sons F and B after his removal from Canada. The decision included a conclusion on a position central to the applicant's H&C application that was not grounded on the evidence: *Vavilov*, at paras 100, 125-128. In the circumstances, while recognizing the principles set out in *Togtokh*, it is unnecessary to determine whether the absence of the visa application information in the CTR also constitutes a breach of procedural fairness.

[34] There are additional concerns in the officer's BIOC/hardship reasoning in its second major element: the financial impact of the applicant's removal from Canada.

[35] The officer's decision proceeded on the assumption that the applicant would not be removed to Turkey (on which the H&C application focused), but instead would go to the United States where he has refugee protection. That scenario implies that, for some undefined period of time, the applicant would live in the United States, F and B would live in Canada and the applicant's wife and youngest son R would live in Turkey.

[36] The officer's assessment of the BIOC and alleged hardship arising in that scenario rested on the finding that the applicant would be able to find employment in the United States, a

"country similar to" Canada. With that employment, the officer found, the applicant could continue to support his wife and son in Turkey (who apparently have no other financial support) and his two sons in Canada. But the officer's assessment of this issue was deficient and incomplete:

(a) At the time of decision, the applicant earned approximately $80,000 per year and was able to provide a home for his sons in Canada and sent money regularly to his family in Turkey. The officer assumed that the applicant would get a job in the United States, but failed to consider whether that job would be financially equivalent to the job he has now in Canada, or would otherwise be sufficient to continue to support himself and his family members in Canada and Turkey. Indeed, the job in the United States might have to be more than just equivalent financially because the applicant's expenses would very likely increase. After removal to the US, he would be supporting three separate households, in the United States, Canada and Turkey. The officer also did not factor into the assessment any other reasons that the applicant's expenses would be increasing, including the cost of his sons' post-secondary education.

(b) The officer did not adequately consider the applicant's previous circumstances when he was living in the United States and his inability to find either a job while there. The applicant's statutory declaration disclosed that, even after obtaining protected status in the United States, he could not find a job and experienced "homeless[ness] for … two months, during which time [he] lived in a park" and was beaten and mugged by drunk people. He stayed at a Kurdish Association office for a time, but did not have basic amenities. His declaration concluded that

although he had refugee status in the United States, “there is no life for me to return to there. The time that I spent in the United States was miserable and fraught with homelessness, harassment and unemployment”.

(c) Having found Canada and the United States to be similar, the officer did not consider the applicant’s difficulty finding a decent job in Canada. The officer criticized the applicant for not having “detailed the types of jobs he held [in Canada], nor how long he was in these positions”, but did not account for what the evidence did disclose: that his employment was “[u]nemployed/cash jobs” from his 2013 arrival in Canada until his current employment started in 2019. The officer could have weighed that evidence when assessing the applicant’s job prospects on removal to the United States, or discounted its impact due to the applicant’s lack of status in Canada during those years. The officer did not account for that evidence either way.

[37] The officer’s assessment of the evidence on BIOC/hardship was therefore unsound with respect the financial and other circumstances that would be faced by this applicant, and his family members in Canada and Turkey, if he were removed to the United States.

[38] These concerns, related to whether the second element of the officer’s BIOC/hardship assessment was properly justified in relation to the evidence, may or may not constitute an independent reviewable error sufficient to justify setting aside the decision on its own.

[39] Overall, however, the applicant has demonstrated that the decision contained flaws in its reasoning that render it unreasonable for failure to be transparent and properly justified.

V. Conclusion

[40] For these reasons, the application must be granted. The officer's decision dated February 8, 2021, is set aside.

[41] Neither party proposed a question to be certified for appeal and none will be stated.

JUDGMENT in IMM-1137-21

THIS COURT'S JUDGMENT is that:

1. The decision dated February 8, 2021 is set aside. The matter is remitted to another officer for redetermination. The applicant may provide additional or supplemental evidence and submissions on the redetermination.

2. No question is certified for appeal under paragraph 74(*d*) of the *Immigration and Refugee Protection Act*.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Charles Steven	FOR THE APPLICANT
James Todd	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Charles Steven Waldman & Associates Toronto, Ontario	FOR THE APPLICANT
James Todd Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT