Federal Court  Cour fédérale

Date: 20220511

Docket: IMM-2163-20

Citation: 2022 FC 664

Ottawa, Ontario, May 11, 2022

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

NELLY NSEKELE TSHIENDELA
MARIE-ANGE KALUBI TSHIENDELA
NAOMI BUBANJI TSHIENDELA
SHEKINA NSEKELE TSHIENDELA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of a Senior Immigration Officer (Officer or decision maker) denying a humanitarian and compassionate [H&C] application to be granted permanent residence without having to make it from outside Canada.

[2] The Officer refused the application on the basis that the Applicants failed to establish that H&C considerations would justify granting an exemption under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The application for judicial review is made pursuant to section 72 of the IRPA.

I. Facts

[3] The Principal Applicant, Ms. Nelly Nsekele Tshiendela, was born in, and is a citizen of, the Democratic Republic of Congo [the Congo]. The Principal Applicant has three minor children, Marie-Ange Kalubi Tshiendela, Naomi Bubanji Tshiendela and Shekina Nsekele Tshiendela [the Minor Applicants]. They are the other Applicants in this case [together, the Applicants]. The Applicants submitted an H&C application to be granted the status of permanent residents after their refugee claim was rejected by the Refugee Protection Division [RPD]. The Applicants were denied refugee status through the operation of section 98 of the IRPA. The section provides that a person referred to in section E of the Article 1 of the United Nations Convention Relating to the Status of Refugees is neither a refugee nor a person in need of protection. Section E of Article 1 reads:

Article 1 - Definition of the term "refugee"	**Article premier. -- Définition du terme "réfugié"**
…	[…]
E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached	**E.** Cette Convention ne sera pas applicable à une personne considérée par les autorités compétentes du pays dans lequel cette personne a établi sa résidence comme ayant les droits et les obligations

to the possession of the nationality of that country.	attachés à la possession de la nationalité de ce pays.

[4] On or around August 25, 2001, the Principal Applicant fled the Congo and moved to South Africa where she obtained refugee status. In her H&C submissions, the Principal Applicant claims that she fled the Congo in 2001 after political protests put her family in danger (Nelly Nsekele Tshiendela and family submissions for H&C application, page 2 of the submissions, page 186/504 CTR). In 2005, the Principal Applicant obtained a study permit in South Africa. She also started living with her current husband, Jean-Paul Tshiendela [Mr. Tshiendela], a South African citizen of Congolese descent (RPD Decision, para 4).

[5] On August 13, 2009, the Principal Applicant married her husband. Mr. Tshiendela is currently working in the Congo on a work permit. He is the father of the Minor Applicants, and provides the Applicants with financial support.

[6] Following her marriage, Ms. Tshiendela's immigration status in South Africa improved. She obtained a relative visa based on the South African citizenship of the husband. It seems that a relative visa was also accessible through the children who are also citizens of South Africa, which eventually became a two-year relative visa, and was subsequently renewed twice. Her most recent relative visa was granted in 2016 and was valid until April 30, 2018 (RPD Decision, para 4).

[7] The Principal Applicant stated that in 2008, South Africa experienced a wave of xenophobic attacks. She alleged that she suffered from that wave. For example, the Principal

Applicant stated that she was turned away from the hospital when she was in labour because she could not produce a South African identity card (Nelly Nsekele Tshiendela and family submissions for H&C application, page 2 of the submissions, page 186/504 CTR).

[8] The Principal Applicant stated that she owned a store in Johannesburg, and also worked for an organization called the African Marketing Global Empowerment and Projects. She claims that she received threats due to xenophobia, both because of her Congolese heritage, and because of her work on a documentary regarding xenophobia. She explains that her house was broken into several times by unknown people, who were armed (Nelly Nsekele Tshiendela and family submissions for H&C application, page 2 of the submissions, page 186/504 of the CTR). Starting in 2010, she also alleges that she was threatened and slapped at her store on three separate occasions (RPD Decision, para 6).

[9] On June 15, 2017, following the third incident at her store, the Principal Applicant hid at her pastor's church. She stayed at the church until July 10, 2017, when she and the Minor Applicants fled to the United States (Nelly Nsekele Tshiendela and family submissions for H&C application, page 3 of the submissions, page 187/504 of the CTR). The Applicants later made their way to Canada where they filed claims for refugee protection pursuant to sections 96 and 97 of the IRPA.

[10] Their claim was denied on June 1, 2018. The determinative issue was the Principal Applicant's exclusion under Article 1E. The RPD also found that there was an Internal Flight Alternative [IFA] in South Africa that was available.

[11] The RPD noted that during the last decade, the Principal Applicant had access to permanent residency in South Africa, both when she married her husband, and when she gave birth to her South African children. However, she never applied for this. The RPD further found that the alleged violence and break-ins were likely the result of widespread and generalized criminality in Johannesburg, rather than motivated by xenophobia.

[12] The Applicants judicially challenged the RPD's decision. The Federal Court upheld the RPD's decision in March 2019. In his decision, Justice Bell relied on the Applicants' immediate family member's presence in one of the IFA areas and the lack of evidence of their persecution to satisfy the first prong of the IFA analysis, namely that there was no serious possibility of the Applicants being persecuted in the IFA. Justice Bell also found that because the threats in Johannesburg were not "personal" to the Principal Applicant, and no perpetrator was identified, it was unlikely that the perpetrator would seek her out in the proposed IFAs *(Tshiendela v Canada (Citizenship and Immigration),* 2019 FC 344 [*Tshiendela*] at para 40).

II. Decision under Judicial Review

[13] After their refugee claim was rejected, the Applicants submitted an application for permanent resident status in Canada based on H&C considerations, under section 25(1) of the IRPA. Section 25(1) is a possible recourse to foreign nationals in Canada who apply for permanent resident status from within Canada, or, more generally, who do not meet the requirements of the IRPA to seek an exemption, on the basis of humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child [BIOC] directly affected.

[14] The Applicants identified their establishment in Canada, the best interests of the Minor Applicants, and the hardships they would face upon return to South Africa or the Congo to support their H&C application. Establishment was based on the Principal Applicant's employment and the family's roots in Canada. The submissions on the best interests of the Minor Applicants considered their social connections in Canada, as well as their Canadian education and the availability of orthodontic services in Canada. Finally, hardship upon returning to South Africa or the Congo was based on country conditions and xenophobia.

[15] On March 4, 2020, a Senior Immigration Officer refused the H&C application. The decision articulates why the application ought to be refused. The Officer found that there were insufficient H&C considerations to justify granting the exemption, which is presented as an exceptional response where the circumstances warrant it. The Officer made the following findings.

A. *Establishment in Canada*

[16] The Officer weighed establishment favourably. The Officer noted that the Applicants had been living in Canada for just over two and a half years, and had demonstrated employment, friendship, social ties, presence of a family member and volunteer activities in Canada.

[17] However, the Officer observed that in the two and a half years the Applicants lived in Canada, it was normal for the Applicants to develop social ties, for the Principal Applicant to obtain a job, and for the Minor Applicants to make friends. In other words, their establishment was viewed as positive, but modest. The Officer also drew a negative inference from the

understanding that the Principal Applicant did not have sufficient resources to pay for her family's needs, and received financial assistance from her husband in the Congo.

[18] The Officer further found that any adversities the Principal Applicant might face in leaving Canada would be incomparable to what she must have faced when leaving her family, friends and acquaintances in South Africa for Canada.

[19] Overall, the Officer found that the Applicants' establishment was positive but not determinative, and was insufficient to grant H&C.

B. *Best interests of the children*

[20] The Officer considered the Applicants' submissions that the Minor Applicants were well integrated in the Canadian school system, had friends, and were involved in church activities.

[21] With respect to the Applicants' submissions that the Minor Applicant, Marie-Ange, was receiving orthodontic treatments in Canada and could not continue these in South Africa, the Officer found that this was unlikely to be the case. The Officer observed that Johannesburg, Cape Town and Port Elizabeth are modern cities, and their inhabitants likely enjoy access to dental services. The Officer further commented that the Applicants had failed to provide sufficient evidence that Marie-Ange would be unable to continue her treatments in South Africa.

[22] The Officer also assessed the submission that Marie-Ange was a role model for individuals within her church community. The Officer weighed this factor positively, but

explained that these individuals could keep in touch with Marie-Ange, and would have other role models. The Officer also stated that Marie-Ange could apply the qualities and skills she learned in Canada in South Africa, and that there was no evidence that she would be unable to join a church abroad.

[23] In terms of the Minor Applicant Naomi, the Officer stated that she had allegedly faced bullying and harassment at school in South Africa. The Officer observed that it was deplorable for a child to be subjected to this treatment, but that harassment and bullying also occur in Canadian schools. The Officer further explained that the Principal Applicant could have sought to place her daughter in a different school in South Africa, but did not do this. Further, the Officer stated that there was insufficient evidence to prove that the harassment suffered by Naomi was due to xenophobia. Further, the Officer commented that the RPD had previously found that Naomi's bullying and harassment might cease if she were to move to Cape Town or Port Elizabeth.

[24] The Officer reasoned that although xenophobia exists in South Africa, the Minor Applicants were born in South Africa and have South African citizenship, so they would not necessarily be harassed if they returned to South Africa.

C. *Hardship in returning to South Africa or the Congo*

[25] The Applicants also alleged that their removal from Canada would create unjustifiable difficulties for them. The Applicants submitted that the Minor Applicants have South African citizenship, and cannot go to the Congo, where they have never lived. The Applicants pointed

out that this would result in the Principal Applicant, who is Congolese, being separated from her daughters. In response, the Officer found that the Minor Applicants and their father hold South African citizenship, and it would be reasonable for the Principal Applicant to obtain a residence visa for South Africa. The Officer further observed that the analysis would not consider the Applicants' return to the Congo, since at the time of the decision, Canada had temporarily suspended returns to the Congo.

[26] In considering the possibility of the Applicants' return to South Africa, the Officer wrote that the Applicants would be returning to a country where they have family ties, so any hardships faced by them in leaving Canada would be significantly less than the hardships they likely experienced when they left South Africa. The Officer further wrote that the two and a half years spent by the Applicants in Canada was much shorter than the length of time they passed in South Africa.

D. *Country Conditions*

[27] In terms of country conditions, the Applicants alleged that they were subject to xenophobic attacks prior to their departure from South Africa. The Officer reiterated what the Federal Court found in *Tshiendela* and stated that Applicants were invoking general country conditions instead of a personalized risk. The Officer further noted that the Applicants had failed to demonstrate that they would be at risk if they relocated to Cape Town or to Port Elizabeth, since there was insufficient evidence to demonstrate that women and children in South Africa are at risk of discrimination, or that the Applicants are part of a group implicated by xenophobic attacks.

[28] The Officer concluded that after considering establishment, the BIOC and country conditions, the H&C considerations raised were insufficient to justify granting an H&C application based on section 25(1) of the IRPA.

III. Parties' Arguments

A. *Applicants' submissions*

[29] The Applicants raised three issues on judicial review, including whether the Officer erred by assessing each H&C factor through a "hardship lens", as well as whether the Officer erred in assessing the child's best interests and the hardship of return to South Africa.

[30] The Applicants submitted that the Officer erred by assessing their application, including establishment and the BIOC, through a "hardship lens". For example, the Applicants submitted that instead of assessing whether hardship is a factor weighing for or against approving the application, the Officer filtered establishment through hardship. The Applicant argued that hardship should only be one factor among many to be assessed by the Officer. The Applicants also submitted that the Officer erred by using the Applicants' past hardship in leaving South Africa to condone their future hardship in leaving Canada, which confuses hardship and establishment.

[31] Similarly, the Applicants submitted that the BIOC analysis is filtered through hardship. The Applicants submitted that the Officer viewed the Minor Applicant Naomi's alleged bullying

through a “hardship lens” by stating that bullying occurs in Canada and that the Applicants could change schools.

[32] With respect to the Minor Applicant Marie-Ange, the Applicants submitted that the Officer diminished submissions concerning her orthodontic treatment in Canada because of the lack of evidence she could not continue this treatment in South Africa. The Applicants also submit that the Officer erred by considering the availability of Marie-Ange’s orthodontic treatments abroad.

[33] In addition, the Applicants allege that the Officer conducted a similar hardship analysis in assessing Marie-Ange’s church volunteering by explaining that the children she interacts with can find a new role model, and she can apply her skills in South Africa. The Applicants submit that these are examples of assessing positive markers of establishment and the BIOC, and viewing them through a “hardship lens”.

[34] The Applicants also criticize the Officer’s assessment of the children’s best interests globally by submitting that the Officer failed to conclude on whether the Minor Applicants’ best interests would be served by remaining in Canada, or returning to South Africa.

[35] Finally, the Applicants submitted that the Officer erred in the assessment of hardship of return to South Africa due to prevailing country conditions. The Applicants submitted that the Officer ignored evidence of discrimination against women and girls in South Africa, as well as evidence of xenophobia against all foreigners, regardless of their status. The Applicants

submitted that the Officer's decision relies too heavily on the RPD decision, when the RPD had an entirely different task before it. Specifically, the Applicants explained that the Officer erred by focusing on an RPD-style analysis of whether the Applicants' lives were at risk, instead of considering whether the violence the Principal Applicant was subjected to, and the overall country conditions in South Africa, would create hardship for the Applicants.

[36] In summary, the Applicants submitted that the Officer erred by assessing their establishment and the best interests of the children through a "hardship lens", and incorrectly assessed the Minor Applicants' best interests and the Applicants' hardship of return to South Africa.

B. *Respondent's submissions*

[37] The Respondent submitted that the decision contained a holistic analysis and a reasonable weighing of all of the factors, including establishment, the best interests of the Minor Applicants, and country conditions. The Respondent explains that the Applicants' arguments fail to account for the fact that the Officer was responding to the submissions put forward in their H&C application.

[38] The Respondent first explains that the Officer did not narrow the establishment analysis to "hardship" but took note of the Applicants' employment, friendships, family ties and volunteerism, as well as the financial assistance the Principal Applicant receives. In doing so, the Respondent submitted that the Officer considered all of the relevant factors, in line with *Kanthasamy v Canada (Citizenship and Immigration),* 2015 SCC 61, [2015] 3 SCR 909

[*Kanthasamy*]. For example, the Respondent explains that the Officer gave positive weight to the Principal Applicant's employment, that the Applicants had forged social connections in Canada, and have a cousin in the country. The Respondent further submits that the Officer was cognizant that the Principal Applicant obtained financial help from her husband. The Respondent also submits that the Officer did not err in noting that although the Applicants' establishment is favourable, this alone is not determinative.

[39] It was also submitted that the Officer dedicated a whole section to the best interests of the children, and did not limit the analysis to hardship. Instead, the Respondent submitted that the Officer engaged with the children's integration into the Canadian school system, their relationship to church and their church colleagues, the bullying problem, the availability of orthodontic treatments and the xenophobia issues in South Africa.

[40] For example, the Respondent submitted that the Officer writing that Marie-Ange could continue her church activities in South Africa showed that the Officer was alert and sensitive to her interest and how she could continue this abroad. Additionally, the Respondent submitted that the Officer did not err in assessing the availability of orthodontic treatments elsewhere, and that accepting the Applicants' arguments would mean that an Officer would be disallowed from commenting on the availability of a medical service in another country even where this was put before the Officer as an H&C factor. In terms of addressing whether it is in the best interests of the children to remain in Canada or return to South Africa, the Respondent submitted that immigration officers are presumed to be alert to the fact that living in Canada might offer children opportunities that they may not have elsewhere.

[41] The Respondent further challenged the Applicants' assertions that the Officer ignored or disbelieved evidence of discrimination. Instead, the Respondent submitted that the Officer acknowledged that xenophobia exists in South Africa, but did not find that the Applicants had demonstrated that this problem could not be resolved if the Applicants moved to Cape Town or Port Elizabeth. Further, the Respondent submitted that it was not unreasonable for the Officer to refer to the RPD's relevant factual findings to make a determination on hardship.

[42] In conclusion, the Respondent submitted that the Officer reasonably assessed the H&C application globally, and analyzed and gave weight to all relevant H&C considerations.

IV. Standard of Review and Legal Framework

[43] The Applicants submit that the first issue raised, that the Officer erred by assessing each factor through a "hardship lens", should be examined on a standard of correctness. The Applicant does not elaborate on why this is the appropriate standard beyond explaining that the standard of correctness applies to questions of law. That is not accurate. The Applicants also submit that the other two issues raised, including whether the Officer erred in the assessments of the child's best interests and the hardship of return to South Africa, should be assessed on a standard of reasonableness.

[44] The Respondent submits that the standard of review of an immigration officer's H&C decision is reasonableness.

[45] I disagree with the view that the standard of review for any of the issues is correctness. It was not the standard that prevailed in *Kanthasamy* (at para 44). Questions of law are examined on a standard of reasonableness. In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court wrote that there is a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions (*Vavilov* at para 16). *Vavilov* sets out a narrow list of exceptions to this presumption, none of which applies here. As such, the applicable standard of review is that of reasonableness.

[46] There are implications that follow the determination that the standard of review is that of reasonableness. The Applicant has the burden of demonstrating that the decision is unreasonable. As found in *Vavilov*, there must be sufficiently serious shortcomings to conclude that the decision does not bear the hallmarks of reasonableness, that is justification, transparency and intelligibility: is the decision justified in view of the factual and legal constraints. It is not appropriate for a reviewing court to take a position other than one of judicial restraint (*Vavilov* at para 13) and respect for the role that Parliament has given to administrative decision makers (*Vavilov* at para 14).

[47] Shortcomings in a decision must be more than superficial or peripheral to the merits of the decision, or a "minor misstep" *(Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36). The reasonableness of a decision may be questioned when the decision maker has, for instance, fundamentally misapprehended or failed to account for the evidence before it.

[48] The role of a reviewing court is not that of "reweighing and reassessing the evidence considered by the decision maker": *Vavilov* at para 125, citing *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31. In *Vavilov*, the Supreme Court wrote that "many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review" (*Vavilov* at para 125; *Housen v Nikolaisen*, 2002 SCC 33, [2003] 2 SCR 235 at paras 15-18).

[49] An applicant must accordingly show that the decision under review is unreasonable, not merely that a better decision on the merits ought to be preferred by the reviewing court. Reviewing courts are enjoined to recognize the legitimacy and authority of administrative decision makers in their area of expertise. In this case, the Applicants have not discharged their burden of demonstrating that the Officer's decision was unreasonable.

V. Analysis

[50] As indicated before, the Applicants raise three issues that they contend warrant judicial intervention. These include whether the Officer erred by assessing each H&C factor through a "hardship lens", as well as whether the Officer erred in the assessments of the child's best interests and the hardship of return to South Africa.

[51] The Applicants first suggest that the Officer's "hardship lens" constitutes a reviewable error. The Applicants suggest that the Officer incorrectly assessed each factor in their application under a "hardship lens", starting with the Applicants' establishment.

[52] After *K*anthasamy some seem to have suggested that the notion of hardship has disappeared. However, *Kanthasamy* continues to refer to hardship as being relevant to an H&C analysis. Not only does a closer examination of *Kanthasamy* debunk that myth, but the test favoured by the majority in the case confirms that the purpose of s. 25 of the IRPA centers on the misfortunes of others, and thus the hardship they have suffered. The relief offered by s. 25 constitutes special relief. *Kanthasamy* adopts the test stated in *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338 [*Chirwa*] by observing that H&C "considerations refer to "those facts, established by the evidence, which would excite in a reasonable man [sic] in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes 'warrant the granting of special relief'"" (*Kanthasamy*, at para 13, citing *Chirwa*). As the majority in *Kanthasamy* states at paragraph 23, hardship is inevitable if one is required to leave Canada. Even more telling, the Court notes that section 25 is not intended to be an alternative immigration scheme.

[53] The language of "a desire to relieve the misfortunes of another" incorporates hardship as a relevant concern for the global H&C assessment. Moreover, this constitutes special relief. There is not to be found in *Kanthasamy* a reference to a so-called "hardship lens." Rather, the Court refers to the three adjectives accompanying "hardship" in the Guidelines to Officers who have been delegated the power under section 25 as being "descriptive" and "instructive" (at para

33). As the *Chirwa* test implies, it is not any set of misfortunes that will "warrant the granting of special relief".

[54] The majority rather finds that "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" (*Kanthsamy*, at para 33).

[55] In this instance, the Officer weighed establishment and the BIOC independently of a hardship assessment. In assessing establishment, the Officer viewed the Principal Applicant's employment and volunteer activities, as well as her social connections and church activities, positively. The Officer also positively considered the presence of the Applicants' cousin in Canada. However, the Officer explained that the Applicants' establishment was ordinary, as the Applicants had lived in Canada for just over two and a half years. Further, the Officer drew a negative inference from the Principal Applicant's insufficient resources to support her family's needs.

[56] In the establishment analysis, the Officer also explained that although the Principal Applicant would invariably face some hardship in leaving Canada, it would not be comparable to the difficulties the family must have faced when they left family, friends and acquaintances in South Africa to come to Canada. This is not an error. The Officer was responding to the Applicants' submissions, such as:

> Nelly and her children have not left Canada since 2017. They consider Canada their home and have built a life here as a family. Uprooting their lives back to South Africa or the Congo would certainly cause unusual, undeserved, or disproportionate hardship on her and run contrary to her children's best interests, as they have put down roots in Canada and are finally living in a safe place.
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> (Nelly Nsekele Tshiendela and family submissions for H&C application, page 11 of the submissions, page 196/504 CTR.)

As stated above, hardship continues to be a relevant factor in an H&C analysis. It is a notion with degrees of severity, as we have with "misfortunes". It is therefore unsurprising that the *Kanthasamy* majority accepted that the three adjectives ("unusual", "undeserved" and "disproportionate") continue to be descriptive and instructive of the hardship suffered.

[57] In this instance, the Officer's characterization of the Applicants' establishment in Canada has not been shown to be unreasonable. In my view, it was not minimized by the decision maker but considered with the eyes of someone with expertise in the area of what is considered in order to grant special relief, and not to turn one section meant to be available for special relief into an alternative immigration scheme. The Officer considered all of the relevant factors put forward by the Applicants to weigh establishment favourably, and said that the Applicants' establishment was helpful for their H&C application. However, the Officer was not satisfied, in the discretion that is his, that the Applicants' establishment was a sufficient factor to garner H&C special relief. The Applicants had to show that the assessment was unreasonable when other considerations were weighed. This is a reasonable assessment.

[58] In addition, the Applicants had to show that the Officer acted unreasonably in the consideration of the Minor Applicants' establishment. I do not believe such is the case. Establishment and the BIOC are concepts which are relative. On a spectrum, their establishment and BIOC are each of various degrees such that they must be assessed to exercise the special relief conferred by section 25. Are these factors, considered together, enough to excite in a reasonable person in a civilized community a desire to relieve the misfortunes of another, understanding that there is inevitably hardship in having to leave Canada and that section 25 is not intended to be an alternative immigration scheme. Indeed the hardship must by necessity be of some severity. That is what the Officer did in this case and it was for the Applicants to show that the assessments were unreasonable.

[59] In this instance, the Officer assessed all of the submissions put forward concerning the Minor Applicants' best interests but ultimately found that these were insufficient to render a positive decision.

[60] The Applicants had submitted that the Minor Applicant Marie-Ange could not pursue her orthodontic treatment in South Africa because of the inadequacy of orthodontic treatments in the country. The Officer addressed this by explaining that Johannesburg, Cape Town and Port Elizabeth are modern cities, and their inhabitants are surely able to benefit from services such as dental and orthodontic care. The Officer further noted that the Applicants had not discharged their burden of proving that the Minor Applicant would be unable to continue her orthodontic treatment in South Africa.

[61] By conducting this analysis, the Officer was not unreasonably minimizing the Minor Applicant's best interests, but responding to the Applicants' submissions that Marie-Ange would be unable to continue her orthodontic treatment in South Africa, and explaining that they had not discharged their burden to prove this. To accept the Applicants' position on this matter would preclude officers from commenting on the availability of treatments abroad, even in response to a submission made by the applicants themselves.

[62] I add that this Court has previously upheld officers assessing the availability of medical treatments abroad. For example, McDonald J. in *Zhang v Canada (Citizenship and Immigration),* 2020 FC 503 [*Zhang*] did not find an error where an officer considered the applicant's ability to obtain medical services in China (*Zhang* at paras 34-35). Similarly, Southcott J. explained in *Mashal v Canada (Citizenship and Immigration),* 2020 FC 900 [*Mashal*] that "An applicant's ability to adapt upon returning to another country is a relevant consideration" (*Mashal* at para 36).

[63] The Applicants also raise an issue with the Officer explaining that the Minor Applicant Marie-Ange could continue her church work in South Africa, as they submit that this analysis is irrelevant to a BIOC analysis. However, in reading the Officer's reasons, it is evident that the assessment of Marie-Ange's participation in church was in response to the Applicants' submissions regarding her church activities. The Officer positively weighed the Minor Applicant's role with a church, and wrote that she has probably had a good impact on her church community.

[64] Nevertheless, this is deserving of relatively little weight in the H&C considerations. Marie-Ange's positive contributions with the church would remain impactful, and she could keep in touch with her friends in Canada. The Officer further found that there was no evidence presented that Marie-Ange would be unable to continue her church activities in South Africa. The interests of Marie-Ange in continuing her activities were fully considered and indeed, the Officer was alert, alive and sensitive to them. The Officer found that her interests would remain intact as she could continue her religious activities abroad but her participation in church was insufficient to warrant H&C.

[65] Finally, the Officer referred to the third Minor Applicant, Naomi, who claims harassment at school while she was living in South Africa. The Officer finds that it is deplorable that a child would have suffered any kind of bullying or harassment, but that children are not immune from harassment in Canada as well. But there is no evidence to conclude that bullying is inexorable in any and all schools in South Africa, or that it cannot be remedied. The Officer further comments that the Principal Applicant could have changed her daughter's school but neglected to do so. Finally, the Officer determines that there was no indication that the harassment was the result of xenophobia. Indeed, the Officer comments that the harassment and bullying might be averted if the Applicants were to move to Cape Town or Port Elizabeth.

[66] As such, contrary to the Applicants' submissions, the Officer engaged with the issues submitted relating to the Minor Applicants, including their integration into the Canadian school system, the availability of orthodontic treatments, their participation in church activities, and the alleged bullying and discrimination from their school in Johannesburg. It is not unreasonable for

an assessment of the hardship or benefits to be undertaken. Hardship and benefits are two sides of the same coin (Hawthorne v Canada (Minister of Citizenship and Immigration), [2003] 2 FC 555 at para 4, FCA), and an officer is expected to conduct this analysis.

[67] The Officer showed that, in the exercise of discretion, the interests of the children were fully considered by addressing the various issues that were raised. The Officer was alert, alive and sensitive to them. But the BIOC are not dispositive of H&C claims. It is not sufficient to raise the BIOC to be successful. In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, the Supreme Court acknowledged that much:

> [75] … The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where 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.

Here, the BIOC did not convey the weight needed to grant what has been described as the "special relief" created by Parliament.

[68] The Minister, through his delegate, is entitled to guard against granting the special relief in a way that would "destroy the essentially exclusionary nature" of the immigration scheme. The *Kanthasamy* majority acknowledged that section 25 was also crafted with possible overbreadth in mind:

> [14] The *Chirwa* test was crafted not only to ensure the availability of compassionate relief, but also to prevent its undue overbreadth. As the Board said:
>
> 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 establishment of the Applicants and the BIOC, in this case, do not reach the level of misfortunes that excite the desire to relieve them, such that the granting of special relief was warranted. It does not suffice to state that the standard of review is reasonableness. The standard must also be applied. It has not been shown that the decision was unreasonable.

[69] Finally, that leaves the argument about the hardship of the country conditions. The Court does not agree with the Applicants' submission that the Officer erred in the assessment of the hardship of returning to South Africa due to prevailing country conditions. I repeat: it is required to show that the decision maker "erred" to the point of being unreasonable. The Officer reasonably concluded that the Applicants had expressed general country conditions in South Africa, and not a personalized risk. This country conditions do not contribute significantly to this H&C application.

[70] The Officer also concluded that the Applicants had failed their burden to demonstrate that women and girls are discriminated against in South Africa, or that they would be subject to xenophobic attacks in Cape Town or Port Elizabeth. That was not unreasonable.

VI. Conclusion

[71] The issues raised by the Applicants in their H&C application, when considered cumulatively or individually, do not establish that the decision maker acted unreasonably. Considering the establishment, the best interests of the children and the country conditions, it was reasonable for the Officer to conclude that the threshold to warrant the granting of special relief was not met. As a result, the judicial review application is dismissed.

[72] The parties agree there is not a question to be certified pursuant to section 74 of the IRPA. I share that view.

JUDGMENT in IMM-2163-20

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed.

2. There is not a question to be certified pursuant to section 74 of the IRPA.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2163-20
STYLE OF CAUSE:	NELLY NSEKELE TSHIENDELA ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	OCTOBER 13, 2021
JUDGMENT AND REASONS:	ROY J.
DATED:	MAY 11, 2022

APPEARANCES:

Richard Wazana	FOR THE APPLICANTS
Norah Dorcine	FOR THE RESPONDENT

SOLICITORS OF RECORD:

WazanaLaw Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT