Federal Court  Cour fédérale

Date: 20150820

Docket: IMM-5108-14

Citation: 2015 FC 991

Ottawa, Ontario, August 20, 2015

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

XOLISILE PRUDENCE SONTA MKHONTA
VUYILE NOKUKHANYA MOTSA

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act] of a decision by a Refugee Protection Division [the Board] that the Applicant is not a Convention refugee nor a person in need of protection in the meaning of sections 96 and 97(1) of the Act.

[2] For the reasons that follow, the application is dismissed.

II. Background

[3] Ms. Xolisile Prudence Sonta Mkhonta [Prudence or the adult Applicant] and her daughter, Ms. Vuyile Nokukhanya Motsa [Vuyile or the minor Applicant] are citizens of Swaziland. They came to Canada in January 2012 and sought refugee protection. After arriving, they were required to undergo medical examinations and it was discovered that Prudence was HIV positive.

[4] Their refugee claim was dismissed by the Refugee Protection Division [RPD] in November 2013 and leave for judicial review of the RPD decision was denied by the court on March 27, 2014.

[5] On April 30, 2014, the Applicants attended a pre-removal interview with the Canada Border Services Agency [CBSA] and were advised that they were going to be removed from Canada. They requested a deferral of removal to allow Vuyile to complete the school year, which was granted on May 14, 2014.

[6] On June 13, 2014, the Applicants were served with a Direction to Report for removal on July 3, 2014. On June 16, 2014, the Applicants submitted an application for permanent residence on humanitarian and compassionate grounds [H&C].

[7] On June 25, 2014, the Applicants sought a deferral of removal from CBSA requesting that the decision be provided by June 27, 2014 in order to avoid having to seek a stay. The Applicants' counsel alleged the following:

- Prudence requires regular and reliable ongoing treatment for HIV;
- Prudence would face a health risk due to the inability of Swaziland to provide adequate medical care for women with HIV, including insufficient and unreliable access to proper medication;
- The Applicants would both face difficulties as women in Swaziland;
- The Applicants have demonstrated their establishment in Canada;
- The Applicants would have no family support in Swaziland;
- Prudence will suffer from stigma and discrimination due to her HIV-positive status, including problems finding employment; and
- Swaziland is currently experiencing food shortages, water shortages and severe economic downturn, which puts Vuyile at risk of malnutrition and health problems, which will exacerbate Prudence's health problems, and will make it difficult for them to find work.

[8] In support of these allegations, the Applicants provided the Officer with various documents including country condition evidence, letters of support, letters from Prudence's treating physicians, and a psychological assessment of Prudence by her psychotherapist.

[9] Applicants' counsel also noted that the H&C application had not been submitted prior to June 2014 because of the original counsel was not aware of the exemption from the 12-month statutory bar on account of medical circumstances.

III. Impugned Decision

[10] The Officer denied the Applicants' deferral request on June 27, 2014. The Officer stated that it was beyond her jurisdiction to do a full H&C assessment, but that the H&C factors that had been brought forward in the deferral request would be considered.

[11] The Officer acknowledged that the Applicants have made efforts to establish and integrate themselves. The Officer went on to state that he had considered the hardship factors and the country conditions in Swaziland, but that a lot of the documents were not personalized, so these factors alone do not confer status in Canada.

[12] With respect to the best interests of the child Vuyile, the Officer noted that she is now 18 years old and considered an adult. The Officer rejected the submission that Vuyile would be at risk of malnutrition and health problems, finding that the documentary evidence were not personalized and that counsel's statements were speculative. The Officer concluded that Prudence would be traveling with her mother who will be able to attenuate the period of adjustment for Vuyile and that their extended family living in Swaziland would be able to help with the period of adjustment.

[13] Regarding Prudence's medical situation, the Officer noted that he had considered the documents regarding the medical situation in Swaziland and the letters submitted by the Applicants. However, the Officer noted that he had done some "simple Internet research of the topic" on the medical situation for HIV and cited from the website of a non-governmental organization and the UNAIDS.org report on country progress reports 2014 for Swaziland. Based on that information, he concluded that:

> I note that while health care situation and economic situation in Swaziland is not perfect, and there are improvements to be made, the government took serious steps to improve the conditions in the country and the King, the Prime Minister and senior government officials were praised in the 2012 report.
>
> [...]
>
> Based on the above, there is insufficient information before me to suggest that Ms. Xolisle Prudence MKHONTA would be unable to receive the treatment she needs upon her return to Swaziland. I have considered the deferral request in its entirety and I need to reiterate that the deferral process is intended to address temporary practical impediments to removal and is not meant to be a long term reprieve.

[14] The Officer concluded that there was no evidence that the Applicants would suffer undeserved or disproportionate hardship if they were returned to their country and that there was insufficient objective evidence to warrant a deferral of removal for the Applicants.

[15] The Applicants filed an application for leave and for judicial review of the Officer's decision on June 16, 2014 and subsequently sought a judicial stay of removal. On July 2, 2014, Justice Shore of this court granted a stay of removal pending the determination of this proceeding.

IV. Issues

[16] The following issues arise in this application:

1. Did the Officer breach procedural fairness by relying on extrinsic evidence?
2. Did the Officer err by carrying out an assessment of the hardship factors?
3. Did the Officer err in his assessment of the evidence?

V. Standard of Review

[17] Issues of procedural fairness and natural justice are to be reviewed on the correctness standard (*Mission Institute v Khela*, 2014 SCC 24, [2014] 1 SCR 502 at para 79, [2014] 1 SCR 502; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 43, [2009] 1 SCR 339). However, I note that in *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 245, 246 ACWS (3d) 191 [*Forest Ethics*], the Federal Court of Appeal held that while the procedural fairness issue is to be determined on the correctness standard, the Court must give some deference to the Board's procedural choices (see also: *Re: Sound v Fitness Industry Council of Canada*, 2014 FCA 48 at paras 34-42, 455 NR 87 and *Maritime Broadcasting System Ltd. v Canadian Media Guild*, 2014 FCA 59 at paras 50-56, 373 DLR (4th) 167)).

[18] Conversely, the decision of an Officer to defer removal is subject to the reasonableness standard of review unless it involves a question of law (*Canada (Public Safety and Emergency*

Preparedness) v Shpati, 2011 FCA 286 at para 27, 343 DLR (4th) 128, *Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 25, [2010] 2 FCR 311).

VI. Analysis

A. *Did the Officer breach procedural fairness by relying on extrinsic evidence?*

[19] The Court raised the issue with the parties whether the Officer breached procedural fairness by relying upon extrinsic evidence obtained from her Internet search without providing the Applicants an opportunity to respond to it. Its concern arose out of the Court's consideration of the decisions of *Level v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 227, 324 FTR 71 [*Level*] as also applied in *Williams v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 274, [2011] 3 FCR 198 [*Williams*]. These decisions stand for the proposition that, "if the Officer relies on extrinsic evidence not brought forward by the applicant, the applicant must be given an opportunity to respond to that evidence. That is the minimal duty of procedural fairness" [*Level*].

[20] Ultimately, whether such evidence may be relied upon depends upon its categorization as "extrinsic". In this regard, I conclude that Justice de Montigny best summarized the jurisprudence on the determination of what constitutes extrinsic evidence in *De Vazquez v. Canada (Citizenship and Immigration)*, 2014 FC 530 as that which depends upon whether the information would be known by the Applicant in light of the nature of the submissions made by the parties. He makes this point at paragraphs 27 and 28 of the decision as follows:

[27] I agree with the Applicants' assertion that not everything found online can be considered as publicly available. If it were otherwise, as I stated in *Sinnasamy v Canada (Minister of Citizenship and Immigration)*, 2008 FC 67 (CanLII) (at para 39), it "would impose an insurmountable burden on the applicant as virtually everything is nowadays accessible on line". An officer should therefore be prudent when considering and relying upon "materials that could not be described as the kind of standard documents that applicants can reasonably expect officers to consult" (*Mazrekaj v Canada (Minister of Citizenship and Immigration*), 2012 FC 953 (CanLII) at para 12). In fact, as stated by the Federal Court of Appeal in *Mancia v Canada (Minister of Citizenship and Immigration*), 1998 CanLII 9066 (FCA), [1998] 3 FC 461 [Mancia] at para 22:[W]here the immigration officer intends to rely on evidence which is not normally found, or was not available at the time the applicant filed his submissions, in documentation centres, fairness dictates that the applicant be informed of any novel and significant information which evidences a change in the general country conditions that may affect the disposition of the case.See also: *N.O.R. v Canada (Minister of Citizenship and Immigration*), 2011 FC 1240 (CanLII) at para 28; *Arteaga v Canada (Minister of Citizenship and Immigration*), 2013 FC 778 (CanLII) at para 24; *Begum v Canada (Minister of Citizenship and Immigration*), 2013 FC 824 (CanLII) at para 36

[28] That being said, it is not the document itself which dictates whether it is "extrinsic" evidence which must be disclosed to an applicant in advance, but whether the information itself contained in that document is information that would be known by an applicant, in light of the nature of the submissions made: *Jiminez v Canada (Minister of Citizenship and Immigration*), 2010 FC 1078 (CanLII) at para 19; *Stephenson v Canada (Minister of Citizenship and Immigration)*, 2011 FC 932 (CanLII) at paras 38-39. In the case at bar, while the particular websites consulted by the Officer might be considered somewhat unorthodox and are clearly not standard sources, they contained general information on the Argentinean school system which would have been reasonably accessible by the Applicants. They provide general information on the Argentinean school system that could have been found elsewhere by the Applicants, and that information can clearly not be characterized as "novel and significant information which evidences a change in the general country conditions that may affect the disposition of the case", as stated by the Federal Court of Appeal in *Mancia*.

[Emphasis added]

[21] I agree with the Respondent that publicly available articles from the Internet sites of UNHIV.org and AVERT.org would not be considered extrinsic evidence in the terms described above, given the nature of the submissions in this matter that directly relate to issues of access to services to treat HIV in Swaziland. These are not submissions that would take the Applicants by surprise. They are simply further country condition documents that provide balance to the submissions of the Applicants regarding the availability of treatment services for HIV patients in Swaziland.

[22] The Respondent raises a secondary issue with respect to the rigorous time constraints that deferral Officers are subject to, impliedly suggesting that this should be taken into consideration in respect of the procedural fairness owed the Applicants. I would agree that the circumstances could affect the Officer's reliance upon extrinsic evidence if the situation of urgency was raised or contributed to by the Applicants. This I find to be the case in this matter, inasmuch as the adult Applicant played a significant role in creating the situation where the Officer was subject to time pressures that provided little time to communicate the information obtained from his Internet search.

[23] First, there was the Applicant's unacceptable delay in failing to file a more timely H&C application, allegedly due to the original counsel's misunderstanding that the Applicants were not bound by the one year bar, which is not an excuse that can be relied upon. Second, the Applicants should have submitted their deferral request before letting nearly two weeks go by after receiving notices of their removal date. Third, the Applicants' requested that a decision be

rendered within three days of submitting the deferral request to avoid having to undertake stay proceedings in the Federal Court, if successful. The Officer abided by the request.

[24] Accordingly, I find no breach of procedural fairness by the Officer's reliance upon the information obtained from his Internet searches.

B. *Did the Officer err by carrying out an assessment of the hardship factors?*

[25] The Removals Officer makes a finding that there was no evidence to show that the Applicants would suffer undeserved or disproportionate hardship if returned to Swaziland. The Applicants submit that this finding was not his to make in a request to defer removal. They argue that the evidence before the Officer warranted a decision to defer the Applicants' removal so that a full consideration could be made by an immigration Officer responsible for making decisions on H&C applications before the Applicants are removed from Canada.

[26] An Enforcement Officer has neither the duty, nor the discretion to consider various H&C factors in determining whether to defer removal. This Court has made it clear on numerous occasions that an Enforcement Officer is not an H&C Officer. In *Munar v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1180, at para 36 [*Munar*], the Court stated that the Enforcement Officer does not have the jurisdiction, the necessary training or the duty to conduct an H&C assessment. The Officer recognized the limitation in his jurisdiction. By addressing some of the hardship factors, she did not commit a reviewable error, inasmuch as the Applicants' submissions as they related to the effects of removal were taken into consideration in the decision.

C. *Did the Officer err in his assessment of the evidence?*

[27] The Applicants submit that the Officer erred in making her determination by ignoring relevant evidence and failing to provide adequate reasons. I cannot agree with this submission. In the first place many of the Applicants' submissions relate to hardship factors on a long-term basis such as the issues of discrimination or stigma, which are not relevant to a deferral request in respect of the issues in this matter which pertain primarily to access to treatment facilities for AIDS upon return to Swaziland.

[28] The Officer considered the principal Applicant's positive HIV diagnosis. She considered the country conditions documents concerning, HCV facilities and the evidence concerning the availability of antiretroviral drugs in Swaziland. It is not the Court's task of re-weighing the evidence. The reasons demonstrate that the issue was considered and there is some evidence to support a decision within a reasonably acceptable range of outcomes. The Officer makes reference to the country condition evidence, admittedly said to be exemplified by that found in her own search, to conclude that there was insufficient evidence that the principal Applicant would be unable to receive the treatment she needs upon her return to Swaziland.

[29] The Court does not find that the Applicants' subsequent comments on the articles found in the Internet search are sufficient grounds to conclude the likelihood that the Officer would have come to a different conclusion had she received them prior to rendering her decision. The Applicants pointed out in their supplementary materials that the laudatory comments contained in the NGO article reported at AVERT.org in 2012 of the King, Prime Minister and senior

government officials for "having good political presence against HIV and AIDS", in addition to new legislation suggesting a renewed commitment to the HIV response, was contradicted somewhat by an article in their materials concerning the insufficient budget allocations for 2012-2013. However, the more pertinent recent 2014 article from the reputable UNAIDS.org concerning improved patient retention rates on antiretroviral therapy as indicative of the improved quality of services that arose from the changes made to the national treatment guidelines in 2010 is not refuted or commented on. I would not consider reliance on recent relevant evidence on country conditions constituting over-reliance on extrinsic evidence as argued by the Applicants. The Officer acknowledges the difficult situation in Swaziland and there is no doubt that better care would be available in Canada, but this is not a ground for deferral.

[30] The Officer considered the best interests of the child. This analysis should be less thorough than the full−fledged analysis required in the context of an H&C application and should be focused on the short-term best interests of the child, see *Khamis v. Canada (Citizenship and Immigration)*, 2010 FC 437 applying *Munar*. The Officer was sensitive to the child's circumstances, which were considered. The child was 18 years old living with her mother, who as noted, is educated with an excellent work record in Swaziland. I did not see any reviewable issue concerning the child's situation giving rise to a ground for deferral in this matter given the deference owed the Officer and her review of the evidence on this issue.

VII. Conclusion

[31] The application is dismissed. No questions were suggested for certification and none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. There is no question to be certified for appeal.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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