Federal Court  Cour fédérale

Date: 20161021

Docket: IMM-1892-16

Citation: 2016 FC 1178

[ENGLISH TRANSLATION]

Ottawa, Ontario, October 21, 2016

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ZAJHILIS DULCELINA CORTORREAL DE LEON
ZAJIS MARIE TORRES CORTORREAL

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA], against an Immigration, Refugees and

Citizenship c officer's refusal of the application for permanent residence on April 26, 2016 based on H&C grounds under subsection 25(1) of the IRPA.

II. Facts

[2] The applicants are citizens of the Dominican Republic. The mother is the principal applicant and is 39 years old. Her daughter, a minor co-applicant, is 16 years old. They arrived in Canada on April 22, 2007, after having lived in the United States for approximately one year.

[3] The principal applicant is mother to two other children born in Canada, whose fathers were not declared: A.H. Cortorreal, age 8, and P.Z. Cortorreal, age 10 months.

[4] The applicants filed a refugee claim on May 16, 2007, which was denied by the Refugee Protection Division [RPD] of the Immigration and Refugee Board on February 18, 2010 on the grounds that their story was not credible and was, in fact, implausible and full of contradictions. Our Court denied the application for leave and for judicial review of this decision on May 27, 2010 (IMM-1361-10).

[5] On April 13, 2008, the principal applicant married a Canadian citizen, Dario Jose Jimenes Mercedes. On September 30, 2008, sponsored by her spouse, the principal applicant applied for permanent residence under the Spouse or Common-Law Partner in Canada [SCLPC] Class. The application was initially approved on February 17, 2012 then denied on August 13, 2014 on the grounds that the applicant and her spouse had entered into a marriage of convenience. Indeed, based on the file, it seems that the principal applicant did not live with her spouse, who had not

been declared as the father of the child, A.H., and that they were not in a conjugal relationship. Her actual spouse and the father of the child, A.H., is apparently her spouse's cousin, Juan Hipolito Joaquin Jimenez, a citizen of the Dominican Republic. Our Court denied the application for leave and for judicial review of this decision on April 17, 2015 (IMM-6414-14).

[6] On February 17, 2011, the applicants applied for a pre-removal risk assessment. This application was rejected on November 18, 2015.

[7] On August 8, 2014, the applicants applied for permanent residence based on H&C considerations and on the grounds that it was in the best interests of the minor children in question.

[8] On November 18, 2015, the application for permanent residence based on H&C grounds was denied. Following this decision, the applicants applied to the Federal Court for leave and for judicial review (IMM-5595-15), but withdrew the application when they heard that the H&C application would be reviewed by another officer.

[9] On April 4, 2016, the applicants updated their H&C application and resubmitted it to the IRCC, where it was reviewed by a different officer. The grounds cited in support of their application are essentially based on the best interests of the minor children in question. In this case, all of the minor co-applicant's education has been in French in Canada, and it would therefore be in her best interest to remain there. Furthermore, the principal applicant's son, who was born in Canada and is a Canadian citizen, has learning disabilities and language delays. A.H.

receives specialized support and supervision suited to his condition. According to the applicants, this type of support would not be available in the Dominican Republic and therefore the best interests of the children would be jeopardized.

[10] On April 26, 2016, IRCC rendered a negative decision regarding the applicants' H&C application.

III. Decision

[11] In his decision dated April 26, 2016, the IRCC officer denied the applicants' claim for permanent residence based on H&C grounds, as he considered the factors presented in the claim to be insufficient to justify an exemption on H&C grounds. After reviewing the applicants' file, the officer provided the reasons for his decision, concluding that the principal applicant had not shown a significant degree of establishment and that the best interests of the children was not in jeopardy.

IV. Issues

[12] This application for judicial review raises the following issues:

Was the IRCC officer's decision to deny the H&C application unreasonable, given the best interests of the children?

V. Relevant provisions

[13] The case before the Court necessitates a review of the interpretation given to subsection 25(1) of the IRPA in case law, as it concerns the best interests of the child.

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	**25 (1)** Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

VI. Parties' representations

A. *Applicants' arguments*

[14] The applicants maintain that the IRCC officer's decision is unreasonable in that he did not adequately consider the best interests of the minor children affected by this decision. Their memorandum essentially deals with the best interests of the child A.H.

(1) Best interests of the child A.H.

[15] If the applicants are sent back to the Dominican Republic, they say the child A.H. will go with them. He would therefore be affected by the denial of the claim for permanent residence based on H&C grounds. It is alleged that the developmental and language problems from which he suffers could not be adequately treated in the Dominican Republic because the appropriate care is not available there.

[16] The applicants accuse the officer of reaching contradictory conclusions on that subject. Although he recognizes the need for A.H. to receive speech pathology and occupational therapy treatments to address his language problems and overall developmental delay, and although he concludes that it would be in A.H.'s best interests [TRANSLATION] "to be able to remain in Canada, where he is receiving the necessary treatments and where he has lived his entire life," the officer finds that if the family left Canada and returned to the Dominican Republic, "there would be few negative consequences for him."

[17] However, the applicants maintain that the treatment A.H. requires would not be available in the Dominican Republic. They allege, without presenting any supporting evidence, that special education is not available in this "underdeveloped" country. Furthermore, they point out the officer's misapprehension of the cost of private school and reiterate that the mother is not financially able to assume these costs. They submit that the officer, contrary to the teaching of the Supreme Court in *Kanthasamy v. Canada (Citizenship and Immigration)*[2015] 3 SCR 909, 2015 SCC 61 at paragraph 47 [*Kanthasamy*], minimized the condition and special needs of the child A.H.

(2) Best interests of the minor co-applicant

[18] The interests of the child A.H., as addressed in the contested decision, is the only issue raised in the applicants' memorandum. The applicants are not contesting the officer's reasons with regard to the best interests of the minor co-applicant.

B. *Respondent's arguments*

[19] The respondent maintains that the IRCC officer's decision is reasonable.

[20] Regarding the issue of the best interests of the children affected by the decision, the respondent is of the opinion that the officer took the needs of each of the applicant's three children into careful consideration. The officer concluded that the denial of the application for permanent residence based on H&C grounds would not negatively impact the child P.Z. Next, he assessed the case of the co-applicant, the minor child Z.M., and found that, in spite of the

challenges the teen might face if she returned to the Dominican Republic, her best interests would not be jeopardized.

[21] As for the child A.H., the officer found that he could receive the services required to treat his condition in the Dominican Republic. The respondent maintains that the evidential burden regarding the impossibility of obtaining appropriate treatment in the Dominican Republic lay with the applicants and not with the officer. In the absence of evidence provided by the applicants to demonstrate the expected difficulties in receiving appropriate services, the officer found that the best interests of the child A.H. would not be jeopardized.

[22] The respondent stated that the officer had to determine whether there were sufficient H&C considerations for an exemption from the requirement of the law to allow the permanent residence application, and that he had to take the various factors into consideration.

[23] To summarize, the respondent and the officer carefully considered the best interests of the child A.H. However, in light of all of the factors on file, the officer's denial of the applicants' application remained a possible outcome. His decision was therefore reasonable.

VII. Analysis

[24] After reviewing the IRCC officer's decision and the parties' file, the Court cannot support the applicants' arguments and dismisses this application for judicial review.

[25] The Court finds the decision rendered by the IRCC reasonable. The officer carefully reviewed the application for an exemption based on H&C grounds. He rendered a decision that was within the range of possible outcomes and supported it with reasons that complied with the principles of justification, transparency and intelligibility (*Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 SCR 339, 2009 SCC 12 at paragraph 59; *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9).

[26] Indeed, in his assessment of the best interests of the children affected by the decision, the officer took into account all of the factors presented. He considered the inconveniences this decision would cause the minor co-applicant when she returned to the Dominican Republic after having been educated in French and spent most of her life in Canada. He agreed that the minor co-applicant would have to adjust to a new school environment. The officer also considered the difficulties the child A.H., a Canadian citizen, would face if he had to follow his mother to the Dominican Republic. He considered the child's disabilities and his need for specialized treatment and support. Throughout his analysis, the officer remained receptive and sensitive to the situation of the children in question (*D'Aguiar-Juman v. Canada (Citizenship and Immigration)*, 2016 FC 6 at paragraph 19 [*D'Aguiar-Juman*]).

[27] It is therefore appropriate to distinguish this case from the recent decision rendered by the Supreme Court, written by Justice Abella, in the *Kanthasamy* case:

> [39] A decision under s. 25(1) will therefore be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered: *Baker*, at para. 75. This means that decision-makers must do more than simply *state* that the interests of a child have been taken into account: *Hawthorne*, at para. 32. Those interests must be "well identified and defined" and

> examined "with a great deal of attention" in light of all the evidence: *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 (CanLII), [2002] 4 F.C. 358 (C.A.), at paras. 12 and 31; Kolosovs v. Canada (Minister of Citizenship and Immigration), 2008 FC 165 (CanLII), 323 F.T.R. 181, at paras. 9-12.
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> (*Kanthasamy*, supra, at paragraph 39)

The officer correctly defined and identified the best interests of the children and carefully examined the case, taking into consideration all of the factors related to the applicants' file.

[28] This Court notes that the main applicant submitted little, if any, relevant evidence to support her fear of generalized violence in the Dominican school system or of the absence of appropriate treatment for her son's developmental and language problems. However, it was the applicant's responsibility to assume this burden of proof (*D'Aguiar-Juman*, supra, at paragraph 19; *Patel v. Canada (Citizenship and Immigration)*, 2013 FC 1224, at paragraph 28).

[29] Moreover, although the best interests of the child is a very significant factor in the assessment of H&C considerations, this factor alone does not overshadow all others (*Hawthorne v. Canada (Minister of Citizenship and Immigration)*, [2003] 2 FCR 555, 2002 FCA 475 [*Hawthorne*]; *Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 FCR 358, 2002 FCA 125).

[30] As the officer noted, in the vast majority of cases, the best interests of the child argue in favour of keeping the child in Canada. However, as Justice Décary pointed out in *Hawthorne*, supra, at paragraph 6:

> [6] To simply require that the officer determine whether the child's best interests favour non-removal is somewhat artificial--such a finding will be a given in all but a very few, unusual cases. For all practical purposes, the officer's task is to determine, in the circumstances of each case, the likely degree of hardship to the child caused by the removal of the parent and to weigh this degree of hardship together with other factors, including public policy considerations, that militate in favour of or against the removal of the parent. [Emphasis of the Court]

The officer also considered the main applicant's lack of a significant degree of establishment in Canada and the unclear reasons for which she did not seek to regularize her immigration status by legal means.

[31] In this case, the Court notes that the main applicant tried in several roundabout ways to settle in Canada, but that all of her attempts failed. The RPD denied her refugee claim due to a lack of credibility and it was established that she had entered into a marriage of convenience. As a result, her permanent residence application under the SCLPC Class was denied. Applications for leave and judicial review were filed regarding these two decisions, which our Court denied. It is therefore reasonable that this factor counted against them in the officer's assessment of the application. The undersigned adopts the statements made by Mr. Justice Henry S. Brown of our Court when he reiterates that H&C exemption is an exceptional remedy and not a parallel or stand-alone immigration regime (*Joseph v. Canada (Citizenship and Immigration)*, 2015 FC 904, at paragraph 24 [*Joseph*]. It is a matter of respect for Canadian laws and the integrity of the immigration system.

> [24] To begin with, I wish to note that the Officer correctly identified H&C relief as an exceptional remedy. H&C is not a parallel or stand-alone immigration regime. The regular immigration regime governs individuals such as the Applicants. Only in exceptional cases may relief be granted under the H&C

> exception. The Supreme Court of Canada confirmed the exceptional nature of H&C relief in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 (CanLII) at para 64 [*Chieu*] in which it stated an application for H&C relief "is essentially a plea to the executive branch for special consideration which is not even explicitly envisioned by the [IRPA]." The Federal Court of Appeal in *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 (CanLII) at para 16 [*Legault*], relying on the Supreme Court of Canada's decision in Chieu also confirmed H&C relief is an exceptional and discretionary measure which:
>
> > … is a part of a legislative framework where "[n]on-citizens do not have a right to enter or remain in Canada", where "[i]n general, immigration is a privilege not a right" (*Chieu*, supra, at paragraph 57) and where "the Act treats citizens differently from permanent residents, who in turn are treated differently from Convention refugees, who are treated differently from individuals holding visas and from illegal residents. It is an important aspect of the statutory scheme that these different categories of individuals are treated differently, with appropriate adjustments to the varying rights and contexts of individuals in these groups" (*Chieu*, paragraph 59).
>
> (*Joseph*, supra, at paragraph 24)

VIII. Conclusion

[32] For these reasons, the Court finds that the IRCC officer's decision to deny the permanent residence application based on H&C considerations under subsection 25(1) of the IRPA is reasonable.

[33] The application for judicial review is therefore dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There is no question of importance to certify.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Nataliya Dzera	FOR THE APPLICANTS
Sherry Rafai Far	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nataliya Dzera Montréal, Quebec	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT