Federal Court  Cour fédérale

Date: 20170328

Docket: IMM-4179-16

Citation: 2017 FC 316

Ottawa, Ontario, March 28, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

NER ADAM
YVETA CHARLES

Applicants

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA, the Act] of a decision [Decision] by an immigration officer [the Officer], dated September 12, 2016, refusing the application for

permanent residence [PR] status based on humanitarian and compassionate [H&C] grounds pursuant to subsection 25(1) of the IRPA.

[2] The Applicants, Mr. Ner Adam and Ms. Yveta Charles, aged 50 and 30, are citizens of Haiti. They are married and have a one-year-old Canadian-born daughter. Mr. Adam also has a son, born in 2009, who remains in Haiti. The H&C application addressed establishment in Canada, best interest of their children, political and gender-based persecution, and general hardship in returning to Haiti. The Officer, in refusing the H&C application, found that the Applicants had failed to demonstrate that their personal circumstances were sufficient to justify an H&C exemption to the requirements of the Act. Given the Officer's unreasonable assessment of certain evidence provided by the Applicants, the judicial review will be allowed.

II. Preliminary Matter

[3] As requested by Applicants' counsel, and agreed to by the Respondent, the style of cause is amended to read "Ner Adam" rather than "Adam Ner", as indicated on the initial Statement of Claim.

III. Analysis

[4] This Decision is subject to a reasonableness standard of review (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). The Applicants identify three issues, which I will address in the Order that they were raised in written and oral argument.

Issue 1: Best Interests of the Canadian-born child

[5] The Officer found that the Applicants did not explain how the well-being of their children would be affected, or how the issues raised in the objective documentation directly impact them. Ultimately, the Officer found that insufficient information had been provided to make a positive finding based on best interests of the child, relying, in part on *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 [*Owusu*].

[6] The Applicants argue that this conclusion was unreasonable: *Owusu* is a very different case, confined to its own specific facts, which involved the impact on a child living abroad. Here, although one of the two children lives abroad (with the Applicants' extended family in Haiti), the youngest child lives with the Applicants in Canada, and it was her best interests that were unreasonably addressed.

[7] I neither find the Decision to be unreasonable with respect to best interests of the children, nor do I find any error was made in relying on *Owusu*. Instead, I find that the Applicants failed to furnish sufficient information – whether by way of written arguments and/or supporting evidence – for this component of the H&C submissions. Few submissions were provided to the Officer, as Applicants' counsel acknowledged at the hearing. The Officer did not even know if the Applicants were going to leave the child in Canada, which was possible as they live here with a relative, and the other child lives abroad with family members. Simply arguing that the child's best interest is remaining in Canada is not determinative in granting an H&C

exemption: *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at paras 5-6.

Issue 2: The Hardship of returning to Haiti

[8] The Officer decided that the Applicants failed to demonstrate that their difficulties were prejudicial to the point of not being able to return to Haiti to apply for PR outside Canada, such that they should benefit from the subsection 25(1) exemption. The Applicants assert that in considering hardship, the Officer applied the wrong legal test: instead of referring to undue, underserved or disproportionate hardship the Applicants would face upon returning to their country of origin, the Officer wrongly applied the hardship test based on individual versus general hardship.

[9] Specifically, the Applicants argue that the Officer wrongly imported into the section 25 H&C analysis, a section 97 requirement that an applicant should not face a risk generally faced by other individuals in that country. The Applicants rely on *Diabate v Canada (Citizenship and Immigration)*, 2013 FC 129 [*Diabate*] where Justice Gleason held that "the frame of analysis for H&C consideration has to be that of the individual him or herself, which involves consideration of whether the hardship of leaving Canada and returning to the country of origin would be undue, undeserved or disproportionate" (at para 36).

[10] I disagree that the Officer employed the wrong test. Her approach was consistent with *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at para 56. Here, unlike in *Diabate*, the Officer did not require that the Applicants establish that the hardship

they would be exposed to in Haiti was not generally faced by other Haitians; had that indeed been the case, then I would agree with the Applicants that the Officer had applied the wrong test (see *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 at para 31).

Issue 3: Discounting the medical and psychological reports

[11] While there was nothing unreasonable about the hardship test applied by the Officer, I cannot say the same for some of the evidence considered under that test. Specifically, the Officer unreasonably considered two health professionals' reports which could have impacted on the outcome of the hardship analysis. The Officer addressed these two reports – one from a doctor in Haiti, and the other, a psychotherapist in Toronto – as follows:

> […] Le médecin de service y affirme que la demanderesse aurait eu un dérangement au niveau des parties génitales car elle aurait été violée par des bandits. J'estime qu'il n'appartient pas au médecin de statuer sur les circonstances dans lesquelles la demanderesse aurait eu ces lésions et qu'il relate donc de faits qui lui ont été rapportés. Le rapport psychologique est daté du 9 décembre 2014 et a été rédigé par une psychothérapeute du Centre Francophone de Toronto. L'évaluation est basée sur une seule rencontre et si la psychothérapeute fait mention des événements en question, c'est qu'ils lui (*sic*) été racontés par la demanderesse. Compte tenu de la subjectivité de la preuve, je n'y accorde qu'un poids relatif. (CTR at p 8).
>
> [TRANSLATION] The medical report submitted into evidence is dated March 16, 2012. The on-duty doctor states therein that the female applicant allegedly had a disturbance in her genital area apparently as the result of a rape by criminals. I find that it is not up to the doctor to rule on the circumstances in which the female applicant allegedly sustained injuries and that he is therefore describing the facts that were reported to him. The psychological report submitted is dated December 9, 2014, and was drafted by a psychotherapist and the Francophone Centre in Toronto. The evaluation is based on a single meeting, and if the psychotherapist mentions the events in question, it is because the female applicant had described them to her. In light of the subjective nature of the evidence, I grant it only relative weight (CTR at 15).

[12] These comments are problematic. *Kanthasamy* at para 49 clearly comments on the inappropriateness of rejecting professionals' evidence (or similarly reducing its probative value) on the sole basis of hearsay:

> And while the Officer did not "dispute the psychological report presented", she found that the medical opinion "rest[ed] mainly on hearsay" because the psychologist was "not a witness of the events that led to the anxiety experienced by the applicant". This disregards the unavoidable reality that psychological reports like the one in this case will necessarily be based to some degree on "hearsay". Only rarely will a mental health professional personally witness the events for which a patient seeks professional assistance. To suggest that applicants for relief on humanitarian and compassionate grounds may only file expert reports from professionals who have witnessed the facts or events underlying their findings, is unrealistic and results in the absence of significant evidence. In any event, a psychologist need not be an expert on country conditions in a particular country to provide expert information about the probable psychological effect of removal from Canada.

[13] Likewise, in this case, the Officer gave little weight to the reports due to the hearsay statements they contained. Contrary to the guidance provided in *Kanthasamy,* the Officer did not analyse what the reports did contain. *Kanthasamy* establishes that medical reports may contain some background information recounted by a patient, and to the extent the Officer concluded against the Applicant otherwise, this aspect of the decision is not defensible in respect of the law, and is therefore unreasonable.

IV. Conclusion

[14] The Officer, absent other valid reasons for diminishing weight, should have considered the non-hearsay parts of the medical and psychological reports. Since that did not occur here, and could have had an impact on the outcome, the Decision is unreasonable and the application must accordingly be returned for reconsideration by a different decision-maker.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The matter is referred back for redetermination by a different decision-maker.
2. No question is certified.
3. There is no award as to costs.
4. The style of cause is amended to read "Ner Adam" rather than "Adam Ner".

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4179-16
STYLE OF CAUSE:	NER ADAM AND YVETA CHARLES v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
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