Federal Court  Cour fédérale

Date: 20171004

Docket: IMM-1553-17

Citation: 2017 FC 876

Ottawa, Ontario, October 4, 2017

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

MARINA GARYFALLIA PATOUSIA
STEFANOS CHORTIS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision of an Immigration Officer denying the Applicants' application for permanent residency on humanitarian and compassionate ("H&C") grounds, under section 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

II. Background

[2] The Applicants are Marina Garyfallia Patousia, and her husband, Stefanos Chortis (collectively, the "Applicants"). Ms. Patousia is a citizen of Greece and South Africa, and Mr. Chortis is a citizen of Greece.

[3] The Applicants have two Canadian-born children: Max, aged 7, and Alex, aged 3.

[4] The Applicants lived in Greece until 2006. They then moved to the United States. In 2007, the Applicants moved to Canada. They have been in Canada ever since.

[5] According to the Applicants, they left Greece because they could not find employment. Though they owned a small restaurant in Greece, it was not making any money. Ms. Patousia also, apparently, had worked at an office at some point. They also indicated that they left Greece because they "did not fit in", especially Ms. Patousia, who is viewed as a foreigner (given that she is South African born), and has difficulty with the Greek language.

[6] The Applicants initially came to Canada as visitors. In 2008, they applied for and received an extension to remain in Canada as visitors.

[7] Despite having visitor-status, the Applicants began working in Canada soon after arriving. Ms. Patousia began working at an internet café in 2007, and later registered her own cleaning business. Mr. Chortis has worked for 7 different employers since his arrival in 2007.

[8] In 2009, the Applicants hired an immigration consultant to prepare a skilled worker application for Ms. Patousia. The consultant never submitted the application, a fact which the Applicants did not discover until "years later." However, the Applicants did file an official complaint against the consultant once they learned of his inaction and that complaint remained active for over four years.

[9] The Applicants had no further interaction with the immigration system until June of 2015, when they sought H&C relief to apply for permanent residency. This Application was refused, as was their subsequent application for leave and judicial review.

[10] In February of 2016, the Applicants submitted a new H&C Application, arguing that their circumstances had changed significantly from the time of their previous failed application. In particular, the Applicants' son Max had been diagnosed with and is now receiving treatment for ADHD, and Mr. Chortis had been diagnosed with and is receiving treatment for depression. Further, the economic situation in Greece is "dire", and Mr. Chortis is required to send a portion of his employment income to his parents in Greece to finance their medical treatment, as well as his sister and niece to assist with their daily needs. This application was refused, and is the subject of this judicial review.

[11] In August of 2016, an inadmissibility report regarding the Applicants was prepared pursuant to section 44 of the *IRPA*, on the grounds that the Applicants had failed to leave Canada at the end of their authorized stay (contrary to subsection 29(2) of the *IRPA*), and had obtained work in Canada without authorization (contrary to subsection 30(1) of the *IRPA*).

[12] The Immigration Officer ("Officer") found insufficient H&C grounds and dismissed the Application.

A. *Immigration History*

[13] The Officer began by recounting the Applicants' immigration history. While acknowledging that the Applicants had been misled by the immigration consultant, who they had paid in 2009 to prepare a skilled worker application for Ms. Patousia, the Officer held that they still had "a certain amount of responsibility" to regularise their immigration status between the expiry of their visitor status in 2008, and their first H&C application in 2015. The Officer also took issue with the Applicants demonstrated "lack of respect of the immigration laws", given that they started working soon after arrival in Canada, without authorization. This factor reflected negatively on the Applicants.

B. *Best Interests of the Children*

[14] The Officer took note that Max has been diagnosed with ADHD, and receives special services in school as well as medication to treat his condition. The Officer referenced the supporting documentation outlining Max's behavioural challenges, which have a negative effect on his school and home life, as well as reports suggesting that treatment had proven beneficial. The Officer also noted, however, that the "identified supportive strategies" for Max were such that they "can be used at school and/or at home". As such, the Officer found that the Applicants could continue to assist Max by employing such strategies wherever they reside.

[15] The Officer further acknowledged that removal would result in a disruption in services for Max, but found that there was "insufficient evidence to indicate why he could not continue to benefit from similar services in Greece." The Officer justified this conclusion by pointing to the availability of free education in Greece, as well as special educational programs available in Greece.

[16] The Officer similarly held that there was insufficient evidence that Max would not be able to access his ADHD medication, or a comparable drug, in Greece. The evidence led by the Applicants respecting Greece's child-health care system noted access challenges for Muslim, Roma, or migrant/asylum-seeking children. The Officer held that there was no evidence that Max fell into any of these categories, or further that Max would have challenges accessing health services on account of the noted deficiencies.

[17] Similarly, the Officer held that evidence led regarding child poverty in Greece was focused on children from less advantaged backgrounds, and that there was no evidence that the Applicants' children would suffer in the same way –particularly given the Applicants' industriousness and lengthy work history in both Greece and Canada.

[18] There was also insufficient evidence that the children would be endangered in Greece based on violence in schools.

[19] The Officer noted that very little information had been provided regarding the best interests of the Applicants' second child, Alex. Cumulatively, the Officer found that there was

insufficient evidence that the best interests of the children would be compromised if they accompanied their parents to Greece.

[20] Finally, the Officer noted that the children have extended family members in Greece, and that it was reasonable to believe that these family members would be willing to assist and support the children in some respects, emotionally or otherwise, during their integration.

C. *Fear of Returning to Greece*

[21] With respect to the claim that Mr. Chortis remits money to his family in Greece, in part to assist his parents with medical care, the Officer held that there was insufficient evidence that his family "would be subjected to challenges if such funds were not forthcoming." In the alternative, the Officer held there was insufficient evidence as to why Mr. Chortis could not continue to financially contribute to them once re-settled in Greece.

[22] The Officer assessed the evidence led pertaining to the economic situation in Greece – which the Applicants alleged grounded their fear of returning. The Officer acknowledged the objective documentary evidence led by the Applicants, as well as letters from their Greek friends, both of which discussed the financial crisis in Greece. However, the Officer also took note of a report form 2015 which suggested that the Greek economy was finally on the upswing.

[23] Moreover, the Officer considered the Applicants' work history in Greece, including owning and managing a restaurant. While there would undoubtedly be re-integration difficulties, the Officer found there was insufficient evidence that the Applicants could not use their

entrepreneurial and managerial skills, combined with their experience from Canada, to successfully re-establish themselves in Greece. The Officer found that the Applicants' argument that they would be subject to age discrimination in Greece was speculative, particularly given that such discrimination would be unlawful in Greece.

[24] With respect to the Applicants' evidence regarding Greece's poor health care system, the Officer also took note of the conflicting evidence that certain aspects of the Greek health care system – including life expectancy and direct access to specialists – were strong and/or improving.

[25] With regards to Mr. Chortis' personal health situation, the Officer took note of a letter from a Community Health Centre speaking to the treatment Mr. Chortis was receiving. The Officer noted, however, that the author of the letter was not identified, nor did the letter contain any information regarding a medical diagnosis. The Officer nonetheless accepted that Mr. Chortis was receiving treatment for depression, but held that there was no information as to whether he could receive this treatment in Greece. Further, relying on Federal Court case law, the Officer noted that the stress related to a precarious immigration status is not a valid H&C consideration.

[26] With respect to the Ms. Patousia's argument that she was treated as a foreigner in Greece and therefore had difficulty finding meaningful work, the Officer noted an insufficiency of evidence as to discrimination she faced, or why Ms. Patousia could not find "meaningful work" in Greece.

D. *Establishment in Canada*

[27] The Officer took note of two issues respecting the Applicants' work history. First, a letter from Ms. Patousia's employer in Canada pre-dated her supposed period of employment at that establishment. Second, a letter of reference for Mr. Chortis misspelled his first name. While these were mentioned, the Officer does not appear to have treated them as substantial factors.

[28] The Officer found that there was insufficient documentary evidence about Ms. Patousia's cleaning business to "corroborate the financial viability/success of the established business." However, the Officer did find that it demonstrated her resourcefulness. Similarly, the Officer took note of the Applicants' long employment history in Canada (seven employers in ten years), and held that while it was not reflective of stability, it did demonstrate his resourcefulness in finding new employment

[29] The Officer also noted that the Applicants were self-sufficient in Canada, which was considered a positive factor.

[30] Assessing the Applicants' social ties to Canada, the Officer noted that they were members of a Greek Orthodox church, but also that there was "little information to elaborate on the type and extent of the applicants' involvement with the Church." Ultimately, the Officer found that the "applicants' demonstrated efforts towards community integration does not go beyond one [sic] would expect from individuals residing in Canada for over 9 years."

[31] The Officer considered the reference and support letters from the Applicants' friends in Canada and Greece as positive factors, but found "insufficient evidence…to support that the aforementioned relationships are characterized by a degree of inter-dependency and reliance to such an extent that if separation would occur that it would amount to hardships for either the applicants or their friends." Further, there was no evidence as to why the Applicants could not maintain these friendships, or form new friendships, in Greece.

[32] The Officer found that the abovementioned factors reflected a "modest level of establishment in Canada."

III. Issues

[33] The issues are:

A. Did the Officer err by assessing every H&C factor through a lens of hardship?

B. Was the Officer's consideration of establishment unreasonable?

C. Did the Officer misconstrue evidence regarding the economic conditions in Greece?

D. Was the Officer's assessment of the best interests of the child unreasonable?

IV. Standard of Review

[34] The standard of review is reasonableness for H&C exemptions. The choice of the appropriate legal test to be applied is a question of law to be reviewed on a correctness standard.

V. Analysis

A. *Did the Officer err by assessing every H&C factor through a lens of hardship?*

[35] The Applicants argue that the Officer erred by assessing the entire application through a hardship lens, contrary to *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*]. Instead, the Officer should have considered that hardship was only one among many factors, and applied the test endorsed by *Kanthasamy*: whether the H&C factors, established by the evidence, would excite in a reasonable man [sic] in a civilized community a desire to relieve the misfortunes of another (*Kanthasamy* at para 13, quoting from *Chirwa v Canada (Minister of Citizenship and Immigration)*, (1970) 4 IAC 338).

[36] The Applicants quote from the Decision, where the Officer wrote with respect to their establishment in Canada:

> The purpose of assessing establishment is to determine whether the applicants are established to such a degree that they would suffer hardship if they should leave Canada…

[37] And with respect to Mr. Chortis' mental health condition:

> …little information has been shown with respect to the treatment regime, why the applicant could not continue treatment in Greece or be subjected to hardships in accessing the treatment.

[38] Similarly, the Applicants argue that the Officer's best interests of the children was "centered on hardship", given that the Officer held that "the onus is on the applicant to provide evidence of the adverse effects on the children should the applicants leave Canada". According

to the Applicants, this reasoning positioned the children's best interests against evidence of hardship, or lack thereof, contrary to "[n]umerous decisions prior to Kanthasamy".

[39] Finally, the Applicants argue that the Officer improperly assessed their social connections in Canada through a hardship lens, when the Officer wrote that "insufficient evidence has been put forth to support that…if separation were to occur it would amount to hardship."

[40] The Applicants also make a separate, yet related argument, that the Officer erred by noting the lack of evidence about "why the applicant could not continue the treatment [for his depression] in Greece or be subjected to hardships in accessing the treatment." They argue that this runs afoul of *Kanthasamy*, which holds that once a decision-maker accepts a mental health condition:

> …requiring further evidence of the availability of treatment, either in Canada or [in the country of origin]…undermined the diagnosis and had the problematic effect of making it a conditional rather than a significant factor" (at para 47).

[41] *Kanthasamy* is clear that H&C considerations are not limited to hardship, and "hardship" should not be treated as an independent test which an applicant must meet before being granted relief. Rather, decision-makers should consider all relevant factors, focusing on the "equitable underlying purpose of the humanitarian and compassionate relief application process" (para 31). However, the concept of hardship or unusual and undeserved or disproportionate hardship can be "instructive" in reaching a determination, so long as they are not treated as "thresholds for relief separate and apart from the humanitarian purpose of s.25(1)" (*Kanthasamy* at para 33).

[42] With respect to children however, the concept of “unusual and undeserved hardship” is presumptively inapplicable, because children will rarely be “deserving” of hardship (*Kanthasamy* at para 41).

[43] The Respondent argues that the Officer considered all the evidence and did not assess the application through a hardship lens, but only considered hardship as one factor in the analysis of each of the H&C factors.

[44] The Officer largely focussed on insufficiency of evidence and much of what the Applicants are seeking is for the Court to reweigh the evidence.

[45] However, the problem for the Officer is that he or she bases all of his or her findings of fact through, as the Applicants submit, a lens of hardship, as the threshold test for each H&C factor, instead of focussing on the H&C considerations in a contextually manner. In reading the Officer’s decision as a whole, the Officer has imposed a hardship-based analysis on the evidence, which is both incorrect and unreasonable (*Torres v Canada (Minister of Citizenship and Immigration)*, 2017 FC 715 at para 8), as I will comment on further below.

B. *Was the Officer’s consideration of establishment unreasonable?*

[46] The Applicants’ argue that the Officer erred by failing to properly assess their lengthy establishment in Canada. The Applicants take particular issue with the Officer’s repeated suggestion that factors supporting the Applicants’ establishment in Canada (i.e. their work history and success in making friends) also spoke to their ability to re-establish themselves in

Greece. However, the question should not be whether the Applicants could resume activities in the country of origin, but whether they have demonstrated successful establishment in Canada.

[47] The Applicants further rely on *Marshall v Canada (Minister of Citizenship and Immigration)*, 2017 FC 72 [*Marshall*], which notes that "focus on treatment options in an applicant's home country was criticized by the majority in Kanthasamy" (para 37). The Applicants assert that the Officer's error in this regard was compounded by suggesting that they could relieve the stress associated with a precarious immigration status by returning to Greece.

[48] I agree with the Applicants that the Officer failed to provide any reasonable explanation as to why the establishment evidence is insufficient. As stated by Justice Boswell in *Baco v Canada (Minister of Citizenship and Immigration)*, 2017 FC 694, at paragraph 18:

> 18 The degree of an applicant's establishment in Canada is, of course, only one of the various factors that must be considered and weighed to arrive at an assessment of the hardship in an H&C application. The assessment of the evidence is also, of course, an integral part of an officer's expertise and discretion, and the Court ought to be hesitant to interfere with an officer's discretionary decision. However, the Officer in this case followed the same objectionable and troublesome path as in *Chandidas* and in *Sebbe*. It was unreasonable for the Officer to discount the Applicants' degree of establishment merely because it was, in the Officer's view, "of a level that was naturally expected of them... [and it is not] beyond the normal establishment that one would expect the applicants to accomplish in their circumstances." The Officer unreasonably assessed the Applicants' length of time or establishment in Canada because, in my view, the Officer focused on the "expected" level of establishment and, consequently, failed to provide any explanation as to why the establishment evidence was insufficient or to state what would be an acceptable or adequate level of establishment.

[49] The Officer's analysis of the Applicants' establishment in Canada is unreasonable.

C. *Did the Officer misconstrue evidence regarding the economic conditions in Greece?*

[50] The Applicants argue that the Officer erred by "misconstruing the overwhelming evidence of the dire economic circumstances in Greece" and by focusing instead on one report by "Freedom House" (elsewhere called "Freedom in the World") which suggested that certain aspects of the Greek economy were improving. Specifically, the Applicants' submitted "many articles, reports and letters from friends and family that detail the dire economic situation in Greece". The Applicants argue that these materials were not appropriately considered, and therefore the "officer's conclusions are untenable and not supported by the evidence."

[51] The Applicants also take issue with the conclusion of the Officer that there was insufficient evidence that Mr. Chortis' remittances to his parents were being used for medical care, despite letters from the Applicants' parents saying as much.

[52] With respect to this factor, I must agree with the Officer that the Applicants are asking the Court to reweigh the evidence, which is not the role of the Court.

D. *Was the Officer's assessment of the best interests of the child unreasonable?*

[53] The Applicants argue that the Officer erred by deciding, contrary to the evidence presented about the Greek education system, that Max could continue receiving treatment in Greece.

[54] Moreover, the Applicants argue that the Officer erred by failing to state what was in the children's best interest. According to the Applicant, the Officer should have applied the test from *Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166 [*Williams*], which holds that a best interest analysis should begin by first assessing what is actually in the child's best interests, and then weigh that against the other factor.

[55] While the Applicants acknowledge that subsequent jurisprudence has found it is not necessary to abide strictly by the *Williams* test, so long as the officer identifies and defines the best interests and gives them considerable weight, the Applicants maintain that the Officer strayed from what was permissible by focusing on "whether moving to Greece would be detrimental to their best interests", rather than identifying the best interests of the children.

[56] Again, I agree with the Applicants. The Officer concludes his decision concerning best interest of the children by stating that hardships for the children in Greece do not warrant an H&C exemption – thereby looking though a threshold lens which renders the Officer's decision both incorrect and unreasonable.

JUDGMENT in IMM-1553-17

THIS COURT'S JUDGMENT is that:

1. The application is granted and the matter is remitted to a different officer for reconsideration.

2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Richard Wazana	FOR THE APPLICANTS
Leanne Briscoe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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