Federal Court  Cour fédérale

Date: 20180222

Docket: IMM-812-17

Citation: 2018 FC 205

Ottawa, Ontario, February 22, 2018

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

ANN MARIE PHILLIPS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant is a 46-year-old citizen of Jamaica who arrived in Canada for the first time in 2008 on a temporary resident, multiple entry visa valid until December 31, 2011, to visit her parents and siblings who had recently immigrated to Canada. She subsequently visited Canada several times, most recently on November 1, 2009, with valid visitor status until April 30, 2010. Following expiration of her visitor status, the Applicant continued to reside in Canada and has remained here without status since then. Consequently, the Applicant applied for a permanent

residence visa from within Canada on humanitarian and compassionate [H&C] grounds in February 2016. In a decision dated February 1, 2017, a Citizenship and Immigration Officer decided that an exemption from the legislative requirements to allow the Applicant's application for permanent residence to be processed from within Canada would not be granted. The Applicant has now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [*IRPA*], for judicial review of the Officer's decision.

I. The Officer's Decision

[2] In refusing the Applicant's H&C application, the Officer reviewed the Applicant's written submissions as to her establishment in Canada as a *de facto* member of her brother's family, the best interests of the children [BIOC] for whom she provided care, and hardship in her country of origin.

[3] The Officer first considered the Applicant's establishment in Canada, including an Application to Sponsor, Sponsorship Agreement and Undertaking, and a Financial Evaluation provided by her brother, Jackson Phillips, indicating that he may be in a position to sponsor the Applicant. The Officer found that the Applicant may be financially supported in Canada by her brother. The Officer acknowledged that, although the Applicant had worked as a caregiver for her brother's four children while in Canada, she had provided little evidence to show that she was being routinely paid for this work. The Officer also considered an incomplete live-in caregiver application made by a potential employer of the Applicant in 2010, finding that this showed the Applicant was aware she required authorization to work in Canada yet knowingly continued to work for her brother and sister-in-law without authorization. The Officer thus

assigned little weight to the Applicant's employment history in Canada. The Officer noted that, while the Applicant has a large extended family network living in Canada, she had provided little documentary evidence to support her employment and integration into her community beyond her involvement with her extended family. In this regard, the Officer concluded:

> …I do not find that the applicant has significantly established herself in Canada over the past 7 years. I find that the applicant has resided in Jamaica for the majority of her life and I note that the applicant has some immediate family and extended family residing there. Overall, I find that the applicant's H&C submissions do not demonstrated [*sic*] that she has a significant degree of establishment in Canada. Therefore, I give the applicant's establishment in Canada little weight in this decision.

[4] The Officer next considered whether the Applicant could be considered a *de facto* member of her brother's family based on a situation of dependence. The Officer noted that the Applicant had a dual relationship with her brother as his sister and as an employee, finding that if she separated from her brother's family she may be able to find employment elsewhere, her brother would still be able to provide her with financial support, and she may continue to provide her brother's family with emotional support. While the Officer was satisfied that the Applicant may be considered a *de facto* member of her brother's family unit based on her financial and emotional needs being met in this family, the Officer found that she had other family members with whom she had significant ties who could also meet these needs, including her sister and parents in Canada and her young adult sons and six siblings in Jamaica.

[5] The Officer further found that there was little evidence to show her total dependence on her brother's family unit and that she would not meet the definition of a family class member. In the Officer's view, the Applicant's three sons may benefit from her presence in their lives, and

found little evidence that she would not be able to maintain a relationship from Jamaica with her family in Canada. The Officer noted that the Applicant did not have a negative immigration history and would be able to apply from Jamaica for temporary or permanent resident status in Canada in the future. The Officer thus gave equal weight to the family reunification factors that support her staying in Canada and those that support her return to Jamaica.

[6] The Officer then considered the best interests of the children of the Applicant's brother and the other children for whom she provided voluntary after school care. With respect to her brother's four children, aged 1 to 10 years, the Officer accepted that, while the Applicant had been present in their lives since infancy and birth and had played a significant role in their care and support, she had provided little evidence that she was integral to their lives. In so concluding, the Officer noted that the Applicant was listed only as the second emergency contact in her niece's school form after a Ms. Rachel Lee who was listed as the first emergency contact, and also that the children themselves had provided no materials such as letters or drawings to express their relationship with their aunt. In the absence of such evidence or any letters from the community demonstrating the Applicant's relationship with the children, the Officer was not satisfied that her relationship with the children was so close that she had become, as the Applicant submitted, "a second mother" to them. The Officer noted that the Applicant's sister-in-law had left her job in May 2015 and is a stay-at-home mother, and found the children to be in the care of their mother as well as in the care of the Applicant.

[7] The Officer concluded that, while her brother's children might experience some difficulties if separated from the Applicant, they would still be in the care of their mother, and

thus it was in their best interests to be in the care of their parents. With respect to the best interests of the children for whom the Applicant provided voluntary after school care, the Officer found that, in the absence of evidence to show that these children's basic needs would not be met without the Applicant's care, it was in these children's best interests to remain in the care of their parents.

[8] After assessing the best interests of those children for whom the Applicant provided care, the Officer turned to consider hardship in the Applicant's country of origin. The Officer found that, while the Applicant provided care to her brother's family in Canada, she also had family members in Jamaica who may also require her physical and emotional support, including her three sons. The Officer noted that her brother would still be able to support her if she returned to Jamaica, as could other family members living in Jamaica. Because of her familiarity with Jamaica, her language skills, and her education and work experience in Jamaica and in Canada, the Officer found that the Applicant would be able to support herself and her sons in Jamaica, and any hardship in returning to Jamaica would be mitigated by the presence of her extensive family network there.

[9] The Officer concluded the reasons for refusing the Applicant's H&C application by stating:

> I recognize that having to leave her relatives in Canada when she returns to Jamaica may be difficult, but their close relationship does not have to end, I find little evidence has been provided to suggest that her family in Canada would not be able to continue supporting her in Jamaica. Further, I note that the applicant will not be alone in Jamaica, I note that she continues to have a large network of family members residing there. I am satisfied that

> should the applicant return to Jamaica that she may be able to re-establish herself there.

II. Issues

[10] This application for judicial review raises one principal issue: was the Officer's decision unreasonable?

III. Analysis

A. *Standard of Review*

[11] An immigration officer's decision to deny relief under subsection 25(1) of the *IRPA* involves the exercise of discretion and is reviewed on the reasonableness standard (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44, [2015] 3 SCR 909 [*Kanthasamy*]). An officer's decision under subsection 25(1) is highly discretionary, since this provision "provides a mechanism to deal with exceptional circumstances," and the officer "must be accorded a considerable degree of deference" by the Court (*Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4, [2016] FCJ No 1305; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 15, [2002] 4 FC 358).

[12] The reasonableness standard tasks the Court with reviewing an administrative decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190. Those criteria are met if "the reasons allow the

reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708.

[13] Additionally, provided "the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome"; nor is it "the function of the reviewing court to reweigh the evidence": *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61, [2009] 1 SCR 339. The decision under review must be considered as "an organic whole" and the Court should not embark upon "a line-by-line treasure hunt for error" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd.*, 2013 SCC 34 at para 54, [2013] 2 SCR 458).

B. *Was the Officer's Decision reasonable?*

[14] The Applicant maintains that the Officer's decision was unreasonable. According to the Applicant, the Officer's decision was unintelligible, in that the Officer did not clearly conclude as to whether she was or was not a *de facto* member of her brother's family and failed to consider the Applicant's emotional dependency on her brother's family and his children's dependence upon her. In the Applicant's view, the Officer unreasonably failed to consider the evidence of the Applicant's family members in Canada concerning their ability and willingness to support her as against her stated inability to support herself and her young adult sons in Jamaica. The Applicant says the Officer also failed to consider the objective of family

reunification and it was unreasonable for the Officer to consider the family reunification factor to be neutral by balancing the evidence of the Applicant's family members in Canada with unfounded speculation about support she would receive from her family in Jamaica. The Applicant further says that, in finding she had family members in Jamaica and could therefore return to Jamaica and find employment without hardship, the Officer adopted an unreasonable approach and, in view of her age, education and long absence from Jamaica, the Officer's conclusion regarding her ability to re-enter the Jamaican workforce was speculative. The Applicant also says the Officer applied the wrong test not only for granting H&C relief by considering the standard of "unusual, undeserved, or disproportionate hardship", contrary to *Kanthasamy*, but also in assessing the BIOC by simply finding it was in the children's best interests to remain in the care of their parents instead of considering how the children would be affected by the Applicant's departure.

[15] The Respondent notes that H&C exemptions are exceptional and discretionary and, in this case, the Officer reasonably found there was no unusual, undeserved and disproportionate hardship based on consideration of all the H&C factors put forth by the Applicant. According to the Respondent, *de facto* family member status is limited to vulnerable persons and is not normally given to independent and functional adults, like the Applicant, who happen to have a close emotional bond with a relative residing in Canada; the willingness of family members outside of Canada to provide support is an important consideration. Based on the evidence, the Respondent says the Officer's decision to give equal weight to the Applicant's dependence on family members in Canada and those in Jamaica was not unreasonable, nor was it unreasonable for the Officer to find that *de facto* family reunification was a neutral factor. In the Respondent's

view, it was reasonable for the Officer to find that it was in the best interests of the children for them to remain in the care of their parents, especially in the absence of persuasive evidence to attest to the relationship between the children and the Applicant. The Respondent maintains that the Officer reasonably found that some of the hardships occasioned by the Applicant returning to Jamaica would be mitigated by the support of the Applicant's family there, and that neither the Applicant nor her sons were wholly dependent on the Applicant residing with her brother's family.

[16] I find the Officer's decision in this case to be reasonable because it is intelligible, transparent, justifiable, and is an acceptable outcome defensible in respect of the facts and law. In view of the documentation submitted by the Applicant with her H&C application, it was reasonable for the Officer to assign little weight to the Applicant's establishment in Canada since she had not established herself or integrated into her community beyond her involvement with her extended family.

[17] Moreover, the Officer's assessment and conclusion that the Applicant was not a *de facto* member of her brother's family here in Canada was justifiable and reasonable. This determination by the Officer is in line with this Court's decision in *Frank v Canada (Citizenship and Immigration)*, 2010 FC 270, 185 ACWS (3d) 1025, where the Court stated:

> [26] Where a *de facto* family relationship is said to exist, an important consideration in determining the merits of the H&C application is, to what extent the applicant would have difficulty in meeting financial or emotional needs without the support and assistance of the family unit in Canada.
>
> [27] According to section 6.4 of the Operational Manual IP-5, a *de facto* family member is one who does not meet the definition of family class member under the Act, but who is in a situation of

> dependence, which makes them a *de facto* member of a nuclear family in Canada. Among the examples provided is the example of a son, daughter, brother or sister who does not have a family of their own. Similarly, elderly relatives or persons who have resided with the family for a long time may be considered *de facto* family members.
>
> [28] Among the factors to be considered in the *de facto* family relationship are: the stability of the relationship, the length of the relationship, the ability and willingness of the family in Canada to provide support and any family outside of Canada who are able and willing to provide support (see section 12.6 of the Operational Manual IP-5).
>
> [29] What is clear from the foregoing is that *de facto* family member status is limited to vulnerable persons who do not meet the definition of family members in the Act and who are reliant on the support, both financial and emotional, that they receive from persons living in Canada. Therefore, *de facto* family member status is not normally given to independent and functional adults who happen to have a close emotional bond with a relative residing in Canada, as is the case in the present application.

[18] In my view, contrary to the Applicant's submission, the Officer did not apply the wrong test for granting H&C relief or in assessing the BIOC. It is clear from *Kanthasamy* that H&C considerations are not limited merely to hardship, and that an officer assessing an H&C application should consider the "equitable underlying purpose of the humanitarian and compassionate relief application process" (para 31). *Kanthasamy* further holds that:

> [33] The words "unusual and undeserved or disproportionate hardship" should therefore be treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). As a result, 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. The three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision. [emphasis in original]

[19] The Officer in this case did not, as the Applicant contends, assess the Applicant's H&C application through the lens of "unusual and undeserved or disproportionate hardship." On the contrary, in my view the Officer reasonably considered and assigned weight to all relevant humanitarian and compassionate considerations as raised by the Applicant. It was reasonable for the Officer to assign little weight to the Applicant's level of establishment in Canada, to ascribe equal or neutral weight to the family reunification factors in Canada and in Jamaica, and to find that hardship in returning to Jamaica would be mitigated by the presence of her extensive family network there. It is not the function of the Court to substitute its own view of a preferable outcome or to reweigh the Officer's assessment of the evidence.

[20] Moreover, the Officer in this case reasonably considered the relationship between the Applicant and the children, particularly in light of her evidentiary burden and the fact that she was not their primary caregiver or financial provider. The Officer's determination that the BIOC were to remain in the care of their parents was not unreasonable and does not run afoul of *Kanthasamy* where the Supreme Court instructed that the BIOC principle is "highly contextual" because of the multitude of factors that may impinge on a child's best interest; that the principle must be applied "in a manner responsive to each child's particular age, capacity, needs and maturity" (at para 35); and that:

> [39] A decision under s. 25(1) will…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] 4 F.C. 358 (C.A.), at paras. 12 and 31;

> *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 323 F.T.R. 181, at paras. 9-12. [emphasis in original]

[21] In my view, the BIOC in this case were reasonably and sufficiently identified, defined and examined by the Officer "with a great deal of attention" in light of the evidence. The Officer was obliged to be "alert, alive and sensitive" to the BIOC factor (see: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75, [1999] SCJ No 39). The Officer's reasons in this regard demonstrate that the Officer was alert, alive and sensitive to the BIOC in view of the evidence submitted by the Applicant, and I see no basis to disturb the Officer's findings on this issue.

IV. Conclusion

[22] The Officer's reasons for refusing the Applicant's H&C application are intelligible, transparent, and justifiable, and the decision falls within a range of possible, acceptable outcomes defensible in respect of the facts and law. The Applicant's application for judicial review is therefore dismissed.

[23] Neither party proposed a serious question of general importance to be certified under paragraph 74(d) of the *IRPA*; so, no such question is certified.

JUDGMENT in IMM-812-17

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed, and no serious question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET	IMM-812-17
STYLE OF CAUSE:	ANN MARIE PHILLIPS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 30, 2018
JUDGMENT AND REASONS:	BOSWELL J.
DATED:	FEBRUARY 22, 2018

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