Federal Court  Cour fédérale

Date: 20181025

Docket: IMM-1337-18

Citation: 2018 FC 1077

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 25, 2018

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

MOLEY JWENTZ LOUISSAINT
JACCIN LOUISSAINT

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, a father (Jaccin Louissaint) and his 11-year-old son (Moley Jwentz Louissaint), both originally from Haiti, are challenging the decision of a visa officer [the Officer]

who, on March 7, 2018, rejected the application for a permanent residence visa sponsored by the father on behalf of his son. Moley Jwentz wanted to immigrate to Canada in the family class.

[2] The Officer found that the child was excluded from this class because, contrary to what is required by paragraph 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations], the father omitted to declare him when his own application for permanent residence was processed a few years earlier. The Officer also found that the applicants were not entitled to an exemption under section 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [the Act], since they failed to establish that there were sufficient humanitarian and compassionate grounds, including those associated with the best interests of the child, to allow the application of Moley Jwentz despite his exclusion from the family class.

[3] Subsection 25(1) of the Act, it is worth recalling, gives the Minister of Citizenship and Immigration discretion to exempt a foreign national from the ordinary requirements of the Act if the Minister is of the opinion that such relief is justified by humanitarian and compassionate considerations, which include the best interests of the child (*Kanthasamy v Canada* (*Citizenship and Immigration*), 2015 SCC 61 at para 10 [*Kanthasamy*]).

[4] The applicants, who do not challenge Moley Jwentz's exemption from the family class for the reasons stated by the Officer, nevertheless argue that his decision regarding the lack of humanitarian and compassionate grounds to justify an exemption must be vacated. They criticize the Officer for failing or neglecting to take into account evidence that contradicts his findings in

this regard. In particular, they criticize him for not having applied the correct legal test when examining the best interests of the child.

[5] The situation of the applicants is somewhat peculiar. In 1986, the father, Jaccin, married Mariette Voltaire, who is still his wife today. The two of them had three sons, Ariel, Kelly and Gaslin, born in 1987, 1989 and 1992, respectively. All of them are now adults. Moley Jwentz was born on February 27, 2007. However, he is the offspring from an extra-marital affair. Despite this, the applicants maintain that Moley Jwentz, although he has always lived with his birth mother, was raised as if he was a full member of the family. In fact, Moley Jwentz states that he considers Mariette to be his second mother, and his half-brothers to be his brothers.

[6] Following the terrible earthquake that devastated part of the country in January 2010, including the home of Jaccin and Mariette and their three children, the latter left Haiti for Canada under a family reunification application filed by Jaccin's sister, who lives in Canada. This application was made as part of the expansion of Canada's family reunification program to those seriously affected by this earthquake. Jaccin, Mariette and the three children arrived in Canada on February 29, 2012, but Moley Jwentz stayed behind in Haiti with his biological mother, who, believing that he was still too young, did not want to be separated from him. Against Jaccin's wishes, she therefore refused to consent to her son coming to Canada with his father.

[7] It is for this reason, Jaccin argues, that Moley Jwentz was not included in Jaccin's sister's family reunification application. Moley Jwentz was therefore excluded from the family class

when, after receiving the approval of Moley Jwentz's mother, he and his father made the underlying application for permanent residence in 2017.

II. Discussion

[8] It is well established that when the validity of a decision to refuse an exemption under section 25 of the Act is challenged by way of judicial review, it must be examined on a standard of reasonableness (*Kanthasamy* at para 44). It is now also well established that in such a case, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "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). The reasonableness standard is a "highly deferential one" (*Garcia Rodriguez v Canada (Citizenship and Immigration)*, 2012 FC 437 at paras 9–10); the Court's role is not to reassess the evidence that was before the decision-maker and to substitute its own assessment of the evidence for that of the decision-maker, but to ensure that all elements have been taken into consideration (*Montesuma v Canada (Citizenship and Immigration)*, 2011 FC 918 at paras 33, 38).

[9] The respondent, who believes that the Officer did not err in law and that he considered all the evidence submitted by the applicants, and that his decision was reasonable, raises two preliminary exceptions. The first relates to the standing of Jaccin, who merely sponsored Moley Jwentz's application for a permanent residence visa. The respondent notes that in such a case, according to the case law of this Court, the person sponsoring an application for permanent

residence is not directly affected by a negative decision and therefore does not have standing to seek judicial review. He therefore asks that his name be removed from the style of cause.

[10] The applicants' counsel notes that Moley Jwentz is a minor and lives abroad and that his father's appointment as co-applicant is justified in the circumstances. I agree with her. The rules of our Court provide for the appointment of representatives for people under a legal disability (rule 115 of the *Federal Courts Rules*, SOR/98-106). Although it is not stated in the application for judicial review that Jaccin was appearing as such in this case, some flexibility is necessary in the circumstances. I will therefore allow him to remain named as a party to this proceeding.

[11] The second preliminary exception concerns the six affidavits filed by the applicants in support of this application for judicial review, namely, the affidavits from the applicants, Moley Jwentz's mother, Mariette, and Jaccin and Mariette's three children. The respondent submits that, in so doing, the applicants attempted to improve their evidence, which they were not allowed to do, since the judicial review has to be decided solely on the basis of the evidence before the Officer. He submits specifically that these affidavits go further than the letters signed by the affiants in support of Moley Jwentz's application for permanent residence, in particular as to the relationship that Jaccin, Mariette and their three children have allegedly maintained with Moley Jwentz since birth.

[12] The respondent is correct in stating that, barring exceptions, which do not apply here, this type of enhancement is not permitted (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20). However,

the respondent does not go so far as to ask that these affidavits be struck. Rather, he invites the Court to be cautious and to confine its analysis to the evidence before the Officer. This is what the Court will do. At the hearing, the applicants' counsel was, moreover, invited to rely only on the evidence before the Officer in support of her submissions, which she proceeded to do.

[13] Now, is the Officer's decision, inasmuch as it rejects the application for an exemption made under section 25 of the Act, unreasonable, as the applicants claim?

[14] I note that the Officer found that, except in financial terms, the evidence showing the strength of the relationship between Moley Jwentz and his father, Mariette and his three half-brothers seemed to him to be insufficient to justify an exemption from the usual requirements of the Act, in this case paragraph 117(9)(d) of the Regulations. In particular, finding that Moley Jwentz had always lived with his biological mother, the Officer determined that the evidence did not support the submission that Jaccin and his family have had a strong relationship with Moley Jwentz since his birth and that Jaccin has been in constant communication with him since leaving Haiti.

[15] As for the factor of the best interests of the child, the Officer noted that Jaccin wanted to take care of Moley Jwentz so as to provide him with a good education and a better future, and thus to remove him from the risks to which he is exposed in Haiti as a result of the endemic problems in this country. The Officer reiterated that Moley Jwentz had never really resided with his father and his family since he was born, and that the ties between him and his father, Mariette and his brothers are rather weak, and found that Moley Jwentz had always lived with his

biological mother, that he had access to education in his country of origin and that he did not suffer from any condition that could not be treated; the Officer therefore concluded that it was in Moley Jwentz's best interests that he live in Haiti in the care of his biological mother rather than going to live in Canada with a father with whom he has not lived before. Acknowledging that Canada offered Moley Jwentz better prospects, the Officer noted that this factor alone was not an unusual hardship.

[16] As the Officer noted, the application for an exemption in this case relies mainly, if not exclusively, on the submission that it is in the best interests of Moley Jwentz to leave Haiti to join his father in Canada.

[17] In all cases involving the best interests of the child, this factor, while not determinative, must be given considerable weight (*Motrichko v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 516 at para 21 [*Motrichko*]). Where, as here, the legislation specifically directs that the best interests of a child be considered, those interests are "a singularly significant focus and perspective" (*Kanthasamy* at para 40). Thus, in the analysis of the best interests of the child, those interests "must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence" (*Kanthasamy* at para 39). This exercise will be highly contextual and be dictated by the child's age, needs and capacity (*Kanthasamy*, at paras 34–36). At all times, the Minister's officer dealing with an application where the best interests of a child are raised must be "alert, alive and sensitive to them" (*Kanthasamy* at para 38). The officer must do more than state that he or she has been sensitive to these interests; the decision must reflect this (*Kanthasamy* at para 39).

[18] Lastly, when the child himself is the person making the application, the concept of "unusual and undeserved hardship" cannot be applied to the hardships that he or she alleges since, as the Supreme Court of Canada reminded us in *Kanthasamy*, in paragraph 41, "children will rarely, if ever, be deserving of any hardship".

[19] In this case, I cannot say that the Officer relied on an erroneous test, as claimed by the applicants, in finding that the fact that Canada could offer Moley Jwentz better prospects than his native country was not, in itself, an unusual "hardship". In my opinion, the use of the word "hardship" is not determinative when the Officer's decision is viewed as a whole. In particular, I see no finding to the effect that the application for an exemption must be rejected because Moley Jwentz did not establish that he faces "unusual and undeserved hardship".

[20] However, while I am aware of the deference owed under the reasonableness standard of review, the Officer did not, in my view, and as he should have, properly identify and define, and carefully examine Moley Jwentz's best interests in light of all the evidence on the record.

[21] Indeed, the Officer seems to have given a great deal of weight to the fact that Moley Jwentz did not live with his father, Mariette and his half-brothers "at any point" and allegedly did not develop a strong bond with Mariette and his three half-brothers. Yet it seems to me that the evidence before the Officer suggests a more nuanced picture. In fact, the letter from Moley Jwentz's biological mother, filed in support of the application for an exemption, states that Moley Jwentz's half-brothers came to pick him up [TRANSLATION] "every weekend" to "take him [to] their home" and that Moley Jwentz was therefore able to [TRANSLATION] "have both of

his parents and brothers in Haiti with him because he was well cared for and looked after until all of them left for Canada". The letter emphasizes Jaccin's [TRANSLATION] "constant" attachment to Moley Jwentz and calls Jaccin an [TRANSLATION] "exemplary and responsible father". It also highlights Mariette's attachment to Moley Jwentz, from the time he was born, saying that she was a second mother to him. The letter from the neighbour of Moley Jwentz's biological mother speaks of Moley Jwentz's [TRANSLATION] "unbelievably strong attachment" to his brothers, the fact that he can no longer live without them and his father, his distress over their absence and the miserable conditions in which he and his mother are forced to live, in a [TRANSLATION] "tiny, concrete room that is extremely hot; no water, no electricity".

[22] The Officer, whose duty it was to carefully examine all the evidence and to be "alert, alive and sensitive" to the situation of Moley Jwentz, does not explain how, in spite of this concrete evidence, he still drew the conclusion he did with respect to these two crucial elements of his decision. His failure to perform this duty undermines the reasonableness of the decision in my opinion.

[23] This error is significant in three respects. First, it raises a question about the actual nature of the bond between Jaccin and Moley Jwentz and about whether it might be sufficiently strong to justify reunification in spite of a violation of the Regulations (*Amponsah v Canada (Citizenship and Immigration)*, 2010 FC 974 at para 45). Second, it may explain why the Officer did not speak about the impact that non-reunification would have on Moley Jwentz, particularly in view of the importance of the father's presence in the life of a young boy, a factor that was raised in and supported by the evidence in the application for an exemption. After all, no one

disputes that Jaccin is the father of Moley Jwentz, and it is undisputable that Moley Jwentz considers him to be his father. Third, it allowed the Officer to find that it was in the best interests of Moley Jwentz to remain in Haiti with his mother without having to genuinely assess the other option available to the child, namely, living in Canada with his father and Mariette, and his half-brothers, who have all received university education thanks to their mother's and father's efforts.

[24] It is true that the evidence adduced in support of the application for an exemption in the form of statements from the cellular telephone service company with which Jaccin was dealing does not make it possible to ascertain the statement made in that application to the effect that since their arrival in Canada, Jaccin and his sons have kept in touch with Moley Jwentz by talking to him three times a week, given that the sampling of the statements covers only a brief period. At the hearing of this judicial review, the applicants' counsel indicated that Jaccin's telephone calls with Moley Jwentz were made primarily with calling cards to reduce their cost. However, the record is silent in this regard.

[25] In any event, as I have already stated, the Officer nevertheless had to consider the best interests of the child from the evidence as a whole. In particular, the Officer does not explain how this limited sampling made it possible to disregard the rest of the evidence concerning the relationship maintained with Moley Jwentz since Jaccin and his family are in Canada, namely,

a. Jaccin's steadfast and continuing contribution to Moley Jwentz's material needs;

b. the two trips made by Jaccin to Haiti, despite what can reasonably be expected to be the family's modest means (he is a health safety clerk in a food business, and Mariette is a patient care attendant in a seniors' residence), to visit Moley Jwentz, the purpose of the

second trip being to convince Moley Jwentz's mother to agree to her son joining Jaccin in Canada;

c. Ariel's annual trips to Haiti, during which he always visits Moley Jwentz;

d. Moley Jwentz's testimony on the calls he receives from his father and his half-brothers, and on how sad he feels when these calls end and also on how devastated he feels when Ariel leaves for Canada or when his father returned to Canada, particularly after his second trip; and

e. the biological mother's evidence on Moley Jwentz's reaction each time Jaccin returned to Canada after visiting him.

[26] It appears to me that the Officer also failed to examine the best interests of the child from Moley Jwentz's perspective, even though, once again, it was his duty to do so (*Etienne v Canada (Citizenship and Immigration)*, 2014 FC 937 at para 9).

[27] In summary, although the power exercised by the agent in this case was highly discretionary, he did not, in my view, make the rigorous examination required by the case law when the best interests of the child are at stake. I therefore believe that his decision should be vacated and the matter referred back to another officer for redetermination.

[28] Neither party proposed a question for certification for appeal. I am also of the opinion that no question for certification arises in this case.

JUDGMENT in IMM-1337-18

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is allowed;
2. The decision of the Officer of the Minister of Citizenship and Immigration, dated March 7, 2018, rejecting Moley Jwentz Louissaint's application for a permanent residence visa, sponsored by Jaccin Louissaint, is vacated and the case is referred back for determination by another officer of the Minister;
3. There is no question for certification.

"René LeBlanc"
Judge

Translation certified true
on this 1st day of November 2018

Johanna Kratz, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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