Federal Court  Cour fédérale

Date: 20211004

Docket: IMM-2146-20

Citation: 2021 FC 1026

[ENGLISH TRANSLATION]

Ottawa, Ontario, October 4, 2021

Present: The Honourable Mr. Justice Pamel

BETWEEN:

HOUIDA M. KOURANI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Houida M. Kourani, filed an application for permanent residence from within Canada on the basis of humanitarian and compassionate considerations [Ms. Kourani's application] under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. A senior immigration officer [the officer] refused the application in a decision

dated February 13, 2020. Ms. Kourani is seeking judicial review of this decision under subsection 75(1) of the IRPA.

[2] For the reasons that follow, the application for judicial review is allowed. I am of the opinion that the officer did not carry out a reasonable analysis of the children's best interests.

II. Facts

[3] Ms. Kourani is a Syrian and American citizen. She is the mother of two daughters, Luna, 15, and Mariam-Hiba, 12, who were both born in Canada. On April 13, 2010, Ms. Kourani divorced the father of her daughters, Mhd Eid Shamsi. Although she had been granted sole custody of her daughters under Syrian law, she continued to live with Mr. Shamsi so that her daughters would not be separated from their father.

[4] In September 2012, the girls went to live in Dubai with their father. Ms. Kourani joined them in December 2012. In June 2013, the entire family returned to Syria, but the political situation in Syria prompted Ms. Kourani to sign an authorization in August 2013 for her daughters to live in Canada with their father. Under this authorization, Ms. Kourani required unlimited access to her daughters and notification of their movements. During this time, from September 2013 to May 2014, Ms. Kourani was working in Dubai while waiting for Mr. Shamsi's authorization to return to live in Syria with her daughters.

[5] In June 2014, Ms. Kourani went back to Syria to join her children; she stayed there until February 2015, when her children and their father returned to Canada. Ms. Kourani joined them

a few weeks later. While in Canada, the family lived together until July 2015, when Mr. Shamsi asked Ms. Kourani to return to Syria, which she did; the children and Mr. Shamsi followed shortly thereafter and remained in Syria until September 2015, during which time both parents cared for the girls.

[6] The relationship between Ms. Kourani and Mr. Shamsi began to deteriorate in late 2015. In September 2015, the girls returned to Canada to live with their father, and Ms. Kourani joined them in November 2015. Ms. Kourani then travelled to the United States on November 30, 2015, to renew the rental agreement for her apartment. She had planned to return to her daughters in Canada in January 2016, but since Mr. Shamsi was no longer responding to her messages and calls, she returned in December 2015 without notifying him. Ms. Kourani says Mr. Shamsi was angry that she had returned to Canada early, and he had called the police, who told Mr. Shamsi that they could not force Ms. Kourani to leave. It was then that Mr. Shamsi allegedly took medication in front of the two girls, blaming Ms. Kourani.

[7] Following this incident, Ms. Kourani stayed at Mr. Shamsi's residence for a few days until she felt she had to leave because of a visit from youth protection workers.

[8] Mr. Shamsi then falsely led Ms. Kourani to believe, for almost two years, that she could no longer see her daughters because of a judgment rendered against her and an agreement with youth protection services. Believing that she needed Mr. Shamsi's permission to visit her daughters, Ms. Kourani moved to the United States so that she would be able to travel to Canada quickly if Mr. Shamsi allowed her to.

[9] Mr. Shamsi gave Ms. Kourani permission to visit her daughters in Canada on April 20, 2016, for a few days, and in Syria during the summer holidays in 2016. Mr. Shamsi also allowed Ms. Kourani to visit her daughters in Canada during the 2016–17 holiday season.

[10] Mr. Shamsi allegedly allowed Ms. Kourani to see her daughters in a café in March 2017 for just under an hour. After this meeting, Ms. Kourani allegedly fell in the parking lot when Mr. Shamsi accelerated his car while she was standing next to it. Following this incident, Mr. Shamsi allegedly allowed Ms. Kourani to stay with her daughters for approximately one week.

[11] In June 2017, Ms. Kourani returned to Syria thinking that her daughters would be joining her for the summer holidays. Instead, Mr. Shamsi decided to travel to Dubai with them, without informing Ms. Kourani. Assuming that her daughters were returning to school in Canada in September, Ms. Kourani returned to live in the United States, hoping that Mr. Shamsi would allow her to visit them.

[12] Having received no word from her husband, Ms. Kourani returned to Canada in October 2017 without notifying him. After trying to contact her daughters at their school, Ms. Kourani contacted youth protection services. At a meeting with youth protection services, she then learned that the Superior Court of Québec had rendered a default judgment against her on November 9, 2017, granting sole custody of her daughters to Mr. Shamsi. On November 28, 2017, Ms. Kourani filed an application to set aside the default judgment.

[13] On November 10, 2017, Mr. Shamsi allowed Ms. Kourani to see her two daughters for two hours at their Islamic religion teacher's home. Ms. Kourani obtained a Superior Court judgment on December 4, 2017, prohibiting Mr. Shamsi from travelling outside Canada with their daughters.

[14] On December 15, 2017, Ms. Kourani applied to the Superior Court of Québec for joint custody of her daughters. On the same day, Ms. Kourani and Mr. Shamsi signed an interim consent order restoring Ms. Kourani's access rights. On February 9, 2018, the Superior Court approved this consent and prohibited the parents from travelling with their daughters outside Quebec without the consent of the other parent or the Court. However, Ms. Kourani claims that Mr. Shamsi broke the agreement by not allowing her to see her daughters.

[15] On April 25, 2018, while in possession of a visitor's visa, Ms. Kourani applied for an exemption, on the basis of humanitarian and compassionate considerations under subsection 25(1) of the IRPA, from the requirement to file her application for permanent residence from outside Canada.

III. Senior immigration officer's decision

[16] On February 13, 2020, the officer dismissed the application based on humanitarian and compassionate considerations, finding that the factors raised by Ms. Kourani were not sufficient to justify an exemption from the IRPA criteria. In essence, the officer concluded that Ms. Kourani had failed to produce evidence that she had become established in Canada since

arriving in 2017, and that she had failed to satisfy him that it was in the best interests of Luna and Mariam-Hiba that she be granted permanent residence.

IV. Issue

[17] This application for judicial review raises only one issue: is the senior immigration officer's decision reasonable? Specifically, since Ms. Kourani does not challenge the officer's finding regarding her establishment in Canada, the issue is whether the officer erred in his analysis of the best interests of the children.

V. Standard of review

[18] I agree with the parties that the standard of review for applications on humanitarian and compassionate grounds under subsection 25(1) of the IRPA is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 44–45 [*Kanthasamy*]).

[19] The task of this Court is therefore to review the senior immigration officer's reasoning and determine whether the decision is based on "an inherently coherent and rational chain of analysis" that is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85).

VI. Analysis

[20] Under subsection 11(1) of the IRPA, a foreign national wishing to become a permanent resident must apply for and obtain a visa before entering Canada. Subsection 25(1) of the IRPA gives the Minister of Citizenship and Immigration [the Minister] discretion to exempt a foreign national from this requirement if the applicant establishes humanitarian and compassionate considerations that justify it (*Kanthasamy* at paras 10, 19). This exemption is an exceptional and discretionary measure that is entitled to deference from the Court (*Kanthasamy* at paras 93, 111).

[21] In their analyses, officers must consider the best interests of the child directly affected. The best interests principle is "highly contextual" and "must therefore be applied in a manner responsive to each child's particular age, capacity, needs and maturity" (*Kanthasamy* at para 35, citing *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 11; *Gordon v Goertz*, [1996] 2 SCR 27 at para 20 and *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at para 89).

[22] In their reasons, officers must demonstrate that the best interests of the child affected have been "well identified and defined" and examined "'with a great deal of attention' in light of all the evidence" (*Kanthasamy* at para 39). In analyzing the best interests of the child, officers must demonstrate that they have analyzed all relevant and material facts, including relevant evidence that contradicts their finding, and explain in their reasons why they do not accept it or why they give greater weight to other evidence (*Terigho v Canada (Minister of Citizenship and Immigration)*, 2006 FC 835 at para 9).

[23] In this case, I am not satisfied that the officer paid sufficient attention to the best interests of the children affected. In his reasons, the officer discusses the tumultuous history between the parents and the fact that the girls now live with their father. The officer correctly notes that Ms. Kourani was able to seek the assistance of the Quebec courts to set aside the default judgment obtained by Mr. Shamsi that granted him sole custody of the girls. However, the officer never considers that Ms. Kourani was in Canada at the time she was able to obtain access to her children.

[24] The officer examines in detail the evidence regarding the mother's application and her fears, namely that she wants joint custody of the children and that, if she is not in Canada to fight for it, her husband will find a way to take them away from her. However, the officer's attention is not focused on the needs of the children. Indeed, the officer finds Ms. Kourani's fear that Mr. Shamsi will take advantage of her absence to leave Canada with her daughters without notifying her to be unfounded because Ms. Kourani was able to obtain a Superior Court judgment that does not allow the parents to leave Quebec with their daughters without notifying the other parent.

[25] However, the analysis "must also involve a consideration that goes beyond the *status quo* and considers the best interests of the child on the basis of the situation that will follow a denial of the application, as well as a consideration of the child's life if the application is granted" (*Francois v Canada (Citizenship and Immigration)*, 2019 FC 748 at para 15). In this case, the officer did not define the best interests of the children in light of the evidence. In his analysis, the officer failed to consider the prospects for Luna and Mariam-Hiba if the application of their

mother, Ms. Kourani, were successful, which would enable Ms. Kourani to apply for joint custody.

[26] One would also have expected the officer to have considered the evidence of a power imbalance between the parents that favoured Mr. Shamsi, as well as his efforts at parental alienation. The evidence presented by Ms. Kourani demonstrates misconduct by Mr. Shamsi that is indicative of Mr. Shamsi's position of power. The officer failed to analyze the best interests of the children in light of these factors.

[27] The Minister submits that the onus was on Ms. Kourani to establish the presence of humanitarian and compassionate factors and that she failed to do so. The Minister believes that the officer did consider the evidence presented by Ms. Kourani to demonstrate Mr. Shamsi's misconduct, since the officer stated that he had examined the screenshots of her conversation with Mr. Shamsi.

[28] I cannot agree with the Minister's position. Although the decision does show that the officer took into account the screenshots of their conversations, the officer does not appear to raise Mr. Shamsi's misconduct that is apparent from this evidence, nor does he mention that Mr. Shamsi clearly expresses in the conversations a desire to keep Ms. Kourani out of their daughters' lives.

VII. Conclusion

[29] I allow the application for judicial review. I am of the opinion that the officer's decision is unreasonable because he failed to correctly identify, in light of the evidence, the best interests of the children affected.

JUDGMENT in IMM-2146-20

THIS COURT ORDERS as follows:

1. The application for judicial review is allowed.

2. The impugned decision is set aside, and the matter is referred to a different officer for reconsideration on humanitarian and compassionate grounds.

3. There is no question for certification.

"Peter G. Pamel"
Judge

Certified true translation
Johanna Kratz

FEDERAL COURT

SOLICITORS OF RECORD

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