Federal Court Cour fédérale

Date: 20230320

Docket: IMM-2424-22

Citation: 2023 FC 376

Ottawa, Ontario, March 20, 2023

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

SUSAN M MORAD ALMANSURY, MARIANA SELIM HANA AND DIANA SELIM HANNA

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants seek judicial review of a decision refusing their application to apply from within Canada for permanent residence on Humanitarian and Compassionate [H&C] grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] The Principal Applicant, Susan M Morad Almansury, is a citizen of Iraq who acquired permanent residence in the United States of America [U.S.] in 1998. The dependent Applicants, Mariana Selim Hanna and Diana Selim Hanna, are her daughters and are both U.S. citizens by birth.

[3] In 2011, the Applicants entered Canada. On September 15, 2011, they made a claim for refugee protection, which was unsuccessful.

[4] In 2017, the Applicants submitted their first H&C application. It was denied. It is the decision on their second H&C application made in 2022 that is under review.

[5] The Officer considered their establishment in Canada, adverse country conditions if they were to return to Iraq or the U.S., and best interest of the child [BIOC].

[6] In assessing establishment, the Officer found that there was little evidence supporting that the Principal Applicant remains employed as the letter submitted was dated April 21, 2020. Moreover, the Officer noted that the Principal Applicant relied on social assistance in the past and prior to her first job in 2018 she was unemployed for seven years after coming to Canada. The Officer concluded that the Principal Applicant provided little evidence that she is self-sufficient, and therefore, it was concluded that the Applicant’s economic establishment attracts little weight.

[7] The Officer acknowledged that over the 10 years the dependent Applicants have been in Canada, they likely developed relationships. The Officer found that attending school and church would allow the dependent Applicants to form and develop relationships. The Officer assigned some positive weight to these elements.

[8] The Officer assigned little weight to the Principal Applicant's contribution to the community as there was little evidence that supported her continuing or further community integration activities aside from being a church and parent volunteer.

[9] The Officer assigned little weight that the Principal Applicant would endure significant hardship should she be required to return to the U.S. The Officer found little evidence of the Principal Applicant's strong ties or high level of dependency with her family members in Canada. The Officer found that the Principal Applicant could stay in touch with her Canadian family through video calls and emails. Moreover, the Officer noted that family members from her first H&C application who lived in Michigan, U.S., were absent on the current H&C application. The Officer assumed that because of the lack of explanation as to why certain family members were omitted from the application, the Principal Applicant has familial ties in the U.S. and they would be able to assist her if required. Therefore, the Principal Applicant did not demonstrate that her level of establishment in Canada is significantly enhanced compared to when she was residing in the U.S.

[10] The Officer assigned little weight to the submission that the Principal Applicant has lost her permanent residence status in the U.S. The Officer stated that the reports attached to the

application were general and did not have an obvious reference to the Principal Applicant's personal circumstances. Moreover, the Officer found that there was no evidence that the U.S. government had determined that the Principal Applicant was no longer a legal permanent resident. As such, the Officer was not satisfied that the Principal Applicant would not be granted re-entry to the U.S. should she be required to return.

[11] The Officer acknowledges that the Principal Applicant would endure significant hardship if returned to Iraq, as she is a minority. However, the Officer relied on Canada's temporary suspension of removals to Iraq to conclude that the Principal Applicant would not be removed to Iraq in spite of a negative H&C application. Additionally, the Officer notes that there is a possibility of returning to the U.S., which would mitigate any potential hardships she may face if she were required to return to Iraq.

[12] The Officer found that there was little evidence Mariana is dependent on her mother for support; however, she considered that if Mariana was both financially and emotionally dependent on her mother, then it would be in the best interest of 19-year-old Mariana to remain with her mother should she return to the U.S. The Officer acknowledged that Mariana has developed ties in Canada and has been attending school since arriving in Canada in 2011 and that it is "more than likely during the years that they have resided here that they have developed friendships and established themselves within the community."

[13] Regarding 16-year-old Diana, the Officer found that it would be in the best interest for her to remain in the care of her mother. The Officer found little if any evidence that

demonstrated that Diana would not have similar educational opportunities in the U.S. Furthermore, the Officer found little evidence that Diana would endure hardship should she be required to attend school in the U.S. The Officer acknowledged that Diana established herself in Canada to some degree and that severing ties with friends and community would amount to some hardship. Nonetheless, the Officer concluded that there would be no barrier should she be required to re-establish herself in U.S.

[14] The Officer's conclusion was that "keeping the family unit together and having both dependents remain with their mother is in the best interest of the family. There is little evidence submitted which demonstrates that the dependents are immensely integrated into Canadian society that there would be undue hardship should they be required to re-integrate their lives in the U.S. Therefore, I find that on a balance of probabilities, I am not satisfied that Diana would endure undue hardship if she were to reside with her mother in the U.S."

[15] In summary, the Officer found that the Principal Applicant provided little evidence of establishment in Canada, was unable to substantiate that she abandoned her permanent resident status in the U.S., and "[w]hile her two dependent children have established themselves in Canada, there was little evidence submitted that they are both significantly integrated into Canadian society that having to return to the U.S. would cause a hardship and barriers in re-establishing themselves." Based on these conclusions, the Officer found that granting the requested exemption is not justified based upon H&C factors.

[16] The only issue before the Court is whether the Officer's decision is reasonable.

[17] The Court is satisfied that the Officer's findings relating to establishment in Canada and adverse country conditions were reasonable. However, the finding on BIOC is problematic.

[18] The Applicants submit that the Officer failed sufficiently to consider the "best interests" of the two children by adopting a hardship test that resulted in an unreasonable finding. They further submit that the Officer's reasons do not explicitly mention what is in the "best interests" of the children or the benefits of their non-removal from Canada after over 11 years of continuous residence. Moreover, they say that the Officer fails to consider the negative consequences upon their removal to the U.S., the educational disruption, and separation from family and community in Canada.

[19] The Applicants rely on *Perez Rosales v Canada (Minister of Citizenship and Immigration)*, 2022 FC 201 at paras 20 and 21, where Justice Rochester held that it is incorrect and unreasonable to assess the BIOC through the lens of hardship, she stated:

> [20] Damaris' interests, however, were neither mentioned nor addressed by the Officer in the Decision. Rather, the Officer focused on the hardship, or lack thereof, that Damaris could experience should she move to Mexico. This Court has cautioned that hardship should not be conflated with a BIOC analysis (*Osun v Canada (Citizenship and Immigration*), 2020 FC 295 at para 23) or that an officer should not import a hardship threshold into their BIOC analysis (*Trach v Canada (Citizenship and Immigration)*, 2015 FC 282 at para 38). My colleague Justice Diner states that following *Kanthasamy*, "it is incorrect to consider [the child's] best interests in the context of hardship" (*Taylor v Canada (Minister of Citizenship and Immigration*), 2016 FC 21 at para 24).
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> [21] I find that Damaris' circumstances were viewed and assessed through the lens of hardship, and thus the Officer failed to sufficiently consider Damaris' overall best interests as required by *Kanthasamy*. In doing so, the Officer also minimized Damaris' interests (*Lin* at para 54). Consequently, the Decision is

> unreasonable. Having so found, I find it is unnecessary for me to address the remaining issues raised by the Applicants.

[20] The Respondent submits that the Officer did not import a hardship threshold into her BIOC analysis, she merely considered hardship in the BIOC analysis as was done in *Zlotosz v Canada (Minister of Citizenship and Immigration)*, 2017 FC 724 [*Zlotosz*] at paras 20-22.

> [20] A brief review of *Kanthasamy* on this point is worthwhile. There, the majority found that the concept of "unusual and undeserved or disproportionate hardship" cannot be determinative in the H&C analysis (*Kanthasamy* at paras 31, 32 and 41; see also *Nguyen v Canada (Citizenship and Immigration)*, 2017 FC 27 at paras 26-28 [*Nguyen*]). As stated by the SCC at para 33 of *Kanthasamy*, what decision-makers cannot 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 [emphasis in original]" (see also: *Ordonez v Canada (Citizenship and Immigration)*, 2017 FC 135 at para 19 [*Ordonez*]).
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> [21] An assessment of hardship can, therefore, form part of the BIOC assessment, even if it cannot be used as a threshold that requires demonstrating that the hardship imposed on a child must reach a particular level. In my view, a fair reading of *Kanthasamy* and the jurisprudence of this Court interpreting it, shows that there is no merit to the Applicants' submission that the Officer applied a wrong or incorrect test. Indeed, hardship a child may or may not face can support a favourable outcome based on BIOC (*Kanthasamy* at para 41; *Liang v Canada (Citizenship and Immigration)*, 2017 FC 287 at para 26 [*Liang*]; *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 12.).
>
> [22] Here, the Officer observed that the Applicants did not show the child would be "adversely and significantly affected". This does not equate to using the wrong lens identified in Kanthasamy. It is perfectly clear that while the Applicants would have preferred that the Officer come to a different conclusion, the Officer's approach was justifiable based on the evidentiary record presented. The Federal Court of Appeal has rejected the notion that consideration of the BIOC simply requires that the officer

> determine whether the child's best interests favours non-removal, as this will almost always be the case (see for instance *Louisy v Canada (Citizenship and Immigration)*, 2017 FC 254 at para 11 [*Louisy*]; *Garraway v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 286 at paras 46-47; *Nguyen* at para 7). Rather, the law is clear that the onus rests squarely with the applicant to provide sufficient evidence on which to exercise positive H&C discretion. Here, the Officer applied a contextual approach to BIOC and found that the Applicants failed to provide such evidence.

[21] In my view, the present decision differs from that in *Zlotosz*. In *Zlotosz*, there was no use of the word "hardship" rather there was a finding that the evidence failed to establish that the child would be "adversely and significantly affected." Here, the Officer uses the word "hardship" frequently, as illustrated by the following excerpts:

> There is also little if any evidence provided by PA which would substantiate that Diana would endure hardship should she be required to attend school in the U.S. I acknowledge that Diana has established herself in Canada to some degree and having to sever ties with friends or her community would amount to some hardship. …
>
> … There is little evidence submitted which demonstrates that the dependents are immensely integrated into Canadian society that there would be undue hardship should they be required to re-integrate their lives in the U.S. Therefore, I find that on a balance of probabilities, I am not satisfied that Diana would endure undue hardship if she were to reside with her mother in the U.S.
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> Overall, I find that the PA has provide very little documentary evidence of hardship that she may endure if she were to return to the U.S. The PA provided little evidence of establishment in Canada. While she has some familial ties in Canada, she also has a similar family support system in the U.S. The PA was also unable to substantiate that she has abandoned her permanent resident status in the U.S. and has not demonstrated that she could not return should she be required. While her two dependent children have established themselves in Canada, there was little evidence submitted that they are both significantly integrated into Canadian society that having to return to the U.S. would cause a hardship and barriers in re-establishing themselves.
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> [emphasis added]

[22] In my view, contrary to the direction provided in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 39-41, the Officer imported a hardship threshold into the BIOC analysis.

[23] Moreover, the Officer found that there was little evidence that both of the dependent Applicants were "significantly integrated into Canadian society" that having to return to the U.S. would cause hardship. This finding suggests a "significantly integrated into Canadian society" threshold that has to be met in a BIOC analysis. This is not a valid consideration.

[24] Both of these concerns renders the decision unreasonable.

[25] No question was proposed for certification.

JUDGMENT in IMM-2424-22

THIS COURT'S JUDGMENT is that the Respondent is amended with immediate effect to the proper name - Minister of Citizenship and Immigration – the application is allowed, the H&C application is to be reassessed by a different officer, and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2424-22
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