Federal Court  Cour fédérale

Date: 20111222

Docket: IMM-3785-11

Citation: 2011 FC 1512

Ottawa, Ontario, December 22, 2011

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

FATOS VASHA, MAGGIE VASHA,
AND JASON PERPARIM VASHA

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for judicial review of a decision made by Pre-Removal Risk Assessment [PRRA] Officer S. Neufeld [the officer], dated April 26, 2011, refusing the Applicants' application for permanent residence from within Canada based on humanitarian and compassionate [H&C] considerations under subsection 25(1) of the IRPA.

I. Facts Alleged by the Applicants

[2] Fatos Vasha [the principal Applicant], a citizen of Albania, entered Canada on July 3, 2006, submitting a refugee claim on July 19, 2006. His US-born children, twelve year old daughter Maggie Vasha and eight year old son Jason Perparim Vasha [the minor Applicants], entered Canada on October 1, 2006, and their refugee claims were submitted on October 27, 2006. The Applicants' claims were eventually refused on March 20, 2009 and their application for judicial review was denied on July 2, 2009.

[3] In the meantime, on January 15, 2009, the Applicants filed an application for permanent residence on H&C grounds. In a letter dated June 11, 2009, the Applicants' counsel remitted their application, basing it on the Applicants' establishment in Canada (Applicants' Record [AR] at 18). The application was examined by the officer and the negative decision was rendered on April 26, 2011.

II. Impugned Decision

[4] The officer's decision (AR at 8-14) notes that the Applicants must have shown satisfactory evidence that their personal circumstances were such that the hardship of not being granted the requested exemption would be unusual and undeserved, or disproportionate. The following factors were considered in the application: hardship or sanctions upon return to Albania; family or personal relationships that would create hardship if severed; best interests of the children; degree of establishment in Canada; and ties or residency in any other country. Having read and considered all information and evidence presented by the Applicants and their counsel as well as publicly available documentation, the officer did not find evidence supporting a claim that returning to Albania would amount to unusual and undeserved, or disproportionate hardship.

[5] With regard to the best interests of the children, the issue at the heart of this application for judicial review, the officer noted that the minor Applicants are citizens of the US and have the right to return there if that is what the parents determine to be feasible (AR at 13). The officer was cognizant of the fact the minor Applicants' mother lived in the US illegally. The officer stated however that this would not prevent the minor Applicants from returning there, and any alternate decision "would be subject to the will of the children's parents" (AR at 10).

[6] The officer continued her analysis of the children's interests by reiterating a full paragraph from the 2010 Human Rights Report on Albania [Albania Report], prepared by the US Department of State and available online. The paragraph in question describes the availability of schooling for children in Albania, noting that the law provides for nine years of free education and that school attendance is mandatory through the ninth grade or until age 16 (AR at 322, Albania Report at 19). The decision then notes that the minor Applicants are attending school in Canada and that their ages, the length of their stay in Canada, and a letter written by one of the children have been assessed. The officer's final conclusion however, is that "[a]lthough not required to return to Albania with the applicant, the documentation before me does not support a view that the [minor Applicants] would face an unusual and undeserved, or disproportionate hardship if they were to leave Canada to accompany their father to Albania" (AR at 13).

III. Parties' Positions

[7] The Applicants argue that the officer failed to consider the relevant criteria for the assessment of their application, was not alert to the children's interests, and thus rendered an unreasonable decision. They first emphasize that the departmental guidelines for the processing of applications for ministerial relief, *IP-5 Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds* [Guidelines IP-5], state that when considering the best interests of any

children affected by an application, officers should take into account the following factors pertinent to this case: the age of the child; the level of dependency between the child and the H&C Applicant; the degree of the child's establishment in Canada; the child's links to the country in relation to which the H&C assessment is being considered; the conditions of that country and the potential impact on the child; and the impact to the child's education (Guidelines IP-5 at 5.12).

[8] The applicants then refer to the Federal Court of Appeal's decision in *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FCA 103 at para 58, [2011] FCJ 407, which states that, "[w]here the guidelines specifically direct an officer to consider whether certain identified conditions will result in 'unusual, undeserved or disproportionate hardship', it is appropriate to conclude that the failure to consider those conditions or the failure to consider their effects upon the applicant is an indication of an unreasonable decision." In this case, the Applicants allege the officer ignored or did not properly consider the minor Applicants' links to Albania (neither was born there and they speak little to no Albanian), the education available to them there, and the impact it would have on them. Specifically, the Applicants highlight evidence in the Albania Report referred to by the officer which they argue has been ignored (AR at 322, Albania Report at 19):

> In general parents must register their children in the same community where they are registered. However, according to the Children's Rights Center of Albania (CRCA), children born to internal migrants or those returning from abroad frequently had no birth certificates or other legal documentation and, as a result, were unable to attend school. This is a particular problem for Romani families as well, who often marry young and fail to register their children.
>
> The law provides for nine years of free education and authorizes private schools. School attendance is mandatory through the ninth grade or until age 16, whichever comes first; however, in practice many children left school earlier than the law allowed to work with their families, particularly in rural areas. Parents must purchase supplies, books, uniforms, and space heaters for some classrooms,

> which was prohibitively expensive for many families, particularly Roma and other minorities. Many families also cited these costs as a reason for not sending girls to school [emphasis added].

The Applicants argue that the officer failed to consider whether, as US citizens, the minor applicants would have the documentation necessary to register for school. They further submit that the officer failed to consider whether, due to the financial requirements that would arise from their deportation to Albania, the minor Applicants could afford to attend school. The only other alternative, sending them back to the US and to a mother liable for deportation, would leave them at risk of being placed in foster care. Whichever option is considered, it is argued the minor Applicants will be put in a situation of undeserved and disproportionate hardship.

[9] By failing to take this evidence into consideration and not considering the factors listed in the Guidelines IP-5, the Applicants argue the officer has not been truly sensitive, alert, and alive to the best interests of the children, and has failed to properly identify and give these interests the careful attention required by the courts (*Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at paras 32 and 52, [2002] FCJ 1687 [*Hawthorne*] and *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at paras 12 and 31, [2002] FCJ 457 [*Legault*]).

[10] Addressing the analysis of the best interests of the minor Applicants, the Respondent is of the view these were adequately assessed in the circumstances, that the officer was in fact sensitive, alert, and alive to the best interests of the children, that the interests of the minor Applicants cannot be determinative in an H&C decision, and that it is up to the officer to determine what weight must be given to them in the circumstances (*Legault*, above, at para 12). The Respondent also adds that whether the minor Applicants had the necessary documentation to register in the Albanian school

system or the financial exigencies required to be able to attend school in Albania was never raised in their submissions to the officer and the onus was on them to bring this forward (*Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] FCJ 158 [*Owusu*]).

[11] In reply, the Applicants argue that the officer took the initiative of including the Albania Report without advising the Applicants and that in fact, the edition of the Albania Report relied on was not issued until April 8, 2011, after the application had already been submitted. They argue the respondent cannot therefore rely on their failure to invoke the issues made apparent by the Albania Report. During the hearing before this Court, it was also argued that including the Albania Report without providing the Applicants a chance to respond to it was a breach of procedural fairness.

IV. Issue and Standard of Review

[12] This Court is asked to review the officer's decision to refuse the Applicants' H&C application and more specifically, the officer's analysis of the minor applicants' best interests. The applicable standard of review in such a case is reasonableness (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 57-62, [1999] SCJ 39 [*Baker*]). This Court will therefore consider whether the officer's 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 [*Dunsmuir*]).

[13] With respect to the Albania Report relied upon by the officer, which was issued only after the filing of the applicants' submissions, this is clearly a question of procedural fairness reviewed on a standard of correctness (*Pathmanathan v Canada (Minister of Citizenship and Immigration)*, 2009 FC 885 at para 24, [2010] 3 FCR 395).

V. Analysis

[14] It is well established law that the onus is on the applicant to bring to the officer's attention any evidence relevant to H&C considerations (*Owusu*, above, at paras 5 and 8, [2004] FCJ 158; *Nguyen v Canada (Minister of Citizenship and Immigration)*, 2005 FC 236 at para 8, [2005] FCJ 281 [*Nguyen*]; *Patel v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ 54 at para 10, 36 Imm LR (2d) 175) [*Patel*]). The Guidelines IP-5, on which the applicants rely on heavily in their submissions, also state that "[t]he onus is entirely upon the applicant to be clear in the submission as to exactly what hardship they would face if they were not granted the requested exemption(s). Officers do not have to elicit information on H&C factors and are not required to satisfy applicants that such grounds do not exist" (Guidelines IP-5 at 5.7).

[15] The June 11, 2009 one and a half page letter from the Applicants' counsel indicated the H&C application was based on the Applicants' establishment in Canada. The letter also spoke of undue hardship that would be caused on the family if they were returned to Albania, specifically the impact on the minor Applicants, who as indicated in the letter, are both American citizens that have never resided in Albania and whose knowledge of the Albanian language is minimal. The letter further states that returning them to the US is not an option since neither parent has legal status there (AR at 18-19).

[16] In analyzing the best interests of the children, the officer examined the Albania Report, which had not been submitted or referred to by the Applicants. The report includes a specific section on the situation of children in Albania. In the decision, the officer reiterated, word for word, information contained in the third paragraph of the section on children. This included information on the fact the law provided nine years of free education and that school attendance was mandatory through the ninth grade or until the age of sixteen. It also included information that parents must

purchase supplies, books, uniforms, and space heaters for some classrooms, prohibitively expensive for many families, and that many families cited these costs as a reason for not sending girls to school.

[17] The Applicants also point out that in the paragraph directly preceding the one noted by the officer, it is indicated that children born to those returning from abroad frequently had no birth certificate or other legal documentation, which made them unable to attend school. They stress that this information was not considered by the officer. Indeed, the decision makes no mention of this information or the possibility the minor applicants could not have the required legal documentation. I note however, that the minor applicants were born in the US and have submitted into evidence before the officer copies of their birth certificates (AR at 43 and 44) and passports (AR at 47-49).

[18] In their submissions, the Applicants also invoked the risk that, were they to be sent back to the US, the minor Applicants could be placed in foster care if their mother was eventually deported. They argued this is an additional source of hardship that was ignored by the officer. This Court cannot agree with this argument. The decision makes clear the officer was aware of the mother's status in the US and that removing the children to their country of birth may only be a temporary solution. If their mother were to be deported, the children would surely follow their parents to Albania unless the parents decided otherwise. In essence, this is a decision the parents must make.

[19] That being said, this Court must determine if the officer reasonably found that the children could accompany their father to Albania, be it now or later if their mother is eventually deported from the US. In light of the evidence included in the Albania Report and the officer's analysis considering the best interests of the children, this Court finds that the officer met the requirement of

identifying and defining the interests of the children, and examining them with necessary attention (*Hawthorne*, above, at para 32 and *Legault*, above, at paras 12 and 31).

[20] The Applicants also argued that the officer's reliance on the Albania Report, issued only after their submissions, was a breach of procedural fairness. However, when faced with such a certified question, the Court of Appeal has stated in *Mancia v Canada (Minister of Citizenship and Immigration)*, [1998] 3 FC 461 at para 27, [1998] FCJ 565 [*Mancia*] that:

> [W]ith respect to documents relied upon from public sources in relation to general country conditions which became available and accessible after the filing of an applicant's submissions, fairness requires disclosure by the Post Claims Determination Officer where they are novel and significant and where they evidence changes in the general country conditions that may affect the decision [emphasis added].

In the present circumstances, it cannot be said that the information in the Albania Report was novel, significant, or evidence of changes in the general country conditions as both the 2008 and 2009 US Department of State Human Rights Reports on Albania contained the very same information. The fact the officer cited the newly issued Albania Report, which simply repeated information already available to the applicants, does not constitute a breach of procedural fairness (*Mancia* at para 26).

[21] If the Applicants were truly concerned with any lack of necessary documents to register the minor applicants in school or of any financial limitation issues which they now raise before this Court, the onus was on them to submit such arguments and evidence to the officer (*Owusu*, above, at paras 5 and 8; *Nguyen*, above, at para 8; *Patel*, above, at para 10; Guidelines IP-5 at 5.7). As a result, I must conclude the officer's decision falls within a range "of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47), the decision was reasonable, there was no denial of procedural fairness, and the application is denied.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is denied. No question is certified.

"Simon Noël"

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Judge

FEDERAL COURT

SOLICITORS OF RECORD

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