Federal Court  Cour fédérale

Date: 20130301

Docket: IMM-2318-12

Citation: 2013 FC 216

Ottawa, Ontario, March 1st, 2013

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

BEDRI DINA, DIJANA DINA AND ANDI DINA

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants challenge the legality of a decision made on January 27, 2012 by G. Van Fleet, Senior Immigration Officer [officer] of Citizenship and Immigration Canada [CIC] refusing their application for permanent residence based on humanitarian and compassionate [H&C] grounds. The officer concluded that the applicants would not suffer unusual and undeserved or disproportionate hardship if applying for permanent residence from outside of Canada.

[2] The principal applicant, Mr. Bedri Dina, is a citizen of Kosovo. His wife, Ms. Dijana Dina, and son, Andi Dina, are also citizens of Kosovo and are included in this application for judicial review. The applicants obtained temporary resident permits and arrived in Canada on February 29, 2008. They claimed refugee protection ten days later. Their claim was denied on February 21, 2011.

[3] The applicants subsequently submitted an H&C application in July 2011 and a Pre-Removal Risk Assessment [PRRA] application in August 2011. The PRRA application was premised on the alleged risk of harm the applicants faced from KFOR opponents who threatened to kill the principal applicant's family based on his association with the international forces. The H&C application raised the grounds of degree of establishment in Canada, best interests of the child, hardship in leaving Canada, and risk in Kosovo.

[4] The PRRA and the H&C applications were determined by the same officer who decided concurrently, in separate decisions issued on January 27, 2012, that the applicants were not at risk and that their case did not justify an exemption under s 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Despite the fact that the applicants were removed from Canada on July 5, 2012, the parties agree that the present application for judicial review is not moot and ask this Court to decide same on its merit.

[5] Before this Court, the applicants allege that: (1) the officer applied the wrong test in his analysis of undue hardship in failing to properly consider the issue of risk; and (2) the officer erred by applying the test for undue hardship in the analysis of the best interests of the child. These issues attract the standard of correctness as decided by the Court in *KMP v Canada (Minister of*

Citizenship and Immigration), 2011 FC 981, at para 18 [*KMP*]. The parties agree that both issues are determinative.

[6] The Federal Court of Appeal reiterated in *Canada (Minister of Citizenship and Immigration) v Hawthorne,* 2002 FCA 475, [2003] 2 FC 555, that the best interests of the child are not necessarily determinative. Referring to the non-binding character of the guidelines mentioned in chapter IP5 of Immigration Manual, Justice Décary makes this important cautionary remark at para 9: "It is obvious … that the concept of 'underserved hardship' is ill-suited when assessing the hardship on innocent children. Children will rarely, if ever, be deserving of any hardship."

[7] In the case at bar, the officer apparently gave "significant positive consideration" to the best interests of the child factor. Andi Dina was 17 years old at the time of assessment. He was attending high school, had completed a leadership program, and had won various awards from his school. He was an award-winning soccer player, a talented piano player, and he worked part-time at No Frills. There is no question that Andi has successfully adapted to life in Canada and that there will be much less opportunities for him in Kosovo, where the general country conditions are difficult economically and politically, and there are many conflicts that make life unsafe especially for the younger generation.

[8] Indeed, in the impugned decision, the officer finds that returning to Kosovo will cause psychological hardship and suffering to Andi because of conditions in the country, and he comes to this conclusion despite the fact that "he would likely have the support of his parents and siblings to ease the transition." For these reasons, the officer finds that "[o]verall, based on the information

before [him], … it would be in Andi's best interests to remain in Canada while applying for permanent resident status."

[9] However, despite these specific findings of hardship in the case of Andi, who was still a minor child at the time of the assessment, the officer nevertheless refuses the H&C application on the ground that "[i]ndividually and globally, the elements presented by the applicants [this includes Andi] in this case are insufficient to establish that they would suffer unusual and undeserved or disproportionate hardship if they apply for permanent residence from outside Canada" [my emphasis]. The general rationale provided by the officer to support this conclusion is that "[t]he potential hardship they [including Andi] would experience appear to be similar to the degree of hardship experienced by others who are asked to apply for permanent resident status from abroad."

[10] It is apparent in reading the reasoning of the officer that the officer erred in incorporating a burden of unusual, undeserved, or disproportionate hardship in his assessment of the hardship suffered by Andi, whose best interest is to remain in Canada, while finding that the degree of his hardship "would appear to be similar to the degree of hardship experience by others who are asked to apply for permanent residence status from abroad."

[11] Whether the reasoning of the officer is qualified as an error of law or as a capricious or arbitrary finding, I am satisfied that same constitutes a reviewable error and this suffices to grant the application: *KMP*, above, at paras 25, 27, 34, 35 and 43; *Arulraj v Canada (Minister of Citizenship and Immigration)*, 2006 FC 529 at para 15. Therefore, it is not necessary to decide today if the officer also applied the wrong test in his evaluation of the hardship related to risk factors in light of

the amendments introduced in 2010 and the interpretation given by the Court to the new subsection 25(1.3) of the IRPA (*Caliskan v Canada (Citizenship and Immigration)*, 2012 FC 1190; *Serrano Lemus v Canada (Citizenship and Immigration)*, 2012 FC 1274).

[12] Counsel agree that this case does not raise a question of general importance.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed. The impugned decision is set aside the matter referred back for redetermination by another immigration officer of CIC. No question is certified.

"Luc Martineau"
Judge