

Federal Court



Cour fédérale

Date: 20140319

Docket: IMM-1914-13

Citation: 2014 FC 266

Calgary, Alberta, March 19, 2014

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**GOTTFRIED CLAUS HERMANN
PATRICIA ANN HERMANN
MARC NICKLAS HERMANN
NATHAN EMMANUE HERMANN**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] At the conclusion of the hearing, I informed the parties that the decision of a senior immigration officer, dated February 12, 2013, determining the Applicants should not be granted a humanitarian and compassionate exemption under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the H&C application] would be set aside. These are my reasons for that conclusion.

[2] The Applicants are a family of German citizens. They entered Canada in April 2007 and claimed for refugee protection claiming that they were subject to persecution in Germany because they home-school their twin boys, Marc and Nathan, both of whom are now 17 years of age.

[3] Home-schooling has been illegal in Germany since it was outlawed in 1938 by Hitler, reportedly because the Nazi state wished to have complete control of young minds. In 2006, the Applicants were reported to German authorities. In their refugee protection claim, the family claimed they feared separation from their children, imprisonment, or confinement of their children to a psychiatric institution. The refugee claim and their subsequent leave application were both dismissed.

[4] On June 18, 2011, the Applicants filed their H&C application for permanent residence. They submitted the father would qualify as a skilled worker, as he had previously worked as an electrician, and if they were forced to apply from outside Canada, they would face hardship. Specifically, they submitted hardship based on a number of allegations, including that (1) they would face imprisonment on re-entering Germany, because they had received a letter “threatening to take their boys away from them,” (2) home-schooling is illegal in Germany, and the families who home-school are subject to persecution, (3) the children may be at risk in public school because of their weak health, and (4) the public school system would not satisfy the family’s religious, ethical and moral education.

[5] The officer accepted that the children had been and continue to be home-schooled, and that home-schooling is illegal in Germany. It was further accepted that German authorities may impose fines, prison time, and custody removal due to continuing home-schooling.

[6] The officer cited The Relocation Provision in Inland Processing Manual 5 – *Immigrant Applications in Canada Made on Humanitarian or Compassionate Grounds*:

An applicant for H&C consideration may face hardship in one part of the country of origin, but might reasonably be expected to seek relief at some other locality within that country. ...

Relocation outside the country of citizenship may also be an option for persons who are citizens of countries that have entered into bilateral or multilateral agreements with neighbouring countries and which permit mobility with respect to travel, extended sojourn, employment and study e.g. the Schengen Agreement in the European Union (EU). There are other such regional agreements.

[7] The officer noted Germany and the United Kingdom [the UK] have such a mobility agreement. The officer reviewed the publicly available requirements for German citizens who would like to enter and remain in the UK and determined that German citizens can enter and remain if they are working in the UK, or have enough funds to support themselves without becoming an unreasonable burden on the public. It was also noted that home-schooling is legal in the UK.

[8] While the officer accepted that warrants and custody arrangements could be enforced throughout the European Union, it was concluded that the Applicants had provided little evidence or information that there is currently a warrant out for them. The officer stated:

While I accept that the German courts have requested an in-patient psychiatric assessment of the children in 2006, I find that there is

little other evidence or information provided that indicate that the German authorities have gone beyond this action.

[9] Further, the Officer noted that although custody orders can be implemented throughout the European Union, there was little evidence or information that they were implemented in cases of home-schoolers leaving Germany.

[10] He explored the best interests of the children and found that, on relocation to the UK, they could continue to have the same quality of life they have in Canada. Specifically, the officer stated as follows:

I accept that it was a difficult experience for the minor applicants in Germany. I also accept that this difficult experience may have resulted in the minor applicants being angry at Germany. However, I note that I have considered a relocation to the UK as an option for the applicants.

...

I find that there is little evidence provided that Marc and Nathan [the children] would not be able to adjust to living in the UK, much as they did in Canada.

[11] The Officer determined that there was nothing to demonstrate unusual or undeserved or disproportionate hardship if the Applicants had to apply for permanent residence from the UK, and thus declined to exercise discretion in their favour.

[12] The officer failed to expressly consider whether a H&C exemption ought to be granted to this family if they had to apply from Germany, their country of citizenship. To my mind, the fact that the officer jumped so quickly to looking at the UK as a place of residence for this family suggests that the officer must have concluded that they would experience unusual or undeserved or

disproportionate hardship if they had to return to Germany in order to apply for permanent residence.

[13] The relocation to the UK, colourfully, but perhaps inaptly described by counsel as an External Flight Alternative, was never suggested by the Applicants and they had no notice from the officer that it was under consideration in their H&C application. They were unreasonably, and in my view illegally, denied the opportunity to make submissions on this rather unique consideration.

[14] In my view, if an officer in a H&C application intends to view an applicant's hardship from the viewpoint of that applicant having relocated to a country other than his country of nationality, the officer has a duty of fairness to put that third country directly to the applicant in order that he or she can provide a full and informed response to the suggestion. Natural justice demands it.

[15] Moreover, although it is not necessary for me to decide the issue, given the breach of natural justice that has been found, I have very serious doubt that in making an H&C assessment an officer can assess hardship on the premise that the applicant relocate to a country other than his country of nationality, regardless of any mobility agreements between countries. If an applicant is in Canada without authorization and is to be removed, Canada cannot remove him to a country other than his country of nationality. Why then should Canada consider any other country when examining hardship to the applicant in a H&C application?

[16] Lastly, I observe that the officer appears to have concluded that the best interests of the children were served by relocating to the UK rather than to Germany; if so, then how can it not also

be that their best interests also lay in remaining in Canada, rather than having to apply for permanent residence from Germany?

[17] No question was proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is granted and the Applicants' application for permanent residence on humanitarian and compassionate grounds is to be considered anew by a different officer in accordance with these Reasons.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1914-13

STYLE OF CAUSE: GOTTFRIED CLAU HERMANN ET AL v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: CALGARY, ALBERTA

DATE OF HEARING: MARCH 18, 2014

**REASONS FOR JUDGMENT
AND JUDGMENT:** ZINN J.

DATED: MARCH 19, 2014

APPEARANCES:

Suha Abu-Jazar FOR THE APPLICANTS

Anna Kuranicheva FOR THE RESPONDENT

SOLICITORS OF RECORD:

STEWART SHARMA HARSANYI FOR THE APPLICANTS
Barristers & Solicitors
Calgary, Alberta

WILLIAM F. PENTNEY FOR THE RESPONDENT
Deputy Attorney General of Canada
Department of Justice – Prairie Region
Edmonton, Alberta