Federal Court

Cour fédérale

Date: 20141110

Docket: IMM-493-14

Citation: 2014 FC 1053

Ottawa, Ontario, November 10, 2014

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

GWENDOLYN VERBINA MATTHIAS

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act,* SC 2001, c 27 (*IRPA*), for the judicial review of a decision of a senior immigration officer (the officer), rendered on January 10, 2014, wherein the officer refused the Applicant's application under subsection 25(1) of the *IRPA* to have her application for

permanent residence processed from within Canada on humanitarian and compassionate (H&C) grounds.

[2] The Applicant asks for the decision to be set aside and to have it returned to a different officer for re-determination.

[3] In my opinion, the Applicant's application should be dismissed for the reasons discussed below.

II. Facts

[4] The Applicant is a 42-year-old woman born in St-Vincent and the Grenadines (St-Vincent). She originally entered Canada on June 26, 1993, and has remained ever since, except for a three-month period from September to December 2000. The Applicant has always resided with her sister and her two nieces.

[5] On December 21, 1998, her claim for refugee protection was denied by the Refugee Protection Division of Immigration and Refugee Board. The Federal Court refused her application for judicial review.

[6] The Applicant filed a first H&C application on July 11, 2011, which was denied.

[7] On August 2, 2013, she presented another application based on H&C grounds which resulted in the refusal that is the subject of the present judicial review.

[8] Over the years, the Applicant has developed strong bonds with four children. She now plays a key role in her two nieces' education and, according to her sister, the Applicant has been contributing towards their financial upbringing. Moreover, she works as a domestic helper where she was involved with the upbringing of two children (now grown) since they were very young.

[9] The Applicant also volunteers within her community at the St. Columba House After School Program.

III. Decision

[10] The officer mentioned all the aforesaid factual elements. The officer further noted the Applicant's account balance indicating savings of $9,062.44.

[11] The officer then noted that the Applicant has not demonstrated that she is more than moderately established in Canada. The officer acknowledged that the Applicant's ties to Canada are probably stronger than those to St-Vincent as she is employed and volunteers in her community. However, no demonstration was made that the Applicant would suffer an unusual, undeserved or disproportionate hardship if she had to return to her country of citizenship to seek permanent resident status. Moreover, the officer noted that the Applicant possesses no significant assets in Canada.

[12] The officer then considered the issue of the best interests of the children. He noted the aforesaid factual elements pertaining to the relationship between the Applicant and several children. He also noted that the Applicant had provided letters from her sister and her nieces

which describe how she contributes to their lives. Finally, he mentioned that the Applicant alleges that she assists her sister financially.

[13] The officer also considered many factors pertaining to the hardship caused by the geographical separation of the family members, and the difficulties that the Applicant might face if she returns to St-Vincent. I have summarized this analysis as follows:

1. The Applicant is considered part of her sister's family.
2. The Applicant's sister relies on her for many things, including the care of her children.
3. While a geographic separation would cause an emotional hardship to this family who will experience a period of adjustment, the Applicant did not demonstrate that the best interest of the children would not be met in such a case. Specifically:
    - The Applicant did not submit adequate information regarding her financial contribution to the well-being of her nieces. She did not demonstrate that she would be unable to provide financial assistance to her nieces from St-Vincent. Moreover, the Applicant did not provide sufficient information to conclude that her sister would be unable to provide the necessary care to her children.
    - While the Applicant might not be able to be physically present in the lives of her nieces, the Applicant did not demonstrate that she would be unable to maintain a meaningful relationship with her nieces through the use of technology. Moreover, the Applicant did not demonstrate that the children would be unable to visit her in St-Vincent.

4. The Applicant did not demonstrate that her three siblings in St-Vincent would be unable or unwilling to provide her with temporary assistance.

5. The Applicant has demonstrated that she is adaptable by moving to Canada at an early age, and she did not demonstrate that she would be unable to reintegrate her life in St-Vincent.

IV. Issues

[14] This matter raises the following issues:

1. Did the officer err in assessing the best interest of the children?

2. Did the officer err in assessing the consequences of the separation of relatives?

These two questions can be answered in a single analysis.

V. Relevant Provisions

Immigration and Refugee Protection Act SC 2001, c 27	*Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27
25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the	**25**. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent,

foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected. Non-application of certain factors	étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.
[…]	[…]
Non-application of certain factors	**Non-application de certains facteurs**
(1.3) In examining the request of a foreign national in Canada, the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national.	(1.3) Le ministre, dans l'étude de la demande faite au titre du paragraphe (1) d'un étranger se trouvant au Canada, ne tient compte d'aucun des facteurs servant à établir la qualité de réfugié — au sens de la Convention — aux termes de l'article 96 ou de personne à protéger au titre du paragraphe 97(1); il tient compte, toutefois, des difficultés auxquelles l'étranger fait face.

VI. Submissions of the Parties

A. *Applicant's Submissions*

[15] The Applicant argues that the officer conducted his analysis without considering the Applicant's submission that her case fell within s. 12.8 of the *Citizenship and Immigration Canada operation manuals IP-5* (the Guidelines). By failing to do so, the officer rendered a decision without considering the material before him and committed a reviewable error. Indeed, under s. 12.8, an officer must evaluate the circumstances of all the family members, with

particular attention given to the interest and situation of any dependent children with legal status in Canada. The Applicant argues that the officer's failure to consider s. 12.8 of the Guidelines renders his decision unreasonable (*Davis v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1243, at para 23).

[16] The Applicant submits that the officer also wrongfully ignored the letter of the Applicant's sister, which indicates that the Applicant's absence would be financially and emotionally "horrible" for her nieces and her sister. Therefore, the officer's findings that the Applicant submitted insufficient information to demonstrate that her sister would be unable to take care of the children in her absence are unreasonable. Moreover, the officer discounted the Applicant's close relationship with her nieces and her sister.

B. *Respondent's Submissions*

[17] In his memorandum, the Respondent starts by outlining some key principles pertaining to the judicial review of an H&C decision.

[18] The Respondent first mentions that the H&C process under subsection 25(1) of the *IRPA* is highly discretionary and constitutes an exceptional measure. The Applicant has the burden of providing evidence that, if she was required to apply for permanent residence from St-Vincent, she would suffer an unusual, underserved and disproportionate hardship (*Mirza v Canada (Minister of Citizenship and Immigration)*, 2011 FC 50, at para 2, 16). This hardship should be, in most cases, beyond the control of the Applicant and should have a disproportionate impact on the Applicant due to her personal circumstances (*Singh v Canada (Minister of Citizenship and*

Immigration), 2009 FC 11, at para 19). However, "the inherent hardship of leaving Canada is not sufficient in itself to warrant an exception under subsection 25(1) of the IRPA" (*Singh Gill v Canada (Minister of Citizenship and Immigration)*, 2012 FC 835, at para 28).

[19] The Respondent underlines that considerable deference must be accorded to the officer's findings in cases of an H&C application. Therefore, "the court should refrain from re-evaluating the weight given to different factors considered by an officer" (*Begum v Canada (Minister of Citizenship and Immigration),* 2013 FC 265, at para 20).

[20] The Respondent then argues that the officer's assessment of the best interest of the children was reasonable. Although the Applicant argues that the officer failed to consider that the present case fell within the range of section 12.8 of the Guidelines when assessing the best interest of the children, the Respondent answers that it is not simply because the Applicant's situation is covered by the Guidelines that the H&C application should be granted. Furthermore, these Guidelines are not legally binding (*Jnojules v Canada (Minister of Citizenship and Immigration)*, 2012 FC 531, at para 41 [*Jnojules*]). Even so, the Respondent argues, the officer's reasons indicate that he did in fact (i) consider the circumstances contemplated in s. 12.8 of the Guidelines, (ii) assess the best interest of the nieces, and (iii) assess the hardship caused by the separation of the family.

[21] The Respondent further argues that the Applicant submitted insufficient evidence to demonstrate that the best interest of the children would not be met should she apply for permanent residence from St-Vincent.

[22] Contrary to the Applicant's arguments, the Respondent asserts that the officer did take into consideration the Applicant's sister's letter. However, the officer found that the Applicant failed to provide sufficient evidence to establish the Applicant's financial contribution to the well-being of her nieces.

[23] The Respondent submits that an analysis of the officer's decision demonstrates that he acknowledged the hardship that the Applicant's family would suffer. However, he concluded that the lack of evidence submitted to support the H&C claim justifies the officer's decision. The Respondent argues that the officer's decision falls within the range of possible acceptable outcomes, and that he adequately assessed all the evidence before him.

[24] The Respondent emphasizes that the Applicant bears the burden of proof in support of her H&C claim (*Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, at para 5; *Persaud v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1133, at para 63, 64). Indeed, an applicant must put their best foot forward in an H&C application and must demonstrate "that their personal situation and the risks they faced were clearly explained to the officer reviewing their application" (*Wazid v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1415, at para 24).

[25] The Respondent further argues that the Applicant essentially requests that the Court reconsider the evidence. However, in the absence of an unreasonable conclusion on the part of the officer, it is not for the Court to do so.

[26] The Respondent submits that although the officer was alive, alert and sensitive to the interests of the children, these interests should not trump all other considerations in assessing an H&C application (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 75 [*Baker*]). Moreover, "it is not because the interests of the children favour the fact that a parent residing illegally in Canada should remain in Canada that the Minister must exercise his discretion in favour of said parent" (*Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, at para 12). The Applicant should not be rewarded for accumulating time in Canada.

[27] Finally, the Respondent argues that the Applicant has not established that the hardship that she would face goes beyond the inherent consequences of deportation. Indeed, the hardship is a normal consequence of the deportation proceedings and the H&C application must only be granted when this hardship goes beyond the inherent consequences of deportation (*Alexander v Canada (Minister of Citizenship and Immigration)*, 2012 FC 634, at para 14).

VII. Standard of review

[28] The standard of review applicable to an officer's decision of whether or not to grant an exemption based on H&C considerations is reasonableness (*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, at para 18 [*Kisana*]; *Mangru v Canada (Minister of Citizenship and Immigration)*, 2011 FC 779, at para 10; *Toney v Canada (Public Safety and Emergency Preparedness)*, 2009 FC 904, at para 66) [*Toney*].

[29] The Applicant submits that applying the wrong test or ignoring the relevant factors when assessing the best interest of the child is a question to be reviewed on the standard of correctness (*Canada (Minister of Citizenship and Immigration) v Mathew*, 2007 FC 685, at para 22). However, as explained below, I am of the opinion that in the present case an assessment of the best interest of the children was done and should be reviewed as a question of mixed fact and law under the standard of reasonableness (*Tone*y, at 68, 69; *Jnojules,* at 16, 41).

[30] In a decision similar to the present case, Justice O'Reilly reviewed under the standard of reasonableness whether an officer failed to adequately consider the applicant's establishment in Canada and the negative impact of her departure on the best interest of a dozen children (*John v Canada (Minister of Citizenship and Immigration)*, 2012 FC 96, at 18, 19). Furthermore, in *Frank v Canada (Minister of Citizenship and Immigration)* 2010 FC 270 [*Frank*], at para 15, Justice Martineau applied the standard of reasonableness for review in a case where the applicant relied on the Guidelines to argue that a decision of an officer should be quashed.

VIII. Analysis

[31] I am in general agreement with the arguments of the Respondent.

[32] Before delving into the analysis of the present case, it is worth considering the guidance offered by Justice Martineau in *Frank*, at para 20-21 pertaining to the application of these Guidelines:

> [20] In this application, the applicant heavily relies on the Operational Manual *IP-5 Immigrant Applications in Canada made on Humanitarian and Compassionate Grounds* (Operational

> Manual IP-5) and the recent decision of this Court in *John v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 85, at para 7 (*John*), to argue that the officer should have explicitly considered the applicant's *de facto* family situation since it was clearly raised by the facts as presented to the officer.
>
> [21] While it has been established on numerous occasions that the operational manuals are not law and are not binding, they are valuable guidelines to the immigration officers in carrying out their duties (John, above, at paragraph 7).
>
> [Emphasis added]

[33] According to the Applicant, the officer failed to adequately assess the circumstances of the Applicant's entire family and the best interest of the children. Moreover, the Applicant argues that the officer failed to analyse all the evidence that she provided, namely her sister's letter.

[34] In my opinion, the officer's decision indicates that he weighed all the evidence and considered the relevant factors pertaining to the best interest of the children. I agree with the Respondent that "a simple reading of the decision confirms that it was reached after a complete analysis of the evidence and the Applicant's H&C application and submissions". The following passages from page 4 of the officer's decision convince me that the key factors were taken into account:

> The applicant has provided letters from her sister and her nieces, which discuss how the applicant contributes to their lives. The applicant also states that she assists her sister financially and helps care for her nieces has needed.
>
> I appreciate the relationship the applicant has with her nieces and with her sister. The applicant is considered a part of the family and the applicant's sister relies on the applicant for help […] However, I do not have information regarding the applicant's financial contributions to the well-being of her nieces. Moreover, while a

> geographic separation from her nieces would likely cause a hardship for all the family members, I have insufficient information before me to determine that the best interests of the applicant's sister's children would not be met if the applicant were to return to St. Vincent to apply for permanent residence in Canada. In such situation, the applicant might not be able to physically be present in the lives of the nieces; however, there is insufficient information before me to determine that the applicant would not be able to maintain a meaningful relationship with her nieces through the use of the modern technology […].
>
> <u>The applicant is likely to experience a hardship if she is separated from her sister and her nieces</u> […]; however, the applicant has not demonstrated that she would not be able to maintain a connection and relationship with her loved ones or that she would not be able to provide financial assistance as needed by her sister […]. Additionally, <u>I have insufficient information before me to suggest that the applicant's sister would not be able to provide necessary care to her children</u>.
>
> [Emphasis added]

[35] Having reviewed the officer's decision, I believe that he was alert, alive and sensitive to the best interest of the children. Pursuant to s. 12.8 of the Guidelines, he considered the circumstances of all the family members, with particular attention to the interest of the children. The officer acknowledged and weighed the emotional hardship that the Applicant's family would suffer. Despite this, the officer concluded that there was insufficient evidence to determine that the best interest of the children would not be met.

[36] While it is trite law that the best interest of the children is an important factor that the immigration officer must consider in a matter like this, it is not the role of the Court to re-examine the weight given to the different elements of the evidence provided the officer has been alert, alive and sensitive to this factor (*Kisana*, at para 23; *Baker*, at para 75). As mentioned by

Justice Nadon in *Kisana*, at para 24, "an applicant is not entitled to an affirmative result on an H&C application simply because the best interests of a child favour that result".

[37] Moreover, the Applicant had the burden of proof of the claims she made in her H&C application (*Kisana,* at para 35). In my opinion, it was not unreasonable for the officer to conclude that the Applicant failed to meet that burden. Contrary to her argument, I do not believe that the officer ignored the letter from her sister. Indeed, the officer noted that the Applicant had "provided letters from her sister and her nieces, which discuss how the Applicant contributes to their lives", but he determined that the Applicant failed to provide sufficient evidence to demonstrate that the financial need of the nieces would not be met should the Applicant apply for permanent residence from St-Vincent.

[38] As argued by the Respondent, the Applicant could have submitted objective documentation of her financial contribution, such as bank statements or electricity bills, but she did not. The assertion in the Applicant's sister's letter provided insufficient detail of her financial contribution to the family. Apart from the bald assertion in the letter of the Applicant's sister, there is no objective evidence to demonstrate that the Applicant's sister would be unable to provide the necessary care to her own children. Therefore, the officer reasonably concluded that insufficient information was provided pertaining to this claim.

IX. Conclusions

[39] For foregoing reasons, this application should be dismissed

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is dismissed; and

2. No question of general importance is certified.

"George R. Locke"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-493-14
STYLE OF CAUSE:	GWENDOLYN VERBINA MATTHIAS v. MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTREAL, QUÉBEC
DATE OF HEARING:	SEPTEMBER 2, 2014
JUDGMENT AND REASONS:	LOCKE J.
DATED:	NOVEMBER 10, 2014

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