Federal Court  Cour fédérale

Date: 20151021

Docket: IMM-1756-15

Citation: 2015 FC 1144

[UNREVISED ENGLISH TRANSLATION]

Ottawa, Ontario, October 21, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

HANANE BOUAFIA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AMENDED JUGEMENT AND REASONS

I. Introduction

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision of a senior immigration officer [officer] of Citizenship and Immigration Canada, dated March 23, 2015, rejecting the application for permanent residence based on humanitarian and compassionate considerations made by the applicant.

II. Facts

[2] The applicant, Hanane Bouafia, is a 43-year old citizen of Algeria. She holds a multiple-entry visitor visa that was issued to her in 2012. The visa expires on October 25, 2015.

[3] Her former husband, Hassene Belkhir (64 years old), and their three children, Ayman Rayan Belkhir (11 years old), Ahmed Laid Amastan Belkhir (9 years old) and Khadidja El-Batoul Belkhir (6 years old), are permanent residents of Canada.

[4] In June 2009, when they were still married, the applicant and Mr. Belkhir obtained a Selection Certificate in the investor class. However, following their divorce in October 2009, the applicant ceased benefitting from the immigration procedure for which Mr. Belkhir was the principal applicant. As part of the divorce proceedings, the applicant obtained custody of their three children.

[5] On July 27, 2012, Mr. Belkhir and his two sons became permanent residents; his daughter was granted permanent residence on August 8, 2012.

[6] The applicant is currently living in the same residence as her former husband and their children in the province of Quebec. An application for permanent residence on humanitarian and compassionate grounds was filed by the applicant on November 25, 2013. In the application, the applicant requested an exemption from the obligation to apply for permanent residence on humanitarian and compassionate grounds from outside Canada.

[7] In support of her request for an exemption from the obligation to apply for permanent residence from outside the country, the applicant submits that she wishes to remain with her children, particularly her six-year old daughter. In addition, given that she has legal custody of the children, if she were to have to file her application from outside the country, she would have to bring the children with her, thereby depriving them of the benefits of being permanent residents. Mr. Belkhir would also be deprived of his right to visit the children as a result of the geographical distance that would separate them. It is therefore in the best interests of the children to have access to both their father and mother.

[8] The officer refused the request for an exemption based on humanitarian and compassionate considerations. It is that decision which is the subject of this judicial review.

III. Impugned decision

[9] The officer concluded that the applicant had not established that a refusal of the exemption would cause her to suffer any undue, undeserved or disproportionate hardship if she were to have to apply for a permanent resident visa from outside Canada. Nor would it have a significant impact on the applicant's children.

[10] The officer noted that the applicant failed to provide enough evidence to show that the multiple-entry visitor's visa she was granted would not be a viable option to remain in Canada and be reunited with her family while she applied for permanent resident status. In short, the officer found that the applicant had failed to provide sufficient evidence showing the type of hardship she would face if she were required to file her application for permanent residence from

outside Canada and that such hardship would be unusual, undeserved or disproportionate. The officer pointed out that maintaining family bonds is not of an exceptional nature.

IV. Issue

[11] The Court considers that the application raises the following issues:

Did the officer err in his assessment of the impact on the applicant and children of a refusal to grant an exemption on humanitarian and compassionate grounds?

V. Statutory provisions

[12] The following statutory provisions of the IRPA apply:

Application before entering Canada	**Visa et documents**
11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**11**. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
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	**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

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 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.	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, 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.

VI. Position of the parties

[13] The applicant, relying mainly on *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*], argues that the officer's decision was unreasonable because he failed to take the best interests of the children into consideration. The officer neglected to consider that a refusal to grant the exemption under subsection 25(1) of the IRPA would create unusual and disproportionate hardship for the children in addition to having a harmful and irreversible impact on them.

[14] For his part, the respondent argues that the officer's decision is reasonable. The officer considered all of the evidence, including the fact that the applicant has a multiple-entry visitor's visa in her possession. The applicant having failed to meet her burden of showing that her

situation was an exceptional one that warranted the granting of an exemption, the officer's decision was reasonable.

VII. Standard of review

[15] An officer's findings with regard to humanitarian and compassionate grounds that deal with questions of fact and of fact and law are reviewable on a standard of reasonableness (*Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 [*Kanthasamy*]; *Azziz v Canada (Minister of Citizenship and Immigration)*, 2015 FC 850).

VIII. Analysis

[16] Subsection 25(1) of the IRPA is an exception to subsection 11(1) of the IRPA and allows a foreign national to be granted an exemption from the requirement to apply for permanent residence from outside Canada if justified by humanitarian and compassionate considerations. This Court has ruled on a number of occasions that this discretionary authority in an exceptional measure (*Kanthasamy*, above, at para 40; *Lim v Canada (Minister of Citizenship and Immigration)*, 2014 FC 28 at para 20; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125). An applicant seeking such an exemption must demonstrate that following the usual process provided for in the IRPA would cause unusual, undeserved or disproportionate hardship to them:

> [41] The Federal Court has repeatedly interpreted subsection 25(1) as requiring proof that the applicant will personally suffer unusual and undeserved, or disproportionate hardship arising from the application of what I have called the normal rule: see, e.g., *Singh v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 11. The hardship must be something more than the usual consequences of leaving Canada and applying to immigrate

> through normal channels: *Rizvi v. Canada (Minister of Employment and Immigration)*, 2009 FC 463.
>
> (*Kanthasamy*, above, at para 41)

[17] When analyzing the best interests of the child, an officer must be alert, alive and sensitive to the best interests of the child and must assign considerable weight to this factor (*Baker*, above, at para 73). However, although an officer must examine this factor with great care, it remains but one factor among others:

> [A]n applicant is not entitled to an affirmative result on an H&C application simply because the best interests of a child favour that result. It will more often than not be in the best interests of the child to reside with his or her parents in Canada, but this is but one factor that must be weighed together with all other relevant factors. It is not for the courts to reweigh the factors considered by an H&C officer. [Emphasis added.]
>
> (*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 24)

[18] In this case, it appears from the officer's decision that he took considerable care in his examination of the best interests of the children and proceeded with a thorough analysis of the evidence adduced by the applicant. In particular, the officer considered the fact that the applicant had a multiple-entry visitor's visa. The Court also notes that the applicant did not cite any particular reason that would point to her children having any specific needs that would require their mother's ongoing presence in Canada.

[19] Thus, the officer assigned considerable weight to the best interests of the children but found, in taking into consideration the evidence in the record, that following the usual process would not cause any unusual, undeserved or disproportionate hardship.

IX. Conclusion

[20] For the reasons set out above, the Court finds that the officer's decision was reasonable. Accordingly, the application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed. There is no question of general importance to certify.

OBITER

The application for permanent residence from outside Canada that will ultimately be filed by the applicant contains a number of positive antecedents and factors in the applicant's favour, following several steps already taken by the applicant before federal and provincial authorities.

"Michel M.J. Shore"

Judge

translation

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Sabine Venturelli	FOR THE APPLICANT
Guillaume Bigaouette	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Sabine Venturelli, counsel Montréal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT