Federal Court  Cour fédérale

Date: 20160720

Docket: IMM-5556-15
IMM-5561-15

Citation: 2016 FC 840

Ottawa, Ontario, July 20, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

Docket: IMM-5556-15

JACQUELINE FREMAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

BETWEEN:

Docket: IMM-5561-15

EVELYN FAKAA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, Ms. Jacqueline Fremah and Ms. Evelyn Fakaa, are citizens of Ghana. Their mother, Ms. Comfort Anane, moved to Canada in 2005 and lives here with the Applicants' half-brothers, Luke and Richmond. The Applicants have applied for permanent residence in Canada, sponsored by their mother who is a naturalized Canadian citizen. However, because their mother did not declare the Applicants as family members when she applied for permanent residence, they are excluded from applying as members of the family class. The Applicants have therefore sought an exemption from this exclusion on humanitarian and compassionate [H&C] grounds.

[2] A Citizenship and Immigration Canada officer decided that H&C factors did not warrant granting an exemption. Each of the Applicants has applied separately for judicial review of the officer's decision. This Judgment and Reasons apply to both applications.

[3] As explained in more detail below, I am allowing these applications, because the officer did not consider the emotional impact that continued separation from her daughters would have on Ms. Anane and the resulting impact upon her two sons, Luke and Richmond. Consideration of H&C grounds requires taking into account the best interests of affected children. Despite submissions by the Applicants on this impact upon Ms. Anane and her sons, the officer failed to take this into account, making the resulting decision unreasonable.

II. Background

[4] While the Applicants are now adults, they were 15 and 21 years old at the time of their applications for permanent residence. Their half-brothers, Luke and Richmond, were 3 and 5 years old at the time of the applications. Ms. Fakaa also has two half siblings in Ghana, Kwabena and Baba, who are unrelated to Ms. Anane.

[5] Ms. Anane was born in Ghana but was sponsored to come to Canada as a permanent resident by her ex-husband in 2005. In her own application for permanent residence, she did not declare her daughters as family members. The Applicants first applied for permanent residence in 2010 under Ms. Anane's sponsorship. However, their applications were rejected under section 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR 2002-227, the effect of which is to exclude undeclared family members from membership in the family class.

[6] In May 2012, the Applicants submitted new applications for permanent residence, again supported by the sponsorship of their mother. They requested that the officer reviewing their application consider whether there were sufficient H&C grounds under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], including the best interests of children affected by the decision, to overcome the consequences of section 117(9)(d).

[7] Those applications for permanent residence were rejected on February 24, 2014. The Applicants sought judicial review of that rejection, which was overturned by the Federal Court on June 29, 2015. In an unreported decision in files IMM-2982-14 and IMM-298-14, Justice

McVeigh concluded that the officer had failed to consider the best interests of Luke and Richmond, had not properly applied the test for consideration of the best interests of a child, and had not properly considered evidence of country conditions in Ghana.

[8] Following this Federal Court decision, the Applicants updated their applications for permanent residence, but these were rejected again on November 6, 2015. The decision rejecting those applications is the subject of this judicial review.

III. Impugned Decision

[9] The reasons for the officer's decision are contained in notes in the Global Case Management System. The officer refers to the Federal Court decision returning the permanent residence applications for redetermination and then reviews the facts relevant to the decision, noting the Applicants' exclusion under section 117(9)(d) of the IRPR. The officer then proceeds to the assessment of these facts.

[10] That assessment begins by noting that, following Justice McVeigh's judgment, the officer will assess the best interests of each of the children involved in the applications. The officer refers to these children being the Applicants and their four half siblings, noting that the previous decision that had been reviewed by Justice McVeigh had not considered the interests of Kwabena and Baba.

[11] The officer first considers the best interests of the Applicants, stating that the interests to be examined are whether they should go to Canada or stay in Ghana. The officer takes into

account Ms. Anane's decision not to include the Applicants on her application for permanent residence and notes that she believed at that time that it was in the best interests of her daughters to remain in Ghana while she established herself in Canada. Referring to the Applicants' living situation in Ghana, the officer observes that, while emotional support from their mother may be deficient due to the distance, they appear to receive all the care they need. They are healthy and have done well in school. The officer refers to Ms. Fakaa's attendance at a private university in Ghana and notes that, while private universities are expensive, public universities enjoy a good reputation and offer a broad choice of recognized diplomas.

[12] Turning to the country condition documentation, the officer observes that Ghana is no longer a third world country and that economic, gender equality and health care conditions are improving. While gender discrimination in the labour market still exists, the Applicants' coming to Canada would also affect their linkage to employment opportunities in Ghana. Referring to Ms. Anane's intention to take advantage of her daughters' presence to allow her to work more, the officer observes she would then be less frequently present for all four of her children, including Luke and Richmond. This would also place a heavy burden upon the Applicants. Overall, the officer concludes that it is in the Applicants' best interests to remain in Ghana.

[13] The officer then considers whether it is in the best interests of Luke and Richmond to be reunited with the Applicants or to continue to maintain a distance relationship with them. The officer canvasses the history of their relationship and observes that, if they were not reunited in Canada, they could still continue to maintain contact. Placing significant weight on the concern about leaving Luke and Richmond in the care of the Applicants so that Ms. Anane could work

more, the officer concludes that it is in their best interests to remain separated from the Applicants.

[14] Noting that there was extremely limited information on Kwabena and Baba, and that they had not grown up with Ms. Fakaa, the officer determines that being separated from her would have a limited impact on them.

[15] The decision concludes by stating that, after examining thoroughly all the elements on file, identifying the best interest of all the children involved, and after weighing all the factors, the officer was not satisfied that there were sufficient elements to warrant an exemption to the Applicants' exclusion.

IV. Issues and Standard of Review

[16] The Applicants raise the following issues for the Court's consideration:

A. The Applicants argue that the officer misunderstood Justice McVeigh's decision, in that the officer's analysis focused solely on the best interests of the children involved, to the exclusion of consideration of the hardship upon Ms. Anane resulting from separation from the Applicants;

B. The Applicants argue that the officer engaged in conjecture and speculation in analysing the country condition documents, reaching conclusions on the conditions in Ghana which are unsubstantiated by the documentary evidence and inconsistent with that evidence; and

C. The Applicants argue that the officer erred in the assessment of the best interests of the children, in reaching the conclusion that it would be in their best interests for the Applicants to remain in Ghana because of the adverse impact of Ms. Anane working more if the Applicants were to join her in Canada.

[17] The parties agree that these issues are to be reviewed on a standard of reasonableness.

V. Analysis

[18] My decision to allow these applications for judicial review turns on the first issue raised by the Applicants. Their argument is that, in following the guidance of Justice McVeigh's decision, which focused on the analysis of best interests of the children, the officer failed to consider any H&C factors other than those interests. The Applicants point to the evidence and submissions before the officer on the emotional impact on Ms. Anane of ongoing separation from her daughters and argue that the resulting hardship was not taken into account. They rely on both the content and structure of the decision, which first sets out facts and submissions relevant to Ms. Anane and the children and then proceeds to assess the best interests of each of the children and reach a conclusion, without including a section considering hardship.

[19] The Respondent points out that the decision begins with a statement that the officer has taken into account H&C grounds and the best interests of the children directly affected, The Respondent argues this demonstrates that not only the children's interests were considered and that the portion of the decision setting out facts demonstrates the officer's awareness of the

hardship said to be faced by Ms. Anane. The Respondent also notes that the portion of the decision containing the officer's assessment refers to the officer having taken into consideration the emotional hardship for all the parties involved, referring to the Applicants, their mother, Luke and Richmond, and extended family.

[20] While the Respondent's submissions on this issue focused on establishing that hardship faced by Ms. Anane was considered, the Respondent also raised at the hearing the question whether such hardship is relevant to the H&C consideration, given that the Applicants and not Ms. Anane are the foreign nationals who are seeking permanent residence and exemption under section 25 of IRPA. The Applicants' position on this point is that H&C factors should be considered globally in relation to the affected family, not just the person requesting the exemption.

[21] Neither party argued this point in any detail. However, it is unnecessary for me to address this point, as my decision is based on the officer's failure to consider the effect that ongoing separation from her daughters may have on Ms. Anane's ability to care and provide for Luke and Richmond. The emotional impact of this separation on Ms. Anane is relevant to the best interests of her two sons.

[22] The Applicants' submissions in support of their applications for permanent residence expressly raised this factor. I agree with their position that the decision does not demonstrate that this factor was given any consideration by the officer. The officer's reference to considering the emotional hardship for all parties involved is a general statement and is not accompanied by any

analysis of the emotional hardship faced by Ms. Anane. More importantly, the portion of the decision analyzing the best interests of Luke and Richmond reaches the conclusion that it is in their best interests to remain separated from their sisters, without considering at all the impact that such separation will have upon their mother's emotional capacity to care for them.

[23] It may have been available to the officer to conclude that the best interests of Ms. Anane's sons were not affected by this factor, or that any such effect still did not warrant granting their sisters an exemption. However, my conclusion is that the officer was required to consider this factor and that the failure to do so makes the decision unreasonable. As this conclusion requires that the applications for judicial review be allowed and the applications for permanent residence be returned for redetermination on H&C grounds, it is not necessary for me to consider the other issues raised by the Applicants.

[24] Neither party proposed any question of general importance for certification for appeal, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that these applications for judicial review are allowed and the matters are referred to another officer for re-determination. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5556-15 AND IMM-5561-15
STYLE OF CAUSE:	JACQUELINE FREMAH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION and EVELYN FAKAA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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