Federal Court  Cour fédérale

Date: 20190304

Docket: IMM-366-18

Citation: 2019 FC 262

Ottawa, Ontario, March 4, 2019

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

KATHLEEN ELIZABETH WARDLAW
LAMPRINI KALAMPOKI (A MINOR)
NIKOLAS KALAMPOKIS (A MINOR)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [IRPA] for judicial review of the decision of the Citizenship and Immigration Officer [the Officer] refusing the Applicants' application for permanent residence on

humanitarian and compassionate [H & C] grounds. The application for judicial review is allowed.

II. Background

[2] The Principal Applicant, Kathleen Elizabeth Wardlaw, is a citizen of New Zealand. The Principal Applicant moved to Greece where she was married and gave birth to two children [the Minor Applicants]. The Minor Applicants are Greek citizens. The Principal Applicant and the Minor Applicants (together, the Applicants) then moved to Canada.

[3] The Principal Applicant separated from her husband after arriving in Canada. Subsequently, the Principal Applicant began a common-law relationship with a Canadian citizen. The Principal Applicant and her common-law partner have had three children together in Canada. These children are Canadian citizens.

[4] The Applicants applied for permanent residence based on H & C grounds on December 22, 2016. The Officer sent an email to the Applicants' counsel in order to determine whether the Applicants wished to convert the application to an application for permanent residence under the spouse or common-law partner in Canada class [SCLPC]. The Applicants' counsel responded the next day, stating that the Applicants wished to proceed with an application based on H & C grounds.

[5] On February 2, 2017, the Principal Applicant received a temporary resident permit and work permit, which are valid until February 8, 2019.

III. Impugned decision

[6] On January 5, 2018, the Officer refused the Applicants' application for permanent residence based on H & C grounds.

[7] The Officer considered the degree to which the Applicants have established themselves in Canada. Additionally, the Officer considered the Applicants' family relationships in Canada, Greece, and New Zealand. Finally, the Officer assessed the best interests of the Minor Applicants as well as the Principal Applicant's Canadian-born children.

[8] The Officer determined that the Principal Applicant "has developed a degree of establishment in Canada" due to a number of factors including employment between 2013 and 2016, the children's attendance at school, and her relationship with her common-law spouse. Furthermore, the involvement of the Applicants with community organizations supported the finding of establishment in Canada.

[9] The Officer acknowledged that the lapse in the Applicants' immigration status was due to difficult circumstances including abuse by the Principal Applicant's former husband. Accordingly, the Applicants were not faulted for the temporary lapse in their immigration status.

[10] The significant support received by the Applicants in Canada led the Officer to conclude that hardship would result from having to re-establish in another country.

[11] The Officer considered the best interests of the Minor Applicants and the children with Canadian citizenship. The Officer concluded that it would be "difficult, traumatic and disruptive" for the Minor Applicants to be removed from their support network in Canada. Additionally, the Officer determined that it is unclear whether the Principal Applicant and the Minor Applicants would be able to remain together if they are removed from Canada. Due to their Greek citizenship, the Minor Applicants may be unable to accompany the Principal Applicant to New Zealand. Finally, the Officer found that the children with Canadian citizenship are young and entirely dependent on their parents. It would therefore be in their best interest, according to the Officer, for the entire family to remain in Canada.

[12] The Officer additionally considered the fact that the Principal Applicant lacks family ties or other links to New Zealand.

[13] In conclusion, the Officer stated that:

> While I find that the applicant's humanitarian and compassionate grounds are compelling, I also note that Canada's immigration legislation has accounted for individuals in the applicant's situation and have created public policies to allow individuals without status to be sponsored as members of the family class within Canada.

[14] The Officer held that the Applicants may be eligible to apply for permanent residence under the SCLPC. Based on this determination as well as the consideration of the Applicants' establishment, family ties, and best interests of the children, the Officer rejected the application for an exemption under section 25(1) of the IRPA.

IV. Issues

[15] The Court finds that the issues to be determined in the present matter are the following:

(a) What is the applicable standard of review?

(b) Was the Officer's decision reasonable?

V. Submissions of the Parties

A. *Submissions of the Applicants*

[16] The Applicants argue that,

(a) The Officer erred in finding that the Applicants had another avenue of obtaining status in Canada under the family sponsorship class; and

(b) The Officer erred in failing to take into account the minor applicants in any way in this decision.

[17] The Applicants center their first argument on the notion that the Officer "clearly finds the Applicants' H&C application to satisfy H&C requirements throughout the decision" but rejects the application due to the presence of an alternative means of obtaining permanent residence. The Applicants' apparent eligibility for permanent residence through family class sponsorship is argued to have led the Officer to deny H&C relief.

[18] According to the Applicants, there were a variety of reasons that family class sponsorship was unavailable. These include the common-law spouse's custody battle with his former wife,

domestic violence charges, and inability to sponsor the children. Furthermore, the Applicants did not wish to pursue family class sponsorship and purposefully chose an application based on H & C grounds. The Applicant argued that she did not want to, once again, be reliant on a sponsorship application of a spouse.

[19] The second argument advanced by the Applicants is that the Officer failed to take into consideration the Minor Applicants. Particularly, the Applicants argue that it was an unwarranted assumption that the common-law spouse was willing and able to sponsor the Minor Applicants.

B. *Submissions of the Respondent*

[20] The Respondent argues that the Officer's decision was reasonable. The Respondent emphasizes that relief on H & C grounds is an exceptional remedy which is granted at the discretion of the Officer.

[21] The Respondent contends that Section 12.3 of the IP-5 Manual only enables an applicant to claim relief on H & C grounds if the applicant is ineligible for an application under the SCLPC class. Section 12.3 of the IP-5 Manual reads as follows:

> 12.3. Sponsorship of spouses and common-law partners
>
> Spouses and common-law partners of Canadian citizens or permanent residents may apply to remain in Canada based on H&C grounds, if they do not meet the requirement to apply:
>
> as members of the spouse or common-law partner in Canada class (IP 8); or
>
> under the spousal Public Policy Under 25(1) of IRPA to Facilitate Processing in accordance with the Regulations of the Spouse or Common-law Partner in Canada Class (IP 8, Appendix H).

[22] According to the Respondent, the Applicant failed to provide sufficient evidence to demonstrate ineligibility for an application under the SCLPC.

[23] The Respondent disagrees with the argument that the Officer failed to properly consider the Minor Applicants.

[24] Finally, the Respondent argues that the Officer's decision was based on all available evidence and did not turn solely on the issue of SCLPC eligibility.

VI. Analysis

A. *Standard of Review*

[25] The applicable standard of review for an Officer's decision under subsection 25(1) of IRPA is reasonableness (*Kanthasamy v Canada ((Citizenship and Immigration)*, 2015 SCC 61 at para 44). An Officer's decision to deny or grant relief under this provision is discretionary in nature and attracts considerable deference from a reviewing court (*Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 15; *Cieslak v Canada (Citizenship and Immigration)*, 2018 FC 579 at para 8).

[26] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*

v New Brunswick, 2008 SCC 9 at para 47; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

B. *Reasonableness of the Officer's Decision*

[27] The Applicant challenges the reasonableness of the Officer's decision on two grounds. Firstly, it is alleged that the Officer unreasonably failed to consider the interests of the Minor Applicants. Secondly, the Applicant argues that it was unreasonable for the Officer to deny relief on the basis of apparent eligibility under the SCLPC.

[28] A decision under subsection 25(1) will be found to be unreasonable if the Officer did not give sufficient consideration to the interests of affected children (*Kanthasamy*, above at para 39). In the case at bar, the Officer must have considered the interests of all five children. This analysis is contextual and must focus on the particular characteristics of the children (*A.C. v Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at para 89). It is essential, therefore, that the Officer considered the distinct interests of the three Canadian children and the Minor Applicants.

[29] The Officer described an extensive list of factors related to the children's best interests that had been considered. It is, of course, insufficient to merely state that the interests of affected children have been considered (*Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 32). The analysis must be substantive and focused on the potential impacts on affected children.

[30] The Officer began the examination of the children's best interests by describing the dependence of all the children on the Principal Applicant. The Officer continued by assessing the specific emotional and educational needs of the Minor Applicants. The Officer determined that it would be harmful for the Minor Applicants to be removed from their mother and their various supports in Canada. The Officer gave further consideration to the fact that the Minor Applicants would be unable to join their mother in New Zealand if the Applicants were removed from Canada. Finally, the Officer concluded that the three Canadian children are fully dependent on their parents and would be best served by the maintenance of the family unit.

[31] The Officer gave sufficient consideration to the distinct and varied interests of all the children. The Applicants' argument that "the Officer clearly did not turn her minds [sic] to the situation of the children" holds no weight.

[32] The parties disagree about the weight that the Officer assigned to the Applicants' apparent eligibility under the SCLPC. According to the Applicants, this was the deciding factor which led the Officer to deny relief under subsection 25(1). The Respondent contends that the Officer considered SCLPC eligibility along with the totality of the evidence.

[33] A review of the Officer's reasons demonstrates that the only significant factor weighing against providing relief under subsection 25(1) was the Applicants' apparent SCLPC eligibility. The Applicants' establishment in Canada, family relationships, and the best interests of the children all weighed in favour of the provision of relief on H&C grounds irrespective of the

SLPC option. It is reasonable to conclude that but for the apparent availability of SCLPC, the Officer would have provided relief under subsection 25(1).

[34] It is not for this Court to re-weigh the various factors examined by the Officer (*Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 11). It is, however, open to this Court to assess the decision-making process of the Officer to determine if it was unreasonable.

[35] The Officer relied significantly on Appendix A of the IRCC Manual: Inland Processing-IP 8 in order to guide her analysis of the Applicant's eligibility under the SCLPC. Appendix A sets out a public policy under subsection 25(1) of the IRPA which seeks to "facilitate family reunification and facilitate processing in cases where spouses and common-law partners are already living together in Canada". While this policy objective is relevant to the overall analysis, it does not liberate the decision-maker from her duty to provide a reasonable decision.

[36] At several points in the decision, the Officer notes that the Principal Applicant has failed to prove that she is not eligible for the SCLPC. Nowhere in the text or purpose of subsection 25(1) does such an obligation arise. Instead, the Officer has placed a burden on the Applicants based on the policy contained in the IRCC Manual. The Officer has fettered her discretion by treating the manual as if it were a binding legal framework.

[37] Policy guidelines and guidelines play an important, but limited role in decision-making. The majority in *Kanthasamy* stated that,

> While the Guidelines are useful, they are not legally binding and are not intended to be either exhaustive or restrictive. Officers should not fetter their discretion by treating them as if they were mandatory requirements that limit the equitable humanitarian and compassionate discretion anticipated by s. 25(1) (*Kanthasamy*, above).

[38] The Officer failed to assess whether the evidence as a whole justified an exemption under subsection 25(1). Instead, apparent eligibility under the SCPLC was treated as a bar to relief. Furthermore, the Officer did not make any attempt to explain how the Applicant's apparent eligibility under the SCPLC outweighed the plethora of factors weighing in favour of an exemption under subsection 21(5). Accordingly, the decision was neither justifiable nor transparent. A decision must be both justifiable and transparent in order for this Court to find that it was reasonable.

[39] The Officer's fettering of her discretion constitutes a reviewable error. As stated by Justice Stratas in *Stemijon Investments Ltd. v. Canada (Attorney General), 2011 FCA 299*, "a decision that is the product of a fettered discretion must per se be unreasonable" (at para 24). Moreover, the lack of justifiability and transparency renders the Officer's decision unreasonable.

VII. Conclusion

[40] The Officer's decision was unreasonable. The application for judicial review is allowed. The Officer's decision is set aside. This matter is remitted to a different Officer for reconsideration.

JUDGMENT in IMM-366-18

THIS COURT'S JUDGMENT is that the application for judicial review is allowed. The matter is referred back to be redetermined by a differently constituted decision maker. There is no question of general importance for certification. There is no order as to costs. That the Style of cause be amended to The Minister of Citizenship and Immigration for the Respondent.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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