Federal Court  Cour fédérale

Date: 20190318

Docket: IMM-3926-18

Citation: 2019 FC 310

Ottawa, Ontario, March 18, 2019

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

TAL YOVEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision made on August 1, 2018, by an officer of the Humanitarian Migration Office of Immigration, Refugees and Citizenship Canada [the Officer], which rejected the Applicant's application for permanent residence on humanitarian and compassionate [H&C] grounds.

II. Background

[2] The Applicant, Tal Yovel, is a citizen of Israel who arrived in Canada in September 2011, as a temporary resident.

[3] The Applicant married a Canadian citizen and the couple had a daughter, Daniella, born September 9, 2013.

[4] Ms. Yovel's temporary resident status was extended twice, and she then applied for permanent residence as a member of the family class on December 16, 2013.

[5] The Applicant's marriage deteriorated, and on September 21, 2015, her spouse withdrew his spousal sponsorship application.

[6] On January 16, 2017, the Applicant applied to extend her work permit; this application was denied on April 15, 2017.

III. Decision Under Review

[7] The Applicant filed her H&C application on April 11, 2017 [the Application]. The Application was based on establishment in Canada, the best interests of the child, and hardships in applying for permanent residence from abroad.

[8] The Application was denied by the Officer on August 1, 2018 [the Decision].

[9] In denying the Application, the Officer found that:

i. The Applicant's employment in Canada is relatively short and modest, but she is supported financially by her parents and child support payments;

ii. Aside from some friends in Canada and involvement with Daniella's friends from daycare, there is little evidence of her integration into her community and Canadian society. She has little family support in Canada;

iii. It also appears the Applicant is in Canada without status since April 25, 2017;

iv. The Applicant asserts that her relationship with her spouse cannot be reconciled, and that the Applicant and her spouse intend to continue their divorce proceedings;

v. The Applicant can be financially independent in Israel. During an eight month trip to Israel from September 2015 to April 2016, the Applicant moved into a residential unit that was separate from her parents', found a job, and placed Daniella in daycare. As well, the Applicant may be better supported by her parents and in-laws in Israel;

vi. If Daniella returns to Israel with her mother, Daniella may have the support of both her parents, but may have less physical support from her father. Daniella adjusted well to life in Israel during her eight month visit. Since birth and during this trip, Daniella has been primarily under the care of the Applicant. The Applicant facilitated online contact and visits between Daniella and her father. Residing in Israel would allow Daniella's grandparents to support her as well, as they did when she visited Israel. Moreover, Daniella holds dual citizenship and speaks Hebrew, in addition to English;

vii. If the Applicant were to stay in Canada, Daniella may continue to be exposed to her parents' unstable and confrontational relationship;

viii. There is no more hardship than what is inherent when a visitor returns to his or her country of origin after over two years of residing in Canada. Both the Applicant and Daniella have shown their ability to establish themselves in Israel; and

ix. As for the hardship the Applicant and her daughter would face if they were separated, there is little documentary evidence to demonstrate that a separation may occur.

IV. Issues

[10] The issues are:

A. Was there denial of procedural fairness in the Officer's Decision?

B. Is the Officer's analysis unreasonable?

V. Standard of Review

[11] The standard of review for procedural fairness is correctness. The standard of review for the Officer's analysis is reasonableness.

VI. Analysis

A. *Preliminary Issue*

[12] The Respondent argues that Exhibits B, H, J and K in the Applicant's Record are not properly before the Court and should be excluded. To the extent those materials were not before the Officer as part of the Certified Tribunal Record, I agree.

[13] The documents referred to in the above Exhibits were not evidence provided to the Officer, and I am satisfied that this additional evidence is not necessary to reduce any issue of procedural fairness or jurisdiction, nor would the evidence, even if admitted, affect the outcome of this decision (*Alabadleh v Canada (Minister of Citizenship and Immigration)*, 2006 FC 716 at para 6).

B. *Was there denial of procedural fairness in the Officer's Decision?*

[14] At the outset of the hearing, counsel for the Applicant criticized the spousal sponsorship program as being inappropriate and procedurally unfair. I give no weight to his position on this point.

[15] The Applicant submits that the rules regarding spousal sponsorship encourage women to stay in abusive relationships. It is argued that, since spousal sponsorship may be withdrawn at any time before a final decision is made on the file, the spousal sponsorship system facilitates the intimidation and manipulation of vulnerable women.

[16] However, these arguments have no bearing on this proceeding, are speculative and non-specific, such that they are without merit.

[17] The second argument raised by the Applicant is that several months elapsed between the submission of the Application and the Decision. It is argued that the Officer should have therefore requested an interview with the Applicant or her daughter. Moreover, the Applicant says that Immigration, Refugees and Citizenship Canada did not explain how to update an H&C application, and their website mentions the option of an interview. This, argues the Applicant, creates an expectation that an interview will be conducted.

[18] Justice John Evans of the Federal Court of Appeal in *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at paragraph 8, stated that H&C applicants have no right or legitimate expectation that they will be interviewed:

> H & C applicants have no right or legitimate expectation that they will be interviewed. And, since applicants have the onus of establishing the facts on which their claim rests, they omit pertinent information from their written submissions at their peril...

[19] Additionally, in the context of an application for permanent residence from within Canada on H&C grounds, there is no duty on an immigration officer to highlight weaknesses in an application and to request further submissions (*Adams v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1193 at para 29).

[20] The Applicant had no legitimate expectation of an interview in this case. There was no procedural unfairness.

C. *Is the Officer's analysis unreasonable?*

[21] The Applicant challenges the reasonableness of the Decision on five fronts. I will address each in turn.

(1) Ignoring evidence

[22] The Applicant argues that the Officer's Decision is unreasonable because it does not mention an agreement signed by the spouses on January 5, 2016, before a family court in Israel [the Agreement] or an addendum to the Agreement signed on April 12, 2016 [the Addendum]. According to the Agreement, the Applicant's spouse will retract the withdrawal of spousal sponsorship and will make all efforts at his disposal in order for the Applicant to have a permanent residence visa and/or legal status in Canada. The Applicant explains that the Addendum addresses concerns that such attempts might be fruitless. The Addendum reiterates that the Applicant's spouse should seek to obtain citizenship status for her, but, if she could not obtain it, the Applicant and her daughter would be permitted to return to Israel and live there.

[23] Neither the Agreement nor the Addendum support the Application. Although the Applicant's spouse may regret his withdrawal of spousal sponsorship, he does not cohabit in a conjugal relationship with the Applicant. As a result, the Applicant is no longer eligible for permanent residence as a member of the family class. The absence of any mention of the Agreement or the Addendum in the Decision is not a mistake. Moreover, a tribunal is not required to make an explicit written finding on each constituent element, however subordinate, leading to its final conclusion.

(2) Best Interests of the Child

[24] The principles for considering best interests of the child have been articulated by the Supreme Court of Canada in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 at paragraphs 35-36, 41:

> **35** The "best interests" principle is "highly contextual" because of the "multitude of factors that may impinge on the child's best interest*": Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, at para. 11; *Gordon v. Goertz*, [1996] 2 S.C.R. 27, at para. 20. It must therefore be applied in a manner responsive to each child's particular age, capacity, needs and maturity: see *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181, at para. 89. The child's level of development will guide its precise application in the context of a particular case.
>
> **36** Protecting children through the "best interests of the child" principle is widely understood and accepted in Canada's legal system: *A.B. v. Bragg Communications Inc.*, [2012] 2 S.C.R. 567, at para. 17. It means "[d]eciding what ... appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention": *MacGyver v. Richards* (1995), 22 O.R. (3d) 481 (C.A.), at p. 489.
>
> **[…]**
>
> **41** It is difficult to see how a child can be more "directly affected" than where he or she is the applicant. In my view, the status of the applicant as a child triggers not only the requirement that the "best interests" be treated as a significant factor in the analysis, it should also influence the manner in which the child's other circumstances are evaluated. And since "[c]hildren will rarely, if ever, be deserving of any hardship", the concept of "unusual and undeserved hardship" is presumptively inapplicable to the assessment of the hardship invoked by a child to support his or her application for humanitarian and compassionate relief: Hawthorne, at para. 9. Because children may experience greater hardship than adults faced with a comparable situation, circumstances which may not warrant humanitarian and compassionate relief when applied to an adult, may nonetheless entitle a child to relief: see *Kim v. Canada (Citizenship and Immigration)*, [2011] 2 F.C.R. 448

> (F.C.), at para. 58; UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/09/08, December 22, 2009.

[25] The Officer properly considered the best interests of the Applicant's child in light of the evidence before her. The record discloses that the Applicant's submissions on the best interests of the child included:

i. The Applicant's daughter is a Canadian citizen, the Applicant is the primary caregiver for her child, and the Applicant has facilitated the relationship between her daughter and her husband when the Applicant and her child resided in Israel;

ii. The Applicant had family support in Israel, and the Applicant shared custody of her child with her husband, from whom she was legally separated;

iii. A report from a social worker in Israel reflected that the Applicant's daughter had been well-adjusted and happy at her daycare during her eight months in Israel. The report also reflected that the Applicant's daughter had a positive relationship with her father;

iv. The Applicant's daughter's best interest was to remain with the Applicant and that the Applicant was willing and able to facilitate her daughter's relationship with her father, regardless of their physical location; and

v. The Applicant's daughter would have the benefit of additional support from both sets of grandparents in Israel.

[26] While it is always unfortunate when a child may be separated from a parent, the Officer here did not ignore, misconstrue or fail to consider the best interests of the Applicant's child.

[27] The Applicant believes that the Officer should have requested professional advice or a report from a child psychologist or another expert. The Applicant also argues that for the Officer to consider the emotional, social, cultural and financial support Daniella's father could and would provide her from Canada, when separated from Daniella, if she is in Israel, is not meaningful as there would not be actual, physical support.

[28] There is no evidence to support these allegations and no reverse onus on the Respondent, as is suggested by the Applicant, to put forward evidence to help the Applicant make her case. The onus rests with the Applicant to do so.

[29] There is no reviewable error in the Officer's appreciation of Daniella's best interests. As explained above, the Applicant bears the onus of establishing her claim and she is not entitled to have the Officer request documentation on her behalf. Moreover, the evidence in the file shows that Daniella had a positive relationship with her father during her eight month stay in Israel, and there is no evidence to suggest this would change in the future.

[30] It was reasonable for the Officer to suppose that the arrangements that facilitated contact between Daniella and her father while she resided in Israel with her mother would be possible if the Applicant and her daughter returned to Israel. Moreover, a report from a social worker in Israel dated December 10, 2015, shows that Daniella's father has promised "that if Daniela [sic] returns to Canada with him then he will finance flight tickets for Tal to visit in Canada anytime".

(3) Hardship

[31] Reasons provided by an officer in deciding an H&C matter must show that the Officer has considered H&C factors in a broader sense and has not simply relied on a hardship analysis. In *Marshall v Canada (Minister of Citizenship and Immigration)*, 2017 FC 72 at paragraphs 30-33, the Court stated:

> **30** *Kanthasamy* reviewed the history of the Minister's humanitarian and compassionate discretionary power enacted set out in section 25 of IRPA. The Supreme Court of Canada re- established that *Chirwa v Canada (Minister of Citizenship and Immigration)*, [1970] IABD No 1 [*Chirwa*] provided an important governing principles for H&C assessments, principles that are to be applied along with the older "hardship" analysis required by the Guidelines:
>
> > [13] The meaning of the phrase "humanitarian and compassionate considerations" was first discussed by the Immigration Appeal Board in the case of *Chirwa v. Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338. The first Chair of the Board, Janet Scott, held that humanitarian and compassionate considerations refer to "those facts, established by the evidence, which would excite in a reasonable man [sic] in a civilized community a desire to relieve the misfortunes of another -- so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the Immigration Act": p. 350. This definition was inspired by the dictionary definition of the term "compassion", which covers "sorrow or pity excited by the distress or misfortunes of another, sympathy": *Chirwa*, at p. 350. The Board acknowledged that "this definition implies an element of subjectivity", but said there also had to be objective evidence upon which special relief ought to be granted: *Chirwa*, at p. 350.
>
> **31** The Supreme Court of Canada then stated as follows:
>
> > [21] But as the legislative history suggests, the successive series of broadly worded "humanitarian

> and compassionate" provisions in various immigration statutes had a common purpose, namely, to offer equitable relief in circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another": *Chirwa*, at p. 350.

32 As to hardship the Supreme Court of Canada said that that the hardship tests continue to apply, but added:

> [33] The words "unusual and undeserved or disproportionate hardship" should therefore be treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). As a result, what officers should not do, is look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds, and use the language of "unusual and undeserved or disproportionate hardship" in a way that limits their ability to consider and give weight to all relevant humanitarian and compassionate considerations in a particular case. The three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision.
>
> [emphasis in original]

33 In reviewing the reasons of the Officer, I am unable to detect any appreciation of the *Chirwa* approach. In my respectful opinion, H&C Officers should not only consider the traditional hardship factors, but in addition, they must consider the *Chirwa* approach. I do not say that they must recite *Chirwa* chapter and verse, nor that there are any magic formulae or special words these Officers must use. But the reviewing courts should have some reason to believe that the Officers have done their job, that is, that H&C Officers have considered not just hardship but humanitarian and compassionate factors in the broader sense.

[32] The Officer considered the entirety of the Applicant’s evidence and considered the Application in a holistic manner. The Officer did not limit the analysis to the alleged hardships that the Applicant would face if required to apply for permanent residence in the normal course.

The Officer did not disregard, ignore or otherwise misunderstand the Applicant's submissions that her social and economic ties were to Canada. The evidence showed that the Applicant was familiar with the language, customs, society, and culture in Israel as she had been born and raised there. The Applicant had attended school in Israel and had completed her mandatory military service there. The Applicant had also been able to secure an apartment for herself in Israel when she resided there between August 2015 and April 2016. The Applicant's parents and in-laws reside in Israel; the Officer did not err in finding that they would be able to mitigate any hardship of returning to Israel.

[33] The Officer reviewed the Applicant's submission that she would experience psychological and emotional harm if she were separated from her daughter. The Officer reasonably found that the Applicant had provided little, if any, evidence that she would be separated from her child. The evidence disclosed that the Applicant had maintained primary care of her daughter in both Canada and Israel. The Officer did not err in finding that the Applicant was not the subject of a removal order, which meant that she could travel to Canada on her valid electronic travel authority if her Application was denied. The Officer reasonably chose to accord little weight to the Applicant's claims respecting the hardships that she would face in Israel.

(4) Establishment

[34] The Officer asserted that "there is little evidence before me to establish that the applicant is volunteering her time in her community or that she has become involved in community organization, other activities or integrated into Canadian society". The Applicant argues that she

did not have the time or resources to volunteer. The Applicant notes that, by the Officer's measure, few, if any, Canadians are "established" in Canada.

[35] The Applicant also takes issue with the Officer's comments about her financial situation. The Applicant finds it patronizing that the Officer noted approvingly her reliance on her family in Israel. In addition, she says it is ignorant of the Officer to state that she "does not rely on social services in Canada" because she does not qualify for child benefits from the Government of Canada.

[36] These arguments are not supported in the evidence. There is no patronizing tone in the Decision. As for the observation that the Applicant receives financial support from her parents and child support payments, instead of social services, it is simply a reasonable observation based on the evidence.

[37] The Officer did not ignore, disregard or misconstrue the evidence relating to the Applicant's volunteer activities or other community involvement in Canada. The Applicant is asking the Court to reweigh the evidence on this issue, which is not the role of the Court.

(5) Other Evidence

[38] The Applicant argues that provisions of the *Divorce Act*, RSC 1985, c 3 (2nd Supp) and the *Family Law Act*, SA 2003, c F-4.5 should have been applied by the Officer. This argument has no merit. The Officer properly applied the provisions of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA] and the *Immigration and Refugee Protection*

Regulations, SOR/2002-227 [the Regulations] to the facts of the Application. The IRPA and the Regulations are the proper legislation to be considered on such applications. The Officer did not err in the application of the law to the submissions that were made.

[39] The Officer properly considered the entirety of the evidence submitted by the Applicant. The Applicant in effect is inviting the Court to reweigh the H&C factors provided in support of the Applicant's application, which the Court will not do.

JUDGMENT in IMM-3926-18

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3926-18
STYLE OF CAUSE:	TAL YOVEL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	MARCH 12, 2019
JUDGMENT AND REASONS:	MANSON J.
DATED:	MARCH 18, 2019

APPEARANCES:

K. Paul Wallace	FOR THE APPLICANT
Camille N. Audain	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Wallace Law Office Edmonton, Alberta	FOR THE APPLICANT
Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT