Federal Court  Cour fédérale

Date: 20201023

Docket: IMM-6312-19

Citation: 2020 FC 999

Vancouver, British Columbia, October 23, 2020

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

ROSMOND ADAIR
KAREN NICHOLE PRIMUS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Karen Nichole Primus, is a citizen of St. Vincent and the Grenadines [SVG] and the mother of two Canadian born children who are 17 and 15 years old. She applied for a permanent resident visa as a member of the family class sponsored by her aunt, Ms. Rosmond Adair. The Visa Officer found that Ms. Primus was not a member of Ms. Adair's

family class and that an exemption, on humanitarian and compassionate [H&C] grounds, was not warranted.

[2] This Application is brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 seeking judicial review of the Officer's decision. The Applicants do not dispute the finding that Ms. Primus is not a member of Ms. Adair's family class, but argue that the Officer's H&C decision is unreasonable.

II. Standard of Review

[3] The Applicants raise a single issue: whether the Officer's H&C decision is reasonable. A visa officer's H&C determination is to be reviewed against the standard of reasonableness (*Banatao v Canada (Minister of Citizenship and Immigration)*, 2020 FC 395 at para 20). Reasonableness review focuses on both the reasons for the decision and the outcome. A decision will be reasonable if it "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85 [*Vavilov*]). To be reasonable, a decision must be justifiable, intelligible, and transparent to those subject to the outcome (*Vavilov* at para 95).

III. Analysis

[4] The Applicants submit the Court's intervention is warranted on three grounds; the Officer unreasonably:

A. Found Ms. Primus was not a *de facto* member of Ms. Adair's family class;

B. Concluded hardship relating to general country conditions did not warrant H&C relief; and

C. Considered the best interests of Ms. Primus' children.

[5] I am not convinced that the Officer erred in considering the issues of *de facto* family class membership and hardship related to general country conditions. However, I am satisfied that the Officer committed reviewable errors in considering the Best Interests of the Children [BIOC]. On that basis, the Application is granted.

A. *The Officer reasonably found Ms. Primus was not a* de facto *member of Ms. Adair's family*

[6] Ms. Primus' primary care giver, from the ages of 9 to 12 and again from age 15 to adulthood, was Ms. Adair. Although Ms. Primus is now 46 years of age, Ms. Adair continues to provide her with support.

[7] While the Applicants acknowledge that Ms. Primus is not a member of Ms. Adair's family for the purposes of family class sponsorship, they argue that Ms. Primus should have been recognized as a *de facto* family member. The Applicants rely on the Respondent's Program Delivery Instructions [PDIs]. These instructions recognize that individuals who do not meet the definition of a family class member may nonetheless warrant H&C consideration and detail factors to be considered.

[8] The Applicants submit that the Officer unreasonably concluded that the evidence did not disclose that the relationship between Ms. Primus and Ms. Adair involved a high level of dependency and that the Officer erred by failing to canvas the factors set out in the PDIs for assessing *de facto* family membership.

[9] In *Frank v Canada (Minister of Citizenship and Immigration)*, 2010 FC 270 [*Frank*] Justice Luc Martineau, after reviewing the guidance provided to officers in the Respondent's operational manuals (the PDIs), stated:

> [29] What is clear from the foregoing is that *de facto* family member status is limited to vulnerable persons who do not meet the definition of family members in the Act and who are reliant on the support, both financial and emotional, that they receive from persons living in Canada. Therefore, *de facto* family member status is not normally given to independent and functional adults who happen to have a close emotional bond with a relative residing in Canada, as is the case in the present application.

[10] Dependence upon the sponsor living in Canada, both financial and emotional, is central to the concept of *de facto* family membership.

[11] In this instance, the evidence before the Officer demonstrates that Ms. Adair provided some financial assistance to her family members in SVG, including Ms. Primus. One might reasonably conclude that, in fulfilling the role as Ms. Primus' primary caregiver for periods during her youth, an emotional bond developed between the Applicants. However, the Applicants have not co-habited for many years even though they both resided in SVG for a time. Although Ms. Primus receives financial support from Ms. Adair, this is not Ms. Primus' only source of income; she works, receives tips, and receives support from other extended family

members in SVG. The Applicants also do not dispute the Officer's finding that there is little evidence of communication between the Applicants.

[12] Although Ms. Adair would reasonably have been a source of emotional support for Ms. Primus, the evidence falls short of demonstrating that Ms. Primus is currently emotionally dependent on Ms. Adair. In the absence of evidence demonstrating that Ms. Primus is a vulnerable person reliant on both the financial and emotional support of Ms. Adair, it was not unreasonable for the Officer to conclude that a high level of dependency had not been established.

[13] The Applicants rely on *Nalbandian v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1128 to argue that the Officer's failure to engage with each of the factors identified in the PDIs renders the decision unreasonable. I disagree. In *Nalbandian*, it was held that the Officer committed a reviewable error by failing to document the reasons for the decision and not addressing the prescribed criteria. In this case, the Officer reviewed the evidence relevant to the issue of dependence and found it did not show "how [Ms. Primus] has a high level of dependency and strong ties with [Ms. Adair]". Having found the evidence failed to establish dependency, the Officer was not required to explicitly conduct a *de facto* family member analysis and expressly address each of the factors set out in the PDIs. An officer is not required to "explicitly consider the issue of de facto family members in every case" (*Frank* at para 30).

B. *The Officer did not err in assessing general country conditions*

[14] The Applicants argue that the Officer unreasonably concluded that the evidence relating to the adverse conditions in SVG was evidence of generalized hardship that did not warrant H&C relief. The Applicants rely on a series of cases to argue that generalized hardship is not a basis to deny H&C relief (*Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*]; *Paramanayagam v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1417 [*Paramanayagam*]; *Marafa v Canada (Minister of Citizenship and Immigration)*, 2018 FC 571; *Rubayi v Canada (Citizenship and Immigration)*, 2018 FC 74). The Applicants submit that the general country condition evidence should not have been summarily dismissed, particularly as the evidence was linked to Ms. Primus' personal circumstances—a female heading a household with children—demonstrating a disproportionate impact upon her and her children.

[15] In the H&C context, reasonable inferences can be drawn from generalized evidence of adverse conditions to demonstrate hardship in a home country (*Kanthasamy* at para 56; *Paramanayagam* at para 19; *Aboubacar v Canada (Minister of Citizenship and Immigration)*, 2014 FC 714 at para 12).

[16] The evidence in this case demonstrates that economic adversity in SVG does have a disproportionate impact on women and children who live in female headed-households, and this includes high levels of unemployment. However, as the Officer notes, Ms. Primus obtained employment when she returned to SVG and has remained employed for a number of years.

[17] Although generalized hardship is not a basis to deny H&C relief, it is also not a grounds on which to grant such relief if the evidence demonstrates that the generalized hardship is not hardship that the Applicant is experiencing. While the conditions Ms. Primus faces in SVG are unquestionably difficult as a single mother, I am unable to conclude the Officer erred in finding that Ms. Primus' circumstances did not constitute hardship that would warrant relief. Access to a higher standard of living or better education in Canada is generally not enough to justify H&C relief (*Sanchez v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1295 at para 18; *Esahak-Shammas v Canada (Minister of Citizenship and Immigration)*, 2018 FC 461 at para 40).

C. *The Officer's best interests of the children analysis is unreasonable*

[18] The Applicants submit that the Officer ignored the country condition evidence as it related to the best interests of Ms. Primus' two Canadian born children. They further submit that the Officer erred in considering a consultation report that details significant memory, reading, spelling, computation skills, and developmental challenges faced by Ms. Primus' younger child.

[19] The Officer briefly addresses the 2017 consultation report detailing the learning and developmental challenges faced by Ms. Primus' youngest daughter. Characterizing the report as a "physicians opinion", the Officer gives the report neutral weight on the basis that no medical diagnosis was indicated and that "all recommendations written on report suggest that proper care is available to child in home country".

[20] The report clearly sets out the challenges the child faces. The author of the report had previously assessed the child in 2013, four years earlier. The author is identified as having

qualifications to assess learning and developmental challenges in school age children and the circumstances indicate he has been involved in this work for a number of years.

[21] In reviewing the Officer's reasons, it is not evident why the absence of a medical diagnosis undermines the weight to be given to the report. Perhaps the Officer's mistaken belief that the report was a physician's report explains the position taken. Despite the absence of a diagnosis, medical or otherwise, the report comprehensively addresses the child's learning and developmental challenges, assesses her abilities relative to her age, notes that previously recommended remedial measures have not been undertaken, and indicates the child's circumstances have not improved and perhaps have worsened between 2013 and 2017. The 2017 report states that "[f]rom the current assessment results it is obvious that Eniola has not progressed…since her first assessment". The report further notes "[h]er first assessment in 2013 indicated she needed urgent remedial help and it is very sad that this has not taken place".

[22] Despite the report's conclusion that the remedial help recommended in 2013 had not been provided the Officer concludes, "all the recommendations written on report suggest that proper care is available to child in home country". This conclusion appears to directly contradict the child's experience, as evidenced in the 2017 report. It is also inconsistent with other evidence on the record that highlights a shortage of qualified teachers, limited operating budgets that result in schools struggling to provide basics such as transportation and textbooks, and limited access to professionals who can address learning and developmental challenges.

[23] It is true that a child's disability is not determinative of an H&C claim (*Cortorreal De Leon v Canada (Immigration, Refugees and Citizenship)*, 2016 FC 1178 at para 26). However, this does not relieve an officer of the responsibility of fully engaging with the evidence and addressing the compassionate factors that might warrant exceptional relief (*Bhalla v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1638 at para 17).

[24] In this instance, the Officer gave "short shrift" to the child's challenges. The Officer failed to focus on the simple fact that the child has not been treated for the very real disabilities and challenges identified in the expert report. The Officer failed to address evidence detailing resource challenges within the SVG education system and the impact those challenges have on the very services the report recommends the child be provided. All of these circumstances warrant consideration in an H&C analysis where an officer is expected to engage in more than a simple assessment of a checklist of factors (*Salde v Canada (Citizenship and Immigration)*, 2019 FC 386 at para 23).

[25] When conducting an H&C assessment, it is not enough to address hardship. Compassionate factors must also be weighed and considered. The Officer concludes the BIOC analysis by stating the children, as Canadians, are at full liberty to pursue education in Canada without their mother. This conclusion is reached in the absence of any analysis of the compassionate factors the proposed scenario engages. It is not possible to understand how the Officer concluded this option might advance the children's best interests.

[26] The Officer's failure to address contrary evidence that is directly relevant to the conclusions reached and to consider the compassionate factors the Application raises renders the decision unreasonable.

IV. Conclusion

[27] The Application is granted. The parties have not identified a serious question of general importance for certification and none arises.

JUDGMENT IN IMM-6312-19

THIS COURT'S JUDGMENT is that:

1. The Application is granted;

2. The matter is returned for redetermination by a different decision maker; and

3. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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