Federal Court  Cour fédérale

Date: 20230314

Docket: IMM-6548-21

Citation: 2023 FC 342

Ottawa, Ontario, March 14, 2023

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

ROSMOND ADAIR
KAREN NICHOLE PRIMUS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, Rosmund Adair and Karen Nichole Primus, apply for judicial review of an immigration officer's [Officer] decision refusing Ms. Primus' application for permanent residence and finding that Ms. Primus was not included in any of the enumerated categories which define the family class pursuant to section 117 of the *Immigration and Refugee Protection*

Regulations [IRPR]. The Officer was not satisfied that humanitarian and compassionate [H&C] considerations warranted an exemption under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], from the application of paragraph 117(1)(h) of IRPR [Decision].

[2] The Primary Applicant, Ms. Primus, is a 48-year-old citizen of Saint Vincent and the Grenadines [St. Vincent]. Ms. Primus first entered Canada in 2000 as a visitor. By 2002, however, she was without status. In 2006, an exclusion order was issued and she returned to St. Vincent, where she has lived since. While Ms. Primus was in Canada, she had two children, a son and a daughter, who returned to St. Vincent with her.

[3] Ms. Adair, a Canadian citizen, is Ms. Primus' 59-year-old aunt and sponsor. Ms. Adair cared for Ms. Primus when she was a child, and Ms. Primus lived in her home as a pre-teen and a teenager. Given that Ms. Adair already has direct relatives in Canada, including a Canadian citizen spouse and a daughter, Ms. Primus does not meet the definition of a member of the family class pursuant to section 117 of the IRPR. Consequently, Ms. Primus requested an exemption on the basis of H&C considerations, which was refused.

[4] The Applicants submit that the Officer (i) conducted an unreasonable and flawed analysis of Ms. Primus' claim that she has *de facto* family member status; (ii) erred in their analysis of the best interests of the children [BIOC]; and (iii) focused exclusively on hardship without regard for the compassionate factors.

[5] The Respondent submits that (i) the Officer reasonably found that, based on the evidence, Ms. Primus did not fit within the parameters of a *de facto* family member, when her two children, her mother, her brothers and their families all live in St. Vincent; (ii) the Officer's analysis of the BIOC was commensurate with the level of evidence submitted; and (iii) Ms. Primus' children are Canadian citizens, who can return when they choose to, and on the facts Ms. Primus' submissions were simply insufficient for an exemption on the basis of H&C considerations.

[6] For the reasons that follow, this application for judicial review is allowed.

II. Analysis

[7] The parties submit, and I agree, that the applicable standard of review is that of reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). A reasonable decision is one that is justified in relation to the facts and the law that constrain the decision maker (*Vavilov* at para 85).

[8] An exemption under subsection 25(1) of the IRPA is an exceptional and discretionary remedy (*Fatt Kok v Canada (Citizenship and Immigration)*, 2011 FC 741 at para 7; *Huang v Canada (Citizenship and Immigration)*, 2019 FC 265 at paras 19-20). Subsection 25(1) of the IRPA confers broad discretion on the Minister to exempt foreign nationals from the ordinary requirements of that statute and to grant permanent resident status to an applicant in Canada if the Minister is of the opinion that such relief is justified by H&C considerations. The H&C discretion is a flexible and responsive exception that provides equitable relief, namely to mitigate

the rigidity of the law in an appropriate case (*Rainholz v Canada (Citizenship and Immigration)*, 2021 FC 121 at paras 13-14).

[9] H&C considerations are facts, established by evidence, that would excite in a reasonable person in a civilized community the desire to relieve the misfortunes of another provided these misfortunes warrant the granting of special relief from the otherwise applicable provisions of the IRPA (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 13, 21 [*Kanthasamy*]).

[10] Subsection 25(1) also refers to the need to take into account the best interests of a child directly affected. In considering the BIOC, an officer must be "alert, alive, and sensitive" to those interests (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75). Relevant considerations include the child's age and level of dependency; the degree of the child's establishment in Canada; the child's links to the country in relation to which the H&C assessment is being considered; the impact on the child's education; medical or special needs considerations; gender-based considerations; and the conditions of that country and the potential impact on the child (*Kanthasamy* at para 40).

[11] The Applicants have failed to persuade me that the Officer erred in finding that Ms. Primus is not a *de facto* family member or that the Officer erred by focusing exclusively on hardship. I am, however, persuaded that the Officer's BIOC analysis is unreasonable.

[12] The Applicants have adduced evidence of Ms. Primus' daughter's learning and developmental delays. The Officer noted the evidence of the daughter's learning disabilities and special needs, and gave that factor positive weight. The Officer also noted the impact of those special needs on her education. The Officer then stated that as a Canadian citizen, the child is entitled to pursue education in Canada although it would suppose a separation from her mother and the necessity of adapting to new living arrangements.

[13] The Applicants plead that the Officer never considered whether it would be in the best interests of a child who suffers from learning disabilities to return to Canada with her mother. The Respondent submits that the Officer did not commit a reviewable error by stating that the child is a Canadian citizen who may pursue various educational avenues if she so chooses. The Respondent notes that the Officer never said it would be easy, but recognized it was possible.

[14] I find that the Officer ought to have considered the scenario where Ms. Primus' daughter returns to Canada with her mother rather than alone. In the context of the present case, this scenario ought to have been weighed and considered as part of the Officer's BIOC analysis. For this reason, the Decision is unreasonable.

III. Conclusion

[15] For these reasons, this application for judicial review is allowed. The Decision is set aside, and the case is remitted back to a different officer for redetermination. No question of general importance was submitted for certification, and I agree that none arise.

JUDGMENT in IMM-6548-21

THIS COURT'S JUDGMENT is that:

1. The Applicants' application for judicial review is allowed;
2. The Decision is set aside and the case is remitted back to a different officer for redetermination; and
3. No question of general importance is certified.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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