Federal Court  Cour fédérale

Date: 20110321

Docket: IMM-3198-10

Citation: 2011 FC 347

Ottawa, Ontario, March 21, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

RUTE PEREIRA DA SILVA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of Officer Jerome Trottier (the Officer) dated May 6, 2010, wherein the Applicant's request for permanent residence from within Canada on humanitarian and compassionate (H&C) grounds pursuant to section 25 of the *Immigration and Refugee Protection Act*, RS 2001, c 27 [IRPA] was denied.

[2] Based on the reasons below, this application is dismissed.

I. Background

A. *Factual Background*

[3] Rute Pereira Da Silva (the Applicant) is a citizen of Brazil. She came to Canada on April 1, 2002 on a temporary resident permit and has remained here without status since that time. She submitted her H&C application on October 7, 2005.

[4] The Applicant came to Canada in search of a better life for her orphaned nieces, Shirley and Vanessa do Vale Pereira. Shirley came to Canada on December 30, 2002, and Vanessa joined her on December 11, 2003; both of the nieces were adults by the time they came to Canada. Both of the nieces married Canadian citizens and Shirley gave birth to a son, Daniel. Shirley has received permanent resident status, and Vanessa has been approved in principle for permanent residency as a member of the family class.

[5] At a young age, the nieces lost three primary caregivers in a span of three years – their mother, father, and then grandmother. They were taken in by the Applicant's brother, but suffered verbal and emotional abuse at the hands of his wife. Throughout this ordeal, the Applicant kept in touch with the nieces and she eventually took them in after they left their uncle's home. The

Applicant claims that she has been like a mother to the nieces and a grandmother to Daniel. The Applicant never married and has no children of her own.

[6] The Applicant is an active member of her church, and she also volunteers at a soup kitchen for the homeless. The Applicant has been employed as a housekeeper since her arrival in Canada. Neither she nor her nieces have required social assistance since arriving in Canada. The Applicant has never been charged with a criminal offence.

[7] The H&C application was based on establishment and the Applicant's relationship with the nieces and Daniel.

B. *Impugned Decision*

[8] The Officer considered the evidence of establishment, but found that the Applicant had not demonstrated a high level of integration that warranted H&C relief. The Officer also found that it was unclear whether she was financially self-sufficient because there was no clear evidence as to how many hours she worked or what her income was.

[9] The Officer considered the Applicant's relationship with her nieces and with Daniel, but was not satisfied that the relationship could not be maintained if the Applicant was returned to Brazil. The Officer also noted that the Applicant still had family in Brazil, and that it would not be a hardship for her to return there. The Officer acknowledged that hardship would result from the Applicant's separation from Daniel, but concluded that such hardship would not be unusual and

undeserved or disproportionate.

II. Issues

[10] The Applicant challenges the Officer's consideration of her establishment, and argues that the Officer failed to appreciate the hardship that would result from her removal because he failed to consider her as a *de facto* family member. The Applicant also makes procedural fairness arguments. The Respondent argues that the Applicant is really challenging the weight given to the evidence, and submits that the Applicant is not a *de facto* family member.

[11] I characterize the issues as:

(a) Is the Officer's conclusion on establishment supported by the material in the record?

(b) Did the Officer err in assessing Daniel's best interests?

(c) Is the Applicant a *de facto* family member?

III. Standard of Review

[12] The Applicant did not make submissions about the standard of review. The Respondent submits that H&C decisions are reviewable on the standard of reasonableness.

[13] The Officer's determination regarding establishment was a factual one, and attracts deference. The Supreme Court held at paragraph 46 of *Canada (Minister of Citizenship and*

Immigration) v Khosa, 2009 SCC 12, [2009] 1 SCR 339 that questions of fact are reviewable on a standard of reasonableness.

[14] More generally, the standard of review on H&C applications is reasonableness (see *Kisana v Canada (Minister of Citizenship and Immigration)*, 2008 FC 307, 2008 CarswellNat 671, aff'd 2009 FCA 189). This standard has been applied to determinations about the best interests of the child (see *Benyk v Canada (Minister of Citizenship and Immigration)*, 2009 FC 950, 84 Imm LR (3d) 35) and about whether someone is a *de facto* family member (see *John v Canada (Minister of Citizenship and Immigration)*, 2010 FC 85, 2010 CarswellNat 126).

[15] As set out in *Khosa*, above, and in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, reasonableness requires consideration of the existence of justification, transparency, and intelligibility in the decision-making process. It is also concerned with whether the decision falls within a range of acceptable outcomes that are defensible in respect of fact and law.

IV. Argument and Analysis

A. *The Officer's Conclusion on Establishment is Supported by the Material in the Record*

[16] The Applicant submits that the Officer misconstrued the evidence about her establishment and that the conclusion on this issue is therefore unreasonable. The Applicant argues that the bank statements she provided demonstrate her financial independence and refute the Officer's finding that she had not established her income and self-sufficiency. The Applicant relies on two refugee

decisions of the Federal Court of Appeal in support of this argument, neither of which is relevant because both dealt with situations where the Board ignored evidence in the record. The Applicant further submits that the Officer set the threshold for establishment warranting a positive H&C decision unreasonably and unattainably high.

[17] The Officer did not ignore any evidence of the Applicant's establishment. The Officer expressly considered the employment letters and the letter from her church. Although the Officer did not mention her bank statements in the decision, the Respondent correctly notes that bank statements do not establish the source of funds, but rather the balance of a particular bank account, and so they are insufficient to establish the Applicant's income. The Applicant has failed to demonstrate that the Officer exercised his discretion unreasonably or in bad faith in considering her establishment in Canada.

B. *The Officer Did Not Err in Assessing Daniel's Best Interests*

[18] The Applicant argues that the Officer erred in assessing Daniel's best interests. The Officer's consideration of Daniel's best interests is confined to one paragraph:

> I am also aware that the older niece has a baby boy in Canada named Daniel. The applicant stated to have developed a very strong relationship with the child and considers him to be like her grand-child. I have considered the best interest of the child involved in this case and I am sensitive to it. I am conscious that some levels of hardship will necessary (sic) result from a physical separation from the child as well as from both nieces and gave the argument some weight. However, I am not of the opinion that the hardship suffered would be of an unusual and undeserved or disproportionate nature based on the evidence before me.

[19] The Applicant submits that the Officer failed to consider her relationship with Daniel and the fact that she considers him to be her grandson. The Applicant argues that the hardship is compounded by the fact that she is not eligible for sponsorship by her nieces.

[20] The Applicant relies on *Kolosovs v Canada (Minister of Citizenship and Immigration)* (2008 FC 165, 323 FTR 181). In that decision, Justice Douglas Campbell described the requirement that Officers be "alert, alive and sensitive" to the best interests of children affected by a decision.

[21] The Officer's analysis of Daniel's best interests is brief and does not set out the factors identified in *Kolosovs*, above, and found in the IP-5 manual. However, the Applicant has not provided any evidence that she is Daniel's primary caregiver or even one of his primary caregivers, and so such a detailed analysis of Daniel's interests seems unnecessary. This Court imposed an obligation to consider the interests of a grandchild in *Benyk*, above, but the grandmother in that case was one of two primary caregivers for the children and the children were dependent on their grandmother's care because their mother worked nights.

[22] Daniel's mother is a permanent resident in Canada and there is no question that he will remain in Canada regardless of whether the Applicant is removed. The Officer considered the emotional bond between the Applicant and Daniel and acknowledged that their separation would cause hardship. This emotional bond is the only factor that the Officer was required to consider in assessing Daniel's interests, and the Applicant has failed to identify any other factors that the Officer should have considered.

[23] Contrary to the Applicant's submission, the Officer explicitly acknowledged the Applicant's claim that Daniel is like a grandson to her. Although the Applicant may disagree with the Officer's analysis of Daniel's best interests, she has not demonstrated that it was unreasonable.

C. *The Applicant is Not a De Facto Family Member*

[24] I agree with the comments of Justice Luc Martineau in *Frank v Canada (Minister of Citizenship and Immigration)*, 2010 FC 270, 2010 CarswellNat 525, where he stated at para 30 of the decision:

> [30] I do not believe *John*, above created an obligation for all immigration officers to explicitly consider the issue of *de facto* family members in every case. It is clear in the present application that the officer considered the applicant's relationship with his family in Canada, and, without evidence that the officer failed to consider any other relevant criteria in determining the H&C application, the Court should not intervene.

[25] In the present application it is clear to me that the officer considered the Applicant's relationship with her family in Canada.

[26] The Applicant relies on *Koromila v Canada (Minister of Citizenship and Immigration)* (2009 FC 393, 2009 CarswellNat 1167), and claims that emotional dependence is sufficient to render someone a *de facto* family member. *Koromila* is of little assistance in this application, as it dealt with a decision by a visa officer overseas on a skilled worker application. In considering whether there were H&C factors, the officer in *Koromila* ignored evidence of emotional dependence and refused to consider whether the applicant was a *de facto* family member left behind. In the decision under review, although the Officer did not explicitly examine whether the

Applicant is a *de facto* family member, he did consider the emotional bond between the Applicant and her nieces. Further, there is no evidence that the Applicant would be isolated in Brazil, unlike in *Koromila*, where there was evidence of significant isolation.

[27] However, a review of *John* and of *Frank*, above, makes it clear that the Applicant is not a *de facto* family member. In *Frank*, Justice Martineau held at paragraph 29 that:

> [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.
>
> [Emphasis added]

[28] Similarly, Justice Sean Harrington discussed the concept of *de facto* family members at paragraph 12 of *John*, above:

> [12] In speaking of *de facto* family members, paragraph 13.8 of the Guidelines suggests that an important consideration is to what extent the applicant would have difficulty meeting financial or emotional needs without the support and assistance of the family unit in Canada.

[29] The Officer's failure to consider whether the Applicant is a *de facto* family member is reasonable because it is clear from these two passages and from the evidence in the record that the Applicant is not a *de facto* family member. Although the Applicant certainly has a close emotional bond with her nieces, *de facto* family member is a defined concept in the immigration context and the Applicant simply does not meet the definition. The Applicant claims to be financially self-

sufficient, and she has not demonstrated emotional dependence on the nieces that would render her a *de facto* family member. The Applicant is an independent and functional adult, as was the applicant in *Frank*, above, and so is not a *de facto* family member.

V. Conclusion

[30] No question was proposed for certification and none arises.

[31] In consideration of the above conclusions, this application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-3198-10**
STYLE OF CAUSE:	**RUTE PEREIRA DA SILVA v. MCI**
PLACE OF HEARING:	**TORONTO**
DATE OF HEARING:	**FEBRUARY 15, 2011**
REASONS FOR JUDGMENT AND JUDMENT BY:	**NEAR J.**
DATED:	**MARCH 21, 2011**

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