Federal Court  Cour fédérale

Date: 20120418

Docket: IMM-2508-11

Citation: 2012 FC 447

Ottawa, Ontario, April 18, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

VENITA WALKER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of an immigration officer of Citizenship and Immigration Canada (the officer), dated March 28, 2011, wherein the applicant's permanent residence application was refused (the decision). This conclusion was based on the officer's finding that there were insufficient humanitarian and compassionate (H&C) grounds to

warrant an exception allowing the applicant's permanent residence application to be made from within Canada.

[2] The applicant requests that the officer's decision be set aside and the application be referred back to Citizenship and Immigration Canada (CIC) for redetermination by a different officer.

Background

[3] The applicant, Venitia Walker, is a Jamaican citizen. In Canada, she has two sisters living in Montreal and her daughter and two grandchildren (born in 1994 and 2002) living in Toronto. The applicant's daughter and grandchildren are Canadian citizens. The applicant also has one other daughter in Jamaica.

[4] On May 7, 2007, the applicant filed a request for an exemption from the permanent residence visa requirement on H&C grounds. In a letter dated May 29, 2007, this application was returned to the applicant on the basis that it was incomplete.

[5] On June 26, 2007, the applicant arrived in Canada. Since arriving in Canada, she has been caring for her two grandchildren while her daughter, a single mother, works shift work at a shelter.

[6] In a letter dated September 20, 2007, the applicant was notified that her application for permanent residence from within Canada on H&C grounds was being transferred to the CIC centre in Etobicoke for further assessment.

[7] In a letter dated February 3, 2011, an immigration officer requested that the applicant submit an updated application. With the assistance of a lawyer, the applicant submitted an updated application on March 3, 2011.

Officer's Decision

[8] On March 25, 2011, the officer reviewed the applicant's application. The officer's findings were recorded in an application for permanent residence narrative form, which forms part of the decision.

[9] The officer assessed four factors in coming to the determination that there were no grounds on which the requirement to apply for permanent residency from outside Canada would constitute unusual and undeserved or disproportionate hardship to the applicant.

[10] First, the officer denied the applicant's claim that she was an essential caregiver to her grandchildren on the basis that insufficient evidence had been submitted on the lack of availability of other child care services. The officer also found that the best interests of the children were protected because they lived with their mother, their primary caregiver. The officer therefore granted little weight to this factor.

[11] Second, the officer found that there was insufficient evidence to corroborate the applicant's claim that her grandson's attention deficit hyperactivity disorder (ADHD) had improved since her

arrival. The officer highlighted the lack of medical evidence showing that the grandson had ADHD. The officer therefore granted no weight to this factor.

[12] Third, the officer characterized the applicant's alleged risk of increased violent crime if returned to Jamaica, based on perceptions that she was wealthy due to her time abroad, as fear faced by the general public rather than personalized fear. The officer acknowledged that crime in Jamaica is not a new or recent phenomenon and it would have been present when the applicant previously resided there. Therefore, the officer also granted little weight to this factor.

[13] Finally, the officer acknowledged that there was some level of establishment based on the applicant being: a parishioner at the local church; a volunteer at the church outreach and a community food bank; and unemployed and supported by her daughter in Canada. However, the officer was not satisfied that this establishment was at a sufficient level to outweigh the lack of the other H&C factors.

[14] Based on this review, the officer decided that an exemption on H&C grounds was not warranted. No interviews were conducted.

[15] The officer notified the applicant of the decision in a letter dated March 28, 2011. This letter also stated that the applicant was in Canada without valid temporary resident status.

Issues

[16] The applicant submits the following point at issue:

Did the officer commit reviewable errors of law in refusing the applicant's H&C application?

[17] I would phrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the officer err in denying the applicant's application?

Applicant's Written Submissions

[18] The applicant submits that the standard of review of an immigration officer's decision on an H&C application is reasonableness. The applicant further submits that the reasons for refusal cannot be inconsistent with the values underlying the grant of discretion.

[19] The applicant submits that the officer erred in law by conducting a wholly inadequate assessment of the best interests of the children directly affected by the decision. The applicant submits that the officer ignored the evidence showing her daughter's dependency on her and her grandchildren's strong bonds with her.

[20] The applicant submits that the officer also failed to analyze and assess what would be in the best interests of the children and then weigh this against the other H&C factors. Rather than

considering the best interests of the children, the applicant submits that the officer only considered their minimally sufficient interests. The applicant submits that the officer only listed the relevant factors rather than actively engaging with them to assess the overall interests of the children. In so doing, the officer made a reviewable error.

[21] The applicant also submits that the officer erred in law in assessing her fear of violent crime in Jamaica. The officer should have considered whether this fear amounted to unusual, undeserved or disproportionate hardship.

[22] Finally, the applicant submits that the officer erred in law by not mentioning the following evidence:

Her daughter's signed undertaking to sponsor her mother;

Her daughter's explanation that a sponsorship of a parent is a lengthy process (can take more than five years); and

The fact that the applicant diligently maintained her legal and valid temporary resident status throughout her stay in Canada.

[23] As the officer did not mention this relevant evidence, the applicant submits that it is presumed that the officer ignored it in the decision.

Respondent's Written Submissions

[24] The respondent submits that an immigration officer's determination of the existence of hardship attracts a standard of review of reasonableness.

[25] The respondent submits that an H&C review offers an individual special and additional consideration for exemption from Canadian immigration laws. However, a decision not to grant such an exemption does not take away any rights from the individual.

[26] The respondent submits that the applicant's submissions on taking into account positive factors, ignoring evidence and failing to give proper attention to certain factors actually revolved around the weighing of different factors. The respondent submits that this is within the officer's discretion and the applicant had not demonstrated that the officer exercised this discretion unreasonably. Rather, the officer did consider and weigh all relevant factors and came to a conclusion supported by the evidence as a whole.

[27] The respondent also submits that the officer's conclusion on the best interests of the children was reasonable. Although the jurisprudence requires immigration officers to always consider these interests, it is also clearly established that this issue is not determinative and does not always outweigh all other factors.

[28] Finally, the respondent submits that the applicant did not demonstrate that the officer erred in any way in assessing her alleged risk of hardship in returning to Jamaica.

[29] In summary, the respondent submits that in its review of the evidence before it, the officer repeatedly applied the correct standard applicable in the H&C context.

Analysis and Decision

[30] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[31] It is established law that assessments of an immigration officer's decision concerning an application for permanent residence from within Canada on H&C grounds is reviewable on a standard of reasonableness (see *Garcia De Leiva v Canada (Minister of Citizenship and Immigration)*, 2010 FC 717, [2010] FCJ No 868 at paragraph 13; *Adams v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1193, [2009] FCJ No 1489 at paragraph 14; and *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2009] FCJ No 713 at paragraph 18).

[32] In reviewing the officer's decision on the standard of reasonableness, the Court should not intervene unless the officer came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] SCJ No

12 at paragraph 59). As the Supreme Court held in *Khosa* above, it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraphs 59 and 61).

[33] **Issue 2**

Did the officer err in denying the applicant's application?

Subsection 11(1) of the Act requires persons who wish to apply for permanent residence in Canada to do so from outside Canada. Subsection 25(1) of the Act provides a possible exemption from this rule where it is justifiable on H&C grounds. However, this is an exceptional and discretionary remedy and immigration officers must assess and weigh the relevant factors in the personal circumstances of each particular applicant (see *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125, [2002] FCJ No 457 at paragraphs 11 and 15 to17; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 at paragraph 34; and *Gonzales Castillo v Canada (Minister of Citizenship and Immigration)*, 2009 FC 409, [2009] FCJ No 543 at paragraph 11).

[34] Mere hardship inherent in removal after living in Canada for some time is insufficient to justify an exemption under subsection 25(1) of the Act. The exemption is only available to provide applicants relief from "unusual, undeserved and disproportionate hardship" that they would experience if required to apply from abroad in the normal manner (see *Pashulya v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1275, [2004] FCJ No 1527 at paragraph 43).

[35] In this case, the applicant submits that the officer erred in assessing and weighing several factors pertaining to her personal circumstances, including the best interests of the children and her fear of violent crime in Jamaica.

[36] Extensive jurisprudence has developed on the assessment of the best interests of the children under subsection 25(1) of the Act. Decisions where the interests of children are minimized in a manner inconsistent with Canada's H&C tradition have been deemed unreasonable (see *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 73 and 75).

[37] The assessment must be done carefully and sympathetically in a manner that demonstrates that the officer has been alert, alive and sensitive to the best interests of the affected children. It is not sufficient to merely state that the interests have been taken into account or to simply refer to the children's interests or to the relationships with the children involved (see *Canada (Minister of Citizenship and Immigration) v. Hawthorne*, 2002 FCA 475, [2003] 2 FC 555 at paragraph 32). The children's interests must be well identified and must be defined and examined with a great deal of attention (see *Hawthorne* above, at paragraph 32; and *Legault* above, at paragraphs 12 and 31).

[38] The best interests to be taken into account are those of a "child directly affected". The assessment is therefore not limited to the children of an applicant, but may, for example, include the grandchildren of the applicant (see *Afocha v Canada (Minister of Citizenship and Immigration)*, 2008 FC 240, [2008] FCJ No 300 at paragraph 7).

[39] The applicant bears the burden of providing evidence on the adverse effects on the children should the applicant leave. The officer must consider any such evidence filed (see *Liniewska v Canada (Minister of Citizenship and Immigration)*, 2006 FC 591, [2006] FCJ No 779 at paragraph 20).

[40] In *Castillo* above, Deputy Justice Lagacé found that poorly substantiated letters from applicants' adult children, stating that they relied on the applicants for moral support and felt it was important for their child to know and grow up close to his grandparents, were insufficient. The officer needed to know in concrete terms how and why the applicants' grandchild would be better served by the continuous presence of his grandparents (at paragraph 15). Reasons of family reunification alone are not sufficient. Applicants must demonstrate that applying for permanent residency from abroad would expose them to unusual, undeserved or disproportionate hardship (see *Castillo* above, at paragraph 21).

[41] Finally, although an important factor, there is no *prima facie* presumption that the children's interests should prevail and outweigh other considerations (see *Legault* above, at paragraph 13; and *Canada (Minister of Citizenship and Immigration) v Okoloubu*, 2008 FCA 326, [2008] FCJ No 1495 at paragraph 48).

[42] In this case, the applicant submits that the officer erred in its assessment of the best interests of her Canadian-born grandchildren. In its decision, the officer acknowledged the applicant's caregiving role for the children whilst her daughter worked as well as the alleged improvement in the grandson's ADHD since the arrival of his grandmother. However, as the grandchildren live with

their primary caregiver (their mother) and as no evidence was submitted of either a lack of alternative child care services or of the grandson's medical condition, the officer granted little weight to these submissions. It is also notable that the applicant's daughter acknowledged the importance of her mother's help and support while she was at school. However, she has since graduated and although the grandmother's help with the children remains important as the daughter works odd hours, the need to support her daughter whilst studying is no longer at issue.

[43] The jurisprudence discussed above accentuates the importance of submitting adequate evidence to support an application. I agree with the respondent that the applicant's submissions on this point are predominantly based on the officer's weighing of the evidence. Although the officer did not specifically refer to the letters from the applicant's daughter and grandchildren, their content was acknowledged in the officer's decision. Recalling that deference must be shown to an immigration officer on the weighing of the evidence, I do not find that the officer here made an unreasonable finding on this issue. I am satisfied that the officer was adequately receptive, attentive and sensitive to the best interests of the children based on the evidence in the record. Although a close bond between grandmother and grandchildren was shown to exist, this alone did not necessarily warrant an exemption from the requirement to apply for permanent residency from abroad.

[44] The applicant also submits that the officer failed to adequately consider her fear of being a target of violent crime if returned to Jamaica after living abroad for several years. In *Nazim v Canada (Minister of Citizenship and Immigration)*, 2005 FC 125, [2005] FCJ No 159, Mr. Justice Paul Rouleau explained that applicants must satisfy immigration officers that a particular situation

exists in their country and their personal circumstances in relation to that situation makes them worthy of positive discretion (at paragraph 15). In this case, the officer considered the applicant's alleged fear, but was not satisfied that it represented a personalized fear. The applicant's sole submission on her fear was included in a supplementary information form, apparently completed in 2007. No other evidence was submitted to substantiate the applicant's personal fear. This is therefore also a factor to which this Court should show deference to the officer's finding and weighing of the evidence.

[45] Finally, the applicant submits that the officer erred by not mentioning her daughter's signed undertaking to sponsor her, the length of time to sponsor a parent and her ongoing maintenance of a valid temporary resident status. However, as a whole, I find the officer's reasons are thorough, clear and well-organized, with the different factors adequately weighed before arriving at a conclusion. The additional factors mentioned by the applicant are not sufficient to render the officer's decision unreasonable.

[46] In summary, I find the applicant has failed to show a reviewable error. The officer's decision was transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it. I would therefore dismiss this judicial review.

[47] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

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

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**

25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.
72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

Federal Court  Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

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