Federal Court  Cour fédérale

Date: 20121220

Docket: IMM-1497-12

Citation: 2012 FC 1517

Ottawa, Ontario, December 20, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

MERISSA ROXANNE THOMAS

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 by a Citizenship and Immigration Canada officer (the officer) dated January 23, 2012, wherein the applicant's permanent residence application was refused. 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 and her son are citizens of Grenada and have lived in Canada since April 2006, when they came to Canada on a temporary resident permit. They consider Canada to be their home. The applicant's son has lived in Canada since he was three years old. He is in school and the applicant is gainfully employed to support them.

[4] The applicant argues that leaving Canada would be very difficult for her son given the different school system and lifestyle in Grenada and would create undue psychological and emotional pain.

[5] The applicant filed her H&C application on July 8, 2011.

Officer's Decision

[6] In a letter dated January 23, 2012, the officer informed the applicant her H&C application had been rejected. Several pages of information were attached to serve as reasons for the decision.

[7] In the attached form, the officer noted the applicant's immigration details and family members. The officer briefly summarized the application. The officer went on to note the establishment factors offered by the applicant and her submissions on the best interests of the child.

[8] The officer described the exemption sought by the applicant, an exemption from the requirement of having to apply for permanent residence from outside Canada. The officer considered the hardship factors cited by the applicant, including poverty and unemployment in Grenada. The officer found that the applicant had not sufficiently indicated how her removal from Canada would amount to unusual and undeserved or disproportionate hardship, as she had not demonstrated that the poverty in Grenada meant she would be unable to get a job there or that her skills obtained in Canada would not be of use there in her search for employment. She had also not submitted sufficient information to demonstrate the severing of social ties would cause her sufficient hardship. She lived in Grenada prior to coming to Canada and has four siblings there.

[9] The officer then turned to the applicant's son. The officer acknowledged he had been in Canada for five years and has a grandmother here who cares for him, who submitted a letter indicating her attachment to both her daughter and grandson. The officer acknowledged the applicant's son might have a hard time adjusting to life in Grenada and might miss his grandmother. However, the officer found that it had not been demonstrated that this would be at a level which would cause the applicant unusual and undeserved or disproportionate hardship. Therefore, the officer rejected the application.

Issues

[10] The applicant submits the following points at issue:

1. Did the officer fail to be alive, alert and sensitive to the best interests of the child?
2. Did the officer make his conclusion unreasonably and without regard to the evidence?
3. Did the officer fail to assess the establishment in Canada of the applicant and her son?

[11] I would rephrase the issues as follows:

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

Applicant's Written Submissions

[12] The applicant submits that reasonableness is the appropriate standard of review.

[13] The applicant argues the primary basis for the H&C application was the best interests of the child and that the officer was required to be alert, alive and sensitive to those interests. Those best interests must be clearly identified and defined, examined with a great deal of attention and given substantial weight.

[14] The applicant argues the officer's dismissive reasons demonstrated that the officer was not alert, alive or sensitive to the best interest of the child. In form, the officer improperly applied the

"unusual and undeserved or disproportionate hardship" test to the best interest of the child analysis. This is an error. The officer also made no mention of the best interests of the child. In substance, the officer also disregarded those interests by not acknowledging it would be in the child's best interest to avoid living in poverty. The officer also mistakenly claimed that the applicant had two siblings in Grenada, when it fact her application indicated she had four siblings there.

[15] The applicant further argues the officer applied the wrong standard of proof to her hardship claim, requiring her to demonstrate with certainty she could not find work in Grenada. It was unreasonable for the officer to find that the applicant could find suitable employment given the uncontradicted submissions on the poverty in Grenada. The officer made no real assessment of the hardship due to the severance of the applicant's relationship with her mother, simply dismissing it on the basis of insufficient evidence.

[16] Finally, the applicant argues the officer failed to properly assess the applicant's establishment evidence. The applicant's H&C application set out how she met criteria enumerated in the IP5 Manual. The officer made no assessment of the level of establishment and therefore could not give positive consideration to it. This is an error that renders the decision unreasonable.

Respondent's Written Submissions

[17] The respondent agrees that reasonableness is the appropriate standard of review. The denial of an H&C exemption is not the denial of any legal rights, but simply the lack of being exempt from the normal requirements of applying for permanent residence. The onus is on an H&C applicant to

establish that she would suffer undue, unusual or disproportionate hardship by having to apply from outside Canada.

[18] The respondent agrees that the best interests of the child should be considered an important factor, but they will not always outweigh other considerations. The officer reasonably considered all the factors raised by the applicant, including that the child had a close relationship with his grandmother. The officer was not obliged to point to each document and is presumed to consider all evidence. All the factors raised by the applicant on judicial review were considered by the officer.

[19] The respondent argues that the fact that Canada is a more desirable place to live and raise a child is not determinative of an H&C application. Otherwise, anyone living illegally in Canada with children would have to be granted permanent status for H&C reasons. The officer properly considered all the factors relating to the applicant's son.

[20] The respondent submits that the officer did not require the applicant to demonstrate that she would not be able to find employment in Grenada. Rather, the officer stated that the existence of poverty in Grenada did not mean she would not be able to secure employment.

[21] The respondent characterizes the applicant's establishment argument as simply disagreeing with the weight the officer assigned to the evidence. The degree of establishment is not itself a determinative factor and is not sufficient in establishing hardship.

Analysis and Decision

[22] **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 at paragraph 57, [2008] 1 SCR 190). À

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

[24] 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 at paragraph 59, [2009] 1 SCR 339). 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 paragraph 59).

[25] **Issue 2**

Did the officer err in rejecting the applicant's claim?

This Court has held that the unusual, undeserved or disproportionate hardship test has no place in the best interests of the child analysis (see *Beharry v Canada (Minister of Citizenship and Immigration)*, 2011 FC 110, [2011] FCJ No 134 at paragraph 11).

[26] The mere use of the words unusual, undeserved or disproportionate hardship does not automatically render an H&C decision unreasonable (see *Beharry* above, at paragraph 12). On a judicial review, the Court must determine whether the officer assessed the degree of hardship likely to result from the removal of the child from Canada and then balance that hardship against other factors that might mitigate the consequences of removal (see *Beharry* above, at paragraph 14).

[27] In this case, not only did the officer appear to apply the wrong test, but also completely omitted mention of the proper test, that of the best interests of the child.

[28] Furthermore, the officer's finding was that "it is not demonstrated that this would be at a level where it would cause the applicant unusual and undeserved or disproportionate hardship" (emphasis added). Given that the officer had used the term "the applicant's son" elsewhere in the same paragraph, the language in this sentence could give the impression that the officer was actually considering the hardship that the applicant herself would endure as a result of her son's difficulties. However, I cannot determine from the reasons what the officer meant. If the officer was looking at the applicant's hardship, then there is no assessment or analysis of the best interests of the child.

[29] While the officer did catalogue the issues raised by the applicant on the point of the best interests of the child (his connection with the grandmother, his establishment and the poverty in Grenada), it is very difficult to interpret the reasons as being alert, alive and sensitive to those interests as they pertained to the child.

[30] Furthermore, there is no indication in the reasons that the officer balanced the best interests of the child against other factors, as required (see *Beharry* above, at paragraph 14). Rather, they were simply rejected as insufficient.

[31] It is not a reviewing court's role to reweigh evidence. In this case, however, it is quite clear to me that the officer's assessment of the evidence was the result of the application of the incorrect legal test and even considering the decision with all due deference, it cannot be saved from that error.

[32] Given my finding on this issue, I need not address the applicant's arguments with respect to the officer's other findings.

[33] Consequently, I would grant the application for judicial review and remit the application to a different officer for redetermination.

[34] 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 allowed and the matter is referred to a different officer for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

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

25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible or does not meet the requirements of this Act, and may, on request of a foreign national outside Canada who applies for a permanent resident visa, 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) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada qui demande un visa de résident permanent, 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

SOLICITORS OF RECORD

DOCKET:	IMM-1497-12
STYLE OF CAUSE:	MERISSA ROXANNE THOMAS - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 4, 2012
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	December 20, 2012

APPEARANCES:

Daniel Kingwell	FOR THE APPLICANT
Ildiko Erdei	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mamann, Sandaluk & Kingwell LLP Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT