Federal Court  Cour fédérale

Date: 20130507

Docket: IMM-10500-12

Citation: 2013 FC 480

Winnipeg, Manitoba, May 7, 2013

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

LIDIA FAVELUKIS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Lidia Favelukis seeks judicial review of a decision refusing her application for permanent residence on humanitarian and compassionate (H&C) grounds. Ms. Favelukis based her H&C application on several factors, including her family's presence in Canada, her establishment in this country and the best interests of her two young grandchildren.

[2] Ms. Favelukis argues that the immigration officer erred in this case by using the test of "unusual, undeserved or disproportionate hardship" in assessing the best interests of the children. I

have not been persuaded that this is the case, with the result that the application for judicial review will be dismissed.

The Applicable Law

[3] The parties agree that where the best interests of children are raised in an application for an H&C exemption, the task of an immigration officer is to consider the benefit to the children of the relative's non-removal from Canada as well as the hardship that the children will suffer if the relative is removed: *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2002] F.C.J. No. 1687 at para. 4.

[4] The parties further accept that the "unusual, undeserved, or disproportionate hardship" test has no place in a 'best interests of the child' analysis: *Beharry v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 110, [2011] F.C.J. No. 134; *Hawthorne*, above at para. 9; *Arulraj v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 529, [2006] F.C.J. No. 672 at para. 14.

[5] The best interests of children will not determine the outcome of an H&C application. Rather, it is incumbent on the officer to decide the weight to be given to the interests of the children, in light of all of the other considerations raised by the case: *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] F.C.J. No. 457 at paras. 12-14; *Kisana v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2009] F.C.J. No. 713 at para. 24.

Analysis

[6] The applicant's submissions to the immigration officer with respect to the best interests of her grandchildren were limited. They essentially consisted of the assertion that the applicant and her grandchildren were very close, that the applicant spends a great deal of time with the children, and that the children do not want her to return to Israel. Each of these considerations was specifically referred to by the immigration officer, and nothing was overlooked.

[7] Moreover, while the term "unusual, undeserved or disproportionate hardship" appears at the commencement and conclusion of the officer's reasons, nowhere does the phrase appear in the section of the reasons dealing with the best interests of the children.

[8] Counsel for the applicant urges me to parse the officer's reasons, suggesting that the recognition by the officer that it is "natural" that the children do not want the applicant to leave them suggests that something more is required for H&C relief to be granted - namely unusual, undeserved or disproportionate hardship.

[9] I do not accept this submission. As this Court has previously observed, in determining whether a proper assessment of the interests of children has been carried out, substance ought to prevail over form.

[10] That is, an H&C decision will not automatically be set aside, even in cases where the phrase "unusual, undeserved or disproportionate hardship" is specifically used in a "best interests of the child" analysis. An H&C decision will be upheld if it is clear from a reading of the reasons as a

whole that the officer used the correct approach and conducted a proper analysis: see *Leonce v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 831, , [2011] F.C.J. No. 1033 at para. 17; *Segura v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 894, [2009] F.C.J. No. 1116, at para. 29.

[11] In this case, it is apparent from the reasons that the officer was fully aware of all of the matters that the applicant wished to have considered in relation to her H&C application in general, and in relation to the best interests of her grandchildren in particular.

[12] While the decision could perhaps have been clearer, I am satisfied that when the reasons are read as a whole, the immigration officer properly considered the benefit that would accrue to the children if the applicant were permitted to stay in Canada and weighed that against the negative impact that the children would suffer if she were required to return to Israel.

[13] Indeed, while the officer recognized that the separation of the children from their grandmother would be difficult, she concluded that this difficulty was mitigated by the fact that Canada does not require visas for visitors from Israel, with the result that the applicant would be able to visit her grandchildren from time to time. Given the limited nature of the submissions made with respect to the best interests of the children, nothing more was required.

[14] For these reasons, the application for judicial review is dismissed.

Certification

[15] Counsel for the applicants proposes the following question for certification:

> Does an immigration officer err, when deciding a humanitarian application under *Immigration and Refugee Protection Act* section 25(1) by subsuming a consideration of the best interests of a child directly affected by the decision in an assessment of the degree of hardship likely caused by a refusal?

[16] I agree with the respondent that this is not an appropriate question for certification. As I noted at the outset of these reasons, the law in this area is well-settled and the parties agree as to the applicable principles. The issue in this case is application of these principles to the facts of this case.

[17] In particular, the case turns on the precise wording used by this immigration officer in her reasons and the structure of her analysis. This does not raise a serious question of general importance within the meaning of section 74 of the *Immigration and Refugee Protection Act* and the decision of the Federal Court of Appeal in *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, [2010] 1 F.C.R. 129, at para. 28. Consequently, I decline to certify it.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed; and

2. No serious question of general importance is certified.

"Anne L. Mactavish"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-10500-12
STYLE OF CAUSE:	LIDIA FAVELUKIS v. MCI
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	May 6, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	MACTAVISH J.
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APPEARANCES:

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