Federal Court Cour fédérale

Date: 20150401

Docket: IMM-7169-13

Citation: 2015 FC 416

Toronto, Ontario, April 1, 2015

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

NUSHE DUHANAJ,
SIMONE DUHANAJ,
PREN DUHANAJ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants, a mother and her two children, seek judicial review of a decision refusing their application for permanent residence in Canada on humanitarian and compassionate grounds.

[2] I have concluded that the immigration officer erred in assessing the best interests of the children. The application for judicial review will therefore be granted, and it is unnecessary to address the other issues raised by the applicants.

I. The Best Interests of the Child Test

[3] The jurisprudence teaches that where the best interests of a child are raised in an application for an H&C exemption, the task of an immigration officer is to consider the benefit to the children if they were to stay in Canada against the consequences that the children will suffer if they are removed from this country: *Hawthorne v. Canada (Minister of Citizenship & Immigration)*, 2002 FCA 475 at para. 4, [2003] 2 F.C.R. 555. The "unusual, undeserved, or disproportionate hardship" test has no place in a "best interests of the child" analysis: *Hawthorne*, above at para. 9; *E.B. v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 110 at para. 11, 383 F.T.R. 157; *Sinniah v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 1285, at paras. 62-62, 5 Imm. L.R. (4th) 313.

[4] The best interests of children are not determinative of the outcome of an H&C application. Rather, officers must decide whether the children's best interests, "when weighed against the other relevant factors, justif[y] an exemption on H&C grounds so as to allow them to enter Canada:" *Kisana v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, at para. 38, [2010] 1 F.C.R. 360; *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at paras. 12-14, 212 D.L.R. (4th) 139.

II. The Officer's Analysis in this Case

[5] I am not satisfied that the immigration officer applied the right test in assessing the best interests of the applicant children in this case.

[6] One indication that the wrong test was applied is the statement in the final paragraph of the decision. After reviewing the various H&C factors cited by the applicants, including the best interests of the children, the officer concludes her analysis by stating that:

> I do not find that the H&C elements presented by the applicants are sufficient, either individually or globally, to establish that *they would suffer unusual and undeserved or disproportionate hardship* if they were to apply for permanent residence from outside of Canada. [my emphasis]

[7] I recognize that the use of the words "unusual, undeserved or disproportionate hardship" in a "best interests of the child" analysis will not automatically render an H&C decision unreasonable. It will be sufficient if it is clear from a reading of the decision as a whole that the officer used the correct approach and conducted a proper analysis: *Segura v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 894 at para. 29, [2009] F.C.J. No. 1116. It is not at all clear to me, however, that the officer applied the correct test in this case.

[8] The officer acknowledged the submissions that the children would "experience difficulties in Albania as a result of adverse conditions in that country, including a high rate of poverty, poor economic conditions, a high rate of unemployment, inadequate health care, lack of gender equality for women, a low quality of education and concerns over access to clean drinking water and basic sanitation". The officer further found that there would "likely be a period of hard work and readjustment" for the children when they started school in Albania. The officer was nevertheless satisfied that the children had demonstrated that they had the skills to adapt to a new school system.

[9] While the officer did refer to the adverse country conditions in Albania, including the low quality of education in that country, she found that there was little to indicate that the children

"would experience a direct, negative impact as a result of adverse country conditions". However, the fact that all Albanian children suffer as a result of the poor educational system does not mean that it is not a factor that has to be taken into account in assessing the best interests of the children in this case.

[10] The evidence before the officer demonstrated that while efforts have been made to improve the situation, there continue to be very serious problems with the educational system in Albania. These include decaying infrastructure, declining educational quality, out-of-date curricula and teaching methods, poorly qualified teachers, declining levels of public funding for education, and a lack of modern equipment and sanitation.

[11] Nowhere in the officer's reasons was any consideration given to the benefit that would accrue to these children if they were able to continue with their education in Canada, although I accept that the officer is presumed to know that Canada offers many advantages that may not be available in other countries. What is more problematic, however, is that the officer made no effort to weigh that benefit against the detriment to the children if they were forced to complete their education in the clearly sub-standard educational system in Albania.

[12] Having failed to fully consider the consequences that returning to Albania would have for the two children involved in this case, the officer could not properly weigh their best interests against the other H&C factors cited in support of their application. It is, moreover, apparent from the entirety of the BIOC analysis that while the officer was satisfied that the children would indeed face some hardship in Albania, they would eventually be able to adjust to life there. This in turn led to the officer's conclusion that the hardship that the children faced was not unusual and undeserved or disproportionate.

III. Conclusion

[13] Having concluded that the officer used the wrong test in assessing the best interests of the children in this case, it follows that the application for judicial review will be granted.

[14] I agree with the parties that the case does not raise a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, and the matter is remitted back to a different officer for re-determination

"Anne L. Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	NUSHE DUHANAJ, SIMONE DUHANAJ, PREN DUHANAJ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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