Federal Court  Cour fédérale

Date: 20160104

Docket: IMM-1569-15

Citation: 2016 FC 6

Ottawa, Ontario, January 4, 2016

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

RONYA D'AGUIAR-JUMAN
NICHOLAS AMAL JUMAN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision of a Senior Immigration Officer [Officer] with Citizenship and Immigration Canada [CIC] rejecting the applicants' application for permanent residence, on humanitarian and compassionate [H&C] grounds under subsection 25(1) of the IRPA, for an exemption from certain legislative requirements thereby allowing said application for permanent residence to be processed from within Canada.

[2] For the reasons that follow I am of the view that this application should be dismissed.

I. Background

[3] The applicants, from Barbados, are Ronya D'Aguiar-Juman [Principal Applicant] and her son Nicholas Amal Juman. Nicholas was born in Barbados on December 18, 2000. The Principal Applicant also has a daughter Arya Sumaya D'Aguair, a Canadian citizen by birth, born on September 16, 2010. Arya was born to a different father than Nicholas. The Principal Applicant's adult brother and mother are both permanent residents of Canada.

[4] Nicholas entered Canada in 2008 to reside with his grandmother and his uncle as the Principal Applicant feared his father, her now former spouse, would kidnap Nicholas and hide him. The Principal Applicant subsequently left Barbados due to her fear of her former spouse and entered Canada through the United States in March, 2010. She made a refugee claim on behalf of herself and Nicholas in October, 2010. The applicants were found to be neither Convention refugees nor persons in need of protection and this Court denied an application for judicial review from that decision in February, 2012. The applicants subsequently applied to the Minister under subsection 25(1) of the IRPA to be exempted on H&C grounds from the normal requirement to apply for permanent residence status from outside of Canada.

II. Issues and Standard of Review

[5] The applicants argue the Officer erred in: (1) ignoring evidence relevant to the section 96 and 97 claim contrary to subsection 25(1.3) of the IRPA; (2) applying the wrong test in

considering the best interests of the children [BIOC] directly affected; and (3) unreasonably deciding to not grant an exemption on H&C grounds.

[6] The standard of review to be applied by this Court in reviewing questions of mixed fact and law is reasonableness (*Pierre v Canada (Minister of Citizenship and Immigration)*, 2010 FC 825 at para 22, 193 ACWS (3d) 577; *Mikhno v Canada (Minister of Citizenship and Immigration)*, 2010 FC 386 at paras 21-22), whereas questions relating to the identification and application of the correct legal test are questions of law to be determined on a correctness standard (*Garcia v Canada (Minister of Citizenship and Immigration)*, 2010 FC 677 at para 7, 190 ACWS (3d) 568; *Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166 at para 22, 212 ACWS (3d) 207). Issues 1 and 3 engage questions of mixed fact and law and will be reviewed on a reasonableness standard, whereas issue 2 is a question of law to be reviewed on a standard of correctness.

III. Preliminary Issue

[7] This application was argued on December 9, 2015 just prior to the release, on December 10, 2015, of the Supreme Court of Canada's decision in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*]. *Kanthasamy* addresses the manner in which H&C grounds, including the assessment of the BIOC, are to be addressed by decision-makers and the role of Ministerial Guidelines in assisting decision-makers in determining whether to exercise the discretion provided for by subsection 25(1) of the IRPA.

[8] I have reviewed the Supreme Court's decision and am satisfied that it does not impact upon the reasons for my denial of this application.

[9] In this case, the Officer's decision not to exercise H&C discretion was driven by the absence of objective and relevant evidence in support of the claims being advanced to justify H&C relief. *Kanthasamy* did not purport to change the well-established principle that "an applicant has the burden of adducing proof of any claim on which the H & C application relies" (*Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 5, 318 NR 300 [*Owusu*]). This well-established principle is reflected in *Kanthasamy* where Justice Abella for the majority holds at para 39:

> A decision under s. 25(1) will therefore be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered: *Baker*, at para. 75. This means that decision-makers must do more than simply state that the interests of a child have been taken into account: *Hawthorne*, at para. 32. Those interests must be "well identified and defined" and examined "with a great deal of attention" **in light of all the evidence** [emphasis added]: *Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358 (C.A.), at paras. 12 and 31; *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 323 F.T.R. 181, at paras. 9-12.

[10] I have therefore not sought further submissions from the parties in regard to *Kanthasamy*, nor have the parties chosen to place further submissions before the Court.

IV. Analysis

A. *Hardship Claims*

[11] In considering the applicants' hardship claims the Officer notes that the Principal Applicant's expressed fear of persecution, torture, risk to life or cruel and unusual punishment arising from her fear of harm at the hands of her former spouse are factors beyond the scope of an H&C application by virtue of subsection 25(1.3) of the IRPA. The applicants argue that in coming to this conclusion the Officer misinterpreted subsection 25(1.3) and refused to examine the facts underlying the feared harm from the Principal Applicant's former spouse. I disagree.

[12] Subsection 25(1.3) does not prevent an Officer from considering the facts underlying a claim for relief under sections 96 and 97 of the IRPA for the purpose of determining if those facts suggest the H&C considerations warrant an exemption from the normal application of the IRPA (*Kanthasamy* at para 51). I am satisfied that the Officer did precisely this in considering the applicants' hardship claims.

[13] In addressing the question of hardship raised by the applicants, the Officer quotes extensively from the United States Department of State Country Report [DOS Report]. The DOS Report addresses, among other things, how matters relating to policing, domestic violence, sexual harassment and discrimination are dealt with by the government of Barbados. The Officer sets out the legal, educational, and social service initiatives and programs available to respond to domestic violence and to protect victims of such violence. The Officer then considers country conditions within the context of the applicants' stated fear, and concludes that "if the applicants

encounter problems with anyone they can seek assistance of the government should the need arise."

[14] In respect of this finding the applicants rely on *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at para 17, 157 FTR 35 (TD) to advance the position that the Officer had an obligation to mention contrary information showing possible obstacles to protection in Barbados, specifically the alleged wealth and connections of her former spouse with elites in the Barbados community. Again, I respectfully disagree.

[15] The Officer clearly recognized that "the adult applicant fears harm at the hands of her ex-husband." The perceived threat posed by the former spouse was central to the Officer's consideration of the circumstances and conditions in Barbados as they relate to domestic violence. This includes citing the DOS Report, which notes that "the government has effective mechanisms to investigate and punish abuse and corruption."

[16] I further note that the Principal Applicant's affidavit placed before this Court and relied on in the applicants' submissions did not form part of the H&C application. The only information before the Officer on hardship arising from the former spouse's presence in Barbados was contained in submissions from counsel. Newspaper articles the applicants relied on related to the crimes of the father of the former spouse. There is no objective evidence to support the Principal Applicant's assertion, through counsel, that justice was not served in respect of the father's crime or that any injustice that might exist arises from the father being well-connected to those in power in Barbados. Finally the inference that irregularities, if any,

arising out of the father's involvement in the Barbados justice system supports a conclusion that the former spouse wields inappropriate influence within the Barbados justice system is mere speculation in the absence of evidence to support the assertion.

[17] *Cepeda-Gutierrez* holds at para 17 that the more important the evidence not mentioned and the more the evidence contradicts a finding made, the more ready the Court will be to find the decision was made with an erroneous finding of fact without regard to the evidence. The evidence relating to the father of the former spouse of the Principal Applicant does not contradict the Officer's findings nor does it constitute an important piece of evidence warranting a finding from this Court that the failure to address it demonstrates an erroneous finding of fact without regard to the evidence.

[18] In the circumstances I see no reason for this Court to interfere with the Officer's conclusion that there was insufficient evidence to demonstrate hardship deserving of an exemption.

B. *Best Interests of the Children*

[19] In regard to the officer's assessment of the BIOC, the applicants argue that the Officer's assessment was conducted on the basis of undue hardship rather than by way of separate analysis with the Officer being alert, alive and sensitive to the BIOC. The respondent submits that while the Officer must be alert, alive and sensitive to the child's best interests, those interests do not outweigh all other factors arising in the context of an application, and notes that the onus is on

the applicant to provide relevant evidence in support of the application. I agree with the respondent.

[20] The Officer's analysis in this case considered and addressed the applicants' submissions on the BIOC in detail. The BIOC were identified and defined and examined in light of all the evidence (*Kanthasamy* at para 39). The difficulty was the paucity of evidence not a failure of the Officer to address and consider the circumstances of the children in accordance with the appropriate test.

[21] For example, the applicants' position that the education and medical systems in Barbados are not capable of meeting the needs of the children were supported by nothing more than the submissions of counsel. On the other hand, the applicants did provide independent, objective evidence of Nicolas's learning disability and enuresis diagnosis. This evidence was acknowledged, considered and the Officer took no issue with the diagnosis. Similarly, while the Officer acknowledged and considered the Principal Applicant's contention that her Canadian born daughter would be unable to enter Barbados on the basis of a lack of status, the Officer also notes "I have been provided insufficient evidence that Arya could not reside in Barbados […] All I have before me are the adult applicant's statements."

[22] I am satisfied that the record demonstrates that the Officer was alert, alive and sensitive to the best interests of the children (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75) and did not err in identifying or applying the appropriate test in considering the BIOC.

C. *Reasonableness*

[23] I am satisfied that the officer's conclusion that the applicants simply failed to satisfy their evidentiary burden in advancing their H&C application was within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47). While decision-makers must do more than simply state that the interests of a child have been taken into account when considering their best interests, the flip side of that coin is that the applicant must do more than simply assert what is in a child's best interests (*Hawthorne v Canada (Minister of Citizenship and Immigration*, 2002 FCA 475 para 32, 222 DLR (4th) 265; *Owusu* at para 5).

[24] I am satisfied that this application should be dismissed. The parties did not identify a question of general importance.

JUDGMENT

THIS COURT'S JUDGMENT is that:

This application for judicial review is dismissed. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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