Federal Court  Cour fédérale

Date: 20110721

Docket: IMM-7078-10

Citation: 2011 FC 918

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, July 21, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

SARA JOSÉ MONTESUMA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, submitted by the applicant, of a decision by an immigration officer (officer) dated November 2, 2010, rejecting her application for permanent residence based on humanitarian and compassionate grounds pursuant to section 25 and subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act).

[2] For the following reasons, this application for judicial review is dismissed.

I. FACTUAL BACKGROUND

[3] The applicant, a Haitian girl who is 15 years of age, filed an application for permanent residence on September 7, 2003. This application was under the family class because she was sponsored by her biological father, Orismond Montesuma (sponsor).

[4] The sponsor was landed in Canada, sponsored by his spouse. In his application, however, he failed to declare the applicant as a non-accompanying dependant.

[5] On May 24, 2004, the applicant's application for permanent residence was refused.

[6] On March 2, 2005, the Immigration Appeal Division (IAD) dismissed the appeal from this decision.

[7] On January 25, 2010, the applicant filed a new application for permanent residence based on humanitarian and compassionate considerations, supported by the sponsor's application for sponsorship and undertaking. This application was received in Port-au-Prince on January 27, 2010.

[8] On April 13, 2010, the sponsorship application was refused by the Case Processing Centre in Mississauga on the ground that the applicant was not a member of the family class pursuant to paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations* (Regulations).

[9] On May 21, 2010, the counsellor at the Embassy in Port-au-Prince (officer) refused the applicant's application for permanent residence.

[10] On November 2, 2010, the officer signed a second letter of refusal. The officer wrote computerized notes (CAIPS notes) in May 2010.

[11] The letter dated November 2, 2010, specified that the applicant is not a member of the family class pursuant to paragraph 117(9)(*d*) of the Regulations. It also indicated that the applicant does not meet the requirements for granting special humanitarian and compassionate considerations by virtue of subsection 25(1) of the Act. The officer found that the humanitarian and compassionate circumstances raised by the applicant did not justify an exemption from some or all of the criteria and obligations of the Act.

[12] This finding was based on the following reasons:

a. Her biological mother lives and resides in Haiti.
b. She has resided with her female cousin, Iphose, since the age of four. Her cousin treats her like a daughter.
c. She is well looked after and her life does not seem to be in danger.
d. She goes to school and has friends.
e. She does not seem to know her sponsor well and is not able to speak at length about him. No emotional or monetary ties seem to exist between him and her.

[13] On December 2, 2010, the applicant filed, through the sponsor and his counsel, this application for judicial review. She is challenging the decision in the letter of refusal dated

November 2, 2010, and is focusing exclusively on the refusal to grant her an exemption based on humanitarian and compassionate grounds.

II. PRELIMINARY MOTIONS

[14] The respondent argues that this application for judicial review must be dismissed because it was filed late, on December 2, 2010, that is, more than six months after the copy of the letter of refusal was received in May 2010.

[15] The Court notes that, notwithstanding the CAIPS notes, which show a refusal recorded on May 21, 2010, the date that appears on the letter of refusal to the applicant is November 2, 2010. If we start the time from this date, the applicant did comply with the deadline for challenging a decision rendered abroad. Under paragraph 72(2)(*c*) of the Act, the Court may also extend the time for filing for special reasons.

[16] This Court's jurisprudence is clear. The time begins to run on the date the applicant in this proceeding becomes aware of the refusal (see *Chen v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 899 at paragraphs 19 and 20). Her claim was filed late. However, the progression of events surrounding this file favours an extension of time. This is why the Court is dismissing the respondent's motion and hearing the applicant's application for judicial review.

[17] The respondent is also asking the Court to redact from the applicant's record the documents in Annex 1 of the sponsor's affidavit and in the affidavit of the immigration consultant, Timothy

Morson. He maintains that these documents were not before the officer when he rendered his decision. These were documents attesting to the transfer of funds to the applicant over the course of 2005 and 2006. The applicant claims the opposite.

[18] The Court allows the respondent's motion and redacts from the record the documents in Annex 1 of the sponsor's affidavit and in Annex 3 of Timothy Morson's affidavit. It has been clearly established by this Court that, on judicial review, the Court may only examine the evidence that was adduced before the initial decision-maker (see *Isomi v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1394 at paragraphs 6 and 7).

III. ISSUE

[19] This application for judicial review raises only one issue:

i. Did the officer err by not granting the applicant the exemption sought on humanitarian and compassionate grounds?

A. Applicable standard of review

[20] A visa officer's decision of whether to grant an exemption based on humanitarian and compassionate grounds by weighing the various relevant factors must be reviewed on the standard of reasonableness (*Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at paragraph 12 (*Legault*); *Lalane v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 6 at paragraph 47).

B. Position of the parties

[21] The applicant argues that the officer erred in assessing the best interests of the child and did not give them sufficient weight. He lacked compassion. His findings were weak and imprecise, and few reasons were given. The officer interpreted subsection 25(1) of the Act too narrowly. In doing so, he went against Parliament's intention of facilitating the reunion of family members.

[22] The applicant also emphasizes the unreasonableness of the reasons given by the officer to justify his decision. In his decision, the officer's first argument was that [TRANSLATION] "you have lived with your cousin, Iphose, since you were four years old, and she treats you like her daughter". The applicant claims that the officer must consider her biological father as her real family. His refusal to encourage a reunion with her father is likely to lead to devastating consequences in her life.

[23] The officer also stated the following: [TRANSLATION] "you are well looked after and your life is not in danger". According to the applicant, this demonstrates that he [TRANSLATION] "was not alert, alive and sensitive" with respect to her best interests. Later on, the officer wrote: [TRANSLATION] "your life does not seem to be in danger". This was also, according to the applicant, a misinterpretation of the facts because newspapers report that minor girls are victims of rape, assault and child trafficking.

[24] The applicant also rebuts the officer's statement that the she goes to school and has friends. Again, she believes that the officer did not take her best interests into consideration.

[25] Finally, the applicant contends that the following statement is erroneous: [TRANSLATION] "You do not seem to know your sponsor very well and cannot say much about him; also, there does not seem to be any emotional and financial connection between you and him". Her father is also in regular contact her and has come to visit her in Haiti.

[26] The applicant also criticizes the officer for not considering all of the documentary evidence in the record, including her cousin's affidavit, which specifies that she can no longer take care of her.

[27] In short, the applicant relies on *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (*Baker*). She also alleges that the officer did not carry out a *bona fide* inquiry. The purpose of the questions asked of the applicant during the interview was not to determine the danger she faces in Haiti or to discover the depth and quality of her relationship with her biological father.

[28] The respondent maintains that a reading of the CAIPS notes demonstrates that the officer "was alert, alive and sensitive" to the best interests of the child and, in particular, to the current situation in Haiti. He did not lack compassion. The applicant is asking the Court to weigh the factors stated in the officer's decision differently, which is not its role in this case.

[29] The respondent also submits that the Court cannot exclusively rely on the letter of refusal dated November 2, 2010, because the CAIPS notes are part of the reasons for a visa officer's decision. He cites the Court's jurisprudence, which specifies that visa officers need not give as many reasons for their decisions as, for example, the Immigration and Refugee Board.

[30] The respondent further states that, in challenging the reasonableness of each finding, the applicant is asking the Court to weigh each of the factors stated differently, which is not the role of the Court. It is up to the decision-maker to assess the documentary evidence and the testimony of the various persons in question. The officer in this case properly exercised his duty. He assessed the evidence and found it insufficient to prove the existence of an emotional and economic connection between the applicant and her sponsor. An assessment of the CAIPS notes establishes that the officer took into consideration all of the factors raised by the applicant. He met with the applicant, considered her situation in Haiti and made his decision using the evidence in the record.

[31] Finally, the respondent notes that the evidence establishing the relationship of economic dependency between the applicant and her sponsor was not in the record when the decision was made. Consequently, this element cannot be considered by the Court in this case.

IV. ANALYSIS

[32] By virtue of subsection 25(1) of the Act, when a person cannot obtain permanent residence under other provisions in the Act, the Minister's delegate has the discretionary power to grant an

exemption based on humanitarian and compassionate grounds if the Minister's delegate is of the opinion that it is justified:

Humanitarian and compassionate Considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
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.

[33] The officer faced with an application under this section must consider all of the relevant factors to decide whether they justify granting an exemption. The role of the Court is not to reassess the evidence presented, but to ensure that all elements have been taken into consideration (*Baker*, above, at paragraphs 54-56, 68, 73-75; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paragraphs 34 to 38; *Legault*, above, at paragraph 11; *Mpula v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 456 at paragraph 26).

[34] The officer must take into consideration the best interests of the children directly involved or affected by the decision. The officer must be “alert, alive and sensitive”. The exercise of the officer’s discretionary authority requires him or her to weigh all of the evidence and facts in *Legault*, above, at paragraph 12:

> 12 In short, the immigration officer must be "alert, alive and sensitive" (*Baker*, *supra*, at paragraph 75) to the interests of the children, but once she has well identified and defined this factor, it is up to her to determine what weight, in her view, it must be given in the circumstances. . . .

[35] In this case, the reasons for the decision under judicial review can be found in the letter dated November 22, 2010, and the CAIPS notes written by the officer (*Nodijeh v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1217, at paragraph 6).

[36] Reading them convinces us that the officer took the applicant’s best interests into account. He found that there was a strong emotional, financial and educational connection between the applicant and her cousin:

> [TRANSLATION]
>
> The applicant states that Iphose takes good care of her, that she drives her to school every morning and that, after school, the applicant goes to Iphose’s business to find her. The applicant states that Iphose is like a mother to her and that if she left for Canada, she would miss Iphose. There is a strong relationship of economic/social/emotional dependency between the applicant and Iphose. (CAIPS notes)

[37] The CAIPS notes also mention that the probability of the applicant becoming a victim of a crime is no different from that of a large portion of the population. The applicant is not particularly targeted.

[38] In analyzing the decision, the Court finds that the officer took the applicant's current life in Haiti into consideration, which is reasonable and justified. See *Yue v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 717 at paragraph 10. It would be inappropriate for the Court to substitute its own assessment or weigh the factors assessed by the officer differently. Even considering that the evidence of the sponsor's financial support was not before the officer does not change the Court's finding because the notes in the record establish that the applicant is not very emotionally connected to her biological father. The officer's decision is reasonable and is one of the possible outcomes.

V. CONCLUSION

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

JUDGMENT

THE COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed.

2. There is no question of general interest to certify.

"André F.J. Scott"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7078-10
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