Federal Court  Cour fédérale

Date: 20121005

Docket: IMM-9524-11

Citation: 2012 FC 1173

Ottawa, Ontario, October 5, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

DENISE MILLER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant seeks judicial review of the November 29, 2011 decision of a Citizenship and Immigration Canada (CIC) Immigration Officer ("the Officer") refusing the Applicant's application for an exemption on humanitarian and compassionate (H&C) grounds to allow her to apply for permanent residence from within Canada.

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

I. Facts

[3] The Applicant is a Saint Vincentian citizen who came to Canada in July 2001 on a visitor visa. She did not maintain or renew her status when it expired in January 2002, and has been in Canada since she first arrived.

[4] The Applicant left her eldest son with her parents in Saint Vincent when she came to Canada, and has since had two Canadian-born children. She works as a childcare provider and sends money home to her ailing parents and her son every month.

[5] The Applicant submitted an H&C application in December 2010.

II. Decision under Review

[6] The Officer's decision focused on three areas: the Applicant's establishment in Canada, the best interests of her children, and the factors related to her return to Saint Vincent and the Grenadines.

[7] The Officer recognized that the Applicant had worked in Canada since her arrival, sent money home to her parents and son in Saint Vincent, and is involved in her community before concluding the following:

> While I find the applicant's establishment and integration are admirable, in consideration of the evidence before me, I do not find the applicant has demonstrated a level of establishment and integration in Canada that warrants a positive visa exemption. Furthermore, while [*sic*] that the applicant has taken positive steps in establishing and integrating herself in Canada, I place little weight on this demonstration of establishment and integration as she did so without having immigration status to allow her [*sic*] remain in Canada, with the exception of the six months of visitor status granted her upon her initial entry to Canada. The settlement that resulted and the hardship of now uprooting her children and herself was entirely within her control and do not constitute undue and undeserved hardship. I also do not consider the hardship caused by voluntary establishment to be disproportionate. All foreigners must weigh the pros and cons of lengthy settlement in a country in which they do not benefit from permanent status.

[8] With respect to the best interests of the Applicant's children, the Officer considered the emotional and financial ties between her Canadian-born children and their father, concluding that there are "limited grounds on which to conclude that the children would be negatively impacted by the separation from their father." The Officer noted that the children are young, and that it is reasonable to believe that they would be able to adapt to life in Saint Vincent.

[9] The Officer considered the differences in education, health care and standard of living between Canada and Saint Vincent and, while remarking that the standards are lower in Saint Vincent, nonetheless concluded that they did not constitute disproportionate hardship.

[10] The Officer further considered the interests of the Applicant's eldest child in Saint Vincent, and concluded that reunification with his mother and step-siblings would be beneficial for him.

[11] Finally, the Officer considered the effect of the Applicant's return to Saint Vincent on the financial support she provided to her parents and her son. While recognizing that the Applicant sent money home every month, the Officer determined that there was "little documentary evidence that the applicant's parents are financially dependent on her to the extent they would not be able to afford their own medications, if required, and basic amenities should the applicant return."

[12] The Officer addressed counsel's argument that the Applicant would not qualify for permanent residence from outside Canada by stating that this is not a factor that is to be taken into account in the current H&C application, "which was not meant to circumvent Canada's immigration program."

III. Issues

[13] This application raises the following issues:

(a) Was the Officer's assessment of the Applicant's establishment in Canada reasonable?

(b) Did the Officer use the incorrect test in assessing the best interests of the children?

(c) Was the Officer's evaluation of the hardship that might be faced by the Applicant's family should she return to Saint Vincent reasonable?

IV. Standard of Review

[14] The appropriate standard of review for the questions of mixed fact and law relating to H&C applications is that of reasonableness (see *Bichari v Canada (Minister of Citizenship and Immigration)*, 2010 FC 127, [2010] FCJ No 154 at para 25; *Laban v Canada (Minister of Citizenship and Immigration)*, 2008 FC 661, [2008] FCJ No 819 at para 14). Reasonableness is concerned with the justification, transparency and intelligibility of the decision-making process, but also with whether the decision falls within a range of possible, acceptable outcomes defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

[15] Whether the Officer applied the correct legal test is a legal question, to be reviewed on the standard of correctness. The Officer's conclusions, however, on the best interests of the children will be reviewed on a standard of reasonableness.

V. Analysis

[16] Subsection 11(1) of IRPA sets out the general visa requirement for foreign nationals wishing to come to Canada:

11. (1) A foreign national must, before entering Canada,	**11.** (1) L'étranger doit, préalablement à son entrée au

apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

[17] Section 25 of IRPA provides, however, for an exemption from the general requirement to apply for permanent residence from outside of Canada in certain circumstances:

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.

[18] The H&C decision-making process foreseen by subsection 25(1) of IRPA is highly discretionary, and calls for a fact-specific weighing of factors in order to determine whether the special grant of an exemption to the general visa requirements is warranted (*Kawtharani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 162, [2006] FCJ No 220 at para 15; *Mirza v Canada (Minister of Citizenship and Immigration)*, 2011 FC 50, [2011] FCJ No 259 at para 18). Indeed, in assessing the level of hardship that would be faced by an applicant were the exemption not granted, the Officer is directed to consider, *inter alia*, an applicant's level of establishment and the best interests of children affected by the decision. The factors are to be assessed as a whole, and no one factor is determinative.

[19] This Court and the Federal Court of Appeal have both made it clear that the "weighing of relevant factors remains the domain of the Minister or his delegate, and that the court's role is not to examine the weight given to them by the officer" (*Laban*, above, at para 18; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] FCJ No 457 at para 11).

A. *Establishment*

[20] In this case, the Applicant submits that the Officer erred in assigning little weight to her establishment in Canada by virtue of her lack of status. She points to CIC's Operation Manual for Inland Processing, *IP 5 -- Immigration Applications in Canada made on Humanitarian or Compassionate Grounds* ("the Manual"), to argue that there is nothing in the guide that states that one may not apply for an exemption from the requirement to apply for permanent residence from outside of Canada if one is in Canada illegally.

[21] The Manual describes, however, that in order for an application to succeed on H&C grounds, applicants must demonstrate that they would face unusual and undeserved or disproportionate hardship if forced to apply for permanent residence from outside of Canada. It describes that the hardship must be both unusual - that is, "a hardship not anticipated or addressed by the *Act* or *Regulations*" - and undeserved - that is, "in most cases, **the result of circumstances beyond the person's control**" (emphasis added) (Manual, section 5.10). It defines "disproportionate hardship" in cases where the "unusual and undeserved" criteria are not met, but "where the hardship of not being granted the requested exemption(s) would have an unreasonable impact on the applicant due to their personal circumstances" (Manual, section 5.10).

[22] The Officer specifically considered the Applicant's establishment and, while recognizing that it was "admirable", was ultimately entitled to decide what weight to give this factor in the particular circumstances of the case. As the Manual points out, unusual and undeserved hardship generally arises from circumstances that are beyond the applicant's control. Indeed, in many of the cases cited by the Applicant, the individuals concerned had established themselves while waiting on a determination on an H&C or refugee protection or other type of application (see, for example, *Lin v Canada (Minister of Citizenship and Immigration)*, 2011 FC 316, [2011] FCJ No 395 in which the applicant's H&C application was pending for seven years). By contrast, the Applicant here was not awaiting a decision on any application. The Officer's decision with respect to the Applicant's establishment falls within a range of possible, acceptable outcomes defensible in respect of both the facts and the law and is thus reasonable.

B. *The Best Interests of the Child*

[23] The Applicant submits that the Officer applied the incorrect test with respect to his analysis of the best interests of the child. Specifically, the Applicant posits that the Officer conflated the best interests of the child test with the test of unusual and undeserved or disproportionate hardship that is more appropriate for the overall assessment of the H&C application.

[24] This Court has established that "what is required when conducting a best interests of the child analysis in an H&C context is an assessment of the benefit the children would receive if their parent was not removed, in conjunction with an assessment of the hardship the children would face if their parent was removed or if the child was to return with his or her parent" (*Segura v Canada (Minister of Citizenship and Immigration)*, 2009 FC 894, [2009] FCJ No 1116 at para 32; *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2002] FCJ No 1687 at para 4). The obligation of officers to be "alert, alive and sensitive" to the best interests of the children has further been described as demonstrating "an awareness of the child's best interests by noting the ways in which those interests are implicated" (*Segura*, above, at para 34; *Kolosovs v Canada (Minister of Citizenship and Immigration)*, 2008 FC 165, [2008] FCJ No 211 at para 9). Form is not to be elevated above substance when reviewing an officer's determination of the best interests of the child.

[25] In this case, I am satisfied that the Officer was sufficiently alert, alive and sensitive to the best interests of the Applicant's children. The Officer noted several ways in which the children's interests were implicated, including the relationship the Applicant's Canadian children have with

their father, the children's enrolment in school, as well as concerns for their health, safety, and economic well-being. While noting that living in Canada offers more opportunities for the children, the officer found that the hardship related to not having access to those opportunities was not, when weighed against other factors, hardship that amounted to the level of unusual and undeserved or disproportionate.

C. *Hardship*

[26] The Applicant further contends that the Officer erred in his assessment of the hardship the Applicant would face by returning to Saint Vincent. Specifically, the Applicant points to the Officer's assessment of the financial support the Applicant provides to her parents and son, positing that the evidence submitted demonstrates clearly that the Applicant is the sole source of financial provision for her parents and her eldest son. The Respondent takes the position that the letter relied upon by the Applicant does not demonstrate this clearly at all. Both parties rely on the following excerpt from the letter:

> she is very honest and hard working and very helpful to the family. My husband and I are diabetes and also … and if it was not for our daughter who help us to buy our treatment and also supply us with food and clothes, because we are old and not working.

[27] The Officer is entitled to significant deference on such questions of fact. I find nothing unreasonable with the Officer's assessment of the evidence on this point.

VI. Conclusion

[28] The Officer considered the entirety of the application and weighed the various factors in a reasonable manner.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	**DENISE MILLER v MCI**
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