Federal Court  Cour fédérale

Date: 20150601

Docket: IMM-4082-13

Citation: 2015 FC 689

Ottawa, Ontario, June 1, 2015

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

FATMIR QOSAJ
DONIKE SHYTI
ROVENA QOSAJ
ERALDA QOSAJ
ELSA QOSAJ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants' application for permanent residence from within Canada on humanitarian and compassionate (H&C) grounds was rejected by an officer of Citizenship and Immigration Canada. They are now applying for judicial review of this decision pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] The applicants seek an order setting aside the negative decision and returning the matter to a different officer for redetermination.

I. Background

[3] The applicants are a family from Albania; a couple with their three daughters (4, 6 and 7 years old). The daughters are American citizens born in the United States.

[4] In 2000, the principal applicant and his spouse fled to the U.S. due to a family feud that began in 1998. While in the U.S., they had three daughters (the minor applicants). The principal applicant and his spouse made asylum claims in the U.S., but they were rejected.

[5] On February 19, 2012, the principal applicant came to Canada and made a claim for refugee protection on the same day. His wife arrived in Canada in November 2011 and their children arrived in Canada in December 2011. On June 25, 2012, they submitted an H&C application.

[6] The applicants' claim for refugee protection has not yet been determined.

II. Decision Under Review

[7] In a decision dated May 31, 2013, the officer rejected the applicants' H&C application.

[8] The applicants presented the following factors for consideration: degree of establishment, best interests of the children and hardship due to the family blood feud in Albania. For establishment, the applicants submitted employment letters and letters of support from friends. For best interests of the children, the applicants submitted that if returned to Albania, the children would be sequestered at home due to the blood feud and would endure psychological trauma. For hardship, they submitted they would be forced into self-confinement due to the family feud.

[9] Based on the evidence submitted, the officer made the following findings.

[10] First, the officer observed the applicants' level of establishment in Canada and found the level was not unusual for individuals who have resided here since February 2012.

[11] Second, the officer observed since the applicants have not provided any documents to establish the family feud, the officer did not give full weight to their descriptions of hardship arising from the family feud. The officer therefore gave little positive consideration to this factor.

[12] Third, the officer stated since the applicants have provided little evidence to demonstrate that the family is currently involved in a blood feud, it gave little weight to the statements that the children would be in self-confinement at home and unable to attend school and the applicants would not be able to find employment to provide for their children if they were to return to Albania.

[13] The officer also noted the children, although not proficient in the Albanian language, would have their parents and other family in Albania to assist with their language skills. As for the alleged psychological trauma, the officer acknowledged the stressful situation which returning to Albania might create, but found the children have demonstrated their adaptation skills in Canada. The officer also noted they would have support from other family members.

[14] Therefore, the officer found the applicants would not face unusual and undeserved or disproportionate hardship in order to be granted an exemption on H&C grounds.

III. Issues

[15] The applicants raise three issues for my consideration:

1. Did the officer fail to properly consider the best interests of the children?
2. Did the officer fail to properly consider the evidence before it and were its findings as to hardship and establishment of the applicants unreasonable?
3. Was the officer's decision unreasonable as a whole?

[16] The respondent raises one issue in response: have the applicants raised a serious issue or demonstrated that there is a fairly arguable case for judicial review of the officer's decision?

[17] In my view, there are two issues:

A. What is the standard of review?

B. Was the officer's decision reasonable?

IV. Applicants' Written Submissions

[18] First, the applicants submit the officer failed to properly consider the best interests of the minor applicants. They argue the reasoning the children have proven that they can adapt to Albania because they adapted to Canada is unreasonable, because Canada is extremely similar to the U.S. in many aspects. Also, this transition will be exasperated by the adult applicants' imposition of self-confinement. They argue that the ability for the parents to support the children is an important factor (see *Raposo v Canada (Minister of Citizenship and Immigration)*, 2005 FC 118 at paragraph 32, [2005] FCJ No 157). They argue it is thereby in the children's best interests for their parents to have a job in Canada than to live with their fearful and unemployed parents in Albania.

[19] Also, the applicants argue the assessment of the best interests of the children has to be considered independently and an officer has to have the reality of a child's potential future life squarely in mind (see *Bocerri v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1021, [2008] FCJ No 1262 [*Bocerri*]). They argue this case is similar to *Bocerri* because the officer in the present case also does not appear to be sensitive to the harm that the children's displacement will cause. Further, the applicants submit the best interests of the children should be given substantial weight (see *Gelaw v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1120 at paragraph 37, [2010] FCJ No 1398 [*Gelaw*]). They argue that similar to *Gelaw*, the children in the present case had never set foot in their parents' home country.

[20] Further, the applicants argue the officer was unreasonable when it was concluded in the decision on the best interests of the children with an "impossible obstacle" standard, which has no basis from case law. Further, they argue the officer made a judicially reviewable error by focusing on whether the children can adapt to Albanian life and culture if they were deported instead of properly considering where their best interests are adequately served.

[21] Second, the applicants submit they have become very well established in Canada over the last year and a half through employment and community involvement. They submit their establishment is an important factor and must be given significant weight (see *Cobham v Canada (Minister of Citizenship and Immigration)*, 2009 FC 585, 178 ACWS (3d) 421 at paragraphs 27 to 28).

[22] Third, the applicants submit the officer was unreasonable to give little positive consideration to the hardship that would arise from the blood feud because the applicants did not provide documents. In *Jakaj v Canada (Minister of Citizenship and Immigration)*, 2012 FC 677 at paragraph 14, [2012] FCJ No 918, this Court found a "blood feud is essentially a private dispute between families, it is unclear what other evidence can be expected to attest to the existence of the blood feud". In *Chi v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 126, 112 ACWS (3d) 132 at paragraph 50, "[i]t is well established in the jurisprudence that the CRDD cannot disbelieve the applicant's evidence simply because she fails to produce documents in support of her oral testiony [*sic*]". Therefore, they argue the officer should have given more weight to the applicants' hardship based on the blood feud.

[23] Fourth, the applicants submit they do not have an internal flight alternative due to Albania's small size and corruption.

[24] Lastly, based on the aforementioned arguments, the applicants submit the officer's decision was unreasonable as a whole. They would face unusual and undeserved or disproportionate hardship meriting an exemption on H&C grounds.

V. Respondent's Written Submissions

[25] The respondent submits the standard of review applicable to an H&C decision is reasonableness (see *Mikhno v Canada (Minister of Citizenship and Immigration)*, 2010 FC 386 at paragraphs 21 to 23, [2010] FCJ No 583 [*Mikhno*]; and *Singh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 11 at paragraphs 21 and 37, [2009] FCJ No 4 [*Singh*]).

[26] First, the respondent submits the officer's establishment assessment was reasonable. It states that the officer considered all the evidence such as the applicants' employment history and letters of support; so the respondent argues the applicants' arguments are nothing more than a disagreement with the officer's conclusion, which is not a valid ground for judicial review because they are asking this Court to reweigh the evidence in their favour.

[27] Second, the respondent submits the officer's hardship assessment was reasonable. It distinguishes the present case from *Jakaj*. It submits in *Jakaj*, the claimants tendered a letter from a peace missionary which detailed their specific story; but in the present case, no such evidence was provided.

[28] It also distinguishes the present case from *Chi*. In *Chi*, oral testimony was provided and the Court ruled it could not be disbelieved simply due to the lack of supporting documentation; whereas in the present case, an H&C application is based entirely on the written record. Therefore, the principle from *Chi* does not apply.

[29] Third, the respondent submits the officer's best interests of the children assessment was reasonable. It references *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraph 75, [1999] SCJ No 39 [*Baker*] and *Kolosovs v Canada (Minister of Citizenship and Immigration)*, 2008 FC 165 at paragraph 8, [2008] FCJ No 211 [*Kolosovs*] that in assessing the best interests of the children, an officer has to be "alert, alive and sensitive". It argues the decision demonstrates that the officer understood the perspective of the children and that it was aware of their interests and the impact that a refusal of the H&C application could have on their future.

[30] Further, it argues even if this Court finds the officer's finding about adaptation as shown in Canada is unreasonable, the officer's decision should still stand as it is based on several other reasonable findings. Here, the officer noted the reality of the children's future life in Albania and support from family in Albania. Further, regarding self-confinement, the applicants did not establish through evidence that the children would not be able to attend school or that the applicants would not be able to work.

[31] Then, the respondent distinguishes the present case from *Gelaw*. The officer's decision in *Gelaw* was not as asserted by the applicants in this case overturned simply because the children

had never "set foot in their parents' home countries" but because the officer in *Gelaw* failed to consider established risks of "early death, rape, starvation, abduction, forced marriage, and violent discrimination" (at paragraph 35).

[32] Lastly, the respondent argues the officer did not err in using the term "impossible obstacle" in the reasons. Here, the officer did not include any discussion of impossible obstacles. The decision was thorough and well-reasoned. It simply noted at the conclusion of the decision that the obstacles faced by the minor applicants are not impossible. This does not render the decision unreasonable.

VI. Analysis and Decision

A. *Issue 1 - What is the standard of review?*

[33] The respondent submits the proper standard of review is reasonableness. I agree. Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 57, [2008] 1 SCR 190 [*Dunsmuir*]).

[34] For questions of fact or mixed fact and law decided on an H&C grounds application, the standard is reasonableness (*Mikhno* at paragraphs 21 to 23; *Singh* at paragraphs 21 and 37; *Dunsmuir* at paragraph 53; and *Baker* at paragraphs 57 to 62). This means that I should not intervene if the decision is transparent, justifiable, intelligible and within the range of acceptable outcomes (see *Dunsmuir* at paragraph 47; and *Canada (Citizenship and Immigration) v Khosa*,

2009 SCC 12 at paragraph 59, [2009] SCJ No 12 [*Khosa*]). As the Supreme Court held in *Khosa* at paragraphs 59 and 61, a court reviewing for reasonableness cannot substitute its own view of a preferable outcome, nor can it reweigh the evidence.

B. *Issue 2 - Was the officer's decision reasonable?*

[35] Subsection 25(1) of the Act governs the determination for an H&C application. It states:

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 — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — 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 — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — 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.

[36] Insofar as establishment is concerned, I find the officer's assessment was reasonable. It appears to me that the applicants disagree with the officer's assignment of weight regarding the evidence as they argue that their establishment must be given "significant weight". A court reviewing for reasonableness cannot substitute its own view of a preferable outcome, nor can it reweigh the evidence. Here, the officer considered all the evidence such as the applicants' employment history and letters of support.

[37] Therefore, the officer's assessment of establishment was reasonable.

[38] Insofar as hardship is concerned, I find the officer's assessment was reasonable. Here, the applicants and the respondent disagree on the type of evidence required to establish an allegation of a family feud.

[39] I disagree with the applicants' reliance on the case law. In *Jakaj*, the claimants tendered various pieces of evidence and this Court overturned the decision below because it found the decision maker had misconstrued the evidence. In that case at paragraph 13, Madam Justice Danièle Tremblay-Lamer did not say no supporting evidence was required to corroborate the allegation of a family blood feud:

> I agree. I find that the Board misconstrued the evidence that was before it to support the existence of the blood feud. The Board found that the letter from the Peace Missionaries was not sufficient evidence to establish the existence of a blood feud, but it made no mention of the letter from the Village Dignitary, the letter from the Chairman of the village, the declaration from the applicant's father, or the letter from the All-Nation Association for the Integration of the Prisoners and Political Prosecuted Persons, all of which attested to the existence to the blood feud and the risk to the applicant. Nor did the Board mention the email from the Canadian

> Mission, which indicated that the NRC corroborated the existence of the feud. Although the staff at the Canadian Mission did not contact the Albanian police directly, the email does suggest that the police in the village are aware of the blood feud.

[40] In *Chi*, this Court overturned the decision below because it found the decision maker failed to provide reasons for preferring the documentation it relied on. In that case, there was substantial documentation that supported the applicant's fears and contradicted the documentation relied on by the decision maker.

[41] In both of these cases, there was evidence provided to corroborate the allegations. In the present case, the applicants submitted documentary evidence that corroborated that blood feuds have led to the murder of many Albanians; however, there was no evidence that established or related them to the blood feud they alleged.

[42] Therefore, I can understand the officer's negative determination on the element of hardship since the applicants did not produce supporting documents for the specific allegation of their family blood feud.

[43] Next, I find the officer's assessment of the best interests of the applicants' children was not reasonable.

[44] The assessment of the children's best interests is an important factor to be given substantial weight; however, it will not necessarily be the determining factor in every case. (*Kolosovs* at paragraph 8).

[45] *Baker* at paragraph 75, states that an H&C decision will be unreasonable if the decision maker does not adequately consider the best interests of the children affected by the decision, and requires the decision maker to be "alert, alive and sensitive" to these interests:

> The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them.
>
> [Emphasis added]

[46] Mr. Justice Douglas Campbell defined the meaning of "alert, alive and sensitive" in the case *Kolosovs* at paragraph 9:

> The word alert implies awareness. When an H&C application indicates that a child that will be directly affected by the decision, a visa officer must demonstrate an awareness of the child's best interests by noting the ways in which those interests are implicated.
>
> [Emphasis added]

[47] Also, Mr. Justice Campbell reviewed the Guidelines (IP5 Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds) at paragraph 9. He noted section 5.19 which sets out some factors that often arise in H&C applications:

> 5.19. Best interests of the child
>
> The *Immigration and Refugee Protection Act* introduces a statutory obligation to take into account the best interests of a child who is directly affected by a decision under A25(1), when examining the circumstances of a foreign national under this section. This codifies departmental practice into legislation, thus eliminating any doubt that the interests of a child will be taken into account. Officers must always be alert and sensitive to the interests of children when examining A25(1) requests. However, this obligation only arises when it is sufficiently clear from the material

> submitted to the decision-maker that an application relies, in whole or at least in part, on this factor.
>
> …
>
> Generally, factors relating to a child's emotional, social, cultural and physical welfare should be taken into account, when raised. Some examples of factors that applicants may raise include:
>
> • the age of the child;
>
> • the level of dependency between the child and the H&C applicant;
>
> • the degree of the child's establishment in Canada;
>
> • the child's links to the country in relation to which the H&C decision is being considered;
>
> • medical issues or special needs the child may have;
>
> • the impact to the child's education;
>
> • matters related to the child's gender.

[48] The element of alive was analyzed by Mr. Justice Campbell at paragraph 11 in *Kolosovs* that the best interests factors need to be considered cumulatively:

> Once an officer is aware of the best interest factors in play in an H&C application, these factors must be considered in their full context and the relationship between the factors and other elements of the fact scenario concerned must be fully understood. Simply listing the best interest factors in play without providing an analysis on their inter-relationship is not being alive to the factors. In my opinion, in order to be alive to a child's best interests, it is necessary for a visa officer to demonstrate that he or she well understands the perspective of each of the participants in a given fact scenario, including the child if this can reasonably [*sic*] determined.
>
> [Emphasis added]

Further, Mr. Justice Campbell defined the element of sensitivity at paragraph 12 as a clear articulation of the suffering of a child from a negative decision:

> It is only after a visa officer has gained a full understanding of the real life impact of a negative H&C decision on the best interests of a child can the officer give those best interests sensitive consideration. To demonstrate sensitivity, the officer must be able to clearly articulate the suffering of a child that will result from a negative decision, and then say whether, together with a consideration of other factors, the suffering warrants humanitarian and compassionate relief.
>
> [Emphasis added]

[49] I have read the officer's decision with respect to the best interests of the children. I am not satisfied from the decision that the officer was "alert, alive and sensitive to the best interests of the children." There is no balancing of the negative and positive factors as they relate to the best interests of the children. The case law has indicated that simply listing the factors is not sufficient.

[50] I am also concerned about the following statement of the officer at page 6 of the tribunal record which concludes the remarks on the best interests of the children:

> I acknowledge that relocation to a country and being educated in their non-dominant language will be disruptive, but I am not persuaded, based on the evidence submitted and arguments advanced, that it would be an impossible obstacle.

This is not a proper background for the "best interests of the children" review.

[51] As a result, I find that the officer's decision was unreasonable and the matter must be referred to a different officer for redetermination.

[52] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter is referred to a different officer for redetermination.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, SC 2001, c 27

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 — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — 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 — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — 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.
…	…
72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une

Court. demande d’autorisation.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4082-13
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