

Federal Court



Cour fédérale

Date: 20170404

Docket: IMM-3138-16

Citation: 2017 FC 340

Toronto, Ontario, April 04, 2017

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

**DAVID SHTJEFHILAJ
LINDITE SHTJEFHILAJ
DIANA SHTJEFHILAJ AND
ORNELA SHTJEFHILAJ (BY HER
LITIGATION GUARDIAN
DAVID SHTJEFHILAJ)**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Background

[1] The Applicants applied for judicial review of a decision of a senior immigration Officer [the Officer], dated July 11, 2016 [the First Decision]. The First Decision was supplemented by a letter dated July 19, 2016 [the Update Letter], and by a note made on the same date [the Note], (collectively the Decision). The Decision denied the Applicants' application for permanent

residence on humanitarian and compassionate [H&C] grounds. This application is brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA].

II. The Note

[2] The Applicants' H&C application was made on October 9, 2015, and was initially refused in the First Decision. However, the Applicants changed counsel and made additional submissions [the Additional Submissions] dated July 13, 2016. The Update Letter advised them that the Additional Submissions had been accepted and considered, but that the refusal was maintained. The Note explained the reasons for the Update Letter.

[3] The Application for leave and judicial review was perfected on September 30, 2016. However, the Applicants had not received the Note by this time, because it was not included in the response to the Rule 9 Request [the Request]. The Note was not received until October 26, 2016, when the Respondent filed an Affidavit by the Officer sworn on October 24, 2016. It exhibited the Note and said that she had prepared it on July 19, 2016. This meant that the Applicants did not receive the entire Decision until after they perfected their Application and filed their Memorandum of Fact and Law. However, the Applicants were not prejudiced because they filed a Reply Memorandum on November 4, 2016. It addressed the entire Decision, including the Note.

III. The H&C Application

[4] The Principal Applicant and his wife are citizens of Albania. Their two daughters Diana (19 years old) and Ornela (16 years old) are citizens of the United States.

[5] In the First Decision, the Officer noted that the only evidence before her showed that husband and wife had worked as a cook and waitress since 2013 and 2015, respectively. The Officer found that while the Applicants had “achieved a level of establishment through employment and friendships in their community...it is not above what would be expected after 4 years in Canada.”

[6] In the Note, the Officer described the evidence provided with the Additional Submissions. It included letters from employers and friends; a letter from the pastor of the family church; a letter from a relative; a letter from the building superintendent at their apartment; income tax documents and bank statements; Ornela’s report card and a reference from her teacher; and country condition reports.

[7] The Officer found that notwithstanding the Applicants’ employment, financial self-sufficiency and community friendships, their establishment was still not above “what would be expected.”

[8] A social worker interviewed Ornela twice and in her Report [the Report] summarized Ornela’s concerns about relocating to Albania. They included a concern that she would lose her current friends and that the language barrier would negatively impact her ability to make new

friends and succeed in school. She was worried that her marks would drop and this would negatively affect her opportunities for further education and a career. She was also worried that she would lose the significant support of her older sister, Diana, who planned to attend Humber College in Toronto. The Report included the Social Worker's opinion that Ornela was at a stage in her development when she needed peer support.

[9] The Officer noted that Albania has a public school system and that because she is an American citizen, Ornela could return to the US for her post-secondary education. The Officer reasoned that since both Ornela's parents speak fluent Albanian "she must understand and speak Albanian to some extent." The Officer concluded that Ornela's adaptation to life in Albania was "not an impossible feat" given that she would have family support and had already demonstrated resiliency to change when she came to Canada. The Officer concluded that Ornela could continue her Canadian friendships from Albania using long distance technology. In the Note, the Officer suggested that in Albania, the family could pursue private schooling or tutoring for Ornela, and the Officer repeated her conclusion that the quality of life the family would have in Albania would not be substandard to a level that would put Ornela's wellbeing in jeopardy.

IV. Issues

- A. Was the failure to provide the Note until after the application was perfected a breach of procedural fairness?
- B. Was the analysis of establishment reasonable?
- C. Was the analysis of Ornela's best interests reasonable?

V. Discussion and Conclusions

A. *Was the failure to provide the Note until after the application was perfected a breach of procedural fairness?*

[10] The Applicants were concerned that the Note might have been prepared after their application for leave was perfected. However, since I accept the Officer's evidence that it was made on July 19, 2016, I have found no breach of procedural fairness.

B. *Was the analysis of establishment reasonable?*

[11] The Applicants' letters of support show that they are hardworking, self-supporting members of their community. They are admired by their employers, friends, family and members of their church. Their daughters are well liked by friends and family and Ornela has the respect and admiration of a teacher at her school. In sum, the evidence shows that this is a happy, hardworking, well-adjusted family. The Officer acknowledges that this degree of establishment is a positive factor, but says it is not exceptional in the sense that it is what would be expected after 4 years.

[12] The Applicants criticize this conclusion saying that the Officer fails to explain what level of establishment would be exceptional. However, it is important to recall that the issue is not the degree to which the Applicants have become established. Rather, the question is whether the degree of establishment they have achieved, whatever it may be, is such that if required to leave Canada, they will experience unusual, undeserved or disproportionate hardship other than the hardship normally associated with a departure. In my view, when the Officer said the

establishment was what would be expected, she meant and was really saying that their circumstances were ordinary and that there was nothing about them that would meet the hardship test. In other words, they would experience the usual impact of separation – the loss of jobs and friends. On the facts of this case, I have concluded that this aspect of the Decision is reasonable.

C. *Was the analysis of Ornela's best interests reasonable?*

[13] The only child at issue is Ornela and, in my view, the analysis of her best interests was unreasonable because it was unrealistic. For example, the Officer has no basis for her speculation that Ornela speaks Albanian, especially when the Report says she is concerned about the language barrier. Further, it was unreasonable of the Officer to find Ornela to be resilient and able to cope with a move from Canada to Albania based on her move from Michigan to Ontario. The two moves are not comparable.

[14] The Report's conclusion that a return to Albania would have a "profound negative impact on Ornela", was largely based on the language barrier which will make it hard for her to make friends at a stage in her development when she needs peer support. The Officer addressed this concern by suggesting that her Canadian friendships could be sustained over the internet. In my view, it is not reasonable to conclude that Canadian teenagers will take the time necessary to maintain their friendships with Ornela when they are unlikely to see her again.

[15] Lastly, although no test is established for the best interests of the child, I find it unreasonable of the Officer to conclude that her best interests are only impacted in a negative

manner if her well-being will be in “jeopardy” in Albania, or if she faces “an impossible feat” adapting to life in Albania.

VI. Conclusion

[16] The application will be granted.

VII. Certification

[17] No questions were posed for certification for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is granted. The H&C application is to be reconsidered by another officer.

“Sandra J. Simpson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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