Federal Court Cour fédérale

Date: 20220504

Docket: IMM-2439-20

Citation: 2022 FC 655

Ottawa, Ontario, May 4, 2022

PRESENT: Mr. Justice Norris

BETWEEN:

JOANNE RAYLENE JONES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant, Joanne Raylene Jones, is a citizen of Australia. Since February 2004, she has visited Canada often and has lived here for extended periods of time. She has several children but two minor children – a daughter born in March 2005 and a son born in December 2005 – are Canadian citizens and live in Canada. (In these reasons I will refer to these children as the daughter and the son.)

[2] In June 2018, Ms. Jones, without any professional assistance, applied for permanent residence in Canada on humanitarian and compassionate ("H&C") grounds under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). The application was based on the best interests of her minor children ("BIOC").

[3] A Senior Immigration Officer refused the application in a decision dated April 28, 2020. The Officer was not satisfied that the best interests of Ms. Jones's children warranted an exemption from the usual requirement that someone in Ms. Jones's position must apply for and obtain a permanent resident visa from outside Canada. Although not raised in the application, the Officer also considered whether an exemption from this requirement was warranted on the basis of Ms. Jones's establishment in Canada.

[4] Ms. Jones now applies for judicial review of this decision under subsection 72(1) of the *IRPA*. She contends that the Officer breached the requirements of procedural fairness by failing to give due consideration to the fact that she was self-represented when she made her H&C application and by making adverse credibility findings without first giving her a chance to address the Officer's concerns. She also contends that the Officer's assessments of the best interests of her children and of her establishment in Canada are unreasonable.

[5] For the reasons that follow, I am not persuaded that the decision is either unfair or unreasonable. This application must, therefore, be dismissed.

II. BACKGROUND

[6] Ms. Jones was born in Sydney, Australia, in 1969. At some point (it is not entirely clear when from the record) she formed a romantic relationship with Edward Hamilton, a Canadian citizen. Their relationship ended in 2009 but they remain on friendly terms.

[7] Mr. Hamilton is the father of the daughter and the son. In November 2014, a Family Court order granted him sole custody. When this order was made, Ms. Jones was living in Australia. She had been excluded from Canada for 12 months for having overstayed on an earlier visitor's visa. The daughter and the son have also remained in Canada with their father during other times when Ms. Jones has returned to Australia.

[8] Ms. Jones returned to Canada most recently in February 2018. When she submitted her H&C application in June 2018, she, Mr. Hamilton, the daughter and the son were all living together in Mr. Hamilton's home in Cornwall, Ontario. The November 2014 Family Court order had provided that Ms. Jones's return to Canada would constitute a material change in circumstances and, other things being equal, "this would permit the parties to resume a shared parenting/shared custody regime" and that "the parties will have equal rights and responsibilities towards the children." No subsequent Family Court orders dealing with custody of the children were provided with the H&C application.

[9] The H&C application was supported by letters from Ms. Jones and Mr. Hamilton as well as a letter from Dr. Irina Kirtsman, the daughter's and son's pediatrician. Ms. Jones also provided support letters from her friends Jacob and Ruth Lechleitner and from her pastor.

III. DECISION UNDER REVIEW

[10] The Officer considered three factors in assessing the H&C application: establishment in Canada, BIOC, and Ms. Jones's mental health. No weight was given to the mental health factor because, while Ms. Jones had stated in her application that she suffered from Post-Traumatic Stress Disorder, she had provided no evidence to support this diagnosis or to show that she was receiving treatment in Canada. This determination has not been challenged.

[11] The Officer gave some weight to Ms. Jones's establishment in Canada and to the best interests of the children but concluded these factors individually and cumulatively were insufficient to warrant relief from the usual requirements of the law.

Establishment in Canada

[12] The Officer found that Ms. Jones did not have significant establishment in Canada. Although cumulatively she had lived in Canada for several years, generally speaking her individual stays were relatively short and sporadic. The Officer noted that, at the time the application was being determined, Ms. Jones had been in Canada for just over two years.

[13] The Officer found that Ms. Jones had demonstrated little community integration since coming back to Canada or generally because:

- She was not working;
- She was living rent-free with her former partner;
- She was estranged from her eldest daughter, who lives in Canada;
- The support letter from her pastor did not establish that she was a member of the congregation at the time of application;
- The letter from Jacob and Ruth Lechleitner stated that they had known Ms. Jones since 2011 and that they would help her with her expenses but it said nothing else about her establishment in the community;
- While the letter from Mr. Hamilton stated that Ms. Jones had many friends who helped her with food and medical expenses, Ms. Jones did not provide evidence of any other friendships in Canada besides the Lechleitners;
- During her longest stay in Canada, Ms. Jones had collected social assistance and was removed from Canada by an exclusion order;
- There was no evidence to support Ms. Jones's claim that she had lost her pension and her apartment in Australia due to her travel to Canada.

Best Interests of the Children

[14] The Officer accepted that, overall, it would be in the best interests of the daughter and the son to be raised in Canada by both of their parents. However, the Officer found that this factor was insufficient to warrant H&C relief in this case. The Officer gave three reasons to support this finding.

[15] First, the two children had previously lived without the physical presence of their mother for prolonged periods and no evidence was provided to show how this had affected them.

[16] Second, there was insufficient evidence to show that the children suffered from mental health issues that would be exacerbated by separation from their mother, as Ms. Jones had contended. In this connection, Dr. Kirtsman's letter stated that both children "have serious chronic medical issues," that the daughter "has severe anxiety with suicidal thoughts and depressed moods," that her "biggest fear is to be separated from her mother," that she is "getting counseling," and that the son "is always very emotional with the issue of potential separation from his mother." However, the Officer gave little weight to this letter because it did not contain a medical diagnosis for either child. The Officer wrote:

> Dr. Kirtsman is a pediatrician and not a psychologist or psychiatrist. It is not clear from her letter that [the reference to the daughter's severe anxiety and depressed mood] is her official diagnosis or whether she is simply parroting information about [the daughter's] mental health that was provided as part of her general medical history. What is missing, however, is an actual clinical diagnosis by a mental health practitioner regarding [the daughter's] mental health, including possible physiological, psychological and/or emotional triggers. There is also no information from the treating counsellor describing [the daughter's] current mental

> health. Therefore while the applicant's presence in Canada may contribute to her daughter's overall mental health, the evidence before me does not demonstrate that it is a critical component of it as the applicant has presented no evidence to support that conclusion. The same can be said for her son [. . .]. While I accept that [the son] would be very emotional about the possibility of separation from his mother, there is little evidence before me that demonstrates that [the son] has any clinical diagnosis of a mental health issue that would necessitate his mother's presence in his life.

[17] Third, the custody order stated that Ms. Jones and Mr. Hamilton were to share custody of the children when she was in Canada but it was not clear whether this required a variation of the order. The Officer noted that Ms. Jones had stated that the order had been varied but she had provided no evidence that this was the case. The Officer therefore concluded that Ms. Jones does not have shared custody of the children and that it remains the case that Mr. Hamilton has sole custody of them.

Overall Assessment

[18] The Officer concluded that Ms. Jones's establishment in Canada was "fairly minimal" but was entitled to some weight. The Officer also concluded that the best interests of the children favour Ms. Jones remaining in Canada but this, by itself, is not sufficient to justify granting relief. Considering these factors cumulatively, the Officer was not satisfied that there were sufficient H&C considerations to justify granting the application. Accordingly, the application was refused.

IV. STANDARD OF REVIEW

[19] Ms. Jones challenges both the substance of the decision and the fairness of the procedure followed by the Officer.

[20] It is well-established that the substance of an H&C decision should be reviewed on a reasonableness standard: see *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44. That this is the appropriate standard has been reinforced by *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10.

[21] A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). A decision that displays these qualities is entitled to deference from the reviewing court (*ibid.*). When applying the reasonableness standard, it is not the role of the reviewing court to reweigh or reassess the evidence considered by the decision maker or to interfere with factual findings unless there are exceptional circumstances: see *Vavilov* at para 125. At the same time, reasonableness review is not a rubber-stamping process; it remains a robust form of review: see *Vavilov* at para 13.

[22] The onus is on Ms. Jones to demonstrate that the Officer's decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). The court "must be satisfied

that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable" (*ibid.*).

[23] With regard to whether the requirements of procedural fairness were met, the reviewing court must conduct its own analysis of the process followed by the decision maker and determine for itself whether the process was fair having regard to all the relevant circumstances, including those identified in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21-28: see *Canadian Pacific Railway Co v Canada (Attorney General)*, 2018 FCA 69 at para 54, and *Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14. This is functionally the same as applying the correctness standard of review: see *Canadian Pacific Railway Co* at paras 49-56 and *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship*), 2020 FCA 196 at para 35. The burden is on Ms. Jones to demonstrate that the requirements of procedural fairness were not met.

V. ANALYSIS

A. *The Nature of H&C Relief*

[24] Subsection 25(1) of the *IRPA* authorizes the Minister to grant relief to a foreign national seeking permanent resident status who is inadmissible or otherwise does not meet the requirements of the Act. The Minister may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations under the Act. As the provision states, relief of this nature will only be granted if the Minister "is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national." Whether

relief is warranted in a given case depends on the specific circumstances of that case: see *Kanthasamy* at para 25. As noted, in the present case, Ms. Jones seeks an exemption on H&C grounds from the usual requirement that one must apply for permanent residency from outside Canada.

[25] When subsection 25(1) of the *IRPA* is invoked, the decision maker must determine whether an exception ought to be made to the usual operation of the law: see *Damian v Canada (Citizenship and Immigration)*, 2019 FC 1158 at paras 16-22. This discretion to make an exception provides flexibility to mitigate the effects of a rigid application of the law in appropriate cases: see *Kanthasamy* at para 19. It should be exercised in light of the equitable underlying purpose of the provision: *Kanthasamy* at para 31. Thus, decision makers should understand that H&C considerations refer to "those facts, established by the evidence, which would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another – so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the *Immigration Act*" (*Kanthasamy* at para 13, adopting the approach articulated in *Chirwa v Canada (Minister of Manpower & Immigration)* (1970), 4 IAC 338). Subsection 25(1) should therefore be interpreted by decision makers to allow it "to respond flexibly to the equitable goals of the provision" (*Kanthasamy* at para 33). At the same time, it is not intended to be an alternative immigration scheme: see *Kanthasamy* at para 23.

[26] As Justice Abella observed in *Kanthasamy*, "[t]here will inevitably be some hardship associated with being required to leave Canada. This alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under s. 25(1)" (at para 23). What

does warrant relief will vary depending on the facts and context of the case (*Kanthasamy* at para 25).

[27] H&C relief is an exceptional and highly discretionary measure: see *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 15; and *Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4. The onus is on an applicant to present sufficient evidence to warrant the exercise of such discretion in his or her case: see *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 45; *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 5; *Ahmad v Canada (Minister of Citizenship and Immigration)*, 2008 FC 646 at para 31; and *Zlotosz v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 724 at para 22.

[28] Subsection 25(1) expressly requires a decision maker to take into account the best interests of a child directly affected by a decision made under that provision. The "best interests" principle is "highly contextual" because of the "multitude of factors that may impinge on the child's best interests" (*Kanthasamy* at para 35, quoting *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 11 and *Gordon v Goertz*, [1996] 2 SCR 27 at para 20). As a result, it must be applied "in a manner responsive to each child's particular age, capacity, needs and maturity" (*Kanthasamy* at para 35). Protecting children through the application of this principle means "[d]eciding what . . . appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention" (*Kanthasamy* at para 36, quoting *MacGyver v Richards* (1995), 22 OR (3d) 481 (CA) at p 489).

[29] Given the fact-specific nature of the inquiry into the best interests of a child affected by the decision, evidence to support one's reliance on those interests must be provided: see *Zlotosz* at para 22; and *Lovera v Canada (Minister of Citizenship and Immigration)*, 2016 FC 786 at para 38.

[30] Finally, it follows from the discretionary nature of decisions under subsection 25(1) of the *IRPA* that generally the administrative decision maker's determinations will be accorded a considerable degree of deference by a reviewing court: see *Williams* at para 4; and *Legault* at para 15.

B. *Did the Officer Breach the Requirements of Procedural Fairness?*

[31] Ms. Jones argues that the Officer breached the requirements of procedural fairness in two respects: first, by failing to extend to her the "latitude" or "leeway" that she was entitled to as a self-represented applicant; and second, by making adverse credibility findings without first giving Ms. Jones an opportunity to address the Officer's concerns. In my view, the requirements of procedural fairness were not breached in either respect.

[32] Looking first at the issue of the latitude or leeway to which Ms. Jones submits she was entitled, the case law she cites in support of this principle – for example, *Kotelenets v Canada (Citizenship and Immigration)*, 2015 FC 209 – concerned in-person hearings before the decision maker. The issue was whether the decision maker had unfairly curtailed a self-represented litigant's presentation of their case. In such circumstances, where the litigant does not have the benefit of professional advice and guidance on how to present their case, the duty to be fair may

require a decision maker conducting a hearing to extend some latitude or leeway when proper procedures have not been followed: see *Kotelenets* at para 32. That is not the case here. The Officer did not constrain or control Ms. Jones's presentation of her case in any way. I agree with the respondent that the jurisprudence on which Ms. Jones relies is entirely distinguishable.

[33] Furthermore, this Court has consistently held that there is no duty on the decision maker to elicit further evidence from an applicant for H&C relief, even one who is self-represented. See, for example, *Jaramillo v Canada (Citizenship and Immigration)*, 2014 FC 744 at para 62; and *Celise v Canada (Citizenship and Immigration)*, 2015 FC 642 at paras 35-36.

[34] Finally, I agree with Ms. Jones that a decision maker must make a good faith effort to understand the submissions or evidence presented and, as a result, might need to make allowances for the fact that an application was not prepared with professional assistance. That being said, the underlying principle applies irrespective of whether the party is represented or not. It is hardly necessary to point out that professionally prepared materials are not always models of clarity and cogency or that self-represented applicants can make clear and cogent applications. In any event, there is no suggestion that the Officer misunderstood any material aspect of Ms. Jones's application, which was itself quite clear and concise. If anything, the Officer took a generous approach to the application by addressing the issue of establishment even though Ms. Jones had not raised it. Likewise, the Officer approached the application with the requisite amount of care given that the interests of minor children would be directly affected by the decision. The application was refused not because the Officer failed to grasp its material points but, rather, because the evidence was found to be insufficient to entitle Ms. Jones to the

relief she sought. The standard against which the sufficiency of the evidence is measured is the same whether an applicant is self-represented or not.

[35] This brings me to Ms. Jones's second procedural fairness argument – that the Officer did not simply assess the sufficiency of the evidence but, rather, made adverse credibility findings – particularly with respect to the letter from Dr. Kirtsman.

[36] While the Officer's articulation of their assessment of the letter is not flawless, I do not agree that the assessment was based on an adverse credibility determination. For example, the Officer made a poor word choice when referring to Dr. Kirtsman potentially "parroting" another medical professional's diagnosis of the daughter. However, the underlying point is still sound: one cannot tell from the letter who made the diagnosis or when and these are relevant factors when assessing the weight to be given to the opinion in the context of the application being advanced. Significantly, the Officer did not doubt that someone had made this diagnosis; what was found to be missing was any explanation of a connection between the diagnosis and Ms. Jones's presence or absence. As for the son, on the other hand, there was no suggestion that he had a diagnosed mental health condition; rather, Dr. Kirtsman simply reported that he was "always very emotional with the issue of potential separation from his mother."

[37] The critical difficulty for Ms. Jones's application was that the application turned on the impact of her removal on her children's mental health yet Dr. Kirtsman's letter said very little about any nexus between the children's mental health and Ms. Jones's presence in Canada apart from the elementary point that the children did not want to be separated from their mother – a

point the Officer accepted. Even with respect to the daughter, who has been diagnosed as having mental health challenges, Dr. Kirtsman's letter offered little in the way of insight into how those challenges were connected to the question in issue – whether Ms. Jones should be permitted to apply for permanent residency from within Canada. The Officer could reach the conclusion that the doctor's brief letter, which offered little elaboration of the basis for the opinions offered, was insufficient to establish that H&C relief on the basis of the best interests of the children is warranted without in any way impugning the doctor's credibility. Whether that conclusion is unreasonable is a separate question. I turn to it next.

C. *Is the Decision Unreasonable?*

[38] As just noted, even though Ms. Jones sought H&C relief solely on the basis of the best interests of her minor children, the Officer also considered her establishment in Canada. While Ms. Jones challenges the Officer's assessment of both factors, her main focus in this application for judicial review is the BIOC assessment.

[39] When deciding an H&C request that engages the best interests of a child, the decision maker must do more than simply state that the interests of the child have been taken into account. A child's best interests must be "'well identified and defined' and examined 'with a great deal of attention' in light of all the evidence" (*Kanthasamy* at para 39, quoting *Legault* at paras 12 and 31 and referencing *Kolosovs v Canada (Minister of Citizenship and Immigration)*, 2008 FC 165 at paras 9-12). A decision under subsection 25(1) of the *IRPA* will be found to be unreasonable if the interests of children affected by it are not sufficiently considered (*Baker* at

para 75). However, what constitutes sufficient consideration of the best interests of an affected child will depend on the evidence presented on the application.

[40] In my view, the Officer reasonably determined that the evidence was insufficient to support granting Ms. Jones H&C relief on the basis of the best interests of her daughter and her son. The Officer accepted that it would be in the children's best interests to have their mother remain in Canada. However, as discussed above, Ms. Jones submitted little evidence to establish that her presence was necessary for the well-being of her children, particularly with respect to the daughter's mental health issues. Ms. Jones, her daughter and her son had lived both apart and together over the course of her children's lives yet there was little evidence about how the children had managed under either circumstance.

[41] While the BIOC factor is a significant one, it is not necessarily determinative of a particular H&C application: see *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at paras 2 and 8. As the Supreme Court of Canada held in *Baker*, "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" (at para 75). However, this "is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration" (*ibid.*). I am satisfied that the Officer was alert, alive and sensitive to the best interests of the daughter and the son and gave this factor substantial weight. However, given the very limited evidence before the Officer, the decision that relief was not warranted on this basis is entirely reasonable.

[42] Turning to the issue of Ms. Jones's establishment in Canada, I am also satisfied that the Officer's assessment is reasonable. Once again, very little evidence to support this factor was offered. In fact, as I have already noted, Ms. Jones did not expressly rely on this factor at all in her application. In my view, the Officer reasonably assessed such evidence as there was bearing on Ms. Jones's establishment in Canada, reasonably determined that only a limited degree of establishment had been demonstrated, and reasonably gave this factor some weight. I am not persuaded that the Officer committed any reviewable errors in this regard.

[43] In summary, Ms. Jones has not persuaded me that the Officer's conclusion that the factors considered – either alone or cumulatively – were insufficient to warrant H&C relief is unreasonable.

VI. CONCLUSION

[44] For these reasons, the application for judicial review must be dismissed.

[45] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

[46] Finally, Ms. Jones requested costs in her Notice of Application for Judicial Review. This request was not pursued in her Memorandum of Fact and Law or at the hearing. Accordingly, no costs are ordered.

JUDGMENT IN IMM-2439-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No question of general importance is stated.

3. No costs are ordered.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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