Date: 20081203

Docket: IMM-1024-08

Citation: 2008 FC 1345

Toronto, Ontario, December 3, 2008

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

LUCENE CHARLES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review made pursuant to section 72 of the *Immigration and Refugee Protection Act* (IRPA), S.C. 2001, c. 27 of a decision of an Immigration Officer, dated February14, 2008, refusing the applicant's application for permanent residence on Humanitarian and Compassionate (H&C) grounds.

[2] In view of the unexplained absence of the respondent's counsel at the hearing and of the presence of the applicant with the children affected by the impugned decision, the applicant's counsel insisted to proceed with the hearing. The hearing therefore proceeded in the absence of the respondent's representative who had however filed extensive written arguments and authorities in support of the respondent's position.

II. Facts

[3] The applicant, Lucene Charles, is a citizen of Saint-Vincent. While visiting Canada in 1995, she met Joseph Michael Polk, whom she married in 1997. They both lived in Canada between the years 1997-1999. In 1999 the family left for Gambia, Africa where the applicant's mother was on a contract with the United Nations.

[4] Three children were born to the marriage: Ajahla Abib on June 7, 1997, and Aksum Abib on June 24, 1998, both in Brampton, Ontario, and Amlicar Abib on July 17, 2000, in Gambia. Unfortunately, this marriage ended with a divorce in 2006. Subsequently, the applicant had a fourth child born in Gambia from another relationship.

[5] After her mother's contract ended in Gambia, the applicant decided to return to Canada where she arrived with her children on September 1, 2007. As a Saint-Vincent national, the applicant did not require a visa before entering and was entitled to stay in Canada for a six month period.

[6] On November 1, 2007, the applicant applied for: (1) a work permit on H&C grounds, (2) an extension on her Temporary Resident Permit, which was to expire by March 31, 2008 and (3) an exemption from visa requirement on H&C grounds so that she could apply for permanent residence in Canada. All three requests having been refused, the applicant sought and was refused leave to review the refusal of her request for a work permit and the refusal of an extension of her Temporary Resident Permit.

[7] The present recourse concerns only the third request. The applicant submits now that the decision to reject her request exemption from visa requirement on H&C grounds is patently unreasonable since, in her view, the Officer did not consider the significant humanitarian and compassionate factors present in this case.

[8] Other than her stating that the father of her youngest child is paying for his support, the applicant has not provided any proof of support in Canada. True, the applicant obtained in Gambia an order for alimentary support from the father of the three Canadian children, but her ex spouse has failed in his obligations so far. The applicant has been living with an aunt since her arrival in Canada, while her parents and relatives reside in Saint-Vincent and the applicant has offered no proof that she would not be able to obtain proper support in her home country for herself and her children. The applicant has offered no proof either that the children’s interest would be for them to remain in Canada and that they would not receive in Saint-Vincent the proper care, attention, love and education they need.

[9] It is also noted that the applicant remains unemployed and a stay-at-home-mom since her arrival in Canada, and she has offered no proof that she could not obtain support from her parents if she were to return to her country of origin. The evidence seems to indicate that the applicant received support from her mother during her stay in Gambia, and there is no reason to believe that similar support would not be available in Saint-Vincent. Aside from being the mother of three Canadian born children, the applicants did not offer any proof of her establishment in Canada, nor of her children's establishment here as well. The applicant holds a valid passport issued by Saint-Vincent that she has used to travel freely so far.

[10] The applicant has to show how she would face unusual, undeserved or disproportionate hardship if she were to return to her country of origin and apply for a permanent resident visa from outside Canada.

III. Issues

[11] The central issues in this case are as follows:

a. Did the Officer err in finding that the applicant failed to demonstrate any undue hardship in being required to apply for permanent residence from abroad?

b. Did the Officer err when assessing the best interest of the children?

c. Did the Officer err when assessing the issue of establishment from the wrong perspective?

IV. The Impugned Decision

[12] After considering the information provided by the applicant and assessing her degree of establishment in Canada, the Officer determined that she could not be granted the exceptional relief sought since she had not demonstrated that separation from her relatives in Canada would qualify as undue hardship if required to apply from abroad as in the normal course.

[13] The Officer considered also all the information adduced in respect of the children and noted that they were young enough to adapt if the applicant was required to leave Canada so that they would not experience any undue hardship.

V. Analysis

A. *Standard of Review*

[14] The Officer's finding is to be reviewed on a reasonableness standard. Consequently the decision must be justifiable, transparent and intelligible within the decision-making process (*Dunsmuir v. New Brunswick*, 2008 SCC 9).

B. *Finding of Undue Hardship & Best Interest of the Child*

[15] The applicant asserts that the Officer's determination is unreasonable. She states that the finding has no evidentiary basis and is inconsistent with the overwhelming weight of the evidence. She alleges that the Officer disregarded the existence of undue hardship which was made apparent in her submissions.

[16] Further, she insists that the best interest of her children was not assessed.

[17] Applications for permanent residence must, as a general rule, be made from outside Canada. One of the exceptions to this is when admission is facilitated owing to the existence of compassionate or humanitarian considerations. While a person may obtain special permission on H&C grounds to apply for permanent residence from within Canada, that person must demonstrate that such relief is warranted due to the compelling circumstances of the case.

[18] Furthermore, while the existence of undue hardship and best interests of children are basis on which H&C relief can be granted, the existence of both must be demonstrated and they are not to be presumed.

[19] While the applicant alleged she would suffer undue hardship if she were required to apply for landing from abroad as the law requires and that the best interests of her children warrant H&C relief, she adduced no evidence in support of her allegations that the children's best interests would be furthered were she allowed to apply for permanent residence from within Canada, nor did she canvass how their interests would be harmed if she were not allowed to do so, except for mentioning that her three Canadian children are entitled as of right to remain in Canada.

[20] While the applicant made numerous assertions in her arguments as to what she or the children might face should she be required to return to Saint-Vincent to apply for permanent residence, she submitted however no evidence in support of these assertions.

[21] True, an H&C Officer must be "alert, alive and sensitive" to, and must not "minimize", the best interests of children who may be adversely affected by a parent's deportation (*Baker v. Canada (Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 817 at para.75). However, this duty arises only when it is sufficiently clear from the material submitted to the decision-maker that an application relies on this factor, at least in part. Moreover, an applicant has the burden of adducing proof of any claim on which the H&C application relies. Hence, if an applicant provides no evidence to support the claim, the Officer may conclude that it is baseless (*Samuel Kwabena Owusu and The Minister of Citizenship and Immigration* 2004 FCA 38, at para. 5), without being taxed without any ground,as he was here, of not being sufficiently "alert, alive and sensitive" to and to have "minimize" the best interests of the children who may be adversely affected by their mother's deportation.

[22] While lacking any legal status in Canada, the applicant insists that the simple fact of being the mother of three Canadian born children suffice in itself to warrant an H&C relief. The Court disagrees with this proposition. To be granted the exceptional relief sought, the applicant had also to demonstrate that she would suffer undue hardship if required to apply from abroad as in the normal course.

[23] The applicant argues that she explained in a January 25, 2008 letter, in response to the rejection of her work permit application, what the situation of her Canadian born children in Canada was, and that this should have triggered more fulsome assessment of the children's best interests. However this submission is unacceptable for two reasons: Firstly, this letter was addressed to the Immigration Officer who rejected the applicant's request for a work permit, and there is no proof that this letter was directed to the H&C Officer seized of her request to waive the requirement to apply for permanent residence from abroad. Secondly, this letter makes only passing reference to the best interests of the Canadian born children, let alone canvass the benefits to the children of allowing their mother to apply for landing from within Canada, how they might be adversely affected if their mother were required to apply for landing from abroad, or why, on balance, the best interests of the children would warrant exceptional relief in view of their short term establishment in Canada.

[24] Again the H&C Officer cannot be faulted for failing to consider a letter which had not been submitted to him and for failing to assess the best interests, considerations put forward in a letter addressed to another officer, and this without sufficient explanation or supporting evidence.

[25] Finally, it may very well be that in Canada, where the applicant currently resides, her children do not pay for their school books and tuition fees. While in Gambia, the evidence reveals they were receiving their education in private schools where, in all probability, the applicant's children had to pay for their school books and tuition fees. But we still do not know what would be the situation in Saint-Vincent in this regard.

[26] However the question is not whether Canada is more advantageous than the applicant's country, but rather whether the likely degree of hardship resulting from requiring her to leave Canada with or without the children, in order to apply for permanent residence, qualify as undue hardship warranting the H&C application (*Hawthorne v. Canada (Minister of Citizenship and Immigration)* [2002] 1 F.C.). The applicant has not established whether any of her children would have to leave Canada with her, should she be required to apply for landing from abroad, and what any adverse results or undue hardship they would suffer as a consequence.

[27] The applicant cannot fault the H&C Officer for considering the age of the children, their corresponding adaptability, and their short term establishment in Canada since their return from Gambia. The age and adaptability considerations are relevant when assessing the best interests of children, more particularly here, when considering the children had little contact with the Canadian society (*Qureshi v. Canada (Minister of Citizenship and Immigration)* (2000) 195 FTR 9). However, while the best interests of the children may be a significant factor, they are not determinative (*Canada (Minister of Citizenship and Immigration.) v. Legault*, 2002 FCA 125) to support the applicant's request. In light of the applicant's failure to provide evidence to support her request, the applicant's argument would, if accepted, make the case of the best interest of her Canadian children determinative of her H&C application. This proposal is unacceptable.

[28] As the Immigration Officer could not assume the hardship that the applicant alleged, and as the applicant adduced no evidence in support of her allegations, the Court cannot see how the Officer erred in deciding that the applicant had not demonstrated that the undue hardship in her case warranted H&C relief or that the best interests of her children warranted H&C relief. Without diminishing the important role of the applicant as a mother of four children, and in the absence of any contrary evidence, who knows if the best interests of the children would not be better served in the closeness of the grand-mother's affection they benefited from during their stay in Gambia, rather than being here in Canada? In the absence of any evidence in this regard the Court cannot speculate and will not try to answer this question; the same reasoning applies to the Officer.

[29] The applicant demonstrated her ability to secure employment and to provide for her family while living in Gambia. Recognizing that the applicant's parents and siblings remain in Saint-Vincent the Court does not see how requiring that she apply for permanent residence from outside Canada would constitute hardship for herself or for her children.

[30] In brief, the impugned decision falls within a range of possible and acceptable outcomes which are defensible in respect of the facts and the law, and therefore deserves deference from this Court. For these reasons, this Court concludes that the Officer did not commit a reviewable error and that his decision is reasonable. Therefore the judicial review application will be dismissed.

[31] The Court agrees with the parties that there is no serious question of general importance to certify.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application is dismissed.

"Maurice E. Lagacé"

Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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No Appearance	FOR THE RESPONDENT

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