Federal Court Cour fédérale

Date: 20120210

Docket: IMM-2177-11

Citation: 2012 FC 194

Ottawa, Ontario, February 10, 2012

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

KEISHA PAUL
KALANJI PAUL

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of the decision of a Pre-Removal Risk Assessment Officer of Citizenship and Immigration Canada (the Officer) dated February 24, 2011, whereby the applicants' application for permanent residence based on humanitarian and compassionate grounds pursuant to section 25 of the Act was refused.

Factual Background

[2] Keisha Moleica Paul (the principal applicant) and her eleven (11) year old son Kalanji Atonio Paul are citizens of Saint Vincent and the Grenadines (Saint Vincent) (together, the applicants). The principal applicant has another child, a four (4) year old daughter named Kaleisha Agobre-Paul who was born in Canada.

[3] On June 11, 2002, the principal applicant arrived in Canada, having left Saint Vincent in order to get away from her abusive ex-boyfriend, Desbert Scott, who is the father of her son. Kalanji remained in Saint Vincent under the care of the principal applicant's aunt. Four (4) years later, specifically on June 20, 2006, Kalanji arrived in Canada. On June 27, 2006, the applicants claimed refugee status based on a fear of persecution from Desbert Scott. On October 10, 2008, their application for refugee status was denied and leave for judicial review was not granted.

[4] The Immigration and Refugee Board (the Board) denied their application for refugee protection on the basis that state protection remained available and that they did not have a reasonable fear of persecution. Although the Board did not doubt that the principal applicant was a victim of abuse, (i) she had failed to seek state protection, such protection being available, (ii) she did not make reasonable efforts for Kalanji to leave Saint Vincent as soon as possible, and (iii) she waited four (4) years before seeking refugee status.

[5] On September 14, 2009, the applicants requested a pre-removal risk assessment, which was denied on March 16, 2010. On August 11, 2009, the applicants filed an application for permanent residence based on humanitarian and compassionate grounds. Their application was denied in

March 2010. However, on February 7, 2011, the Court allowed the judicial review of the decision and sent the application back for redetermination, the initial Immigration Officer having failed to apply the correct legal test for humanitarian and compassionate grounds.

[6] On February 24, 2011, the Officer reconsidered the applicants' application for permanent residence based on humanitarian and compassionate grounds, but nonetheless denied their application. The applicants now seek judicial review of this decision. On April 1, 2011, the Court granted a stay of removal to the applicants.

Decision under Review

[7] In the decision, the Officer assessed the alleged risk faced by the applicants should they be forced to return to Saint Vincent, specifically, the principal applicant's fear of subsequent abuse at the hands of Desbert Scott. The Officer emphasized that it had been eight years since the principal applicant had left Saint Vincent and that there was no evidence of any contact with Mr. Scott since she had arrived in Canada. Moreover, the principal applicant had left Kalanji in Saint Vincent for four (4) years with her aunt, during which time Mr. Scott never tried to harm his son, nor harass the principal applicant's family. Therefore, the Officer concluded that the principal applicant had not demonstrated that Mr. Scott would still be looking for her, nor that he would want to harm her.

[8] The Officer then considered the documentary evidence relied on by the applicants. However, the Officer noted that these sources describe the generalized situation in Saint Vincent and the general status of women within the country: the documentary evidence did not specifically address the principal applicant's situation. In addition, despite the difficult situation faced by women

in Saint Vincent, the Officer highlighted the existence of services to aid women victims of abuse. However, the principal applicant did not establish that she would be unable to use these state services upon her return, if need be. Consequently, despite the existence of violence against women in Saint Vincent, the Officer concluded that the principal applicant had failed to prove she faced any real risk upon her return and that state protection would be inefficient, failing to establish the existence of unusual, undeserved or disproportionate hardship.

[9] The Officer then went on to consider the applicants' ties to Canada, such as the principal applicant's religious commitments, her financial situation and her current employment. However, the Officer emphasized that for four (4) years, the principal applicant, lacking status within the country, worked without paying taxes, in contravention of the laws of Canada. Moreover, the principal applicant chose to remain in Canada without any legal status.

[10] Lastly, the Officer assessed the best interests of both children concerned, Kalanji and Kaleisha.

[11] Kalanji arrived in Canada at the age of five (5) and went to school here. Nonetheless, the Officer found that nothing inhibits him from pursuing his education in Saint Vincent, where he resided the first half of his life, with knowledge of the language and the culture. The Officer also observed that the principal applicant's aunt, who raised him, is still in Saint Vincent, whereas in Canada the only family he has is his younger sister. Therefore, the Officer concluded that the applicants had failed to prove that their return to Saint Vincent would seriously impact Kalanji's best interests, while he would have to adapt.

[12] The principal applicant's other child, Kaleisha, is a Canadian citizen. Her father, Mr. Justin Agobre, is also a Canadian citizen. However, Kaleisha's parents are separated, the principal applicant having custody pursuant to their custody agreement. Mr. Agobre has access rights and pays for various things, including daycare. The Officer considered the evidence submitted to establish Mr. Agobre's close relationship with his daughter, notably a letter and undated photographs. Nonetheless, the Officer did not consider that this evidence proved a continued relationship between Kaleisha and her father, nor that they would be incapable of maintaining a relationship, nor that he would be unable to continue to provide for her should she go to Saint Vincent with her mother. For these reasons, based on the evidence and the age of the children, the Officer concluded that their best interests were not affected so as to warrant the special relief the applicants seek by virtue of their application based on humanitarian and compassionate grounds. Hence, their application was denied, the applicants having failed to prove the existence of unusual, underserved or disproportionate hardship should they be forced to return to Saint Vincent.

Issues

[13] The issues raised by the present application are as follow:

1. Did the Officer err in his assessment of the best interests of the children involved?

2. Did the Officer err in failing to further the applicants' right to the protection of family life, in contravention of Canada's obligations under international law?

3. Did the Officer commit a reviewable error in failing to mention the Board's Guidelines for "Women Refugee Claimants Fearing Gender-Related Persecution" (Guideline 4 – Women Refugee Claimants Fearing Gender-Related Persecution (1996), [the Guidelines])?

4. Did the Officer commit a reviewable error by not following the jurisprudence depicting the social condition of abused women in Saint Vincent and the lack of state protection?

Applicable Legislation

[14] The following provisions of the *Immigration and Refugee Protection Act* are applicable in the present proceedings:

OBJECTIVES AND APPLICATION	OBJET DE LA LOI
OBJECTIVES – IMMIGRATION	OBJET EN MATIERE D'IMMIGRATION
3. (1) The objectives of this Act with respect to immigration are	**3.** (1) En matière d'immigration, la présente loi a pour objet :
…	[…]
(*d*) to see that families are reunited in Canada;	*d*) de veiller à la réunification des familles au Canada;
…	[…]
HUMANITARIAN AND COMPASSIONATE CONSIDERATIONS — REQUEST OF FOREIGN NATIONAL	SEJOUR POUR MOTIF D'ORDRE HUMANITAIRE A LA DEMANDE DE L'ETRANGER
25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, 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	**25.** (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada, 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.

foreign national, taking into account the best interests of a child directly affected.

… […]

Standard of Review

[15] The applicable standard of review to an officer's determination based on humanitarian and compassionate grounds is reasonableness (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75, [1999] SCJ No 39, [*Baker*]; *Arulraj v Canada (Minister of Citizenship and Immigration*), 2006 FC 529 at para 9, [2006] FCJ No 672 [*Arulraj*]; *Toney v Canada (Minister of Public Safety and Emergency Preparedness*), 2009 FC 904 at para 66, [2009] FCJ No 1128). It is the role of the officer to weigh the various factors raised by the application for permanent residence based on humanitarian and compassionate grounds: the Court cannot reweigh these factors (*Arulraj*, above, at paras 9-10 citing *Suresh v Canada (Minister of Citizenship and Immigration*), 2002 SCC 1 at paras 37-38, (2002) 208 DLR (4th) 1; *Serda v Canada (Minister of Citizenship and Immigration*), 2006 FC 356 at para 12, [2006] FCJ No 425 [*Serda*]). Essentially, the Court must determine whether the Officer's decision is justified, transparent and intelligible, falling within the range of "possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190, [*Dunsmuir*]).

1. *Did the Officer err in his assessment of the best interests of the children involved?*

[16] The applicants argue that the Officer erred in his assessment of the best interests of the children, making conclusions in disregard of the evidence before the Officer, in contravention of the obligations set out in *Baker*, above. The applicants contend that the Officer failed to consider the documentary evidence describing the situation of poverty present in Saint Vincent which the

applicants would be forced to face, in comparison to the abundant resources available to them in Canada. In addition, they contend that the Officer ignored the evidence of Kaleisha's relationship with her Canadian father, failing to consider that her only family ties are within Canada. Essentially, the applicants claim that the Officer was not alert and sensitive to the children's best interests as required by the jurisprudence. Hence, they submit that the Officer ignored that it was in the applicants' best interests to remain in Canada, together, allowing Kaleisha to also remain with her father and only other family, in conformity with the objectives of paragraph 3(1)(*d*) of the Act.

[17] However, after reviewing the evidence, the Court cannot agree with the applicants. The Officer conducted a comprehensive analysis of the evidence and his assessment of the identified humanitarian and compassionate grounds was reasonable. Moreover, the Court is of the view that the Officer applied the proper legal test and reasonably assessed the best interests of the children involved setting out the relevant considerations for each child separately. Therefore, the Officer was also alert, alive and sensitive to the children's best interests, in conformity with the requirements set out by the Supreme Court of Canada in *Baker*, above. Rather, in this case, the issue solely amounts to one of sufficiency of evidence. Indeed, the evidence before the Officer was insufficient to demonstrate that the concerned children would be incapable of adapting or that the difficulties they may face would amount to unusual, underserved or disproportionate hardship.

[18] Further, Canada's international Convention obligations do not allow individuals to remain in the country on the basis that they would be better off in Canada nor has this factor been given paramountcy (*Vasquez v Canada (Minister of Citizenship and Immigration*), 2005 FC 91, [2005] FCJ No 96 [*Vasquez*]); *Serda*, above). Rather, humanitarian applications are meant to assess

hardship. Having carefully read the Officer's reasons, and on the basis on the evidence adduced, the Officer's findings do not strike the Court as being unreasonable.

2. ***Did the Officer err in failing to further the applicants' right to the protection of family life, in contravention of Canada's obligations under international law?***

[19] The applicants also argue that under international law, Kaleisha has a right to remain with her family. The applicants also have this right to the protection of family life, for an interference with this right may only be justified in order to protect public order and where such means are proportional to that end, relying on a 2000 report by the Inter-American Human Rights Commission on Canada (Applicants' memorandum, paragraph 31). In the applicants' opinion, the principal applicant's deportation contravenes Canada's international obligations, the latter being well-established within the country, her daughter being Canadian and there being no justification based on criminality or public policy. Therefore, the Officer's reasoning would be inconsistent with Canada's obligations under international law: there must be good reasons for not allowing the parents of Canadian born children to remain in this country.

[20] Again, the Court cannot agree with the applicants' submissions on this point. The Officer did not commit a reviewable error by not specifically mentioning in her decision the various international instruments identified by the applicants: an Officer need not cite all the documents before her (*Thiara*, above, at para 18). The real issue is whether the Officer's decision reveals a failure to apply the applicable principles of international law (*Thiara*, above, at para 19). Contrary to the applicants' allegations, there is no obligation for an Officer to grant an application based on humanitarian and compassionate grounds solely to ensure that family members remain together within Canada. In the words of Justice Mosley, "[c]onsideration of the best interests of a child does

not lead inescapably to the conclusion that parent and child should remain in Canada" (*Persaud v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1369 at para 18, [2004] FCJ No 1687). Indeed, to hold otherwise would encourage individuals remaining illegally in Canada to have Canadian born children in order to remain in the country and gain status. While the Officer had an obligation to consider the benefits to Kalanji and Kaleisha in remaining in Canada, specifically Kaleisha remaining close to her father, such considerations fall under the best interest's analysis previously discussed.

3. ***Did the Officer commit a reviewable error in failing to mention the Board's Guidelines for "Women Refugee Claimants Fearing Gender-Related Persecution"?***

[21] The applicants acknowledge that the Guidelines are mentioned in the Board's decision but they allege that they are not followed.

[22] The Court recalls that in a refugee claim, the Board has the obligation to consider and apply the Guidelines, in order to ensure knowledgeable and sensitive consideration of the evidence provided by the women. The Court notes that the present judicial review is not against the Board's decision denying the applicants' refugee status, but the Officer's determination. Hence, the applicants' allegations are without merit and the Officer did not commit a reviewable error.

4. ***Did the Officer commit a reviewable error by not following the jurisprudence depicting the social condition of abused women in Saint Vincent and the lack of state protection?***

[23] Lastly, the applicants argue that the Officer erred by not following the jurisprudence of the Court depicting the abuse of women in Saint Vincent and the lack of state protection within the

country. The applicants identify various cases and documentary evidence recognizing the constant problem of violence against women in Saint Vincent and their victimization at the hands of their spouses (see *Alexander v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1305, [2009] FCJ No 1682).

[24] Simply because the Court has previously found state protection to be inadequate in Saint Vincent, in certain cases, does not mean that state protection will always be found to be unavailable in Saint Vincent, as counsel for the applicants seems to suggest. Each case requires a case-by-case assessment (*Da Souza v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1279 at para 6, [2010] FCJ No 1658, [*Da Souza*]). Suffice it to say that caution should be exercised when relying heavily on case law of the Court concerning nationals of Saint Vincent and the Grenadines in order to establish country conditions.

[25] In the case at bar, the Officer relied on the Board's determination that state protection was available to the applicants. Judicial review of this determination was denied. As such, the Officer cannot be faulted for relying on this finding and the applicants' argument is misguided.

[26] The Court sympathizes with the applicants' situation. However, it finds that the Officer's decision is reasonable as it falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above). The application for judicial review will thus be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. No question to be certified.

"Richard Boivin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2177-11
STYLE OF CAUSE:	**KEISHA PAUL ET AL v. MCI**
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	January 24, 2012
REASONS FOR JUDGMENT:	BOIVIN J.
DATED:	February 10, 2012

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