Federal Court  Cour fédérale

Date: 20130125

Docket: IMM-2719-12

Citation: 2013 FC 82

Ottawa, Ontario, January 25, 2013

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

DROUPATI JUDNARINE AND TULSIKUMAR JUDNARINE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] for judicial review of a decision by a Senior Immigration Officer [the Officer] dated March 7, 2012 wherein the applicants' permanent residence application was refused. This conclusion was based on the Officer's finding that there were insufficient humanitarian and compassionate [H&C] grounds to warrant an exception allowing the applicants' permanent residence application to be made from within Canada.

I. Background

[2] Ms. Droupati Judnarine [the principal applicant, or PA], and Tulsikumar Judnarine, her 15-year-old son, are citizens of Guyana. In 2007, the PA's husband, who was the minor applicant's father, died unexpectedly. The following year, on July 14, 2008, the applicants arrived in Canada on visitor visas. The PA's mother, two brothers, and three sisters all reside in Canada and are all Canadian citizens. The PA's siblings support her and her son financially and the applicants reside with one of the PA's sisters and her family.

[3] On or about August 26, 2008, the applicants submitted an H&C application. Pursuant to a request from Citizenship and Immigration Canada, on March 2, 2011, the applicants submitted additional information and documentation for their application. They alleged they would suffer unusual and undeserved hardship if ordered to leave Canada, given the fact that all of the PA's family lives in Canada, that it was in the best interest of the minor applicant to remain in Canada, and that the applicants would suffer hardship by returning to Guyana. The applicants provided supporting documentation, including numerous letters of support and a recent report card for the minor applicant.

[4] Since first submitting their H&C application more than four years ago, the applicants have remained in Canada under renewed visitor visas.

[5] The Officer reviewed the applicants' establishment in Canada, the best interests of the child directly affected by the removal, and the risk the PA faced in her country of origin, and found that

the applicants had not established unusual and undeserved or disproportionate hardship on any of these grounds.

[6] With respect to the PA's establishment in Canada, the Officer noted that all of the PA's five siblings reside in Canada, as well as her mother, three nephews, a niece, and two aunts, and that her father is deceased. The Officer stated that the PA's family showed tremendous support through their letters and that they vowed to help her and her son financially.

[7] The Officer acknowledged that according to the PA's siblings, the PA was fundamental in helping her brothers who have health problems by cleaning and cooking for them, and that she also helps her sister. However, the Officer noted that the PA had not submitted any evidence to demonstrate that she had any involvement with other activities that might show she had integrated into the community, such as volunteer work or professional or linguistic studies.

[8] The Officer found that the PA had family support, but that her mother and five siblings made a conscious decision to move to Canada and leave the PA in Guyana, and it would be reasonable for them to expect that permanent separation from the applicants might occur.

[9] Regarding best interests of the minor applicant, the Officer acknowledged that children residing in Canada may enjoy better social and economic opportunities than they would in Guyana, but found no evidence to suggest the minor applicant could not attend school in Guyana. The Officer also acknowledged that it was reasonable to assume it would cause the minor applicant some difficulties to leave behind his friends and family in Canada, but he was convinced that with

the help of his mother he could overcome these difficulties, and noted the child was returning to a culture he was familiar with.

[10] Finally, with respect to the risk the PA faces in Guyana as a single and widowed mother, the Officer found there was insufficient evidence the PA might face a greater risk in Guyana than any other single and widowed mother in that country and noted documentary evidence stating that Guyana has effective mechanisms to investigate and punish crime. The Officer found that although the PA may face difficulties in re-adapting to life in Guyana, she had left her native country at the age of 43, she speaks the language there, she is familiar with the customs and way of life, whatever skills she has are readily transferable, and that her family members are willing to help her financially.

[11] The Officer therefore refused the application.

II. Issues

[12] Three issues are raised in the present application:

A. Did the Officer err in assessing the applicants' establishment in Canada and risk in the country of origin?

B. Did the Officer apply the wrong test for the best interests of the child?

C. Did the Officer err in assessing the best interests of the child?

III. Standard of review

[13] The parties agree that the proper standard of review is if the Officer's decision is reasonable (*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 18; *Sinniah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1285 at para 23 [*Sinniah*]; *Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166 at para 18 [*Williams*]).

[14] The standard of reasonableness is concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a 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 [*Dunsmuir*]; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

[15] However, failure to consider the proper legal test for the best interest of the child is a question of law. It is therefore reviewable on the correctness standard (*Segura v Canada (Minister of Citizenship and Immigration)*, 2009 FC 894 at para 27 [*Segura*]; *Williams*, above, at para 22).

[16] As the Supreme Court of Canada held in *Dunsmuir*, above, at paragraph 50:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

IV. Analysis

A. *Did the Officer err in assessing the applicants' establishment in Canada and risk in the country of origin?*

[17] The applicants submit it was unreasonable for the Officer to draw a negative inference from the fact the PA had not "undertaken any professional, linguistic or other study that shows integration into Canadian society" given that the Officer was aware the PA was authorized to be in Canada as a visitor and did not have a study permit.

[18] The applicants also assert the Officer ignored evidence of a job offer the PA had received which was conditional on her obtaining permanent resident status. Similarly, the applicants argue the Officer ignored the fact that since the PA's husband died, the PA has been unable to support herself and her son and that her relatives in Canada have been supporting both of them.

[19] Further, the applicants maintain that the Officer erred by failing to consider whether the applicants could be considered *de facto* family members as a result of their dependency with family members in Canada, even though this was part of the applicants' submissions to the Officer, and that the Officer failed to consider how the death of the PA's husband would create hardship for the applicants if they were required to apply for permanent residence from outside Canada.

[20] With respect to the Officer mentioning that the PA had not undertaken studies in Canada, the respondent submits this observation was reasonable in the context of the establishment analysis and that the fact remains that the PA could have applied to vary her visa to be allowed to study in Canada if she so desired, which may have strengthened her establishment in Canada.

[21] The respondent submits the PA's job offer does not support a positive consideration under the establishment factor because it does not demonstrate any level of establishment during her four years in Canada. Accordingly, the respondent asserts the Officer was not required to mention it.

[22] With respect to the applicants' argument about the impact of leaving her family in Canada, the respondent asserts it was reasonable for the Officer to point out that the applicants' family members made the decision to immigrate to Canada and that the family could expect this decision might result in permanent separation from the applicants.

[23] Since the PA is actually a daughter and sister within the family unit in Canada, the respondent submits it would not be reasonable for her to be considered a *de facto* family member.

[24] Moreover, the respondent admits that while the Officer may not have specifically referenced the death of the PA's husband, he was aware of this fact given his references to the PA being a widowed and single mother.

[25] In terms of the applicants' financial position if forced to apply for permanent residence from Guyana, the respondent submits that the Officer acknowledged the applicants' family's vow to assist them financially and there is no evidence the family would withdraw their support should the applicants return to Guyana.

[26] The respondent also notes that there are no submissions on the applicants' relationship with their deceased husband/father's relatives, if any, who may be living in Guyana and able to offer emotional and financial support.

[27] Finally, the respondent submits that in any event, the death of a relative, while sympathetic, is not considered "unusual" or unanticipated by the Act.

[28] In reply, with respect to the Officer's failure to mention the PA's job offer, the applicants submit the respondent cannot assess this evidence after the decision has been rendered by stating that it does not demonstrate establishment. Rather, it was the Officer's duty to evaluate this evidence and assign it whatever weight he felt was necessary.

[29] With respect to the respondent's observation about the deceased husband's family in Guyana, the applicants submit this is irrelevant given that it was not addressed in the Officer's decision and was not a ground of refusal.

[30] Finally, in response to the respondent's argument that the death of a relative is not "unusual" under the Act, the applicants submit that a death of a relative still might qualify as disproportionate hardship, and the Officer in the present case failed to consider whether the death of the PA's husband would qualify as such.

[31] In *Raudales v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 385, [2003] FCJ No 532 at para 19 [*Raudales*], Justice Eleanor Dawson found that absent a proper assessment

of the applicant's establishment in Canada, a proper determination could not be made regarding whether it would cause unusual and undeserved or disproportionate hardship to the applicant to apply for permanent residence from abroad. It is a reviewable error to assess establishment in Canada without adequate reference to the applicant's particular circumstances (see *Raudales*, above, at para 18 and *Amer v Canada (Minister of Citizenship and Immigration)*, 2009 FC 713 at paras 12 and 13).

[32] However, I do not agree with the applicants that it was unreasonable for the Officer to draw a negative inference from the fact that the PA had not undertaken any professional, linguistic or other study during the four years she was in Canada. As the respondent points out, the PA may have applied to vary her visa and acquire a study permit.

[33] I also do not agree that the Officer erred by not mentioning the job offer the PA included with her application that was conditional on her acquiring permanent resident status. This job offer is not relevant to the establishment the applicants had Canada in the period preceding their application.

[34] Further, under his analysis of the risk the applicants face in their country of origin, the Officer acknowledged that the PA is a "single mother" and "widowed" and evaluated the risk she would face in Guyana if forced to return there to apply for permanent resident status in Canada. The Officer also noted the following:

> The applicant left her native country at the age of 43; she speaks the language and is familiar with the customs and way of life. English is also her first language. Whatever skills she possesses are readily transferable. Her family members are willing to help financially.

[35] These findings demonstrate that the Officer did consider what circumstances the PA would face in Guyana as a single, widowed mother, and his decision was not unreasonable in this regard.

[36] As for whether it was reasonable for the Officer to not directly address the applicants' submission in their H&C application that they could be considered *de facto* family members as a result of their dependence on family members in Canada, Citizenship and Immigration Canada's Operation Manual IP-5 for the processing of H&C applications made in Canada [the Manual] defines a *de facto* family member as follows:

> *De facto* family members are persons who do not meet the definition of a family class member. They are, however, in a situation of dependence that makes them a *de facto* member of a nuclear family in Canada.

[37] The Manual states that a son, daughter, brother or sister who does not have a family of their own, or an elderly relative or unrelated person who has resided with the family for a long time, are potential examples of a *de facto* family member. Therefore, even though the PA actually is a daughter and sister within her family unit, she could potentially be considered a *de facto* family member.

[38] Although the respondent is correct that the Manual is not binding on officers, it is noteworthy that among the factors the Manual states officers should consider in evaluating a *de facto* family relationship are the level of dependency, the stability and duration of the relationship, the ability and willingness of the family to provide support, and whether there is family outside Canada who is able and willing to provide support (see section 12.6 of the Manual).

[39] In *Frank v Canada (Minister of Citizenship and Immigration)*, 2010 FC 270 at paras 29 and 30 [*Frank*], Justice Luc Martineau concluded the following from these sections of the Manual:

> What is clear from the foregoing is that *de facto* family member status is limited to vulnerable persons who do not meet the definition of family members in the Act and who are reliant on the support, both financial and emotional, that they receive from persons living in Canada. Therefore, *de facto* family member status is not normally given to independent and functional adults who happen to have a close emotional bond with a relative residing in Canada, as is the case in the present application.
>
> I do not believe *John*, above, created an obligation for all immigration officers to explicitly consider the issue of *de facto* family members in every case. It is clear in the present application that the officer considered the applicant's relationship with his family in Canada, and without evidence that the officer failed to consider any other relevant criteria in determining the H&C application, the Court should not intervene. [Emphasis added]

[40] Similarly, in *Archibald v Canada (Minister of Citizenship and Immigration)*, 2012 FC 647 at para 9 [*Archibald*], Justice Danièle Tremblay-Lamer stated the following:

> I am unable to accept the applicant's argument that the Officer applied the wrong guidelines and failed to consider her *de facto* family members who are in Canada. Although the Officer may not have included a separate heading titled "*De facto* family members" in the decision, it is clear from the reasons for the decision that she considered the applicant's family members in Canada…

[41] However, in *Okbai v Canada (Minister of Citizenship and Immigration)*, 2012 FC 229 at para 19 [*Okbai*], Justice Ronald J. Rennie stated the following:

> Finally, the Officer erred by failing to consider the H&C considerations that were relevant to disposition of the application: family reunification and the applicant's *de facto* dependency on her sister in Canada. Family reunification is only one of several objectives identified in the *IRPA* and officers have discretion to weigh the statutory objectives against one another. Notwithstanding

> this discretion, officers are not entitled to decline to consider a relevant factor that is supported by the evidence in an application. Neither the CAIPS notes nor the decision letter indicate that the Officer gave any thought to any of the suite of considerations relevant to the disposition of H&C applications. [Emphasis added]

[42] I find the present case is more analogous to *Frank* and *Archibald*, above, than to *Okbai*, above. In my view, therefore, the Officer did not err by not explicitly considering the issue of *de facto* family members.

B. *Did the Officer apply the wrong test for the best interests of the child?*

[43] The applicants submit the Officer applied the wrong legal test by imposing the burden of showing "unusual and undeserved or disproportionate" hardship with respect to the best interests of the child analysis.

[44] The respondent argues that both this Court and the Federal Court of Appeal have made it clear that the form of a decision should not be elevated above its substance (*Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 3; *Segura*, above, at para 29, citing *de Zamora v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1602 at para 18 and *Kamal Webb v Canada (Minister of Citizenship and Immigration*), 2012 FC 1060 at para 11). The respondent submits that in the case at bar, like the Court found in *Segura*, on a reading of the decision as a whole, the Officer in the present case applied the correct test and conducted a proper analysis.

[45] I must disagree. The Officer did not apply the correct test in evaluating the best interests of the minor applicant. Like in the *Sinniah* case, the Officer in the present case appears to have applied

the wrong legal test, by requiring a significant negative impact on the child that would be "i) unusual and undeserved or ii) disproportionate", rather than evaluating what was actually in the best interests of the minor applicant and weighing that against the other factors relevant to an H&C application. He incorrectly elevated the test for the best interests, not only in form but also in substance.

[46] I acknowledge there are decisions of this Court that seem to set a slightly different standard for officers who are evaluating the best interests of the child in the context of an H&C application than the Court set out in *Sinniah*. The respondent refers the Court to *Segura* at para 29, where Justice Russell Zinn stated the following:

> As Justice Mosley observed in *De Zamora v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1602 at para. 18 substance ought to prevail over form. "I do not read *Hawthorne* as deciding that the use of [the term 'undeserved hardship] by an immigration officer in considering the children's best interests constitutes reviewable error or renders the decision as a whole unreasonable." I agree. It is not the use of particular words that is determinative; it is whether it can be said on a reading of the decision as a whole that the officer applied the correct test and conducted a proper analysis.

[47] In my view the Officer's decision in the present case is incorrect, because although the Officer labelled his analysis "best interests of the child" and stated he is "alive, alert and sensitive regarding the best interests of the child", the question the Officer clearly posed himself in his analysis under this heading was whether removing the child "would have a significant negative financial, emotional, social or physical impact on him that would be i) unusual and undeserved or ii) disproportionate". As Justice James Russell states in *Williams*, at para 67:

> A child's best interests are certainly not determinative of an H&C application and are but one of many factors that ultimately need to be assessed. However, requiring that certain interests not be "met" or

> that a child "suffer" a certain amount before this factor will weigh in favour of relief, let alone be persuasive in the decision, contradicts well-established principle that officers must be especially alert, alive and sensitive to the impact of the decision from the child's perspective. Furthermore, this would seem to contradict the instruction of the Supreme Court of Canada that this factor be a primary consideration in an H&C application that must not be minimized. [Emphasis added]

[48] Moreover, the Officer here failed to adequately or reasonably consider the impact of the father's death on the child, and the hardship to be faced by the child in being forced to return to Guyana. The interests of the child were not well-identified or defined by the Officer.

[49] On the basis alone, this application must be granted. It is therefore unnecessary for me to address the third issue.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1.) The applicants' application for judicial review is granted and the matter is remitted to a different Officer for reconsideration;

2.) No question is certified.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2719-12
STYLE OF CAUSE:	JUDNARINE ET AL. V. MCI
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 24, 2013
REASONS FOR JUDGMENT AND JUDGMENT BY:	MANSON J.
DATED:	January 25, 2013

APPEARANCES:

Alesha Green	FOR THE APPLICANTS
Prathima Prashad	FOR THE RESPONDENT

SOLICITORS OF RECORD:

The Law Office of Alesha A. Green Toronto, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT