Federal Court  Cour fédérale

Date: 20150918

Docket: IMM-7928-14

Citation: 2015 FC 1095

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, September 18, 2015

Present: The Honourable Mr. Justice Shore

BETWEEN:

PRIVA DORLUS
JARDE DORLUS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Preliminary

[1] Although the financial dependency criterion is tangible and may be demonstrated by objective evidence, the emotional dependency criterion is intangible and may be difficult to demonstrate except by objective evidence.

[2] In some circumstances, emotional dependency may easily be demonstrated; for example, when adults take care of children as their own. In other cases, it is very difficult, if not impossible, to demonstrate emotional dependency. How can a person demonstrate emotional dependency? How can emotional dependency between individuals be measured? When has an applicant done enough to discharge his burden of proving emotional dependency?

[3] This case must be considered on its own merits. Why would a person invest so much time, energy and financial resources to have a relationship with the applicants unless an emotional dependency has been created?

II. Introduction

[4] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) of an immigration officer's decision at Port-au-Prince, Haiti, dated September 16, 2014, refusing the application for permanent residence of Priva Dorlus and Jarde Dorlus.

III. Facts

[5] The applicants, Jarde Dorlus, 16 years old, and her brother, Priva Dorlus, 21 years old, are citizens of Haiti.

[6] Their first cousin, Farah Mathurin (the guarantor), 33 years old, is a Canadian citizen of Haitian origins. She applied to sponsor the applicants.

[7] This story began in 2001, when Ms. Mathurin, who lived at the time in Montréal, took a trip to Haiti to discover her origins and find her biological mother, who she had not met up to that point. Unfortunately, her mother was already deceased. It was during this trip that she met for the first time her biological mother's brother, Jean Michel Dorlus, and his children: Jarde Dorlus and Priva Dorlus.

[8] On her return to Canada, Ms. Mathurin financially helped the applicants so that they could be adequately sheltered, fed and educated. With Ms. Mathurin's financial support, the applicants left their village of Côte-de-Fer to relocate to Port-au-Prince. Since the applicants were not with their parents in Port-au-Prince, support persons were hired by Ms. Mathurin to take care of the applicants. Ms. Mathurin then travelled several times to Haiti to visit the applicants. When she was in Montréal, Ms. Mathurin would telephone the applicants to keep in touch with them.

[9] In 2007, the applicants' father, Jean Michel Dorlus, died. Then, the applicants' mother died in 2009. Following this, the applicants' grandmother, Théliana Baptiste, came to live with the applicants to watch over them. She died in January 2010 during the large earthquake. On March 12, 2010, Ms. Mathurin obtained, in Haiti, legal tutorship of the applicants when a certain Jean Baptiste Dorlus was named as subrogate-tutor—a title that he abandoned by notarial deed on September 21, 2010.

[10] The applicants filed a first application for permanent residence sponsored by Ms. Mathurin in January 2010. This application was refused since the applicants were not in the

"family class" and there were not enough humanitarian and compassionate circumstances to overcome this defect.

[11] A second application for permanent residence sponsored by Ms. Mathurin was submitted on November 8, 2011. This application was refused without the officer being able to review the humanitarian and compassionate circumstances. An application for judicial review was submitted in February 2013 (IMM-1388-13), but the parties agreed to abandon the judicial review on condition that the application be reconsidered by a different officer.

[12] Finally, on September 16, 2014, a different officer made a decision in which he refused the application for permanent residence. It is this decision that is subject to judicial review.

IV. Impugned decision

[13] In his decision of September 16, 2014, the officer refused the application for permanent residence under the family class. The officer found that the applicants do not satisfy the requirements of this class and that the humanitarian and compassionate considerations are not sufficient to be exempted from all or part of the requirements of the IRPA. The application was therefore dismissed.

[14] First, with respect to family class, the officer reviewed subsection 12(1) of the IRPA and subsection 117(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPR). The officer found that the applicants were not in the family class under

subsection 117(1) of the IRPR by recalling that Ms. Mathurin had not legally adopted the applicants.

[15] Second, with respect to humanitarian and compassionate considerations, the officer found that the considerations did not justify the exemption, in whole or in part, from the criteria and obligations applicable to the family class. Therefore, although the officer recognized that Ms. Mathurin is a cousin interested in the applicants' well-being and that she brings financial support, the officer was not persuaded that it was Ms. Mathurin's intention to [TRANSLATION] "form a parent-child relationship with Jarde and Priva". The officer supported his conclusion on the fact that a parent-child relationship or a similar relationship did not exist at the time that he made his decision, recalling that Ms. Mathurin and the applicants had never lived together, that Ms. Mathurin had not visited the applicants for three years and that Ms. Mathurin had never attempted to adopt the applicants. Furthermore, the officer stated that most of the humanitarian and compassionate grounds raised in the applicants' submissions are the direct result of Ms. Mathurin's actions—i.e. that they were moved from their village where they lived with their parents to go to Port-au-Prince and be under the care of support persons. Finally, the officer specified that he considered all the documents that were submitted to him, the interview with the applicants and Ms. Mathurin, and the best interest of Jarde, who is a minor.

[16] For all these reasons, the immigration officer refused the application. The officer reiterated that refusal to accept applicants' application only perpetuates the status quo, not separate a family.

V. Issue

[17] The Court considers that the application raises the following question:

Did the immigration officer err in his assessment of family class with respect to humanitarian and compassionate considerations and in finding that the applicants had not formed a de facto family with the guarantor?

VI. Statutory provisions

[18] The statutory provisions of the IRPA and the IRPR are set out below:

Family reunification	**Regroupement familial**
12. (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.	**12.** (1) La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.
Economic immigration	**Immigration économique**
(2) A foreign national may be selected as a member of the economic class on the basis of their ability to become economically established in Canada.	(2) La sélection des étrangers de la catégorie « immigration économique » se fait en fonction de leur capacité à réussir leur établissement économique au Canada.
Refugees	**Réfugiés**
(3) A foreign national, inside or outside Canada, may be selected as a person who under	(3) La sélection de l'étranger, qu'il soit au Canada ou non, s'effectue, conformément à la

this Act is a Convention refugee or as a person in similar circumstances, taking into account Canada's humanitarian tradition with respect to the displaced and the persecuted.

tradition humanitaire du Canada à l'égard des personnes déplacées ou persécutées, selon qu'il a la qualité, au titre de la présente loi, de réfugié ou de personne en situation semblable.

Humanitarian and compassionate considerations – request of foreign national

25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, 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 foreign national, taking into account the best interests of a child directly affected.

Séjour pour motif d'ordre humanitaire à la demande de l'étranger

25. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, 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.

Member

117. (1) A foreign national is a member of the family class if,

Regroupement familial

117. (1) Appartiennent à la catégorie du regroupement

with respect to a sponsor, the foreign national is

familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants :

(*a*) the sponsor's spouse, common-law partner or conjugal partner;

a) son époux, conjoint de fait ou partenaire conjugal;

(*b*) a dependent child of the sponsor;

b) ses enfants à charge;

(*c*) the sponsor's mother or father;

c) ses parents;

(*d*) the mother or father of the sponsor's mother or father;

d) les parents de l'un ou l'autre de ses parents;

(*e*) [Repealed, SOR/2005-61, s. 3]

e) [Abrogé, DORS/2005-61, art. 3]

(*f*) a person whose parents are deceased, who is under 18 years of age, who is not a spouse or common-law partner and who is

f) s'ils sont âgés de moins de dix-huit ans, si leurs parents sont décédés et s'ils n'ont pas d'époux ni de conjoint de fait :

(i) a child of the sponsor's mother or father,

(i) les enfants de l'un ou l'autre des parents du répondant,

(ii) a child of a child of the sponsor's mother or father, or

(ii) les enfants des enfants de l'un ou l'autre de ses parents,

(iii) a child of the sponsor's child;

(iii) les enfants de ses enfants;

(*g*) a person under 18 years of age whom the sponsor intends to adopt in Canada if

g) la personne âgée de moins de dix-huit ans que le répondant veut adopter au Canada, si les conditions suivantes sont réunies :

(i) the adoption is not being entered into primarily for the purpose of acquiring any status or privilege under the Act,

(i) l'adoption ne vise pas principalement l'acquisition d'un statut ou d'un privilège aux termes de la Loi,

(ii) where the adoption is an international adoption and the country in which the person resides and their province of intended destination are parties

(ii) s'il s'agit d'une adoption internationale et que le pays où la personne réside et la province de destination sont parties à la Convention sur

to the Hague Convention on Adoption, the competent authority of the country and of the province have approved the adoption in writing as conforming to that Convention, and

(iii) where the adoption is an international adoption and either the country in which the person resides or the person's province of intended destination is not a party to the Hague Convention on Adoption

(A) the person has been placed for adoption in the country in which they reside or is otherwise legally available in that country for adoption and there is no evidence that the intended adoption is for the purpose of child trafficking or undue gain within the meaning of the Hague Convention on Adoption, and

(B) the competent authority of the person's province of intended destination has stated in writing that it does not object to the adoption; or

(*h*) a relative of the sponsor, regardless of age, if the sponsor does not have a spouse, a common-law partner, a conjugal partner, a child, a mother or father, a relative who is a child of that mother or father, a relative who is a child of a child of that mother or father, a mother or father of that mother or father or a relative who is a child of the mother or father of that mother

l'adoption, les autorités compétentes de ce pays et celles de cette province ont déclaré, par écrit, qu'elles estimaient que l'adoption était conforme à cette convention,

(iii) s'il s'agit d'une adoption internationale et que le pays où la personne réside ou la province de destination n'est pas partie à la Convention sur l'adoption :

(A) la personne a été placée en vue de son adoption dans ce pays ou peut par ailleurs y être légitimement adoptée et rien n'indique que l'adoption projetée a pour objet la traite de l'enfant ou la réalisation d'un gain indu au sens de cette convention,

(B) les autorités compétentes de la province de destination ont déclaré, par écrit, qu'elles ne s'opposaient pas à l'adoption;

h) tout autre membre de sa parenté, sans égard à son âge, à défaut d'époux, de conjoint de fait, de partenaire conjugal, d'enfant, de parents, de membre de sa famille qui est l'enfant de l'un ou l'autre de ses parents, de membre de sa famille qui est l'enfant d'un enfant de l'un ou l'autre de ses parents, de parents de l'un ou l'autre de ses parents ou de membre de sa famille qui est l'enfant de l'un ou l'autre des

or father	parents de l'un ou l'autre de ses parents, qui est :
(i) who is a Canadian citizen, Indian or permanent resident, or	(i) soit un citoyen canadien, un Indien ou un résident permanent,
(ii) whose application to enter and remain in Canada as a permanent resident the sponsor may otherwise sponsor.	(ii) soit une personne susceptible de voir sa demande d'entrée et de séjour au Canada à titre de résident permanent par ailleurs parrainée par le répondant.

VII. Position of the parties

[19] The applicants argue that by considering the family class (subsections 12(1) and 25(1) of the IRPA and paragraph 117(1)(*h*) of the IRPR), the immigration officer did not take into consideration the factors set out in the operational manual (*The humanitarian and compassionate assessment: De facto family members*), which enabled him to find that the applicants were members of a de facto family with Ms. Mathurin, the guarantor (see *Massey v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1382). Therefore, the immigration officer did not consider the applicants' membership in a de facto family, the relationship of dependence of the children with Ms. Mathurin, the tutorship assigned to Ms. Mathurin, the emotional relationship between the applicants and Ms. Mathurin and the general situation prevailing in Haiti.

[20] As for the humanitarian and compassionate considerations, the applicants argue that the officer had not sufficiently supported his finding that Ms. Mathurin did not intend to form a parent-child relationship with the applicants and that there was no similar emotional bond. The failure of a PRRA officer to set out his findings for which a de facto family had not been formed is, according to the applicants, sufficient ground to accept the judicial review (*Okbai v Canada*

(Minister of Citizenship and Immigration), 2012 FC 229 (*Okbai*)). Therefore, the officer breached his duty, as set out in the decision *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, to support his findings with sufficient reasons regarding humanitarian and compassionate grounds so that the applicants could know why their application was refused (*David v Canada (Minister of Citizenship and Immigration)*, 2007 FC 546). The applicants stated that they have an emotional bond with Ms. Mathurin; their relationship has lasted more than ten years. Furthermore, Ms. Mathurin has watched over the applicants and has been attempting for several years to sponsor them. Therefore, the applicants argue that the officer ignored evidence on file and did not provide adequate reasons for his findings.

[21] The respondent argued that the officer's decision was reasonable since the applicants are not members of the family class as set out in paragraph 117(1)(*h*) of the IRPR (see also sections 12 and 25 of the IRPA). The respondent recalls that the power set out at subsection 25(1) of the IRPA is completely discretionary (*Kawtharani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 162 at para 15 (*Kawtharani*)).

[22] In addition, the respondent argued that the officer indeed considered all the evidence provided by the applicants and that *Okbai*, above, cited by the applicants, is not applicable. The respondent argued that the guidelines in the Guides are not binding on the officer, but serve only as a guide (*Maple Lodge Farms Ltd. v Canada*, [1982] 2 SCR 2, 1982 CanLII 24 (SCC); *Legault v Canada (Minister of Citizenship and Immigration)*, [2002] 4 FC 358, 2002 FCA 125 at para 20, 28; *Ha v Canada (Minister of Citizenship and Immigration)*, [2004] 3 FCR 195, 2004 FCA 49 at para 71). The respondent argued that the mere fact of being part of a family is not sufficient to be

granted a dispensation for humanitarian and compassionate grounds (*Liu v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1090 at paras 8-9 (*Liu*)).

[23] Concerning the officer's findings that there was no parent-child relationship between the applicants and Ms. Mathurin, the respondent argued that the officer supported this finding. Therefore, the respondent reiterated that the officer found that Ms. Mathurin still had not acted in the applicants' best interest, in particular when Ms. Mathurin relocated the applicants when they were young minors. Furthermore, the respondent relied on the decision of the Quebec Court of Appeal, *Adoption – 152*, 2015 QCCA 348 at paras 78 to 83, to argue that long-standing financial support is not sufficient in itself to establish a parent-child relationship. The respondent also argued that in his analysis of the humanitarian and compassionate considerations, the officer considered the contradictions as to the relationship that the applicants have with their older brother Guivard Dorlus.

[24] Finally, with respect to the applicants' argument that the officer did not consider the general situation in Haiti, the respondent stated that it is not sufficient to rely only on the general conditions of a country in an application based on humanitarian and compassionate considerations (*Hussain v Canada (Minister of Citizenship and Immigration)*, 2006 FC 719 at para 12). In sum, the respondent argued that the officer's decision was reasonable and that the findings of fact relate to the officer's expertise (*Mathewa v Canada (Minister of Citizenship and Immigration)*, 2005 FC 914 at para 17).

VIII. Standard of review

[25] An immigration officer's decisions in relation to the application of the correct test of the IRPA, its home statute, are submitted to the standard of reasonableness (*Diaz v Canada (Minister of Citizenship and Immigration)*, 2015 FC 373 at para 13; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, [2011] 3 SCR 654, 2011 SCC 61 at para 34). As for the humanitarian and compassionate considerations addressing issues of fact and law or fact, the standard of reasonableness is applicable (*Joseph v Canada (Minister of Citizenship and Immigration)*, 2015 FC 904 at para 22; *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 18). The standard of reasonableness is also applicable for humanitarian and compassionate considerations in determining whether a person is a member of the de facto family (*Pervaiz v Canada (Minister of Citizenship and Immigration)*, 2014 FC 680 (*Pervaiz*); *Da Silva v Canada (Minister of Citizenship and Immigration)*, 2011 FC 347 at para 14).

[26] Therefore, the immigration officer's decision is reasonable if it is justified, transparent, the decision-making process is intelligible and the decision falls within a range of possible, acceptable outcomes which are defensible on the facts and the law (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 at para 47).

IX. Analysis

[27] There is no doubt that the officer did not err in his assessment of subsection 12(1) of the IRPA and subsection 117(1) of the IRPR. The Court considered the next question, which was to

determine whether the immigration officer should have used his discretionary power provided at section 25 of the IRPA. This provision allows him to grant permanent resident status to the applicants, by lifting in whole or in part the criteria and obligations provided by the IRPA, for humanitarian and compassionate considerations, given the best interests of the child.

[28] This Court recognized on several occasions that a request for humanitarian and compassionate considerations, as provided at subsection 25(1) of the IRPA, is an exceptional and highly discretionary remedy (*Gonzalo v Canada (Minister of Citizenship and Immigration)*, 2015 FC 526 at para 16; *Pervaiz*, above at para 40). For such an application to be granted, the decision-maker must assess the applicable factors in relation to the specific facts of the matter before him (*Miller v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1173 at para 18; *Kawtharani*, above at para 15).

[29] In this case, the applicants argued that the immigration officer had not assessed whether the applicants had formed a de facto family with Ms. Mathurin. It is important to recall that although the IRPA promotes family reunification, family reunification is only one factor among others with respect to humanitarian and compassionate considerations (*Liu*, above at para 14, cited in *Pervaiz*, above at para 40).

[30] For a person to have the status of de facto family member, he or she must be a vulnerable person, not falling under the definition of a family member provided in the IRPA, who depends on the financial and emotional support of persons living in Canada (*Frank v Canada (Minister of Citizenship and Immigration)*, 2010 FC 270 at para 29).

[31] In his analysis, the immigration officer found that although financial dependence may have developed between the guarantor and the applicants, an emotional dependency had not developed. Without emotional dependency, a de facto family cannot form.

[32] In support of his conclusion that there is no emotional dependency, the immigration officer paid careful attention to the fact that Ms. Mathurin had not legally adopted the applicants:

> Mme Mathurin stated at interview that she did not look into adopting Priva and Jarde when they were younger because it had never been her intention to bring them to Canada, just to supplement their care in Haiti. … Mme Mathurin stated at interview that when she did look into adopting Priva and Jarde she was informed it was too late under Haitian law as Priva was already 16 years old and so she dropped this matter. The sponsor's consultant submitted the portion of the Haitian Code Civil relevant to adoption which was procured from the Haitian Consulate in Montreal in June 2011. The consultant has highlighted that the Haitian Code Civil includes several regulations on adoption which would render Mme Mathurin ineligible to adopt her cousins. I note that there is an established legal remedy for these clauses and exceptions to the Haitian adoption regulations are regularly considered and approved when determined to be in the best interest of the children involved by the relevant authorities in Haiti. I further note that in not pursuing legal adoption, the sponsor would be circumventing oversight by the responsible authorities in Haiti (Institut de Bien Être Sociale) to determine the best interest of an orphaned or abandoned child. [Emphasis added.]
>
> (Respondent's file, Affidavit of Susan Bradley, Exhibit "A", p 6)

[33] The Court noted that the immigration officer paid too much attention to the question of the adoption and neglected to consider other important evidence that contradicted his conclusions. It should be remembered that the immigration officer must discuss in his reasons the evidence that seems to flat-out contradict his conclusion (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at para 34).

[34] Although the financial dependency criterion is tangible and may be demonstrated by objective evidence, the emotional dependency criterion is intangible and may be difficult to demonstrate except by objective evidence.

[35] In some circumstances, emotional dependency may be easily demonstrated; for example, when adults take care of children as their own. In other cases, it is very difficult, even impossible, to demonstrate emotional dependency. How can a person demonstrate emotional dependency? How can emotional dependency between individuals be measured? When has an applicant done enough to discharge his burden of proving emotional dependency?

[36] This case must be considered on its own merits. Why would a person invest so much time, energy and financial resources to have a relationship with the applicants unless an emotional dependency has been created?

[37] The relationship between Ms. Mathurin and the applicants dates back to 2001. Since this time, Ms. Mathurin watched over them both financially and emotionally:

> [TRANSLATION]
>
> On my return to Montréal, I made the firm decision to get involved in the lives of these children and to have a transformative impact on their lives … but also by going to see them in Haiti as often as my obligations allowed me to so as to nurture the relationship and let them feel my presence and my attachment to them despite the distance.
>
> Although I was not a mother, my attachment to them was similar to that of a mother in the lives of her children. That is how, by working, sometimes for two shifts, I was able to save enough to be able to provide for them.
>
> (Applicant's record, Affidavit of the Applicant, Exhibit "A", p 18)

[38] In addition, through her actions, Ms. Mathurin demonstrated that she wanted to take care of the applicants and get closer to them. It appears from the evidence on the record that Ms. Mathurin did her own research into the Haitian civil code with respect to the law on legal adoption and found that it would not be possible to adopt the applicants. Furthermore, she became their legal tutor. This conduct is not consistent with that of a person who is only seeking to give financial support.

[39] Given this evidence, it was not reasonable for the immigration officer to conclude that there is no emotional dependency between the applicants and Ms. Mathurin.

Humanitarian and compassionate considerations

[40] With respect to the argument of the general situation in Haiti, this argument must be rejected since it is necessary to demonstrate that the risk is personal and specific (*Joseph v Canada (Minister of Citizenship and Immigration)*, 2015 FC 661 at para 49; *Lalane v Canada (Minister of Citizenship and Immigration)*, 2009 FC 6 at para 1).

X. Conclusion

[41] The Court finds that the immigration officer's decision is not reasonable. Therefore, the application for judicial review is allowed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that this application for judicial review be allowed and that the matter be referred back before another officer for a hearing *de novo*. No question is certified.

"Michel M.J. Shore"
Judge

Certified true translation
Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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