Federal Court  Cour fédérale

Date: 20190220

Docket: IMM-2952-18

Citation: 2019 FC 209

Ottawa, Ontario, February 20, 2019

PRESENT: The Associate Chief Justice Gagné

BETWEEN:

ANGELA DA SILVA
CHRISTIAN BETU TSHIAMALA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Angela Da Silva and Christian Betu Tshiamala challenge a decision of an immigration officer refusing to reopen their spousal sponsorship application. The officer found the sponsoring spouse, Ms. Da Silva, ineligible to sponsor her husband for having received non-disability social assistance contrary to paragraph 133(1)(*k*) of the *Immigration and Refugee Protection*

Regulations, SOR/2002-227 [IRPR]. In addition, Mr. Tshiamala was found inadmissible to Canada for financial reasons, in application of section 39 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

II. Facts

[2] The Applicants met through Facebook in May 2011. Mr. Tshiamala, then in the Democratic Republic of the Congo [DRC], sent Ms. Da Silva, a friend of his sister, a Facebook invitation. Just a few weeks later, Mr. Tshiamala began to express his feelings for Ms. Da Silva. Although Ms. Da Silva was initially reluctant, the couple began a long-distance relationship in 2012. They communicated once or twice a day until Mr. Tshiamala arrived in Canada in December 2013. He made a refugee claim that was refused in September 2014.

[3] The Applicants were married on November 12, 2014.

[4] Mr. Tshiamala has five children in the DRC, born respectively in 2007, 2010, 2012, 2013, and 2014. The child born in 2013 has a different mother. Three of the children were born while Mr. Tshiamala was pursuing a relationship with Ms. Da Silva. Further, the last child was born after Mr. Tshiamala had arrived in Canada.

[5] In December 2015, the Applicants completed a sponsorship application with the help of an immigration consultant. Ms. Da Silva answered “no” to the question, “Are you in receipt of social assistance for a reason other than disability?”

[6] In August 2017, the officer sent Mr. Tshiamala a letter requesting further information. The Global Case Management System notes show the officer was mainly concerned with whether the relationship was genuine. Mr. Tshiamala submitted the requested information. However, the documents submitted raised concerns that Ms. Da Silva was in receipt of social assistance.

[7] In December 2017, the officer advised Ms. Da Silva that she could not sponsor Mr. Tshiamala because she was receiving social assistance, for a reason other than disability, at the time she submitted her sponsorship application. Ms. Da Silva was in fact in receipt of Ontario Works social assistance from November 2015 to December 2015.The officer also sent Mr. Tshiamala a procedural fairness letter advising him that Ms. Da Silva could not sponsor him for that reason. The letter further advised Mr. Tshiamala he could be financially inadmissible for having received Ontario Works social assistance from April 2014 to January 2016. The officer gave Mr. Tshiamala thirty days to respond to these concerns.

[8] In response, Mr. Tshiamala submitted further information and explained that Ms. Da Silva's reliance on social assistance was related to disability; as a result of pregnancy complications, she had to stop working in December 2015. Since she could not afford to wait for her employment insurance claim to be processed, she had to temporarily rely on social assistance. Mr. Tshiamala provided Ms. Da Silva's relevant medical records, but failed to provide any response or documents relating to his own financial situation.

III. Impugned Decision

[9] The officer rejected Mr. Tshiamala's application for permanent residence because he was not validly sponsored. Both he and Ms. Da Silva were in receipt of social assistance for a reason other than disability at the time of the application. The officer acknowledged the medical evidence submitted concerning Ms. Da Silva, but found that since the social assistance she received was work-related, and not disability-related, Ms. Da Silva was an ineligible sponsor. The social assistance payments were issued as Ontario Works payments, and not Ontario Disability Support Program payments. The officer also found Mr. Tshiamala financially inadmissible and noted that he had not provided any evidence in response to the procedural fairness letter.

[10] In January 2018, the Applicants submitted a reconsideration request with the help of a different immigration consultant. They acknowledged that Mr. Tshiamala had received social assistance while he was working part-time, but stated he was no longer receiving it since he had started to work full-time in January 2016. Moreover, Mr. Tshiamala was able to meet his children's financial needs as demonstrated by evidence of fund transfers. The Applicants reiterated that Ms. Da Silva only received social assistance for two months, while she waited for her employment insurance benefits, and added that she had undertaken to reimburse Ontario Works once she received her employment insurance benefits. The Applicants also filed pay stubs, tax records and Ms. Da Silva's pregnancy-related medical records.

[11] On February 9, 2018, the officer refused the Applicants' reconsideration request. The officer reviewed the Applicants' further submissions but concluded that they were not sufficient to reconsider the refusal. The Global Case Management System notes show the officer did not consider that reimbursing Ontario Works would change the fact that Ms. Da Silva was ineligible under the IRPR. The notes also indicate that the officer did not consider the evidence of fund transfers sufficient to respond to all the concerns expressed in the procedural fairness letter.

IV. Issues and Standard of Review

[12] This application for judicial review raises the following issues:

A. *Did the officer breach procedural fairness principles by not considering the best interests of the children?*

B. *Did the officer err in refusing Ms. Da Silva's sponsorship and Mr. Tshiamala's application for permanent residence?*

[13] Issues of procedural fairness do not involve applying a standard of review; rather, the reviewing court must determine whether the decision-maker followed a fair and just process, in light of the substantive rights and consequences involved. A finding that procedural fairness principles were breached warrants the intervention of the Court (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

[14] As for the officer's assessment of the evidence and his interpretation of the IRPA and the IRPR, these are reviewable on the reasonableness standard (*Sekinatu v Canada (Citizenship and Immigration)*, 2015 FC 729 at para 10.

V. Analysis

A. *Did the officer breach procedural fairness principles by not considering the best interests of the children?*

[15] The Applicants submit that, based on their implicit request, the officer had to consider humanitarian and compassionate [H&C] factors, including the best interests of their children. They cite Policy Directive IP2 – *Processing Applications to Sponsor Members of the Family Class* [IP2] which says: "The sponsor may be eligible once social assistance is discontinued. This bar to sponsorship may, upon request by the foreign national, be waived for humanitarian and compassionate reasons or public policy provided the sponsor requests that the application continue despite their ineligibility." As Ms. Da Silva had requested that the application continue if she was found ineligible, the Applicants claim this amounts to a request for H&C consideration. The Applicants claim this is supported by their extensive submissions in response to the procedural fairness letter and in their request for reconsideration. They claim it should have been clear to the officer that they were relying on the best interests of their children in their submissions.

[16] In an H&C application, the onus is on the Applicants to specifically request the consideration of the best interests of the children (*Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 5). Yet, the Applicants never explicitly requested H&C factors to be considered, nor did they raise any concerns regarding the best interests of the children in any of their correspondence with the officer.

[17] The Applicant's submissions following the procedural fairness letter consisted entirely of medical records explaining why Ms. Da Silva received Ontario Works social assistance payments.

[18] Their reconsideration request largely repeated the same submissions, but also explained why Mr. Tshiamala had relied on Ontario Works and suggested that he could provide for his family based on his records of money transfers. This information was not provided to support the argument that the best interests of his Congolese children required Mr. Tshiamala to remain in Canada because he would otherwise not be able to support them from the DRC. Such a finding would have required speculation on the part of the officer as no evidence to this effect had been provided. The same can be said about his Canadian children; no evidence was provided and no argument was raised as to what their best interests would be.

[19] The employment letters and other financial documents provided by the Applicants do not in any way indicate they requested any exemption from an invalid sponsorship application or other ineligibility based on H&C considerations. While the Applicants rightly point out there is no specific form or method to request such an exemption, I do not agree that their follow-up submissions, which are silent on the best interests of their children, contain any such implicit request.

[20] I therefore find that the officer's failure to consider the best interests of the Applicants' children does not constitute a breach of procedural fairness.

B. *Did the officer err in refusing Ms. Da Silva's sponsorship and Mr. Tshiamala's application for permanent residence?*

[21] The Applicants submit that the officer did not fully and fairly address Ms. Da Silva's medical evidence concerning her pregnancy and completely failed to address her undertaking to reimburse all social assistance paid to her. Employment Insurance is not social assistance for the purposes of paragraph 133(1)(*k*) of the IRPR (*Akhmad v Canada (Citizenship and Immigration)*, 2012 CanLII 101692 (CA IRB) at para 9), and as the Ontario Works payments were all reimbursed through the Employment Insurance payments, Ms. Da Silva never received social assistance. She meets the definition of "person with a disability" in section 4 of the *Ontario Disability Support Program Act, 1997*, SO 1997, c 25, Sch B [ODSP Act] and was therefore disabled.

[22] The Applicants also submit that the officer misapprehended the evidence concerning Mr. Tshiamala's gainful full-time employment, which shows he was not inadmissible for financial reasons under section 39 of the IRPA. According to the Applicants, the officer did not give Mr. Tshiamala sufficient time to reimburse his Ontario Works payments, in light of Ontario Works' refusal to stop the payments and to accept a reimbursement. The officer also erred in interpreting section 39 of the IRPA by focussing on Mr. Tshiamala's receipt of social assistance instead of his present and future ability to provide for his family.

[23] I cannot agree with the Applicants that it was unreasonable for the officer to conclude Mr. Tshiamala was financially inadmissible under section 39 of the IRPA. The officer requested, via its procedural fairness letter, confirmation of Mr. Tshiamala's ability to support his wife,

their children, and his five children from the DRC who were to join him in Canada. Mr. Tshiamala did not reply to these concerns at all in his response to the procedural fairness letter. Further, his submissions in support of his request for reconsideration did not directly address the officer's concerns.

[24] The Applicants claim Mr. Tshiamala provided proof of his income and proof he was supporting his children overseas through fund transfers. However, the Applicants do not explain how he intends to support himself and his dependents based on his full-time income. The submissions also do not explain how Mr. Tshiamala intends to continue to provide for his five children currently in the DRC once they are in Canada. It was not sufficient, in light of the officer's concerns, to simply send in records of fund transfers without any explanation. Accordingly, it was reasonable for the officer to conclude as he did.

[25] I also find that the officer's conclusion that Ms. Da Silva does not meet the requirements under paragraph 133(1)(*k*) of the IRPR was reasonable. The Applicants' main contention is that social assistance is not always a bar to sponsoring, as demonstrated by the IP2's statement that: "The sponsor may be eligible once social assistance is discontinued. This bar to sponsorship may, upon request by the foreign national, be waived for humanitarian and compassionate reasons or public policy provided the sponsor requests that the application continue despite their ineligibility."

[26] However, this is clearly discretionary; the bar "may" be waived. As noted above, the Applicants never requested H&C consideration. In addition, the Applicants never requested this

bar to sponsorship to be waived; instead, they argued that the payments they received were disability-related. Having never requested the bar to be waived, the Applicants cannot claim it was unreasonable not to waive it.

[27] Further, the fact that Ms. Da Silva reimbursed Ontario Works is, in my view, irrelevant. Contrary to the Applicants' contention, Ms. Da Silva received the Ontario Works payments in order to meet her basic needs until her Employment Insurance claim was processed. The officer had this information before him when he made his decision. The officer noted the difference between Ontario Works payments and Ontario Disability Support Program payments. Whether or not Ms. Da Silva could have qualified as a person with a disability under the ODSP Act is also irrelevant; the reality is that Ms. Da Silva applied for and received assistance for basic needs from Ontario Works, and was actively receiving this support when she completed her sponsorship application indicating she was not receiving any such support.

[28] The Applicants have not persuaded me that the officer's decision was unreasonable. As such, there is no basis for this Court to intervene.

VI. Conclusion

[29] For the reasons outlined above, this application for judicial review is dismissed. The officer did not commit a breach of procedural fairness and the Applicants have not shown that his decision was in any way unreasonable.

[30] The parties did not raise any question of general importance for certification and none arises from the facts of this case.

JUDGMENT in IMM-2952-18

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed;

2. No question of general importance is certified.

"Jocelyne Gagné"
Associate Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

William N. Fuhgeh	FOR THE APPLICANTS
Elsa Michel	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Fuhgeh Law Office Ottawa, Ontario	FOR THE APPLICANTS
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT