Federal Court  Cour fédérale

Date: 20230925

Docket: IMM-3859-21

IMM-3860-21

Citation: 2023 FC 1290

Ottawa, Ontario, September 25, 2023

PRESENT: Mr. Justice O'Reilly

BETWEEN:

MICHELLE MABUYA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms Michelle Mabuya, a citizen of Zimbabwe, is trying to become a permanent resident of Canada. In 2008, she and her older sister were included as dependents on their mother's permanent residence application. Ms Mabuya's HIV positive status caused delays in the processing of that application, so her mother, Ms Paulina Tshuma, removed her from it in 2011. Ms Tshuma successfully obtained permanent residence.

[2] In 2018, Ms Tshuma tried to sponsor Ms Mabuya for permanent residence as a member of the family class. In 2020, a visa officer in Pretoria, South Africa informed Ms Mabuya that she may not qualify as a member of the family class because she was then 28 years of age and no longer a dependent child. The officer also requested biometric information and a South African police certificate. Ms Mabuya did not provide the required information.

[3] Ms Mabuya changed lawyers and her new counsel provided the officer with submissions and documentation highlighting the humanitarian and compassionate (H&C) factors in her favour.

[4] In 2021, the officer refused Ms Mabuya's application because she was not a member of the family class, the H&C factors she relied on were not persuasive, and she had failed to provide the biometric information and police certificate previously requested.

[5] Ms Mabuya's lawyer asked the officer to reconsider the application, explaining that the failure to submit the requested information was an oversight. The officer refused.

[6] Ms Mabuya brought two applications for judicial review of the officer's decisions: the sponsorship application and the subsequent request for reconsideration. Pursuant to an order by Justice Michael Manson on April 21, 2023, I heard both applications at the same sitting. Ms Mabuya argues that the officer's denial of her sponsorship application and refusal of her request for reconsideration were both unreasonable. Regarding the sponsorship application, Ms Mabuya contends that the officer failed to take proper account of the H&C factors. In respect of the

reconsideration request, Ms Mabuya submits that the officer failed to consider both her explanation for not submitting the requested information and the additional evidence she provided. She asks me to quash the officer's decisions.

[7] I am satisfied that the officer's refusal of the sponsorship application was unreasonable because the officer overlooked important evidence supporting Ms Mabuya's application. I will grant her application for judicial review in respect of that decision and will order another officer to reconsider the sponsorship application. I need not consider the application for judicial review of the decision on her reconsideration request.

[8] The sole issue is whether the officer's decision on the sponsorship application was unreasonable.

II. The Officer's Decision

[9] The officer noted that Ms Mabuya was likely medically inadmissible to Canada due to her HIV status and, for that reason, was removed from her mother's 2008 permanent residence application.

[10] The officer found that Ms Mabuya was not a member of the family class because she was over 22 years of age, and therefore did not meet the definition of a "dependent child" in s 2(b)(i) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (see Annex for provisions cited). Ms Mabuya had argued that she was nevertheless a dependent child because she was left alone in Zimbabwe unable to support herself, and has depended on her mother's

financial support (relying on s 2(b)(ii) of the *Regulations*). However, the officer pointed out that Ms Tshuma had voluntarily removed Ms Mabuya from her own permanent residence application. As a result, Ms Mabuya has been living independently for over 20 years, during which time she was able to pursue her education and find employment. Evidence of dependency on her mother consisted of some money transfers and a visit by her mother to Zimbabwe.

[11] In terms of H&C factors, the officer considered the goal of achieving family reunification and the psychological harm caused by a long separation between Ms Mabuya and her mother. But, again, the officer pointed out that Ms Tshuma chose to remove her daughter from her permanent residence application long ago; the family separation was a result of that decision. H&C factors could have been put forward at that time, but were not.

[12] The officer also considered the submission that Ms Mabuya would experience discrimination and economic hardship if she remained in Zimbabwe. However, the officer noted that little evidence had been provided to support those allegations. In fact, Ms Mabuya was able to engage in post-secondary studies and find employment as a data capture clerk.

[13] Ms Mabuya has a younger half-sister who was born and raised in Canada. The officer considered the best interests of Ms Mabuya's younger sister, then 17 years old. However, given that the two sisters had never lived together, the officer gave this factor little weight.

[14] Overall, the officer found that Ms Mabuya had raised valid H&C factors, but she had not backed them up with sufficient evidence.

[15] Finally, the officer remarked on Ms Mabuya's failure to provide the requested biometric information and police certificate.

III. Was the Officer's Decision Unreasonable?

[16] The Minister submits that the officer's decision was not unreasonable. Ms Mabuya's application was denied primarily because she failed to provide sufficient evidence of H&C factors in her favour. Moreover, the officer properly considered the fact that Ms Tshuma had voluntarily removed Ms Mabuya from her permanent residence application and it was that decision that caused the resulting separation and hardship. Finally, the Minister argues that the officer reasonably took account of Ms Mabuya's failure to provide the requested biometric information and police certificate.

[17] I disagree with the Minister. The officer's decision failed to respond adequately to the H&C factors on which Ms Mabuya relied. In her submissions to the officer, Ms Mabuya noted:

A. The family has experienced significant hardship due to a lengthy separation, exacerbated by the inability to travel during COVID;

B. If Ms Mabuya had been found to be medically inadmissible and had remained on her mother's application, her mother would also have been inadmissible and could not have succeeded in obtaining permanent residence;

C. Persons who are HIV positive experience widespread discrimination and stigma in Zimbabwe;

D. Zimbabwe is plagued by unstable economic and political conditions; and

E. Ms Mabuya's younger sister has grown up in Canada with limited opportunities to visit or get to know her.

[18] The officer's reasons for denying Ms Mabuya's application rely heavily on the fact that Ms Tshuma removed her daughter from the 2008 permanent residence application. The suggestion is that the ensuing family separation was the result of a voluntary choice to leave Ms Mabuya behind. In reality, that decision was the product of the duress of circumstances – Ms Tshuma had to proceed alone in order to succeed on her application. But, in any case, the hardship of separation was no less acute because it resulted from that difficult choice.

[19] The rest of the officer's decision discounted the other relevant H&C factors. In particular, the officer gave little weight to the best interests of Ms Mabuya's younger sister, contrary to the requirement to do so under section 25(1) of *Immigration and Refugee Protection Act*, SC 2001, c 27. The fact that the two daughters had long been separated suggested to the officer that little hardship would result from further separation. That reasoning does not accord with the officer's obligation to give substantial weight to the best interests of the child and to be alert, alive, and sensitive to them (*Baker v Canada*, [1999] 2 SCR 817 at para 75).

[20] Overall, I find that the officer's treatment of the H&C factors on which Ms Mabuya relied was unreasonable; the officer's reasoning was not transparent, intelligible or justified.

IV. Conclusion and Disposition

[21] The officer's treatment of the H&C factors supporting Ms Mabuya's application for permanent residence was unreasonable. The officer relied heavily on the decision to remove Ms Mabuya from her mother's application and discounted the hardships that resulted from that difficult choice. I will, therefore, grant this application for judicial review and order another officer to reconsider the sponsorship application. Neither party proposed a question of general importance for me to certify, and none is stated.

Annex

Immigration and Refugee Protection Regulations (SOR-2002-227)	**Règlement sur l'immigration et la protection des réfugiés (DORS/2002-227)**
Interpretation	Définitions
2. The definitions in this section apply in these Regulations.	2. Les définitions qui suivent s'appliquent au présent règlement.
[…]	[…]
dependent child, in respect of a parent, means a child who	enfant à charge L'enfant qui:
[…]	[…]
(b) is in one of the following situations of dependency, namely,	(b) d'autre part, remplit l'une des conditions suivantes:
(i) is less than 22 years of age and is not a spouse or common-law partner	(i) il est âgé de moins de vingt-deux ans et n'est pas un époux ou conjoint de fait
Immigration and Refugee Protection Act, SC 2001, c 27	Loi sur l'immigration et la protection des réfugiés, LC 2001, c 27
Humanitarian and compassionate considerations — request of foreign national	Séjour pour motif d'ordre humanitaire à la demande de l'étranger

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, 35.1 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, 35.1 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.

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, 35.1 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, 35.1 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.

JUDGMENT IN IMM-3859-21 and IMM-3860-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review in IMM-3860-21 is allowed, and the matter is returned to another officer for reconsideration.
2. It is unnecessary to decide the application for judicial review in IMM-3859-21.
3. A copy of this decision will be placed on file in both IMM-3859-21 and IMM-3860-21.
4. No question of general importance is stated.

"James W. O'Reilly"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3859-21 AND IMM-3860-21
STYLE OF CAUSE:	MICHELLE MABUYA v. MCI
PLACE OF HEARING:	ST. JOHN'S, NL
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