Federal Court  Cour fédérale

Date: 20111129

Docket: IMM-7567-10

Citation: 2011 FC 1382

Ottawa, Ontario, November 29, 2011

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

ILEEN ROSE MASSEY
VERONICA MASSEY

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] The applicants, Ms. Ileen Rose Massey and her biological daughter, Veronica, seek permanent residence in Canada. Ileen's mother, Veena Dass, is a Canadian citizen and sought to sponsor Ileen's and Veronica's applications. In all likelihood, these applications could have been processed in a fairly straightforward manner but for a single fact that complicated everything. In 2001, Veena adopted Veronica, her granddaughter.

[2] An overseas visa officer denied the applicants their requests for permanent residence in the family class. The officer determined that Veronica's application had to be assessed separately from Ileen's because Veronica was the legally adopted child of Veena, not the dependent child of Ileen. The officer concluded that Ileen was not a member of Veena's family class because, being 37 years old, she was not a dependent child of Veena. Further, she was not entitled to an exemption on humanitarian and compassionate [H&C] grounds.

[3] The applicants claim that the officer fettered his discretion by not analyzing the H&C request in relation to Veronica. They also submit that his decision was unreasonable. They ask me to set aside the officer's decision and refer the matter back for re-determination.

[4] I cannot find grounds to overturn the officer's decision. Based on the evidence before him, particularly the evidence relating to Veronica's adoption, the officer really had no choice but to exclude Veronica from this application. Veronica's situation must turn on an assessment of the genuineness of the adoption, about which there was little or no evidence before the officer. In addition, I cannot find that the officer's decision was unreasonable. He weighed the relevant H&C factors relating to Ileen's circumstances. The fact that he gave less consideration to Veronica was a natural consequence of the earlier conclusion that her situation had to be assessed separately. Accordingly, I must dismiss this application for judicial review.

[5] The issues are:

1. Did the officer fetter his discretion by excluding Veronica from the application?
2. Was the officer's decision unreasonable?

II. Factual Background

[6] Veena came to Canada in 1987 as a live-in-caregiver. In 1989, she sponsored her husband and three daughters, including Ileen, to come to Canada. In 1992, Veena's husband and two of her daughters left India for Canada. However, because she had been married the year before and was pregnant, Ileen stayed behind in India. Veronica was born in April 1992.

[7] Ileen claims that her husband was emotionally and physically abusive and that they separated in April 1993.

[8] In 2001, Ileen and her estranged husband signed an adoption deed making Veena the adoptive mother of Veronica.

[9] In 2003, while she was visiting her family in Canada, Ileen left Veronica in her estranged husband's care. She later left for the United States to obtain a work permit in Canada under the live-in-caregiver program. She was granted a permit in May 2003.

[10] However, Ileen claims that in 2004 she discovered that her estranged husband had left Veronica with a neighbour and that she was no longer attending school. Ileen decided to return to India to look after Veronica, even though she had not completed her 24-month work term in Canada which she required in order to qualify for permanent residence.

[11] In 2005, Ms. Massey obtained a divorce from her husband.

[12] In 2009, Veena granted guardianship of Veronica to Ileen. Later that year, Veena sought to sponsor Ileen and Veronica as members of the family class. Their application was reviewed by the Canadian High Commission in New Delhi and, in November 2010, Ileen and Veronica attended an interview with the visa officer.

[13] The officer refused the sponsorship application. He also dismissed the request for relief on H&C grounds.

III. The Officer's Decision

[14] At the outset of the interview, the officer advised the applicants that Ileen did not meet the definition of a member of the family class, and that Veronica could not be included on Ileen's application because she was adopted.

[15] After questioning the applicants, the officer informed them that the H&C factors in this case did not warrant an exemption. He noted that Ileen had used other means in the past (the live-in caregiver program) that could have led to her being landed in Canada, and that this option was still available to her.

[16] The officer also acknowledged that Ms. Massey and Veronica were the last two family members in India. However, while Veronica is Ileen's biological daughter, the applicants were, legally speaking, now sisters. It is not unusual for the parents of a family and two of their children to reside in Canada, while other children remain in India; this fact alone did not constitute undue hardship.

[17] The officer noted that since Veronica is over 18 years of age, it was unnecessary to consider the best interests of a child. He also observed that the adoption had not severed the parent-child relationship between Ileen and Veronica. By contrast, there was no such relationship between Veena and Veronica. The officer clearly doubted that a future application by Veronica as a member of the family class would succeed, notwithstanding the adoption by Veena. A separate H&C application would probably be her only option.

[18] The officer expressly considered all ten of the applicants' submissions in favour of an H&C exemption.

[19] First, the applicants pointed out that Ileen had been included in Veena's original sponsorship application. However, she was ineligible as she was already married. The officer found that the mere fact that some family members have been separated by immigration does not create disproportionate hardship.

[20] Second, Ileen and Veronica are the last two family members in India. Again, the officer noted that this, in itself, does not represent a hardship. The family is in no way prohibited from visiting them in India. Veena last visited India in 2001.

[21] Third, Ileen had to interrupt her live-in caregiver program in Canada in order to return to India to care for Veronica. The officer noted that Ileen could still enter Canada under this program without an H&C exemption. This would not constitute undue hardship.

[22] Fourth, Ileen been denied temporary residence visas since 2004 because the officers reviewing her applications were not satisfied she would leave Canada at the end of her authorized stay. Since then, no member of the family in Canada has visited her in India. The officer concluded that there does not appear to be a close family relationship between Ileen and her family in Canada.

[23] Fifth, Veena apparently suffers from anxiety and depression due to her separation from her daughter. However, she made no effort to visit India since 2001. The officer found that this long period of separation was within Veena's control.

[24] Sixth, Veronica has also been denied a temporary residence visa. However, this was not relevant to this application. Further, Veena has not visited Veronica in India since she adopted her.

[25] Seventh, the family has been separated for 17 years. Again, the officer noted that this was within Veena's control.

[26] Eighth, family reunification is a goal of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [IRPA]. However, the officer observed that there were other legal means available to the family that did not require an H&C exemption. The officer found that the family had not pursued those options.

[27] Ninth, Ileen alleged that she had been violently abused at the hands of her former husband. The officer noted that there was no evidence that charges had ever been laid. Further, in granting the couple a divorce, the Indian Court found that the allegations of abuse had not been substantiated. In addition, this was not an important factor given that Ileen has had no contact with her former husband for many years.

[28] Finally, Ileen showed that she is able to establish herself in Canada when she was previously enrolled in the live-in caregiver program. The officer responded by pointing out again that she could reapply under that program if she wished.

[29] The officer ultimately concluded that an H&C exemption was not warranted in this case because Ileen was not facing a disproportionate hardship. If she wished to immigrate to Canada, other means were available to her.

IV. Issue One – Did the officer fetter his discretion by excluding Veronica from the application?

[30] The applicants submit that the officer should have proceeded in one of three ways. He should have determined that Veronica was Veena's dependent child by virtue of the adoption and

dealt with the sponsorship application accordingly, or instructed her to complete a separate application. Alternatively, he should have requested the additional documentation that was needed to make that determination. In the further alternative, he should have considered whether Veronica was a “de facto” dependent of Ileen even though she had been legally adopted by Veena. The applicants say that this latter request was explicitly made in their submissions to the officer, and that the officer fettered his discretion by not responding to it.

[31] The applicants also maintain that the officer erred by failing to consider the impact on Veronica if Ileen reapplied under the live-in caregiver program, as the officer had proposed. As a consequence, Veronica, then 18, would have been left alone in India.

[32] As I read the officer’s decision, he found that, by virtue of the adoption, Veronica had to submit a separate application in which the circumstances of the adoption could be reviewed to determine whether she could be sponsored by Veena in the family class or, if not, whether there were H&C grounds in her favour. I cannot see any other realistic way of dealing with the unusual circumstances before him.

[33] The law requires a serious analysis of adoptions in the immigration context. This could only be done, as the officer suggested, in a separate application.

[34] Regarding the question whether the officer could consider Veronica to be Ileen’s de facto dependent, I note that the applicants requested consideration of Veronica as a “de facto dependent” in the covering letter accompanying their application, which stated:

> According to this definition, Veronica would not be considered the "dependent child" of Ms. Massey because she has been adopted by a person other than the spouse or common law partner of the parent, namely her grandmother. If for any reason this is not so determined, then it is requested that Veronica be considered a dependent child for the purposes of this application.

[35] Given this request, was the officer bound to consider whether Veronica was a de facto dependent? In my view, in the very unusual facts of this case, no.

[36] A de facto dependent is a "vulnerable person" who, despite not meeting the definition of a family member, is reliant on financial and emotional support from a person applying to immigrate to Canada: see *Frank v Canada (Minister of Citizenship and Immigration)*, 2010 FC 270 at para 29. In other words, a de facto dependent is a person who has been found not to be a member of the family class. Here, no finding has yet been made that Veronica is not a member of the family class. By virtue of the adoption, she may qualify as Veena's daughter.

[37] Not surprisingly, neither IRPA nor immigration guidelines specifically contemplate the unusual situation that was before the officer. Section 8.3 of the Overseas Processing Manual OP-4 (Processing of Applications under s 25 of the IRPA) describes "de facto family members" 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 that is either in Canada or that is applying to immigrate. Some examples: a son, daughter, brother or sister left alone in the country of origin without family of their own; an elderly relative such as an aunt or uncle or an unrelated person who has resided with the family for a long time. Also included may be children in a guardianship relationship where adoption as described in R 3(2) is not an accepted concept. Officers should examine these situations on a

> case-by-case basis and determine whether humanitarian and compassionate reasons exist to allow these children into Canada. (Emphasis added.)

[38] While Veronica was in a guardianship relationship with Ileen, her biological mother, she was also the legally adopted child of Veena. This was not a situation where adoption was "not an accepted concept". The manual goes on to describe the factors that are relevant:

- whether dependency is bona fide and not created for immigration purposes;
- the level of dependency;
- the stability of the relationship;
- the length of the relationship;
- the impact of a separation;
- the financial and emotional needs of the applicant in relation to the family unit;
- the ability and willingness of the family in Canada to provide support;
- the applicant's other alternatives, such as family (spouse, children, parents, siblings, etc) outside Canada able and willing to provide support;
- the documentary evidence about the relationship (e.g., joint bank accounts or real estate holdings, other joint property ownership, wills, insurance policies, letters from friends and family); and
- any other factors that are believed to be relevant to the H&C decision.

[39] While the applicants did raise the issue of de facto dependency in their covering letter, their submissions did not address the many factors the officer would have had to consider.

[40] Moreover, H&C exemptions are meant to be an exceptional form of relief. Other avenues of relief should be pursued first:

> A request for consideration on humanitarian and compassionate grounds must be made in writing and must accompany an application for permanent residence made under one of the existing three classes. A determination must first be made that the applicant does not comply with one of these three classes before such a request is reviewed or considered. (OP-4 Manual, s 5.3, emphasis added.)

[41] In the circumstances, a decision had to be made on the question of Veronica's eligibility in the family class before considering the possibility that she might be a de facto dependent of Ileen.

[42] As for Veronica's best interests, I find that the officer put forward the best solution available in the circumstances before him – that Veronica should seek permanent residence on the strength of her own application. Veronica's (and Ileen's) best interests are likely best served by seeking entry to Canada in the manner proposed by the officer. To my mind, this was a sufficient consideration of Veronica's best interests in the circumstances.

V. Issue Two – Was the officer's decision unreasonable?

[43] The applicants submit that the interview with the officer demonstrates that the adoption of Veronica was designed to protect her, which demonstrated Veena's love for and her relationships with both Ileen and Veronica. The applicants also assert that the later decision to grant Ileen guardianship of Veronica was a sign of love, not of a lack of relationship. The applicants also submit that the fact that Veena provides monthly financial support to Ileen establishes their relationship.

[44] The applicants assert that their many attempts to obtain temporary resident visas also demonstrate that there is a reciprocal willingness to reunite with the family in Canada. The officer

found that Veena had put a “tremendous effort” into getting her daughter to Canada, which the applicants say demonstrates that their relationship is strong.

[45] Further, the applicants contend that the officer was required to conduct a “best interests of the child” analysis. As she was 18 at the time of the decision, Veronica is still considered a “child” under the regulations. The applicants submit that the officer was not “alert and sensitive” to the interests of Veronica.

[46] The applicants further object to the officer’s apparent suggestion that the family should reunite in India. They note that one of the objectives of IRPA is to see families reunited in Canada.

[47] In my view, as described above, the officer explained in detail why an H&C exemption was not warranted in this case, and provided a direct response to each of the applicants’ submissions.

[48] In addition, recent jurisprudence of this Court has held that there is no need to consider the best interests of a person over the age of 18 as a “child directly affected” in an application brought under s 25 of IRPA. In *Leobrera v Canada (Minister of Citizenship and Immigration)*, 2010 FC 587, Justice Michel Shore relied on domestic legislation, international instruments and the jurisprudence of the Federal Court of Appeal and Supreme Court to reach the conclusion that “childhood is a temporary state which is delineated by the age of the person, not by personal characteristics” (at para 72).

[49] In my view, the officer did not err by stating that there was no need to consider Veronica's best interests. In any event, I believe the officer properly considered those interests. The officer explicitly considered Veronica's schooling, financial and housing situation, and the family members available to her in both India and Canada.

[50] Therefore, the officer's conclusion that the evidence did not justify exceptional relief was not unreasonable. He considered all relevant factors, did not ignore the evidence, and did not rely on irrelevant considerations.

VI. Conclusion and Disposition

[51] In my view, the officer did not fetter his discretion by failing to treat Veronica as a de facto dependent. Further, the officer's decision was reasonable. Therefore, I must dismiss this application for judicial review. Neither party proposed a question for certification and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No question of general importance is stated.

"James W. O'Reilly"
Judge

Annex

Immigration and Refugee Protection Act, SC 2001, c 27

Humanitarian and compassionate considerations — request of foreign national

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

Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27

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

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.

FEDERAL COURT

SOLICITORS OF RECORD

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