Federal Court  Cour fédérale

Date: 20150119

Docket: IMM-5270-13

Citation: 2015 FC 65

Toronto, Ontario, January 19, 2015

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

DONNA DENIS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the Applicant's negative humanitarian and compassionate [H&C] decision [Decision] dated June 7, 2013, rendered by a Citizenship and Immigration Canada [CIC] officer [Officer]. The application is made pursuant to section 72.1 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The Applicant is a 32 year old citizen of St. Lucia who came to Canada on June 15, 2003, when she was 22 years old. She has now been in Canada for over 11 years. She lived in Canada

without status until she made a refugee claim on April 26, 2011, which was heard by the Refugee Protection Division [RPD] on October 31, 2011. The RPD rejected her claim on January 5, 2012. She then made a pre-removal risk assessment [PRRA] application, which was rejected on June 5, 2013, two days before the herein H&C application was rejected (Certified Tribunal Record [CTR], pp 110-111).

[3] On November 26, 2013 she received a direction to report for removal. A deferral request was filed on December 16, 2013, and was refused on December 27, 2013. The family's removal was scheduled for January 2, 2014, and an emergency stay was filed with this Court. On December 31, 2013, Justice Zinn stayed that removal, and thus the Applicant remained in Canada with her two children awaiting the outcome of this application.

[4] Notwithstanding the Applicant's unfavourable immigration history, about which the Officer noted the "applicant demonstrated disregard for Canadian immigration laws", there are nonetheless two unjustifiable conclusions in the Decision, namely the Officer's failure to take into account: (i) evidence relating to the Applicant's sexual orientation; and (ii) an appropriate analysis of the best interests of the Applicant's two young Canadian-born children. These failures require me to send this matter back for H&C reconsideration, taking into account the following rationale.

I. Background

[5] The Applicant's H&C submissions, dated May 17, 2012, rested on the following three key assertions.

(i) Sexual Assault

[6] The Applicant was repeatedly raped by her uncle from age 16 until she left St. Lucia for Canada.

[7] The RPD raised no credibility concerns, stating that:

> There were no significant discrepancies between the claimant's oral testimony and the information in her written narratives on being raped repeatedly by her uncle as a teenager and young adult in Saint Lucia.
>
> […]
>
> Having regard to all of the evidence, the panel is persuaded on a balance of probabilities that the claimant was sexually assaulted and molested as a teenager and young woman by her uncle in Saint Lucia.
>
> (RPD decision at paras 9, 16).

[8] The Applicant provided a sworn statement that her parents' home, where she could have returned to, was destroyed in a hurricane, and her parents had to live with her grandmother, with whom her abusive uncle lives. The Applicant fears the consequences of her and her daughters moving in with her uncle.

(ii) Sexual Orientation

[9] The Applicant claims to be a bisexual woman, and she fears her lesbian activities would be shunned in St. Lucia, where male homosexual activity is illegal and where the prevalent attitude is vehemently anti-gay, against either sex.

[10] On this point, the RPD found at paragraph 19 of its Decision that "[n]o letters or affidavits were produced from any woman the claimant has allegedly been sexually involved with since coming to Canada confirming the claimant's oral testimony that she has had and currently favours sexual interaction with woman [sic]." The said woman whom the Applicant had a relationship with, Melissa Joseph, was supposed to attend the hearing and did not appear.

[11] However, by the time of the PRRA decision, the Applicant produced a sworn statement from Ms. Joseph, which provided significant detail about their sexual past.

[12] On June 5, 2013 the PRRA Officer (the same Officer that decided the H&C two days later), noted the sworn statement of Melissa Joseph in the PRRA decision:

> I have reviewed the sworn statement from Melissa Joseph that the applicant has provided. In this document Melissa Joseph states that she dated the applicant for six months in 2007 but they broke up when the applicant decided to pursue a relationship with a man. Melissa Joseph states that she had no further contact with the applicant until she saw her at Downsview Park in July of 2012. Melissa Joseph states that after she saw the applicant at Downsview Park she and the applicant began dating again and states that they are presently in a relationship.
>
> I note that the sworn statement from Melissa Joseph is the only documentation that has been submitted, apart from the applicant's own statements, to indicate that the applicant is bi-sexual.
>
> (PRRA decision, p 6)

[13] The CIC Officer concluded in the PRRA that this evidence, on its own, was insufficient to indicate that a forward-looking risk in St. Lucia based on sexual orientation would result.

[14] On June 7, 2013, the same Officer refused the H&C application, noting:

> I note that the applicant has provided little documentary evidence to support her statements that she has been involved in lesbian relationships or that she either is or would be perceived to be an LGBT individual. No documentation, such as letters or emails from the applicant's present or former partners in either St. Lucia or in Canada, has been submitted.
>
> [Emphasis added] (Decision, CTR, p 9)

(iii) Best interests of the children (BIOC)

[15] The Officer conducted the BIOC analysis from the perspective of the Applicant, discussing the fact that she would likely have success finding employment in St. Lucia, and therefore be better able to provide a stable home for her daughters, and that there are a number of social assistance programs in St. Lucia. The Officer concluded that the Applicant could keep her children away from her uncle in St. Lucia, and that, in any event, there is redress available to women involved in domestic violence, which would be available to her and her daughters should the uncle cause any future difficulties.

II. Issues

[16] Three issues were raised in this matter:

1. Misapprehension of the evidence.

2. Failing to properly address the BIOC.

3. Ignoring key evidence.

III. Analysis

A. *Misapprehension of the evidence*

[17] The Applicant contended that the Officer erred in referring to the rape as domestic abuse, rather than sexual assault, and considering the evidence of assistance available to women who have suffered domestic abuse and violence.

[18] The Respondent noted in reply that in various materials and submissions to the government, the Applicant had referred to domestic abuse and provided references to same in the country condition documentation.

[19] This issue was dispensed with at the hearing, as counsel had referred to the rape as domestic violence in the H&C submissions. However, the issue was nonetheless a consideration within the BIOC analysis, which follows.

B. *Best Interests of the Child*

[20] The Applicant submits that the Officer did not turn her mind to the fact that the evidence before her was that the two Canadian-born children would have to move to a situation of sexual violence, namely the home where her former abuser lives. The Applicant contends that the Officer neither (i) addressed BIOC as it concerns the children's vulnerability at the hands of a sexual predator with whom they would live, nor (ii) undertook a proper best interests analysis for the two children, namely whether remaining in Canada or returning to St. Lucia would be in their

best interests. The Applicant relies on my recent decision in *Bautista v Canada (Citizenship and Immigration)*, 2014 FC 1008 [*Bautista*] with respect to a proper BIOC analysis.

[21] The Respondent counters that the Officer undertook a complete BIOC analysis, and that this is simply a request to reweigh the evidence, which is not the Court's role. The Respondent relies on *Owusu v Canada (MCI)*, 2004 FCA 38 for the proposition that the problem was an insufficiency of evidence before the Officer, rather than a failure to consider the evidence. It argues that on the contrary, the Officer was alert and alive to the BIOC, finding that it was best for the children to remain with their mother.

[22] It is my opinion that both sides are correct in certain regards. I agree with the Respondent that the H&C application could have been more complete based on other evidence that was clearly available, including school letters and the like which were provided with the stay application materials to Justice Zinn. Other evidence could also have been provided to buttress any case with respect to the children's interests in Canada.

[23] Had counsel for the Applicant included all relevant BIOC evidence and arguments in the Applicant's H&C submission package, the Applicant would have been far less susceptible to the Respondent's assertions regarding insufficiency of evidence – just as a complete H&C package would have avoided issue #3 below regarding the Officer's failure to consider the sworn statement that was submitted with the PRRA application, but omitted from the H&C application.

[24] That said, notwithstanding the paucity of supporting documentation in the H&C application relating to BIOC, I nonetheless am of the opinion that the Officer was not sufficiently alert and alive to the hardships that would face the two Canadian-born children in St. Lucia: there were certainly sufficient facts before the Officer to require such consideration.

[25] As mentioned, the Applicant cited *Bautista*. That case was premised on the Supreme Court of Canada's requirement in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at 863 that officers be "alert, alive and sensitive" to BIOC in determining H&C applications. It also reviewed the guidance given by the Federal Court of Appeal in cases such as *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 [*Hawthorne*] and *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 [*Kisana*] , which both held that, absent exceptional circumstances, BIOC favours non-removal of a parent . However, that is not where the analysis ends, otherwise such a finding would almost always ensue. As Justice Décary of the Court of Appeal wrote in *Hawthorne*, and Justice Nadon cited in *Kisana*, BIOC is not the only or the determinative factor, and is just one part of the analysis that must be factored in along with the other H&C considerations:

> [6] To simply require that the officer determine whether the child's best interests favour non-removal is somewhat artificial - such a finding will be a given in all but a very few, unusual cases. For all practical purposes, the officer's task is to determine, in the circumstances of each case, the likely degree of hardship to the child caused by the removal of the parent and to weigh this degree of hardship together with other factors, including public policy considerations, that militate in favour of or against the removal of the parent.

[26] There is no "magic formula" in determining BIOC or how hardships associated with the removal of a parent impact on the other H&C factors. That balancing exercise is the heartland of

the H&C officer's broad discretion. What is certain is that, for the officer to be able to arrive at an outcome, the officer must engage in a BIOC analysis that is "well identified and defined", to be able to measure this important (but not determinative) factor against the others: See *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 12.

[27] It is not this Court's role to decide the H&C application or offer a substantive analysis of the balancing that the Officer must do. It is, however, the role of this Court to ensure that this important H&C factor has been well identified and defined from the perspective of the daughters. That exercise remains outstanding. The issue that I find with the H&C analysis in this case is not that the Officer ignored or overlooked the BIOC factor entirely, but rather that the officer unreasonably analysed it, for the following reasons.

[28] Although Applicant's counsel could presumably have provided far more evidence in support of the BIOC factor, he provided the following statement in the H&C submission letter that accompanied the application:

> An impediment to [employment] is her two Canadian born daughters whom she is raising as single mother [*sic*]. Her children [*sic*] best interest [*sic*] is clearly that as Canadians stay in Canada [*sic*]. Furthermore, Ms. Denis is afraid that if she is to return to St. Lucia her daughters would face same problems [*sic*] as she did once they became teens or, even worse, before that. She strongly believes that her uncle who is in his late 30s would attempt to rape not only her but later her daughters too.
>
> (H&C Submissions, CTR, p 86).

[29] This is not the only evidence the Officer had in this respect when making the H&C decision. The Officer had the RPD decision, which recognized the abusive uncle. The Officer

also had country condition documentation which discussed sexual abuse in St. Lucia, including against children.

[30] The Officer, in the face of personal and objective country evidence, nonetheless decided that the Applicant "has been unable to regularize her immigration status in Canada", and her daughters "are still very young and… completely dependent upon the applicant. Accordingly, I find that it would be in Desiree's and Dee's best interests to live with the applicant in St. Lucia and to not be separated from her" (Decision, p 8, emphasis added).

[31] The Officer's analysis assumes that the children should accompany their mother to St. Lucia, and reviews the protection and programs that may be available to victims of domestic abuse. However, what is absent from the analysis, and is not well identified and defined are the hardships the children would face with that relocation.

[32] One cannot simply assume that because the daughters are young – they will be able to adjust. This is especially so when the mother has suffered serious sexual abuse in the past and her testimony is that she will have to bring the daughters up in the same home where the sexual predator who abused her lives. In addition, the daughters have lived their entire lives in Canada, in what appears to be a safe and non-threatening environment. The evidence regarding the location to which they would be destined, stands in stark contrast, and they are strangers to that land.

[33] The Officer, in his discussion of BIOC, also cites the fact that the Applicant has not had steady employment in Canada, but did have employment in St. Lucia when she fled 10 years ago. He cites labour market programmes, which provide job assistance, in addition to social assistance programs should she not find a job, which could help her to support her daughters. Again, this analysis uses the mother as the starting point, and how she would cope. It does not consider how she will care for the adjustment of her daughters at the same time. And it does not consider all of these resettlement factors, or hardships, from their perspective.

[34] The recent case of *Diarra c Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2014 CF 1228 [*Diarra*] is somewhat analogous. In that case, Ms. Diarra had two daughters, close in age to Ms. Denis' daughters. One was a Canadian citizen, and the other, a US citizen. There was also an element of abuse in risking the daughters going back with the mother to Guinea, her native land, in that the evidence showed an extremely high prevalence of genital mutilation, made even more likely through the observant family of her daughters' father. Justice Harrington found that the BIOC analysis in that case was not made in accordance with section 25 of *IRPA* and the decision was accordingly unreasonable:

> **4** Si Mme Diarra n'avait pas d'enfant, il va sans dire que cette Cour n'aurait aucune hésitation à rejeter la présente demande. Toutefois, les considérations d'ordre humanitaire doivent être axées sur les deux filles de la demanderesse principale : Félicité, 13 ans, née aux États-Unis et Jeannette, 5 ans, née au Canada. Ni l'une ni l'autre ne peuvent être envoyées en Guinée. Quel genre de vie mènerait alors Félicité si renvoyée aux États-Unis sans sa mère? Et quel genre de vie mènerait Jeannette si elle vivait au Canada sans sa mère?
>
> **5** La demanderesse principale soulève sa crainte de la menace d'excision qui plane sur ses deux filles advenant qu'elles se retrouvent en Guinée avec elle. Le décideur en reconnait la possibilité, mais en minimise la gravité, du moins en partie, au motif du manque de crédibilité de Mme Diarra. Elle est

> musulmane. Elle allègue que son père est un iman radical. Elle a épousé un homme chrétien. Ce mariage cause de grandes difficultés au sein de la famille.
>
> …
>
> **7** Mme Diarra fait face à un choix impossible -- soit qu'elle retourne en Guinée et laisse ses enfants au Canada et aux États-Unis, ou soit qu'elle les apporte avec elle en Guinée où ses filles risquent l'excision, et où les trois enfants auraient de la difficulté à s'intégrer à une culture qu'ils ne connaissent pas. Il serait raisonnable de conclure, sur la prépondérance des probabilités, que Félicité et Jeannette seront victimes de mutilation génitale féminine si elles accompagnent leur mère en Guinée.
>
> ...
>
> **11** Dans les circonstances, l'analyse de l'intérêt supérieur des enfants directement touchés n'a pas été faite conformément au paragraphe 25(1) de la *Loi sur l'immigration et la protection des réfugiées*. La décision n'était pas raisonnable.
>
> [English translation not available at the time of publication of this judgment]

[35] In the case now before the Court, the Officer had a duty to go to the next step of analyzing how living within potentially close proximity to a sexual predator in St. Lucia (or even in the same house), might affect the daughters. The Officer, in my view, addressed the hardship from the mother's perspective rather than from that of the children. The Officer wrote:

> The applicant's H&C submissions state that [the daughters] would run the risk of being assaulted by the applicant's abusive uncle if they were to return to St. Lucia. I note, however, that no information has been submitted to indicate that the applicant could not arrange for [her daughters] to be kept away from the applicant's abusive uncle in St. Lucia. As well, I note that I have previously found that redress is available in St. Lucia to women who are involved in situations of domestic violence and would be available to the applicant and to her daughters should they

> experience any future difficulties in St. Lucia with respect to the applicant's abusive uncle.
>
> (Decision, CTR, p 10)

[36] To simply state that shelter from a predator may be available from social welfare agencies, is not, in my view, to undertake the requisite "well identified and defined" BIOC analysis from the perspective of the children.

[37] While BIOC is only one factor in an H&C determination, and there are certainly important others, it is nonetheless a central factor when it comes to a case that includes two Canadian-born children. Focusing on whether the children can adapt by accompanying the parent back to a foreign land where there is a credible prospect of abuse, without a complete BIOC analysis, is in my view a reviewable error, just as it was in *Diarra*.

C. *Ignoring evidence*

[38] While the finding on the second issue (BIOC) is determinative of the need to send this matter back for reconsideration, I will nonetheless provide my observations on the third issue.

[39] The Applicant acknowledged that there was no independent evidence of her sexual orientation available to the RPD. However, the Officer's PRRA decision discussed, in detail, the sworn statement of Ms. Joseph. The Applicant contended that the Officer erred in law by overlooking this evidence on her H&C decision, when she had discussed its details in her PRRA decision a maximum of two days prior.

[40] The Applicant contends that it was a fiction for the Officer to rely on the fact that the sworn statement had not physically been included in the PRRA application, which she had submitted to exactly the same office, contemporaneously with the H&C application. The Applicant pointed to case law, in asserting that the Officer was obligated to consider the evidence that she ignored: see *Giron v Canada (Minister of Citizenship and Immigration),* 2013 FC 114 [*Giron*] ; *Sosi v Canada (Minister of Citizenship and Immigration)* 2008 FC 1300 at para 14 [*Sosi*] .

[41] The Respondent, arguing that each application is discrete, stated that H&C officers are not expected to investigate submissions provided in other immigration applications – in this case a PRRA – as Justice Gleason held in *Cobe v Canada (Minister of Citizenship and Immigration),* Federal Court Docket IMM-975-12 dated September 13, 2012, at 4-5 [*Cobe*] . The Respondent argued that the case law is well settled that an H&C Officer only needs to look at whatever is directly before him or her (*Owusu* at para 5).

[42] I would agree with the Respondent, but for in this narrow exception that the law appears to acknowledge in the specific context where a single officer decides both the PRRA and the H&C applications in quick succession. In this narrow circumstance, Justice Campbell found in *Sosi,* above, that applicants do not need "to present the same material on each discrete application when they are inextricably linked. Indeed, since the Visa Officer was charged with rendering both decisions, this is absolutely unnecessary" (*Sosi,* above, at para 15). In that case, it was clear that the visa officer viewed the two applications as inextricably linked because the H&C risk analysis was taken from the PRRA decision.

[43] In *Giron*, above, Justice O'Reilly held at paragraph 16 that:

> In circumstances where the officer deciding the H&C has also conducted the PRRA, and where that officer relies on the PRRA analysis in deciding the issue of hardship on the H&C, fairness requires that the officer consider all of the PRRA submissions.

[44] The Court also discussed "compartmentalizing" evidence as between PRRA and H&C decisions made in quick succession by the same officer in *Durrant v Canada (Minister of Citizenship and Immigration)*, 2010 FC 329 [*Durrant*]. Justice Mandamin writes, in finding that the officer erred in the second (H&C) decision, one day after deciding the PRRA:

> [21] It is not uncommon for one Immigration Officer to determine an immigrant's PRRA and H&C application. As was done here, the assessment of one follows on the heels of the other. Ideally, the officer's familiarity with the file leads to better decisions. However, this Court has expressed concern on occasion from some adverse consequences of this practice.
>
> …
>
> [32] The Officer compartmentalized the evidence used for the July 27, 2009 PRRA decision and the July 28, 2009 H&C decision. The effect of this distinction is that risk was assessed in one case, but not the other.
>
> [33] The Officer acknowledges the risk the Applicant says she faces if returned to St. Vincent but does not consider it in her assessment of hardship in the H&C application. Instead, she explicitly ignores the Applicant's evidence of risk because it pre-dates the request for more current information. The Officer provides no justification for this distinction besides her expectation the Applicant should have re-provided the same information if it was critical.

[45] The *Durrant* situation is also analogous to the Applicant's case, the facts of which are also more similar to *Giron* and *Sosi* than to *Cobe*. In *Cobe*, the H&C decision was attacked on the basis that the Officer failed to consider risks for the minor children. However, in *Cobe*,

unlike in the present case, the arguments regarding these risks were not made to the H&C Officer. Justice Gleason wrote in *Cobe*:

> I find no merit in this submission as it is well-established that it is incumbent on H&C applicants to place all evidence and arguments before the Officer that they wish to have considered (see e.g. *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 5, [2004] 2 FCR 635).
>
> [Emphasis added]

[46] Unlike in *Cobe*, the issue of sexual orientation and the risks associated with it were raised in the H&C submissions and were thus properly before the Officer in this case.

[47] While the Respondent argues that, based on *Cobe* and *Owusu*, the H&C Officer cannot be expected to check the PRRA file, and can only make the H&C Decision based on the information in the H&C file before him, I find that the narrow exception to this rule as outlined in the cases of *Giron*, *Sosi* and *Durrant* applies here as well -- namely that where the same officer decides the PRRA just before deciding the H&C, that officer must consider evidence provided in the PRRA for the purposes of that H&C, assuming that the underlying arguments have been raised in the H&C.

[48] It should be noted that in the present case, the H&C Officer referred to the PRRA decision in her H&C decision of June 7, 2013. She also relied on much of the same documentation that she had for the PRRA two days prior on June 5, 2013. This documentation included the country condition sources (the 2012 U.S. Department of State Report and an IRB Response to Information Request – albeit a 2006-2009 version in the H&C, as opposed to the updated 2009-2012 version referenced in the PRRA – but relying on exactly the same

observations and drawing the identical conclusions, on domestic protection for victims of domestic violence).

[49] The Officer cannot rely on some parts of that earlier PRRA decision where it is convenient, and ignore evidence included in the PRRA application where it is inconvenient (i.e. stating that there was no evidence on the sexual orientation issue).

[50] I find that we are in the circumstance where the officer deciding the H&C has also conducted the PRRA, and where that Officer has implicitly relied on the PRRA analysis in deciding the issue of hardship on the H&C.

[51] Like in *Giron*, *Sosi* and *Durrant*, fairness requires that the Officer should have considered the evidence from the same-sex sexual partner, which she ignored. This evidence was a sworn statement. Had the Officer not said anything about what evidence she considered of the LGBT issue, one might have been able to say that she was presumed to have considered all the evidence. However, in stating that "[n]o documentation [emphasis added], such as letters or emails from the applicant's present or former partners in either St. Lucia or in Canada, has been submitted", in the H&C Decision, after commenting with specific detail about Ms. Joseph's sworn statement two days prior, reasonableness required that she consider the evidence.

[52] All of the above is especially so in light of the Officer's finding in the H&C that "a LGBT individual in St. Lucia would likely experience significant hardship" (Decision, p 7).

Based on this finding, it is possible that the H&C would have been granted had the Officer been satisfied that the Applicant was bisexual.

[53] The Respondent submits that based on the PRRA analysis of the sworn statement of Ms. Joseph, the H&C outcome would have been the same even had it been considered. However, the H&C includes other factors other than the risk in returning due to sexual orientation, and I am not prepared to assume that the Decision would have been the same after a weighing of these factors.

IV. Conclusion

[54] The application is allowed and should be reconsidered by another Officer.

[55] At the hearing, the Applicant proposed the following question(s) for certification:

> If the same decision maker is charged with rendering both PRRA and H&C decisions with respect to the same applicant(s) must the evidence tendered for the first application, which happens not to have been reproduced for the second application, be considered for that second application, if the two applications are inextricably linked?

[56] The Respondent opposed certification of this question.

[57] Given that the incomplete BIOC analysis is sufficient to return this matter for reconsideration, the proposed certification question is not dispositive of the matter, and shall therefore not be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed. The matter will be sent back for reconsideration by a different officer.

2. No question is certified.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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