

Federal Court



Cour fédérale

**Date: 20150317**

**Docket: IMM-5892-13**

**Citation: 2015 FC 336**

**Ottawa, Ontario, March 17, 2015**

**PRESENT: The Honourable Mr. Justice Rennie**

**BETWEEN:**

**JEAN ANTHONY LAUTURE  
MARIE MOSE LAUTURE-ST HILAIRE  
LUDNY LAUTURE  
MARCLEY LAUTURE**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Nature of the Matter**

[1] The applicants seek judicial review of a decision of an Immigration Officer (the Officer), dated August 19, 2013, refusing their application for permanent residence from within Canada on humanitarian and compassionate (H&C) grounds pursuant to subsection 25(1) of the

*Immigration and Refugee Protection Act, SC 2001, c 27 (IRPA)*. For the reasons that follow, the application is granted.

## **II. Facts**

[2] The facts may be briefly stated, as the crux of this application lies in events subsequent to the applicants' departure from Haiti.

[3] The applicants are Mr Jean Anthony Lauture (the applicant), his wife Mrs Marie Rose Lauture St-Hilaire, and their children Ludny Lauture and Marcley Lauture. All are Haitian nationals. The applicants fled Haiti by reason of Mr Lauture's work as a journalist. The applicant had denounced, on his radio program, crimes and violence committed against women and children. Following threats, and then an attempt on his life, he left Haiti for the Dominican Republic in June 2003.

[4] The applicant returned to Haiti in February 2004. When he returned, he did not return to work as a journalist, and instead began working as a teacher in a secondary school. He organized a conference for his students on the rule of law in Haiti. However, because of his involvement in organizing this conference, the applicant's wife was assaulted in February 2006, and there was another attack on the applicant's life in September 2007.

[5] The applicant was kidnapped on July 2, 2008. Following the kidnapping, armed men visited the applicant's neighbours, thinking that it was the home of the applicant. The neighbours' son was kidnapped, and a ransom demanded. Once the ransom was paid both

victims were released. The applicants' neighbours blamed the applicant for these events and demanded that the applicants leave the neighbourhood.

[6] The applicants claimed refugee protection upon arrival in Canada at the Fort Erie border crossing. The Refugee Protection Division of the Immigration and Refugee Board determined that the applicants were not Convention refugees or persons in need of protection.

[7] The application for humanitarian and compassionate grounds for the applicant and his family was refused on August 19, 2013.

### **III. Decision**

#### **A. *Degree of establishment***

[8] The Officer first considered the applicants' degree of establishment in Canada. The Officer explained that upon arrival in Canada, the applicants supported themselves financially through social assistance. However, during that time the applicant volunteered for the Salvation Army, the Heritage Skills Development Center, the Centre Francophone de Toronto, the United Haitian Community of Ontario, and was a volunteer reporter for CIUT radio. He also sits on the board of directors for Festival Kompas Zouk Toronto, for the promotion of Creole culture.

[9] The Officer noted that the applicant found a job in May 2010 and currently worked as a teacher for the Alpha Toronto school, a literacy learning centre. In respect of the female applicant, the Officer noted that she did not work but has taken language training in Canada and hoped to study early childhood education at university. She worked as a substitute at the Jeanne

Lajoie daycare and was a volunteer at the Montessori youth centre of Toronto. The female applicant also volunteered for the Lung Association and was an executive committee member of the Festival Zouk Toronto.

[10] The Officer then turned to the couple's children, now aged 15 and 18 years and in secondary school. The Officer stated "[t]he representative does not add any consideration respecting the best interests of the child in this file".

[11] The Officer concluded that the applicants are "generous people devoted to the community" and that they "display humanity" and that "[n]ot only are they involved in the Haitian community in Canada, they are also invested in the life of the Toronto community, particularly with respect to education". The Officer commented that these qualities are "rare and very noble".

[12] However, the Officer concluded that "the fact remains that working and obeying the law are everyday activities for many people living in Canada".

[13] In terms of their volunteer and community activities, the Officer commented that "their engagement in society is remarkable" and "there is no doubt that the relationships they have formed within their Canadian community over these past years are significant". However, she concluded that "the fact remains that this type of activity can also be pursued in Haiti" and that she was not satisfied that the applicants "will be unable to continue their community and volunteer activities and form new friendships in Haiti".

[14] The Officer noted the letters the children wrote to the attention of the immigration officials asking that they not be sent back to their country and indicating they fear kidnapping in Haiti. However, she concluded that at their young age, “it is easy to adapt to a new school environment and to form new friendships”.

[15] Finally, the Officer addressed the prospective risk of kidnapping should the female applicant and minor applicants would be returned to Haiti. The Officer noted that since June 29, 2010, such allegations cannot be analyzed as part of an H&C application, and consequently there is no jurisdiction to rule on risks to life or to grant protection. However, in the interests of procedural fairness she considered the possibility of gender-based discrimination and found that although there is discrimination against women and children in Haiti, the female applicant is married and therefore her risk is lowered. Further, the children will “benefit from the protection of the family unit”. She noted that since the earthquake in Haiti, the entire Haitian population faces poverty, violence, kidnappings, and a lack of resources and therefore the situation affects most of the population without distinction and is “therefore not peculiar to the applicants”.

#### **IV. Relevant provisions**

[16] Subsection 25(1) of *IRPA* allows the Minister to grant an applicant permanent resident status or exempt an applicant from any requirements of *IRPA*:

25(1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister’s own initiative or 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 obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate

considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.

## **V. Analysis**

### **A. *The standard of review***

[17] The issue of whether the Officer applied the proper legal test and assessed the best interests of the child is a question of law reviewable on the correctness standard: *Judnarine v Canada (Minister of Citizenship and Immigration)*, 2013 FC 82 at para 15; *Joseph v Canada (Minister of Citizenship and Immigration)*, 2013 FC 993 at para 12. When applying the correctness standard, the reviewing court “will not show deference to the decision maker’s reasoning process; it will rather undertake its own analysis of the question”: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50.

[18] The issue of the Officer’s conclusion on establishment is a question of mixed fact and law reviewable on the standard of reasonableness. The reasonableness standard is concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir* at para 53.

### **B. *The Officer’s conclusion on establishment was not reasonable***

[19] Section 5.14 of the Citizenship and Immigration Canada Operational Manual IP-5 states that an applicant’s degree of establishment in Canada may warrant a positive H&C consideration when the period of inability to leave Canada due to circumstances beyond the applicant’s control is of considerable duration and when there is evidence of a significant degree of establishment in

Canada. The respondent cites Justice Snider in *Shallow v Canada (Minister of Citizenship and Immigration)*, 2012 FC 749 at para 9, wherein Justice Snider observed that “[f]or this factor to weigh in favour of an applicant, much more than simple residence in Canada must be demonstrated” and it “must always be remembered that the focus is on the hardship to the Applicants on applying for permanent residence from their country of origin”. That is, unless the establishment in Canada “is both exceptional in nature and not of the applicant's own choosing, this will not normally be a factor that weighs in favour of the applicants”: *Shallow* at para 9.

[20] Although exceptional, meaning must still be given to the establishment factor. In deciding whether an applicant's degree of establishment may warrant positive H&C considerations, factors that may be taken into account include employment history, volunteer and integration in the community, civic record, and educational upgrading.

[21] In the present case, the Officer concluded that the applicants' “engagement in society is remarkable” and that the relations they had formed with their community were significant. However, despite this conclusion the Officer did not weigh the establishment factor in the applicants' favour, and instead dismissed the factor on the basis that community involvement also may occur in Haiti. This is not a proper application of the establishment factor.

[22] The Officer also concluded that there was little evidence to suggest that the male applicant will not be able to work and support his family in Haiti. As a result, little weight was assigned to this factor. The Officer also dismissed the applicants' involvement in their church

due to the fact that they were unable to show they would not be able to practice their faith in Haiti.

[23] Instead of assessing whether the applicants would be able to volunteer and attend church in Haiti, the Officer should have assessed the applicants' evidence of employment, volunteer work, and integration in their community *in Canada*. The Officer then should have considered whether this factor favours the application, is neutral, or weighs against the application.

[24] The analytical error here was also considered in *Sosi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1300. There, the officer had stated:

The applicants have demonstrated a very high level of establishment in Canada in a short period of time; however, while establishment is an important factor in assessing hardship it is not the only factor to be considered. The industriousness of this family also tends to demonstrate a high level of ability to re-integrate back into Kenyan society, especially when considering the prospect of them being reunited with their remaining children on their return. [emphasis added]

[25] The Court held this to be an unreasonableness analysis and at para 18 wrote:

In my opinion, the use of the conclusion that the applicants are well established in Canada is perverse because it takes the existence of a factor set out in IP 5 as a consideration militating towards granting humanitarian and compassionate relief and uses it to do just the opposite. Obviously, the proven establishment of the applicants in Canada should work in their favour because there is absolutely no way of knowing whether the personal abilities they used to create this establishment can be used in Kenya to accomplish the same thing.



[26] In other words, an analysis of the applicants' degree of establishment should not be based on whether or not they can carry on similar activities in Haiti. Under the analysis adopted, the more successful, enterprising and civic minded an applicant is while in Canada, the less likely it is that an application under section 25 will succeed. My colleague Justice Russel Zinn made the point well in *Sebbe v The Minister of Citizenship and Immigration*, 2012 FC 813 at para 21:

...However, what is required is an analysis and assessment of the degree of establishment of these applicants and how it weighs in favour of granting an exemption. The Officer must not merely discount what they have done by crediting the Canadian immigration and refugee system for having given them the time to do these things without giving credit for the initiatives they undertook. The Officer must also examine whether the disruption of that establishment weighs in favour of granting the exemption.

**C. *The Officer employed the wrong test when assessing the hardship of returning to Haiti***

[27] I turn next to the second error which was to import section 97 criteria into the H&C analysis.

[28] The applicants' submissions highlighted their fear of returning to Haiti where the female applicant was at risk of gendered violence and the children were at risk of generalized violence. The applicants also submitted that the recent earthquake and cholera outbreak would affect them.

[29] In the decision, the Officer concluded that the applicants have the choice to relocate outside of the Capital, Port-au-Prince, and that in any event, the applicants do not face a greater risk of kidnapping than the general Haitian population. The Officer also concluded that in respect of generalized country conditions in Haiti, the situation "affects most of the population without distinction and is therefore not peculiar to the applicants".

[30] This analysis confounds an analysis pursuant to section 97 with an H&C hardship analysis. In *Diabate v Canada (Minister of Citizenship and Immigration)*, 2013 FC 129, the officer had written that although country conditions were poor in the Ivory Coast, all citizens were affected similarly, and the applicant had not shown how he would be differently affected. In response to this line of reasoning, my colleague Justice Mary Gleason wrote at paras 33 and 36:

I agree with the applicant that such an interpretation of section 25 frustrates its purpose. As indicated, section 25 exists to provide relief from the provisions of other sections of the IRPA. To impose those requirements on an applicant seeking relief from them entirely frustrates the section and is thus an interpretation that the Act cannot reasonably bear. The officer imported a requirement of section 97 - that, to be eligible for protection, an individual must face a risk "not faced generally by other individuals in or from that country" - into her section 25 analysis. Such an interpretation strips section 25 of its function.

[...]

...It is both incorrect and unreasonable to require, as part of that analysis, that an applicant establish that the circumstances he or she will face are not generally faced by others in their country of origin. Rather, the frame of analysis for H&C consideration has to be that of the individual him or herself, which involves consideration of whether the hardship of leaving Canada and returning to the country of origin would be undue, undeserved or disproportionate.

[31] I agree with Justice Gleason's analysis and find it to be dispositive of this application. In the present case, the Officer made the same error. The Officer incorrectly and unreasonably required that the applicants establish that the hardship they would be exposed to in Haiti is not generally faced by other Haitians.

**D. *The Officer failed to assess the best interests of the children***

[32] The third error lies in the Officer's failure to assess the best interests of the applicant children. In my view, this issue comes down to whether it was sufficiently clear from the material submitted to the Officer that the application relied on the best interests of the child factor.

[33] The applicants submit that it was sufficiently clear that they intended to rely on the best interests of the child factor. They base this submission on the fact that the applicant and his wife have two children, aged 15 and 18 who were included in the application. Submissions with respect to the children were limited to the hardship of returning to Haiti, given the constant threat of kidnapping and various on-going human rights abuses against women and children. Further, both children wrote letters pleading with the Officer to approve the application. A letter from the female applicant's cousin was also submitted, and it explained the close relationship between the minor applicants.

[34] The applicants concede that the submissions on the best interests of the children were brief; however it was clear from the submissions and the letters that the best interests of the children were raised as a factor in the H&C application. In addition, the applicants point to the Officer's consideration in her decision of the minor applicants' fear of kidnapping as proof that the Officer knew this was an important factor that affected the children. The applicants submit that the Officer should have applied the proper best interests of the child analysis and taken into account the minor applicants' present situation in Canada as a starting point, and not their return to Haiti as the analytical starting point.

[35] In response, the respondent argues that it is the responsibility of the applicants to bring forward all relevant H&C considerations, including clearly identifying the best interests of the children.

[36] In considering an H&C application, an immigration officer must be “alert, alive and sensitive” to the best interests of children who may be adversely affected by removal from Canada: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

However, this duty “only arises when it is sufficiently clear from the material submitted to the decision-maker that an application relies on this factor, at least in part”: *Owusu* at para 5.

Submissions that are oblique, cursory and obscure do not impose a positive obligation on the Officer to inquire further about an issue relied on by the applicants: *Owusu v MCI*, 2004 FCA 38 at para 9. Further, an applicant “has the burden of adducing proof of any claim on which the H&C application relies” and therefore, “if an applicant provides no evidence to support the claim, the officer may conclude that it is baseless”: *Owusu* at para 5.

[37] In *Owusu*, the applicant argued that the immigration officer erred by failing to consider the best interests of his children. Mr. Owusu lived in Canada and financially supported his children, who lived in Ghana. The only reference to Mr. Owusu’s children in his H&C claim was a single sentence stating: “Should he be forced to return to Ghana [Mr. Owusu] will not have any ways to support his family financially and he will have to live every day of his life in constant fear”. The Federal Court of Appeal concluded that this reference was oblique, cursory and obscure.

[38] In my view, the present case is distinguishable. Admittedly, the submissions in regards to the best interests of the minor applicants were brief, however they were not “oblique, cursory and obscure”. Both applicant children submitted letters to the Officer, which were sufficient to trigger an analysis of the best interests of the children. For example, in Marcle’s letter, he wrote that “every time I hear that someone got kidnapped, I feel like I am awaiting my turn” and “I could not even sleep if my parents did not come back home on time because I was afraid something might have happened to them” . Marcle also wrote that “since I came to Canada I felt like this stress that I had before was lifted off my shoulders” and “please do me a favour, do not send me back to this terrible way of living”. Ludny expressed in her letter that “À l’école j’ai des amis” but “en Haïti, nous avons tout perdu: pas de parents, pas d’amis, pas de maison”. Further, Ludny wrote “et nous ne pourrions pas aller à l’école mon frère et moi si nous retournons en Haïti”.

[39] The Officer also failed to consider whether the children, at the critical ages of 15 and 18 would have access to education in Haiti. This critical consideration was unaddressed, as the Officer simply noted that since no representations were made the matter need not be considered. Further on in the decision, the Officer simply wrote that “at their young age, it is easy to adapt to a new school environment and to form new friendships”. This phrase, commonly applied by officers in assessing the interests of primary school children is, for anyone familiar with teenagers, of dubious application in the context of teenagers and high school.

[40] The Officer cannot, in respect of an issue of critical importance to the best interests of the children, such as education, shelter behind the failure of the applicants to make representations.

In this regard, I adopt the comments of Justice Zinn, who in *Sebbe* at para 13 wrote:

...However, officers are under a duty to consider children's best interests when conducting H&C determinations, when there is some evidence before them. Children are not separately represented in these proceedings and the role of the officer is akin to that of *parens patriae*...

[41] The Officer ought to have considered, in the particular circumstances of Haiti, the impact of returning the children of such an age to Haiti. Instead, the Officer dismissed any concern in this regard by simply stating that the children were young and could adapt. The adaptability of teenagers to changes in their environment is not the same as that of a young child.

**E. *The Officer failed to consider the implications of a temporary suspension of removals to Haiti***

[42] I turn to the fourth error in the decision, and that was with respect to the Officer's failure to consider the implications of the fact there was, and remains, a temporary suspension of removals to Haiti. This implies that the conditions are sufficiently dire or unstable that Canada will not removal nationals to that country.

[43] It is unclear, in my mind, how the Officer rationalized her conclusion that there would be no undue burden in applying from Haiti when Canada, by its own policy decision, has determined it is unsafe or unfair to return individuals to that very country. In this regard, I adopt the analysis of Justice Keith Boswell in *Maroukel v Canada (Citizenship and Immigration)*, 2015 FC 83 at para 32, in the context of a refused H&C application in respect of Syria:

In my view, it also was unreasonable for the Officer, on the one hand, to conclude that country conditions in Syria are “dangerous” and then, on the other, to ignore the direct negative impact such conditions would have upon the Applicants since it “is not comfortable for anyone who lives there”.

## **VI. Conclusion**

[44] As the Officer’s decision is both incorrect, in respect of the legal test, and unreasonable in respect of its application, the application is granted. The matter is sent back for re-determination by a different Immigration Officer, having these reasons in mind.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is granted.

The matter is remitted to a different Immigration Officer for re-determination. There is no question for certification.

"Donald J. Rennie"

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Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-5892-13

**STYLE OF CAUSE:** JEAN ANTHONY LAUTURE, MARIE MOSE  
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