Federal Court Cour fédérale

Date: 20150402

Docket: IMM-5649-13

Citation: 2015 FC 415

Ottawa, Ontario, April 2, 2015

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

JEANY ETIENNE
ROSE ETIENNE
HANNAH ETIENNE
JUDITH ETIENNE
SIMEON ETIENNE

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS

Respondent

and

CANADIAN ASSOCIATION OF REFUGEE
LAWYERS

Intervener

JUDGMENT AND REASONS

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act,* SC 2001, c 27, challenging a decision of a Canadian Border Services Agency enforcement officer refusing the applicants' request for a deferral of their removal.

[2] In addition to their request that this court quash the enforcement officer's decision, the applicants are seeking an order declaring that paragraph 112(2)(b.1) of the Act is unconstitutional and of no force or effect. That paragraph provides that unsuccessful refugee claimants, such as these applicants, are not eligible for a Pre-removal Risk Assessment [PRRA] for a 12-month period after their claims have been denied.

[3] Paragraph 112(2)(b.1) of the Act was determined by this court in *Peter v Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FC 1073 [*Peter*] to be constitutional on the facts before the court. The facts here are materially different.

[4] For the reasons that follow, I quash the decision of the enforcement officer; the constitutional issue does not arise.

Background

[5] The following description of the events leading to the Etienne family seeking Canada's protection and the basis for their deferral request are taken from documents in the record. Although the veracity of these facts has not been independently examined by any immigration authority, they are accepted as accurate for the purposes of this application.

Personal History

[6] The adult applicants, Jeany and Rose Etienne, are originally from Haiti. In 1995 they moved to the Turks and Caicos Islands where they had three children: Hannah, Judith and Simeon. The Turks and Caicos Islands are a British Overseas Territory and as such is under the jurisdiction and sovereignty of the United Kingdom, but does not form part of it.

[7] Mr. Etienne worked as a court interpreter. He first experienced problems in 2000 when he worked on a criminal trial where the accused, a native of the Turks and Caicos Islands, was convicted of raping a Haitian woman in his employ. As the accused was led from the courtroom, he threatened to have his Haitian victim and Mr. Etienne killed. As Mr. Etienne left the courthouse, supporters of the convicted man angrily shouted that they would send him back where he belonged.

[8] Following this trial, the Etienne family experienced a number of calamities that ultimately led them to seek refuge in Canada.

[9] In April 2000, there was a serious fire at their apartment and the building burned to the ground. Although the police took a statement from Mr. Etienne and told him there would be an investigation, nothing came of it. He was told by community members that he had been targeted because of his work at the court.

[10] In June 2003, Mr. Etienne received an anonymous phone call, threatening to kill and torture him and his family if they did not leave the country. He took the threat seriously and, in

an effort to protect his family, left his job at the courts. He worked in construction and provided part-time translation services to the police.

[11] In November 2010, the door handle of his car was broken, and when he was driving he noticed that the front driver's side wheel was wobbly. He discovered that all of its wheel bolts had been loosened. A week later the same happened to the other front wheel.

[12] Soon thereafter, the applicants' apartment was vandalised – there was human excrement covering the front of the apartment and racial slurs painted on the wall. Mr. Etienne contacted the police, but he was just told to clean it up.

[13] The Etienne children had problems in school at the hands of other students and their teachers. Simeon, the youngest child, suffered the most. The applicants allege that because of his Haitian background, Simeon was subjected to harsh treatment from his teachers who beat him, denied him access to the washroom, and prevented him from eating lunch. The other students ridiculed him and shouted racial slurs at him. Simeon started to have nightmares and developed a heart murmur. The school principal denied Judith (and some other Haitian students) permission to ride the school bus and Mr. Etienne had to pay someone to pick her up from school. There was an incident where Hannah accidentally drank water mixed with bleach that was intended to be used by the teacher to clean the blackboard. She required hospitalization and when Mr. Etienne and Hannah met with the principal, Hannah was accused of trying to hurt the school's reputation.

[14] On December 25, 2010, Mr. Etienne traveled to Canada to attend a conference. He planned to stay for two weeks. The next day, Ms. Etienne called and informed him that someone had attempted to break into their home the previous night. The intruder stopped when she yelled for help but said that "he was not done with her and that he would make sure we would go back to Haiti." Frightened, Ms. Etienne packed up the children and went to a town on another island. A friend offered to help pay for their flights to Canada.

[15] Ms. Etienne and the children arrived in Canada on December 27, 2010. The family applied for refugee protection in early January 2011, on the basis of persecution due to their Haitian ethnic origin.

[16] Simeon's issues continued after arriving in Canada - he suffered from nightmares and had behavioural problems, both at home and at school. After the decision was made on their refugee claims, Simeon was diagnosed with post-traumatic stress disorder and is undergoing treatment at the Children's Hospital of Eastern Ontario.

[17] The Refugee Protection Division of the Immigration and Refugee Board of Canada [RPD] rejected the applicants' refugee claims on September 4, 2012. The decision was based solely on the availability of an internal flight alternative [IFA] in London, United Kingdom [UK]. The RPD determined that, as citizens of a British Overseas Territory, the applicants have the right to live and work in the UK. The RPD did not assess the applicants' alleged risk to life or to cruel or unusual treatment or punishment in the Turks and Caicos Islands:

> The claimants were shown A/3, the [National Documentation Package] for the UK dated 15 June 2012. It includes at Tab 3.1 a

> [Response to Information Request] discussing the right of [British Overseas Territory] citizens except those associated with the Sovereign Base Areas – with which these claimants have no linkage. The claimants therefore have UK citizenship and can move there with no impediment.
>
> …
>
> The claimants are citizens of the UK. They have the right to live and work there now. No visa or anything else is required to go there. Based on that finding, London in the UK is an IFA location for these claimants.
> [emphasis added]

[18] The Response to Information request relied on by the RPD states:

> The right of abode entitles individuals to enter a country without permission from immigration officials of that country for the purpose of residence and employment without any restrictions (British High Commission 25 Feb. 2005). Information on the Website of the British High Commission, in Ottawa, provides that "[a]ll British citizens have the right of abode in the UK" (ibid.). Further, "British citizens from the Overseas Territories will ... be able to come to the UK for purposes of leisure, study and employment without gaining prior permission" (UK n.d.b).
> [emphasis added]

[19] On March 1, 2013, the applicants were notified that their removal was “imminent.” On March 6, 2013, they requested a deferral of removal until the end of July 2013, based on the risk to their lives in the Turks and Caicos Islands and Simeon’s mental health condition. The applicants provided a psychiatric report as evidence of the risk to Simeon if he returned to the Turks and Caicos Islands. The officer met with Mr. and Ms. Etienne on March 7, 2013, and agreed to defer the family’s removal until July 15, 2013, in order to allow the children to finish the school year and the parents to prepare themselves and their children for removal. It was

agreed that the applicants would provide the officer with an itinerary for their departure by mid-May 2013.

[20] On May 9, 2013, the applicants presented the officer with an itinerary to Manchester, UK. The officer indicated to them that they would have to return to the Turks and Caicos Islands, unless (notwithstanding the RPD's finding that they had a right to live and work in the UK), they could present documentation from the British authorities permitting them to be removed to the UK. The applicant's evidence, confirmed in the decision under review, is that the officer agreed to research the possibility of them being removed to the UK. It is unclear if that happened.

[21] The applicants made a second request on June 10, 2013, seeking an additional four month deferral. They noted that they feared returning to the Turks and Caicos Islands and that the children had suffered trauma in that country. They indicated that they needed more time to pay Simeon's hospital bills and to save money for their airfare and resettlement to the UK. The applicants' evidence is that they never received a response to this letter. The respondent contends that a response was sent on June 17, 2013, denying the request but extending the removal date to August 31, 2013. On the motion to stay the removal, a photocopy of such a letter was produced by the respondent; however, as was noted by the applicants, the photocopy of the envelope addressed to the applicants that was produced had no postage affixed to it.

[22] On August 8, 2013, the applicants were given notice of their impending removal. They were asked to "make all necessary arrangements and prepare [themselves] (including all [their]

children) for [their] departure from Canada with [an] anticipated removal date no sooner than August 24, 2013, and no later than August 30, 2013." Mr. Etienne requested a further extension on August 11, 2013, noting that they had not received any response from CBSA to the June deferral request. He reiterated that they wanted to move to London, in accordance with the IFA identified by the RPD, and not to the Turks and Caicos Islands.

[23] On August 12, 2013, the applicants were served with a direction to report for removal on August 31, 2013. Mr. Etienne wrote a letter to the enforcement officer's supervisor on August 13, 2013, requesting a written response to their last deferral request. They received a letter denying the request the same day.

[24] On August 19, 2013, the enforcement officer informed the applicants that they were subject to an enforceable removal order and it was not possible for them to be removed to the UK.

[25] The applicants retained counsel on August 23, 2013, in order to seek a stay of removal, pending an application for judicial review. Their counsel requested a deferral on August 26, 2013, indicating the applicants' imminent eligibility for a PRRA on September 4, 2013, and the best interests of the children (particularly Simeon). Their counsel wrote:

> The Applicants seek a deferral of their removal from Canada currently scheduled to be enforced on August 31, 2013, given that:
>
> 1. The Applicants' eligibility for a pre-removal risk assessment ('PRRA') is imminent <u>and the risk of harm to the Applicant and his family, and in particular, his son (Simeon Etienne) if returned to the Turks and Caicos Island [*sic*] (T&C) has not been assessed</u> (September 11, 2013). Considering the fragile mental health condition of Simeon at the present time it is in

> his best interest to be afforded a PRRA prior to being removed to the Turks and Caicos; [emphasis added]
>
> 2. The CBSA has failed to make travel arrangements to remove the Applicants to the United Kingdom, the Internal Flight Alternative identified in [*sic*] the Refugee Board Member.
>
> Given the risk of harm and unusual punishment to the family and particularly the irreparable harm to Simeon if removed to the Turks and Caicos Islands, and particularly considering the short-term best interest of their children, this Officer should defer the removal of the Applicants from Canada until such time as they have become PRRA eligible. The Applicants' premature removal without a PRRA assessment, and in the absence of consideration of the risk of irreparable harm by this officer, violates section 7 of the *Canadian Charter of Rights and Freedoms* and is not in accordance with the principles of fundamental justice, rendering it unconstitutional.

[26] The enforcement officer refused the applicants' request in his decision dated August 27, 2013. The enforcement officer noted the previous deferral requests that had been made by the applicants. Regarding the applicants' August 11, 2013, request to be removed to the UK, the enforcement officer noted:

> Clients asked to be removed to UK not Turks and Caicos. This was explained to the clients numerous occasions that Citizens of Turks and Caicos Islands may be able to reside, work and abode in United Kingdom but this may be subject to some conditions and restrictions specially when leaving Canada under a removal order. Clients were advised that they needed authorization from UK authorities if they wished to be removed from Canada to United Kingdom.

[27] The enforcement officer noted that the applicants made this same request again on August 19, 2013:

> On 19 August 2013, when Mr. and Ms. Etienne were asked if they had approached the UK authorities for permission to move and live in UK, they advised that dealing with the British High Commission

> in Ottawa or Toronto was too difficult and inconvenient for them and it required much of their time. It was further explained to the clients that they could leave for UK as soon as they would land in Turks and Caicos Islands on 31 August 2013 because they would not be under a removal order travelling from Turks and Caicos but clients suggested that it was too expensive and they did not have sufficient funds to purchase own ticket to UK and they had not prepared themselves to move to UK as of yet.

[28] The enforcement officer mentioned the applicants' concerns about the children's schooling and summer camps, their ability to pay for the airfare, and requiring time to give notice to their employers and landlords. There is no mention of Simeon's mental health condition or the alleged harm that might befall the applicants if they were returned to the Turks and Caicos Islands.

Procedural History

[29] On August 27, 2013, the applicants filed an application for leave and judicial review of the enforcement officer's negative deferral decision, and brought an urgent motion to stay their removal pending the outcome of the application.

[30] On August 30, 2013, I granted the motion noting that, as in *Suresh v Canada (Citizenship and Immigration)*, 2002 SCC 1 [*Suresh*], there had been no assessment of the applicants' alleged risk in the Turks and Caicos Islands and a *prima facie* case of risk had been established. In the brief endorsement, I indicated that "[a]lthough an officer is required to remove person as soon as 'possible', this must mean as soon as legally possible" and "[r]emoval in breach of the Charter is an illegal removal." I further found that the risk to Simeon in not granting the stay of removal was not speculative:

> Dr. Palframan, a Child and Family Psychiatrist with the Children's Hospital of Eastern Ontario wrote, after assessing Simeon, that 'a return to the Turks and Caicos would precipitate significant worsening of his posttraumatic stress disorder symptoms which are caused by his abusive treatment at his former address. [original emphasis]

[31] Following the stay of removal, the applicants were offered a PRRA on September 4, 2013.

[32] On June 20, 2012, the Etienne family filed an application for permanent residence on humanitarian and compassionate grounds [H&C application]. In the decision under review, the enforcement officer noted that he "explained to the clients that time frame for H&C application was up to 42 months which would mean decision for their application was not imminent." In fact, a negative decision was rendered on August 30, 2013, one day before their scheduled removal. That decision has been judicially reviewed by this court, and by Judgment dated October 6, 2014, was set aside by Justice Rennie because the officer had imported an elevated hardship test into his analysis of the best interests of the child: *Etienne v Canada (Minister of Citizenship and Immigration)*, 2014 FC 937.

[33] On February 19, 2014, the respondent brought a motion for judgment with respect to this application. The respondent admitted for the first time that the underlying decision was flawed because the best interests of Simeon had not been considered, and submitted that with this admission, there was no longer any live controversy between the parties:

> [T]he record does not show that the Enforcement Officer considered the best interests of the child when making his decision. As a result the decision is unreasonable and should be quashed.

[34] In response, the applicants maintained that the constitutionality of paragraph 112(2)(b.1) of the Act was a live issue "properly before this Court for consideration and adjudication." The respondent argued that this issue did not have to be decided in the present case, because it was before the Court in *Peter* and other applications that were to be heard together on December 13, 2013.

[35] I dismissed the respondent's motion for judgment on March 14, 2014, holding:

> I agree with the Applicants that the facts of those cases are quite different as none involve a risk of harm to a minor and, more importantly, none involve a situation where an applicant was being removed without any risk assessment whatsoever.
>
> Although that situation will never again arise for these Applicants, it may well arise for others. The Minister does not assert that the Court's determination of the constitutionality of paragraph 112(2)(b.1) in the cases now under consideration by this Court will also apply to that situation. Given the differing factual background, it cannot.

[36] On April 9, 2014, the court granted the Canadian Association of Refugee Lawyers [CARL] leave to intervene in the application, notwithstanding the respondent's opposition.

Issues

[37] The applicants submit that the following issues require determination:

1. Did the enforcement officer err in applying "as soon as possible" in subsection 48(2) of the Act, fettering his discretion and rendering a decision that violated the *Charter*, and
2. Is paragraph 112(2)(b.1) of the Act unconstitutional?

[38] The respondent submits that there is no need to address, nor should the court address, any constitutional question, as the application can be determined on pure administrative principles; namely, the enforcement officer's failure to consider the submission made regarding Simeon and whether his removal would expose him to inhumane treatment. The respondent further submits that the enforcement officer's error did not arise because of the PRRA bar in paragraph 112(2)(b.1) of the Act, and therefore no issue is raised as to its proper interpretation. Rather, the respondent submits it was the specifics of the removal arrangements, in light of the RPD's IFA finding, combined with the failure to address the best needs of the child, which led to the decision under review.

[39] The intervener restricted its submission to the second issue identified by the applicants.

[40] *Peter* was decided after the parties filed their written submissions. The court permitted the parties to file further and additional submissions.

Analysis

[41] I agree with the applicants that the factual matrix that underlies *Peter* differs from that before the court on this application. In *Peter* and its companion cases, the applicants had a risk assessment and that was certainly a relevant factor in the court's assessment of the constitutionality of paragraph 112(2)(b.1) of the Act. Here, as noted above, there had been no assessment of the risk to the Etienne family in returning to the Turks and Caicos Islands, either that identified in their original claims for protection, or the risk to Simeon that was discovered after the RPD decision.

[42] Nevertheless, I agree with the Minister that there is no need for the court on this application to engage in an analysis of the constitutionality of paragraph 112(2)(b.1) of the Act because it was not that provision that was the direct cause of the Etienne family not having their risk assessed prior to removal; rather, it was the decision of the enforcement officer not to defer their removal. Notwithstanding that the timing of the removal and refusal to defer may suggest that the respondent was anxious to remove the Etienne family before they became eligible for a PRRA, there is no evidence on which such a conclusion can be reached. Accordingly, the decision under review had nothing to do with the PRRA bar.

[43] I agree with the Minister that the enforcement officer failed to address the submissions and evidence presented as to the impact on Simeon of removal to the Turks and Caicos Islands, and that this error is a basis for granting the application. I note that the respondent did not concede this until six months after the decision at issue, well after it had opposed a motion to stay the removal, and leave to judicially review the decision.

[44] On the other hand, I do not accept the Minister's submission that because this application can be determined on the basis that the enforcement officer failed to properly consider the child's best interests, the decision should be set aside on this basis alone without considering any other issue. If the court were to adopt that position, it would do a disservice to these applicants and their counsel who, with limited financial means, have presented full submissions on each occasion they have been before the court. Moreover, and perhaps more importantly, it would do a disservice to future applicants who find themselves in a situation similar to the Etienne family, i.e. where they are facing removal without having had their allegation of risk assessed.

[45] For the reasons that follow, it is my view that the enforcement officer, in addition to failing to consider the risk to Simeon, failed to consider the risk the Etienne family had first raised when they sought protection, and further failed to focus his attention on the fact that the alleged risk in the Turks and Caicos Islands, the location to which he was removing them, had never been assessed.

[46] The Federal Court of Appeal in *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 [*Baron*], affirmed that "an enforcement officer's discretion to defer removal is limited." The court accepted the observation of Justice Pelletier in *Wang v Canada (Minister of Citizenship and Immigration),* 2001 FCT 148 [*Wang*] at para 32 that "aside from questions of travel arrangements and fitness to travel, the execution of the order can only be affected by some other process occurring within the framework of the Act since the Minister has no authority to refuse to execute the order." The Federal Court of Appeal endorsed the conclusion of Justice Pelletier at para 48 that "deferral should be reserved for those applications or processes where the failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment" [emphasis added]. As he noted, "the consequences of removal in those circumstances cannot be made good by readmitting the person to the country."

[47] The Federal Court of Appeal in *Canada (Minister of Public Safety and Emergency Preparedness) v Shapati*, 2011 FCA 286 [*Shapati*], had another opportunity to consider when deferral of removal may be appropriate. Mr. Shapati asked the enforcement officer to defer his removal pending his application for judicial review of a negative PRRA decision. The refusal to defer was based on the fact that Mr. Shapati had "produced no evidence of some new (that is,

post-PRRA) risk." From this the Federal Court of Appeal inferred "that if Mr. Shapati had such evidence, the officer would have considered whether it warranted deferral and exercised his discretion accordingly." The court observed that such a position was consistent with the position expressed in *Baron* and "is an accurate statement of the law."

[48] Following the release of *Shapati*, CBSA issued Operational Bulletin: PRG-2014-22 entitled *Procedures relating to an officer's consideration of new allegations of risk at the deferral of removal stage*. The respondent noted that the Operational Bulletin gives an enforcement officer broader discretion to defer removal than described in *Shapati*. The relevant portion of the Operational Bulletin reads as follows:

> In the case of Shapati, the FCA confirmed that deferral should be reserved for those applications where:
>
> - Failure to defer removal will expose the applicant to the risk of death, extreme sanction or inhumane treatment;
> - Any risk relied upon must have arisen since the last Pre-removal Risk Assessment (PRRA) (or since the last risk assessment); and
> - The alleged risk is of serious personal harm.
>
> Note that while this case law provides important guidance, officers nevertheless retain discretion to defer removal in cases where these three elements are not strictly met. For example, new evidence may substantiate an allegation of risk that was previously considered. Similarly, evidence that pre-dates the last risk assessment may arise for which there are reasons it was not presented before the last risk assessment. [emphasis added]

The Operational Bulletin directs that an enforcement officer is not to conduct a full assessment of the alleged risk, nor come to a conclusion on whether the person is at risk. Rather, the enforcement officer is to "consider/assess the evidence submitted" and if the enforcement officer decides to defer removal, he or she is directed to write to the applicant advising that the removal

has been temporarily deferred, that the file will be brought to the attention of Citizenship and Immigration Canada for possible consideration under section 25.1 of the Act (exempting the applicant from the Act's requirements or obligation on humanitarian and compassionate grounds), and that the applicant will be further advised.

[49] There was a previous assessment of risk in *Peter* and the other decisions referred to by the respondent. As a consequence, they all speak to the enforcement officer assessing "whether there is sufficient new probative evidence of the applicant's exposure to a risk of death, extreme sanction, or inhumane treatment:" *Peter* at para 254 [emphasis added]. Here, other than perhaps the psychiatrist's letter regarding Simeon, it appears that the Etienne family offered the enforcement officer no "new" evidence as that term was described by the Federal Court of Appeal in *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385. Rather, they offered exactly the same evidence of risk that they had presented to the RPD. The respondent conceded this his oral submission.

[50] Although the Operational Bulletin provides that enforcement officers have discretion to grant a deferral in circumstances other than were considered in *Shapati*, neither of the examples it offers where that discretion may be exercised, describe the situation in which the Etienne family found itself.

[51] The respondent submitted an affidavit from the person whose duties include responsibility for overseeing the respondent's removals program and providing guidance to enforcement officers. His statement hardly provides the assurance this court requires that

persons who advance a credible risk allegation that has not been previously assessed, will be granted a deferral in order that it be assessed. He deposes as follows:

> As a general matter, I can say that it is usual and expected practice that when an individual is convoked for removal by an enforcement officer, and that individual asks for a deferral of removal, alleging that they will face a risk against the country to which they are potentially being removed, it is incumbent on the individual to provide some substantiation for that allegation and if they do, it is part of the officer's due diligence to determine whether that is new and whether it has been previously been assessed. Part of this due diligence may consist of reviewing the existing tribunal decisions on file such as the RPD decision.
>
> If the risk has not been previously assessed by a previous decision-maker and removal to that country is being pursued, the usual and expected practice is for the officer to consider a deferral of removal if the allegations rise to the level that would meet the test set out by the jurisprudence. [emphasis added]

[52] In this case, the respondent had determined that it would not remove the Etienne family to the UK - the IFA found by the RPD. Whether that was possible is not a question for the court. Instead, the respondent decided to remove the Etienne family to the Turks and Caicos Islands, a place where they had claimed that they were at risk. The allegations of risk they advanced were neither frivolous nor insignificant. It was no answer for the respondent to say, as the enforcement officer did, "that they could leave for UK as soon as they land in Turks and Caicos Islands on 31 August 2013 because they would not be under a removal order travelling from Turks and Caicos." It is no answer to their risk allegations because, as they told the enforcement officer, they did not have the financial means to leave for the UK as soon as they landed. A location is only an IFA if it is possible for the person to reach the location, and he or she is willing to do so: *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC

706, [1991] FCJ 1256 (CA). Here, although the family members clearly expressed their willingness to relocate to the UK, they did not have the financial means to do so.

[53] Once the enforcement officer decided that the Etienne family would not be removed to the identified IFA but would be removed to their country of origin, the enforcement officer was required to turn his mind to the allegation of risk raised by them in their claims for protection. In the words of Justice Pelletier in *Wang*: the enforcement officer had to consider whether "the failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment in circumstances where deferral might result in the order becoming inoperative." In this case, either a positive PRRA or H&C application would have rendered the removal order inoperative. The enforcement officer was required to turn his mind to the evidence presented, to consider and assess it, and if it showed that the Etienne family might be at risk in the Turks and Caicos Islands, then he was required to defer removal in order that the risk could be assessed.

[54] The risk the enforcement officer must consider is not restricted to a "new" risk in the sense that it arose after a refugee determination or other process. Risks that the enforcement officer is also required to consider include risks that have never been assessed by a competent body. In addition to this situation of the Etienne family, where the RPD did no assessment of the alleged risk because it found that there was an IFA, this would also include a circumstance where the RPD did no risk assessment because it found that the claimant had failed to establish his or her identity.

[55] For these reasons, I conclude that the enforcement officer erred in failing to consider the new risk to Simeon and also erred in failing to consider the old but and unassessed risk to the Etienne family in the Turks and Caicos Islands.

[56] I agree with the respondent that in light of the changed circumstances (the H&C application and PRRA) there is no merit in sending the deferral request back for reconsideration. The appropriate remedy is to grant the application for the reasons set out herein.

[57] The applicants proposed that the court certify a question directed to the constitutionality of the 12 month PRRA bar in paragraph 112(2)(b.1) of the Act. In light of the findings made, that question would not be determinative of an appeal from this judgment, and accordingly, it cannot be certified.

[58] The court expresses its sincere appreciation to all counsel for their thoughtful and thorough written and oral submissions. They were invaluable.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is allowed; the decision of the enforcement officer refusing to defer the removal of the applicants to the Turks and Caicos Islands is quashed because he failed to consider the evidence of a new risk to the child, and because he failed to consider the evidence of a pre-existing and unassessed risk to the Etienne family; and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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