Federal Court  Cour fédérale

Date: 20160722

Docket: IMM-5072-15

Citation: 2016 FC 851

Ottawa, Ontario, July 22, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

SARAH MARGARET ESTEPHANE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application brought by the Applicant, Ms. Sarah Margaret Estephane, seeking judicial review of a decision dated October 13, 2015 by the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada, dismissing the Applicant's appeal of a refusal by a visa officer at the Canadian Embassy in Port of Spain to issue the Applicant's husband a permanent resident visa.

[2] For the reasons that follow, this application is dismissed.

I. Background

[3] Ms. Estephane is a Canadian citizen who is married to Willie Estephane, a citizen of St. Lucia. In 2002, before he met the Applicant, Mr. Estephane entered Canada under the name Mitchel Estephane using a temporary visitor visa. He overstayed this visa and then filed a claim for refugee protection which was denied. He was removed from Canada to St. Lucia on a deemed deportation order in November 2005. Due to the nature of this removal, he required an Authorization to Return to Canada [ARC] in order to return.

[4] While in St. Lucia, Mr. Estephane changed his name to Willie Estephane, obtained a passport in this name, and travelled to Canada in May 2008 without first obtaining an ARC. He failed to disclose to immigration authorities that he had previously been issued a deportation order and was issued a temporary resident visa, allowing him to remain in Canada for a maximum of six months, but did not leave at the end of this period.

[5] The Applicant met Mr. Estephane in 2009, they began living together in July 2010, and married in Canada in October 2010. Mr. Estephane left Canada for St. Lucia in December 2010 and submitted an application for a permanent resident visa in January 2011 under the spousal sponsorship of Ms. Estephane. The couple's daughter Kayla was born in Canada in February 2012. Mr. Estephane applied for an ARC in August 2013, which was denied, as a result of which his application for permanent residence was refused. Ms. Estephane appealed this refusal to the IAD, and the IAD's dismissal of this appeal is the subject of this judicial review.

II. Impugned Decision

[6] The IAD accepted that the Estephanes' marriage was genuine but also found that an ARC was required in order for Mr. Estephane to return to Canada. The IAD noted that the granting of an ARC is a is a highly discretionary decision made by a delegate of the Minister of Citizenship and Immigration and that it did not have jurisdiction to consider the legal validity of the decision denying the ARC, such decision being subject to challenge only by judicial review in the Federal Court. Rather, the jurisdiction available to the IAD was to consider special relief related to the refusal of the permanent resident visa. The IAD therefore reviewed the humanitarian and compassionate [H&C] considerations raised by Ms. Estephane pursuant to the its jurisdiction under section 67(1)(c) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[7] The IAD noted Ms. Estephane's claim that Kayla experiences delays in speech as a result of her father's absence and suffers from hives caused by this absence and the stress of travelling to St. Lucia. She argued that she and Kayla would be forced to travel to St. Lucia to reunite with Mr. Estephane but testified as to adverse country conditions there, which would preclude moving to live with him on a full time basis. She also referred to the severe financial situation she experienced from supporting both her and her husband's households and reported debts in excess of $7000.

[8] The IAD considered Ms. Estephane's testimony but noted that she entered into the relationship with Mr. Estephane and subsequently conceived a child with the full knowledge that her husband was in Canada illegally and may not be granted status to live in Canada. It also

noted that Ms. Estephane has resources available in the community in Canada to care for herself and her daughter, that she is gainfully employed, that Kayla is enrolled in a daycare, and that there was no evidence that she cannot juggle her employment and care for Kayla. There was also a lack of evidence that Mr. Estephane would be better off in Canada, as there was insufficient evidence of employment opportunities for him. The IAD found there was no persuasive or corroborating evidence of her Kayla's alleged speech and health impairments and, given the absence of persuasive medical evidence, found it was speculative for Ms. Estephane to state that these health problems were caused by stress and the absence of Kayla's father.

[9] On the subject of country conditions, the IAD stated there was no persuasive evidence of the conditions described by Ms. Estephane and accordingly gave no weight to such conditions.

[10] The IAD was not persuaded by Ms. Estephane 's evidence about potential hardship she or Kayla would experience if separation from her husband continued. She and Kayla enjoyed family support in Canada and could visit her husband in St. Lucia. With respect to financial hardship, the IAD questioned why Mr. Estephane was not making greater efforts to support himself and his child. While the IAD acknowledged there may be some financial hardship, it noted there was no documentary evidence to substantiate her debt and that any debt was a result of her choice to marry someone without any guarantee he could gain status to live in Canada.

[11] Considering hardship to Mr. Estephane, the IAD observed that he continued to live in the country of his birth, near his family including a minor son from a previous relationship. He was visited by his Canadian family at least annually, and they speak at least daily. The IAD expressed

the view that family reunification alone is not a sufficient ground on which to grant special relief and that Mr. Estephane 's dislocation from his family was a result of his actions and lack of respect for immigration laws.

[12] The IAD noted that the best interests of two children were engaged, being Kayla and Mr. Estephane's son from a previous relationship who lives in St. Lucia with his mother. The IAD observed that the best interests of a child was only one of many factors to be considered and that typically the best interests of a child are always to have both parents present in their lives, noting that, in this instance, Kayla lives with Ms. Estephane as her primary caregiver.

[13] The IAD referred again to the argument about Kayla 's developmental delays but found that the only medical documentation submitted was not particularly helpful in assessing any impact upon her as a result of separation from her father. The IAD also considered the best interests of Mr. Estephane's son whom he saw on a somewhat regular basis. Moving to Canada would result in loss of this contact. The IAD concluded that the competing best interests of the children offset each other and held that this factor therefore did not weigh in favour of the appeal being allowed.

[14] The IAD concluded that Ms. Estephane had failed to meet her onus to establish that, taking into account the best interests of a child directly affected by the decision, sufficient H&C considerations warranted special relief. The appeal was therefore dismissed.

III. Issues and Standard of Review

[15] As explained in greater detail below, Ms. Estephane was represented by counsel before the IAD and argues as an issue in this judicial review that the incompetence of her former counsel resulted in a denial of procedural fairness or natural justice. She also argues that the IAD failed to conduct a reasonable best interests of the child assessment.

[16] The parties agree that the question whether there was a denial of procedural fairness or natural justice is reviewed on a standard of correctness but that the question whether Ms. Estephane's counsel's conduct fell within the acceptable range is reviewed on a standard of reasonableness. The parties also agree that a standard of reasonableness applies to the IAD's consideration of the best interests of the child. I concur with these positions.

IV. Analysis

A. *Incompetence of Counsel*

[17] In support of her argument that she has been denied procedural fairness, Ms. Estephane filed an affidavit detailing her interaction with the law firm Niren & Associates, including Ms. Subuhi Siddiqui who represented her at the IAD hearing. She alleges the following incompetence or negligence on the part of that firm:

A. Her file was transferred among several lawyers, and she did not have a substantive meeting with a lawyer until she met with Ms. Siddiqui 5 days before her hearing;

B. Her counsel provided no direction as to the sort of documentation that Ms. Estephane should compile to support her appeal;

C. Her counsel did not contact or prepare Mr. Estephane prior to the IAD hearing;

D. Her counsel did not adequately prepare her for the hearing.

[18] In accordance with the Procedural Protocol dated March 7, 2014 issued by the Federal Court, Ms. Estephane's current counsel placed Niren & Associates on notice of her intention to allege negligence on their part as a ground in her judicial review. Ms. Siddiqui responded by letter to the Court dated December 10, 2015, supported by an affidavit of a legal assistant employed by Niren & Associates who attended the meeting with Ms. Estephane in the days before the hearing. Ms. Siddiqui denies any negligence on her part or on the part of her firm.

[19] Ms. Siddiqui's response states that a lawyer from Niren & Associates did meet with Ms. Estephane and provided her guidance on essential documentation in the months following the firm's retention in 2013. In the month prior to the July 6, 2015 hearing, Ms. Siddiqui also arranged a meeting between Ms. Estephane and a legal assistant to review and discuss documentation, which documentation was subsequently filed with the IAD. Ms. Siddiqui says that she then met with Ms. Estephane on July 2, 2015 to prepare her for the hearing, that she prepared her with mock questions, and that it was Ms. Estephane's decision to prepare Mr. Estephane for the hearing herself.

[20] With respect to the issue of Kayla's verbal development, Ms. Siddiqui says that this issue came to light only during the July 2 meeting and that she then asked Ms. Estephane to provide medical evidence on this issue.

[21] The Court is therefore presented with conflicting evidence of the events surrounding some of the allegations. However, it is not necessary to resolve these conflicts, as my decision on this ground of judicial review turns on whether there has been a miscarriage of justice resulting from the alleged incompetence. The full test applicable to an allegation of procedural fairness arising from incompetent representation was set out as follows by Justice Annis at paragraph 16 of *Yang v. Canada (Citizenship and Immigration)*, 2015 FC 1189 [*Yang*]:

> In order to succeed on the basis of a procedural fairness violation resulting from incompetent representation, the Applicant must meet the requirements of the following tripartite test:
>
> > 1. The representative's alleged acts or omissions constituted incompetence;
> >
> > 2. There was a miscarriage of justice in the sense that, but for the alleged conduct, there is a reasonable probability that the result of the original hearing would have been different; and
> >
> > 3. The representative be given notice and a reasonable opportunity to respond. See: *Guadron v Canada (Citizenship and Immigration)*, 2014 FC 1092 at para 11; *Pathinathar v Canada (Citizenship and Immigration)*, 2013 FC 1225 at para 25; and *Zdraviak v Canada (Citizenship and Immigration)*, 2013 FC 640 at para 25.

[22] The Supreme Court of Canada has observed that, if it is appropriate to dispose of an ineffectiveness claim on the ground of no prejudice having occurred, that is the course to follow (see *R. v G.B.D.* [2000] 1 S.C.R. 520 at para 29).

[23] I note that, while Ms. Estephane relied on the above articulation of the second branch of the test (i.e. that, but for the alleged conduct, there is a reasonable probability that the result of the original hearing would have been different), the Respondent pointed out that there is some authority for the second branch instead being whether the applicant can establish a fairly arguable case that the result would have been different (see *Thamotharampillai v Canada (Minister of Citizenship and Immigration)*, 388 F.T.R. 95). In *Srignanavel v Canada (Minister of Citizenship and Immigration)*, 2015 FC 584, Justice Brown considered both versions of the test and concluded that the correct test depends on the fault involved. That case involved a clerical or inadvertent error, which Justice Brown considered to militate in favour of a requirement only to show a fairly arguable case.

[24] The Respondent argued that neither test would be met on the facts of the case at hand. While that may be so, this is not a case involving a clerical or inadvertent error, and I have applied the reasonable probability test.

[25] I cannot conclude that there is a reasonable probability that, but for the alleged incompetence of counsel, the result of the IAD's decision would have been different. In support of her position on this branch of the test, Ms. Estephane focuses on the references in the IAD's decision to the lack of documentary and persuasive evidence and notes the documentation,

attached to Ms. Estephane's affidavit filed in this judicial review, that she says would have been provided to the IAD if she had received competent representation. However, I do not find that there is a reasonable probability this evidence would have resulted in a positive decision by the IAD. I would summarize this evidence, and analyze its impact, as follows:

> *(1) Documentation intended to support Ms. Estephane's argument as to the impact separation from her father is having upon Kayla, including hives and impaired speech development*

[26] This documentation includes medical articles, a letter from Ms. Estephane's sister, reports from home care and cay care, and a doctor's referral to a child psychologist. Ms. Estephane argues that this documentation would have affected the IAD's decision, because the IAD expressly notes that the evidence before it made no reference to Kayla's health or speech impairments.

[27] However, the IAD's findings are based on the lack of any medical evidence of Kayla's health problems being caused by stress and the absence of her father. I do not read any of the new documentary evidence as expressing a link between Kayla's separation from her father and her medical conditions. The medical articles Ms. Estephane attaches to her affidavit refer to a variety of causes of hives, one of which can be anxiety or stress. However, this does not represent evidence that the hives that Kayla in particular is experiencing are caused by stress. I cannot conclude that there is a reasonable probability that any of this evidence would have changed the decision.

(2) Documentation intended to support Ms. Estephane's argument as to her financial hardship resulting from her separation from Mr. Estephane

[28] This documentation does support Ms. Estephane's allegations of financial hardship, including the debt she has accumulated. However, the IAD's decision, while noting that there was no documentary evidence to substantiate her debt, acknowledged that there may be some financial hardship from supporting two homes but found that any debt was a result of Ms. Estephane's decision to marry Mr. Estephane without any guarantee he could obtain status to stay in Canada. Based on the IAD's reasons, I cannot conclude that there is a reasonable probability that better documentary support for the financial hardship would have changed its decision.

(3) Documentary evidence about country conditions in St.Lucia

[29] Ms. Estephane correctly points out that her former counsel had urged the IAD to take judicial notice of country conditions in St. Lucia, which it refused to do. As a result, the IAD gave no weight to what it described as the subjective negative country conditions described by Ms. Estephane. The decision refers to Ms. Estephane citing, based on her personal experience, conditions in St. Lucia (including poor health, water quality and education, high unemployment, and lack of employment opportunities in her field) as reasons why she cannot move herself or Kayla to live in St. Lucia. However, as the IAD's decision does not appear to be in any way premised on a conclusion that Ms. Estephane and Kayla can move to St Lucia, I cannot conclude that there is a reasonable probability that country condition documentation would have changed the decision.

(4) Evidence of an employment opportunity for Mr. Estephane

[30] The new documentary evidence includes a letter dated December 4, 2015 from Prototype Design Lab Inc., advising that it was prepared to employ Mr. Estephane on a full time basis once he landed in Canada. However, as noted by the Respondent, there is no evidence that this employment opportunity had been identified at the time of the hearing.

[31] In conclusion on this issue, Ms. Estephane has, with the assistance of her new counsel, assembled additional documentary evidence that was not before the IAD. However, consideration of the IAD's reasons for its decision does not support a conclusion that there is a reasonable probability that this evidence would have changed the decision. Therefore, regardless of whether her representation by her previous counsel can be characterized as meeting the threshold of incompetence, Ms. Estephane cannot succeed on this ground of judicial review.

B. *Analysis of Best Interests of the Child*

[32] Ms. Estephane argues that the IAD's best interests of the child analysis is flawed and contrary to the recent guidance of the Supreme Court of Canada in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*]. She submits that the analysis was perfunctory and imported a harm assessment, which *Kanthasamy* held to be a reviewable error.

[33] The IAD's decision is divided into various sections with headings, one of which is "Best interests of a child". The language in the decision that employs the terms "hardship" and "harm"

is found in other sections. However, the IAD's analysis of the impact on Kayla of separation from her father extends to other sections of the decision. In my view the decision must be reviewed as a whole to assess whether the IAD has approached its best interests of the child analysis in a manner that contravenes the guidance in *Kanthasamy* and therefore represents a reviewable error.

[34] *Kanthasamy* explains at para 41 that, because children will rarely, if ever, be deserving of any hardship, the concept of "unusual and undeserved hardship", as expressed in the Guidelines which the Supreme Court was addressing in that decision, is presumptively inapplicable to the assessment of hardship invoked by a child. However, I do not read this jurisprudence as prohibiting consideration of hardship that a child may face as a result of the circumstances under consideration. Indeed, it is often such hardship that is argued by an applicant to support a particular result being in the best interests of a child. As noted by Justice Zinn at para 17 of *Sebbe v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 813, it is not a reviewable error to use hardship language with respect to children. Rather, *Kanthasamy* prohibits employing the threshold of "unusual and undeserved hardship" in considering the best interest of a child, i.e. requiring demonstration that the hardship imposed upon a child reaches a particular level.

[35] Reading the IAD's decision as a whole, I find that it did not err in its use of the concepts of "hardship" and "harm". The IAD states that it is not persuaded by the evidence about any potential hardship or harm Kayla will experience as a result of separation from her father and that such hardship or harm to children resulting from physical separation from a parent must be proven and not presumed. This represents a finding on the sufficiency of evidence establishing

the effect on Kayla of separation from her father as argued by Ms. Estephane, not a suggestion that such effect must meet any particular threshold of harm or hardship.

[36] Ms. Estephane also argues that the IAD erred in failing to assess Kayla's best interests using the three-step analysis prescribed by Justice Russell in *Williams v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 166 [*Williams*]. This analysis involves first assessing what is in the child's best interests, second assessing the degree to which the child's best interests are compromised by one potential decision over another, and third determining the weight that this factor should play in the ultimate balancing of positive and negative factors being assessed in the application.

[37] It has been held that the analysis prescribed by *Williams* is an articulation of one of many approaches to the best interests of the child analysis and that an officer is not required to follow a particular formula (see *Diaz v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 373 at para 30). Regardless, even if the IAD were obliged to adhere to *Williams*, I regard the substance of the IAD's analysis to be consistent with that approach.

[38] While the IAD did not expressly follow the three-step process, I read its decision as addressing each of these steps. The IAD finds that the best interests of Kayla favour having Mr. Estephane in Canada and the best interests of his son favour having Mr. Estephane living near him in St. Lucia. This is apparent from the IAD's finding that the best interests of the two children offset each other. The IAD also considers the potential impact upon Kalya's interests from separation from her father, focusing on the developmental delays argued by Ms. Estephane

to result from this separation, although finding a lack of evidence to support this argument. The IAD then concludes its best interests of the child analysis by finding that the interests of one child offset that of the other, such that this factor does not weigh in favour of the appeal being allowed.

[39] Ms. Estephane argues that the IAD's analysis is flawed in treating Kayla's interests and those of her half-brother in St.Lucia as an equation, effectively canceling each other out. While I would consider it insensitive to treat children as terms in a mathematical equation, I do not read the IAD's reasons as doing so. Rather, the IAD identifies that there are two children affected by the decision and that their interests favour different results, such that the best interests of the children become a neutral factor. Ms. Estephane argues that Kayla's interests are affected more significantly by geographic separation from her father than are those of her half-brother, because he does not reside with his father in St. Lucia. However, this represents a disagreement with the IAD's weighing of this factor, which I do not consider to be a basis for the Court to interfere with the IAD's decision.

[40] I find the IAD's decision on the best interests of the children to be within the range of acceptable outcomes.

[41] Ms. Estephane has proposed for certification as a question of general importance the following question which has been certified in other matters:

> In the best interests of the child analysis, is an officer required first to explicitly establish what the child's best interests are, and then to establish the degree to which the child's interest are compromised by one potential decision over another, in order to

> show that the officer has been alive, alert and sensitive to the best inserts of the child?

[42] Effectively, this question raises whether the *Williams* approach is mandatory. The Respondent opposes certification, arguing that the case law is clear that there is no requirement to follow a particular formula. Ms. Estephane is correct that this question has been certified in other cases (see *Celise v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 642 and *Bermudez v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 1270. However, I decline to do so in the present case, as the proposed question would not be dispositive of an appeal, given my conclusion that the IAD's analysis was consistent with *Williams*.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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