Federal Court Cour fédérale

Date: 20190528

Docket: IMM-1646-18

Citation: 2019 FC 748

Ottawa, Ontario, May 28, 2019

PRESENT: Mr. Justice Pentney

BETWEEN:

EDVARD FRANCOIS
WATSON FRANCOIS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Context

[1] Edvard Francois is a citizen of Haiti, who has applied for permanent residence in Canada. He has also applied for humanitarian and compassionate (H&C) relief so that he can sponsor Watson Francois, whom he has treated as his son for his entire life, as a *de facto* dependent. This case turns on whether the decision to deny this relief is reasonable. For the reasons that follow, I find that it is not, and therefore I am granting this application for judicial review.

[2] Watson Francois was born in Haiti in 2000. His mother lived in the same town as Edvard Francois, and they had a brief relationship. When Watson was born, his mother told Edvard that he was the father, and ever since Edvard has treated Watson as his son. From the age of three, Watson lived with Edvard and his family in Port-au-Prince, Haiti. Since that time Watson has had no contact with his mother.

[3] In 2008, Edvard left Haiti for the United States. He left Watson in the care of his mother and older sister. Watson lived with them until they passed away in 2013 and 2014. Since then he has lived with a friend of Edvard, and Edvard has transferred money to her every month to take care of Watson's expenses.

[4] Edvard made a refugee claim in Canada in October 2008, which was refused. He has continued to live in Canada, and is now married to a Canadian citizen. Edvard has several children in Canada, two of whom live with their mother in Windsor, Ontario, and two of whom live with him and his wife in Ottawa.

[5] Edvard applied for permanent residence, and included Watson in his application as an accompanying dependent. He included a birth certificate for Watson. The Respondent had concerns about the birth certificate and requested that Edvard provide DNA proof that he is Watson's father. The DNA test results showed, to the surprise of both Applicants, that Edvard was not, in fact, Watson's father.

[6] The Respondent sent a procedural fairness letter to Edvard, asking him to explain the situation. Based on that explanation, the Respondent did not find that Edvard had intentionally

misrepresented the relationship and so he was not inadmissible under s. 40(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *Act*]. Edvard then requested that Watson be processed as his *de facto* dependent, on H&C grounds under s. 25 of the *Act*. Section 25 gives the Minister of Citizenship and Immigration the discretion to exempt a foreign national from the ordinary requirements of the statute if the Minister is of the opinion that such relief is justified by H&C considerations, which include the best interests of the child (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 10 [*Kanthasamy*].

[7] This request was denied twice. The first decision was reversed on consent between the parties, because the decision-maker had not conducted the proper analysis. When the application was re-considered, the request for exceptional relief under s. 25 was again denied, for reasons which are explained in more detail below. This is an application for judicial review of the second decision denying H&C relief.

II. Issue and Standard of Review

[8] The issue in this case is whether the decision to deny H&C relief under s. 25 of the *Act* is reasonable, and in particular whether the decision should be overturned because of the inadequacy of the analysis of the best interests of the child, and the conclusions based on speculation.

[9] Reasonableness review "is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome" (*Canada (Attorney General) v Igloo Vikski Inc*, 2016 SCC 38 at para 18). This involves an examination of justification, transparency, and intelligibility in the decision-making process, and whether the decision falls

within a range of acceptable outcomes that are defensible in fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

III. Analysis

[10] The Applicants submit that the Officer's decision is unreasonable because: (i) the best interests of the child analysis was inadequate, in particular in failing to consider the interests of the Canadian children of Edvard, and in giving undue emphasis to the *status quo* rather than considering the alternative of Watson moving to Canada to be reunited with his father and brothers and sisters; and (ii) it is based on speculation about key evidence that the Officer relies on to justify the refusal.

A. *Best Interests of the Child Analysis*

[11] H&C relief under s. 25 is discretionary and exceptional. It is a decision deserving of deference from a court on an application for judicial review (*Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4). This is equally true of an H&C decision involving a consideration of the best interests of a child. The jurisprudence is clear that officers are to treat seriously the interests of any minor child affected by the decision. In the language of the Supreme Court of Canada in *Kanthasamy*, these interests are a "singularly significant focus and perspective," and they must be "well identified and defined" and examined "with a great deal of attention" in light of all of the evidence (paras 39-40). At all times, the officer must be "alert, alive and sensitive" to the best interests of the child, and this cannot simply be stated in the decision, it must be demonstrated in the reasoning (paras 38-39).

[12] The Applicant's argument on this issue is that the reasons of the decision-maker are not sufficient. Much has been written about adequacy of reasons, and a recurring question is the extent to which a reviewing court can look to the record to gain a better understanding of the reasoning process of the decision-maker, and thereby "supplement" the reasons provided in support of the decision: see, for example: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61; *Delta Airlines Inc v Lukacs*, 2018 SCC 2. For a useful summary of the recent principles, see *Canada (Citizenship and Immigration) v Adeola*, 2018 FC 1222 at paras. 32-34. It is not necessary to review this in more detail, since I find that this case turns on specific errors which relate to a particular aspect of this doctrine.

[13] Both parties submit that the best interests of the child analysis cannot be reduced to a set of "magic words." I agree. Rather than simply reciting a formula, the jurisprudence requires that the officer demonstrate that he or she applied the correct legal test, and engaged with the specific facts relevant to the best interests of this particular child, in these particular circumstances. This engagement must entail some consideration of the most relevant and important facts of each case. Otherwise it may be simply impossible to know whether or how the decision-maker took these facts into account in reaching the decision.

[14] Officers may take useful guidance from the elements listed in the *IP5 Operational Guidelines*, section 5.19, which indicate that "factors relating to a child's emotional, social, cultural and physical welfare should be taken into account…" (see *Kolosovs v Canada (Citizenship and Immigration)*, 2008 FC 165).

[15] The analysis must also involve a consideration that goes beyond the *status quo* and considers the best interests of the child on the basis of the situation that will follow a denial of the application, as well as a consideration of the child's life if the application is granted (*Valenzuela v Canada (Citizenship and Immigration)*, 2016 FC 603 at para 24 [*Valenzuela*]; *Kobita v Canada (Citizenship and Immigration)*, 2012 FC 1479 at para 52).

[16] In summary, what is required is the opposite of "boilerplate" language or the use of "magic words." Although refugee decision-makers must address a high volume of cases, and there is every reason to try to do so as quickly as is reasonably possible, the jurisprudence is clear that where the best interest of the child are involved in an H&C decision, the decision-maker must demonstrate that they took care to focus on the particular circumstances of the individual child or children affected (*Kanthasamy*), and at the least the essentials of the factual context must be reflected in the decision.

[17] I find that the Officer's decision falls short of this in three main respects: (i) the analysis does not consider the interests of Watson and his *de facto* brothers and sisters in Canada, (ii) it is focused almost entirely on the *status quo*, and (iii) it draws unjustified conclusions regarding the failure of Edvard to take steps to legally adopt Watson in Haiti after the discovery that they were not father and son.

[18] It is trite law that the interests of all of the children directly affected by a decision must be considered (*Weng v Canada (Citizenship and Immigration)*, 2014 FC 778 at para 32). The decision in this case, however, does not contain any meaningful analysis of the best interests of Watson or his siblings in being together in Canada, rather the entire emphasis is on the ways in

which they can continue a long-distance relationship if Watson remains in Haiti. The Officer states that "the applicant and the applicant's other children can continue visiting Watson in Haiti as they have done in the past to maintain the relationship they have developed so far." There is no mention of the evidence of the steps Edvard and his wife have taken to prepare for Watson's arrival, their plans to support him in pursuing higher education, or the ways in which Watson and his siblings would benefit from living in closer proximity.

[19] Further, while the Officer examines the ways in which Edvard and Watson can continue their long-distance relationship if the application for H&C relief is denied, there is no indication that the Officer considered the "other side of the coin" (*per* Justice Alan Diner in *Valenzuela*, at para 24), by reviewing how Watson's situation would be improved if he was able to come to live with his father and family in Canada.

[20] The Officer accepts that Edvard and Watson have a *bona fide* relationship of support, and that Edvard has maintained a parental relationship from a distance. The Officer further notes that Watson has, in fact, lived the majority of his life with only the financial and long-distance support of Edvard and not the physical presence of his father in his daily life. At the time of the decision Watson was almost 18-years old, and as the Officer observed, "he has effectively grown up without the applicant and has been able to adapt to the impacts that the separation may have caused." All of these observations fairly reflect the evidence in the record.

[21] What I find is missing, however, is any reference to other equally important facts. The evidence is that Watson had lived with his grandmother and aunt since 2008, but that they had both passed away in 2012 and 2014. The primary familial support he had depended on in Haiti

was gone by the time of the H&C decision, and Watson was living with a friend of Edvard's, who had indicated that she could no longer look after Watson. These are surely crucial factors in assessing Watson's best interests, but there is no mention or analysis of them in the decision.

[22] This leads to the third issue with the best interests of the child analysis. The Officer notes at several points in the decision that upon learning of the results of the DNA test, Edvard took no steps to adopt Watson. The relevance of this is not entirely clear from the decision but it is evident that the Officer weighs this as a negative factor against the granting of H&C relief. I find this to be unreasonable in the particular circumstances of this case.

[23] Edvard had thought Watson was his son for his entire life, and the evidence is clear that he had worked to maintain a parental relationship with him. When Edvard learned that Watson was not, in fact, his son, he nevertheless continued in his efforts to sponsor him to come to Canada and to live with his family as his son. There is no indication in the record that Edvard was advised by any official that he should take steps to adopt Watson; instead he opted to pursue the legal avenue open to him under the *Act*, by seeking H&C relief on the basis that Watson was his *de facto* son. In the circumstances, it is not reasonable to fault Edvard for not interrupting the entire process to pursue an adoption process in Haiti, especially as he was listed as Watson's father on his birth certificate and thus is already his legal parent in Haiti.

[24] In conclusion on this point, I would adopt the following passage from Justice René LeBlanc in a case involving somewhat similar facts, *Louissaint v Canada (Citizenship and Immigration)*, 2018 FC 1077 at para 27:

> In summary, although the power exercised by the agent in this case was highly discretionary, he did not, in my view, make the rigorous examination required by the case law when the best interests of the child are at stake. I therefore believe that his decision should be vacated and the matter referred back to another officer for redetermination.

B. *Speculation about key evidence*

[25] The Applicants argue that the decision is unreasonable because the Officer engaged in speculation about key elements of the evidence. I agree. Two examples make the point.

[26] The Officer rejects the Applicants' submission that Watson had no family remaining in Haiti. The Officer noted that Edvard had only provided information about four of his five living siblings, and then continued: "No information has been provided to indicate that members of his extended family are not still in Haiti and could not provide family support to the child." There is no evidence that Edvard had any extended family in Haiti, and once again I would observe that this statement is not complete, in the sense that there is no mention that the immediate family with whom Watson had lived for many years, his grandmother and aunt, were both deceased.

[27] I find it more troubling that the Officer would make the following statement in considering the available opportunities for Watson to pursue his life in Haiti: "Additionally, if the child chooses to do so, he could explore a potential relationship with his mother." Recall the facts here: since the age of three, Watson has lived with his father, then his father's family, and most recently with a friend of his father. There is no evidence that he has had any contact with his mother throughout his life, although they have both been living in Haiti. The evidence is that Watson's last (and only) contact with his mother was quite recent, when he visited her so that she

could sign a form indicating that she consented to him being sponsored by Edvard to come to Canada, a form which she did in fact sign. There is no evidence that the mother has sought to have or establish any relationship with Watson. It is unreasonable to find that a child could somehow re-establish a relationship with a mother who has not had any part in his life, nor sought out any opportunity to develop a relationship with her son, since the age of three. It is not reasonable to expect that she would somehow become a major support in his life now.

IV. Conclusion

[28] For these reasons, I find the decision to deny the application for H&C relief to be unreasonable. The decision is set aside, and the matter is remitted back to the Respondent for re-consideration by a different officer.

[29] The parties did not propose any question of general importance for certification, and I find that none arises in this case.

JUDGMENT in IMM-1646-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The matter is remitted back for re-consideration by a different officer.

2. There is no question of general importance to certify.

"William F. Pentney"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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