Federal Court Cour fédérale

Date: 20200204

Docket: IMM-2921-19

Citation: 2020 FC 190

Ottawa, Ontario, February 4, 2020

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

WIDLENE ALEXIS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

UPON HEARING this application for judicial review at Vancouver, British Columbia on Wednesday, January 13, 2020;

AND UPON hearing counsel for the parties and reviewing the materials filed;

AND UPON reserving this decision;

AND UPON determining that the application be allowed for the following reasons:

[1] Widlene Alexis is a fourteen-year-old minor currently living in the Dominican Republic and who, for a decade, has been in the *de facto* care of Vaden Earle. Mr. Earle is a Canadian citizen. For ten years he has attempted without success to bring Widlene to Canada under the authority of a Temporary Resident Permit (TRP). On two occasions he applied for a TRP and both times it was refused. It is the most recent refusal made on April 12, 2019 that is challenged on this application.

[2] For a number of years Mr. Earle pursued the idea of adopting Widlene. Widlene's mother was deceased but her biological Haitian father was apparently alive. This, among other issues, including doubts about Widlene's nationality, created barriers to adoption and, by the time the underlying application for a TRP was made on December 16, 2017, Mr. Earle had abandoned any idea of adoption. In a letter written on his behalf, it was said that a TRP was required "because [Widlene] does NOT qualify for sponsorship because we cannot obtain an adoption order from any country. Widlene was born in a country that will not recognize her birth citizenship [the Dominican Republic], and there are circumstances outside of the families [*sic*] control which effectively disqualify her from being adopted through the country of her ancestry [Haiti]": see Application Record pp. 158-172.

[3] Mr. Earle's application for a TRP relied substantially on humanitarian and compassionate considerations and included reference to the Supreme Court of Canada decision in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909. The TRP application

stated that Widlene was then 12 years old. She looked upon the Earles as her parents and she was dependent on them for her care. She was said to have no ties to Haiti and no secure status to remain in the Dominican Republic. Her biological father was unknown to her and had never been a presence in her life. Her biological grandmother and older sister were supportive of the application and Widlene's move to Canada. Widlene's access to education in the Dominican Republic was precarious because she had no secure right of residency in that country. The application for relief summed up her situation in the following way:

> Whether Widlene has a claim to Haitian citizenship or not, there is compelling evidence to suggest that repatriating her to Haiti would significantly and negatively impact her social/emotional development, and sever the ties to any and all family Widlene has ever known. Remaining in Dominican Republic will equally have negative impacts as the fear of deportation weighs heavily on children living there. The only security Widlene finds is with her de facto parents and their safety is substantially compromised whether they are in Dominican Republic or Haiti.
>
> Widlene is asking that Minister Hussen acknowledge her rights to safety and security; to acknowledge the inhumane conditions and human rights abuses well documented in Dominican Republic and Haiti, particularly in border camps which have been created as a direct result of racist laws in Dominican Republic.
>
> Widlene is asking the Minister to acknowledge her many years spent waiting for an adoption to be complete in spite of the fact that, from her perspective, an adoption will not in anyway impact her sense of family. It matters very little to Widlene that their family was advised by a Canadian adoption service provider and a lawyer in Haiti that this adoption was not possible. They are a family.
>
> The Earle's are asking for support from Canada in their personal commitment to their daughter, to help them uphold her rights and freedoms, and to give her a nation where there is no confusion as to whether she is a member of Canadian society or not.
>
> Widlene Alexis Earle is the exception to the rule. She is deserving of protection because of her gender and her race. Yet she fits no immigration category, making her particular set of circumstances extremely unique and worthy of Ministerial intervention. Her

> parents and biological family have done everything within their legal means to secure her future. They now need Canada's support.

[4] Notwithstanding the compelling nature of the case for issuing a TRP, Mr. Earle's application was refused for the following reasons:

> After a careful and sympathetic review of the application, including an assessment of humanitarian and compassionate considerations and the best interest of the child and all information subject in support of this application as well as your previous application for a Temporary Resident Permit and for citizenship under the provisions of the Citizenship Act I regret to inform you that the application is refused.
>
> A Temporary Resident Permit is issued in exceptional circumstances to allow entry to Canada of persons who fail to meet one or more requirement of the Immigration and Refugee Protection Act. I have determined that the issuance of a Temporary Resident Permit is not justified in the circumstances. This decision is based on the following reasons:
>
> - In the documentation submitted in support of your application it was submitted that, as a person born in the Dominican Republic of a Haitian mother, who no legal status, and an unknown father that you are stateless. Documents submitted in support of your citizenship application, included a birth certificate issued in 2006 and Haitian passport issued in 2009, listing Dumolex Alexis as you biological father. IRCC verified with Haitian authorities in October 2017 and again in August 2018 that both these documents are genuine. This means that you are a Haitian citizen and that your biological father has parental rights and would have to consent your adoption.
>
> - The documentation submitted in support of the application indicates that there is no longer a valid home study with the Province of Ontario. This would be required for a valid adoption.
>
> - The documentation submitted indicates that the Province of Ontario indicates that it lacks the

> jurisdiction to issue a no objection letter regarding your adoption.
>
> - I am not satisfied that the guardianship agreement signed by your grandmother is legally valid based on the following reasons.
>   - The document was prepared in English by Haitian Notary and signed in the Dominican Republic. It is highly usual that a third language that is not understood by your grandmother would be used.
>   - The document acknowledging the translation signed by your grandmother show a mark of three crosses whereas normal procedure for someone who cannot sign is to use a thumbprint.
>   - The document does not appear to have be registered with any court to make it a legal document.
> - I have examined your application for humanitarian and compassionate considerations, taking into account the best interest of the child. Based on an examination of all the documents on the file and information provided there does not appear to be sufficient grounds to warrant approval.
>
> As a result, I am refusing your application for a Temporary Resident Permit.

[5] The Officer's notes to file include further details about her assessment of the humanitarian and compassionate aspects of Widlene's request for relief. Summarized below are the primary issues she considered and her related findings:

(a) Insufficient evidence had been adduced to prove Widlene was an "orphan" or "stateless".

(b) There was no consensus that Widlene can be adopted. She also had a biological father noted on her Haitian birth certificate and he "could have" potential parental rights.

(c) Widlene looked upon the Earles as her parents and Mr. Earle's current partner as a stepmother.

(d) Widlene had no *de facto* connection to Haiti. In the Dominican Republic she had limited access to an education because her residency status there was tenuous.

(e) Widlene's older sister and grandmother had ceded custody to the Earles.

(f) The details of the proposed care and custody of Widlene in Canada were unclear.

(g) The Earles had provided no evidence about their efforts since 2012 to adopt or formalize their parental rights. The possibility of adopting Widlene from Haiti remained an option, thus opening up other legal routes for Widlene to come to Canada.

(h) Widlene wanted to live in Canada with the Earles and had had the opportunity to make her views known in accordance with Article 12 of the *Hague Convention of the Rights of the Child*.

(i) The known risks in the Dominican Republic of trafficking and sexual violence were of little concern because Widlene could avail herself of the protection of Haiti, or, alternatively, of other family members including her grandmother, sister or her father who "may still be living in the [*sic*] Haiti".

[6] It is common ground that this application be reviewed under the standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] SCJ No 65 (QL) [*Vavilov*]. According to the *Vavilov* decision, reasonableness must be based on the quality of the reasons given by a decision-maker as measured by justification, transparency and intelligibility [para 81]. Among other factors, the Court said that a reasonable decision is one that is internally coherent and justified by appropriate attention to the evidentiary

record. Conversely, when there are serious flaws in overarching logic, where reasons fail to reveal a rational chain of analysis, or where reasoning is circular, presents false dilemmas, unfounded generalisations or an absurd premise, the decision may be set aside [paras 102-104].

[7] The Officer's justifications for refusing a TRP for Widlene are, in the main, incoherent or profoundly inconsistent with the presented evidence. Indeed, the Officer's decision is mostly rooted in concerns about technical impediments to adoption and about the documentary formalities for establishing legal guardianship. In contrast, the Officer almost entirely ignored Widlene's personal circumstances. Nowhere in the Officer's analysis is there any consideration of the benefits to Widlene of enjoying a stable and loving family life in Canada in contrast to the instability, risks and deprivations she has faced and would likely face in either the Dominican Republic or Haiti. Indeed, if she was deported to Haiti, she would almost certainly be separated from Mr. Earle with no equivalent source of protection.

[8] The idea that her biological father might one day show up and that his rights ought to prevail over Widlene's wishes and interests has no historical foundation. The fact that he had apparently abandoned Widlene since birth detracts from any serious concern about his "rights", particularly in the face of the love and care that the Earles have in fact provided to her since 2009. Moreover, unlike an adoption, there was no reason to think that issuing a TRP to Widlene would interfere with the hypothetical interests of an absent and unknown father.

[9] The Officer's legalistic concerns about the form of the guardianship documents the Earles had submitted provided no sound basis for ignoring the stated wishes of Widlene's grandmother

and sister. Both were in favour of the Earles' *de facto* guardianship, a status that had existed for ten years. Widlene's grandmother also swore an affidavit to that effect before a Canadian consulate official in support of the TRP application.

[10] The Officer's belief that Widlene was neither an "orphan" nor "stateless" is of minimal significance. On the record presented, she was a *de facto* orphan if she left the care of the Earles. The fact that she may have been a citizen of Haiti did not dissipate the concern that, without the care of the Earles, she would be at substantial risk in that country and in the Dominican Republic. The fact that, until the Earles came along, Widlene was living in poverty should have been a significant concern. Instead, that fact was effectively ignored.

[11] The Officer's fixation with the possibility of adoption is perplexing. No reasonable assessment of this record would lead to the conclusion that adoption was a viable option in this case. Indeed, the application for a TRP was expressly based on the Earles' inability to perfect a Haitian adoption as a means of entry to Canada: see p. 167 of the Applicant's Record.

[12] The Officer's concerns about the supposed lack of details about the arrangements for Widlene's care in Canada and the role of her stepmother were of minimal significance. What the Officer needed to consider was the fact that the Earles had, since 2009, provided love and support to Widlene in the Dominican Republic. There was, on the record, no reasonable basis for thinking that what had been generously done by the Earles for a decade would somehow evaporate upon a return to Canada. This concern is a "straw man" of the first order.

[13] Although the Supreme Court of Canada decision in *Kanthasamy* was cited to the Officer, it is apparent she did not read it. According to that decision, the best interests of a child are decided by "what … appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention" [para 36]. Those interests are to be examined with a great deal of attention in light of all the evidence [para 39]. This means that attention to factors relating to a child's emotional, social, cultural and physical well-being must be taken into account. Parsing up such a review into discrete elements and focussing on technicalities and documentary formalities does not remotely conform to the recognized obligations found in the jurisprudence. Like the *Kanthasamy* case, nowhere in the Officer's assessment is consideration given to the effect of Widlene's possible separation from the Earle family or to the fact that without a TRP, the family was effectively being exiled to the Dominican Republic. Mr. Earle finds himself caught between the responsibility of looking after Widlene in the Dominican Republic or returning to Canada without her. To his immense credit, he and his current and former spouses, have done the responsible thing; since 2009 they have provided ongoing care for Widlene. Mr. Earle wants to bring Widlene to Canada and she wants that, too. The time has assuredly come for someone to take a holistic and full-fledged humanitarian and compassionate review focussed on Widlene's circumstances and needs. Technicalities and formalities may be relevant to that assessment but they decidedly must not be at the heart of it.

[14] While I accept the Minister's point that the authority to issue a TRP on behalf of children living in impoverished circumstances must be constrained, Widlene's situation is exceptional. For ten years she has been in the care of a Canadian family among whom strong bonds have

formed. There are no realistic options for this family but to stay put in the Dominican Republic, or to allow them to all to live in Canada.

[15] For the foregoing reasons, this decision is set aside. The matter is to be re-determined on the merits and in accordance with these reasons by a different decision-maker.

[16] Neither party proposed a certified question and no issue of general importance arises on this record.

JUDGMENT in IMM-2921-19

THIS COURT'S JUDGMENT is that this application is allowed with the matter to be re-determined on the merits in accordance with these reasons by a different decision-maker

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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