

Date: 20080623

Docket: IMM-4869-07

Citation: 2008 FC 790

Ottawa, Ontario, June 23rd, 2008

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

JACQUELINE ANNEMARIE LEWIS

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Jacqueline Annemarie Lewis came to Canada in 1992 from Jamaica. She has made various attempts to obtain permanent residence in Canada over the years, but has not succeeded. She again failed in her latest effort to obtain an exemption, based on humanitarian and compassionate grounds, from the requirement that an application for permanent residence be made from outside Canada.

[2] Ms. Lewis argues that the officer who considered her request for humanitarian and compassionate relief (H & C) erred in her treatment of the issue of the best interests of her seven-year-old, Canadian-born son Matthew. In particular, she submits that the officer focussed entirely

on the degree of hardship that Matthew would suffer if he left Canada with her so that she could apply for re-entry from Jamaica. Instead, she suggests, the officer should have determined where Matthew's best interests lay and then assessed the degree to which those interests would be compromised by his removal from Canada.

[3] While I agree that the officer's approach could cause problems in other circumstances, I cannot find any basis for overturning the officer's decision on the facts before me. Therefore, I must dismiss this application for judicial review.

I. Issue

[4] Did the officer conduct a reasonable analysis of the best interests of the child?

II. Analysis

[5] I can overturn the officer's decision only if I find that it was unreasonable : *Ahmad v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 646, [2008] F.C.J. No. 814 (QL), at para. 11.

[6] Ms. Lewis concedes that the officer did not overlook or misconstrue any of the evidence relating to her son's circumstances. Rather, she argues that the officer applied the wrong approach. The officer stated:

Based on all of the information before me, I do not find that if Matthew were to accompany the applicant on her removal to Jamaica that it would amount to unusual and undeserved or disproportionate hardship that would justify an exemption based on H & C considerations.

[7] Ms. Lewis submits that the officer erred by failing to compare the hardship that Matthew would endure by leaving Canada with the scenario that would actually serve his best interests. She suggests that the proper approach is the one put forward by Justice John Evans in *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2002] F.C.J. 1687 (QL). There, Justice Evans had faulted the officer for not defining the child's best interests at the time of the decision and then comparing the hardship of removal against that backdrop.

[8] However, the majority in *Hawthorne*, in reasons authored by Justice Robert Décary (Justice Marshall Rothstein concurring), believed that an analysis of the child's best interests will often be "somewhat artificial" because the child will almost always be better off staying in Canada with his or her parent. As Justice Décary stated:

For all practical purposes, the officer's task is to determine, in the circumstances of each case, the likely degree of hardship to the child caused by the removal of the parent and to weigh this degree of hardship together with other factors, including public policy considerations, that militate in favour of or against the removal of the parent.

[9] Based on this approach, I can find no error in the officer's assessment of Matthew's best interests. The officer properly considered the impact that removal to Jamaica would have on him.

[10] Ms. Lewis also argued that the officer should not have discounted the hardship Matthew would suffer simply because it could not be described as “unusual and undeserved or disproportionate”. She suggests that the effect on him should have formed an important part of the overall analysis of the H & C factors, even if it could not be characterized by those adjectives.

[11] Here, I believe Ms. Lewis has a good point. The case law instructs us that the best interests of children must be “well identified and defined” (*Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] F.C.J. No. 457 (F.C.A.)(QL), at para. 12), form an important factor, and be given substantial weight in H & C applications (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817). To my mind, it is not only “unusual and undeserved or disproportionate hardships” that matter. Any hardship that a child would suffer should be taken into account in determining whether there are humanitarian and compassionate grounds justifying an exemption. One can easily see that an analysis that focussed only on hardships that were “unusual and undeserved or disproportionate” would risk leaving out significant factors relating to a child’s best interests. As Justice Décaré noted in *Hawthorne*, above, the terms “disproportionate”, “unusual” and “undeserved” may be ill-suited to a description of a child’s suffering (particularly “undeserved”).

[12] However, in the case before me, I am satisfied that the officer’s consideration of Matthew’s best interests was consistent with the obligation to be “alert, alive and sensitive” to the relevant factors and that the officer’s use of the words “unusual and undeserved or disproportionate” did not

result in a failure to take adequate account of those factors.

[13] Accordingly, I find that the officer's analysis was reasonable and I must, therefore, dismiss this application for judicial review. Given that this conclusion is mandated by the judgment of the Federal Court of Appeal in *Hawthorne*, above, no question of general importance arises for certification.

JUDGMENT

THIS COURT'S JUDGMENT IS that

1. The application for judicial review is dismissed.
2. No question of general importance is stated.

“James W. O’Reilly”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-4869-07

STYLE OF CAUSE: JACQUELINE ANNMARIE LEWIS v. MCI

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: June 10, 2008

**REASONS FOR ORDER
AND ORDER:** O'Reilly J.

DATED: June 23, 2008

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