Date: 20081023

Docket: IMM-1070-08

Citation: 2008 FC 1190

Toronto, Ontario, October 23, 2008

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

CHERRY-ANN AGATHA GUADELOUPE,
ZIMRON DESRON KERON GUADELOUPE,
ZOMORIA FEMISHA KAYON GUADELOUPE

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of an Immigration Officer (Officer) of the Department of Citizenship and Immigration Canada (CIC or the Department), dated February 15, 2008 (Decision) refusing the Applicants' in-land application for permanent residence based on humanitarian and compassionate (H & C) grounds under section 25 of the Act.

BACKGROUND

[2] Cherry-Ann Agatha Guadeloupe (Principal Applicant) is a citizen of both St. Vincent and Grenada which are located in the South Eastern Caribbean. She attended school in St. Vincent until she became pregnant at the age of 16 and started work as a sales clerk in St. Vincent. Her son Zimron, who was born in St. Vincent, is now in grade 12 in Canada. She had her second child, a daughter named Zomoria, in 1998 in St. Vincent. Zomoria is now in grade 4 in Canada. The Principal Applicant came to Canada in September 1999 with her daughter Zomoria.

[3] The Principal Applicant and Zomoria returned home to St. Vincent in March 2000 after the Principal Applicant's mother passed away. They returned to Canada in May 2001. After their return, they spent two months in Toronto and then moved to Montreal, returning to Toronto in January 2002 because of difficulties encountered in trying to enrol Zomoria in school in Montreal. The Principal Applicant's son, Zimron, joined them in Canada in July 2002.

[4] After her return to Toronto in January 2002, the Principal Applicant began an intimate relationship with Mr. Keith Walters who is a mechanic. They had a daughter, Zonaya Walters Guadeloupe, on June 14, 2005, and the Principal Applicant and her children moved in with Mr. Walters shortly thereafter. The Principal Applicant claims her common-law spouse said he would sponsor her. They met with a lawyer who advised them of the documents and forms to file for sponsorship. However, the sponsorship papers were never filed.

[5] The family moved into a new home in Etobicoke, Ontario in November 2006 and later that year Mr. Walters went to visit family in Jamaica over the Christmas holidays. Upon his return, the Principal Applicant says he began to abuse her verbally, physically and psychologically.

[6] The Principal Applicant says that this abuse included calling her “slut,” threatening to call immigration authorities on her and the children, threatening her life, biting her arm, cutting her hand with a screwdriver, pulling a knife on her, and sexually assaulting her in the room she shared with her two young daughters. The Principal Applicant claims she did not call the police because of her lack of status and her fears that her family would be removed. The Principal Applicant and her common-law spouse began to sleep in separate rooms.

[7] The Principal Applicant alleges that Mr. Walters began seeing other women and again threatened her with calling immigration authorities if she made a fuss. The Principal Applicant says she began receiving help from a cousin with whom she and her children went to live in October 2007. Mr. Walters still sees their daughter, Zonaya, regularly.

[8] The Principal Applicant works as a self-employed cleaner in Toronto and Zimron has also begun working part-time. The children have no ties or connections to St. Vincent, and do not wish to reside there. The Principal Applicant has not received social assistance during her time in Canada. She attends church regularly. She has also developed a social network of friends and considers Canada to be her home.

[9] The oldest child, Zimron, has completed the majority of his education in Canada, while the middle daughter, Zomoria, has completed all of her schooling in Canada. Both children have obtained numerous awards and are active in their schools.

[10] On November 29, 2007 the Principal Applicant submitted an application for permanent residence for herself and her two eldest children, Zimron and Zomoria, based on humanitarian and compassionate grounds, with an emphasis on the family violence section (13.10) of the Inland Processing Manual dealing with *Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds* (IP-5).

[11] On February 20, 2008, the Applicants received a negative Decision on their application.

DECISION UNDER REVIEW

[12] The Officer produced a refusal letter and a Humanitarian and Compassionate Narrative Report dated February 15, 2008, which concluded that the Principal Applicant's children would have the benefit of the care and protection of their mother and would not face any unusual, undeserved or disproportionate hardship if they were required to leave Canada with the Principal Applicant. The Officer also concluded that the Applicants could apply for permanent resident visas and/or student visas at the visa office in the normal manner.

[13] The Officer found that the Principal Applicant had not provided any proof of income or support. The Officer reasoned that, since the Principal Applicant had left St. Vincent as an adult, she would be familiar with life in St. Vincent and could return and re-establish herself there. The Officer was not satisfied that the Principal Applicant and her children were sufficiently established in Canada, and noted that they had traveled to and from St. Vincent more then once prior to their last entry into Canada.

ISSUE

[14] The single issue raised by the Applicants is:

> **Did the Officer err in law by failing to conduct an adequate analysis of the best interests of the Principal Applicant's children?**

STAUTORY PROVISIONS

[15] The following provisions of the Act are applicable in these proceedings:

Application before entering Canada	**Visa et documents**
11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document shall be issued if, following an examination, the officer is satisfied that the	**11. (1)** L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement, lesquels sont délivrés sur preuve, à la suite d'un contrôle, qu'il n'est pas interdit de territoire et se

foreign national is not inadmissible and meets the requirements of this Act.	conforme à la présente loi.
Humanitarian and compassionate considerations	**Séjour pour motif d'ordre humanitaire**
25. (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	**25. (1)** Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

STANDARD OF REVIEW

[16] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review" (*Dunsmuir* at para. 44). Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[17] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[18] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 61, the Supreme Court of Canada held that the standard of review applicable to an officer's decision of whether or not to grant an exemption based on humanitarian and compassionate considerations was reasonableness *simpliciter*. A long line of cases has since applied that standard. Thus, in light of the Supreme Court of Canada's decisions in *Baker* and *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to the issue in the present case to be reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para. 47). Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*ibid).*

ARGUMENTS

The Applicants

[19] The Applicants submit that the Officer failed to conduct an adequate analysis of the best interests of the children. They say the Officer only dedicated one paragraph to the analysis of this issue. The Applicants rely upon sections 5.19, 12.2, 12.4 and 12.10 of Chapter 5 in IP-5, which read as follows:

> **5.19. Best interests of the child**
>
> The *Immigration and Refugee Protection Act* introduces a statutory obligation to take into account the best interests of a child who is directly affected by a decision under A25(1), when examining the circumstances of a foreign national under this section. This codifies departmental practice into legislation, thus eliminating any doubt that the interests of a child will be taken into account.
>
> Officers must always be alert and sensitive to the interests of children when examining A25(1) requests. However, this obligation only arises when it is sufficiently clear from the material submitted to the decision-maker that an application relies, in whole or at least in part, on this factor. An applicant has the burden of proving the basis of their H&C claim. If an applicant provides insufficient evidence to support the claim, the officer may conclude that it is baseless. As with all H&C decisions, the officer has full discretion to decide the outcome of a case.
>
> It is important to note that the codification of the principle of **best interests of a child** into the legislation **does not mean** that the interests of the child outweigh all other factors in a case. The best interests of a child are one of many important factors that officers need to consider when making an H&C or public policy decision that directly affects a child.
>
> In reaching a decision on an H&C application, officers must consider the best interests of any child **directly affected** by the decision. “Any child directly affected” in this context could mean

either a Canadian or foreign-born child (and could include children outside of Canada).

The relationship between the applicant and "any child directly affected" need not necessarily be that of parent and child, but could be another relationship that is affected by the decision. For example, a grandparent could be the primary caregiver who is affected by the immigration decision, and the decision may thus affect the child.

The outcome of a decision under A25(1) that directly affects a child will always depend on the facts of the case. Officers must consider all evidence submitted by an applicant in relation to their A25(1) request. Thus, the following guidelines are not an exhaustive list of factors relating to children, nor are they necessarily determinative of the decision. Rather, they are meant as a guide to officers and illustrate the types of factors that are often present in A25(1) cases involving the best interests of the child. As stated by Madame Justice McLachlin of the Supreme Court of Canada, ". . . The multitude of factors that may impinge on the child's best interest make a measure of indeterminacy inevitable. A more precise test would risk sacrificing the child's best interests to expediency and certainty. . . ." (*Gordon v. Goertz*, [1996] 2 S.C.R. 27).

Generally, factors relating to a child's emotional, social, cultural and physical welfare should be taken into account, when raised. Some examples of factors that applicants may raise include:

• the age of the child;
• the level of dependency between the child and the H&C applicant;
• the degree of the child's establishment in Canada;
• the child's links to the country in relation to which the H&C decision is being considered;
• medical issues or special needs the child may have;
• the impact to the child's education;
• matters related to the child's gender.

The facts surrounding a decision under A25(1) may sometimes give rise to the issue of whether the decision would place a child directly affected in a situation of risk. This issue of risk may arise regardless of whether the child is a Canadian citizen or foreign-born. In such cases, it may be appropriate to refer to sections 13.1 to 13.6 of this chapter for further guidance.

12.2 Factors related to country of origin

Officers should consider the following factors:
• the links with the applicant's country of origin (e.g., amount of time resident in their country of origin, ability to speak language, return visits since arrival in Canada, family members remaining in the country of origin); and
• the links of family members to the applicant's country of origin, if applicable (e.g., amount of time spent in applicant's country of origin, ability to speak language of applicant's country of origin, other family members in applicant's country of origin).

12.4 Factors related to links with family members

• Officers should consider the following factors:
• what are the effective links with family members (children, spouse, parents, siblings, etc.) in terms of ongoing relationship as opposed to simple biological fact of relationship;
• where the applicant is residing in relation to the family members, particularly their children;
• if there has been any previous period of separation, what was the duration and the reason;
• if the applicant and their spouse are separated or divorced, was there a court order in relation to custody arrangements;

12.10 Separation of parents and children

The removal of an individual without status from Canada may have an impact on family members who do have the legal right to remain (i.e., permanent residents or Canadian citizens). Other than a spouse or partner, family members with legal status may include children, parents and siblings, among others. The lengthy separation of family members could create a hardship that may warrant a positive H&C decision.

In evaluating such cases, officers should balance the different and important interests at stake:

• Canada's interest (in light of the legislative objective to maintain and protect the health, safety and good order of Canadian society);
• family interests (in light of the legislative objective to facilitate family reunification);
• the circumstances of all the family members, with particular attention given to the interests and situation of dependent children related to the individual without status;

> • particular circumstances of the applicant's child (age, needs, health, emotional development);
> • financial dependence involved in the family ties; and
> • the degree of hardship in relation to the applicant's personal circumstances (see Definitions, Section 6.6, Humanitarian or compassionate grounds*).*

[20] The Applicants suggest that, when the Officer says at page 8 of the Decision that "I am not satisfied that subject has demonstrated that severing her ties with those in Canada will cause unusual, undeserved or disproportionate hardship," the Officer intended to include the Canadian born child of the Principal Applicant as one of the relatives with whom the Principal Applicant could sever ties without any hardship.

[21] The Applicants also submit that the Officer simply reiterated the facts in the Decision and made hasty conclusions without any analysis whatsoever. They say the Officer ignored the letters written by the Principal Applicant's children. The Applicants say this was a violation of Canada's international obligations regarding the children.

[22] In this regard, the Applicants rely upon *Baker*, at paragraph 70 which states that "the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them" and "where the interests of the children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable." The Applicants cite Article 12 of the *Convention on the Rights of the Child*, signed by Canada May 28, 1990, [1992] Can. T.S. No. 3, which stresses the right of a child to be heard in a meaningful way in any process that affects them. This Convention was considered in *Okoloubu v. Canada (Minister of Citizenship and Immigration)*,

2007 FC 1069 at paragraphs 9-11. Section 3(3)(*f*) of the Act states that the Act "…is to be construed and applied in a manner that complies with international human rights instruments to which Canada is a signatory."

[23] The Applicants also refer to paragraph 4 of *Canada (Minister of Citizenship and Immigration) v. Hawthorne*, 2002 FCA 475 for the test used to determine the best interests of the child:

> The "best interests of the child" are determined by considering the benefit to the child of the parent's non-removal from Canada as well as the hardship the child would suffer from either her parent's removal from Canada or her own voluntary departure should she wish to accompany her parent abroad. Such benefits and hardship are two sides of the same coin, the coin being the best interests of the child.

[24] The Applicants point out that, in accordance with *Hawthorne*, an officer cannot demonstrate that he or she has been "alert, alive and sensitive" to the best interests of a child simply by stating that they she/he has taken into account the interests of a child in their reasons for a H&C decision.

[25] The Applicants further rely upon *Kolosovs v. Canada (Minister of Citizenship and Immigration)* 2008 FC 165 for the following:

> 9. …When an H & C application indicates that a child that will be directly affected by the decision, a visa officer must demonstrate an awareness of the child's best interests by noting the ways in which those interests are implicated…
>
> …
>
> 11.… Simply listing the best interest factors in play without providing an analysis on their inter-relationship is not being alive to

> the factors. In my opinion, in order to be alive to a child's best interests, it is necessary for a visa officer to demonstrate that he or she well understands the perspective of each of the participants in a given fact scenario, including the child if this can reasonably be determined.
>
> …
>
> 12…To demonstrate sensitivity, the officer must be able to clearly articulate the suffering of a child that will result from a negative decision, and then say whether, together with a consideration of other factors, the suffering warrants humanitarian and compassionate relief…

[26] The Applicants conclude by stating that the Officer erred in his assessment of the best interests of the children because he failed to consider the current benefits to the children of having their mother with them in Canada, and the potential hardship to the children of leaving Canada with their mother and what they would lose. The Applicants insist that the Officer simply reiterated the facts and, contrary to *Kolosovs* and *Hawthorne*, reached a one-sentence conclusion.

The Respondent

[27] The Respondent reminds the Court that an officer's decision is highly discretionary in nature and that an officer has substantial leeway to determine the purpose of the considerations in an H & C decision. The Respondent says that excerpts from the policy manual, as well as the legal propositions cited by the Applicants, do not directly address the question of whether the reasons of the Officer were adequate in this case.

[28] The Respondent argues that the Officer's assessment was based on the Principal Applicant's information that her children would accompany her if she was to leave Canada.

[29] The Respondent points to the Officer's mention of the children's involvement in school and their academic achievements at section 4 of the H & C consideration of the Narrative Report and in section 5 of the Decision and rationale. In addition, the desire of the minor Applicants to remain in Canada was also noted under section 4 by the Officer. The relationship of the Canadian-born child with her father and her potential loss of contact with him was mentioned, as well as the children's schooling and the effect of removing them from their present schools. The Respondent argues that information regarding the children was not ignored, and that the Officer directed his attention to the best interests of the children. The Respondent says that no reviewable error was made by the Officer.

ANALYSIS

[30] A review of the Decision as a whole leads the Court to agree with the Respondent that the Principal Applicant indicated her children would accompany her. There is no reasonable ground for concluding that the Officer would assume that the Principal Applicant would leave her Canadian-born daughter behind. The Principal Applicant is the primary caregiver for that child.

[31] The H&C grounds analysis is a discretionary one and I must give due deference to the Decision of the Officer. However, I agree with the Applicants on this application and find that,

based on the case law cited by the Applicants, particularly *Kolosovs* and *Hawthorne*, the Officer merely listed "the best interest factors in play without providing an analysis on their inter-relationship" which, according to *Hawthorne* is "not being alive to the factors."

[32] I agree with the Respondent that the Officer did mention schooling and other factors related to the children. However, I find that this was merely a recitation of the facts by the Officer and is not evidence of the Officer taking those factors into account in his analysis. I find the Officer's conclusion that the children would be unaffected by a move from Canada to be unreasonable.

[33] The Officer's analysis is unreasonable in that it merely lists the best interest factors in play without providing an analysis of their inter-relationship and their relative weight vis-à-vis other factors.

[34] *Dunsmuir* states at paragraph 47:

> 47. …conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the **process of articulating the reasons** and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process…

In the present case, it cannot be said that the Officer provided the justification, transparency and intelligibility necessary to render the Decision reasonable within the meaning of *Dunsmuir*. It must be returned for reconsideration.

[35] The Respondent says that the Officer's approach to the best interests of the children is sufficient in this case because it was obvious that the children would be returning with their mother: "I am satisfied that subject's children have the benefit of the care and protection of their mother." The Respondent also says that the Principal Applicant did not place before the Officer much in the way of evidence that could be used to assess the children's best interests beyond what the Officer did consider and say.

[36] My review of the file suggests that there was material evidence before the Officer that the children's educational aspirations would be significantly damaged if forced to leave Canada. As well, there is clearly a relationship between the younger child and her father, which the Officer acknowledges.

[37] *Hawthorne* makes it clear at paragraph 4 that these matters must be considered:

> The "best interests of the child" are determined by considering the benefit to the child of the parent's non-removal from Canada as well as the hardship the child would suffer from either her parents' removal from Canada or her own voluntary departure should she wish to accompany her parent abroad. Such benefits and hardships are two sides of the same coin, the coin being the best interests of the child.

This kind of determination and analysis is not evident in the Decision and the matter needs to be returned for reconsideration in accordance with the principles established in *Hawthorne* and its progeny.

[38] In addition, the Officer's assertion that the Applicant "has not provided any proof of income and support" in Canada is clearly at odds with the letters from the Principal Applicant's employers which set out what the Applicant does in Canada and the money she earns. It is clear that she works full-time and supports herself and her children. The Officer's failure to address the employment evidence is, in my view, a failure to take into account relevant and highly material evidence. For this reason, also, the Decision is unreasonable and the matter should be reconsidered.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. This Application is granted and the matter is returned for reconsideration by a different officer.

2. There are no questions for certification.

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1070-08
STYLE OF CAUSE:	*CHERRY-ANN AGATHA GUADELOUPE, ZIMRON DESRON KERON GUADELOUPE, ZOMORIA FEMISHA KAYON GUADELOUPE v. MCI*
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	September 15, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	JUSTICE RUSSELL
DATED:	October 23, 2008

APPEARANCES:

Richard Wazana	FOR THE APPLICANT
Leena Jaakkimainen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

RICHARD WAZANA BARRISTER AND SOLICITOR TORONTO, ONTARIO	FOR THE APPLICANT
JOHN H.SIMS,Q.C. DEPUTY ATTORNEY GENERAL OF CANADA TORONTO, ONTARIO	FOR THE RESPONDENT