Date: 20090903

Docket: IMM-5639-08

Citation: 2009 FC 870

Toronto, Ontario, September 3, 2009

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

DAMEON LODGE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of an Immigration Officer's decision, dated December 17, 2008, rejecting Mr. Lodge's application for permanent residence based on humanitarian and compassionate (H&C) grounds. For the reasons that follow the Officer's decision is quashed and the application is remitted to another officer for determination in

accordance with the legal principles set out herein that ought to have been observed by the first officer.

Background

[2] Mr. Lodge is a citizen of Jamaica. He was born on March 6, 1981. He became a permanent resident of Canada on June 11, 1999 when, at age 18, his mother sponsored him to come to Canada.

[3] In July 2001, Mr. Lodge was convicted for failure to comply with recognizance and carrying a concealed weapon. He was sentenced to 15 days in prison for each conviction. In November 2001, Mr. Lodge was convicted of failure to comply with recognizance, possession of break-in instruments, attempted theft, theft, and possession of property obtained by crime. He was sentenced to one day in prison, 3 months pre-custody, as well as 18 months probation. Together, these July and November 2001 incidents amounted to nine criminal convictions.

[4] As a consequence of these convictions, inadmissibility proceedings were instigated against Mr. Lodge, and he lost his permanent residence. A deportation order was issued against him in 2006. However, Mr. Lodge was not removed from Canada.

[5] Since his release from prison, Mr. Lodge appears to have turned his life around. He left Toronto and moved to London, Ontario. He has not relied on social services and although he is registered with an employment agency he was not employed at the time the

decision under review was made. He is also enrolled with the Ministry of Training, Colleges and Universities for their Literacy and Basic Skills Program, with the intention of improving his employment prospects.

[6] In December 2003, Mr. Lodge met Kongkham (Kay) Phouttharath, a Canadian citizen, and the two were married on October 22, 2006. The couple have been living together in London, Ontario, since 2005 and recently purchased a house together. At the date of the decision they were expecting their first child who was expected to be born on August 14, 2009.

[7] Mr. Lodge has two Canadian-born children, Markaylia Cristal Campbell-Lodge born December 11, 2002 and Dajonay Wallace-Lodge born May 2, 2003, from two separate previous relationships. Both girls are six years old and live in Toronto, Ontario, with their respective mothers. Mr. Lodge pays $400 per month to his daughters in child support. Mr. Lodge also has a third child, Markesha Lodge, who was born in Jamaica on October 20, 1999, some four months after Mr. Lodge entered Canada. She lives in Kingston, Jamaica.

[8] Mr. Lodge has family in both Canada and Jamaica. His mother, a step-father, two sisters, and half sister reside in Canada. His father and two brothers reside in Jamaica. There is no evidence in the record that he has ever returned to Jamaica since he entered Canada.

[9] Given the rescission of his permanent residence, and outstanding deportation order, Mr. Lodge filed an application for permanent residence based on H&C grounds on February

7, 2007. This application was accompanied by an application to sponsor and undertaking completed by his spouse. The H&C application was denied.

[10] Mr. Lodge based his H&C application on his marriage to a Canadian citizen, the best interests of his children, and his establishment in Canada.

[11] The Officer noted the Applicant's nine convictions, as well as charges for other offences where the Applicant was either acquitted or the charges were withdrawn.

[12] The Officer noted as positive factors the Applicant's marriage and home co-ownership, his two Canadian children, his other family in Canada, his employment record, and his community involvement. The Officer acknowledged these positive factors regarding establishment, but determined that they were to be expected of an individual in similar circumstances. The Officer discounted the Applicant's marriage on the grounds that the couple knew there was a prospect that they would be separated when they began their relationship. The Officer discounted the Applicant's family ties on the grounds that his mother's and sister's letters of support were less than unequivocal in their requests for the Applicant to remain in Canada, and that the Applicant had family ties to Jamaica. The Officer also discounted the Applicant's employment record on the grounds that it was sporadic, and that the Applicant was currently unemployed, which supported the conclusion that in returning to Jamaica the Applicant would not be forced to sever employment ties.

[13] The Officer made a number of findings with respect to the best interests of the Applicant's children. The Officer noted that the Applicant had not made submissions with respect to his daughter in Jamaica, but concluded that she would benefit from his return to Jamaica. The Officer noted that fathers are important in the lives of their children, and concluded that the best interests of the Canadian children did not outweigh the best interests of the child in Jamaica, and that the Canadian children would not suffer unusual, underserved or disproportionate hardship should the Applicant be returned to Jamaica.

[14] The Officer also made a negative credibility finding with respect to the Applicant's involvement in the lives of his Canadian children. He found that the Applicant did not contact or visit his children as frequently as he stated.

[15] The Officer found that the Applicant had "not identified any bars to admission back to Jamaica or risk associated with his return" and that the Applicant's presence in Canada was "largely due to his own decisions and choice to remain, rather than to leave under the terms of his removal order."

[16] Taking all these considerations as a whole, the Officer held that they did not constitute unusual, underserved or disproportionate hardship, and that there were insufficient H&C grounds to approve the request for exemption of the overseas application for permanent residence requirement. Consequently, the application was rejected.

Issues

[17] The Applicant raises three issues:

1. Whether the Officer erred in considering the best interests of the children;
2. Whether the Officer erred in assessing the Applicant's degree of establishment in Canada; and
3. Whether the Officer based his negative credibility finding on an erroneous finding of fact without regard for the material before him.

Analysis

[18] In spite of the able submissions of counsel for the Respondent, it is clear to me that the Officer made a number of errors such that his decision is unreasonable and must be quashed.

A. Irrelevant Considerations

[19] The Officer, quite correctly, notes the nine criminal convictions the Applicant has. These were serious offences and the nature of them and the sentence imposed are relevant considerations on an H&C application. However, the Officer states: "It is noted that the Applicant has been charged with other offences in Canada but that he was either acquitted or the charges were withdrawn." Having made this statement, one can only conclude that these "other charges" were considered by the Officer. In my view, it was improper and irrelevant to the issue before the Officer to consider charges for which the Applicant had been acquitted as well as charges that had been withdrawn by the Crown before trial. It is clear to me from reading the decision was a whole, that the Officer was fixated with the criminal history of the

Applicant, including acquittals and withdrawn charges, such that he failed to fairly weigh all of the evidence before him.

B. Faulty Credibility Finding

[20] The Applicant stated that he contacts his two children in Toronto every other day by telephone and spends two weekends every month with one of the children. The Applicant, as noted previously, lives in London, while these girls live in Toronto. The Officer did not believe the Applicant. He writes:

> It is noted that the children reside in Toronto with their mothers and that the applicant resides with his spouse in London. These two cities are separated by a distance of 200 kilometers. Due to the geographical separation and the applicant's assertion that he is working diligently in London to secure employment and improve his education I am not satisfied that he sees them on a regular basis. The applicant states that he is in regular contact with his children by telephone, however no phone records have been provided to validate this statement.

[21] Perhaps, had the only evidence been that of the Applicant, this would have been a finding within the range of acceptable outcomes; although one wonders on what basis other than speculation the Officer concludes that 200 kilometres is too far to drive every other weekend, and how educational advancement and job searches prevent a father from meeting his children. However, there was other evidence that supported the Applicant's assertion regarding his contact with these children that was ignored by the Officer. Specifically, there were letters from each of the mothers of these children that confirmed that the Applicant does visit them regularly on weekends, as he said, and that he is in contact with them regularly, as he said, by telephone. Further, one of the daughters provided a letter that also confirmed this, as did the Applicant's spouse. In fact, every letter of support filed stated that the Applicant

was a loving caring father to these girls. The Officer erred in failing to consider this evidence or, if he was of the view that it was not relevant, in failing to provide any reason why he discounted it.

C. Weighing the Best Interests of the Child

[22] The legal basis for an H&C application is subsection 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27. It specifically obligates an officer, when assessing an H&C application to take into account the "best interests of a child directly affected". This Applicant, at the date of the decision, had three children directly affected: two girls in Toronto and one in Jamaica. The Officer considered all three. In *Irmie v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1906, the officer considered not only the interests of Mr. Irmie's child in Canada but also the interests of his children in Romania by his first marriage. Justice Pelletier held that it was not inappropriate for the officer to consider the interests of all of these children.

[23] Once the interests of the children have been identified by an officer, the officer must then weigh those interests against the other factors relevant in the H&C application. This is evident from the following passage from the decision of the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para 75:

> The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, 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. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration.

> However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable

[24] In this case, the Officer failed to weigh the children's interests against the other considerations; rather, he weighed the Canadian-born children's interests against the Jamaica-born child's interest. He writes: "I am not satisfied, based on the applicants (*sic*) submissions that the best interests of the children in Canada outweigh the best interests of his daughter in Jamaica…". Accordingly, I find that the Officer erred in law in applying the wrong test when weighing the best interests of the children affected.

[25] The Officer did not err in considering the interests of the daughter in Jamaica; as he found she was directly affected however, he did err in his assessment of those interests. He states: "It is accepted that a father is an important figure in the lives of children." While that may well be generally true it is not always the case. The Officer concludes, with no evidentiary basis, that it would be in the interests of the girl in Jamaica that her natural father be present in her life. He writes: "The applicant has not made tangible submissions regarding this child; however it would be reasonable to conclude that she would benefit from having her father in her life as well." With respect to this Officer's personal opinion of the important role fathers play in their children's lives, there was simply no evidence before him from which one could reasonably conclude that the daughter in Jamaica would benefit from having the Applicant in her life. The only evidence in the record before this Officer was that the girl was born in Jamaica, was the Applicant's daughter, and was living in Jamaica. Not only was there no evidence of any contact between these two, there was evidence that the

daughter had been born after the Applicant left Jamaica for Canada. Further, there was no evidence that the Applicant had ever returned to Jamaica or financially supported this daughter. The Officer's conclusion that it was in this child's best interest to have her father in her life is no more than mere speculation. There is no evidence that this child is even aware that the Applicant is her natural father. Nor is there any evidence of her current circumstances. She may well have a loving step-father; perhaps her mother and step-father do not want the Applicant in her life; perhaps the appearance of this man after having abandoned her 10 years ago will cause her psychological harm. Who knows? Not this Officer. As he acknowledges, the Applicant made no "tangible submissions regarding this child" and it was an error for this Officer, in the absence of facts, to speculate about this child's best interests.

[26] The Officer has misapplied the legal analysis when weighing the relevant factors in an H&C determination and he has either ignored evidence or failed to provide reasons for not accepting the corroborative evidence submitted by the Applicant. As a consequence the conclusion reached is unreasonable and must be quashed.

[27] Neither party proposed any question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application is allowed, the Applicant's H&C application is to be determined by a different officer, after having given the Applicant an opportunity to update his application in light of the changed circumstance of a new-born child whose interests must also be considered, and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Lorne Waldman	FOR THE APPLICANT
Tamrat Gebeyehu	FOR THE RESPONDENT

SOLICITORS OF RECORD:

WALDMAN & ASSOCIATES Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT