Federal Court  Cour fédérale

Date: 20100224

Docket: IMM-4030-09

Citation: 2010 FC 215

Montréal, Québec, February 24, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

ZELMA CORDELLA CAESAR

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of a negative decision rendered by a Pre-Removal Risk Assessment Officer (the Officer) refusing the Applicant's application for permanent resident status from within Canada on humanitarian and compassionate grounds.

Factual Background

[2] The Applicant, Zelma Cordella Caesar, is a resident of Saint Vincent and the Grenadines (SVG). She entered Canada on December 20, 1997 as visitor and made a refugee claim almost two years later. Her refugee claim was refused on June 7, 2000. In August 2000, she applied for admission to Canada in the Post-Determination Refugee Claimants in Canada class. In December 2003, she became subject to an immigration arrest warrant and was finally located and arrested in February 2008. In the same month, her Post-Determination Refugee Claimants in Canada class application was converted into a pre-removal risk assessment.

[3] In December 2007, before her arrest, the Applicant made an application for permanent residence on the basis of humanitarian and compassionate considerations (H&C). She made additional submissions on July 2, 2008. The H&C application was refused by the Officer on June 26, 2009 and is subject to this judicial review.

[4] The Applicant has two Canadian-born daughters, Rozel and Zishawna, born on November 26, 1999 and June 10, 2008 respectively.

Questions at issue

[5] There are two questions at issue argued in this case:

a. Did the Officer err in his treatment of the best interests of the children in this case?

b. Did the Officer err in his treatment of a letter sent by Rozel's school?

The application for judicial review shall be dismissed for the reasons that follow.

Impugned Decision

[6] As only the findings with regard to the Officer's consideration of the best interests of the children are in question in this case, I will summarize only those relevant portions of the decision. The Officer begins by noting that amongst the alleged risks and hardships, the Applicant claims that separation from her daughters would be a serious hardship and that taking them to SVG would also be a serious and unfair disadvantage to her daughters, particularly her eldest who has been treated for behavioural problems.

[7] With regard to the best interests of the children, the Officer notes that the Applicant has indicated that she no longer lives with Rozel's father. Rozel only sees her father once a year and he provides no support. Accordingly, the Applicant claims that to leave Rozel in Canada would make her parentless and this would be an excessive hardship.

[8] With regard to Zishawna, the Applicant alleged that she intended to nurse her daughter for one year and thus, separation would be a hardship. The Officer also notes that the Applicant has not provided much information with regard to her relationship with Zishawna's father and that he cannot ascertain if assistance would be provided to the Applicant and her daughters.

[9] The Officer states that the Applicant claims that a return to SVG would deprive her daughters of healthcare, education and financial security. Particularly in the case of Rozel, the Applicant submits medical evidence showing that her daughter has been treated for behavioural

problems and attention deficit disorder using both therapy and medication. The Officer contrasts the latest piece of medical evidence, dated June 2006, which speaks of a fragile improvement with a letter from Rozel's school, dated August 31, 2007, stating that Rozel has an impeccable attendance record and is a wonderful child to have in the school. As there is no mention of behavioural or learning problems in the letter, the Officer concludes that Rozel's condition is under control.

[10] Although the Applicant has indicated that Rozel needs to remain in Canada to continue her therapy and medication, the Officer notes that no evidence with regard to health and education services in SVG has been provided against which one could compare with that of Canada in order to conclude that it would represent an excessive hardship for the children to travel to SVG to live with their mother. The Officer also finds that, in general, the Applicant has not provided any probative objective evidence regarding any serious problems with respect to healthcare, education or finances for her children.

Analysis

Standard of Review

[11] The Federal Court of Appeal has recently confirmed that the appropriate standard of review of a decision on an H&C application is reasonableness in matters of fact and mixed fact and law (*Kisana v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, 392 N.R. 163, at para. 18). These include the issue of whether or not the Officer, in considering the application, was "alert, alive and sensitive" to the best interests of the children who may be adversely affected by a parent's removal (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817,

at par. 75). Accordingly, the Court must look "into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. […] But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47).

Did the Officer err in his treatment of the best interests of the children in this case?

[12] The Applicant submits that the Officer erred in his treatment of the H&C factors that she relied on, specifically the best interests of her daughter Rozel. She contends that the Officer erred by making a comparison between Rozel's current situation in Canada and her potential future situation in SVG. She claims that such an analysis is not the correct test as set out in *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2003] 2 F.C. 555.

[13] She urges that the Officer failed to consider the fact that Rozel has been diagnosed with behavioural problems, as detailed in the medical evidence submitted with the H&C application, and the impact that removing her from Canada would have on her as she would no longer have access to her therapy and medication. She highlights certain portions of the medical evidence that she feels are particularly persuasive.

[14] The Applicant further submits that the Officer should have considered Rozel's age, her dependency on her mother, her establishment in Canada, her relation to SVG and any medical and educational needs she might have. She also claims that the Officer had to inquire as to whether

Rozel would be adequately cared for if the Applicant, as the sole custodial parent, were removed from Canada.

[15] The Respondent, on the other hand, emphasizes that although the best interests of the child are an important factor in the H&C application, it is not a determinative factor to the issue of removal of the parent. Furthermore, the Officer has latitude in how to treat the question of the best interests of the child and that requirement can be satisfied by considering the degree of hardship to which the removal of the parent exposes the child.

[16] The Respondent also advances that the burden of proof rests on the Applicant, not on the Officer and that he was not obliged to conduct an elaborate assessment of a matter where the Applicant failed to do so. The Respondent argues that, in the case at bar, the Officer's assessment was reasonable as he considered the child's situation and benefits of remaining in Canada, but held that the Applicant had not provided evidence about employment, health or education in SVG that could lead to the conclusion that having to relocate would represent an excessive difficulty for the children.

[17] The Respondent also distinguishes this case, where the child presents behavioural disorders, from other cases, such as *Canlas v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 303, 81 Imm. L.R. (3d) 312, where the best interests of the child were given particular importance as the child could not accompany the parent due to health conditions.

[18] In determining the bests interests of the child, I agree that *Hawthorne*, above provides considerable guidance. It is well accepted that the best interests of the child are an important factor that must be given substantial weight (*Baker*, above). However, the best interests of the child are not determinative (*Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, 212 D.L.R. (4th) 139).

[19] *Hawthorne*, above, at para. 4, further teaches that:

> 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.

[20] In these cases, the officer must carefully examine the specific reasons alleged by a parent or by a child as to why non-removal of the parent is in the best interests of the child (*Hawthorne*, above, at para. 5).

[21] In the present case, the Officer noted that amongst the alleged risks and hardships, the Applicant claimed leaving Rozel behind in Canada would make her parentless and deprive her of having a mother which would be an excessive hardship. He then concluded that this separation may be an excessive hardship when compared to the prospect of accompanying the Applicant to SVG, a country for which the Applicant had not provided any probative evidence regarding any serious problems with respect to healthcare, education or finances for her or her children.

[22] The Officer also mentioned that the Applicant claimed that it would be to Rozel's benefit to remain in Canada and continue her therapy and medication. However, he again noted that there was no objective evidence or information showing that these would not be available in SVG should Rozel accompany her mother there.

[23] The Applicant faults the Officer for comparing Rozel's situation in Canada to her potential situation in SVG. However, the approach described in *Hawthorne*, above, shows that the evaluation of this ground is not a formulaic one**.** I am not convinced that the approach adopted by the Officer, in this particular case, is sufficient to conclude that the Officer erred by not being alert, alive and sensitive to the best interests of the child or minimized the best interests of the child. As stated in *Hawthorne*, above, an officer is presumed to know that living in Canada will generally provide children with many opportunities that are not available to them in other countries and that residing with their parents is generally more desirable than being separated from them.

[24] Here, the Applicant's claim was essentially that it would be best for Rozel to reside in Canada and that they not be separated, particularly in light of Rozel's diagnosed behavioural problems. The Officer was clearly aware of these allegations and noted them in the decision.

[25] He was also aware of the benefits for Rozel if her mother were to stay in Canada. However, the Officer also had to consider other factors, including the hardships that Rozel would face should she accompany her mother to SVG. As the Officer noted, the Applicant provided no evidence as to these potential hardships or reasons why her daughter could not accompany her.

[26] The Officer was not obliged to conduct elaborate assessments of matters where the Applicant herself failed to (*Barrak v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 962, 333 F.T.R. 109, at para. 37). The Officer concluded that the issues raised by the Applicant on these considerations were insufficient and, in light of the submissions, the Officer's assessment on this issue was entirely adequate.

[27] As emphasized by the Court of Appeal in *Legault*, above, the best interests of the child, although a significant factor, is not a determinative one and must be weighed against other considerations. The Applicant has not taken issue with any other parts of the decision, only the consideration of this factor. The decision as a whole shows that the Officer weighed all of the factors in concluding that this was not an appropriate case to grant the H&C application.

Did the Officer err in his treatment of a letter sent by Rozel's school?

[28] With regard to the Officer's conclusion on the letter sent by Rozel's school, the Applicant submits that there is an error as the Officer failed to recognize that the improvements in Rozel's mental health and development are the direct result of the therapy that she receives in Canada and her mother's support. She claims that it was unreasonable to infer that Rozel is cured and no longer needs her mother's support. Instead, the proper inference would have that Rozel's best interests are clearly being met in Canada.

[29] The Respondent argues that the Officer's interpretation of the letter is not determinative, given his conclusion that the Applicant has not adequately demonstrated that the conditions in SVG

would be such that they would result in excessive difficulty for her children. Also, the Respondent contends that the Officer's finding is not unreasonable in view of the fact that the letter was more recent than the medical evidence and no evidence was submitted that showed what Rozel's current needs are.

[30] Although I agree with the Applicant that the Officer's conclusion with regard to the letter from Rozel's school is somewhat tenuous, I do not find that this conclusion was unreasonable. The inference suggested by the Applicant is questionable and unfounded particularly as the letter does not give any indication of the current state of Rozel's behavioural problems and any follow up that she might be involved in.

[31] The medical reports provided by the Applicant clearly show that Rozel's therapy was aimed at helping her integrate a school environment and does not give any indication of necessary follow-up treatment. The Applicant did not provide any evidence with regard to Rozel's current treatment plan or needs. The letter from Rozel's school was the most recent piece of evidence that spoke to her current situation and gave no indication of her having particular needs. The Officer's conclusion with regard to the letter was not determinative of this issue.

[32] The weighing of relevant factors is not the function of the reviewing Court and the presence of a child and the consideration of his best interests is an important factor but it is not determinative. The interests of the children are a factor that must be examined with care and weighed with other factors. In light of these principles and the above analysis, I am satisfied that the Officer's decision

falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[33] No question for certification was proposed and none arises.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed. No question is certified.

"Michel Beaudry"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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