Federal Court  Cour fédérale

Date: 20100902

Docket: IMM-6310-09

Citation: 2010 FC 825

Ottawa, Ontario, September 2, 2010

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

JOHN PIERRE, KATIANA PIERRE,
AND KERDESHA AMBER ABIGAIL PIERRE,
by her litigation guardian, JOHN PIERRE

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] The Applicants are correct. There are different tests for refugee protection and humanitarian and compassionate (H&C) exemptions. The fact that state protection is available to applicants in their country of origin does not necessarily mean that allegations of risk do not amount to hardship for consideration in an H&C application.

[2] Nevertheless, in this case, the Court does not find that the officer erred in the H&C assessment. It is clear from the decision that the officer was fully aware of the distinctive tests to be applied. The officer noted:

> I am the officer who assessed the applicants' PRRA application and as such have knowledge of their RPD decision and reasons. I am guided by the principle that when risk is cited as a factor in an H&C application, the risk is assessed in the context of the applicant's degree of hardship. (Emphasis added)

(Applicants' Record (AR) at p. 8).

[3] The officer went on to hold:

> After careful consideration of all the documentation before me, I am not satisfied that the applicants would be subjected personally to a risk to their lives or to a risk to the security of the person if returned to St. Lucia. I do not find that the applicants' fear of risk in St. Lucia would make the hardship of their return there to apply for a permanent residence visa unusual and undeserved or disproportionate. (Emphasis added)

(AR at p. 10).

[4] The officer refers to the Refugee Protection Division's (RPD) findings in respect of state protection in which regard the Court notes the case of *Ramirez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1404, 304 F.T.R. 136, where Justice Yves de Montigny held:

> [43] … it is perfectly legitimate for an officer to rely on the same set of factual findings in assessing an H&C and a PRRA application, provided that these facts are analyzed through the right analytical prism…

[5] It is the Court's conclusion that the officer viewed this case through the appropriate analytical prism.

[6] The Court notes that the case of *Segura v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 894, [2009] F.C.J. No. 1116 (QL) states that the use of "hardship" language by an officer determining the best interests of the child does not, in and of itself, constitute an error.

[7] The court in *Segura*, above, also held:

> [29] As Justice Mosley observed in *De Zamora v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1602 at para. 18 substance ought to prevail over form. "I do not read *Hawthorne* as deciding that the use of [the term 'undeserved hardship] by an immigration officer in considering the children's best interests constitutes reviewable error or renders the decision as a whole unreasonable." I agree. It is not the use of particular words that is determinative; it is whether it can be said on a reading of the decision as a whole that the officer applied the correct test and conducted a proper analysis. (Emphasis added).

[8] The court went on to hold:

> [32] The Court of Appeal in *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, observed that what is required when conducting a best interests of a child analysis in an H&C context is an assessment of the benefit the children would receive if their parent was not removed, in conjunction with an assessment of the hardship the children would face if their parent was removed or if the child was to return with his or her parent.

II. Judicial Procedure

[9] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of an October 29, 2009 decision of a Pre-Removal Risk Assessment Officer (PRRA) refusing to allow the Applicants' H&C grounds claim.

III. Background

[10] The Applicants, Mr. John Pierre, his wife, Mrs. Katiana Pierre, and their daughter Kerdesha Amber Abigail Pierre, are all citizens of St. Lucia. Mr. and Mrs. Pierre's second daughter, Breanna, born in Canada on September 8, 2007, is a Canadian citizen.

[11] The Applicants first came to Canada in 1999 and were removed from the country in 2004. The Applicants returned to Canada in 2005 to make a claim for refugee protection. The Applicants alleged that Mr. Pierre had been threatened and attacked by a criminal gang after a cache of drugs hidden near his property could not be found. The Applicants' claim was denied by the RPD, as was the PRRA.

IV. Decision under Review

[12] The Applicants' H&C claim was based on allegations of hardship stemming from risks they may face should they be returned to St. Lucia, hardship caused by severing their establishment to Canada, family ties in Canada and the best interests of the children.

[13] With regard to the Applicants' allegations of risk, the officer noted the RPD's finding that Mr. Pierre had not rebutted the presumption of state protection with clear and convincing evidence. The officer noted new evidence submitted by the Applicants in the form of letters and photographs from Mr. Pierre's parents. The letters allege that the criminal gang is looking for and continues to pursue Mr. Pierre's family in St. Lucia. The photographs show damage caused to what has been

alleged to be Mr. Pierre's automobile. Also, notes had been submitted as evidence which had allegedly been written by members of the criminal gang in question.

[14] The officer gave little weight to the new evidence as the letters had been written by parties who had had an interest in the outcome of the Applicants' case. The letters were dated as they had been written in 2007 and contained information that could not be verified. The officer gave little weight to photographs which had been produced as evidence.

[15] The Applicants' representative argued that Mrs. Pierre and Kerdesha would be at risk in St. Lucia due to membership in a particular social group, females in St. Lucian society. The officer found there was insufficient evidence to substantiate this claim; no evidence, per se, had demonstrated a personalized risk to the female Applicants. The officer concluded that the Applicants' fear of risk in St. Lucia would not amount to unusual and/or disproportionate hardship if the family was to be removed from Canada.

[16] The officer noted the Applicants' employment history, Kerdesha's education history, Mrs. Pierre's medical problems and various other pieces of evidence which demonstrated their degree of establishment in Canada. After reviewing this evidence, the officer came to the conclusion that the Applicants had not established that severing their ties would amount to hardship. It is acknowledged that refugee applicants are permitted to live and work in Canada and would be expected to develop a significant degree of establishment.

[17] The officer reviewed evidence of the Applicants' ties to members of their family who reside in Canada. It was, nevertheless, considered insufficient as an obstacle to removal due to hardship.

[18] With respect to the best interests of the children, the officer did consider the best interests of the two daughters, as well as the niece and nephew; however, the officer held that the parents had not shown that their daughters had formed ties to Canada which would prevent their removal due to disproportionate hardship.

[19] The officer reviewed the submissions of the Applicants' representative regarding potential economic difficulties in St. Lucia, but, nevertheless, held that the Applicants did have a history of employment in their country of origin. It was concluded by the officer that the evidence did not bear out that the family members would not be supported by the existing family structure in St. Lucia.

V. Issues

[20] 1) Did the officer, in his H&C assessment, apply the wrong test when considering risk-based hardship?

2) Did the officer make an unreasonable finding regarding risk-based hardship?

3) Did the officer err with respect to the Applicants' degree of establishment in Canada?

4) Did the officer make an unreasonable finding with regard to the hardship that would affect the Applicants' family in Canada if they are removed?

5) Did the officer err with respect to the best interests of the children?

VI. Pertinent Legislative Provisions

[21] Subsection 25(1) of the IRPA states:

Humanitarian and compassionate considerations	Séjour pour motif d'ordre humanitaire
25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, 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 se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, 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.

VII. Standard of Review

[22] The Court will review each of these issues on the standard of reasonableness, recognizing that they are questions of fact or of mixed fact and law; and, as a result, are within the specialized expertise of the officer.

[23] When applying the standard of reasonableness, a court must show deference to the reasoning of the agency under review and must be cognizant that certain questions before

administrative tribunals do not lend themselves to one specific result. As the Supreme Court of Canada explained, reasonableness is concerned mostly with "the existence of justification, transparency and intelligibility within the decision-making process", as well as "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).

VIII. Analysis

1) Did the officer, in his H&C assessment, apply the wrong test when considering risk-based hardship?

[24] The Applicants are correct. There are different tests for refugee protection and H&C exemptions. The fact that state protection is available to applicants in their country of origin does not necessarily mean that allegations of risk do not amount to hardship for consideration in an H&C application.

[25] Nevertheless, in this case, the Court does not find that the officer erred in the H&C assessment. It is clear from the decision that the officer was fully aware of the distinctive tests to be applied. The officer noted:

> I am the officer who assessed the applicants' PRRA application and as such have knowledge of their RPD decision and reasons. I am guided by the principle that when risk is cited as a factor in an H&C application, the risk is assessed in the context of the applicant's degree of hardship. (Emphasis added)

(AR at p. 8).

[26] The officer went on to hold:

> After careful consideration of all the documentation before me, I am not satisfied that the applicants would be subjected personally to a risk to their lives or to a risk to the security of the person if returned to St. Lucia. I do not find that the applicants' fear of risk in St. Lucia would make the hardship of their return there to apply for a permanent residence visa unusual and undeserved or disproportionate. (Emphasis added)

(AR at p. 10).

[27] The officer refers to the RPD's findings in respect of state protection in which regard the Court notes the case of *Ramirez*, above, where Justice de Montigny held:

> [43] … it is perfectly legitimate for an officer to rely on the same set of factual findings in assessing an H&C and a PRRA application, provided that these facts are analyzed through the right analytical prism…

[28] It is the Court's conclusion that the officer viewed this case through the appropriate analytical prism.

2) Did the officer make an unreasonable finding regarding risk-based hardship?

[29] The Applicants take issue with the officer's analysis of the evidence submitted by Mr. Pierre's parents. The Applicants cite the case of *Shafi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 714, [2006] 1 F.C.R. 129, where the court held it was an error to dismiss evidence in regard to the identity of an applicant due to bias on the basis that it emanates from the applicant's family members.

[30] The Court finds that the facts in *Shafi*, above, are not analogous to the present circumstances. *Shafi* was decided in the context of a judicial review of a PRRA, whereas, the

present case deals with a decision made pursuant to subsection 25(1) of the IRPA. Similarly, the court in *Shafi* held that it was an error for an officer to disregard evidence from family members in the context of identifying a refugee applicant pursuant to section 106 of the IRPA. This notion acknowledges the difficulty in proving national identity with acceptable documentation from countries with unstable civil administrations. Section 106 treats evidence which relates to the identity of refugee applicants; it does not apply in the present circumstances.

[31] It is the Court's conclusion that the officer reasonably considered the evidence from Mr. Pierre's parents. The officer was aware of the letters and photographs to which the officer assigned little weight in recognition of due concerns. The standard of reasonableness establishes that this Court is not to disturb the weight, accorded to the evidence, by the first-instance decision-maker.

[32] The Applicants also submit the officer unreasonably dismissed the potential envisaged by the population as a whole to the risk of crime which exists in St. Lucia. The Applicants cite the case of *Mooker v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 518, 167 A.C.W.S. (3d) 579, wherein Justice Michel Beaudry held:

> [19] The line of cases relied upon by the applicants (*Ramirez* and *Mooker*, above; *Dharamraj v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 853, 2006 FC 674; *Pinter v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 366, 2005 FC 296) imposes upon H&C Officers the requirement that the generalized risk of violence, or risks flowing from discrimination, be considered according to the appropriate test. It does not go so far as to require the Officer to conclude that discrimination and a risk of generalized violence always constitute undue, undeserved or disproportionate hardship.

[33] The jurisprudence cited by the officer, in addition to that of the Applicants and the Respondent, makes it clear that both personalized and generalized risks are relevant considerations in an H&C application. Most of the Applicants' submissions to the officer refer to allegations of personalized risk which stem from a variety of grounds linked to actual persecution, if, in fact, that was the case. Accordingly, a considerable amount of the decision addresses these allegations. After coming to this conclusion, the officer held:

> … I do not find that the applicants' fear of risk in St. Lucia would make the hardship of their return there to apply for a permanent residence visa unusual and undeserved or disproportionate.

(AR at p. 10).

[34] The Court also notes the decision of Justice Sean Harrington in *Chand v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 964, [2009] F.C.J. No. 1175 (QL), where it was held:

> [6] In considering the best interests of the children, the Officer not only took into account Dr. Pilowski's opinion but also country conditions. He accepted that both the children and the parents might suffer trauma if returned to Guyana and are acutely afraid about their future. However, the point the officer made, which was quite reasonable, is that there are a great many victims of crime in Guyana and if, as country reports indicate, abuses are rampant in the schools, the Chands would not find themselves in an unusual situation. They should not be in a better position because they left Guyana, while others had to stay behind. As stated in *Ramatar v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 362, [2009] F.C.J. No. 472, it is not enough to be a likely victim of generalized crime. There must be something more.

[35] It is clear to the Court that the officer was aware of the general country conditions in St. Lucia, but could not find the existence of unusual and/or disproportionate hardship in the absence of something more than that which impacts all St. Lucians.

3) Did the officer err with respect to the Applicants' degree of establishment in Canada?

[36] The Applicants cite the cases of *Amer v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 713, 81 Imm. L.R. (3d) 278, *Jamrich v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 804, 29 Imm. L.R. (3d) 253, *Raudales v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 385, 121 A.C.W.S. (3d) 932 and *Shafqat v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1186, [2009] F.C.J. No. 1624 (QL), for the proposition that an officer may not reasonably assign little weight to exceptional degrees of establishment in referring to them as "expected" under the circumstances. The Applicants submit the evidence shows that the Pierre family's degree of establishment is truly exceptional.

[37] The cases of *Amer*, *Jamrich* and *Raudales*, above, were distinguished in the case of *Singh v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1062, [2009] F.C.J. No. 1322 (QL), where Justice Richard Mosley held:

> [10] With respect to the officer's assessment of the evidence of establishment, the applicants rely on the recent decision of Madam Justice Elizabeth Heneghan in *Nuria Ben Amer v. Canada (Minister of Citizenship and Immigration)* 2009 FC 713, [2009] F.C.J. No. 878. In that case, Justice Heneghan found that the officer had committed a reviewable error in finding that the applicant's establishment was no more than would be expected of a person who has been in Canada for several years without status: see also *Jamrich v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 804 (F.C.T.D.), [2003] F.C.J. No. 1076; *Raudales v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 385 (F.C.T.D.), [2003] F.C.J. No. 532.
>
> [11] In *Ben Amer*, *Jamrich* and *Raudales* the assessment of establishment was made without adequate reference to the particular circumstances of the applicant. That is not the case here. The officer carefully reviewed the significant evidence of establishment. It was not necessary for the officer to expressly refer to matters such as the applicants' bank accounts and credit cards, as was suggested in argument.

[38] Similarly, the court in *Shaqfat*, above, held that the officer erred by describing the applicant's level of establishment in Canada as exceptional and then not assigning any weight to this factor (*Shaqfat* at paras. 3-4).

[39] It is the Court's conclusion that the officer's findings regarding the Applicants' degree of establishment is reasonable. The Court notes that several pages of the officer's decision are devoted to analyzing the Applicants' establishment. Similarly, the officer canvassed and weighed a wide variety of factors in coming to a conclusion. The Court finds that the officer adequately considered the particular circumstances of the Pierre family and reached a reasonable decision.

[40] As has been mentioned, the Applicants cite the case of *Benyk v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 950, 84 Imm. L.R. (3d) 35, for the proposition that an officer may not disregard an applicant's degree of establishment in Canada due to a lack of status for the period in which that establishment occurred.

[41] Although the officer mentioned that the Applicants' degree of establishment was gained while the family was out of status, the Court is not convinced that the officer did not adequately consider the Pierre family's situation. As has been shown, it is clear from the reasons that the composite circumstances of the family were examined. The officer did consider the evidence and came to the conclusion that the Applicants' degree of establishment was insufficient to warrant a positive H&C decision.

4) Did the officer make an unreasonable finding with regard to the hardship that would affect the Applicants' family in Canada if they are removed?

[42] The Applicants submit the officer dismissed the impact that removal will have on family members who live in Canada and rely on the Applicants for support.

[43] It is clear from the decision that the officer reasonably considered the hardship that might ensue should the Applicants be removed. The officer explicitly acknowledged the wishes of the Applicants' extended family and the challenges of family separation should the Applicants be removed to St. Lucia; however, the officer was not of the view that this consideration constituted unusual and/or disproportionate hardship in the circumstances.

[44] The officer also considered the interests of Mr. Pierre's niece and nephew and concluded that severing ties with the children would not constitute unusual and/or disproportionate hardship.

[45] Upon review of the record, the Court cannot conclude that the officer ignored the interests of the Applicants' family. The officer acknowledged the letters provided by family members and recognized the difficulty that removal would cause; however, the officer was not convinced that the considerations would amount to unusual and/or disproportionate hardship.

[46] It is the Court's conclusion that the standard of reasonableness requires its deference to the officer's discretion.

5) Did the officer err with respect to the best interests of the children?

[47] It is for this Court to determine whether the officer substantively followed the test as specified by the Federal Court of Appeal.

[48] The Court agrees with the Respondent that the officer performed a reasonable examination of the best interests of the children on the basis of the record. The Applicants made no specific submissions regarding the best interests of the children. The evidence demonstrated that Kerdesha is attending school and has an emotional attachment to her friends and cousins. It is clear from the reasons that the officer explicitly considered the evidence on record:

> On page 6 and 7 of his H&C submission; counsel provided instructions on dealing with the best interests of the child; however, no specific submissions regarding the best interests of the daughter, Kerdesha Amber Abigail Pierre, were made. I note that the daughter is attending school in Canada and has made some friends (letters from two friends were included in the H&C submission). The adult applicants also have a 2-year old Canadian citizen daughter but no specific submissions regarding the best interests of this child were made. The daughters' aunt, Suzanna Bryon, stated that her children are close to their cousins and fond of their aunt, Katiana Pierre. I have considered the best interests of the daughters; however, the adult applicants have not demonstrated that their daughters have formed ties to Canada such that severing those ties would have such a significant negative impact that would constitute unusual and undeserved or disproportionate hardship. I have also considered the interests of Suzanna Bryon's children and find that the applicants have not demonstrated that severing the ties with those children would have such a significant negative impact that would result in unusual and undeserved or disproportionate hardship.

(AR at p. 12)

[49] On the basis of the above, the Court recognizes that the officer reasonably considered the best interests of the children.

IX. Conclusion

[50] Therefore, the Court dismisses the application for judicial review. It follows that:

> [48] … Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law…

(*Dunsmuir*, above).

JUDGMENT

THIS COURT ORDERS that

1. The application for judicial review be dismissed;

2. No serious question of general importance be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6310-09
STYLE OF CAUSE:	JOHN PIERRE, KATIANA PIERRE, AND KERDESHA AMBER ABIGAIL PIERRE, by her litigation guardian, JOHN PIERRE v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	August 10, 2010
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DATED:	September 2, 2010

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