Federal Court  Cour fédérale

**Date: 20130219**

**Docket: IMM-6035-12**

**Citation: 2013 FC 170**

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
**Ottawa, Ontario, February 19, 2013**

**PRESENT: The Honourable Mr. Justice Boivin**

**BETWEEN:**

**BERNADETTE DELARY PIARD**
**AUGERSON BERTHOLLET JOSEPH**
**LISBIRD SOPHONIE BERRY JOSEPH**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] This application for judicial review is brought under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], and concerns a decision of an immigration officer [the officer] dated May 28, 2012. In that decision, the officer denied the application for permanent residence on humanitarian and compassionate [H&C] grounds that the applicants had filed under subsection 25(1) of the Act.

Factual background

[2] Bernadette Delary Piard (the applicant) is a Haitian citizen. Augerson Berthollet Joseph and Lisbird Sophonie Berry Joseph (the minor applicants), also Haitian citizens, are the applicant's minor children and are also parties to this application for judicial review. They are 15 and 11 years old, respectively. The Court will use "the applicants" to designate both the applicant and her children, the minor applicants.

[3] When they lived in Haiti, the applicant studied at the Institut Supérieur des Hautes Études Paramédicales de la Caraïbe (Applicants' Record, page 105), while her husband, who is not a party to these proceedings, worked as a refrigeration and air conditioning technician at the Canadian Embassy in Port-au-Prince (Applicants' Record, Applicant's Affidavit, page 12). Following the earthquake that ravaged Haiti on January 12, 2010, the applicants left their country, entering Canada on February 3, 2010 (Applicants' Record, page 7). The three (3) applicants were issued a temporary residence permit on the same day under the Haiti Special Measures. This permit was renewed on February 2, 2011, and again on May 18, 2012 (Tribunal Record, page 3). It will expire on May 18, 2013 (Tribunal Record, page 2).

[4] According to the applicant, they would never have left Haiti had it not been for the earthquake. The applicant's husband initially remained in Haiti to assess whether the situation was going to improve, in the hope of an eventual return. He sent money to the applicants in Canada to help them meet their needs. The applicant also states that she has worked since arriving in Canada in order to meet her family's needs, first working as a housekeeper in a hotel

from March to May 2010, and then as a personal care attendant from July 2010 to the present (Applicants' Record, page 40).

[5] Wishing to regularize their immigration status in Canada, the applicants filed an application for permanent residence on H&C grounds on February 9, 2011 (Applicants' Record, page 42). Seeing no signs of improvement in the situation in Haiti anytime soon, the applicant's husband arrived in Canada in November 2011 and made a claim for refugee protection.

[6] On May 28, 2012, the immigration officer in charge of the file denied their application for permanent residence on H&C grounds.

Impugned decision

[7] The officer considered their establishment, the country-of-origin information and the best interests of the children before concluding that the applicants would not face unusual and undeserved or disproportionate hardship if required to apply for permanent residence from outside Canada, as prescribed by the Act.

[8] The officer concluded that the applicants had failed to establish that they would face unusual and undeserved or disproportionate hardship if required to apply for permanent residence from outside Canada, as prescribed by the Act. The officer therefore denied their exemption request brought under subsection 25(1) of the Act.

Issues

[9] This case raises the following issue: was the officer's decision reasonable?

Statutory provisions

[10] The Act authorizes the Minister to waive any applicable criteria or obligations of the Act on the basis of humanitarian and compassionate considerations, including the requirement to apply for permanent residence before entering Canada. This is the requirement from which the applicants are seeking an exemption. It is important to note the wording of section 25, which requires that the best interests of any children be taken into account. The statutory provisions relevant to this application for judicial review are the following:

| | |
|---|---|
| PART 1 | PARTIE 1 |
| IMMIGRATION TO CANADA | IMMIGRATION AU CANADA |
| DIVISION 1 | SECTION 1 |
| REQUIREMENTS BEFORE ENTERING CANADA AND SELECTION | FORMALITÉS PRÉALABLES À L'ENTRÉE ET SÉLECTION |
| *Requirements Before Entering Canada* | *Formalités préalables à l'entrée* |
| 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 may be issued if, following an examination, the officer is satisfied that the foreign | **11.** (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente |

national is not inadmissible and meets the requirements of this Act.

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[…]

DIVISION 3

ENTERING AND REMAINING IN CANADA

SECTION 3

ENTRÉE ET SÉJOUR AU CANADA

. . .

[…]

Humanitarian and compassionate considerations – request of foreign national

**25.** (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible or does not meet the requirements of this Act, and may, on request of a foreign national outside Canada who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

Séjour pour motif d'ordre humanitaire à la demande de l'étranger

**25.** (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

. . .

[…]

Standard of review

[11] The Court is of the view that this case is reviewable on a standard of reasonableness. It involves questions of mixed fact and law, regarding which the Court must show deference to the officer. As a general rule, decisions of officers examining applications for permanent residence on H&C grounds are reviewable on a standard of reasonableness (*Mudiyansele v Canada (Minister of Citizenship and Immigration)*, 2012 FC 928 at paras 9-11, [2012] FCJ no 1061 (QL); *Walker v Canada (Minister of Citizenship and Immigration)*, 2012 FC 447 at paras 31-32, [2012] FCJ no 479 (QL) [*Walker*]; *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 18, [2010] 1 FCR 360). The Court must therefore limit its review to "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v Nouveau-Brunswick*, 2008 CSC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]).

Analysis

[12] The applicants submit that the officer's decision is unreasonable. They state that no negative factors were raised with respect to their establishment and that the officer had considered their submissions on establishment, country-of-origin conditions and the best interests of the children in a vacuum.

[13] First, the Court notes that the exemption provided under subsection 25(1) is an extraordinary and discretionary measure, and that the onus is on the applicants to demonstrate that, in the circumstances, they would face unusual and undeserved or disproportionate hardship

if they were to return to Haiti (*Adams v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1193 at paras 29-31 and 34, [2009] FCJ no 1489 (QL)). Moreover, in this context, deference is required.

[14] In this case, the only evidence provided by the applicants relates to the conditions in Haiti, as well as certain documents concerning the establishment of the applicant (employment and involvement with her church) and minor applicants (school activities) in Canada.

[15] The Court finds that it was reasonable for the officer to conclude that establishment, one factor among others, was insufficient in this case to justify granting the exemption. It was open to the officer to conclude that a relatively short establishment period of two (2) years, combined with a few expected establishment elements (employment and school attendance), does not suffice to establish unusual and undeserved or disproportionate hardship in the event that the applicants are required to apply for permanent residence from outside of Canada.

[16] The applicants are asking this Court to give more weight to some evidence. However, a long line of case law has established that it is not for this Court to reweigh the evidence in the context of a judicial review. In this case, the Court is of the view that the officer ignored neither the evidence nor the arguments raised by the applicants.

[17] With respect to the conditions in Haiti, the applicants insisted on the need to conduct a purely objective evaluation of hardship, citing this Court's decision in *Damte v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1212, 5 Imm LR (4th) 175 [*Damte*]. The Court notes

that the comments on which the applicants rely, found at paragraph 33 of *Damte*, above, were made in *obiter* and were not the basis of the Court's decision. The Court also notes that the original English version of this passage states that "unusual hardship might only require an objective analysis" (*Damte*, above, at para 33). [Emphasis added.]

[18] It does not follow that such an analysis must be conducted in a vacuum without regard for the applicants' personal circumstances, as the applicants seem to be suggesting. In this regard, the Court notes the comments of Justice Shore in *Lalane v Canada (Minister of Citizenship and Immigration)*, 2009 FC 6 at paras 38, 39 and 42, 338 FTR 224 [*Lalane*]:

> [38] The allegation of risks made in an H&C application must relate to a particular risk that is personal to the applicant. The applicant has the burden of establishing a link between that evidence and his personal situation. Otherwise, every H&C application made by a national of a country with problems would have to be assessed positively, regardless of the individual's personal situation, and this is not the aim and objective of an H&C application. That conclusion would be an error in the exercise of the discretion provided for in section 25 of the IRPA which is delegated to, *inter alia*, the PRRA officer by the Minister . . . .
>
> [39] Moreover, . . . a temporary stay will be imposed where return to a specific country or place presents a generalized risk that the Minister of Public Safety and Emergency Preparedness considers dangerous and unsafe to the entire general civilian population of that country or place. Individualized risk is different from generalized risk and is assessed during IRB, H&C and PRRA assessments . . . .
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> . . .
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> [42] The question is not when or to where the applicant will be removed. The issue here is whether applying for a visa from outside Canada would cause the applicant unusual and undeserved or disproportionate hardship. The applicant has the burden of proving the particular facts of his personal situation, which mean that applying for a visa from outside Canada would cause him unusual and undeserved or disproportionate hardship. . . .
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> [Emphasis added.]

[19] Therefore, individuals seeking an exemption from a requirement of the Act may not simply present the general situation prevailing in their country of origin, but must also demonstrate how this would lead to unusual and undeserved or disproportionate hardship for them personally. With respect to the issue of the temporary stay of removals in effect for Haiti, it was found that a moratorium on removals does not in and of itself prevent an application made on H&C grounds from being denied (*Nkitabungi v Canada (Minister of Citizenship and Immigration)*, 2007 FC 331, 74 Imm LR (3d) 159).

[20] With respect to the issues relating to the analysis of the best interests of the children, the Court does not find the applicants' arguments convincing. In his evaluation, under the heading [TRANSLATION] "Best Interests of Children", the officer dealt with the arguments raised by the applicants, namely, the sleep problems that have since been resolved and the difficult circumstances in their country of origin, Haiti.

[21] Given the evidence filed by the applicants, a large volume of objective documentation and very little evidence directly relating to the applicants, the Court is satisfied that the officer reasonably assessed the issue of the best interests of the children, the minor applicants. The applicants' limited submissions regarding the children are contained in three (3) paragraphs (Tribunal Record, page 119) and were not ignored by the officer. Faced with insufficient evidence, the Court cannot find that the officer's decision is unreasonable.

[22] The Court adopts the comments of Justice Gleason in *Momodu v Canada (Minister of Citizenship and Immigration)*, 2012 FC 793 at para 12, [2012] FCJ no 817 (QL) :

> [12] It is trite law that the burden is on an applicant in an H&C application to file evidence to support his or her claims . . . . In the absence of any evidence from the applicant establishing any risk to her child, the officer's determinations cannot be said to be unreasonable.
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> [Emphasis added; citations omitted.]

[23] In light of the evidence submitted by the applicants, the Court is not satisfied that the officer erred in law, as the applicants allege. The officer's decision is reasonable, and his conclusions fall within a range of possible, acceptable outcomes *(Dunsmuir*, above; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708). The intervention of this Court is unwarranted.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that** this application for judicial review be dismissed. No question of general importance is certified.

"Richard Boivin"
Judge

Certified true translation
Francie Gow, BCL, LLB

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-6035-12 |
| **STYLE OF CAUSE:** | Bernadette Delary Piard et al v MCI |
| **PLACE OF HEARING:** | Montréal, Quebec |
| **DATE OF HEARING:** | February 11, 2013 |
| **REASONS FOR JUDGMENT:** | BOIVIN J. |
| **DATED:** | February 19, 2013 |

**APPEARANCES:**

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| Daniel Latulippe | FOR THE RESPONDENT |

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