Federal Court  Cour fédérale

Date: 20130827

Docket: IMM-7819-12

Citation: 2013 FC 903

Ottawa, Ontario, August 27, 2013

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

DESALYN ANASTASIA BEGGS AND SHARRI ALISHA ASHA WILLIAMS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants seek to set aside a decision denying their application for permanent residence from within Canada on humanitarian and compassionate (H&C) grounds. The applicants required an exemption from the usual requirement under subsection 11(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) that they apply for a permanent residence visa from abroad.

[2] I have concluded that this application for judicial review should be dismissed.

[3] The principal applicant is a citizen of Grenada and arrived in Canada as a visitor in 1999. Her daughter, Sharri, joined her in 2004. The applicant provided evidence of her establishment in Canada, including her employment and volunteer activities. She explained that she has nothing to return to in Grenada as she has no property or close relatives there. She also explained that the hurricane in 2004 caused significant economic and social upheaval, rendering her prospects of employment minimal.

[4] Pursuant to subsection 25(1) of the *IRPA*, the Immigration Officer assessed whether the hardship of applying for a permanent resident visa from outside of Canada would be unusual, undeserved or disproportionate. This requires evidence of hardship beyond the usual and inherent consequences of being required to leave Canada after a period of establishment: *Irimie v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1906, para 12. The standard of review for H&C decisions is reasonableness: *Kisana v Canada (MCI)*, 2009 FCA 189, para 18. There is also a question of procedural fairness which is reviewed on the correctness standard.

Procedural Fairness

[5] The Officer referred to reports from the United States Department of State, the World Bank, the Granada government and an Immigration and Refugee Board Response to Information Request.

[6] The applicants submit that the Officer breached procedural fairness by relying on extrinsic evidence without giving them an opportunity to respond. I see no merit in this argument.

[7] It is unnecessary for an officer to disclose publicly available documents unless they contain novel information or show a change in country conditions that may affect the decision: *Mancia v Canada (MCI)*, [1998] 3 FC 461 (CA), paras 26-27. Though *Mancia* involved a risk assessment, the principle applies equally in the case of H&C decisions: *Jiang v Canada (MCI)*, 2010 FC 580, para 29-30; *Hernandez v Canada (MCI)*, 2011 FC 1301, para 16. As Justice Michel Beaudry explained in *Jiminez v Canada (MCI)*, 2010 FC 1078, at paragraph 19, though the applicants may not have read the specific reports at issue, the information contained therein is widely available and would have been easy for the applicants to locate.

[8] Had the Officer relied on extrinsic evidence to refute a specific allegation or component of the applicants' evidence, as was the case in *Mark v Canada (MCI)*, 2009 FC 364, fairness may require that it be disclosed. This is not the case in the present application. The documents in question contain non-contentious information regarding general country conditions, including the education system, government and economy. The evidence merely provided context for the Officer's analysis. Accordingly, there is no breach of procedural fairness.

Best Interests of the Child

[9] The applicants submit that the Officer erred by failing to follow the approach set out by Justice James Russell in *Williams v Canada (MCI)*, 2012 FC 166. Justice Russell determined that an officer must first identify what is in the child's best interests and then consider the degree to which the child's interests would be compromised by one outcome over another. In *Williams*, the officer applied the wrong test, namely whether the child would experience disproportionate or undeserved hardship. This concept is inapplicable to children, who would rarely if ever be

deserving of hardship. Therefore, Justice Russell considered it necessary to provide a detailed template for use on reconsideration.

[10] *Williams* provides useful guidance, but should not be elevated to a mandatory formula. The substance of the Officer's analysis must prevail over the form: *Ye v Canada (MCI)*, 2012 FC 1072; *Webb v Canada (MCI)*, 2012 FC 1060, and in *Hawthorne v Canada (MCI)*, 2002 FCA 475, the Court of Appeal held that an officer is presumed to know that living in Canada can provide a child with many opportunities and that the child's best interests will generally favour non-removal.

[11] The essential question is whether the officer is alert, alive and sensitive to the child's best interests: *Baker v Canada (MCI)*, [1999] 2 SCR 817. The applicant provided minimal evidence on this issue, stating only that Canada has better health care and education than Granada. The Officer addressed these concerns and considered Sharri's academic success and community involvement. The applicant has not identified any factor which has been overlooked or unreasonably minimized. What is sought is a different outcome, and while a different outcome would be reasonable on these facts, it does not follow that the conclusion reached was unreasonable.

Establishment

[12] The Officer considered the applicants' establishment in Canada, including the principal applicant's employment, volunteerism and community involvement. The Officer concluded that the degree of establishment was normal and expected and therefore did not warrant an H&C exemption. I consider this assessment reasonable. It is undoubtedly a hardship to leave Canada after so many

years; however, the Officer is not empowered to eliminate all hardship, only that which is unusual, disproportionate or undeserved.

[13] The applicants submit that the Officer erred by noting that they had knowingly remained in Canada without status. Unless an applicant's stay in Canada has been both exceptional and not of her own choosing, this factor will normally be neutral, at best: *Shallow v Canada (MCI)*, 2012 FC 749, para 9. Why else, in the ordinary course, would H&C relief be sought?

[14] There appears to have been substantial delays in the processing of this H&C application and so the applicants cannot be faulted for continuing on with their lives while waiting. However, it does not appear that the Officer discounted their establishment merely because they were in Canada without status. Rather, the Officer concluded that their degree of establishment was unexceptional. This conclusion is reasonable and fully consistent with this Court's direction in *Shallow*.

Risk in Grenada

[15] In her initial application, the principal applicant explained that she had been abused by her ex-boyfriend. She also alleged that she and her daughter would become homeless in Grenada and that the healthcare system is poor. The applicants submit that the Officer applied the wrong legal test, considering only whether they would face discrimination in Grenada and not whether they would be at risk.

[16] I disagree. The Officer identified the principal applicant's allegations and addressed her concerns with reference to the minimal evidence provided and the relevant country conditions. The

Officer concluded that the evidence did not support the allegation that the principal applicant "would face risk in her home country that would cause an unusual, undeserved or disproportionate hardship." This is the correct test.

[17] With regards to the economy and the possibility that the applicants would become homeless, the Officer reasonably determined that return to a country less prosperous than Canada is an ordinary consequence of removal. The Officer also noted that Grenada's healthcare facilities had been restored to pre-hurricane conditions. This analysis is responsive to the applicants' concerns and the Officer's conclusion falls within the range of reasonable outcomes which are defensible in respect of the facts and law.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There is no question for certification.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7819-12
STYLE OF CAUSE:	**DESALYN ANASTASIA BEGGS AND SHARRI ALISHA ASHA WILLIAMS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Toronto, ON
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REASONS FOR JUDGMENT AND JUDGMENT:	RENNIE J.
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