Federal Court  Cour fédérale

Date: 20140505

Docket: IMM-12788-12

Citation: 2014 FC 409

Ottawa, Ontario, May 5, 2014

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

FINA NORBERT,
EARDLEY WILMORT PETER, AND
ODELMA VERLINER SERBRINA PETTER

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or Act] for judicial review of the decision of a Senior Immigration Officer [Officer] dated November 22, 2012 [Decision], which refused the Applicants'

application for permanent residence from within Canada based on humanitarian and compassionate [H&C] grounds

BACKGROUND

[2] The Applicants are Fina Norbert and her two adult children, Odelma and Eardley. They are citizens of St. Lucia.

[3] Ms. Norbert has endured a very difficult life in St. Lucia. As a child, she suffered extensive sexual and physical abuse at the hands of a man named Valerious Raymond. Mr. Raymond continued to threaten and abuse her into adulthood. She was also physically abused by her mother as an adolescent. As a young woman and adult, Ms. Norbert was in a relationship with Eardley Peter, the father of her two children, who sexually and physically abused her in a cycle of domestic violence. She left Mr. Peter after twelve years together, but continued to be terrorized by Mr. Raymond. Indeed, the degree of abuse that Ms. Norbert has suffered in St. Lucia – and the Officer did not doubt her story – is truly appalling. Her son, also named Eardley, was born with albinism.

[4] In July 21, 2010, Ms. Norbert fled to Canada with her two children. They made refugee claims on August 9, 2010. The Refugee Protection Division of the Immigration and Refugee Board rejected their claims on January 21, 2011, and their application for leave for judicial review was dismissed on May 6, 2011. Their Pre-Removal Risk Assessment [PRRA] application was rejected on October 11, 2011.

[5] In November 2011, the Applicants submitted an H&C application, the Decision which is here under review. The Applicants argued that they would face unusual and undeserved or

disproportionate hardship if returned to St. Lucia because Ms. Norbert would be at risk at the hands of Mr. Raymond and Mr. Peter. Ms. Norbert claims that her friends from St. Lucia have told her that Mr. Raymond has been looking for her and has also threatened to rape her daughter Odelma and even her son Eardley. She also claims that Mr. Peter called her in October 2011 and threatened and intimidated her. Thus, the Applicants claim that there is a very real risk of harm to all of them should they be returned to St. Lucia, especially since law enforcement in domestic violence situations is not effective there.

[6] In addition, the Applicants argued that there would be unusual and undeserved or disproportionate hardship because Ms. Norbert suffers from post-traumatic stress disorder arising from her traumatic childhood, and she would be without the social and family support she needs in St. Lucia. Further, Eardley's albinism would make him a target of discrimination, which can range from taunts to physical violence, and would put him at a greater risk of skin and eye cancer, since the sun is stronger, sunscreen is prohibitively expensive, and he would not have access to the same level of medical care in St. Lucia.

[7] The Applicants further submitted that they had established themselves in Canada. Ms. Norbert had developed a support network of friends and community, obtained stable employment, and joined a church community. All three Applicants had also been taking adult education courses and had done very well.

[8] While the Decision was still pending, the Applicants were removed from Canada on February 16, 2012. They were in Canada a total of just under 19 months.

DECISION UNDER REVIEW

[9] On November 22, 2012, the Officer rejected the Applicants' H&C application. The Officer acknowledged that in the more than 18 months they had been residing in Canada, the Applicants had made efforts to establish themselves here. Ms. Norbert had joined a church community and had been employed part-time at a nursing home, had good references from her supervisors, and had been taking adult education courses. Odelma had completed adult education courses and had been working part-time at a fast food restaurant. And Eardley had likewise completed adult education courses. The Officer noted that Ms. Norbert indicated she had a sister living in the Hamilton area, Lona Poleon, but there was no letter filed from Ms. Poleon, and no indication whether she is a Canadian citizen or permanent resident.

[10] Despite these links to Canada, the Officer held that, while a return to St. Lucia would certainly cause disappointment, there was insufficient evidence to show that the Applicants would not be able to re-establish themselves there. Ms. Norbert had previously worked in St. Lucia as a security guard for eight years, and the children were in their 20s. The Officer thought it reasonable that they would be able to support themselves in St. Lucia.

[11] Regarding Ms. Norbert's alleged lack of social and family support, the Officer noted that Ms. Norbert had mentioned family members in her narrative, and that she had friends in St. Lucia, five of whom had sent letters in support of her H&C application, suggesting that she would have access to a support network in St. Lucia. The Officer also found the Applicants could support each other emotionally, as they were "very close," and they could potentially find support in a church community as well. In a similar vein, the Officer held that Ms. Norbert could

seek such support to help with her stress disorder, or seek the assistance of a doctor there, as she had done in the past.

[12] Regarding the risk posed by Mr. Raymond and Mr. Peter, the Officer noted that in light of recent amendments to the IRPA, factors of risk under sections 96 or 97 of the Act, including risk to life or cruel or unusual treatment or punishment, should not be taken into consideration in an H&C application. The Applicants had been able to voice such risks and have them considered in their refugee and PRRA applications.

[13] Finally, regarding Eardley's exposure to discrimination and medical risks due to his albinism, the Officer found that the evidence of discrimination came from Ms. Norbert, not from Eardley himself, and that the objective evidence put forward regarding discrimination against albinos was not specific to St. Lucia or the Caribbean region. The Officer also found there was no evidence to suggest that medical care would not be available or that sunscreen was prohibitively expensive.

[14] Overall, the Officer found that, while a return to St. Lucia would cause the Applicants some hardship, it would not be disproportionate or unusual or undeserved hardship.

ISSUES

[15] The issues on this review are:

a. Did the Officer err in not conducting a "best interests of the child" analysis?

b. Did the Officer err in the hardship analysis?

STANDARD OF REVIEW

[16] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48).

[17] It is well recognized that an immigration officer's H&C decision under section 25 of the Act is reviewable on the standard of reasonableness (*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 18; *Kambo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 872 at para 22; *Terigho v Canada (Minister of Citizenship and Immigration)*, 2006 FC 835 at para 6). When reviewing an H&C decision, "considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language" (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 62).

[18] Applying the standard of reasonableness, the Court will be concerned with "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of

the facts and law" (*Dunsmuir*, above at para 47). Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

STATUTORY PROVISIONS

[19] The following provisions of the Act are applicable in these proceedings:

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
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	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.
[…]	[…]

Non-application of certain factors	**Non-application de certains facteurs**
(1.3) In examining the request of a foreign national in Canada, the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national.	(1.3) Le ministre, dans l'étude de la demande faite au titre du paragraphe (1) d'un étranger se trouvant au Canada, ne tient compte d'aucun des facteurs servant à établir la qualité de réfugié — au sens de la Convention — aux termes de l'article 96 ou de personne à protéger au titre du paragraphe 97(1); il tient compte, toutefois, des difficultés auxquelles l'étranger fait face.

ARGUMENT

Issue 1: Did the Officer err in not conducting a "best interests of the child" analysis?

Applicants' submissions

[20] The Applicants argue that the Officer erred in not conducting a "best interests of the child" analysis; even children aged 18 and older may still be considered children for the purposes of such an analysis. See *Naredo v Canada (Minister of Citizenship and Immigration)* (2000), 192 DLR (4th) 373 at para 20; *Swartz v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 268 at para 14; *Yoo v Canada (Minister of Citizenship and Immigration)*, 2009 FC 343 at para 32; *Noh v Canada (Minister of Citizenship and Immigration)*, 2012 FC 529 at paras 63-65 [*Noh*]; and *Ramsawak v Canada (Minister of Citizenship and Immigration)*, 2009 FC 636 at para 18. The Applicants submit that the Officer should have considered whether such an analysis was required, particularly in the case of Eardley, and that the failure to do so was an error reviewable on the standard of correctness. See *Noh*, above at para 22. In their Further Memorandum, however, the Applicants concede that the Board's failure to conduct a best interests analysis may

attract the standard of reasonableness, citing *Hoyos v Canada (Minister of Citizenship and Immigration)*, 2013 FC 998 at paras 8-24.

[21] In their Further Memorandum, the Applicants also note that the definition of "dependant child" in section 2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 includes a child who "is less than 22 years of age and not a spouse or common-law partner." They argue that at the time of the H&C application, Eardley was 21-years-old but financially dependant on Ms. Norbert, enrolled full-time in school, and had a serious medical condition (his albinism). Even though he was over 18 years of age, his level of dependency was such that the Officer should have conducted a best interests analysis, and erred in not doing so.

[22] On the merits, the Applicants argue in their original Memorandum that, in concluding that the children could work to support the family, the Officer failed to consider whether it would be in their best interests to do so instead of continuing their education. The Officer also failed to consider the barriers Eardley would face as an albino man in finding employment in St. Lucia. In these ways, the Applicants submit the Officer did not take into account the best interests of Ms. Norbert's adult children.

[23] Citing *Sinniah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1285 and *Noh*, above, in their Further Memorandum, the Applicants add that the best interests analysis must not be wrapped up in the general hardship analysis. They submit that the Officer's treatment of the needs of the children amounted to a mere cursory consideration and "lip service." The Officer found that Eardley might be able to adjust back to life in St. Lucia, but the Applicants argue that the Officer was required to ask what would be in his best interests, not merely whether he would be able to adapt. This application of the wrong legal test is a

reviewable error, as it led the Officer to apply the wrong test with a higher threshold than was appropriate.

[24] The Applicants further argue that the Officer was not alert to and did not fully understand Eardley's best interests. First, the Officer was dismissive of Eardley's health risks, not giving them "careful attention." The Officer also minimized evidence of the discrimination Eardley would face in St. Lucia by ignoring the evidence of Ms. Norbert on that point, and dismissing the objective evidence regarding albinism by saying it was not specific to St. Lucia or the Caribbean, even though it provided accounts from Latin American countries which, like St. Lucia, are predominantly black.

[25] The Officer also failed to consider a piece of documentary evidence (a 2010 U.S. Department of State Country Condition Report [U.S. DOS Report]) indicating that St. Lucia does not respect human rights and has no remedies for violations. The Applicants acknowledge that an administrative decision-maker need not refer to every piece of evidence, but should address evidence that is central to the decision or which contradicts their findings. They argue that the U.S. DOS Report contradicted the Officer's finding on discrimination, so that failing to reference it was unreasonable.

[26] Finally, the Applicants argue that the Officer did not consider how discriminatory barriers could affect Eardley's access to employment. Instead, the Officer trivialized the impact that returning to St. Lucia would have on Eardley. They submit that the Officer used a "dismissive and results-driven approach" inconsistent with the values underlying section 25 of the IRPA.

Respondent's submissions

[27] The Respondent notes that in the Applicants' H&C submissions, they did not request that the Officer consider the best interests of the child. Rather, they focussed on hardship and establishment. It is the responsibility of the Applicants to bring all relevant H&C considerations to the attention of the Officer (*Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 9 [*Owusu*]). Therefore, the Officer committed no error in not conducting a best interests analysis.

[28] Citizenship and Immigration Canada's [CIC] Operation Manual IP-5 [Manual IP-5] states that a best interests analysis is available only to children under 18 years of age (Manual IP-5 at para 5.12). It provides, in relevant part:

> Children 18 years and over
>
> BIOC must be considered when a child is under 18 years of age at the time the application is received. There may, however, be cases in which the situation of older children is relevant and should be taken into consideration in an H&C assessment. If, however, they are not under 18 years of age, it is not a best interests of the child case.

[29] The Respondent points out that several Federal Court decisions have affirmed that children over 18 are not entitled to a best interests assessment (see e.g. *Leobrera v Canada (Minister of Citizenship and Immigration)*, 2010 FC 587 [*Leobrera*] at para 63; *Moya v Canada (Minister of Citizenship and Immigration)*, 2012 FC 971 at paras 17-18; *Ovcak v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1178 at para 18; *Massey v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1382 at para 48 [*Massey*]).

[30] In any event, the Respondent argues, the Officer did consider the circumstances of Eardley and found the evidence insufficient.

Issue 2: Did the Officer err in the hardship analysis?

Applicant's submissions

[31] The Applicants argue that the Officer erred in ignoring the hardship posed by Mr. Raymond and Mr. Peter. They submit that even in light of recent legislative amendments to the Act, an Officer in an H&C application must still consider any hardships that directly impact the Applicants, regardless of connection to risk. See *Caliskan v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1190. The Officer failed to consider the hardship that Ms. Norbert would face in dealing with those men who had sexually and physically abused her, and the terror she would experience in being unable to hide from them on the tiny island of St. Lucia. The Applicants further argue that the Officer's comments that Ms. Norbert would be able to find support and medical help in St. Lucia indicate that the Officer did not fully appreciate the scope and severity of Ms. Norbert's past abuse and the hardship she would likely face.

[32] In their Further Memorandum, the Applicants argue that by superficially dismissing the risk components from the hardship analysis, the Officer failed to consider the most compelling aspects of Ms. Norbert's hardship, which would require her to perpetually evade her abusers, leading to an insecure housing and employment situation. They argue that the Officer also failed to account for several pieces of evidence that attest to the hardship she would face as a victim of domestic violence in St. Lucia, including several reports documenting the lack of effective police protection in such cases. The Officer also ignored evidence of gender-based discrimination.

[33] The Applicants also say that the Officer failed to appreciate the scope and severity of Ms. Norbert's post-traumatic stress disorder, and the psychological hardship of having to return to St. Lucia. The Officer did not consider the affidavit of Dr. Ruth Herman, a trauma expert. The Officer's finding that Ms. Norbert would have emotional support in St. Lucia, as evidenced by

the letters from her friends in St. Lucia, was perverse given that those letters implored her to stay in Canada. The Applicants also argue that the Officer's finding that Ms. Norbert could just resume medical treatment and counselling in St. Lucia was unreasonable because it ignored the U.S. DOS Report, which stated that there is only one mental health facility on the island and "mentally ill persons are not generally provided much care." The Officer failed to consider whether this reduced level of care, and Ms. Norbert's being forced to disrupt her then-current treatment regime, would amount to undue hardship.

[34] Finally, the Applicants argue that the Officer mischaracterized and ignored evidence of economic hardship. The Officer acknowledged that the job market in St. Lucia is very bad, but dismissed the issue by essentially saying that the Applicants might still be able to find work. The Applicants argue that the gendered nature of St. Lucia society, and the fact that they had been away from St. Lucia for almost two years and had depleted their savings, were not considered by the Officer. Failure to at least grapple with these factors was a reviewable error (citing *Shallow v Canada (Minister of Citizenship and Immigration)*, 2012 FC 749).

Respondent's submissions

[35] The Respondent provided no written submissions on the issue of whether the Officer committed a reviewable error in dismissing risk factors related to Mr. Raymond and Mr. Peter from the hardship analysis in its written submissions.

[36] The Respondent submits that the Officer did not err in not discussing the general country condition documents on violence against women, as the Officer found that Ms. Norbert would not face undue hardship, as she had received assistance in St. Lucia in the past. The Respondent

further submits that there is nothing in the record to show that the Applicants would be subject to harassment or be unable to secure housing or employment.

ANALYSIS

Best Interests of the Child

[37] The Officer was not required to undertake a best interests of the child analysis in this case. The Applicants are correct to point out that there is some jurisprudence that suggests that children over the age of 18 may, in certain circumstances, still be considered children for the purposes of an H&C application. However, there is also jurisprudence that says a best interests analysis is simply not available under the IRPA for older children and, in this regard, it is my view that the reasoning and conclusions in such cases as *Leobrera*, above, and *Massey*, above, is to be preferred. In *Massey*, at para 48, the Court held that:

> [48] In addition, recent jurisprudence of this Court has held that there is no need to consider the best interests of a person over the age of 18 as a "child directly affected" in an application brought under s 25 of IRPA. In *Leobrera v Canada (Minister of Citizenship and Immigration)*, 2010 FC 587, Justice Michel Shore relied on domestic legislation, international instruments and the jurisprudence of the Federal Court of Appeal and Supreme Court to reach the conclusion that "childhood is a temporary state which is delineated by the age of the person, not by personal characteristics" (at para 72).

In addition, in this instance, the Applicants, in their submissions to the Officer, did not even request that a best interests analysis be done for Eardley. They requested that the Officer address hardship. The Applicants argue that, nevertheless, the Officer should have considered whether such an analysis was required. I do not think that the jurisprudence of this Court supports this position.

[38] Manual IP-5 at 5.12 makes it clear that a best interests analysis is only compulsory for children under 18 years at the time the application was received. Eardley was 21 years of age at the material time. As 5.12 of the Manual makes clear, there may be situations in which the situation of older children is relevant and should be taken into consideration, but this does not require the Officer to conduct a best interests analysis. In the present case, Eardley's situation was obviously highly relevant to the Officer's hardship analysis but the Applicants did not request and did not make a case for a best interests analysis. The onus was upon the Applicants to bring all relevant H&C considerations to the attention of the Officer. See *Owusu*, above, at para 9.

Section 25(1.3)

[39] The Applicants point out that, relying upon subsection 25(1.3), the Officer ignored the hardship that the Applicants would face from Mr. Raymond and Mr. Peter if they are returned.

[40] The Decision makes it clear that, indeed, the Officer did conclude that he/she should not address section 96 persecution and section 97 risk when considering hardship and this meant that he/she left out of account an extremely important and material aspect of the Applicants' case for hardship.

[41] I am of the view that subsection 25(1.3) merely codifies, and does not change, the jurisprudence of this Court that risk factors under sections 96 and 97 remain relevant but have to be analysed from the perspective of hardship. This is the view of, for example, Justice O'Keefe in *Vuktilaj v Canada (Minister of Citizenship and Immigration)*, 2014 FC 188 at paras 25-38. However, Justice Kane's ruling to the same effect in *Kanthasamy v Canada (Minister of*

Citizenship and Immigration), 2013 FC 802, is presently before the Federal Court of Appeal so that we do not yet have the Court of Appeal's guidance on this issue.

[42] However, it is my view that I need not wait for a decision from the Federal Court of Appeal on the meaning and scope of subsection 25(1.3). This is because I find that the general hardship analysis in this case contains reviewable errors that, in any event, require the matter to be returned for reconsideration by a different officer. Such reviewable errors arise even if subsection 25(1.3) allows the Officer to disregard the most compelling aspect of the Applicants' case which is hardship at the hands of the two principal perpetrators of abuse, i.e. Mr. Raymond and Mr. Peter.

Hardship Analysis

[43] I find persuasive the following arguments for reviewable error in the Officer's hardship analysis:

a. The Officer acknowledges the psychological hardship that Ms. Norbert will face if returned to St. Lucia but his/her conclusion that Ms. Norbert should be able to rely upon family and friends for "emotional support" does not address the expert evidence of Dr. Ruth Herman as to what will happen if Ms. Norbert is returned to the scene of the trauma;

b. The evidence does not support the Officer's apparent view that there are some sources of emotional support available to Ms. Norbert in St. Lucia;

c. The Officer's analysis ignores objective evidence of barriers in accessing mental health treatment and what would happen to Ms. Norbert if her therapeutic relationships in Canada are disrupted;

d. The Officer ignores the advice of the U.S. DOS Report that there is only one mental health facility in St. Lucia and that mentally ill people are not, generally speaking, provided with much care;

e. Even if some care were available to Ms. Norbert in St. Lucia, the Officer failed to consider the hardship that would result from Ms. Norbert severing her therapeutic relationships in Canada;

f. The Officer does not reasonably assess Ms. Norbert's chances of finding employment given the evidence of deteriorating economic conditions for women in St. Lucia; and

g. The Officer ignores clear evidence of what Eardley suffered and will suffer in terms of discrimination for his albinism in St. Lucia on the irrelevant grounds that "I do not have any evidence from Eardley himself regarding how he perceived the treatment he received in St. Lucia."

[44] The errors above are sufficient to warrant reconsideration.

[45] Counsel agree that, apart from the subsection 25(1.3) issue, which is not required for my decision, there are no questions for certification. I agree.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a different officer; and

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-12788-12

STYLE OF CAUSE: FINA NORBERT, EARDLEY WILMORT PETER AND ODELMA VERLINER SERBRINA PETTER v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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APPEARANCES:

Sayran Sulevani	FOR THE APPLICANTS
Tamrat Gebeyehu	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barbra Schlifer Commemorative Clinic Toronto, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT