Federal Court  Cour fédérale

Date: 20140619

Docket: IMM-2891-13

Citation: 2014 FC 582

Ottawa, Ontario, June 19, 2014

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

SARAH FELIX

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of K. Carlile, a Senior Immigration Officer at Citizenship and Immigration Canada [the Officer], pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. The Officer refused to exempt the Applicant's permanent residence visa application from the selection criteria of the Act on humanitarian and compassionate [H&C] grounds pursuant to section 25 of the Act.

I. Issue

[2] The issues in the present application are whether the Officer's decision is reasonable with respect to the hardship facing the Applicant in returning to St. Lucia and whether the Officer failed to be alert, alive or sensitive to the best interests of the Applicant's Canadian child.

II. Background

[3] The Applicant is a citizen of St. Lucia. She was born on October 29, 1970.

[4] According to her Personal Information Form [PIF] narrative, the Applicant began a relationship with a man named Allan Marius when she was 17 years old. It deteriorated after a few months, and by 1991 he was abusive. She recounts several incidences of physical and verbal abuse. She did not report these threats to the police. In 1992 she left her home and quit her job at a grocery store to avoid Mr. Marius. She worked at a manufacturing facility from 1992 to 1996 and at a hotel from 1996 to 2003.

[5] On May 25, 2003, the Applicant left St. Lucia for Canada and has resided in Ontario since that time. In 2007, she gave birth to a son, Jacob. The Applicant alleges that Jacob's father is unknown.

[6] On July 8, 2009, the Applicant was involved in a motor vehicle accident. She received rehabilitative treatment from a physiotherapist. A letter from her doctor indicates that as of June,

2012, she is generally healthy, but continues to use medication to ease pain resulting from her accident.

[7] On December 2, 2010, a prior H&C application made by the Applicant was rejected. Leave to seek judicial review of that decision was subsequently denied. In 2012, the Applicant made a claim for refugee protection. It was denied on December 21, 2012.

[8] Currently, the Applicant is employed full-time with a staffing company. Reference letters indicate that she attends church and occasionally volunteers at Jacob's daycare centre. According to a letter from his teacher, Jacob is an intelligent, friendly child, who is active and engaged in school.

[9] On June 19, 2012, the Applicant submitted the H&C application at issue in this application. In the written submissions provided with her application, the Applicant states that she is established in her community and would suffer hardship if she was made to return to St. Lucia. This hardship was described as including:

- The danger posed by Mr. Marius and being a survivor of domestic abuse;
- Difficulty in finding employment and supporting herself financially due to the poor economic situation in St. Lucia and her age;
- Difficulty in receiving appropriate medical care;
- The hardship suffered by the Applicant's mother, who would forgo the financial assistance she is receiving from the Applicant's wages in Canada; and

- The hardship suffered by Jacob, including the loss of Canada's education and healthcare system;

[10] The Officer acknowledged the Applicant was established in Canada, accepting her history of employment, lack of a criminal record, community involvement, and letters of support from friends. However, the Officer found that the Applicant's degree of establishment was not greater than what would be expected of similarly-situated individuals, and did not by itself warrant an exercise of discretion on H&C grounds.

[11] The Officer noted that according to subsection 25(1.3) of the Act, considerations appropriate to a refugee analysis under section 96 and 97 of the Act are not to be considered in the H&C application. This includes the risk that would be faced by the Applicant from Mr. Marius on her return to St. Lucia. However, the Officer did consider the Applicant's hardship related to returning to St. Lucia as a survivor of domestic abuse.

[12] The Officer cited the 2011 United States Department of State Report on Human Rights for St. Lucia for the proposition that the police in St. Lucia are willing to arrest perpetrators of domestic violence and have done so. The St. Lucia police force also maintains a Vulnerable Persons Unit to handle domestic violence. In addition, the Family Court in St. Lucia can issue protective orders and there are government support services available for victims of abuse. Based on this, the Officer concluded that redress would be available to the Applicant in St. Lucia to mitigate future hardship that the Applicant would experience as a survivor of domestic abuse.

[13] The Officer also reviewed country condition reports for St. Lucia which shows that crime has risen in recent years. However, the Officer found that the crime rate in St. Lucia would have no disproportionate impact on the Applicant and that police forces respond to victims of crime.

[14] The Officer acknowledged the poor economic situation in St. Lucia and that the Applicant's age would likely present a barrier to employment. However, the Officer found that the Applicant's history of employment and her resourcefulness would assist her in finding a job. In addition, the Officer found that the worst unemployment in St. Lucia occurs in rural areas and if the Applicant moved to an urban environment she would be more likely to find employment. The Officer also found that there was no evidence that the Applicant's injuries have hampered her ability to find and maintain employment.

[15] The Officer acknowledged that health care in St. Lucia may not be as comprehensive as Canadian healthcare. Despite this, there was no information suggesting that the Applicant requires further medical treatment or therapy. While the Applicant alludes to taking painkillers to manage ongoing pain, there was no evidence that she was taking them as of the date of the hearing, or that painkillers would be unavailable in St. Lucia.

[16] With regard to the Applicant's mother, the Officer found that either the Applicant's siblings, or the Applicant would, after obtaining employment in St. Lucia, be able to provide financial support.

[17] With regard to the best interests of Jacob, the Officer found that despite Jacob's Canadian citizenship, it would be in his best interest to return to St. Lucia with the Applicant. The Officer concluded that Jacob's young age, intelligence and good humour will help him establish a new daily routine and make new friends in St. Lucia. Based on the Officer's findings regarding the safety and employment prospects of the Applicant, he would be safe and well-provided for. In addition, the Officer cited a UNICEF report entitled "A Study of Child Vulnerability in Barbados, St. Lucia and St. Vincent and the Grenadines" in finding that school-aged education is compulsory in St. Lucia and that there is no indication that Jacob would be unable to access training or education available in St. Lucia. Likewise, the UNICEF report states that healthcare for children is accessible in hospitals and major health centres and there is no evidence that Jacob would be unable to access that care.

III. Standard of Review

[18] The standard of review is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, at paras 47, 50; *Gill v Canada (Minister of Citizenship and Immigration)*, 2011 FC 863, at para 16).

IV. Analysis

A. *Hardship*

[19] For the reasons that follow, while I accept the Respondent's position that the Officer was reasonable in considering hardship of the Applicant, I find the Officer was unreasonable in his analysis dealing with the best interests of the Applicant's son, Jacob.

[20] While in many instances the Officer gave little attention to aspects of the evidence on hardship, his reasoning was reasonable with respect to the hardship directed towards the Applicant, given the exceptional nature of the H&C remedy.

[21] With regard to the economic situation, the Officer noted that "…the economy in St. Lucia is poor and that high rates of unemployment and poverty are serious, ongoing issues." He considered the Applicant's work history and her personal characteristics and determined that she would not face unusual, undeserved or disproportionate hardship. While I believe the Officer's analysis was weak, it was at least intelligible. The Respondent was not obligated to cite all the documentary evidence and the Applicant's arguments amount to a call for this Court to re-weigh the evidence before the Officer.

[22] Likewise, the Officer's findings regarding the risk posed by Mr. Marius and the high crime rate in St. Lucia was reasonable. As is stated in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113, at paras 48-49, a generalized risk is insufficient to warrant undue hardship in a section 25 analysis. With regard to the risk posed by Mr. Marius, I believe the Respondent was reasonable in assessing the various forms of redress available to the Applicant in deciding whether the risk posed by Mr. Marius would constitute undue hardship. I do not see the Officer's analysis as importing a section 96/97 analysis into a section 25 analysis – rather, I believe it was assessing undue hardship based on risks that would be relevant to both analyses.

[23] I do not think the Applicant fulfilled her evidentiary burden to show that she required any ongoing medical treatment in St. Lucia. A letter by her doctor stating that she sometimes relies on pain medication is not a sufficient indication that the she requires it on an ongoing basis or would be unable to obtain it in St. Lucia at a reasonable price.

[24] Moreover, given my finding above regarding the reasonableness of the Officer's decision in relation to the Applicant's employment prospects, and the fact that the Applicant has siblings, I do not think the Officer's analysis unreasonably failed to consider the Applicant's mother.

B. *Best Interest of the Child*

[25] However, the Officer's analysis with respect to the Applicant's son Jacob is unreasonable. The task of analyzing the best interests of the child in the H&C context is described in *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 [*Hawthorne*], at para 6:

> To simply require that the officer determine whether the child's best interests favour non-removal is somewhat artificial - such a finding will be a given in all but a very few, unusual cases. For all practical purposes, the officer's task is to determine, in the circumstances of each case, the likely degree of hardship to the child caused by the removal of the parent and to weigh this degree of hardship together with other factors, including public policy considerations, that militate in favour of or against the removal of the parent.

[26] I believe that Justice James Russell's decision in *Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166 [*Williams*], at para 63 also provides useful guidance as to how this analysis should be conducted:

> When assessing a child's best interests an Officer must establish first what is in the child's best interest, second the degree to which the child's interests are compromised by one potential decision over another, and then finally, in light of the foregoing assessment determine the weight that this factor should play in the ultimate balancing of positive and negative factors assessed in the application.

[27] There is nothing from *Hawthorne* or any other higher-level court that would suggest that *Williams* enforces a strict analytical formula in assessing the best interests of the child. However, regardless of the formula used, or the order in which the analysis was conducted, the thrust of the Officer's analysis was not focused on determining what was in the best interests of the child. The Officer concluded that "…it would be in Jacob's best interests to return to St. Lucia with the applicant and to not be separated from her". I agree with the Applicant that this is an unjustifiable and unintelligible conclusion. There is no way to justify the conclusion that it would be in a six or seven-year-old child's best interest to move him from Canada's health and education system and the stability of his mother's current employment situation into a developing country where his mother's income would be precarious at best, and the health and education systems are documented as weak.

[28] The Officer did not heed the guidance from *Hawthorne* to weigh the degree of hardship on Jacob or weigh it against other factors relevant to the section 25 analysis. This is evident as the Officer makes virtually no reference to negative impacts on Jacob and only refers to various aspects of relocating to St. Lucia as meeting his needs.

[29] While it is in a different factual context, I adopt Justice Judith Snider's characterization of similar findings from *Shallow v Canada (Minister of Citizenship and Immigration)*, 2012 FC 749, at paras 19-20 – these are "wishful statements" that are not reflective of a reasonable H&C analysis.

[30] The Officer was also unreasonable in that his ostensible analysis of Jacob's best interests seems to instead focus on determining whether relocating to St. Lucia would meet Jacob's needs, or, at least, not harm him. This is evident in several instances:

- "I find that the redress that is available in St. Lucia would….allow the applicant to provide a safe environment for Jacob";
- "I have previously found that the applicant would likely be able to obtain employment in St. Lucia that would enable her to provide a stable home for Jacob";
- "I do not find…that the rate of crime in St. Lucia would cause a direct, negative impact to either the applicant or to Jacob"; and
- "There is little…to indicate that Jacob would be unable to access the health care that is available for children in St. Lucia...(or in the) applicant's materials to support the applicant's statement that the health care that is available for children in St. Lucia would be inadequate to meet Jacob's needs".

[31] This analysis echoes the type which was cautioned against by Justice Russell Zinn in *Sebbe v Canada (Minister of Citizenship and Immigration)*, 2012 FC 813, at paras 15-16:

> 15 In stating that "there is insufficient evidence before me to indicate that basic amenities would not be met in Brazil" the Officer is importing into the analysis an improper criterion. He appears to be saying that a child's best interest will lie with staying

> in Canada only when the alternative country fails to met the child's "basic amenities." That is neither the test nor the approach to take when determining a child's best interests. As Justice Russell recently held in *Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166, at paragraph 64:
>
> > There is no basic needs minimum which if "met" satisfies the best interest test. Furthermore, there is no hardship threshold, such that if the circumstances of the child reach a certain point on that hardship scale only then will a child's best interests be so significantly "negatively impacted" as to warrant positive consideration. The question is not: "is the child suffering enough that his "best interests" are not being "met"? The question at the initial stage of the assessment is: "what is in the child's best interests?"
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> 16 Undoubtedly placing a child in an environment where his or her basic needs are not met can never be said to be in that child's best interest. However, to suggest that the child's interest in remaining in Canada is balanced if the alternative provides a minimum standard of living is perverse. This approach completely fails to ask the question the Officer is mandated to ask: What is in this child's best interest? The Officer was required to first determine whether it was in Leticia's best interests to go with her parents to Brazil, where she had never been before, or for her to remain in Canada where she had "better social and economic opportunities." Only once he had clearly articulated what was in Leticia's best interest could the Officer then weigh this against the other positive and negative elements in the H&C application.

[32] While the Respondent is correct that the best interests of the child are not determinative in an H&C application, given the Officer's unreasonable consideration of Jacob's interests here, I believe they are of sufficient importance to allow this application for judicial review.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Applicant's application is allowed and referred back to a differently constituted Board for reconsideration;

2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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