Federal Court Cour fédérale

Date: 20141114

Docket: IMM-3608-13

Citation: 2014 FC 1078

Toronto, Ontario, November 14, 2014

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

SHAH FAISAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the April 30, 2013 decision of a Senior Immigration Officer of Citizenship and Immigration Canada (Officer) refusing an application for permanent residence based on humanitarian and compassionate (H&C) grounds, made pursuant to section 24(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), by the Applicant, Shah Faisal.

[2] Having read the materials filed and upon hearing the submissions of counsel for the parties, I have determined that this application should be allowed as the Officer failed to properly assess the best interests of the children.

Background

[3] The Applicant is a citizen of Pakistan. He came to Canada in May 2007 on a visitor's visa and made a claim for refugee status the following month. The Refugee Protection Division of the Immigration and Refugee Board of Canada (RPD) denied his claim in June 2009 and the Applicant's application for leave for judicial review of that RPD decision was denied by this Court in December 2010. The Applicant filed a pre-removal risk assessment (PRRA) application which was rejected and leave for judicial review of the negative PRRA application was denied on December 6, 2010.

[4] In February 2010 the Applicant filed an H&C application based primarily on the best interests of two nieces and two nephews, one of whom was suffering from Hodgkins Lymphoma; the support he provided to his Canadian sister who lives in an abusive relationship; and, his establishment in Canada. The H&C application was denied on March 2, 2012, however, after leave for judicial review was granted, the Respondent consented to having the application reconsidered. The reconsidered H&C application was refused on April 30, 2012 and that decision is the subject of this judicial review.

Decision Under Review

[5] The Officer found that the Applicant could not demonstrate that his removal from Canada would result in unusual, undeserved or disproportionate hardship. In reaching that conclusion, the Officer considered hardship as related to risk or sanctions upon return to Pakistan; establishment in Canada; personal/familial ties; and, the best interests of the child being the Applicant's four nieces and nephews, Zanab, Fatima, Umer and Mohammed, all of whom were under the age of 18 at the time of the application.

[6] As the issues raised by the Applicant pertain only to personal/familial ties and the best interests of the child, only these aspects of the Officer's decision are described below. When considering personal/familial ties the Officer referred to the affidavit of the Applicant's Canadian sister, Farah Fayyaz, and noted that she deposed that her arranged marriage to her first cousin, Fayyaz Ahmed, is an abusive one. Along with domestic violence, her husband isolated her and prohibited her from gaining employment or education. The Officer noted that Ms. Fayyaz deposed that the Applicant has been instrumental in her life. Without his presence, she would not have had the conviction to obtain an education, pursue a vocation, acquire a driver's license and otherwise live with a measure of independence. While cultural constraints prevent her from leaving her husband, it is a goal she is progressing towards with the Applicant's support. She submitted that if the Applicant is removed, this would be impossible.

[7] The Officer acknowledged that there may be "issues in the home" but concluded that there was no objective evidence that Ms. Fayyaz had sought assistance or redress from law enforcement, community organizations, or other resources to address the domestic violence.

[8] The Officer further concluded that the Applicant's removal would not result in undue financial hardship for Ms. Fayyaz's family. The Applicant had submitted a monetary transfer to Ms. Fayyaz while she was travelling in Pakistan as an example of her financial dependency. The Officer found that the reason given for the financial transfer, Zanab's hospitalization, had actually occurred after the funds had already been sent. Given that Ms. Fayyaz has two jobs, and that information regarding her husband's employment was not provided, the Officer was not convinced that her family required the Applicant's financial support.

[9] As to the best interests of the child, the Officer noted that one of the Applicant's nieces, Zanab, was diagnosed with Hodgkins Lymphoma in August 2010. The evidence before him was that she has undergone chemotherapy, two hip replacements and numerous other medical procedures; that the Applicant was a constant source of support throughout Zanab's illness; and, that their relationship remains close. Further, in a letter dated January 30, 2012, Zanab had detailed her lack of familial support outside of her nuclear family, the violence and anger displayed by her father, her lack of a good relationship with him and the supportive relationship she shares with her uncle. Aside from continuing to take her to medical appointments, she stated that he has helped her with the costs of attending university, including a $600.00 residence fee for February 2013 which she said her father had refused to pay. However, the Officer stated he was not presented with sufficient evidence regarding the details of her tuition payments. The

Officer found that Zanab would not be precluded from accessing loans and bursaries through programs such as the Ontario Student Assistance Program or Canada Student Loans Program.

[10] The Officer also noted that the Applicant's younger niece, Fatima, is currently a student in high school and had also provided a letter of support in which she indicated the Applicant was like a second father and that she relies and depends on him to take her to school, help with her homework and for emotional support because she does not have a very good bond with her father as a result of his aggressive behaviour. The Applicant's nephews, Mohammed and Umer, wrote similar letters which noted his contributions to their family such as lending money to their father, driving them to various places, paying bills, helping with homework and taking care of Zanab as well as supporting them with personal issues, such as school bullies, and sheltering them when their father threw the family out of their home.

[11] The Officer concluded that it was reasonable to expect that the Applicant established a bond with his nieces and nephews and that "it is noted that the children are solely dependant on their primary care-givers, that being their parents; it is reasonable to expect that their parents will continue to care for them". And, while the best interests of the child are to be given substantial weight, it is only one of the many important factors to consider when making an H&C decision. The Officer placed positive consideration on the involvement the Applicant has with his nieces and nephews, but found that "the evidence before me does not support that the general consequences of departing Canada would be contrary to their interests".

Issues

[12] In my view the issues are as follows:

i. Did the Officer err in failing to conduct a proper best interests of the child analysis?

ii. Did the Officer otherwise misapprehend the evidence before him?

iii. Did the Officer err in failing to recognize the Applicant as a *de facto* family member?

Standard of review

[13] The standard applicable to an officer's decision on an H&C application, including assessments of the best interests of a child, is reasonableness (*Figueroa v Canada (Minister of Citizenship and Immigration)*, 2014 FC 673 at para 24; *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 20 [*Kisana*]; *Webb v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1060 at para 5 [*Webb*]).

Positions of the Parties

Applicant's Position

[14] The Applicant makes three substantive submissions in arguing that the decision was unreasonable. First, that contrary to established jurisprudence, the Officer engaged in a perfunctory analysis in assessing the best interests of the children affected (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] SCR 817 [*Baker*]; *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 32 [*Hawthorne*]) and did not undertake the required three part analysis (*Williams v Canada (Minister of Citizenship and*

Immigration), 2012 FC 166 at paras 54 and 63 [*Williams*]). And, in any event, the Officer failed to identify and include an assessment of the scenario that best protects the child's interests (*Kobita v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1479 at para 53 [*Kobita*]; *Joseph v Canada (Minister of Citizenship and Immigration)*, 2013 FC 993 at paras 18-20 [*Joseph*]).

[15] Second, that the Officer misunderstood, unreasonably assessed and ignored evidence that was presented and came to conclusions, concerning familial support to his sister and financial support to her family, which were contradicted by the record and were unreasonable. And, third, that the Officer failed to conduct an assessment of whether the Applicant was a *de facto* family member, which should have been a positive consideration in his H&C application.

Respondent's Position

[16] The Respondent submits that the onus is on the Applicant to provide all relevant evidence to satisfy the Officer that the requirement to obtain a visa from outside Canada would cause unusual and undeserved or disproportionate hardship. The Officer carefully reviewed all of the submissions but was not satisfied that the Applicant had met that onus. Further, that the Officer was alert, alive and sensitive to the best interests of the Applicant's nieces and nephews and reasonably concluded that the children are dependant on their parents, who are the primary care givers, and that it is reasonable to expect that their parents will continue to care for them. The best interests of the child were reasonably assessed and the jurisprudence indicates that there is no mathematical formula to determine the outcome of a best interests of the child analysis (*Hawthorne*, at paras 7, 37; *Kisana*, at para 32; *Webb*, all above; *Tarafder v Canada (Minister of*

Citizenship and Immigration), 2013 FC 817 at para 46; *Gara v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1247 at paras 46-47).

[17] The Respondent also submits that the Applicant is not a *de facto* family member, as this status is limited to vulnerable persons who do not meet the definition of family members contained in the IRPA and who are reliant on financial and emotional support from persons in Canada (*Frank v Canada (Minister of Citizenship and Immigration)*, 2010 FC 270 at para 29; *Judnarine v Canada (Minister of Citizenship and Immigration)*, 2013 FC 82).

ISSUE 1: Did the officer err in failing to conduct a proper best interest of the child analysis?

[18] Section 25(1) of the IRPA provides an exception to the requirement that persons seeking permanent resident visas must, as set out in s. 11(1) of the IRPA, apply from outside of Canada. It provides exceptional relief in situations where unusual, underserved or disproportionate hardship would be caused if an applicant was required to leave Canada and apply from abroad in the normal fashion (*Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 at para 40; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 15 [*Legault*]). Section 25(1) requires that the best interests of a child directly affected be taken into account for the purposes of that analysis:

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	25. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada

permanent resident status and who is inadmissible - other than under section 34, 35 or 37 - or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada - other than a foreign national who is inadmissible under section 34, 35 or 37 - 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.	qui demande le statut de résident permanent et qui soit est interdit de territoire - sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 -, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada - sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 - 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.

[19] In *Baker*, above, the Supreme Court of Canada held that H&C officers should consider children's interests as an important factor, give them substantial weight and be "alert, alive and sensitive" to them.

[20] In *Legault*, above, at para 12, the Federal Court of Appeal held that once an officer has identified and defined the best interests of the child, it is up to the officer to determine what weight those interests must be given in the circumstances of the case.

[21] In *Kisana*, above, the Federal Court of Appeal noted that the Supreme Court of Canada in *Baker*, also above, found that the best interests of the child are one factor that an officer must

examine with a great deal of attention. Equally, in *Suresh v Canada (Minister of Citizenship and Immigration*), 2002 SCC 1 at para 37, the Supreme Court had made it clear that it is up to the officer to determine the appropriate weight to be afforded to this factor in the circumstances of the case. It is not the role of the courts to re-examine the weight given to the different factors by the officer. The officer must be alert, alive and sensitive to the interests of the children, but once the officer has identified and defined this factor, it is up to them to determine the weight it must be given:

> [24] Thus, an applicant is not entitled to an affirmative result on an H&C application simply because the best interests of a child favour that result. It will more often than not be in the best interests of the child to reside with his or her parents in Canada, but this is but one factor that must be weighed together with all other relevant factors. It is not for the courts to reweigh the factors considered by an H&C officer. On the other hand, an officer is required to examine the best interests of the child "with care" and weigh them against other factors. Mere mention that the best interests of the child has been considered will not be sufficient (*Legault, supra*, at paragraphs 11 and 13).

[22] The Applicant submits that the Officer failed to follow the framework set out in *Williams*, above, wherein the officer first determines what is in the child's best interest, second, the degree to which the child's interest is compromised by one potential decision over another, and finally, the weight that the best interests of the child should play in the overall balancing of the positive and negative factors assessed in the application. However, as the Respondent notes, Justice Mosley in *Webb*, above, recognized that the assessment of the best interests of the child in circumstances where the affected child is not the child of the applicant may not conform readily to the *Williams* test. Further, that the officer is not bound by "any magic formula in the exercise of their discretion":

> [13] An assessment of the best interests of the child in the circumstances of a case such as this does not conform readily to the type of analysis described in Williams, above. In my view, the Williams formula provides a useful guideline for officers to follow where it may be helpful in assessing a child's best interests but it is not mandated by the governing authorities from the Supreme Court and the Federal Court of Appeal. In Williams, the interests of the Canadian born child in question were directly and significantly affected by the removal of his mother as he had to leave Canada with her. Here, it is likely that Alika's interests would best be served by the applicant remaining in Canada. But it is difficult to see how an officer could assess the degree to which that interest would be compromised by a negative decision and weigh that in the ultimate balancing of positive and negative factors. As stated in the paragraph cited from Hawthorne above, immigration officers are not bound by any magic formula in the exercise of their discretion.

[23] Thus, while the *Williams* approach is a valuable tool by which, in some cases, an officer can endeavour to ensure that the analysis they have conducted meets the threshold of reasonableness, the failure to strictly apply that framework is not in itself enough to render a decision unreasonable (*Chandidas v Canada (Minister of Citizenship and Immigration)*, 2013 FC 258 at para 67; *Simkovic v Canada (Minister of Citizenship and Immigration)*, 2014 FC 943 at para 13; *Martinez Hoyos v Canada (Minister of Citizenship and Immigration*), 2013 FC 998 at paras 32-33; and *Beggs v Canada (Minister of Citizenship and Immigration*), 2013 FC 903 at paras 10-22). In any event, what is clear is that under any approach, the officer must demonstrate that the analysis of the best interests of the child was conducted "with care" (*Kisana*, above, at para 24) and identifies and defines the best interests of the child.

[24] The Applicant relies on *Kobita* and *Joseph*, both above, to support a view that the Officer was, in any event, compelled to identify and include an assessment of the scenario that best protects the children's interests and to weigh all other scenarios against this. Although those

cases concerned situations where a Canadian born child faced remaining in Canada without a parent or accompanying the parent to the country of removal and therefore are factually distinct from this situation, the principle remains that the Officer was at least required to consider the scenario of the Applicant's removal and how that would affect the best interests of the children in this case (*Kobita*, above, at paras 52-53).

[25] In my view, the Officer erred in this regard by failing to assess the effect that the Applicant's removal would have on Zanab's health and well being. While the Officer discussed Zanab's condition, and found the Applicant to be a "constant source of support for her throughout her illness", he failed to address the impact of removing the Applicant from her life and whether it was in her best interest for the Applicant to remain.

[26] The significant role that the Applicant plays in Zanab's life is described in her letter dated May 18, 2011, which was before the Officer [AR, p. 76]:

> …My father is a very violent and an angry man…My uncle on the other hand is calm and generous. Over the last 3 years he has become a father figure to me.
>
> Needless to say, my father and I do not have a good relationship. Which made it really hard to when I got sick, I have been diagnosed with cancer: Hodgkin's Lymphoma. Even though I am so sick, my father has not curbed his abusive behavior. When I was in hospital he rarely if ever came to see me. The yelling at home hasn't stopped.
>
> My uncle, on the other hand, has been there for me every step of the way. When I was first diagnosed he was living with us. He would spend time with me, giving me support, and helping me cope with my treatment. Now he comes with me to hospital appointments and he is my biggest supporter. He gave me the strength to believe that I will soon get better, and he showed me that there is nothing in the world that can stop me from living the way I want to. Not even Cancer…

> I do not know what I will do if my uncle leaves. I'm going through the most difficult time of my life.
>
> …..I've been through a lot of pain, and when my family & I thought everything was over, all the trips to the hospital would end, we would have to deal with another problem.…-My cancer side would be okay, but my lungs would be acting up, my lungs would be okay, but I'd soon have another problem. Due to this, my time at the hospital never came to an end. I didn't let that get in the way of me being a regular 17 year old, because my uncle always made sure I was.

[27] The Applicant's continued involvement in her treatment and care is clear from her January 30, 2013 letter:

> … I had two hip replacement surgeries last year. If it wasn't for my uncle and his wife's help, I wouldn't be able to walk on my feet again. They both took care of me like a daughter…
>
> …I'm in and out of the hospital all the time. My treatments are never ending procedure and I need someone to take me to the appointments all the time. I'm better than before but not fully recovered. I often get pneumonia due to my weak immune system, regular checkups with many different doctors at St. Michael's Hospital (Toronto) to discuss my conditions with the doctor and make me understand what the procedure is…I only feel comfortable with my uncle to go places.

[28] The affidavit of the Applicant also describes how he visited Zanab twice a week when she was in the hospital and would stay with her on weekends. When, as a result of her treatment, at the age of 17 she had to undergo two hip replacement surgeries, he and his wife stayed with and supported her through the surgery and recovery. Currently, he picks her up every weekend from university and brings her home, or to stay with him, and then brings her back at the end of the weekend. He states that she will face further surgeries and that he wants to be here for her

and to be a positive male role model in her life and the lives of her siblings. The continued close relationship between the Applicant and Zanab is also attested to in the affidavit of Ms. Fayyaz.

[29] Although the Applicant's influence on Zanab's health and continued well being is clear from the record, there is no assessment of how his removal would affect her best interests or how this was weighed in the Officer's consideration of the whole of the H&C application. Rather, the Officer eventually concludes that, "…the evidence before me does not support that the general consequences of departing Canada would be contrary to their best interests". The notable absence of such an analysis renders the decision unreasonable. Zanab's circumstances, in the context of her relationship with her uncle, should have been afforded careful consideration. The Officer's reasons do not demonstrate that he clearly identified this as a factor to be assessed in his best interests analysis and, therefore, that he was alert, alive and attentive to her best interests.

[30] Further, as noted above, the Officer conducted a best interests of the child analysis of all four of the Applicant's minor nieces and nephews. In the course of this analysis, the Officer discussed, among other things, the sympathetic ear and support the Applicant lent to his nieces and nephews in the course of his time in Canada. In addressing the impact of being removed from his two nephews and his niece, Fatima, the Officer reasonably concluded that an affectionate relationship would not be the uncommon result of a prolonged stay.

[31] However, the Officer erred in failing to assess the impact of the positive role model that the Applicant plays in the lives of all of the children. Each of the Applicant's nieces and nephews provided letters describing the role that the Applicant plays in their lives and wherein

each child describes the violent and abusive situation in which they live with their father. In one instance, in December 2010, while Zanab was ill, their father threw them and their mother out of their home in the middle of the night. The Applicant came and got them and took them in. They each describe the Applicant as always and dependably there for them when needed, for any reason, and the positive and supportive role that the Applicant plays in each of their lives.

[32] Despite this evidence, the Officer concludes:

> While it is reasonable to expect that the applicant has established a bond with his nieces and nephews since coming to Canada, it is noted that the children are solely dependant upon their primary care-givers, that being their parents; it is reasonable to expect that their parents will continue to provide for them. ….I place favourable consideration on the positive involvement the applicant has had with his nieces and nephews, however the evidence before me does not support the general consequences of departing Canada would be contrary to their best interests.

[33] This conclusion does not flow from the evidence before the Officer. The children's submissions were clear that it is the Applicant, and not their father, who they depend upon to provide them with emotional and other support. Further, the Officer does not identify or address the positive role model that their uncle provides in the context of the domestic violence to which they are exposed, yet that role may be very significant. Nor is it explained why it would be in the best interests of the children to have that role model removed in such circumstances.

[34] The Officer acknowledges that there may be "issues in the home" but concludes that the submissions do not include objective corroborating evidence that Ms. Fayyaz sought assistance or redress from the police or agencies that specialize in dealing with domestic abuse and that it was reasonable to expect that she would have done so. However, he takes the analysis no

further. The inference may be that if these community resources were provided to Ms. Fayyaz, then the Applicant's removal would not constitute unusual and undeserved or disproportionate hardship. However, this is not clear and the Officer does not explain why the best interests of the children would be better served by such measures rather than, or in addition to, the support that the Applicant could provide to them and Ms. Fayyaz in these circumstances. Nor does the Officer address Ms. Fayyaz's evidence that she will find it impossible to leave her husband if the Applicant is removed and the impact that this would have on the best interests of the children.

[35] To be alert, alive and sensitive to the best interests of the children the Officer was required to gain a full understanding of the real life impact of a negative H&C decision (*Kolosovs v Canada (Minister of Citizenship and Immigration)*, 2008 FC 165) and I am not persuaded that the Officer did so in this case. The Officer should have identified the children's best interests then considered how this would be impacted by the removal of the Applicant. This could then be weighed as a factor in the overall consideration of the H&C application. Here the Officer's failure to properly identify the children's best interests in view of the evidence before him renders his decision unreasonable.

[36] Given my conclusion on the first issue above, it is unnecessary to address the second and third issues raised by the Applicant.

Costs

[37] The Applicant seeks an award of costs. He submits that the application for judicial review of the initial H&C decision, which the Respondent agreed to send back for

redetermination, was predicated on an erroneous best interests of the child assessment. He submits that given that the same error has occurred upon redetermination and that this results in unnecessary expense and suggests bad faith on the part of the Respondent. The Applicant submits that costs were awarded upon similar facts in *Bautista v Canada (Minister of Citizenship and Immigration)*, IMM-2673-13 (Order dated October 8, 2014).

[38] It is trite law that costs in the immigration context are an extraordinary remedy, and may only be awarded for "special reasons" pursuant to s. 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22. Special costs cannot be justified merely because an immigration official has made an erroneous decision (*Ndungu v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 208 at para 7(5)(i)) and there is no evidence of bad faith. In the circumstances of this case, I do not believe that the threshold of "special reasons" has been met.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed, the decision is to be remitted to a different officer for reconsideration;
2. No question of general importance was proposed or arises for certification; and
3. There is no order as to costs.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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