

Federal Court



Cour fédérale

Date: 20150430

Docket: IMM-1268-14

Citation: 2015 FC 567

Toronto, Ontario, April 30, 2015

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

**JUNIOR CALVERT INNISS
ROANNA LISSETTE STEPHENS
MYA STEPHENS
(BY LITIGATION GUARDIAN
ROANNA LISSETTE STEPHENS)**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

ORDER AND REASONS

[1] The present Application concerns a father, mother, and their minor child who, as citizens of St. Vincent, made an application for permanent residence in Canada on humanitarian and compassionate (H&C) grounds pursuant to s. 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). The test to be applied on an H&C application is whether the

applicant will face unusual and undeserved or disproportionate hardship if the application is rejected and the applicant is forced to return to his or her country of origin. In addition, according to the provision itself, an H&C decision must be rendered “taking into account the best interests of a child directly affected”. Thus, in the present case, those interests were required to be considered with respect to the minor Applicant Mya. But, as outlined below, the mother and father’s Canadian born child, Jayanna, is also directly affected by the application, and, as a result, her best interests were also required be determined.

[2] In a decision dated February 6, 2014, a Minister’s delegate (Officer) rejected the Applicants’ application. A critical issue raised by the present Application is whether the Officer properly addressed the best interests of Mya and Jayanna. For the reasons which follow, I find that the Officer failed to do so.

I. The Context

[3] The movement of the family from St. Vincent to Canada is as follows. According to their sworn evidence, the mother arrived from St. Vincent in December 2002, and the father arrived from St. Vincent in August 2004; they were married in Canada in 2005, and Jayanna was born in Canada in April 2006. In November 2008, the father left Canada for St. Vincent to follow a business proposition; the mother and Jayanna followed the father to St. Vincent in April 2009. In July 2011, Mya was born in St. Vincent. In August 2011, the father and Jayanna returned to Canada, and because of complications from the birth of Mya, the mother and Mya did not return until May 2012 (Certified Tribunal Record (CTR), pp. 100 -105).

[4] The H&C application was prompted by the fact that the father overstayed the visitor visa he obtained in August 2011 and, as a result, an exclusion order was made which applies to all members of the family, except Jayanna. As is set out below, the Officer confirms that the family fled abject poverty in St. Vincent and came to Canada for a better life. The Officer also confirms the fact that the Applicants have done this out of the best interests of their children.

[5] On the issue of establishment in Canada, the Officer makes the following statement which provides important context with respect to the experiences of the parents in St. Vincent:

I note that the applicants both have work experience from their time living in St. Vincent previously. While I consider that the applicants' [sic] faced financial hardship in St. Vincent, I also note the male applicant was able to work during while residing in St. Vincent and earn a living. I also note that although the female applicant states that she was unable to find work in St. Vincent, that this particular time in St. Vincent also coincided with her difficult pregnancy, and the pre-mature birth of her daughter Mya, who was ill and remained in hospital for some time. I find these factors as very real and compelling reasons as to why she was not employed for at least some of her time in St. Vincent. I note these were circumstances beyond her control. Still, I consider that the applicants experienced a lower standard of living in St. Vincent in [sic] compared to Canada. I also consider however that the applicants are very hardworking individuals, who, in addition to raising two minor daughters work three jobs between them. This demonstrates their adaptability, their hardworking nature, and their desire to find adequate employment, regardless of their location. The H&C process is not designed to eliminate hardship for applicants, but rather to provide relief from unusual and undeserved or disproportionate hardship. I do not find that the applicants have demonstrated with evidence they will return to a situation of hardship, in light of the evidence provided.

In regards to the economic hardship the applicants' [sic] state they faced in St. Vincent, I accept that the adult applicants (the male applicant in particular) grew up in poverty. I note that the female applicant states in her affidavit that the family was forced to reside in an extra room in her mother's house for some time after returning there in 2008/2009. However, I also note that the female applicant states later in her affidavit that she and the couple's

daughter Mya resided in an apartment, where they were unable to pay for electricity. I consider this statement, finding it indicates that the female applicant and her daughter moved out of her mother's residence and into an apartment. This is evidence that the family was able to pay rent while residing in St. Vincent for some time, after initially residing with relatives. Though the applicants state that they will receive no assistance from their relatives in St. Vincent because they are all poor, I note that they have resided with the female applicant's mother in the past. I find the presence of numerous family members in St. Vincent advantageous, in terms of social ties and family assistance, if not financial aid.

(CTR, pp. 7-8)

II. Determining the Best Interests of the Children: The Law

[6] Two decisions of the Court are particularly important with respect to the Officer's analysis in reaching the decision under review.

[7] As stated in the decision in *Kolosovs v Canada (Minister of Citizenship and Immigration)*, 2008 FC 165 at paragraphs 8 to 12, the Officer was required to conduct a best interests of the children analysis according to a detailed legal standard:

Requirements for Determining the Best Interests of the Child

[*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817] at para. 75 states that an H&C decision will be unreasonable if the decision-maker does not adequately consider the best interests of the children affected by the decision:

The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them.

[Emphasis added]

This quote emphasizes that, although a child's best interests should be given substantial weight, it will not necessarily be the determining factor in every case, (*Legault v Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358 (C.A)). To come to a reasonable decision, a decision-maker must demonstrate that he or she is alert, alive and sensitive to the best interests of the children under consideration. Therefore, in order to assess whether the Officer was "alert, alive and sensitive", the content of this requirement must be addressed.

A. Alert

The word alert implies awareness. When an H&C application indicates that a child that will be directly affected by the decision, a visa officer must demonstrate an awareness of the child's best interests by noting the ways in which those interests are implicated. Although the best interests of the child is a fact specific analysis, the *Guidelines* at s. 5.19, provide a starting point for a visa officer by setting out some factors that often arise in H&C applications:

5.19. Best interests of the child

The *Immigration and Refugee Protection Act* introduces a statutory obligation to take into account the best interests of a child who is directly affected by a decision under A25(1), when examining the circumstances of a foreign national under this section. This codifies departmental practice into legislation, thus eliminating any doubt that the interests of a child will be taken into account.

Officers must always be alert and sensitive to the interests of children when examining A25(1) requests. However, this obligation only arises when it is sufficiently clear from the material submitted to the decision-maker that an application relies, in whole or at least in part, on this factor.

[...]

Generally, factors relating to a child's emotional, social, cultural and physical welfare should be taken into account, when raised. Some examples of factors that applicants may raise include:

- the age of the child;
- the level of dependency between the child and the H&C applicant;
- the degree of the child's establishment in Canada;
- the child's links to the country in relation to which the H&C decision is being considered;
- medical issues or special needs the child may have;
- the impact to the child's education;
- matters related to the child's gender.

[Emphasis added]

B. Alive

The requirement that a child's best interests be given careful consideration was reiterated by the Federal Court of Appeal in *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, [2003] 2 F.C. 555 (C.A) (QL) at para. 52:

The requirement that officers' reasons clearly demonstrate that the best interests of an affected child have received careful attention no doubt imposes an administrative burden. But this is as it should be. Rigorous process requirements are fully justified for the determination of subsection 114(2) [now s. 25(1) of the *IRPA*] applications that may adversely affect the welfare of children with the right to reside in Canada: vital interests of the vulnerable are at stake and opportunities for substantive judicial review are limited.

Once an officer is aware of the best interest factors in play in an H&C application, these factors must be considered in their full context and the relationship between the factors and other elements of the fact scenario concerned must be fully understood. Simply listing the best interest factors in play without providing an analysis on their inter-relationship is not being alive to the factors. In my opinion, in order to be alive to a child's best interests, it is necessary for a visa officer to demonstrate that he or she well understands the perspective of each of the participants in a given fact scenario, including the child if this can reasonably [sic] determined.

C. Sensitive

It is only after a visa officer has gained a full understanding of the real life impact of a negative H&C decision on the best interests of a child can the officer give those best interests sensitive consideration. To demonstrate sensitivity, the officer must be able

to clearly articulate the suffering of a child that will result from a negative decision, and then say whether, together with a consideration of other factors, the suffering warrants humanitarian and compassionate relief. As stated in Baker at para. 75:

“ ... where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.”

[Emphasis added]

[8] The approach to be adopted in determining the best interests of a child is specifically addressed by Justice Russell in *Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166. Justice Russell held that it is an error for a visa officer to apply a test of hardship when assessing the degree to which a child's best interests may be compromised by removal with his or her parents. More specifically, at paragraph 64 he explained as follows:

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?"

[Emphasis added]

III. The Officer's Best Interests Analysis

[9] Three principal issues are addressed by the Officer in considering how the “Best Interests of the Children” (CTR, pp. 9 and 10) will be impacted by their potential return to St. Vincent:

dislocation, gender-based concern, and poverty. In the following passages from the decision, the emphasis is added to highlight the Officer's best interests conclusions.

[10] With respect to dislocation, the Officer made the following findings:

In sum, Jayanna has resided in Canada for 5 out of her 7 young years. It should be noted that Jayanna is not required to leave Canada as she is a Canadian citizen. She is able to remain in Canada regardless of the outcome of this decision. However, it remains to be seen if this is in her best interest, as her parents are without status in Canada. I consider that her parents have demonstrated through their submissions that they care for her and love her, and I find as there is minimal family in Canada, it would be in Jayanna's best interest to remain in the loving care of her parents, wherever they reside.

[...]

I accept that their eldest child, Jayanna has settled into school and has made friends. She appears to be a well adjusted and healthy 7 year old. I also note that Jayanna has personal experience in moving from Canada to St. Vincent previously. I also note she has experience leaving her social circle from St. Vincent, without any reported negative consequences. I consider her age and her adaptability, and find that removal would not compromise her interests in light of her establishment in Canada, and in light of her personal history of moving internationally. I also note that Jayanna is not required to leave Canada, and could remain if he [sic] parents so wished.

In regards to Mya, I note and consider her young age (3 years old), finding that she is very young and entirely reliant on her parents for support. Keeping this in mind, I consider that her parents have always put their children's best interests first, regardless of their location. I find that removal to St. Vincent would not compromise Mya's best interests noting she has yet to make any serious ties to Canada, and that she benefits from numerous family members in St. Vincent. I consider her gender and her access to education in making this finding.

[11] With respect to gender-based concern, the Officer made the following findings:

The female applicant states in her affidavit that violence is a problem in St. Vincent, which she does not hope for her daughters. While I place some weight on this statement, I also note that none of the family members have ever faced any community violence in the past. While objective country reports are useful for informational context, I do not find them applicable to the applicants' personal situation, with particular respect to the minor applicant and her sister. I find very little grounds present indicating that the children impacted by this decision are likely to face violence in the future by returning to St. Vincent. I find the presence of societal violence does not indicate that the children will face a compromise to their interests if returned to St. Vincent.

[...]

Counsel for the applicants raises the issue that the children impacted by this decision are both girls, and notes that violence and discrimination against women and girls in St. Vincent is a serious problem. I accept this factor, based on the evidence provided, and place weight on this element. Violence against women and girls in St. Vincent is a serious problem, which impacts women in general disproportionately. However, I also note that these girls are raised in a loving home by their parents, who seek to provide them with ongoing security. I note that Mya and Jayanna benefit from family in St. Vincent. I do not find this factor in and of itself indicative that a return to St. Vincent will cause them a personal compromise to their best interests.

[12] With respect to poverty, the Officer made the following findings:

I note that poverty is a serious problem in St. Vincent, which the applicants state has impacted these children negatively in the past. The female applicant describes in her affidavit how she was unable to pay her bills, pay for her outstanding health care bill, or pay for electricity in her apartment for nearly 2 years. This is undoubtedly a serious concern which I consider in light of the best interests of these children, noting that despite the presence of various family members in St. Vincent, the children were impacted negatively by their parents' low income in St. Vincent. However, I also note that during this time, the female applicant was raising an infant with infancy related health needs, while alone for much of the time, and that she was unable to work. I find that although the female applicant has faced problems finding employment in St. Vincent in the past, that she returns with a significant amount of work experience from Canada. I find that these factors lead me to

conclude that the applicants are no [sic] likely to return to a situation of financial destitution. This factor leads me to conclude that although the family has suffered economic problems in the past, that they have demonstrated they always put their children's best interests first. I find that a return to St. Vincent will not compromise these girls' best interests.

[Emphasis added]

[13] The following is the Officer's conclusion to the best interests analysis:

For these reasons, while being alert, alive and sensitive to the best interests of the children, and viewing the situation from their perspective, I find that it would not cause a negative cultural, social or emotional impact on the children in such a way so as to warrant an exemption under s. 25(1) of the IRPA. In this instance, the children's best interests do not outweigh other considerations anticipated by the legislation.

IV. My Opinion on the Analysis

[14] In my opinion, the Officer failed to address the best interests of Jayanna and Mya according to law.

[15] To meet the legal standard, the Officer was required to provide, at the very least, a reasoned answer to two questions with respect to Jayanna's and Mya's best interests: in whose care should they live; and where should they live? The Officer did provide an answer to the first question with respect to Jayanna: "it would be in Jayanna's best interests to remain in the loving care of her parents, wherever they reside" (CTR, p. 9). It appears from the decision that the same answer was assumed with respect to Mya just because she is an infant. As a result, her best interests were not specifically determined by the Officer.

[16] However, the Officer failed to answer the second question with respect to both Jayanna and Mya. It appears from the Officer's reasoning that, since the children's parents had not proved establishment in Canada to the Officer's satisfaction, not only would they be required to return to St. Vincent, but both children would naturally return with them. While the Officer commented that, as a Canadian citizen, Jayanna was not required to leave Canada with her parents, the comment was not developed for a good reason: she would have no one to care for her in Canada except a child welfare agency. Of course, this outcome would be contrary to the finding that Jayanna should be with her parents.

[17] From the way the decision reads, the possible outcome that the children's best interests might require that they remain together with their parents in Canada was never an option. As a matter of law, the best interests of the children must be determined first. Thus, if the determination is made that the children should remain with their parents, then it should remain open for an officer to conclude that the children should remain in Canada with their parents.

[18] In my opinion, the Officer's analysis displays a non-transparent attempt to divert away from concluding that the children, and thus their parents, should remain in Canada, to a conclusion that the children will somehow be able to tolerate and adapt to the serious hardships they would face if they were required to reside with their parents in St. Vincent. This discourse is unacceptable because it exhibits the fact that no sensitivity to Jayanna's or Mya's best interests was applied. As described below, I find that the Officer relied upon unfounded speculation and a misapplication of the evidence on the record to reach a conclusion to the best interests analysis.

A. *Regarding dislocation*

[19] With respect to Jayanna, to legitimize her removal from Canada on the basis that she has a “personal history of moving internationally” is a capricious finding to make given that her only travel outside Canada occurred when she was three years old.

[20] With respect to Mya, there is no evidence that a child of her age would not suffer from being dislocated from a life to which she has become accustomed. In fact, the evidence concerning the obvious differential that exists between life in St. Vincent and life in Canada suggests the opposite. In addition, the evidence on the record before the Officer is that Mya’s parents cannot rely upon family support in St. Vincent. Therefore, it is an erroneous finding of fact for the Officer to conclude that the support would exist upon return.

B. *Regarding gender-based concern*

[21] In my opinion, the Officer’s reasoning that Jayanna’s and Mya’s parents can protect them from the reality of gender-based violence in St. Vincent is pure unfounded speculation. In addition, the Officer failed to recognize, and be sensitive to the fact that, as the children grow up and become more independent, they may be at enhanced risk from the acute gender-based violence which is described in the evidence on the record.

C. *Regarding poverty*

[22] With respect to this point in the Officer's analysis, I find that Justice Russell's admonition is most relevant: "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' " (*Williams* at para 64). As quoted above, despite finding that poverty is a "serious problem in St. Vincent," and that the children's mother was previously unable to secure employment or pay her bills, the Officer attempts to set a standard of poverty that the children should be able to tolerate without having their best interests compromised: something short of "a situation of financial destitution". In addition, the Officer's finding that the children's mother now has Canadian work experience is irrelevant; there is no evidence on the record to support the Officer's speculation that Canadian work experience would make a difference to the poverty that the family would face upon return to St. Vincent. In my opinion, the Officer's attempt to downgrade the poverty reality exposes a profound lack of sensitivity to Jayanna's and Mya's best interests.

V. Conclusion

[23] For the reasons provided, I find the decision under review is manifestly unreasonable.

ORDER

THIS COURT ORDERS that the decision under review is set aside and the matter is referred back to a different Minister's delegate for redetermination.

There is no question to certify

“Douglas R. Campbell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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