Federal Court  Cour fédérale

Date: 20190228

Docket: IMM-2682-18

Citation: 2019 FC 248

Ottawa, Ontario, February 28, 2019

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

ABBA SHAWNDELL DANIEL
JADEN DAMON LAFORCE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA or the Act] of a decision of a Senior Immigration Officer of Immigration, Refugees and Citizenship Canada [the Officer] refusing the application of Abba Shawndell Daniel and Jaden Damon Laforce [the Applicants] for permanent

residence from within Canada on humanitarian and compassionate grounds [H&C], dated May 16, 2018. The Officer refused the application on the grounds that the positive and negative H&C factors collectively do not justify granting an exemption under subsection 25(1) of the IRPA.

II. Background

[2] The Principal Applicant, Abba Shawndell Daniel, was born in 1980 and is a citizen of Saint-Lucia. The Minor Applicant, Jaden Damon Laforce, was born in 2008, is also a citizen of Saint-Lucia, and does not have status in Canada. The Principal Applicant also has a daughter, born in 2015, who is a Canadian citizen.

[3] The Applicants arrived in Canada on December 3, 2009 under six month visitor visas. Their claims for refugee protection submitted on December 9, 2010, on the basis that the Principal Applicant would face risks in Saint-Lucia because she is bisexual, were dismissed in June 2012. The Applicants' pre-removal risk assessment [PRRA] applications were dismissed in June 2014.

[4] The Applicants did not appear for their scheduled removal in July 2014 and a warrant was issued against the Principal Applicant in August 2014. The Principal Applicant was located by the Canada Border Services Agency [CBSA] in April 2015. Because she was eight months pregnant and babysitting a minor child, the officer did not arrest her and instead instructed her to appear at the CBSA office the following day. The Principal Applicant did not appear and her warrant was outstanding at the time the decision under review was rendered.

[5] The Applicants initially applied for H&C relief in January 2016. This Application was refused in March 2017. After applying for the judicial review of that decision, this Court granted leave in August 2017. By consent, that application was remitted to be re-determined by a different officer in September 2017. The Applicants provided updated submissions in November 2017.

[6] The Officer ultimately dismissed the application on May 16, 2018, finding that the Principal Applicant's establishment, the best interests of the Principal Applicant's two children currently in Canada, and submissions about the hardship that the Principal Applicant would face as a bisexual person in Saint-Lucia were not sufficient to warrant granting H&C relief. The Officer also based his conclusion on the Principal Applicant's failure to adhere to Canadian immigration laws, notably, by evading removal.

[7] The Applicants now challenge this decision on the ground that the Officer failed to consider relevant evidence with respect to the hardship that the Principal Applicant would face upon her return to Saint-Lucia.

III. Impugned decision

[8] The Officer first commended the Principal Applicant's volunteer work and involvement in her community and recognized that she has established a social network in Canada. The Officer accepted that the Principal Applicant is gainfully employed full-time and is self-sufficient. Ultimately, the Officer found that the Principal Applicant has demonstrated an

expected level of establishment given the length of her time in Canada and did not find it to be exceptional, yet gave her establishment some weight.

[9] With respect to the best interests of the Principal Applicant's children in Canada, the Officer concluded that insufficient evidence was presented establishing that the Principal Applicant's Canadian two-year-old daughter requires medical support or would be significantly impacted if she leaves Canada. There was no information regarding her father or his involvement in her life or her upbringing. There is also little information or evidence indicating that she would not be able to relocate to Saint-Lucia or that her well-being would be compromised upon leaving with her mother.

[10] With respect to the 10-year-old Minor Applicant, the Officer dismissed the submissions that he is potentially gay based on a statement made two years previously and may be at risk in Saint-Lucia, as the Applicants provided no other evidence regarding his sexual orientation or identity. There was insufficient evidence to confirm that he is gay.

[11] The Officer further concluded that the Minor Applicant is well-established in Canada and that for a number of reasons it would be in his best interests to remain in Canada. The Officer gave this factor "considerable weight" in favour of the Applicants.

[12] The Officer then addressed the Principal Applicant's submissions that if removed to Saint-Lucia she "will face severe discrimination and violence as a bisexual woman along with

poverty and isolation," that everyone in Saint-Lucia knows that she is bisexual because it is a small island, and her statement that "no one will hire me, and I will likely be attacked."

[13] The Officer accepted that "there may be the perception that the principal applicant may not be heterosexual because [*sic*] her involvement with in the LGBT community in Canada" and that "there is societal discrimination against LGBT persons in Saint-Lucia."

[14] The Officer cited an excerpt from a country condition document dating from 2017, which states that there is widespread discrimination against LGBT people in Saint-Lucia, notably, "daily verbal harassment," reports state that they are denied access to rental homes or are forced to leave rental homes, and they are denied jobs, or forced to leave jobs due to a hostile work environment. The excerpt also concludes that "[t]here were few reported incidents of violence or abuse during the year."

[15] The Officer remarked that the Principal Applicant was self-employed as a hairdresser in Saint-Lucia for nine years and worked as a cashier in Saint-Lucia for over one year. The Officer further noted the Principal Applicant resided at the same address in Saint-Lucia for nine years. From these facts, the Officer held that she was gainfully employed in two different roles while living in Saint-Lucia and managed to secure housing for herself. In the Officer's view, little information or evidence suggested that she was ever homeless, in poverty, or that she suffered from discrimination on the basis of her sexual orientation or gender.

[16] With respect to the Principal Applicant's statement that she would face violence in Saint-Lucia, the Officer concluded as follows:

> I note that there is little information or evidence brought forward indicating any individuals are still looking to harm the principal applicant in Saint Lucia because of her sexual orientation, especially now that it has been over eight years since she left the country. I accept that Saint Lucia is a small island with a relatively low population. However, I note there is little information indicating the applicants will be returning to the same city, community, or neighbourhood they previously resided in. I also note the applicants had their refugee claims and pre-removal risk assessments refused which I find indicates that the applicants are not at risk in returning to Saint Lucia.

[17] Ultimately, the Officer concluded as follows with respect to discrimination in Saint-Lucia:

> However, based [*sic*] the information and evidence concerning her previous residence in Saint Lucia, I find the principal applicant failed to demonstrate on a balance of probabilities that she was discriminated against in Saint Lucia. Nevertheless, I have given some weight pertaining to possible discrimination and the resulting hardship the principal applicant may face in Saint Lucia as a result of her bisexuality or perceived sexual orientation.

[18] The Officer noted that while the Principal Applicant may face some difficulties in re-establishing herself in Saint-Lucia, she is familiar with the customs in Saint-Lucia and that the official language of Saint-Lucia, English, is her mother tongue. The Officer noted her resilience in adapting to life in Canada and found that this would assist her in re-establishing in Saint-Lucia.

[19] The Officer then made several comments about the Principal Applicant's conduct, which, in his view, demonstrates her "pattern and lengthy history of failing to comply with immigration

laws and law enforcement in Canada." The Officer then noted that after the Applicants' visitor visas expired, they did not attempt to regularize their status until they claimed refugee protection almost one year later. The Officer gave "significant weight" to the Principal Applicant's failure to comply with Canadian immigration laws.

[20] The Officer further remarked that the Principal Applicant had a valid work permit from February 24, 2011 to December 9, 2012, but that the majority of her employment in Canada occurred outside of that period and was unauthorized. While the Officer's reasons indicate that he gave this consideration "significant" weight, it is clear from the context that she meant significant negative weight.

[21] The Officer noted that the Principal Applicant spent three years and nine months in Canada while subject to an outstanding warrant and that she failed to appear for her removal in July 2014, that a warrant was issued for her arrest, and that she did not appear at the CBSA office as instructed after she was located in April 2015. The Officer noted that the CBSA has since been unable to locate her, that at the time of the decision the warrant is outstanding, and that she has hindered her own removal to Canada on at least two occasions. The Officer afforded these factors considerable negative weight.

IV. Issues

[22] I find that this application raises one question: was the Officer's decision to refuse the application for an exemption on H&C grounds unreasonable for a failure to consider evidence

said to demonstrate that the Principal Applicant suffered discrimination in Saint-Lucia because she is bisexual?

V. Standard of review

[23] The Officer's exercise of discretion in assessing H&C considerations entails an analysis of questions of mixed fact and law and shall be reviewed on a reasonableness standard (*Kaur v Canada (Citizenship and Immigration*), 2017 FC 757 at paras 54-55; *Kanthasamy v. Canada (Citizenship and Immigration*), [2015] 3 SCR 909 [*Kanthasamy*]).

VI. Analysis

[24] The Applicants submit that the Officer confined his analysis of discrimination to issues of housing, employment, and financial hardship, which led him to conclude that there was "little" evidence that the Principal Applicant suffered discrimination as a bisexual woman in Saint-Lucia and that she would likely be able to re-establish herself there.

[25] In this regard, the Applicants argue that there was no mention of the following:

- one paragraph in the Principal Applicant's affidavit, filed in this matter, claiming that she would face "severe discrimination and violence" upon her return to Saint-Lucia and that she previously attempted to commit suicide with sleeping pills while living in Saint-Lucia;

- a letter from a friend who the Principal Applicant met in Canada, dated September 30, 2015, who recounted the Principal Applicant's statements about her mistreatment in Saint-Lucia, due to her sexual orientation, before coming to Canada in 2009;

- a statutory declaration from a “close personal friend” living in Saint-Lucia dated October 28, 2011, stating that the Principal Applicant became “an object of ridicule, harassment and jest” after the Applicant was outed as bisexual, and that the Principal Applicant fled a man with whom she had a relationship after he threatened her when he discovered her sexual orientation.

[26] In the Applicants’ view, the Officer committed a reviewable error by failing to consider this evidence, or incorporate it into his analysis, beyond stating that the Principal Applicant submitted “various documents” pertaining to her sexual orientation including “statutory declarations and letters” (*Cepeda-Guitierrez v. Canada (Minister of Citizenship and Immigration*), 1998 CanLII 8667 (FC), [1998] FCJ 1425 at paras 16-17 [*Cepeda-Guitierrez*]). If the Officer had considered this evidence of the Principal Applicant’s mistreatment, he could not reasonably have concluded that there was little evidence that the Principal Applicant would suffer discrimination in Saint-Lucia or that she could likely re-establish herself there.

[27] However, case law describing a fact-finding process error involving the failure to comment on contradictory evidence, such as *Cepeda-Guitierrez*, must be read together with the Supreme Court’s decision in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board*), [2011] 3 SCR 708, 2011 SCC 62 at para 12. The Supreme Court endorsed the notion that deference requires “a respectful attention to the reasons offered or which could be offered in support of a decision”, and that “the court must first seek to supplement them [the reasons] before it seeks to subvert them”. As such, the “decision should be presumed to be correct even if its reasons are in some respects defective”. Accordingly, the decision-maker is

presumed to have weighed and considered all of the evidence before it, unless the contrary is shown.

[28] For the reasons that follow, the presumption stands that, as part of the Officer's holistic H&C assessment, he weighed and considered the unmentioned material, but concluded that it was of insufficient importance to support a finding that the Principal Applicant would experience hardship in Saint-Lucia that warrants the granting of special relief.

[29] The short paragraph in the Principal Applicant's affidavit, to which the Officer referred, is insufficient to establish discrimination in Saint-Lucia demonstrating hardship given the lack of objective evidence produced in support of this component of the H&C application. The Applicants essentially submit that since the Principal Applicant swore an affidavit, the Officer had to presume that its contents were truthful, failing a reasonable and explicit adverse credibility finding (*Maldonado v Canada (Minister of Employment and Immigration*), [1980] 2 FC 302, 31 NR 34 (FCA)).

[30] In this regard, there is no requirement to attribute truthfulness to an applicant's sworn statement in the circumstances of an H&C assessment(see *Garcia v. Canada (Citizenship and Immigration*), 2014 FC 832 at para 17):

> [17] Moreover, the requirement to attribute truthfulness to an applicant's sworn statement, as first enunciated in *Maldonado v Canada (Minister of Employment and Immigration*), [1980] 2 FC 302, 31 NR 34 (FCA), reflects a policy that exigent circumstances facing fleeing refugees may compromise their ability to present corroborative documentation. Conversely, when a claimant has, or may readily obtain, corroborative evidence in situations where it normally would be filed with the adjudicative tribunal to bolster

> the weight of an otherwise bare allegation, it is expected that the party will adhere to the ordinary reliability requirements to introduce the best evidence in support of their case. If they fail to do so, less weight (or none at all) may be attributed to the statement. The situation is similar to the presumption that arises against the party not calling a witness who may provide relevant evidence on an issue.

[31] While the Officer did not draw an explicit adverse finding as to the Principal Applicant's credibility, the fact that she demonstrated a flagrant disregard for Canadian immigration laws, twice absconding, is a strong indication that she did not believe that she could enter the country legally. By this fact, and her recourse to illegal means to remain in the country, it was open to the Officer to view her evidence with a heavy degree of skepticism as to its truthfulness. There can be little doubt that these circumstances could reasonably ground an adverse credibility finding, as credibility does not just pertain to what a person says, it also may be implied by the actions of the individual.

[32] In this case however, the Officer deemed that the evidence was "insufficient" to prove the Principal Applicant's past experiences of discrimination on a balance of probabilities. Even assuming that sworn statements ought to be presumed truthful, this cannot be the case when there is a valid reason to doubt the statement's truthfulness. When such circumstances present themselves, decision-makers are entitled to afford the sworn statement little weight. A lack of detail or objective supporting evidence tendered in support of a bare statement, when such supporting evidence would normally be expected, can certainly present valid reasons to doubt the truthfulness of an affidavit (*Ikeji v. Canada (Citizenship and Immigration*), 2016 FC 1422 at paras 26-34; *Adetunji v. Canada (Citizenship and Immigration*), 2012 FC 708 at para 46).

[33] Moreover, the 2015 letter of her friend consisted of information that the Principal Applicant provided her about events in Saint-Lucia. It is of little probative weight given its obvious self-serving purpose as simply being a statement from the Principal Applicant. The letter does not contain personal knowledge from the author, or from other persons, or related circumstances which would corroborate that the Principal Applicant's sexual orientation caused her problems when she was living in Saint-Lucia.

[34] The statutory declaration of the Principal Applicant's "close and personal" friend in Saint-Lucia referred to an incident in which the Principal Applicant was caught with a neighbor described only as "Betty". According to her declaration, the friend was surprised to learn from Betty's sister that the Principal Applicant is bisexual. Her sexual orientation was discovered by the Principal Applicant's boyfriend upon his return from a vacation. According to this declaration, it was his anger upon being informed about her sexual orientation that caused her to flee the country. This declaration was made in 2011 and despite being relevant to the Principal Applicant's unsuccessful RPD and PRRA applications, in which she claimed being at risk due to her sexual orientation, copies of these decisions were not placed before the Officer.

[35] It is difficult to see how this dated document, submitted in support of the Principal Applicant's unsuccessful refugee claim could constitute "important" or "critical" evidence that "clearly" contradicts the Officer's finding that, on a balance of probabilities, the Principal Applicant did not experience discrimination (*Kahumba v. Canada (Citizenship and Immigration*), 2018 FC 551 at paras 44-46; *Rahal v. Canada (Citizenship and Immigration*), 2012 FC 319 at para 39).

[36] In these circumstances it is fair to assume that the Officer reviewed the material before him, but concluded that this evidence was not of sufficient probative value to be mentioned in the decision, as it added little to the Principal Applicant's affidavit. In contrast, the only objective evidence was to the effect that the Principal Applicant successfully lived in Saint-Lucia, was employed there, and retained stable housing there, over a long period of time without any apparent difficulty before coming to Canada due to the alleged incident with her boyfriend.

[37] The Officer nevertheless considered that the Principal Applicant could suffer discrimination upon return to Saint-Lucia, following his express consideration of recent and objective country condition documentation. Going forward from there however, in consideration of the different factors pertaining to her H&C claim, the Officer ultimately afforded more weight to the Applicant's serious failures on more than one occasion to adhere to Canadian immigration laws, and other laws, by working for a number of years without authorization in Canada.

[38] As this Court has held on previous occasions, *Kanthasamy* requires that all facts and factors be assessed in the context of an H&C application, including a failure to adhere to immigration laws (*Nguyen v. Canada (Citizenship and Immigration*), 2017 FC 27 at para 33; *Semana v. Canada (Citizenship and Immigration*), 2016 FC 1082 at paras 43-52). It goes without saying that this Court is not in a position to re-weigh the H&C factors that the Officer considered differently.

[39] Having considered the Officer's findings, and the evidence in the record, I find that this Court's intervention is not warranted.

VII. Conclusion

[40] For the foregoing reasons, I conclude that the Officer's decision was reasonable. Accordingly, the application must be dismissed. There are no questions for certification.

JUDGMENT in IMM-2682-18

THIS COURT'S JUDGMENT is that the application is dismissed and there are no questions for certification.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2682-18
STYLE OF CAUSE:	ABBA SHAWNDELL DANIEL ET AL. v. MCI
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 13, 2019
JUDGMENT AND REASONS:	ANNIS J.
DATED:	FEBRUARY 28, 2019

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