Date: 20080219

Docket: IMM-5698-08

Citation: 2009 FC 165

Ottawa, Ontario, February 19, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

OUMOU DIAKITÉ

Applicant

and

THE MINISTERS OF CITIZENSHIP AND IMMIGRATION AND OF PUBLIC SAFETY AND EMERCENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Supreme Court of Canada has ruled, in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 75, that immigration officers should consider the best interests of the child while making decisions that may have an impact on children. This requirement has now been codified in the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA). Moreover, international instruments to which Canada is a party, *inter alia*, Convention on the Rights of a Child, the Inter-American Declaration on Human Rights and the International Covenant on Civil and Political Rights, imposes upon state parties the obligation to take into

account the best interests of the child. The principles and obligations should be considered while making a decision in this case.

[2] To be "alert, alive and sensitive" to be best interests of a child is a duty (*Martinez v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1341, 127 A.C.W.S. (3d) 121).

[3] The Court has recently re-affirmed that a faulty analysis of the best interests of the children, where the Officer fails to demonstrate that he or she was alert, alive, and sensitive to the best interests of the children, renders the decision unreasonable (*Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 165, 323 F.T.R. 181 and *Guadeloupe v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1190, [2008] F.C.J. No. 1469 (QL)).

II. Background

[4] The Applicant, Oumou Diakité, is a 17 year old female minor, born in Mali, Africa.

[5] As is the prevailing custom in Mali, she suffered female genital mutilation (FGM) at a very young age.

[6] Oumu's early childhood was in the household of her polygamous father.

[7] When Oumu was twelve years old, her father left the family residence, leaving behind, Oumu, her mother who was pregnant at the time, her three sisters, and younger brother.

[8] Oumu's uncle, her father's eldest brother, Ibrahim Diakité took charge of her family after her father left the household.

[9] Her uncle made the decisions concerning the family, as is the custom in Mali.

[10] In January 2006, when Oumu was fifteen years old, her uncle told her that she was to marry one of his friends who was over 50 years old and who already had three wives.

[11] Oumu's mother objected to this marriage and had to leave the family residence.

[12] As the remaining members of Oumu's family were younger than her, they also left to reside with her mother.

[13] Oumu was forced to continue living with her uncle due to her marriage scheduled for September 21, 2006, while her younger family members had left with her mother.

[14] Although she was not to visit her mother, Oumu did find ways to see her mother and siblings when she could.

[15] Oumu's mother told her that she was trying to find a way for her to leave the country to avoid the forced marriage, without giving her any details.

[16] Oumu's mother made all the arrangements for her to leave Mali.

[17] On September 14, 2006, Oumu left Mali with her mother and they arrived in Canada on September 15, 2006.

[18] Once in Canada, Oumu's mother entrusted her daughter's care to her cousin Santa Keita and returned to Mali.

[19] Ms. Keita obtained information on claiming refugee status in Canada and accompanied Oumu to make a refugee claim at the offices of Citizenship and Immigration Canada in early October 2006.

[20] Oumu began secondary school at "École de La Dauversière" in Montreal in November 2006.

[21] At her hearing before the Immigration and Refugee Board (IRB), held on June 14, 2007, Oumu, fourteen years of age at the time, was anxious and had difficulty expressing herself.

[22] Her claim for refugee status was rejected, on July 11, 2007, and an application for judicial review of this decision was also subsequently rejected.

[23] On December 17, 2007, Oumu had an application filed for permanent residence from within Canada on humanitarian and compassionate (H&C) grounds.

[24] On December 27, 2007, Oumu had an application filed for a Pre-Removal Risk Assessment (PRRA).

[25] On December 17, 2008, Oumu received a decision informing her that these applications had been refused.

[26] Oumu filed for judicial review of these decisions, on December 30, 2008.

[27] It is the decision regarding Oumu's application for permanent residence from within Canada on H&C grounds that is the object of the stay underlying application.

[28] Oumu received notice, on January 15, 2009, at an interview with a Canada Border Services Agency (CBSA) agent that she must present herself for removal to Mali, on February 23, 2009.

[29] On January 30, 2009, the new solicitor for Oumu received written reasons regarding both the H&C and the PRRA decision.

[30] She has made a new life for herself in Canada and is thriving at school, in her volunteer and paid work, as well as amongst her friends and *de facto* family, consisting of her aunt Ms. Keita and her uncle Kalilu Haidara, and their four children with whom she has become very close.

[31] Oumu is in the middle of her school year at "École secondaire Évangéline" where she is presently in "secondaire trois" and where she is very involved in school activities, such as the student council and soccer team.

[32] Oumu is also employed part-time at Tim Horton's restaurant and earning money to support herself.

[33] Oumu fears that she will be unable to continue her schooling and will also be forced into marriage with a fifty year old man if she returns to Mali.

[34] Oumu seeks an order staying her removal until such time as the Application for Leave and for Judicial Review is determined in file IMM-5698-08, on the basis of H&C grounds.

III. Analysis

[35] According to the tri-partite test set out in *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 (F.C.A.), in order to be granted a stay of removal, the applicant must demonstrate:

a. that she has raised a serious issue to be tried in the underlying judicial review application;
b. that she would suffer irreparable harm if no order was granted; and
c. that the balance of convenience, considering the total situation of both parties, favours the grant of the stay

Serious Issue

Decision under review

[36] A motion for a stay of removal is being presented only with respect to the Officer's decision regarding Oumu's application for permanent residence on H&C grounds, although Oumu has also applied for judicial review of the negative PRRA decision in file IMM-5699-08.

[37] In her decision on the H&C application, the Officer begins by setting out Oumu's case history in Canada, and then summarizes Oumu's family in Canada as consisting of her mother's cousin, Ms. Santa Keita, while stating that Oumu's parents and siblings remain in Mali.

[38] The Officer summarizes the grounds invoked by Oumu, including a list of the documentary evidence filed.

[39] The Officer then proceeds with an analysis of Oumu's links in Canada, determining that while Oumu expresses herself in French, enjoys school and has developed ties with her mother's cousin and her family, these elements are not determinative because she has been in Canada for only two years, is a student and is not financially independent.

[40] The Officer equally determines that Oumu's ties are of lesser importance than those in Mali, and that being separated from the family with whom she lives in Canada as well as her friends in Canada, does not constitute an unusual, undeserved or disproportionate hardship.

[41] Regarding the risks faced by Oumu, the Officer adopts, at the outset, the IRB negative credibility finding and conclusions concerning Oumu's refugee claim, and then analyzes the current situation in Mali with respect to FGM and forced marriage.

[42] The Officer gives little weight to the risk of FGM because if Oumu has suffered FGM in the past, there was little chance she would again if returned to her country. Furthermore, according to the Officer, Oumu could suffer FGM even in Canada.

[43] The Officer concludes that there is no risk to Oumu's security or life in Mali.

[44] Regarding the general situation in Mali, the Officer refers to the various international conventions to which Mali is a signatory, finds that FGM is mainly practiced in rural areas of the country, and declares that there are numerous groups working on women's rights in the country.

[45] The Officer ultimately concludes that while Oumu wants to improve her situation by staying in Canada, using the refugee system to do so, even by a minor, shows little respect for Canadian rules and laws.

[46] The Officer then rejects her H&C application.

[47] Nowhere in her decision does the Officer mention the best interests of the child nor give any indication that she has performed the particular type of analysis these interests necessitate, given that Oumu is a minor child.

Errors in Issue

[48] The underlying application for leave to seek judicial review of the PRRA Officer's decision concerning Oumu's application for permanent residence from within Canada on H&C grounds, includes the following serious issues for the Court's consideration:

(1) Did the PRRA Officer err in law by failing to conduct an analysis of the best interests of Oumu, a minor child?

(2) Was the PRRA Officer's refusal of Oumu's H&C application unreasonable in that it was made without regard to the evidence before her?

Standard of Review

[49] Decisions on H&C applications are reviewed on a standard of reasonableness *simpliciter*: *Baker*, above and *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

[50] The Court has recently re-affirmed that a faulty analysis of the best interests of the children, where the Officer fails to demonstrate that he or she was alert, alive, and sensitive to the best interests of the children, renders the decision unreasonable (*Kolosovs*, above and *Guadeloupe*, above).

[51] Paragraph 18.1(4)(*d*) of the *Federal Courts Act*, R.S., 1985, c. F-7, provides that the Court may quash the decision in question if the decision-maker makes a finding of fact without regard for the material before it, and several judgments of this Court have confirmed that such an error warrants the Court's intervention (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, 83 A.C.W.S. (3d) 264 at paras. 17 and 27; *Risco-Flores v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1412, 134 A.C.W.S. (3d) 472 at para. 6; *Mahanandan v. Canada (Minister of Employment and Immigration)* (1994) 49 A.C.W.S. (3d) 1292, [1994] F.C.J. No. 1228 (QL) at paras. 7 and 8; and *Kammoun v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 128, 153 A.C.W.S. (3d) 1208 at para. 21).

[52] Thus, if the Court is satisfied that the Officer failed to consider the relevant evidence before her, particularly concerning the best interests of the child, the decision must be quashed.

The Officer Failed to Consider the Best Interests of the Child

The duty to consider the best interests of the child

[53] The Officer was presented with an application for permanent residence made from within Canada on H&C grounds submitted by a minor child.

[54] Oumu was 16-years old at the time the H&C application was filed and 17-years old when the Officer rendered her negative decision on the application.

[55] The Officer, therefore, had a statutory obligation to study the application using the best interests of the child analysis.

[56] Subsection 25(1) of the IRPA specifically requires that an officer take “into account the best interests of a child directly affected” in arriving at a decision in regard to children.

[57] At the outset, it is important to note that, nowhere in her decision, does the Officer mention or refer to “the best interests of the child” nor refer to any possible benefit to Oumu in remaining in Canada.

[58] Rather, the Officer studies the application made by Oumu who is a minor as though it were an application made by an adult.

[59] In so doing, the Officer erred in law.

[60] Nowhere is it more evident that the Officer treated the H&C application as though it was submitted by an adult than in her following conclusion regarding Oumu’s integration factors, such as being a fluent French speaker, enjoying school, and her close relationship with her *de facto* family in Canada:

> [...] ces éléments d’intégration ne sont pas déterminants dans le cas de la requérante, vu qu’elle est au Canada depuis deux ans seulement, qu’elle est étudiante et non autonome financièrement et donc dépendante.

(Decision at p. 3).

[61] To state that a child attending school full-time and earning awards for her performance is not integrated because she is not independent or entirely financially autonomous, although working part-time, demonstrates a lack of consideration in regard to the best interests of the child.

The content of the duty to consider the best interests of the child

[62] The content of the duty to consider the best interests of the child requires that a particular analysis and balancing of factors be conducted in order for the decision in question to be considered reasonable.

[63] The recent judgment of this Court in *Kolosovs*, above, is most instructive regarding the content of the duty to consider the best interests of the child:

> **I. Requirements for Determining the Best Interests of the Child**
>
> [8] *Baker* 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*

[9] 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…

B. *Alive*

[10] 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) 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.

[11] 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 [be] reasonably determined.

C. *Sensitive*

[12] 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”
>
> …
>
> [14] … In my opinion, the glib use of an undue hardship standard in the present case certainly reflects a lack of sensitivity to each of the children.
>
> [15] As a result, I find that the decision is unreasonable.
>
> (Emphasis added).

[64] Nowhere in her decision does the Officer note how Oumu’s interests are implicated, nor does the Officer determine what “best interest factors are at play” in Oumu’s case.

[65] The Officer did not consider the factors in context, nor the relationship between those factors and other elements of the fact scenario in order to assess the hardship that Oumu, as a minor, would face if deported.

[66] The Officer does not consider or list any benefits to Oumu as a minor in remaining in Canada, nor articulate any possible suffering to Oumu as a minor that may result from her negative decision.

[67] Rather than asking where the best interests of the child lie, the Officer performed an analysis of the degree of unusual and undeserved or disproportionate hardship she would suffer if deported as in the case of an adult.

[68] The Officer concludes that there are no risks to the safety and security of Oumu if deported to Mali, but she does not mention any best interests factors that would militate in favour of Oumu remaining in Canada.

[69] With regard to the general situation in Mali, particularly the rights of women, forced marriage and FGM, the Officer simply resumes her findings on these issues at pages 4 and 5 of her decision but does not indicate how or if these findings would impact either positively or negatively on Oumu if she were deported.

[70] As articulated in *Kolosovs*, above, the method for assessing the best interests of a child directly affected by an H&C decision is to assess the child's best interests, determine where they lie and for what reasons, and then to weigh those considerations against all other relevant factors.

[71] This method is mandated by the language of subsection 25(1) of the IRPA, the guidelines of the IP-5 manual, and by the applicable case law.

[72] As is clear from the wording of subsection 25(1) of the IRPA and the applicable case law, the best interests of the child must always be taken into account, regardless of whether or not the child would suffer an unusual and undeserved or disproportionate hardship.

[73] The IP-5 manual clearly provides instructions on the assessment of the best interests of the child at section 5.19: “The best interests of a child are one of many important factors that officers need to consider when making an H&C or public policy decision that directly affects a child.”

[74] As the best interests of the child is one of multiple factors to consider, the best interests of the children cannot be assessed according to the same standard that applies globally to the H&C application.

[75] The best interests of the directly affected child is a factor to be considered in and of itself.

[76] This interpretation is consistent with the decision in *Baker*, above, where Justice Claire L’Heureux-Dubé concludes:

> [75] …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. That is not to say that children’s best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children’s interests are given this consideration. However, 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.)

[77] As these statements of the applicable law make clear, the best interests of the child must be weighed against all other relevant factors in determining the H&C application, the standard for the latter being a demonstration of unusual and undeserved or disproportionate hardship.

[78] It is therefore an error in law to discard the impact of the negative decision on the child because it does not, in the opinion of the Officer, amount to an unusual and undeserved or disproportionate hardship.

[79] The Officer must first determine the degree of hardship that would be caused, and then weigh that hardship, whatever it may be, against all other relevant factors, including the best interests of the child.

[80] In the present case, the Officer fails to apply the proper test for consideration of the child's interests and ultimately concludes at page 5 of her decision:

> Je comprends que la requérante veuille améliorer son sort en restant dans notre pays, cependant, le fait d'utiliser le système de demande de protection, même émanant d'une mineure et surtout de sa famille, démontre peu de respect des Lois et prescription canadiennes**.** Par conséquent, compte tenu des liens important au Mali, des études dans son pays avant de venir au Canada, de sa situation familiale favorable, du peu d'autonomie vu son âge, du fait qu'il n'y ait pas de risque pour sa sécurité et sa vie au Mali, je suis d'avis que les circonstances particulières de son cas ne justifient pas l'acceptation de sa demande.
>
> Le fait de déposer une demande de visa à l'étranger ne constitue pas une difficulté inhabituelle et injustifiée ou excessive. Sa demande est refusée.
>
> (Emphasis added.)

[81] To say that this conclusion is the result of an analysis of the child's best interests, or a balancing of the H&C factors at play, is not understandable.

[82] That an Officer would reproach Oumu for her alleged lack of respect for Canadian law in the circumstances, given that she was a minor at all relevant times during the process, is unfair to a child and further shows that the Officer dealt with the H&C application as though made by an adult.

[83] Not to conduct a “best interests” assessment is a breach of the statutory duty under subsection 25(1) of the IRPA.

[84] The requirement to be alive, alert and sensitive to the best interests of the children as required by *Baker*, above, and *Kolosovs*, above, is required.

[85] The best interests of the child is the proper test for consideration of the child's circumstances.

[86] As a result, the decision is unreasonable and raises a serious issue.

The Applicant’s schooling

[87] Oumu’s evidence explains in detail her schooling and the progress she has made since starting school in Canada.

[88] Furthermore, she provides copies of three awards she obtained since starting school in Canada and reference letters from her teachers.

[89] Oumu is, despite her outstanding efforts, behind in certain aspects of her schooling, most obviously due to the differing education standards between Canada and Africa.

[90] Oumu's math teacher, Ms. Horia Cucu, writes the following in her letter:

> Elle est consciencieuse et travaillante, et malgré un petit retard tout à fait compréhensible au niveau scolaire, déterminée à poursuivre ses études pour réaliser son rêve, devenir infirmière.

(Motion Record (MR) at p. 61).

[91] Regarding Oumu's education, the Officer simply states at page 3 of her decision:

> [...] Elle a pu étudier dans son pays jusqu'à son départ, ce à quoi n'ont pas accès la majorité des jeunes filles du Mali.

[92] In a comparable case, *Henry v. Canada (Minister of Citizenship and Immigration)* (2000), 100 A.C.W.S. (3d) 1038, [2000] F.C.J. No. 1699 (QL), the Court rules as follows:

> [11] I am satisfied that the applicant has raised a serious issue to be tried. In *Baker* v *Canada (Minister of Citizenship and Immigration)* (1999) 174 D.L.R. (4th) 193 (S.C.C.), L'Heureux-Dubé J. stated at page 230 when speaking of subsection 114(2):
>
> > In my opinion, a reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children. Children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society

<u>The risk of forced marriage to the Applicant</u>

[93] The Officer's only examination of this issue consists of the following statement at page 4 of her decision, and the Officer never mentions what sources she is citing to draw these conclusions:

> [...] Selon les documents de sources publiques, l'âge légal du mariage au Mali est de 18 ans pour les filles et 21 ans pour les garçons. Il peut arriver que des parents autorisent un mariage précoce pour des raisons économiques car cela fait une bouche de moins à nourrir et ils reçoivent une dot du mari. Le gouvernement met

> en place des démarches pour informer la population sur les droits de femmes au Mali. Je note que la requérante aura 18 ans en 2009.

[94] What the Officer seems to be implying is that because the legal age of marriage is 18 years of age for women and Oumu will be 18 years old in 2009, she is almost of legal age to marry and therefore cannot be forced into marriage.

[95] This is an unreasonable inference.

[96] Indeed, the fact that Oumu is almost of legal age to marry means that she will have even less recourse in a forced marriage as the marriage will not be illegal and no state protection will be available.

[97] In her analysis of the risk of forced marriage to Oumu, the Officer also ignored the documentary evidence in the H&C application.

[98] The documentary evidence submitted by Oumu, a Response to Information Request (RIR) from the IRB entitled “Mali: information sur la fréquence du marriage forcé et ses conséquences en cas de refus”, stated that forced marriage was an extremely common occurrence that persists regardless of the government putting measure in place to inform the population of women’s rights.

[99] In direct contradiction to the Officer’s “examination” of the issue of forced marriage, the RIR states:

> Cependant, dans une communication écrite du 23 février 2007 envoyée à la Direction des recherches, la présidente par intérim de l'Association pour le

> progrès et la défense des droits et des femmes maliennes (APDF) a au contraire indiqué que **«** le mariage forcé est une pratique courante au Mali, [malgré son interdiction] par le Code [m]alien de mariage et de la [t]utelle **»** (23 févr. 2007). De même, dans une communication écrite datée du 14 février 2007, le président de l'association du Sahel d'aide à la femme et à l'enfance (ASSAFE), établie à Bamako, a indiqué que « les femmes maliennes se marient très jeunes et très souvent sans [avoir donné] leur consentement » et « [qu]' [elles] sont souvent mariées à 12 ans » (14 févr. 2007). Deux autres sources consultées par la Direction des recherches indiquent que les mariages précoces, assimilables à des mariages forcés, sont fréquents au Mali (Nations Unies 14 juin 2005; Population Council sept. 2005), en dépit de leur interdiction par la loi et de sanctions pouvant aller de un à cinq ans de prison ou jusqu'à vingt ans d'emprisonnement dont dix de travaux forcés si la fille est âgée de moins de 15 ans (Nations Unies 14 juin 2005).
>
> (Emphasis added).

(MR at p. 77).

[100] Thus, the Officer's dismissal of the risk of forced marriage for Oumu is unreasonable.

[101] The Officer draws a conclusion that directly contradicts the evidence before her, does not cite what evidence she indeed consulted to draw her conclusion.

The situation of women in Mali

[102] In her decision, the Officer ignores the documentary evidence on the situation of women in Mali submitted by Oumu (MR at pp. 77-85, as well as Oumu's written submissions referring to the poor treatment of women in the country (MR at pp. 30-33).

[103] While the Officer summarizes the general situation in Mali, she makes no conclusion, nor conducts any analysis, as to whether these conditions would cause any undue or undeserved hardship on Oumu, or negatively impact on her interests.

[104] In summarizing the general situation in Mali, at pages 4-5 of her decision, the Officer makes general statements regarding the government's adherence to instruments of international law, the limitation of FGM to rural areas and the south-west of the country, and the efforts of non-governmental organizations to limit FGM and forced marriage, with no reference to what evidence she consulted in order to draw these conclusions.

[105] The documentary evidence submitted by Oumu, in particular the U.S. Department of State 2007 Country Report on Human Rights Practices (MR at p. 84), directly contradicts the Officer's statements:

> Section 5 Discrimination, Societal Abuses, and Trafficking in Persons
>
> The constitution and law prohibit discrimination based on social origin, color, language, sex, or race, and the government generally enforced these provisions effectively; however, violence and discrimination against women, FGM, and trafficking in children were problems.
>
> Women
>
> Domestic violence against women, including spousal abuse, was tolerated and common. Spousal abuse is a crime, but police were reluctant to enforce laws against or intervene in cases of domestic violence. Assault is punishable by prison terms of one to five years and fines of up to $1,000 (465,000 CFA francs) or, if premeditated, up to 10 years' imprisonment. Many women were reluctant to file complaints against their husbands because they were unable to support themselves financially. The Ministry for the Promotion of Women, Children, and the Family produced a guide on violence against women for use by health care providers, police, lawyers, and judges. The guide provides definitions of the types of violence and guidelines on how each should be handled. NGOs Action for the Defense and Promotion of Women Rights and Action for the Promotion of Household Maids operated shelters.
>
> The law criminalizes rape, but spousal rape is not illegal. Reports of rape were rare, and most cases went unreported.
>
> FGM was common, particularly in rural areas, and was performed on girls between the ages of six months to six years. According to domestic NGOs, approximately 95

> percent of adult women had undergone FGM. The practice was widespread in most regions and among most ethnic groups, was not subject to class boundaries, and was not religiously based. There were no laws against FGM, but a government decree prohibits FGM in government-funded health centers.
> ….
>
> The law does not specifically address sexual harassment, which occurred commonly.
>
> Family law favored men, and women were particularly vulnerable in cases of divorce, child custody, and inheritance rights, as well as in the general protection of civil rights. Women had very limited access to legal services due to their lack of education and information, as well as the prohibitive cost. For example, if a woman wanted a divorce, she had to pay approximately $60 (28,000 CFA francs) to start the process, a prohibitive amount for most women.
>
> While the law gives women equal property rights, traditional practice and ignorance of the law prevented women--even educated women--from taking full advantage of their rights. A community property marriage must be specified in the marriage contract. In addition, if the type of marriage was not specified on the marriage certificate, judges presumed the marriage was polygynous. Traditional practice discriminated against women in inheritance matters, and men inherited most of the family wealth.
>
> Women's access to employment and to economic and educational opportunities was limited. Women constituted approximately 15 percent of the formal labor force, and the government, the country's major employer, paid women the same as men for similar work. Women often lived under harsh conditions, particularly in rural areas, where they performed difficult farm work and did most of the childrearing. The Ministry for the Promotion of Women, Children, and the Family was charged with ensuring the legal rights of women.
>
> (Emphasis added).

[106] On this matter, also, the Officer disregards the documentary evidence provided by Oumu, rendering a decision that is unreasonable and raises a serious issue.

Oumu's *de facto* family in Canada

[107] In the H&C application, Oumu describes the new *de facto* family which she has found in Canada as follows:

> [...] Je ne pourrais pas être plus heureuse que chez elle. J'entretiens d'excellentes relations avec tous les membres de la famille. Mes cousins et cousines sont adorables, sans parlée de mon oncle Kalilu Haïdara, que je considère comme mon père […] Quand je pense que je pourrais être séparée non seulement de ma tante et de mon oncle mais de mes cousins et cousines de Montréal, cela me rend triste et je prie que cela n'arrive pas [...]
>
> Évidemment, je m'ennuie de ma mère et de mes frères et sœurs qui sont au Mali mais, j'ai vraiment trouvé ici une nouvelle vie, une nouvelle famille. Je ne sais pas comment je pourrais faire pour me réadapter à la vie que j'ai laissée en Afrique. Je m'entends à merveille avec mes cousins et mes cousines. Mon petit cousin Ismail qui n'a que six ans m'a écrit une lettre (produite au soutien de la présente demande) où il m'envoie des bisous d'amour et où il dit qu'il est mon ami. J'adore m'occuper de mon petit cousin et en été je l'amène au parc [...]
>
> [...] Je vis dans une famille où il y a beaucoup d'amour et de joie.

(MR at pp. 27-28).

[108] Furthermore, both Oumu's aunt and uncle, as well as three of their minor children, write reference letters outlining their very close ties with Oumu.

[109] The Officer then dismisses the importance of the links Oumu, as a child, has made in Canada.

[110] The Officer concludes at page 3 of her decision:

> En ce qui a trait à ses liens au Canada, ils sont de moindre importance que ceux au Mali, étant donné que sa famille proche vit à Bamako au Mali et qu'elle vit avec une cousine de sa mère au Canada, Cette petite cousine, Santa Keita, appelée tante est citoyenne canadienne née au Burkina Faso. Le fait d'être séparée d'une cousine et de petits cousins ne constitue pas une circonstance inhabituelle, injustifiée ou excessive [...]

[111] The Officer chooses to ignore Oumu's assertion that she comes from a broken home.

[112] Rather, the Officer concludes erroneously that the child's parents are together and that her father, rather than her uncle who kept her, is the head of the family. As the Officer writes at page 4 of her decision:

> … je constate que la situation familiale de la requérante ne correspond pas à ses déclarations, elle vivait avec ses parents et a étudié au Mali, son père l'a autorisé à voyager ici. De plus, le fait qu'elle ait pu voyager et retourner dans son pays sans problèmes à plusieurs reprises ne supporte pas ses allégations de risqué de mauvais traitement par un oncle, étant donné que son père est toujours vivant et le chef de la famille [...]

[113] The Officer makes a speculative conclusion about Oumu's family situation in Mali and dismisses significant evidence of her close *de facto* family ties in Canada.

[114] Once again, the Officer fails to consider the child's best interests and pay sufficient attention to the evidence before her.

Conclusion regarding the failure to consider the evidence

[115] The Officer's dismissal of evidence pertinent to the evaluation of the child's best interests, without evaluating it in connection with Oumu's best interests, is unreasonable.

[116] It cannot be said that the Officer was **alert, alive and sensitive** to the child's best interests.

[117] In sum, the Officer did not consider the most pressing issues with respect to the child's best interests, and instead performed a superficial analysis of the child's ties to Canada, the education she may be able to access in Mali, and the hardship she could face as a woman in Mali.

[118] The Officer erred in not assessing the best interests of the child and acted without regard to the evidence, all of which raise a serious issue necessitating the intervention of this Court.

[119] In light of the foregoing, Oumu has clearly raised an arguable case in respect of the Officer's erroneous evaluation of her Application for permanent residence in Canada on H&C grounds.

[120] Oumu' underlying judicial review application is clearly neither vexatious nor frivolous.

Irreparable Harm

[121] The documentary evidence establishing the risk of irreparable harm has been provided at Exhibits A, E, F, and G of Oumu's affidavit.

[122] The irreparable harm in the present matter flows both from the fact that removal from Canada would be contrary to the best interests of Oumu as a minor and the fact that she faces risks in Mali regarding forced marriage.

[123] Oumu has raised a serious issue with respect to her best interests, and has alleged that the Officer erred grievously in the assessment of her best interests. Thus, Oumu has also, in so doing, established that as a child she faces a risk of irreparable harm in that removal would pose a serious threat to her best interests.

[124] Given that the Officer failed to examine the quality of education available to the child in Mali, the judgment in Henry, above, is directly applicable in the present matter.

[125] Oumu is currently employed at Tim Horton's on a part-time basis, but earning money in order to support herself. It is entirely unclear how she would find equivalent income in Mali or be supported by family in Mali given that her father has left her household and her mother has lost her business.

[126] Oumu also faces the risk of forced marriage (to a man more than fifty years of age) and that amounts to irreparable harm.

[127] The following were cited as habitual consequences suffered by women who refuse a forced marriage in Mali, as contained in the RIR submitted with Oumu's H&C application:

> - **Maltraitance :**
>
> Elle est très fréquente. Il arrive souvent que les enfants qui refusent de se marier soient punis, voire brutalis[és]et rejet[és] de leurs familles.
>
> **- Prostitution :**
>
> Les filles qui refusent le mariage arrangé par les parents sont souvent victimes de prostitution. En effet, une fois la couverture familiale tombée, les filles se retrouvent embauchées comme domestiques et demeurent ainsi sans contrôle parental.
>
> Ceci plonge les jeunes filles dans une extrême pauvreté et accroît le risque de les voir entrer dans le commerce du sexe et se faire récupérer par les réseaux mafieux.
>
> **- Maladies :**

> La vulnérabilité des filles qui refusent les mariages forcés s'accentue avec le « boycott » que les familles mettent en place pour les y contraindre. Ainsi, les besoins élémentaires ne sont plus pris en charge par les parents. Les filles scolarisées souvent cessent de l'être car les parents se déchargent du paiement des frais de scolarité ; les consultations médicales et les ordonnances ne sont plus payées. Bref, les filles sont abandonnées à elles [-] mêmes.
>
> (Emphasis added)

[128] These are the consequences faced by Oumu if removed, all of which represent irreparable harm to Oumu.

[129] The failure to take into account the best interests of Oumu who is a child and to proceed with her removal will mean that her best interests will be affected prior to a decision being obtained to the extent to which these interests must be considered and this in itself amounts to irreparable harm.

[130] This branch of the *Toth* test has clearly been met.

Balance of Convenience

[131] In light of the seriousness of the issues raised and the risk of irreparable harm if Oumu is removed from Canada, the balance of convenience lies in her favour for the purposes of the present application.

[132] The inconvenience in not carrying out the removal while the Oumu’s case is reviewed by this Court is miniscule in comparison to the irreparable harm faced by Oumu, a female child, facing return into a forced marriage to a man of fifty years of age.

[133] Oumu, despite being a minor, is mainly self-sufficient as she is employed part time at Tim Horton's.

[134] The presence of Oumu in Canada while the application is determined is in no way prejudicial to the Respondents. To remove Oumu would be irreparably prejudicial.

[135] The balance of convenience rests with Oumu so as to ensure that the right to apply for leave to review a decision is not rendered nugatory by deporting Oumu before her cause is determined by this Court.

[136] The balance of convenience favours Oumu in the present circumstances.

IV. Conclusion

[137] For all of the above reasons, a stay of removal is granted until such time as the Court determines the underlying application for judicial review of the Officer's refusal of Oumu's application for permanent residence from within Canada on H&C grounds.

JUDGMENT

THIS COURT ORDERS that a stay of removal be granted until such time as the Court determines the underlying application for judicial review of the Officer's refusal of Oumu's application for permanent residence from within Canada on humanitarian and compassionate grounds.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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