Federal Court  Cour fédérale

Date: 20110707

Docket: IMM-6657-10

Citation: 2011 FC 831

Toronto, Ontario, July 7, 2011

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

SYLVIA CRISPINA LEONCE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, a citizen of St. Lucia, came to Canada in December 1995 and has remained here without status since that time. The Applicant never sought refugee protection nor did she make any other attempts to acquire status before she applied for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds in 2004. In her H&C application, as updated in 2006, 2008 and 2009, the Applicant claims the following:

- The Applicant left St. Lucia to escape an abusive step father;
- In 2009, the Applicant gave birth to a Canadian-born daughter but does not live with the father of the child;

- The Applicant's mother in St. Lucia lives with the step-father, a violent, alcoholic man; and

- The Applicant has worked in Canada, has never received social assistance and has well-established links to her Canadian community.

[2] In a decision dated October 1, 2010, a pre-removal risk assessment officer [the Officer] refused her application. The Applicant seeks judicial review of that decision, raising the following issues:

1. Did the Officer err by failing to interview the Applicant?

2. Did the Officer fail to consider the best interests of the Applicant's child?

3. Is the decision reasonable?

Standard of review

[3] The standard of review applicable to the first issue – a question of procedural fairness – is correctness, whereas the decision with respect to the best interests of the Applicant's child and the

H&C decision in general are reviewable on the reasonableness standard (see, for example, *Abu Laban v Canada (Minister of Citizenship & Immigration)*, 2008 FC 661, 167 ACWS (3d) 975; *Inneh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 108, [2009] WDFL 3284).

Issue #1: Need for an interview

[4] It must be remembered that the Applicant was seeking an exception from the requirements that a foreign nation obtain a visa before coming to Canada (*Immigration and Refugee Protection Act*, SC 2001, c 27, s 11 [*IRPA*]). Section 25 of *IRPA* permits an exemption from that requirement where admission from within Canada is justified by H&C considerations relating to the foreign national, taking into account the best interests of any child who is directly affected by the decision.

[5] In the decision, the Officer reviewed all of the submissions made by the Applicant and concluded that the Applicant had failed to provide "sufficient objective evidence" to establish that she would face unusual and undeserved or disproportionate hardship if forced to apply for permanent residence from outside Canada. The Applicant submits that, in effect, the Officer made a negative credibility finding and that, as such, the Officer should have held a hearing or, at a minimum, requested further information.

[6] H&C applications do not generally require an interview (*Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193). Applicants, making H&C applications, know that the application will almost always be dealt with on the basis of the written record. Whether the issue is the best interests of a child or an allegation of risk, they must put

forward sufficient material to support their claims. As stated by Justice Evans in *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 FCR 635 at para 8:

> H&C applicants have no right or legitimate expectation that they will be interviewed. And, since applicants have the onus of establishing the facts on which their claim rests, they omit pertinent information from their written submissions at their peril.

[7] Exceptions to this general rule have been made in cases where an officer's decision is clearly based on a credibility finding. Two cases relied on by the Applicant - *Duka v Canada (Minister of Citizenship & Immigration)*, 2010 FC 1071, 92 Imm LR (3d) 255 and *Shpati v Canada (Minister of Public Safety & Emergency Preparedness)*, 2010 FC 1046, 93 Imm LR (3d) 117 – illustrate the exceptions.

[8] In this case, I am not persuaded that the Officer made credibility findings. Nor was the Officer obliged to advise the Applicant of the deficiencies in her application.

[9] In spite of three follow-up submissions, the Applicant simply failed to provide sufficient information or corroborating documents to support her claims. Even if the Officer believed every word in the meagre submissions, the point is that there was not enough evidence upon which a positive determination could be made. For example, she did not provide any evidence from the child's father to explain the extent of his involvement in his daughter's life. The Applicant could have provided evidence from her daughter's father of their relationship or documentary evidence about the difficulty of finding employment in St. Lucia after a lengthy absence. Further, the letters from her mother were vague and unsubstantiated. The Applicant's failure to provide detailed,

specific submissions and objective evidence does not create a reviewable error on the part of the Officer.

[10] The Applicant's reliance on *Duka* is misplaced. *Duka* can be distinguished, as the risk alleged in that decision had not been mentioned in an earlier decision, and the officer doubted the credibility of the allegation because of the applicant's failure to raise it earlier. Further, Justice Martineau's conclusion about the supporting letters in *Duka* is tied to his finding about the Officer's credibility determination. In this instance, there is no prior application in which the Applicant failed to raise the alleged risk, and the Officer did not disbelieve her claim because of a failure to raise the claim earlier. *Duka* is of no assistance to the Applicant.

[11] Similarly, *Shpati* is irrelevant to this application. *Shpati* dealt with an applicant who had filed several previous applications which mentioned his spouse, only to later be rejected on the basis that there was no evidence that he had close ties to his family in the United States. The decision was set aside, in part, because the officer failed to allow Mr. Shpati to address concerns that had not arisen in his previous applications and that therefore could not have been anticipated. In contrast, this is the Applicant's first contact with Canada's immigration system, and she does not have any prior decisions in which her claims were accepted.

[12] In sum, there was no breach of procedural fairness by the Officer either in not convoking a hearing or in not requesting additional information. Quite simply, the Applicant failed to submit sufficient information to establish the facts on which her claim for H&C relief rests.

Issue #2: Best Interests of the Child

[13] There is no question that an officer, in the context of an H&C application must be alert, alive and sensitive to the best interests of children affected by the decision (*IRPA*, s 25(1); *Baker*, above; *Hawthorne v Canada (Minister of Citizenship & Immigration)*, 2002 FCA 475, 222 DLR (4th) 265). However, the burden is on an applicant to put forward sufficient information to support a claim regarding a child (*Owusu*, above). Finally, it is also important to remember that the best interest of a child, while an important consideration in the H&C decision, is not determinative of an H&C application. The officer's task is to weigh the interests "together with other factors, including public policy considerations, that militate in favour of or against removal of the parent" (*Hawthorne*, above, at para. 6).

[14] The Applicant asserts that the Officer erred in two ways: (a) by failing to be "alert, alive and sensitive" to the interests of the Applicant's daughter; and (b) by incorrectly applying the test of "unusual and undeserved and disproportionate hardship" to the analysis of the interest of the child.

[15] With respect to the first assertion, I see no reviewable error in the decision. The Officer carefully analyzed the evidence put forward by the Applicant. The Applicant's submissions on the subject of her daughter's best interests consisted of little more than bald assertions that she has a relationship with her father and that she and her daughter would be at risk in St. Lucia. The Officer considered the benefit to the daughter remaining in Canada, as well as the difficulty she would face in St. Lucia. In light of the Applicant's failure to provide sufficient objective evidence as to either of these issues, the Officer's analysis was not unreasonable.

[16] In support of her second alleged problem with the Officer's analysis, the Applicant relies on *Beharry v Canada (Minister of Citizenship & Immigration)*, 2011 FC 110, [2011] WDFL 2136, in which decision Justice Mactavish set aside an H&C decision because of the officer's consideration of whether the child would suffer unusual, undeserved or disproportionate hardship. The Applicant argues that the Officer committed a similar error in the decision under review. I disagree. In *Beharry*, at para 11, Justice Mactavish describes the error that she observed as follows:

> At various points in the analysis the Officer discusses the best interests of the children in terms of whether the children would suffer "unusual, undeserved, or disproportionate hardship" if they were required to return to Guyana. However, the unusual, undeserved or disproportionate hardship test has no place in the best interests of the child analysis.

[17] A similar error is not found in the decision before me. During a lengthy analysis of the interests of the child, the Officer reviews all of the evidence before her and acknowledges that socio-economic conditions in St. Lucia for the child "may not be favourable relative to those in Canada" and that she "may enjoy better social and economic opportunities in Canada." Nothing was ignored. The Officer did not, as alleged by the Applicant, assess the best interest of the child using the test of "unusual, undeserved or disproportionate" hardship. Those words are not used until the very end of the section where the Officer looks at how those interests are to be weighed. As I read this section of the decision, the Officer weighs the interests of the child against the "personal circumstances of this family" and concludes that resettling in St. Lucia would not have such a significant negative impact to her child that would amount to unusual and undeserved or disproportionate hardship to the Applicant. Perhaps the decision could have been clearer on this point. However, I am not persuaded that the Officer applied the test of "unusual, undeserved or

disproportionate" to an assessment of the child's interest; rather, she was weighing the interests of the child as one of the factors.

Issue #3: Reasonableness of the Decision

[18] The Applicant submits that the Officer's analysis of her potential life in St. Lucia is perverse. The Applicant argues that the decision was unreasonable because:

- The Officer minimized the hardship that her mother continues to face in St. Lucia;
- The Officer failed to address the fact that the Applicant is currently supporting her mother financially and that neither of them will have the means to support themselves or the child if the applicant is removed from Canada;
- The Officer held the Applicant to an impossibly high threshold in respect of the possibility of employment in St. Lucia;
- The Officer erred by failing to give more weight to the mother's letters on the basis that they were not from a disinterested party.

[19] The Applicant submitted two one-paragraph letters from her mother (one in 2006 and a second in 2010) describing the difficult situation that the mother faced in St. Lucia. The mother states that her husband is an alcoholic and violent. She states that "My granddaughter [will] suffer in my husbands house". The Applicant argues that these letters were improperly dismissed by the Officer as not being from a disinterested party. I appreciate that letters of support from family members cannot always be dismissed as "self serving" or "not from a disinterested party" (see, for example, *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2004 FC 226, 40 Imm. LR

(3d) 50 at para 31; *Kaburia v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 516, 2002 CarswellNat 1042 at para 25). However, in this case, the letters from the Applicant's mother were not only from a family member but they were vague and general in nature; these short letters failed to identify specific risks. It was not unreasonable for the Officer to give little weight to this evidence. In any event, the Officer did not dismiss the letters for that reason. Rather, as stated by the Officer, the letters do not support or corroborate any of the assertions of the Applicant.

[20] In sum, all of the arguments go to the weight given by the Officer to the evidence; in effect, the Applicant is seeking to have the Court re-weigh the evidence that was before the Officer. The key problem for the Applicant is that she failed to provide sufficient evidence to meet her burden. On the basis of the evidence provided by the Applicant, the Officer reasonably determined that the Applicant had failed to discharge her evidentiary burden. I conclude that the decision the Applicant would not face unusual and undeserved or disproportionate hardship that would warrant an exception to s 11 of *IRPA*, "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

Conclusion

[21] For these reasons, I would dismiss the application for judicial review. The parties do not propose a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. the application for leave and judicial review is dismissed; and

2. no question of general importance is certified.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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