Federal Court  Cour fédérale

Date: 20150213

Docket: IMM-6066-13

Citation: 2015 FC 175

Ottawa, Ontario, February 13, 2015

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

JULIANA DESMARIEN HOYTE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a September 5, 2013 decision of a Senior Immigration Officer of Citizenship and Immigration Canada (Officer) refusing an application for permanent residence, based on humanitarian and compassionate (H&C) grounds pursuant to s. 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), made by the Applicant, Juliana Desmarien Hoyte.

[2] Having read the materials filed, and upon hearing the submissions of counsel for each of the parties, I have determined that this application should be allowed for the reasons that follow.

Background

[3] The Applicant is a citizen of both Antigua and Barbuda (Antigua) and of St. Vincent and the Grenadines (St. Vincent). She claims that she was abused and neglected by her parents as a child, sexually abused by a man who lived in her parents' home, violently attacked by her brother on a number of occasions, and, held up while working in her parents' bakery. During a visit to Canada in 1995 she met her future husband, who she married in Canada on June 2, 1996. The marriage broke down and her husband withdrew his sponsorship application. Her son, Durrael, was born in Canada on December 24, 2011. He was premature, required resuscitation upon delivery and the Applicant claims that he has resultant ongoing health problems. She is concerned about access to appropriate health and educational services for her son if she is returned to Antigua or St. Vincent; that due to an economic downturn she will be unable to find employment to support herself and her son there; and, that she and her son will be threatened by her brother upon their return.

Decision Under Review

[4] The Officer considered hardships upon the Applicant's return to Antigua or St. Vincent, her establishment in Canada, the personal ties which would create a hardship if severed and the best interests of the Applicant's child, but concluded that the evidence did not establish that the hardship upon return would be unusual, undeserved or that it would be disproportionate.

Analysis

[5] The Applicant's submissions are lengthy, numerous and take issue with many matters. In summary, she submits that the Officer's decision was both procedurally unfair and unreasonable. The duty of procedural fairness was breached because the Officer relies on extrinsic evidence and because evidence material to the best interests of the child is missing from the Certified Tribunal Record. Further, that the Officer applied the wrong test and disregarded and misconstrued evidence in her analysis of the best interests of the child. And, that the hardship analysis was unreasonable in light of the Applicant's circumstances, including a history of abuse and a lack of support in her country of nationality.

[6] Having reviewed the submissions of the parties, the record and the decision, it is necessary to address one matter on a preliminary basis, and that is the Applicant's submission that Durrael has, or may develop, health issues and educational needs resulting from his premature birth. More specifically, that "he is at higher risk for multiple health conditions and developmental delays". The Applicant relies heavily on this premise in many aspects of her submissions challenging the Officer's decision. However, having reviewed the record, it is my view that her position is not supported by the evidence and that the Officer made no reviewable error in this regard.

[7] As noted by the Officer, the Applicant submitted Durrael's hospital discharge report. This indicates that he was born on December 24, 2011 at 32 and 3/7 weeks gestation and discharged on January 20, 2012. He had an "unremarkable" head ultrasound on December 30,

2011 and continued to "demonstrate a normal neurological exam". A follow up neurological appointment was scheduled for June 7, 2012, however, no evidence was submitted concerning that examination. Nothing in the discharge report indicates any significant concern for Durrael's health. While he was initially given antibiotics these were quickly discontinued. He remained "clinically well" while in hospital and on discharge the only medications prescribed were elemental iron and vitamin D.

[8] The only other medical evidence is a prescription note of Dr. Caulford of the Community Volunteer Clinic, dated May 23, 2013, stating that Durrael "male, weight 8.26 kg 17months, is continuously breast feeding. Mother has difficulty weaning child. Please see this pleasant child with regards to his feeding habits". This referred Durrael to the Toronto Public Health, Healthy Babies Healthy Children (HBHC) Program. The HBHC report, dated May 27, 2013, described Durrael as having been breast fed for his first eleven months, taking limited pureed food at the time, not tolerating textured food well, and, that his mother considered him to be a "picky eater". The Applicant was described as a first time parent who would like to increase her parenting knowledge, including toddler feeding. Weekly visits by a HBHC worker and visits every 6-8 weeks by another worker were indicated to increase the Applicant's parenting skills in toddler, growth, development and feeding.

[9] This is the full extent of the record pertaining to Durrael's health and needs. As indicated by the Officer, the Applicant did not provide additional information or documentation concerning diagnosed health conditions or developmental delays.

[10] Thus, while the Applicant asserts that Durrael has delayed speech and continues to be at risk because his weight is lower than 99% of children in his age range, this is not supported by the record. Similarly, while she submitted a report entitled "Behaviour Difficulties and Cognitive Function in Children Born Very Prematurely", this journal article states that it pertains to children born before 32 weeks gestation age. The medical evidence pertaining to Durrael is that he does not fit into that definition nor is there any evidence that he is now or will in the future be at risk of such problems.

Use of extrinsic evidence

[11] It is well established that breaches of procedural fairness are to be reviewed on a standard of correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 62; *Mission Institution v Khela*, 2014 SCC 24 at para 79). Further, that the correctness standard of review applies in cases, where an applicant has not been afforded a meaningful opportunity to respond to independent research conducted by an officer (*Begum v Canada (Minister of Citizenship and Immigration)*, 2013 FC 824 at para 20 [*Begum*]; *Noh v Canada (Minister of Citizenship and Immigration)*, 2012 FC 529 at para 20).

[12] The Officer in this case stated she had read and considered the application and submissions of the Applicant in their entirety. In addition, that she considered documentary evidence obtained through independent research, which she listed, being:

- United States Department of State Country Reports on Human Rights Practices (US DOS) 2012 (US DOS);
- Immigration and Refugee Board of Canada (IRB), Response to Information Request, VCT 42844.FE (RIR), accessed via http://www.refworld.org/docid/41501c701c.html;

- Education Database: Antigua and Barbuda Education System (Education Database) accessed via http://www.classbase.com/countries/antigua-and-baubuda/education-system;
- Commonwealth Health Online: Health in Antigua and Barbuda (Commonwealth Health), accessed via http://www.commonwealthhealth.org/health/Americas/Antigua_and_barbuda/;
- Government of Saint Vincent and Grenadines, Ministry of Health, Wellness & The Environment, Early Child Health Outreach (Outreach) accessed via http:/www.health.gov.vc/index.php?option+com_content&view+article&id+130&itemid+122.

[13] Of these documents, the first two could be found in the National Documentation Packages (NDP) of those countries. The remainder were obtained by the Officer on her own initiative.

[14] As the parties have noted, I have previously addressed the use of information found on the internet in the conduct of an H&C analysis. In *Begum*, above, I stated that I did not agree with the position of the respondent therein, which was that information found on the internet is not extrinsic evidence because it is publicly available in that forum. Rather, it was my view that extrinsic evidence, in the context of an H&C application, is evidence that does not form a part of the submissions of the applicant, the immigration record of the respondent concerning the applicant, or, the disclosed tribunal record, which includes online NDPs. Further, where an officer relies on such information, there is a duty to disclose novel and significant evidence which affects the decision (see also: *Radji v Canada (Minister of Citizenship and Immigration)*, 2007 FC 835 at para 15; *Bailey v Canada (Minister of Citizenship and Immigration)*, 2014 FC 315 at paras 70-71; *Begum*, above, at para 20). I remain of that view. Accordingly, while the first two documents listed above are not extrinsic evidence, the following four are.

[15] The question then becomes whether meaningful facts that are essential or potentially crucial to the decision were used to support it without providing the affected party with an opportunity to respond to, or comment on, those facts (*Yang v Canada (Minister of Citizenship and Immigration)*, 2013 FC 20 at para 17; *Mancia v Canada (Minister of Citizenship and Immigration)*, [1998] 3 FC 461 (FCA) at para 22; *Lopez Arteaga v Canada (Minister of Citizenship and Immigration)*, 2013 FC 778 at para 24). That is, is it new and significant evidence that affected the Officer's decision?

[16] The Applicant submits that in response to her submissions that education in St. Vincent and in Antigua is underdeveloped, the Officer relied on an undisclosed source. Based on the Education Database concerning Antigua, the Officer stated that education is free and compulsory for all children between the ages of 5 and 16. Further, this source also reported that "Even transport, school infrastructure and class materials are accounted for under a levy of basic wages. Primary education starts at age 5 and lasts for 7 years". The Applicant points out that the website does not provide a source or date of publication for this information, and that the referenced levy is not mentioned in any of the materials submitted by the Respondent. Additionally, that its relevance appears to be undermined by information submitted by her indicating that children often discontinue their education due to poverty. Similarly, another extrinsic source, the Encyclopaedia of Nations – St. Vincent and the Grenadines, describes educational facilities in St. Vincent in 1994, and states that the government-assisted School for Children with Special Needs serves handicapped children. The Applicant submits that these two documents formed the sole basis for the Officer's findings with regards to the educational opportunities available to Durrael in St. Vincent and Antigua.

[17] It is true that these documents were extrinsic evidence. However, the Officer stated that she had also reviewed all of the Applicant's submissions. These generally support that education in both countries is available. For example, the UN Caribbean Development Report states at page 37 (CTR, p 102):

> The Caribbean subregion also scored favourably on many United Nations Millennium Development Goals, particularly literacy, primary education, gender representation and improved access to source amenities. Literacy rates were generally high and most CARICOM countries were on target to meet the Goal of universal primary enrolment…
>
> (Also see p. 55)

[18] Similarly, the UNICEF "Structural Analysis of Children and their Families in the Eastern Caribbean" states that World Bank data from 2009 showed primary education enrolment of 88.3% in Antigua and 91.5% in St. Vincent. Secondary level access was 88% for Antigua in 2009, and 90.3% in St. Vincent in 2008. However, that performance at that level was poor, with only 21% obtaining passes in at least five subjects.

[19] As to health care, the Officer referred to the RIR which states that health care is free for children in St. Vincent. The Poverty Assessment Report states that St. Vincent "has a reliably robust system of primary health care" (CTR p 484). And the UNICEF report entitled "A Study of Child Vulnerability in Barbados, St. Lucia and St. Vincent and The Grenadines" confirmed that in St. Vincent, free medical care is provided to children 16 years and younger (CTR p 507).

[20] As to Antigua, the Officer referred to the undisclosed Commonwealth document describing available health care services. The Applicant challenges this both because it was

extrinsic and because she asserts that it contains contradictory evidence. She submits that the same document states that the government is facing challenges. However, the full quote is that;

> The future for small island developing states such as Antigua and Barbados holds many challenges including reduced financial resources, the negative impacts of globalization and limited human resources. However, my government believes that focusing on the social deterrents of health, strong political will and continued health system strengthening will help to ensure quality, equitable healthcare for citizens and residents will in turn help to ensure sustainable development.

In my view, this is not contradictory.

[21] The Applicant also submits that the Officer does not reference any of her submissions regarding the lack of support services for students with special needs, the use of corporal punishment or the economic barriers which, in her view, prelude education. While the Officer was not required to address every piece of evidence submitted by the Applicant (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16) the burden to address contradictory information increases in proportion to relevance of the contradictory evidence to the matter (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, (1998) 157 FTR 35 at para 17; *Weng v Canada (Minister of Citizenship and Immigration)*, 2014 FC 778 at para 27). I am not convinced, however, that the extrinsic evidence as to education and health services referenced by the Officer was novel, significant evidence that affected the outcome of her decision. The Applicant's own documentary evidence largely supports the Officer's conclusions. And for the same reason, nor am I of the view that the Officer erred in failing to refer to that information.

[22] As to the extrinsic Outreach document, the Officer described this as a program designed to link early childhood development and health care services for families with children at risk. This was quoted as stating that "ECHO uses methods of an informal home-visiting programme for children (birth to three years) which support parents in communities with limited access to these services giving them access to early stimulation and parenting education". It may or may not be that the services ECHO provides are comparable to that which the Applicant currently obtains through her referral to the HBHC in Canada, and, therefore, the Officer should have provided the Applicant the opportunity to address any discrepancies in the services between the programs. This is compounded by the fact that the HBHC services plan was submitted on July 18, 2013 but does not appear in the CTR. However, in my view, this was not novel or significant evidence that would have affected the outcome. The evidence does not suggest that Durrael's weaning difficulties pose a health risk. Thus, even if not exactly comparable to the HBHC program, such services to assist with Durrael's weaning and enhancing his mother's knowledge was available. Further, while the CTR may not have contained the HBHC report, the Officer put her mind to the issue (*Yadav v Canada (Citizenship and Immigration)*, 2010 FC 140 at para 36; *Varadi v Canada (Citizenship and Immigration)*, 2013 FC 407 at paras 6-8; *Aryaie v Canada (Citizenship and Immigration)*, 2013 FC 469 at para 27).

[23] In these circumstances, the failure of the Officer to disclose the extrinsic evidence concerning the ECHO program and allow the Applicant a chance to properly respond did not amount to a breach of the duty of procedural fairness.

Other issues

[24] The Applicant further claims that the Officer failed to provide due consideration to the circumstances of her hardship upon return to Antigua or St. Vincent. However the decision addresses her transferable employment skills, the law enforcement apparatus and government support services available to victims of domestic violence in both Antigua and St. Vincent, and her integration into the community. H&C relief is an exceptional remedy (*Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at para 40), and the reasons indicate that the Officer turned her mind to these issues. I find no reason to disturb her findings in this regard.

Best interests of the child

[25] The Applicant also argues that the decision is unreasonable because the Officer failed to demonstrate she was alert, alive and sensitive to the best interests of Durrael, and to accord this factor substantial weight in her analysis. In this respect, I am inclined to agree.

[26] An example of a misapprehension of the best interests of the child can be seen in the Officer's approach to the potential harm Durrael faces from his uncle Tony, who lives in St. Vincent. The Applicant deposes that Tony has a violent history, and has threatened and injured her and members of her family on several instances, including:

- Heating a knife over a flame and burning the Applicant's forearm when she was 15;
- Attacking the Applicant with a cutlass in 2005;
- Sending the Applicant a text message in 2010 stating, "Wait until you come back here, I'll get you";

- Breaking a bottle and throwing it at the Applicant's sister, resulting in stitches;
- Assaulting and choking the Applicant's father in 2011.

[27] Both the Applicant's sister and her father have confirmed these incidents in letters that were before the Board.

[28] However, the Officer does not address this issue, stating merely that:

> The fact that poverty and violence exist might adversely impact a child as he integrated into society; however, this does not impact the best interest of that child in a significant manner. No country, including Canada which is built on the value of good governance, can provide a guarantee that poverty and hurtful incidents of a criminal and prejudicial nature will not occur in a child's lifetime.

[29] It is true that the best interests of the child is only one factor among several, and does not dictate the result in any given case (*Habtenkiel v Canada (Citizenship and Immigration)*, 2014 FCA 180 at para 46). It is also true that no country, including Canada, can guarantee a child a life free from hurtful events. However, limiting the best interests of the child analysis to such an aphorism does not address the question that must be answered – what is the likely degree of hardship to the child, and how does that hardship weigh against other factors that militate in favour of or against the removal of the parent? (*Canada (Minister of Citizenship and Immigration) v Hawthorne*, 2002 FCA 475 at para 6).

[30] The Officer in this case did not meaningfully address Durrael's potential for abuse or articulate why the Applicant's concerns are to be disbelieved or deserve little weight and thereby failed to properly consider his best interests. This is a reviewable error.

[31] I would also note that while the Officer states that the Applicant's cousin resides in Canada and so "it would be a parental decision as to whether or not Durrael would remain with her should the applicant return", there appears to be no evidence on the record that the Applicant's cousin would in fact be willing or capable of looking after Durrael.

[32] With respect to the Applicant's novel arguments as to whether s. 25(1.3) of the IRPA would apply to Durrael given his status as a Canadian citizen, I find no need to address this issue in light of the error noted above.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted. The decision of CIC is set aside and the matter is remitted back for redetermination by a different officer;
2. No question of general importance is proposed by the parties and none arises; and
3. There will be no order as to costs.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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