Federal Court  Cour fédérale

Date: 20150806

Docket: IMM-3768-14

Citation: 2015 FC 944

Ottawa, Ontario, August 6, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

TESSA TISSON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Tessa Tisson has brought an application for judicial review pursuant to s 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA]. She challenges the decision of an immigration officer [the Officer] to refuse her request to apply for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds in accordance with s 25(1) of the IRPA.

[2] For the reasons that follow, I have concluded that the Officer did not apply the correct legal test in assessing the best interests of Ms. Tisson's children. In addition, the Officer breached Ms. Tisson's right to procedural fairness by improperly relying on extrinsic evidence to assess her daughter's medical condition.

[3] The application for judicial review is therefore allowed and the matter is remitted to a different immigration officer for re-determination.

II. Background

[4] Ms. Tisson is a citizen of St. Lucia. She has two Canadian-born children: a seven year-old son and a five year-old daughter. Ms. Tisson's daughter was born with a genetic condition known as "craniofrontonasal dysplasia," which can result in physical malformation of the head.

[5] Ms. Tisson alleges that she experienced sexual abuse at the hands of various family members throughout her childhood and into her teens. She states that prior to leaving St. Lucia she had no safe or permanent place to live.

[6] Ms. Tisson first entered Canada in March, 2000. She met the father of her children, who is a Canadian citizen, in 2002. Ms. Tisson overstayed her visa and was arrested in February, 2003 because she was in Canada without status and was working without authorization. Ms. Tisson applied for a Pre-Removal Risk Assessment [PRRA] which resulted in an adverse decision in December, 2003. She did not seek leave to challenge the decision in this Court and she did not appear for her scheduled removal in January, 2004.

[7] Ms. Tisson was arrested again in November, 2005. She then made her first application for an exemption to permit her to apply for permanent residence from within Canada on H&C grounds. The first application was refused in November, 2005. Ms. Tisson did not seek leave to challenge the decision in this Court and she was deported to St. Lucia.

[8] Ms. Tisson entered Canada for a second time in December, 2006, using a valid passport issued under a different surname. Ms. Tisson then began a common-law relationship with the father of her children. In 2008, Ms. Tisson gave birth to her son. In 2010, she gave birth to her daughter. The father of her children became physically abusive when Ms. Tisson was pregnant with her second child. He abandoned the relationship in 2013 when Ms. Tisson threatened to call the police. Ms. Tisson alleges that her former common-law partner had previously offered to sponsor her for permanent residence, but no application was ever made.

[9] Ms. Tisson made a second H&C application in February, 2014, which was rejected on April 8, 2014. This decision is the subject of the present application for judicial review.

III. The Officer's Decision

[10] In his decision, the Officer first addressed the best interests of Ms. Tisson's two children. While observing that they were unlikely to "suffer unduly" if they lived in St. Lucia, the Officer conceded that it was "probably in the children's best interests that they remain in Canada, where services and standards of living are higher than would likely be for them in St. Lucia." The Officer found this to be a positive factor in his consideration of Ms. Tisson's H&C application, but he nevertheless concluded that "this is not an important factor in this case."

[11] The Officer then described Ms. Tisson's deceitful behaviour and the lack of candour in her interactions with Canadian immigration authorities. In particular, the Officer noted that Ms. Tisson had twice stayed beyond the period that was authorized upon her entry into Canada, that she had failed to report for removal, that she had worked without authorization, and that she had disguised her identity upon her return to Canada. The Officer concluded that Ms. Tisson had not submitted her H&C application with "clean hands," and put "considerable weight on Ms. Tisson's bad faith and lack of candor."

[12] The Officer also observed that Ms. Tisson appeared to have misrepresented her past in St. Lucia. In 2004, Ms. Tisson stated in her first H&C application that she was at risk in St. Lucia because she was a lesbian and the state authorities in St. Lucia would be unable to protect her from persecution. However, in her second H&C application Ms. Tisson did not mention a risk of persecution due to her sexual orientation, and instead claimed that the risk she faced was from her former abusers.

[13] Given the inconsistency between the two accounts of the risk that Ms. Tisson allegedly faced in St. Lucia, the Officer concluded that one of them must have involved misrepresentation. The Officer reasoned that if the sexual abuse had in fact occurred, then the trauma was not as severe as Ms. Tisson claimed; if it was, then it would have been included in Ms. Tisson's first H&C application.

IV. Issues

[14] Ms. Tisson raised a number of issues in support of her application for judicial review. Only two of them are determinative:

A. Whether the Officer applied the correct legal test in assessing the best interests of the children; and

B. Whether the Officer breached Ms. Tisson's right to procedural fairness by relying on extrinsic evidence to assess the medical condition of her daughter.

V. Analysis

A. Whether the Officer applied the correct legal test in assessing the best interests of Ms. Tisson's children

[15] Whether the Officer applied the right legal test in assessing the best interests of the children [BIOC] is a question of law to be reviewed against the standard of correctness (*Judnarine v Canada (Minister of Citizenship and Immigration)*, 2013 FC 82 at para 15). The Officer's treatment of the evidence is to be reviewed against the standard of reasonableness (*Mandi v Canada (Minister of Citizenship and Immigration)*, 2014 FC 257 at para 19).

[16] In *Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166 [*Williams*] at para 63, Justice Russell adopted a three-step approach to assessing a child's best

interests: an officer must establish first what those interests are; second, the degree to which the child's interests are compromised by one potential decision over another; and finally, the weight that the child's interests should be given in the ultimate balancing of the factors to be assessed in the application (see also *Chandidas v Canada (Minister of Citizenship and Immigration)*, 2013 FC 258). However, as noted by Justice Mosley in *Webb v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1060 at para 13, the guidelines proposed in *Williams* may not readily conform to the circumstances of each case and appellate jurisprudence does not require that immigration officers adhere to a specific formula when assessing the BIOC. Nevertheless, an officer is required to examine the BIOC "with care" and to weigh them against other factors (*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 24). Ultimately, an officer must be "alert, alive and sensitive" to the BIOC in order to satisfy the correct test (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75; *Kolosovs v Canada (Minister of Citizenship and Immigration)*, 2008 FC 165 [*Kolosovs*]).

[17] In this case, I am not satisfied that the Officer applied the correct legal test to his consideration of the BIOC. Nor was his analysis reasonable. According to the Officer's notes, there "would be some disruption involved and, for [Ms. Tisson's son], a change in schools and friends." With respect to Ms. Tisson's daughter, the Officer acknowledged that her doctor was unaware of any hospitals in St. Lucia that were capable of providing any surgical treatment that may be required. The Officer noted that there were no photos of Ms. Tisson's daughter included in the application, and so it was difficult for him to see "how severe the conditions might be for her." Nevertheless, the Officer concluded that it was not apparent "that surgical care will be

required or that she will experience significant problems, should she go [to St. Lucia] and remain without surgical care."

[18] The Officer's BIOC analysis improperly focused on the level of hardship that Ms. Tisson's daughter would experience if she were removed to St. Lucia, as evidenced by his use of the terms "severe" and "significant." Applying a hardship threshold to an analysis of the best interests of the child has repeatedly been found by this Court to be an error of law (*Arulraj v Canada (Minister of Citizenship and Immigration)*, 2006 FC 529 at para 14; *Mangru v Canada (Minister of Citizenship and Immigration)*, 2011 FC 779 at paras 24, 27; *Williams* at paras 59-62; see also *Weng (Litigation Guardian of) v Canada (Minister of Citizenship and Immigration)*, 2014 FC 778 at para 23). As noted in *Williams* at para 64, when assessing the BIOC "there is no hardship threshold, such that if the circumstances of the child reach a certain point on that hardship scale only then will a child's best interests be so significantly 'negatively impacted' as to warrant positive consideration."

[19] In order to demonstrate that the Officer was alert, alive, and sensitive to the BIOC, it was necessary for his analysis to address the "unique and personal consequences" that removal from Canada would have for Ms. Tisson's children (*Ali v Canada (Minister of Citizenship and Immigration)*, 2014 FC 469 at para 16). In this case, several consequences of removal do not appear to have been fully considered, including the inadequacy of medical care for Ms. Tisson's daughter, the lack of social services (on which Ms. Tisson and her children are heavily dependent), and the real risk of homelessness for the children in St. Lucia.

[20] As the Federal Court of Appeal held in *Hawthorne* at para 52:

> [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) [the predecessor to s 25(1) of the IRPA] applications that may adversely affect the welfare of children with the right to reside in Canada: vital interests of the vulnerable are at stake and opportunities for substantive judicial review are limited.

B. Whether the Officer breached Ms. Tisson's right to procedural fairness by relying on extrinsic evidence to assess the medical condition of Ms. Tisson's daughter

[21] Questions of procedural fairness and natural justice are reviewable by this Court against the standard of correctness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Re: Sound v Fitness Industry Council of Canada*, 2014 FCA 48 [*Re: Sound*] at para 34). Nevertheless, some deference is owed by this Court to the RPD's procedural choices (*Re: Sound* at para 42; *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 245 at paras 70, 81. This may include procedural choices regarding the disclosure of information (*Re: Sound* at para 37).

[22] Disclosure of information may be necessary to provide the affected party with a reasonable opportunity for meaningful participation in the decision-making process (*Adewole c Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2014 FC 112 at paras 27-28). When a decision-maker unilaterally consults information found on the Internet, and this could not have been reasonably anticipated, then fairness may require that the person affected by the decision be given an opportunity to challenge its relevance or validity (*Lopez Arteaga v Canada (Minister of*

Citizenship and Immigration), 2013 FC 778 at para 24; *Begum v Canada (Minister of Citizenship and Immigration)*, 2013 FC 824 at para 20).

[23] In this case, the Officer's decision included the following statement:

> I looked up descriptions of [Ms. Tisson's daughter's] conditions at Wikipedia and followed a few of the related links. These showed a number of photos of children with varying degrees of these conditions. Their appearances ranged from mildly abnormal to severely disfigured.

[24] The record disclosed to Ms. Tisson and submitted to this Court did not include the on-line photographs that were viewed by the Officer. Nor is it clear what inferences the Officer drew from viewing them. Because Ms. Tisson's daughter was described by her doctor as "currently…[appearing] to be mildly affected," the implication is that the on-line photographs contributed to the Officer's conclusion that she may not "experience significant problems in St. Lucia" or require "surgical care" in the future. However, according to the doctor who is treating Ms. Tisson's daughter, "decisions with respect to surgery are delayed until approximately 5-7 years of age, when the skull and orbital growth are almost complete." At the time of the Officer's decision, Ms. Tisson's daughter was not yet five years of age.

[25] I conclude that the Officer's reliance on the results of an Internet search that were not disclosed to Ms. Tisson denied her the opportunity to address the information, and thereby breached her right to procedural fairness.

VI. Conclusion

[26] For the foregoing reasons, the application for judicial review is allowed and the matter is remitted to a different immigration officer for re-determination.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter is remitted to a different immigration officer for re-determination. No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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