Federal Court  Cour fédérale

Date: 20160108

Docket: IMM-7729-14

Citation: 2016 FC 21

Toronto, Ontario, January 8, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

AEISHIA NOLA TAYLOR
BASIL MONTAGUE HAMILTON

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] This judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], challenges the September 8, 2014 refusal of a Humanitarian and Compassionate [H&C] application for permanent residence [the Decision] made under subsection 25(1) of the Act. The Senior Immigration Officer [the Officer]

determined that the Applicants did not demonstrate unusual and undeserved or disproportionate hardship in having to apply for residency from outside Canada. I took this case under reserve and was preparing to issue a decision at the time the Supreme Court of Canada [SCC] released *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 (*Kanthasamy SCC*). That case had an impact on issues surrounding the evaluation of hardship, including best interests of the child [BIOC] and the consideration of psychological reports in that regard, in the context of section 25(1) of the Act. Both parties were provided an opportunity to comment on *Kanthasamy SCC* when the hearing was resumed on December 18, 2015 for that purpose.

[2] The Applicants are a married couple. They are nationals of Jamaica, who came to Canada in October 2008. The couple had their first and only child, their daughter Shalom, on August 13, 2009. At the time of this judicial review, Shalom was five years old. As a Canadian citizen, she was not part of the Applicants' H&C application, although she was a focus of the application and subsequent Decision.

[3] Indeed, the Decision primarily focused on Shalom. The Officer acknowledged that although she would be eligible to stay in Canada given her Canadian citizenship, she would ultimately accompany her parents were they to leave. The Officer reviewed material aspects of the H&C application, excerpting key contents of the Applicants' submissions which addressed the realities Shalom would face in Jamaica, including inferior educational, medical, security, social, and living conditions. After reviewing the evidence regarding Shalom, the Officer found that, while conditions in Jamaica would be less than favourable, returning there would neither

compromise her best interests nor would "her fundamental rights… be denied" (Certified Tribunal Record [CTR], p 7).

[4] The Officer, in coming to these conclusions, considered the objective country condition evidence for Jamaica, including the ability for Shalom to pursue an education there and her ability to ultimately pursue a post-secondary education either in Jamaica or in Canada (CTR, p 5).

[5] The Officer also reviewed evidence from an optometrist and a psychologist and a letter from a teacher in Jamaica describing how educational and societal problems there would negatively impact Shalom. The Officer determined that Shalom neither appeared to be suffering from any psychological conditions or health problems nor was she unable to receive treatment for potential psychological or vision issues in Jamaica. As for the teacher's letter, it was found to be speculative and lacking in objective evidence (CTR, pp 4-5).

[6] The Officer then considered the risks associated with a return to Jamaica in the context of hardship per the requirements of subsection 25(1.3) of the Act and noted that the onus remains on the Applicants to demonstrate that these conditions would affect them directly and personally. The Officer concluded that they would be subject to conditions faced by the general populace, and those hardships associated with general country conditions do not amount to "unusual and undeserved, or disproportionate hardship" (CTR, pp 7-8).

[7] Finally, the Officer considered the establishment evidence of the Applicants, including their employment, volunteer, and community service, noting their positive efforts to become established in Canada. However, the Officer noted that they did not have a reasonable expectation of being able to remain in Canada permanently and that they had not remained in Canada due to circumstances beyond their control. The Officer ultimately concluded that the Applicants could re-establish themselves in Jamaica with the skills acquired in Canada and with family to help them resettle there (CTR, pp 8-9).

II. ISSUES AND PARTIES' SUBMISSIONS

[8] The Applicants allege that the Officer made two errors: first, in applying the incorrect legal test in assessing BIOC; and second, in assessing the evidence in an unreasonable fashion.

[9] Regarding BIOC, the Applicants argue that the Officer conducted an assessment of the hardships Shalom would face if returned to Jamaica, a focus that resulted in the following legal errors:

i. concluding that Shalom would be at no greater risk of gang violence than the rest of the population;

ii. focusing on whether Shalom's basic needs would be met in Jamaica;

iii. assessing whether Shalom's fundamental rights would be denied in moving to Jamaica (and concluding they would not);

iv. assessing whether a "significant negative impact" would result for Shalom from the relocation; and

v. importing a state protection analysis to conclude that the Jamaican government is making serious efforts to combat child poverty.

[10] The effect of all this, the Applicants assert, is that they were expected to demonstrate that Shalom faced specific risks and that her fundamental rights would be denied before the Officer would conclude that the BIOC militated in favour of granting the H&C application. As neither of these are appropriate considerations within the BIOC analysis, the Officer made a fundamental error of law.

[11] The Applicants, at the July hearing, primarily argued that the correct test for a BIOC analysis was most recently formulated by Justice Russell in *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 at para 63 [*Williams*]:

> When assessing a child's best interests an Officer must establish first what is in the child's best interest, second the degree to which the child's interests are compromised by one potential decision over another, and then finally, in light of the foregoing assessment determine the weight that this factor should play in the ultimate balancing of positive and negative factors assessed in the application.

[12] Although the Applicants admit that the *Williams* test need not be strictly applied, the Court must look at whether the Officer has engaged in a meaningful assessment respecting the substance of the test. In other words, it is the substance, not the form, of the analysis that dictates whether BIOC has been correctly considered. And here, they assert, the Officer conducted none of the required analysis, relying instead on extrinsic factors of risks, rights, and the possibility of state protection. No assessment of Shalom's best interests was done, no assessment of how those interests would be affected by a decision in either direction, and no balancing of the factors.

[13] The Respondent, in brief, counters that there is no formulaic requirement to apply any given test (such as in *Williams*) and contends the Officer undertook an adequate and reasonable BIOC analysis.

[14] Regarding the second alleged error, the Applicants argue that the Officer's assessment of the evidence presented was unreasonable. First, the Applicants submitted a report by a clinical psychologist which stated that moving to Jamaica would have significant negative mental effects on Shalom. The Officer, however, took issue with the report, as Shalom had no actual psychological problems at the time of the assessment. The Officer further concluded that the report overstated Shalom's health problems in the absence of any corroborating evidence. Second, the Applicant submitted a letter from a teacher in Jamaica detailing the shortcomings of the Jamaican education system and the adverse impact a move to Jamaica might have on Shalom. As with the psychological report, the Officer concluded that the assertions in the letter lacked corroborating evidence and were thus speculative. The Applicants submit that both these documents went to the heart of a proper BIOC assessment and were thus unreasonably ignored.

[15] The Respondent counters that the Officer undertook a reasonable and comprehensive analysis of the evidence and that the Applicant's arguments essentially amount to a request to reweigh the evidence.

III. STANDARD OF REVIEW

[16] In *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 [*Kanthasamy FCA*] at para 99, the Federal Court of Appeal concluded that for the fact-finding component of

subsection 25(1) matters, the deferential standard of reasonableness applies, and the Supreme Court confirmed this approach (*Kanthasamy SCC* at para 44). A reasonableness review asks whether the impugned decision "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 at para 47). This is a deferential approach, and "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome" (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

[17] The Applicants, however, argue that the Officer both erred in assessing the evidence and in applying the right test to the H&C analysis, and on that latter issue, the case law on standard of review remains in flux. Justice Mosley addressed the uncertainty on standard of review for H&C decisions in *Gonzalez v Canada (Citizenship and Immigration)*, 2015 FC 382 at paras 26-34. After a very extensive summary of the leading case law up to *Kanthasamy FCA* and *Lemus v Canada (Citizenship and Immigration)* 2014 FCA 114, Justice Mosley concluded that the standard of correctness applies to the officer's choice of a legal test.

[18] Since there is nothing in the recent release of *Kanthasamy SCC* that explicitly contradicts Justice Mosley that correctness should apply for the choice of the legal test in an H&C assessment, and it is the same standard recently used by Justice Gleeson in *D'Aguiar-Juman v Canada (Citizenship and Immigration)*, 2016 FC 6 at para 6, I endorse this view.

IV. ANALYSIS

[19] The primary issue challenged by the Applicants is that the decision-maker failed to correctly consider hardship, particularly as it applies to BIOC (*Kanthasamy FCA* at paras 41-55). In a section 25 analysis, the decision-maker must be alert, alive and sensitive to the best interests of the child (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 para 75 [*Baker*]; *Canada (Minister of Citizenship and Immigration v Hawthorne*, 2002 FCA 475, para 31 [*Hawthorne*]). *Kanthasamy SCC* directs that an officer should not view hardship through the limiting lens of the heretofore oft-applied descriptors "unusual and undeserved or disproportionate":

> [33] The words "unusual and undeserved or disproportionate hardship" should therefore be treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). As a result, what officers should not do, is look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds, and use the language of "unusual and undeserved or disproportionate hardship" in a way that limits their ability to consider and give weight to *all* relevant humanitarian and compassionate considerations in a particular case. The three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision.

[20] The Supreme Court further states that it is particularly important not to limit the hardship focus when a child is directly affected:

> [41 It is difficult to see how a child can be more "directly affected" than where he or she is the applicant. In my view, the status of the applicant as a child triggers not only the requirement that the "best interests" be treated as a significant factor in the analysis, it should also influence the manner in which the child's other circumstances are evaluated. And since "[c]hildren will rarely, if ever, be deserving of any hardship", the concept of "unusual or undeserved hardship" is presumptively inapplicable to the assessment of the hardship invoked by a child to support his or her application for humanitarian and compassionate relief: *Hawthorne*, at para. 9. Because children may experience greater hardship than adults faced with a comparable situation, circumstances which may not

> warrant humanitarian and compassionate relief when applied to an adult, may nonetheless entitle a child to relief: see *Kim v. Canada (Citizenship and Immigration)*, [2011] 2 F.C.R. 448 (F.C.), at para. 58; UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/09/08, December 22, 2009.

[21] In this case, the Officer canvassed the matters raised by the Applicants regarding their daughter, including medical, educational, safety, and family components of a potential move to Jamaica. He acknowledged attractive elements of life in Canada for both the Applicants and Shalom. The Officer began from a starting point that presumes life in Canada is better than life in the country of origin, which is indeed acknowledged and accepted by the jurisprudence (see, for example, *Hawthorne* at para 5).

[22] However, the Officer erred in looking at these elements through the lens of unusual and undeserved or disproportionate hardship, which *Kanthasamy SCC* now teaches us is the wrong focus when it comes to a child. Having already acknowledged that daughter Shalom was inseparable from her parents in any return to Jamaica, the Officer in this case found that it would not be "unusual and undeserved, or disproportionate' for the Applicants to re-adapt to life in Jamaica" (CTR, p 8). I would note that beyond the legal error disclosed in that conclusion, the statement itself is unreasonable, in my view, because Shalom had never adapted to life in Jamaica in the first place: unlike her parents, she had spent her entire life in Canada. Though she was not one of the H&C Applicants, the Officer was clearly aware of her centrality to the analysis.

[23] With respect to relatives and friends of the child in Canada, the officer once again peered through the hardship lens of the test that *Kanthasamy SCC* instructs us to avoid:

> I have considered the letters of support from the applicants' relatives and friends; however, insufficient evidence has been put forth to support that the aforementioned relationships are characterized by a degree of interdependency and reliance to such an extent that if separation were to occur it would amount to hardship that is unusual and undeserved or disproportionate. Moreover, I am not satisfied that separation from relatives or friends here in Canada would sever the bonds that have been established. While separation from friends and other acquaintances is difficult, I am not satisfied that in these circumstances it is an unusual and undeserved or disproportionate hardship…. Relationships are not bound by geographical location and the applicants can maintain contact with their relatives and friends in Canada through the internet in the form of e-mails, instant messaging, Skype or Facebook. If computers are not readily available, telephone and letters are another viable option. (CTR, p 8; emphasis added).

[24] While the Officer referred to the Applicants in the quote above, it was also clear that any relocation would necessarily include Shalom (CTR, p 6). The effects of relocation and separation, then, should have been separately considered for her since, as we now know from *Kanthasamy SCC*, it is incorrect to consider Shalom's best interests in the context of hardship, as was done here.

[25] The Supreme Court in *Kanthasamy SCC* had the following to say about relationships in Canada and the resulting BIOC hardship analysis:

> [58] Nowhere did the Officer ask whether the effect of separating Jeyakannan Kanthasamy from the people he was close to in Canada would be magnified by the fact that his relationships with them developed when he was a teenager. This approach is inconsistent with how hardship should be uniquely addressed for children.

> [59] Moreover, by evaluating Jeyakannan Kanthasamy's best interests through the same literal approach she applied to each of his other circumstances — whether the hardship was "unusual and undeserved or disproportionate" — she misconstrued the best interests of the child analysis, most crucially disregarding the guiding admonition that "[c]hildren will rarely, if ever, be deserving of any hardship": *Hawthorne*, at para. 9. See also *Williams v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 166, at paras. 64-67.

[26] In light of *Kanthasamy SCC*, it is clear that the Officer erred in applying the "unusual, undeserved, or disproportionate" requirement when considering Shalom's best interests: this constitutes a reviewable error in that it employed the wrong test, given this new jurisprudence.

[27] On the second issue raised by the Applicant regarding assessing evidence in an unreasonable manner, I entirely agree with the Respondent's proposition that the role of this Court in a judicial review is not to reweigh the evidence, and that BIOC is the central, but not the sole factor to be considered in the section 25 analysis (*Legault v Canada (Citizenship and Immigration)*, 2002 FCA 125). As *Baker* articulated this principle at para 75, "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".

[28] I find, however, that the Officer here failed to adequately assess key evidence relating to Shalom's best interests, including letters relating to her education, living arrangements, financial insecurity, physical safety, and health care (her eye condition, and ability to afford corrective treatment in Jamaica).

[29] To provide but one example, I will turn to the Officer's assessment of Shalom's psychological report. The Officer found "[f]rom the information provided by Dr. Antczak, the applicant's [sic] daughter does not appear to be suffering from any psychological conditions or problems necessitating the appointment with Dr. Antczak. The report is absent any information regarding the reason for the referral to Dr. Antczak or information about when the interview took place or the length of the assessment" (CTR, p 5). The Officer's assessment, in my view, misses the psychologist's point that the deleterious effects would occur due to a relocation to Jamaica, rather than on account of any psychological needs that already exist (CTR, p 72).

[30] In *Kanthasamy SCC*, the Court said the following about analogous findings by the H&C officer:

> [48] Moreover, in her exclusive focus on whether treatment was available in Sri Lanka, the Officer ignored what the effect of removal from Canada would be on his mental health. As the Guidelines indicate, health considerations *in addition to* medical inadequacies in the country of origin, may be relevant: *Inland Processing*, s. 5.11. As a result, the very fact that Jeyakannan Kanthasamy's mental health would likely worsen if he were to be removed to Sri Lanka is a relevant consideration that must be identified and weighed regardless of whether there is treatment available in Sri Lanka to help treat his condition: *Davis v. Canada (Minister of Citizenship and Immigration)*, 96 Imm. L.R. (3rd) 267 (F.C.); *Martinez v. Canada (Minister of Citizenship and Immigration)*, 14 Imm. L.R. (4th) 66 (F.C.)

[31] We know that, per *Kanthasamy SCC*, a child affected by an H&C decision must be given the full and careful attention of the decision-maker. This means a thorough assessment of the child's interests – assuming relevant evidence is provided – which includes education, accommodation, personal safety, and health, and which takes into consideration the full spectrum

of consequences that may result from granting, or denying, the H&C application. To do otherwise constitutes a reviewable error.

V. CONCLUSION

[32] In light of my above reasons, I am granting this judicial review. I commend counsel for their excellent preparation, including both oral and written submissions, both at the time of the hearing and at its post-*Kanthasamy SCC* resumption. They served their respective clients well.

VI. QUESTION FOR CERTIFICATION

[33] Counsel submitted the following question for certification, which they argued transcends the interest of the immediate parties and contemplates issues of broad significance or general application, per *Liyanagamage v Canada (Secretary of State)*, [1994] FCJ No 1637 (FCA):

> In a best interests of the child analysis, is an officer required first to explicitly establish what the child's best interests are, and then to establish the degree to which the child's interests are compromised by one potential decision over another, in order to show that the officer has been alert, alive and sensitive to the best interests of the child?

[34] This question, which asks in essence whether the *Williams* test for BIOC in the H&C context must be explicitly and formally adhered to or not, has been certified twice already in the last year – in *Celise v Canada (Citizenship and Immigration)*, 2015 FC 642 [*Celise*] and *Bermudez v Canada (Citizenship and Immigration)*, 2015 FC 1270. While *Celise* did not ultimately get appealed, it appears that, at least at this point, the appeal in *Bermudez* is moving forward.

[35] In this case, however, despite the request by both parties to certify the question, I do not think it appropriate because I ultimately disposed of the matter by the application of *Kanthasamy*, rather than addressing any adherence to the *Williams* test (see *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at para 9, "the question must also have been raised and dealt with by the court below"). Thus, while this Court has acknowledged that the question above transcends the parties' immediate interests, it cannot be said to be dispositive of the appeal, and therefore, will not be certified. Having said that, I have no doubt that when adjudicated, the *Bermudez* outcome, if rendered, will be of importance to the reassessing officer in this matter.

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. No question of general importance is certified.

3. No costs will be awarded.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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