Federal Court Cour fédérale

Date: 20170517

Docket: IMM-3964-16

Citation: 2017 FC 508

Ottawa, Ontario, May 17, 2017

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

PHARA DELILLE, OLIVER JACKSON EDME

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

[1] This is the judgment concerning a judicial review application of a decision made by an immigration officer to deny the exemption available to applicants pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. The judicial review application is made pursuant to section 72 of the Act.

[2] Section 25 (1) of the Act provides for an exemption from any applicable criteria or obligations created by the Act if the Minister is of the opinion that it is justified by humanitarian or compassionate [H&C] considerations. In the case of an applicant who seeks to become a permanent resident in Canada, the first obligation is to make an application before entering Canada, as is required by subsection 11(1) of the Act. In the case at hand, Ms. Delille wishes to make her application for permanent residence from within Canada. In order to be successful, she must therefore be granted an exemption using the mechanism found in section 25.

[3] The decision under review, dated August 31, 2016, concludes that the exemption is not warranted in view of the evidence put forth and in spite of the best interests of a child directly affected.

I. The Facts

[4] The facts presented to the immigration officer are quite unique. They will be introduced in the form of a chronology of events:

- The applicant was born in 1981. She entered into a common law relationship with one Jackson Edme in May 2005.
- The applicant lived with her mother, father and sister until May 2009, at which point she moved in with Mr. Edme.
- There was a disastrous earthquake in Haiti in 2010. From April 2010 to June 2011, the applicant worked as a procurement officer for "Save the Children", a non-governmental organization operating out of Port au Prince in Haiti. It appears that a then colleague, Vladimir Claveus, blamed the applicant for his job loss at "Save the Children" and he would have threatened her. According to the record, Mr. Claveus would have been involved in a fraud scheme of some sort at "Save the Children". The nature of the scheme and why this person would have held the applicant responsible for his firing remain nebulous.

- The applicant lived with her half-sister in New York City in July 2011. She was sexually assaulted in the apartment by three intruders during that stay and they also stole from the apartment.

- The applicant returned to Haiti in August 2011. Upon her return, the applicant realized she was pregnant; however, at the time, she felt it was unclear whether the father of the child was Mr. Edme or whether the child was conceived as a result of the sexual assault she suffered in New York City. According to her, Mr. Claveus's threats increased into having bandits set her parents' house on fire. On November 1, 2011, the applicant alleges that Mr. Claveus sent armed thugs to her house which she escaped through the back door. According to a police report filed by the applicant on November 2, this occurred while she was alone, as armed men came to her house and requested that she opens the door. According to the report, she was able to find refuge with a neighbour. I note that there is a police certificate on file, dated June 15, 2012, which reports that on March 6, 2011, more armed bandits entered her house while she was away and ransacked the place after firing their firearms in the air. Ten days later, another "certificate" reports that Jackson Edme was the victim of an attack by two armed gunmen on a motorcycle. However, the June 25, 2012 certificate report was about a statement made by someone other than Mr. Edme.

- In November 2011, the applicant's fiancé fled to the Dominican Republic while the applicant fled to the United States in order to seek asylum. However, once in the United States, the applicant changed her mind and decided to make her claim for refugee status in Canada. Thus, she crossed the border in Fort Erie, Ontario, a town on the Niagara River across from Buffalo, NY. It is on December 2, 2011 that this applicant made a refugee claim. However, the claim was ineligible under paragraph 101 (1) (e) of the Act because "the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence". The United States is one such country. It seems that the applicant tried to seek an exception based on her uncle's Canadian status in Canada, but the proof of their relation was insufficient. She was accordingly returned to the United States.

- However, it doesn't seem that the applicant stayed in the Buffalo region for a long period of time as from December 2011 to June 10, 2012 she was living in the state of Michigan where she gave birth to her son on March 12, 2012. Her son, Oliver Jackson Edme, is the co-applicant in this case.

- Three months later, on June 11, 2012, the applicant, having travelled back from Michigan to Buffalo again sought asylum in Canada at the Fort Erie crossing. This time, it is paragraph 101 (1) (c) of the Act which prevented her claim from being eligible as a claim is ineligible if a prior claim was determined to be ineligible to be referred to the Refugee Protection Division. Nevertheless, since her child had not already made an application for refugee protection, he would be allowed to make a claim and, this time, there was a sufficient proof that there was a relationship with a Canadian uncle such that there was no "refoulement". As for the principal applicant

herself, a removal order was registered, but she was allowed to enter Canada in order to accompany her son while his application for refugee status was processed. Following the dismissal of the child applicant's refugee protection application (March 2013), the applicants were able to stay in Canada despite the removal order because of the temporary suspension of removals to Haiti which was then in effect. The temporary stay was lifted in December 2014. The principal applicant was advised that she had the right to apply for a pre-removal risk assessment [PRRA] before being deported.

- Upon gaining access to Canada, the applicants did not stay in the Fort Erie region but rather went to Toronto where Ms. Delille settled until August 2014. In the meantime, it seems that the applicant ended her relation with Jackson Edme.

- In February 2013, the applicant met a man in Montréal, a permanent resident of Haitian origin, with whom she began a long-distance relationship.

- Ms. Delille moved to Montreal in August 2014 in anticipation of her marriage to that man met in Montréal. The marriage was celebrated on October 11, 2014. However, the verbal abuse allegedly suffered at the hands of this man before the marriage continued after the wedding and it even became physical. There is on record a police report in support of the contention that Ms. Delille complained about being hit by her spouse. The said report is dated March 14, 2015.

- The application by the applicant's husband to sponsor Ms. Delille for permanent residence, made on January 19, 2015, was withdrawn in February 2015 after the applicant left the family home and took refuge in a home for victims of domestic abuse. Divorce proceedings followed in May 2015.

- The applicant was issued an open work permit on June 5, 2015. She had submitted four days earlier, on June 1, 2015, the H&C application currently under judicial review.

- The decision to deny the H&C application was rendered on August 31, 2016.

II. The Decision under Review

[5] In the decision that is rather comprehensive, the immigration officer summarized the applicant's history relevant to the immigration issues. This applicant had made a number of allegations directed at supporting her claim that H&C reasons would justify obtaining permanent residence in Canada without making the application from outside of the country.

[6] First, the applicant contended that her establishment in Canada carried significant weight. Her volunteer work and participation in religious groups were advanced. However, the officer concluded that while ties were established in Canada, that did not rise to the level of humanitarian concerns. In fact, the applicant confirmed that she was not working at the time the application was considered and she seems to have benefited from social security payments. She came to Canada instead of seeking asylum in the United States, in spite of knowing full well that a removal order would be issued, as she was so advised when she came to the border a second time. She persisted in coming to this country. These are not circumstances beyond the principal applicant's control such that it can be said that the inability to leave Canada for a significant period of time and a significant degree of establishment deserve positive H&C consideration. At any rate, the officer was not satisfied that the principal applicant had any significant degree of establishment in Canada.

[7] Second, as for the abuse the applicant suffered at the hands of her husband in Canada, although the evidence was accepted, the officer was of the view that it did not show how that particular situation would favour granting an exemption from the requirement that permanent resident status be sought from abroad.

[8] Third, as the psychological health of the applicant was raised as a consideration to be taken into account, the officer reviewed and accepted the psychologist's report. Once again, the officer expresses the view that the exemption is not supported by what is presented as psychological distress suffered by the applicant, in circumstances showing significant resilience.

Although the applicant experienced violent episodes in Haiti, the United States and Canada, she would benefit from the support of her family if she were to go back to Haiti.

[9] The officer considered that the country conditions in Haiti constituted the best argument raised by the principal applicant in her effort to stay in Canada. Two factors are to be considered. One is the general situation in her country of origin and the other is the harassment and the threats authored by one Vladimir Claveus.

[10] The officer noted the concerns about violence against women in Haiti, poor security, targeting of individuals returning from abroad as they are perceived to be wealthy, the high unemployment rate, and poor educational opportunities for her son. However, he also pointed out that the applicant identified no specific violence she was concerned about other than what is reported as being the general situation in Haiti. The officer concluded that the applicant would be no more at risk of domestic abuse in Haiti compared to Canada where her husband had abused her. Similarly, the general threat of kidnapping for those perceived as wealthy is not a specific risk to the applicant or her son. Indeed, the applicant did not explain why she would be perceived as wealthy. Furthermore, she has lived in Haiti for 30 years, is familiar with the country, and it would not be difficult to identify places to avoid. The high unemployment rate in Haiti has been a fact of life for a long time and the applicant is educated and has found employment in the past.

[11] Overall, the officer acknowledged that there is no doubt that Canada offered a high quality of living, which is a reason why persons want to immigrate to Canada; however, that cannot be sufficient to support an H&C application. The purpose of section 25 of the Act is not

to compensate for the difference between the quality of living in Canada and that found in other countries.

[12] The officer then dedicated a few paragraphs to the threats which would have been made against the principal applicant by her former colleague, Vladimir Claveus. She left Haiti in November 2011 because, she claimed, she was harassed and threatened. According to the decision under review, the allegation made by the principal applicant would have been that Mr. Claveus was fired because of a fraud in which he would have been involved; he would have tried to implicate the principal applicant, who would have taken over his position. Death threats would have followed.

[13] In the view of the officer, the evidence submitted in support of the allegations did not align with the applicant's allegations. Thus, the officer examined three police documents offered by the principal applicant. The police report of November 2, 2011, indicates that Mr. Claveus would have been fired for reasons unknown to the applicant. Furthermore, the report speaks of Mr. Claveus and the principal applicant being co-workers of the same rank, not that the applicant replaced Mr. Claveus. The report then indicates that armed bandits went to her house on June 6, 2011. The report speaks of anonymous threats starting on February 14, 2011 that she attributes to Mr. Claveus. The allegations concerning Mr. Claveus did not align with the police report in the view of the officer. He also concluded that the document did not establish a link between the anonymous phone calls attributed to Mr. Claveus and the attacks that allegedly took place.

[14] The police certificate of June 15, 2012, refers to an incident reported by the principal applicant that would have occurred on March 6, 2011, incident that was not even mentioned in the November 2011 report. The March 6, 2011, incident is not insignificant. While away, armed bandits would have broken into her house, that they would have ransacked it, and fired their firearms in the air. The third police document, another "certificate", refers to a statement made by a third party having witnessed an armed attack against Mr. Edme by assailants on a motorcycle on June 6, 2012. The third certificate bears the date of June 25, 2012. There is no connection made in that document to Mr. Claveus.

[15] Not only do the allegations made in her affidavit not accord with the police report offered in support of her allegation, but the officer concluded that the threats have not been linked with Mr. Claveus who is allegedly seeking revenge. Actually, an incident as significant as that of March 6, 2011, is not even reported in the "procès-verbal de plainte" of November 2, 2011. Finally, the officer was doubtful that Mr. Claveus would still have an interest in the applicant more than five years since she left Haiti.

[16] The only evidence that could make the threats contemporaneous and link positively to Mr. Claveus comes from a letter purportedly written by the applicant's father on April 10, 2015. According to the letter, Mr. Claveus more recently personally threatened to kill the applicant if she returned. He is presented in the letter as a powerful individual who would seek revenge for the applicant being responsible for his lost income at "Save the Children". The letter describes more fully the illegal activities alleged to have taken place at "Save the Children". In the view of

the officer, the letter suffers from the absence of proof of the writer's identity and because, if written by the applicant's father, the author was a self-interested party.

[17] Finally, the officers' lengthiest comments were kept for the best interests of the co-applicant, the principal applicant's child. It was noted that the son would be eligible to apply for Haitian citizenship. It is acknowledged that children raised in Canada will have better opportunities than if they are raised in Haiti, starting with a better educational system. Consistent with the previous analysis, the officer also concluded that while the son would have better opportunities in Canada than in Haiti, the difference in living standards is not sufficient to ground an H&C application.

[18] Although young Oliver has never been to Haiti, the officer recognized that his first languages were Creole and French, which will facilitate his integration in Haitian society. The officer further noted that Oliver will benefit from the presence of his father and extended family in Haiti. The officer specifically mentioned his sensitivity to the abuse the child would have suffered from the applicant's husband in Montréal, but concluded that the applicant failed to show how that factor supported a need to stay in Canada versus returning to Haiti. Indeed, the social network in Haiti would benefit the principal applicant's son.

[19] The officer chose to sum up his view concerning the best interests of the child by applying the framework developed in *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 and *Sun v Canada (Citizenship and Immigration*, 2012 FC 206. Thus, he found that the best interests of the child is to stay with his mother in Canada. However, the interest of the child

would not be substantially compromised because he would benefit from the presence of his father, his extended family and a support system that is non-existent in Canada if the applicants go to Haiti. Finally, the officer considered the weight to be given to the best interests of the child in the determination of the overall H&C application. Although the interest as found in this case carries some weight ("un certain poids"), it would not sway the balance in favour of the applicants.

[20] The officer concludes that the case boils down to two issues: the best interests of the child and the basic conditions in Haiti. Those conditions affect the two applicants. Quoting *Kanthasamy v Canada (Citizenship and Immigration),* 2015 SCC 61, [2015] 3 SCR 909 [*Kanthasamy*], the officer noted that subsection 25(1) offers "equitable relief" ("mesure à vocation équitable") (para 21); it is not a way for families coming from less advantaged countries to immigrate to Canada. The mere fact that more and better opportunities occur in Canada carries little weight. It follows that if the best interests of the child are not substantially compromised otherwise, the best interests of the child will carry only a certain weight.

[21] In the result, the officer found that the best interests of the child did not outweigh the other considerations as there was little to justify the exemption.

III. Standard of Review

[22] In this case, the applicants raise two sets of issues; some are in respect of an alleged breach of procedural fairness while the other is concerned with the assessment of the evidence made by the immigration officer.

[23] The standard of review for whether the officer fulfilled his duty of procedural fairness is correctness (*Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 [*Khosa*] at para 43). As for H&C decisions, the case law has been consistent that it is the reasonableness standard which controls. There should not be any doubt left since the decision in *Kanthasamy* (para 44).

IV. Arguments and Analysis

[24] The principal applicant is content that procedural fairness issues are reviewed on a standard of correctness while issues of fact and mixed fact and law are to be reviewed on a standard of reasonableness. However, she also contends that errors of law are assessed on the standard of correctness. Such is not the case. Already in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] at para 54, the Court had signalled that only certain questions of law, including those of central importance to the legal system and outside the expertise of the administrative tribunal, were deserving of the correctness standard. Since then, the Court has created a presumption that a question of law concerned with the interpretation of the tribunal's own statute benefits from deference on judicial review (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654, at para 34, confirmed in *McLean v British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 SCR 895). It is, of course, only a presumption. However, nothing in this case suggests that a standard other than reasonableness controls (*Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 SCR 293; *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53, [2016] 2 SCR 555). Accordingly, other than arguments

raising procedural fairness issues, all other arguments in this case are to be assessed on a reasonableness standard of review.

[25] The standard of review applicable to different issues makes a difference. The nature of the burden on an applicant changes where reasonableness is the appropriate standard. In the now famous paragraph 47 of *Dunsmuir*, Justices Bastarache and Lebel recognize that certain questions do not lend themselves to one particular result: there is a range of outcomes. Indeed, as indicated before, that is true of questions of law (*McLean*, supra). Thus, administrative tribunals have a margin of appreciation. The reviewing court must defer to reasonable decisions made by administrative tribunals.

[26] Accordingly, the reviewing court is not to substitute its own appreciation for that of the administrative tribunal which was granted the discretion by Parliament (*Delios v Canada (Attorney General)*, 2015 FCA 117, at para 28). The reviewing court's role is to control the legality of the tribunal's decision through a determination of the reasonableness of the decision under review. The court looks for the qualities that make a decision reasonable: that in turn involves the process of articulating the reasons and the outcome. If there exists justification, transparency and intelligibility within the decision-making process, and the decision falls within a range of possible, acceptable outcomes which are defensible in view of the facts and the law, the decision will be found to be reasonable: the reviewing court will defer to the decision of the administrative tribunal, in spite of a possible difference of view as to the outcome of the case. In *Khosa*, Binnie J. captured the process in an illuminating fashion:

> [59] Reasonableness is a single standard that takes its colour from the context. One of the objectives of *Dunsmuir* was to

> liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, 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.

[27] It follows that the burden on an applicant is not so much to seek to convince the reviewing court that the outcome ought to be different than the outcome reached by the administrative tribunal, but rather that this outcome is not a possible acceptable outcome, in view of the facts and the law, reached without justification, transparency and intelligibility. The applicant's task will be more or less difficult depending on the breadth of the acceptable range. As the Federal Court of Appeal found in *Bergeron v Canada (Attorney General)*, 2015 FCA 160, "(b)y its nature, a range can be broad or narrow" (para 44). How broad or narrow seems to depend on the context (*Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2, [2012] 1 SCR 5 [*Catalyst Paper*]). As put by the Supreme Court of Canada in *Catalyst Paper*, "(t)he fundamental question is the scope of decision-making power conferred on the decision-maker by the governing legislation. The scope of a body's decision-making power is determined by the type of case at hand" (para 18).

[28] That takes us to the nature of the power given to the Minister by Parliament through section 25 of the Act. The Federal Court of Appeal noted in *Canada (Minister of Transport, Infrastructure and Communities) v Jagjit Singh Farwaha*, 2014 FCA 56 [*Farwaha*]:

> [91] …In some cases, Parliament has given a decision-maker a broad discretion or a policy mandate – all things being equal, this broadens the range of options the decision-maker legitimately has. In other cases, Parliament may have constrained the decision-maker's discretion by specifying a recipe of factors to be considered – all things being equal, this narrows the range of options the decision-maker legitimately has. In still other cases, the nature of the matter and the importance of the matter for affected individuals may more centrally implicate the courts' duty to vindicate the rule of law, narrowing the range of options available to the decision-maker.

As in *Farwaha* and *Philipos v Canada (Attorney General)*, 2016 FCA 79, it would appear that the Minister benefits from significant discretion which would make the range of acceptable and defensible options fairly broad. The Act does not define what constitutes sufficient humanitarian and compassionate considerations to grant an exemption from the criteria or obligations of the Act, such as having to apply for permanent residence from outside Canada. Section 25 is meant to "mitigate the rigidity of the law in an appropriate case" (Janet Scott, first Chair of the Immigrate Appeal Board, in her testimony before the Special Joint Committee of the Senate and the House of Commons on Immigration Policy in 1975, as quoted in *Kanthasamy*, at para 15). Clearly, the exemption is warranted in an appropriate case, not on a large scale.

[29] However, that discretion is not infinite, which limits the range of acceptable outcomes. Discretion is never arbitrariness. At the heart of the matter is the requirement that the discretion be exercised in a humanitarian and compassionate manner:

> 66 The wording of s. 114(2) and of Regulation 2.1 requires that a decision-maker exercise the power based upon "<u>compassionate</u> or <u>humanitarian</u> considerations" (emphasis added). These words and their meaning must be central in determining whether an individual H & C decision was a reasonable exercise of the power conferred by Parliament. The legislation and regulations direct the Minister to determine whether the person's admission

> should be facilitated owing to the existence of such considerations. They show Parliament's intention that those exercising the discretion conferred by the statute act in a humanitarian and compassionate manner. This Court has found that it is necessary for the Minister to consider an H& C request when an application is made: Jiminez-Perez, supra. Similarly, when considering it, the request must be evaluated in a manner that is respectful of humanitarian and compassionate considerations.
>
> [Emphasis in original]
>
> *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*]

[30] It is beyond dispute that the discretion conferred by section 25 of the Act was not meant, and is not, a regime created to provide for an alternative immigration scheme (*Kanthasamy*, para 23). Furthermore, the measure continues to be of an exceptional nature. That flows from this passage, cited with approval by the majority in *Kanthasamy* and relied on, in *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338 [*Chirwa*], a decision of the Immigration Appeal Board. It was found that humanitarian and compassionate consideration are "those facts, established by the evidence, which would excite in a reasonable man [*sic*] in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the Immigration Act" (para 13). Here is what the majority had to say about the danger of overbreadth:

> [14] The *Chirwa* test was crafted not only to ensure the availability of compassionate relief, but also to prevent its undue overbreadth. As the Board said:
>
> > It is clear that in enacting s. 15 (1) (*b*) (ii) Parliament intended to give this Court the power to mitigate the rigidity of the law in an appropriate case, but it is equally clear that Parliament did not intend s. 15 (1) (*b*) (ii) of the Immigration Appeal

> Board Act to be applied so widely as to destroy the essentially exclusionary nature of the Immigration Act and Regulations. [p. 350]

[31] In *Kanthasamy*, the Court did not take issue with the guidance provided that applicants must show unusual and underserved hardship, or disproportionate hardship. That is because "(t)here will inevitably be some hardship associated with being required to leave Canada. This alone will not generally be sufficient to warrant relief on humanitarian or compassionate grounds under s. 25(1)" (para 23). The problem stems from limiting the analysis to these three adjectives:

> [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.

[32] The Supreme Court insists that the circumstances be considered as a whole, applying the test described as "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another". The reviewing judge will consider whether the test has been applied reasonably, that is whether the outcome reached is one of the acceptable outcomes in view of the facts and the law, and whether there is justification, transparency and intelligibility within the decision-making process. The burden to satisfy the Court that the decision is not reasonable remains on the applicant's shoulders. It continues to be that the Court shall not

substitute its assessment of the evidence to reach a different outcome. It is for the applicant to show that the outcome is not reasonable.

A. *Reasonableness*

[33] Concerning the reasonableness, the applicants raised two issues.

[34] First, the applicants contend that there were some arbitrary findings of fact made by the decision-maker. They relate to the potential role of the son's father if they were to return to Haiti on which the decision-maker relied to a significant extent. Specifically, they argue that the decision-maker speculated as to the likely support that the father would provide.

[35] The respondent argues that in the absence of any evidence concerning Mr. Edme's relationship with Oliver, the officer "was entitled to rely on rationality and common sense when making a finding."

[36] It is well-recognized that immigration officers can consider the presence of relatives in an applicant's home country in determining the degree of establishment:

> [10] …In relation to other factors of establishment raised by the Applicant, the Officer was entitled to consider, *inter alia*, whether the Applicant had employment or relatives in St. Vincent (see *Kawtharani v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 162 at para. 17).
>
> *Williams v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1474

The only evidence concerning Mr. Edme's relationship with Oliver is Ms. Delille's statements that he agreed to act as a father to Oliver regardless of the uncertainty regarding his paternity:

> …Je n'étais pas certaine si c'était l'enfant à naître de mon fiancé ou si c'était suite à a viole à New York que je suis tombée enceinte – mais selon mes calculs, je pense qu'il est l'enfant de Jackson Edme.
>
> De toute façon, mon fiancé à l'époque était très compréhensif et me disait, peu importe qui est le père, qu'il est prêt à accepter l'enfant comme son propre enfant.
>
> [TRANSLATION]
>
> …I wasn't sure whether my pregnancy resulted from my relationship with my fiancé or from being raped in New York – but, according to my calculations, I think he is Jackson Edme's child.
>
> In any event, my fiancé at the time was very understanding and told me that even if he was not the father he was prepared to accept the child as his own.
>
> (Paras 25-26, principal applicant's affidavit of May 21, 2015)

[37] However, the affidavit goes on to state that Mr. Edme and the principal applicant separated for good toward the end of 2012. Given that this appears to be the only evidence, it is hard to understand how the officer could rely so heavily on the presence of the father in Haiti to alleviate the concerns about the return of the child to Haiti. The circumstances and the evidence can hardly justify such strong comments. The reliance on the availability of the father may be more wishful thinking than hard reality. The inference requires a proven fact and a probability of the occurrence. Here, the facts are weak and I fail to see how the inference of the involvement in the life of the child can be presented as probable.

[38] Reasonableness allows for a range of reasonable outcomes. It has not been shown by the Crown on this record that the inference drawn is reasonable. It is improper to draw such an inference based on such weak evidence. At best, there remains some remote possibility that the father could remain involved with the child. The evidence would not allow to go beyond this narrow inference. Nevertheless, if this justification used by the officer is extracted from the reasons, there may be other valid considerations that justify a refusal of the remedy. However, the reliance on the availability of the father is not justified and is misguided.

[39] The applicants also argue more generally that the officer erred in limiting the scope of his analysis and in disregarding evidence of the hardships the applicants would face if they have to return to Haiti. They assert that the analysis of the best interests of the child directly affected also produced an unreasonable outcome.

[40] The applicants put together a series of circumstances, some directly relevant to the situation in Haiti and some that are peculiar to their personal situation. Gender, personal experiences of gender-based violence suffered by Ms. Delille and her financial situation are to be considered, according to the applicants, with the generalized situation of insecurity and violence in Haiti. There is also the particularized fear of Vladimir Claveus. Moreover, there is no doubt that the best interests of the child favour the applicants staying in Canada.

[41] Without being decisive, the best interests of a child directly affected carry much weight. In *Baker*, the Court stated:

> 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.

The same passage was reproduced in *Kanthasamy*.

[42] It seems to me that if an immigration officer must apply the test of "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another", it is very relevant to assess the personal condition of an applicant under section 25 of the Act. The Court insists in *Kanthasamy* that all relevant humanitarian and compassionate considerations in a particular situation should be weighed.

[43] Here, the decision-maker disagreed that the violence suffered by the applicant outside of Haiti is relevant. Similarly, little weight is awarded to the psychological trauma such that the psychological state raises humanitarian considerations favouring an exemption. I would have thought that, if proven to the satisfaction of the decision-maker and not merely stated, these deserve not to be completely discounted.

[44] The discounting of the personal characteristics is in fact compounded by the country conditions in Haiti. Instead of considering the circumstances as a whole, including the

characteristics of the principal applicant, the decision-maker seems to divide clearly what has happened outside of Haiti (in Canada and the United States) and the country conditions. Most importantly, perhaps, the decision-maker does not identify the standard against which the case is assessed. Thus, this is a case where, if she is to be believed, the applicant suffered gender-based violence that has left not insignificant psychological stigma: this is not disputed by the decision-maker. The country conditions are such that violence against women and discrimination are prevalent. Crime and general insecurity prevail. The question is: would a reasonable person in a civilized community be desirous to relieve the misfortunes of an applicant. That question was not answered on this record.

[45] The best interests of the child were, on the other hand, carefully assessed. However, the assessment is somewhat flawed for the same reason. The violence suffered by the child, which the decision-maker does not doubt, is also discounted such that it does not count because the trauma would be suffered as much in Haiti as in Canada. One would have thought that country conditions could have an impact. Instead, the decision insists on the support of the father to justify discounting the hardship that will be suffered by the applicants. On the other hand, the alleged risks of kidnapping because the child would be perceived as wealthy, being an American citizen by birth, are pure speculation (*Nicayenzi v Canada (Citizenship and Immigration)*, 2014 FC 595, at para 34). It bears repeating that the interests of the child would not be determinative of the outcome in most cases. But the child's situation could be determinative and, at any rate, it must be sufficiently considered, together with the rest of the evidence.

[46] In this case, it is not so much that there were allegations made that certain evidence was ignored or not given enough weight, which I would not hesitate to discard as being an attempt to make this Court re-weigh the evidence. Rather, the difficulty with concluding that the decision is reasonable stems from the undue reliance on the presence of the child's father in Haiti, who would take up a significant role, coupled with a lack of recognition of the hardship already suffered by the applicants together with the acknowledged country conditions. Once the involvement of the child's father has been properly considered and the circumstances and hardship adequately taken into account, the decision-maker would have to apply the test of "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of others." The situation would be drastically different if the facts alleged are not believed. But such does not appear to be the case here.

[47] It is possible that denying the H & C application in this case would be a reasonable outcome once all of the relevant considerations have been properly factored into the decision. It will be for a differently constituted decision-maker to make a new determination that would be judged on a reasonable standard.

B. *Procedural fairness*

[48] I would not have found in favour of the applicants concerning their argument that the principal applicant should have been interviewed in view of the contradictions in the evidence she offered in support of her H&C application. Procedural fairness does not require that an interview take place when evaluating an H&C application. What is required is meaningful participation in the process (*Baker*). The sufficiency of the evidence is not to be supplemented

with an interview. It is the duty of an applicant to put her best foot forward. Contradictions in the evidence submitted are not credibility issues; they go to the sufficiency of the evidence.

[49] Here, the principal applicant submits that, had she been interviewed, she could have tried to explain the contradictions and deficiencies apparent in the evidence she submitted.

[50] There is no duty on the officer conducting an H&C review "to highlight weaknesses in an application and to request further submissions" (*Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189). Insufficiency and credibility are two different notions (*Ibabu v Canada (Citizenship and Immigration)*, 2015 FC 1068). There may be special circumstances that require an interview be conducted (*Duka v Canada (Citizenship and Immigration)*, 2010 FC 1071). Such is not the case here. There was no breach of procedural fairness.

C. *Other evidence*

[51] Since this matter must be sent back for a new determination by a different officer, a comment about the alleged incidents involving Vladimir Claveus might be apposite.

[52] The decision-maker found that it is unlikely that Mr. Claveus would still have an interest in the applicant if she were to return to Haiti. The immigration officer gave little weight to a letter purportedly written by the principal applicant's father on April 10, 2015. If accepted, and given weight, that letter would support the argument that the threats are real and contemporaneous.

[53] The immigration officer found that there was no proof of service (“preuve de signification”) nor evidence concerning the identity of its author. If the father is the author, the decision-maker would have given the letter little probative value (“faible valeur probante”) because the letter would be self-serving (“preuve intéressée”). In my view, this is an unsatisfactory state of affairs.

[54] Not only does the letter under consideration invite further communications, but the telephone number is written twice, together with the address. Despite such overture, no attempt was made at reaching out and obtaining confirmation about authorship. At the very least, a more careful examination of the letter is required with a view to analysing its content to establish reasons why it would not be reliable. That may be the case, but that was not done in the decision under review. Although I agree with my colleague Justice Brown that “rejection of evidence from family and friends because it is self-serving or because the witnesses are interested in the outcome, is an unprincipled approach to potentially probative and relevant evidence” (*Tabatadze v Canada (Citizenship and Immigration)*, 2016 FC 24), it is quite a different matter to assess its weight even if admissible. The motivation for offering evidence, especially where not under oath, is always a relevant fact. Bias is a ground to discredit evidence at common law: he who possesses a real interest in the outcome of a case may well be discredited; considerations of the sort must be articulated. But here, the immigration officer just about dismissed completely the piece of evidence because it would be in his view self-serving, without anything more. There is not even an attempt to analyze the letter. It is unsafe to let a decision stand in that fashion.

[55] In this day and age, it is difficult to understand why there was no communication attempted with the purported author of the letter. Clearly, the participation of the applicant would be required as such communication becomes an extrinsic piece of evidence requiring the ability to participate in one fashion or another. But administrative expediency should not come to the detriment of an appropriate examination of issues.

[56] In the result, this matter must be returned to a different officer for redetermination. The parties did not suggest a serious question of general importance. None is stated.

JUDGMENT in IMM-3964-16

THIS COURT'S JUDGMENT is that the judicial review application is granted. The matter is remitted to a different immigration officer in order to conduct a re-determination.

No question is certified.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3964-16
STYLE OF CAUSE:	PHARA DELILLE, OLIVER JACKSON EDME v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA
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