Federal Court  Cour fédérale

Date: 20190709

Docket: IMM-109-18

Citation: 2019 FC 902

Ottawa, Ontario, July 9, 2019

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

DENISHA DONEAL DOUGLAS

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Denisha Doneal Douglas, [Ms. Douglas] seeks judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], of the January 9, 2018, decision of an inland enforcement officer [the Officer] by which the Officer refused her request to defer her removal to St. Vincent and the Grenadines [Decision].

[2] On December 3, 2014, the Refugee Protection Division [RPD] rejected Ms. Douglas's claim for refugee protection. Her appeal of the RPD decision to the Refugee Appeal Division [RAD] was dismissed as it was not perfected. A subsequent Pre-Removal Risk Assessment [PRRA] was determined against her on November 25, 2016.

[3] Ms. Douglas was served with a direction to report on December 15, 2017 for removal to St. Vincent and the Grenadines on January 17, 2018. She requested a deferral of removal on December 18, 2018 until such time as the first stage of her Humanitarian and Compassionate [H&C] application [submitted July 2017] was determined. Ms. Douglas relied upon the best interest of her Canadian born child Zariyah and the current conditions in St. Vincent and the Grenadines to support her request for deferral.

[4] An Order staying the removal of Ms. Douglas was issued on January 15, 2018.

[5] I find that the Officer did not reasonably assess the short-term best interests of Zariyah [BIOC]. This application is therefore granted. The following reasons will only address the Officer's BIOC analysis.

II. **Issue and Standard of Review**

[6] The standard of review of a decision not to defer removal is reasonableness: *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 42 [*Lewis*].

[7] A decision is reasonable if the decision-making process is justified, transparent and intelligible resulting in a determination that falls within a range of possible, acceptable outcomes

which are defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*].

[8] If the reasons, when read as a whole, "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within a range of acceptable outcomes, the *Dunsmuir* criteria are met": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16.

III. **The Extent of an Enforcement Officer's Discretion under s. 48**

[9] The obligation of an enforcement officer to consider the interests of children affected by removal is "at the low end of the spectrum": *Varga v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394 at para 16.

[10] It is widely acknowledged that an enforcement officer's discretion to defer removal is limited, and that any such deferral is intended to be temporary. When there is an underlying H&C application, it is clear that "enforcement officers are not intended to make, or to remake, PRRAs or H&C decisions": *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 at para 45.

[11] The two most frequently cited cases in this area are *Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81, [*Baron*] and *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [*Wang*]. In *Baron*, the Federal Court of Appeal adopted the reasons in *Wang* concerning an enforcement officer's discretion to defer removal, the essence of which is found at paragraph 48 of *Wang*:

> [. . .] At its widest, the discretion to defer should logically be exercised only in circumstances where the process to which deferral is accorded could result in the removal order becoming unenforceable or ineffective. Deferral for the mere sake of delay is not in accordance with the imperatives of the Act. One instance of a policy which respects the discretion to defer while limiting its application to cases which are consistent with the policy of the Act, is that deferral should be reserved for those applications or processes where the failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment in circumstances and where deferral might result in the order becoming inoperative. The consequences of removal in those circumstances cannot be made good by readmitting the person to the country following the successful conclusion of their pending application [. . .].

[12] In *Lewis*, the Federal Court of Appeal considered the extent to which the decision of the Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] might have changed the nature of the assessment that an enforcement officer is required to conduct when considering the best interests of a child whose parent seeks to defer their own removal under section 48 of the *IRPA*. The Court of Appeal determined that *Kanthasamy* applies only to H&C decisions made under section 25 of the *IRPA*. An enforcement officer is only required to consider the short-term BIOC under section 48 of the *IRPA*: *Lewis*, at paras 74 and 82.

[13] It was also confirmed in *Lewis* that the mere existence of an H&C application is not enough to ground deferral of a valid removal order. While enforcement officers may look at the short-term best interest of a child or children whose parent(s) are being removed from Canada, including Canadian-born children, they cannot engage in a full-blown H&C analysis of any such child's long-term best interests: *Lewis*, at para 61.

[14] An enforcement officer is required to consider the short-term best interests of a child in a fair and sensitive manner: *Kampemana v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1060 at para 34. This consideration extends to Canadian-born children who, although technically not being "removed" under the IRPA are, as is the case here, being removed from Canada by virtue of their age and circumstances which require them to accompany their single, sole parent who is being removed: *Joarder v Canada (Minister of Citizenship and Immigration)*, 2006 FC 230 at paras 3 and 4.

[15] Determining the BIOC is highly contextual; a multitude of factors may affect a child's best interest: *Kanthasamy* para 35.

[16] The depth of the consideration of a child's best interest does not alter the general nature of the analysis. Whether the short-term or long-term BIOC is being considered, it will always be contextual and there will always be a multitude of factors. The only difference is the time period under consideration – short-term or long-term.

IV. **Analysis**

[17] As stated, the determinative issue in this matter is the Officer's unreasonable consideration of the best interests of the three year old child Zariyah.

A. *The RPD Decision*

[18] The Officer found "that most of the issues submitted within the deferral request were already considered in the RPD decision." The Officer extracted two paragraphs of the RPD

decision indicating that there was no evidence that services "such as employment assistance, housing assistance and educational support . . . are not offered in St. Vincent."

[19] Although the Officer extracted parts of the RPD decision, the reasons of the RPD were not found in the Certified Tribunal Record [CTR]. Only the one page Notice of Decision, which was sent to the claimant, is in the CTR. The speculation of counsel at the hearing of this application was that perhaps the Officer relied on the PRRA decision extracts of the RPD reasons and not the actual reasons.

[20] At the beginning of the hearing of this application, counsel for Ms. Douglas provided the Court with a full copy of the RPD reasons which are now in the record of this application. That of course does not alter the fact that the CTR does not contain the Reasons for Decision of the RPD.

[21] The RPD rejected the refugee claim of Ms. Douglas on the basis that her mother's boyfriend, as he was referred to, had not threatened her while she lived on the streets in St. Vincent and the Grenadines nor during the three years which, at that time, she had lived in Canada. That is the only risk that was assessed by the RPD. There was no assessment of any kind for Zariyah.

[22] As Zariyah's risk of living in St. Vincent and the Grenadines or, of staying in Canada without her mother, was not previously assessed in either the RPD or the PRRA decision, the Officer was required to conduct a reasonably robust review of those risks. The failure of the

Officer to do so, as set out below, renders the Decision unreasonable: *Huang v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 446 at para 9.

B. *The BIOC Analysis*

(1) The BIOC submissions and evidence

[23] All of the submissions and evidence put forward by the FCJ Refugee Centre [FCJ] on behalf of Ms. Douglas in the H&C application were submitted with the deferral request. The FCJ submissions provided extensive details on Ms. Douglas's background and Zariyah's best interests. It included references to the relevant jurisprudence as well as to a number of international instruments.

[24] The sworn affidavit of Ms. Douglas in support of her H&C application was also part of her deferral application. The affidavit outlines a litany of sexual and physical abuse in both St. Vincent and the Grenadines and Canada.

[25] In St. Vincent and the Grenadines, her stepfather repeatedly raped Ms. Douglas beginning at the age of thirteen. When she reported it to her mother and maternal grandmother, they did nothing. Ms. Douglas escaped from the house to live on the street just before she was fifteen years old.

[26] The H&C submissions by the FCJ together with the separate deferral submissions of Ms. Douglas addressed the medical inadequacy, economic hardship and country conditions in St. Vincent and the Grenadines. The report of the *UN Committee on the Rights of the Child* and

the 2017 UNICEF Report on the *Situation Analysis of Children in Saint Vincent and the Grenadines* were submitted in support. Those reports state that St. Vincent and the Grenadines "remains a country of origin, transit and destination for human trafficking, including children, for sexual exploitation and forced labour."

[27] A quote from the United States Department of State *Country Report on Human Rights Practices for 2016* was specifically put before the Officer. It indicated that, although statistics were not available, unlawful sexual intercourse with children under age 15 remained a problem and were in many cases linked to transactional sex with minors. Government and NGO interlocutors indicated that child abuse, including neglect and physical, sexual, and emotional abuse, and incest were significant problems.

[28] In addition to Ms. Douglas's affidavit and the H&C submissions, the submissions to the Officer included additional letters of support for Ms. Douglas, the December 23, 2017 report of Natalie Riback, a registered psychotherapist, and online links to seven country condition documents.

(2) The Officer' BIOC Assessment is Unreasonable

[29] The Officer's BIOC assessment is only one paragraph. It contains no mention of the extensive BIOC evidence and submissions put before the Officer as part of the deferral request.

[30] The Officer states that he or she is "alert, alive and sensitive to the child's situation" and that Ms. Douglas wants to stay in Canada so her daughter will not experience the alleged hardship in St. Vincent and the Grenadines. The Officer then goes on to state that as Zariyah will

be travelling with her mother she will still have her love and support and this will assist in any period of adjustment. The Officer notes that Zariyah, as a Canadian citizen, will be able to come to Canada anytime in the future.

[31] For these reasons, the Officer concludes that there is insufficient evidence to show that Zariyah will be unable to adjust to the new circumstances of St. Vincent and the Grenadines.

[32] The nature of the "new circumstances" Zariyah would face in St. Vincent and the Grenadines is not set out by the Officer. As the Officer does not identify the circumstances in question, what evidence would have been sufficient is unknown. In that respect, the reasons are unintelligible.

[33] The ability of Ms. Douglas to continue to provide love and support to Zariyah was put in issue in the submissions to the Officer because of the likelihood of her re-traumatization if she is removed to St. Vincent and the Grenadines. The Officer appears to accept the mental health fragility of Ms. Douglas, saying there was insufficient information to suggest she would be unable to receive counselling for those needs. But, that conclusion runs contrary to and does not address the objective evidence referred to in the submissions showing that there is a significant lack of access to mental health care in St. Vincent and the Grenadines.

[34] The Officer concluded that Zariyah would be able to attend school. Again, the objective country condition documents are inconsistent with that conclusion. The 2017 UNICEF *Situation Analysis of Children in Saint Vincent and the Grenadines* devotes 15 pages to the right to education for children. Although education is free, it finds that does not translate to "no cost."

The report states that poor families may find it difficult to meet the costs of transportation, uniforms, shoes and textbooks. It also notes that pupils are frequently asked to bring paper, toilet paper and other basic items from home in order to supplement local operating budgets.

[35] Ms. Douglas in her H&C affidavit confirmed that she had to drop out of school because her family did not have money to give her for bus fare and lunch.

[36] The Officer also noted that Zariyah is a Canadian citizen "so she may return to Canada at any time in the future." Zariyah is a three year old with no family in Canada. I find that the comments in *Lewis*, at paragraph 90, are equally applicable, adjusted for these facts, and are most appropriate to address that finding:

- the assumption that Zariyah could return to Canada is pure speculation and therefore unreasonable;
- the Officer does not explain how it would be feasible for Zariyah to make the journey back to Canada on her own, and there is no suggestion that anyone else would be able to accompany her; and
- more importantly, given her mother's age, economic circumstances, skill set, lack of connections in St. Vincent and the Grenadines and the conditions prevalent in that country, there is no basis for concluding that anyone would be able to purchase an airline ticket for the child to return to Canada or guarantee that her basic living requirements are met if she were to return to Canada without Ms. Douglas.

[37] There is also no mention by the Officer of the nature of Zariyah's life in Canada. A settlement counsellor's support letter states that "Zariyah is a happy gorgeous and energetic little girl." An early childhood educator reports that "Zariyah has been very engaging with both the child minders and the other children. Zariyah is able to follow instructions and interacts well with the other children."

V. **Conclusion**

[38] The Officer's cursory BIOC assessment is not at all robust. An adequate BIOC analysis would have examined whether there might be special considerations which, when combined with the pending H&C application, may have warranted the requested short-term deferral until a stage 1 assessment was complete.

[39] The Officer's failure to recognize this and conduct an adequate analysis renders the Decision unreasonable and warrants it being sent for redetermination by a different officer.

[40] The application is allowed and the Decision is set aside. This matter is returned for reconsideration by a different officer.

[41] Neither party proposed a certified question nor does one arise on these facts.

JUDGMENT in IMM-109-18

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the January 9, 2018 decision of the Officer is set aside.

2. This matter is returned for redetermination by a different officer.

3. There is no serious question of general importance for certification.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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