Federal Court  Cour fédérale

Date: 20191030

Docket: IMM-619-19

Citation: 2019 FC 1347

Ottawa, Ontario, October 30, 2019

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

BEDON BRYAN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of an Immigration Officer's refusal of the Applicant's Humanitarian and Compassionate ("H&C") application under section 25(1) of the *Immigration and Refugee Protection Act* ("the Act").

II. Facts

[2] Bedon Bryan ("the Applicant") is a 33-year-old Jamaican citizen who has lived in Canada since 2014. While in Jamaica, the Applicant was married to his first wife from October 2010 to March 2013. In October 2010, the couple had a daughter named McKayle. McKayle resides in Jamaica with the first wife though the Applicant mentioned that his ex wife and her husband planned to move to the United States with McKayle.

[3] The Applicant worked from 2009 to 2014 in Jamaica, before coming to Canada on January 27, 2014 on a two-year work permit. From January 2014 to May 2016, he worked as a wood assembler with Northplex Ltd. in Barrhead, Alberta. In May 2016, his work permit extension was refused.

[4] In February 2016, the Applicant married his second wife Laine Boyd. The Applicant and his wife moved from Barrhead to Edmonton during the first month of the marriage. The couple later moved to Saskatoon in August 2016. The couple's daughter Rhubecka (incorrectly spelt as Rhybecka in the H&C decision) was born on November 23, 2016. The couple lived together for the first six months of the daughter's life, first in Saskatoon, and they then moved to Pinehouse, Saskatchewan where his second wife was employed and her family lives.

[5] The Applicant's second wife is a Canadian citizen and in December 2016, she sponsored his permanent residence application as a member of the family class. She withdrew her sponsorship of the Applicant on September 17, 2017 after the couple separated in May 2017 when their child was 6 months old. The Applicant's submissions are that he was abused while the couple was together. He outlined in his submissions why he decided to make the difficult decision to leave his wife and child.

[6] Upon separation, the Applicant moved from Saskatchewan back to Edmonton. He has been unemployed since May 2016. His sister in Newfoundland, his savings, his church and his friends from Jamaica, provide his only form of support.

[7] In August 2017, the Applicant submitted this H&C application with the assistance of an immigration consultant. The Application was refused on January 14, 2019. No further updated submissions were sought or provided by the Applicant after the original application.

III. Issues

A. *Did the Officer err in the analysis of the Applicant's establishment in Canada?*

B. *Did the Officer err in the analysis of the best interests of the child ("BIOC")?*

C. *Did the Officer fail to cumulatively consider the Applicant's circumstances?*

IV. Analysis

[8] The parties have agreed that the standard of review is reasonableness as do I (*Lemus v Canada (Citizenship and Immigration)*, 2014 FCA 114 at para 18).

[9] In an H&C application under section 25(1), the Minister may exempt a foreign national from any obligations under the Act, "if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected."

[10] The Minister's decision to grant this relief is discretionary. The analysis is "a global one" where "relevant considerations are to be weighed cumulatively as part of the determination of whether relief is justified in the circumstances" (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 28). This Court is not to interfere lightly with H&C decisions

as they involve a fact-specific weighing of many factors (*Hamzai v Canada (MCI)*, 2006 FC 1108 at para 24).

[11] The Applicant's argument is that the H&C decision was unreasonable based on flaws in the establishment analysis, the BIOC analysis, and the global assessment. I cannot agree and will dismiss this application.

A. Establishment

[12] The Applicant submits that the Officer erred in the establishment assessment. In terms of establishment, three areas of concern raised by the Applicant are (i) unreasonably dismissing letters showing the support of friends, family, coworkers and his church, (ii) failing to acknowledge the evidence that Northplex would give him his job back if he gets a permit, and (iii) failing to see the nuance in the relationship with his wife.

i. Seven letters of community support

[13] The Applicant opposes the finding that the Applicant had "little establishment" and advances that it was unreasonable because Officer failed to "meaningfully engage with the letters of support" which show "significant community ties." The Applicant submits that the Officer's listing of the support letters followed by the statement that "several support letters from friends, family and previous co-workers that attest to [the Applicant's] good character and work ethics" was insufficient. The Applicant claims the decision-maker's failure to engage with the letters and give reasons why these letters were not enough to show his establishment was unreasonable. The Applicant says summarizing evidence is different from grappling with it.

[14] When the decision is reviewed, however, the decision-maker found that the Applicant had little establishment and cited other factors that suggested a lack of establishment as well as listing the support letters:

- His 5 years in Canada was a "short period of time";
- The Applicant has been unemployed for 2.5 years and depends on relatives and friends for financial support;
- The Applicant admitted he is homesick and lonely;
- While the Applicant has a sister in Canada, she is in Newfoundland not Alberta;
- The rest of his family is in Jamaica and the Applicant maintains relationships with them; and
- The Applicant married a Canadian citizen, but the marriage has broken down.

[15] Then, the Officer stated the conclusion of "little establishment in Canada." This was not a failure to engage with evidence of the establishment as the Applicant alleges, but rather a listing of several factors pointing for and against establishment. While the Officer may not have explicitly reconciled these letters with the other evidence, a weighting process was clear and the reasons as a whole shows a grappling with the Applicant's establishment and integration. It was

not a determination of whether the Applicant was a hard worker or good friend it was a composite decision regarding his establishment. The Officer weighed the letters of support against other considerations and came to a reasonable conclusion that he had little establishment in Canada.

ii. Ability to return to Northplex

[16] In his reply, the Applicant mentions that the Officer "did not consider the evidence given by the Applicant that stated that he would be able to get his job at Northplex Ltd back upon receipt of his work authorization" (para 2). He argues that this, in connection with the seven letters of support, supports his establishment in Canada.

[17] At the hearing, the Applicant's counsel agreed with the Court that the letter from Northplex did not offer the Applicant a job and the letter only stated when he had worked for them. For this reason, this argument must fail.

iii. Nuance of relationship with his wife

[18] A final establishment issue raised by the Applicant is that the Officer "failed to appreciate the nuance of the Applicant's marital situation". This included the Applicant's decision to "choose to make the hardest decision I have ever made in my life and walk away with the hope my marriage will heal with time."

[19] While this may be the Applicant's belief, there is no evidence of this. The Applicant did not have **any evidence** of any contact, support or reconciliation with his wife in the record. The Officer found that the Applicant lived in Edmonton and that when the application was filed the estranged wife lived in Saskatchewan with no update of reconciliation or even contact.

[20] The Applicant cannot now argue it was an error made by the decision-maker when there is no evidence regarding his wife other than his submissions about why he left and her withdrawal of the spousal application. I see no nuanced argument that was somehow an error in interpretation. His bare statement now that there be some chance of reunion for the separated couple does not make the Officer's finding unreasonable.

Conclusion on establishment

[21] The way that the Officer weighed the establishment evidence including letters about community ties, the Applicant's employment, and the prospects of reunion with his wife was reasonable. Ultimately, the conclusion of "little establishment" followed a summary of the evidence pointing both for and against establishment.

[22] This decision-making was therefore not perfunctory as the Applicant suggests. The case the Applicant cites (*Mitchell v Canada* (MCI), 2019 FC 190) to say establishment decisions that give "perfunctory" reasons must be set aside can be distinguished. It involved a 24-year-old applicant who had been in Canada since age 8 and yet the Officer said, "I give the Applicant's establishment in Canada minimal weight" without elaborating upon the reasons for giving establishment little weight (para 28). The establishment reasoning in this case, on the other hand, was easy to follow and the finding of minimal establishment was transparent and justifiable in this case.

B. BIOC

[23] The Applicant's primary focus in his H&C application was his desire to remain in Canada to raise his young daughter. He had stated that his daughter was the "sole reason I must stay in Canada" but he argues the Officer minimized this evidence. He notes that an H&C

decision is “unreasonable if the interests of children affected by the decision are not sufficiently considered” (*Kanthasamy v Canada*, cited above, at para 39).

[24] Specifically, the Applicant submits that it was unreasonable to find he did not have an ongoing relationship with his daughter. The four BIOC issues the Applicant presented as errors are: (i) ignoring information about the father-daughter relationship in the letters of support; (ii) misconstruing the photos as being from the daughter’s birth and not as a toddler which would support the existence of an ongoing relationship; (iii) ignoring objective evidence about the importance of fathers in children’s lives; and (iv) failing to analyze the factors set out in the Processing Guidelines.

[25] An Officer must be “alert, alive and sensitive” to the BIOC when making their H&C determination (*Baker v Canada (MCI)*, [1999] 2 SCR 817 at 864). A decision will be unreasonable if the BIOC are not sufficiently considered (*Kanthasamy*, cited above, at para 39). The Applicant’s main argument on the BIOC is that the Officer made a flawed assumption that there was no ongoing father-daughter relationship. However, this finding was reasonable and the BIOC analysis as a whole was reasonable.

i. Ongoing relationship: letters of support

[26] As the Applicant correctly points out, the Officer based his BIOC conclusion in part upon the Applicant not being involved in his daughter’s life. He argues that this conclusion ignored the Applicant’s support letters, one of which describes him as an excellent father.

[27] The letters of support are dated shortly after the Applicant left his wife and daughter. While the letters show Mr. Bryan to be a friendly individual with many positive attributes, they do not have much bearing on the BIOC analysis. He argues the support letters refer to him as

being an “excellent father” and indeed one of his former coworkers did say “Bedon is an excellent father and is doing all he can to give his children a better opportunity.” That is the only comment regarding him as a father in all of the support letters and that comment with without any details. The letters do not make the finding about no ongoing father-daughter relationship “directly contrary to the evidence” as was argued by the Applicant. These vague letters have limited value in the BIOC assessment.

ii. Ongoing relationship: the photos with his daughter

[28] The Applicant reasoned that the decision-maker did not consider his daughter was only 9 months when the application was filed. He alleges this was an error because when the Officer assessed the application he did so without a lens to the facts at the time of the application. What he means is that he filed his application when his child was 9 months old and by the time the application was assessed the child was almost three years old. He felt it was an error for the Officer to expect to see photos of a three year old and involvement with the child over the course of her life given she was only 9 months old at the time of application.

[29] The Applicant relies on this argument in a global way regarding other issues and says this makes the decision unreasonable. Furthermore, the Applicant says the Officer misconstrued the photographs by stating, “Some of the photos appear to be taken at a hospital with a newborn.” The Applicant argues, “this ignores the other photos, which are clearly with a toddler and not with a newborn.” In oral arguments, the Applicant’s counsel pointed to the fact the baby had a full head of hair and looked older than a newborn.

[30] I confirmed at the hearing that no further submissions were filed to update the application in general or regarding the child. Providing updates would seem to be prudent in a situation like

the Applicant's. An updated submission when a child is very young would be evidence of what is transpiring in her life as she grows from a baby to a toddler. Because the onus is on the Applicant to put his best foot forward, it is not unreasonable for the decision-maker to make the decision on what they have before them in the application. The case of time passing between the initial application submissions and the decision is common and remedied by further submissions if updates are needed.

[31] In this case, the 11 photos of the Applicant with his wife and/or daughter do not have an especially strong bearing on the BIOC analysis one way or another. The Officer considered them but said they are "undated and some of the photos appear to have been taken at a hospital with a newborn." As a result, the Officer found "these photographs do not demonstrate that the applicant is involved in his daughter's life."

[32] The treatment of these photographs was reasonable, as they are in fact undated and at least four of the 11 photos are taken at a hospital with his wife and/or newborn daughter. The Officer did not say "all" the photos were from the hospital but rather said "some" of the photos were from the hospital, and then suggested the 11 photographs as a whole were not enough to show an ongoing relationship. I agree with this. The onus is on the Applicant and these photographs could have been explained or even simply dated. The photos as submitted are not especially persuasive of any ongoing relationship with the child.

[33] Even if some of the photographs show the daughter as older than a newborn, when the H&C claim was filed his daughter was 9 months old so I do not accept the Applicant's statement that the photographs show that the relationship "went beyond her birth and into her years as a toddler." The only way this would possibly make sense is if these photographs were submitted

later than the August 21, 2017 H&C application date. But this was not the case because when the Applicant made his H&C application, the daughter was nine months old so the photos could not show her as a toddler. In any event, the photos do not add much to the BIOC assessment in terms of an ongoing relationship and child-parent dependency.

iii. Ongoing relationship: evidence about the importance of fathers

[34] The Applicant submitted articles about the importance of fathers in the lives of children. He says the Officer ignored this evidence. He further argues that the Officer never acknowledged that it would be positive for the child to have a relationship with her father. The Applicant argued that the articles support that with him back in Jamaica, his daughter would face "social exclusion, prejudice and discrimination" and he now suggests the Officer misunderstood his argument.

[35] The four documents filed showing the importance of fathers are:

- A Statistics Canada report called "Making fathers "count,";
- A Parenting.com article called "Why Kids Need Their Dads";
- An article on the Department of Justice's website about roles of parents; and
- A Parents.com article called "The Role of Fathers with Daughters and Sons."

[36] The link between these articles and the BIOC of the Applicant's daughter was not clearly expressed in the H&C Application. The Parenting.com article cites a U.S. study that children of highly involved fathers are likelier to succeed in school and less likely to experience behaviour problems or depression. However, the Officer reasonably noted that there was no "supportive evidence" that the daughter could face "prejudice and discrimination" in Canada as the Applicant had argued.

[37] The Officer did not ignore this evidence, and reasoned, “I accept that fathers can have a positive influence in their children’s lives and that is generally in the best interest of children to be involved with both parent (sic).” The Officer acknowledged at page 4 that the Applicant said he was the primary caregiver for the first 6 months of the child’s life. Then the Officer made clear that he did not find the Applicant to now be a highly involved father as he was living in a different province with no evidence of contact provided in the submissions. This suggests his presence in Canada would not be an especially persuasive factor in the BIOC analysis. This was a sufficient explanation about the minimal weight given to the evidence related to the role of fathers.

[38] The Officer explicitly cited the value of having the father present in the daughter’s life, but found this was not persuasive in the Applicant’s case as there was no evidence he had been involved in his child’s life since the separation. These four articles, like the letters of support and the undated photographs, did not help the Applicant show an ongoing relationship. Having found that no ongoing relationship was a reasonable conclusion, I will now consider the way the Officer weighed this with the other BIOC factors.

iv. Inadequate assessment of factors from Processing Guidelines

[39] Whereas the other alleged errors relate to the lack of a father-daughter relationship, the Applicant further argues the Officer ignored factors set out in the BIOC section of the Processing Guidelines. The Applicant alleges the Officer did not grapple with the BIOC factors such as age, degree of child’s establishment, impact on child’s education, and matters relating to child’s gender. The Applicant stated that as “none of these factors were specifically considered by the Officer in the decision. This alone justifies the Court’s intervention.”

[40] But I cannot agree because the Officer cited several pieces of evidence (or areas where there was a lack of evidence) to reach the conclusion that the BIOC did not warrant H&C relief, including:

- Rhubecka would continue to reside in Canada if the application was refused;
- There is no evidence of any contact between father and daughter between his move to Edmonton in May 2017 and the August 2017 H&C application, or any further updated submissions to show contact after the August 2017 H&C application;
- There is nothing to indicate the wife does not adequately care for their daughter;
- The photographs were undated and did not demonstrate involvement in the daughter's life;
- The general importance of fathers in a child's life was accepted, but the Applicant "has not shown that he is currently involved" in his daughter's life;
- The Applicant did not provide any evidence of how he could financially support his daughter in Canada, and he had more work experience in Jamaica and could likely work there; and
- His relationship with his daughter in Jamaica who he is in touch with "weekly if not more often" could in fact improve if he returns to Jamaica.

[41] Moreover, the Applicant's argument about the Guidelines is misleading. The Applicant argues that the Officer considered "none" of the BIOC factors listed in the Guidelines meaning the decision must be set aside. This is not the law. The Guidelines require that the Officer is "alert, alive and sensitive" to the BIOC when making their determination (*Baker, cited above* at 864). The Processing Guidelines explain that:

> Generally, factors relating to a child's emotional, social, cultural and physical welfare **should be taken into account when raised**. Some examples of factors that applicants may raise include but are not limited to:
>
> - the age of the child
> - the level of dependency between the child and the H&C applicant
> - the degree of the child's establishment in Canada
> - the child's links to the country in relation to which the H&C assessment is being considered

> - the conditions of that country and the potential impact on the child
> - medical issues or special needs the child may have
> - the impact to the child's education
> - matters related to the child's gender.
>
> [*emphasis added*]

[42] These Guidelines also explain:

> The outcome of a decision under A25(1) that directly affects a child will always depend on the facts of the case. Decision makers must consider all evidence submitted by an applicant in relation to their A25(1) request. The following guidelines are not an exhaustive list of factors relating to children, nor are they necessarily determinative of the decision. Rather, they are meant as a guide and illustrate the types of factors that are often present in A25(1) cases involving the best interests of a child. As stated by Madam Justice McLachlin of the Supreme Court of Canada, "[t]he multitude of factors that may impinge on the child's best interest make a measure of indeterminacy inevitable. A more precise test would risk sacrificing the child's best interests to expediency and certainty" (*Gordon v Goertz*, [1996] 2 S.C.R. 27).

[43] The case that the Applicant cites to say that failing to analyze the impact on the child's education, age, and gender is an error is *Babafunmi v Canada (MCI)*, 2019 FC 151. That case does not say that the Officer must go through a step-by-step analysis of each factor in the Guidelines, as it does not mention the Guidelines at all. Rather, as noted in *Kanthasamy* at para 32, the Guidelines are "not legally binding" and are not "mandatory requirements." Instead, in *Babafunmi* at para 70, Justice Elliott said that there "is no explicit test that must be followed by an Officer when considering the BIOC so long as the Officer is alert, alive and sensitive to the best interests of the children directly affected and the child's interests are well identified and defined after which they are to be examined with a great deal of attention in light of all the evidence."

[44] *Babafunmi* does not say that it is an error to fail to cite factors like education and gender in the Processing Guidelines. Instead, the error in *Babafunmi* was the way the Officer overlooked the negative impact of removal of the children's godfather after the Officer accepted evidence about the "integral role" the applicant was playing in those children's lives even though the godfather was not the primary caregiver.

[45] In the case at bar, the Officer did not accept the Applicant to be playing an integral role, and in fact found the opposite. This makes the Officer's decision distinguishable from the jurisprudence that the Applicant cites to suggest the analysis was unreasonable.

[46] Further, the Applicant did not raise arguments about gender and educational impact so these need not necessarily be addressed. In terms of age, the Applicant simply notes the daughter is vulnerable and of a young age. The analysis is supposed to "be applied in a manner responsive to each child's particular age, capacity, needs and maturity" (*Kanthasamy* at para 35). Perhaps the Officer could have been more explicit, but the Officer did not ignore the child's age and was well aware of it. Given nothing specific was submitted regarding her age what the Officer addressed was reasonable.

[47] The Officer considered a number of factors in the Guidelines when they were submitted and supported by evidence, such as establishment in Canada. The Officer started the BIOC assessment by noting Rhubecka would continue to reside in Canada with the mother, and noting there was nothing to suggest the mother does not adequately care for the daughter.

[48] Dependency was also considered, as the Officer found there was no evidence the child depended on her father financially or at all through an ongoing relationship in recent months.

[49] Case law where a non-primary caregiver has a limited ongoing relationship with a Canadian child generally means the BIOC is given little to no weight in the decision: see for e.g. *Zlotosz v Canada (Citizenship and Immigration)*, 2017 FC 724 at paras 29–30; *Mack v Canada (MCI)*, 2017 FC 98 at paras 18–20; *Jin v Canada (PSEP)*, 2018 FC 359 at para 29.

[50] The Applicant's counsel argued that too much weight was placed on the lack of electronic or other communication considering the child was so young. But I find the Officer's decision on lack of dependency or support to be consistent with the case law. As well it appears that evidence of communication keeping a relationship between the Applicant and his other daughter and family was before the decision-maker.

[51] The Officer concluded by briefly considering the impact of refusing the H&C application on the Applicant's relationship with his other daughter, McKayle, in Jamaica. This child's situation would not be altered and might in fact improve if the Applicant returned to Jamaica since there was evidence that the father and that daughter have an ongoing relationship. As there was only a mention of the child moving to the United States and no update, this factor did not change any analysis as they already have a long distance relationship. This did not have much bearing on the analysis, which was reasonable.

Conclusion on BIOC

[52] The Officer engaged with the evidence and performed a separate analysis of the best interests of both children, and ultimately found the BIOC did not warrant granting an H&C exemption.

[53] The decision-maker's process was clear and the decision reached was reasonable in light of the finding of no genuine ongoing relationship.

C. Cumulative assessment

[54] The Applicant concludes by arguing the H&C assessment is flexible and fact-specific, and that the Officer is required to weigh the factors globally. The Applicant says there was no proper global analysis about why the factors did not justify the granting of the H&C application.

[55] The Respondent however cites *Nguyen v Canada (MCI)*, 2016 FC 1207, where Justice Gascon discussed how to approach the sufficiency of reasons on judicial review. Reasons should show why the decision was made and need not be lengthy (*Nguyen* at paras 37–38). The Respondent emphasizes that the onus is on the Applicant on an H&C decision. The Officer is given discretion to weigh the factors and reach a decision.

[56] I agree with the Respondent. While reasons often can be more explicit or detailed, the reasons still show the Officer considered both establishment and BIOC followed by the Officer saying he had performed a "global assessment."

V. Conclusion

[57] The decision to refuse the H&C application was justifiable, transparent, and intelligible.

[58] No question for certification was presented or arose from the materials.

JUDGMENT IN IMM-619-19

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. No question is certified.

"Glennys McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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