Federal Court  Cour fédérale

Date: 20110927

Docket: IMM-7131-10

Citation: 2011 FC 1110

Ottawa, Ontario, September 27, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

GALENE ANESTA CAINE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of an Immigration Officer (Officer), dated November 9, 2010. The Officer denied an application for permanent residence on humanitarian and compassionate (H&C) grounds under section 25(1) of the *Immigration and Refugee Protection Act*, RS 2001, c 27 (IRPA).

[2] For the following reasons, this application is dismissed.

I. Facts

[3] The Applicant, Galene Anesta Caine, is a citizen of St. Vincent and the Grenadines (St. Vincent). On March 1, 1997, she arrived in Canada at 17 years old. She left St. Vincent because she was raped repeatedly by her Aunt's husband and had not received any assistance from family members or the authorities. She has never made a refugee claim and asserts that she was unaware of that process.

[4] In 2007, the Applicant was admitted to a battered women's shelter where she was advised to make an application for H&C grounds. She made the application without any assistance and was refused in November 2007.

[5] Since coming to Canada, the Applicant has had three daughters: Ashanti in September 2002, Shardae in November 2005, and Shaniyah in March 2010. These children live with the Applicant and she is their primary caregiver.

II. Decision

[6] The Officer considered the best interests of the children and found the Applicant had failed to establish that bringing the children with her to St. Vincent would cause them disproportionate hardship. The Officer acknowledged that the children might enjoy better education, health care and

socialization in Canada as compared to St. Vincent. There was, however, no evidence of any legal obstacles for the children to reside in St. Vincent with their mother. Basic amenities could be provided in that country and the children would retain Canadian citizenship. The Officer was not satisfied that the abuse experienced by the Applicant as a child would be encountered by her children should they be returned to St. Vincent.

[7] In addition, the Officer recognized the Applicant's desire for Shardae to maintain contact with her father, a Landed Immigrant in Canada. While if returned to St. Vincent with her mother Shardae could not have contact with her father in person, she could nonetheless visit him at vacation time or stay in contact by telephone or internet. The Officer further noted that there was limited documentary evidence of the access arrangements in place for Shardae and Shaniyah with their father.

[8] The Officer commented on the Applicant's efforts to socially integrate and establish herself in Canada for thirteen years, including her letter of employment, registration in a literacy course and volunteer work. While the Applicant would have no means of survival in St. Vincent and the labour market was not ideal, she had overcome the difficulties of re-establishing herself when originally coming to Canada and finding employment. This spoke to her ability to adapt to, and handle, difficult situations. There were also family members, such as her grandfather and siblings that could provide assistance. The Officer was ultimately not satisfied that "the difficulties relating to the best interest of her children, the length of time she has spent in Canada and personal circumstances in and of themselves, are sufficient to justify an exemption under humanitarian and compassionate considerations."

III. Issues

[9] This application raises the following issues:

(a) Was the Officer's assessment of the best interests of the child reasonable?

(b) Was the Officer's consideration of the Applicant's past hardships reasonable?

(c) Was it reasonable for the Officer to conclude that despite the Applicant's establishment in Canada she could be returned St. Vincent?

IV. Standard of Review

[10] Humanitarian and compassionate decisions are reviewed on a standard of reasonableness (see *Ahmad v Canada (Minister of Citizenship and Immigration)*, 2008 FC 646, 2008 CarswellNat 1565 at para 11). Reasonableness is "concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" as well as "whether the 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, [2008] 1 SCR 190 at para 47).

[11] This Court has also recognized that the highly discretionary element of H&C decisions require significant deference to the decision-maker and a wider scope of possible outcomes (see *Inneh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 108, 2009 CarswellNat 239 at para 13).

V. Analysis

Issue A: Best Interests of the Children

[12] The Applicant submits that the Officer's decision was unreasonable because it failed to be alert, alive and sensitive to the interests of the Applicant's children as prescribed by *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CarswellNat 1124 at para 75. She goes as far as to suggest that there was only a mention of the *Baker* guidelines and no accompanying analysis. The Applicant claims that as Canadian citizens the children have an absolute right to basic education and health care in the country.

[13] As the Respondent contends, however, the Officer did undertake the necessary best interests of the child inquiry. The Officer looked at potential differences in education, health care and lifestyle that the children would face in St. Vincent, as they were young and likely to go to that country in the care of their mother. The Officer also assessed the potential loss of personal contact between the second child and her father. This evidence was weighed against continued access to basic amenities in St. Vincent, retention of Canadian Citizenship and a variety of other means available to maintain contact with the father in Canada, who is not the primary caregiver and has no clearly established access arrangements with the Applicant to see Shardae.

[14] Although the best interests of the child are an important factor that must be given substantial weight (*Baker*, above), they are not determinative (*Legault v Canada (Minister of Citizenship and*

Immigration), 2002 FCA 125, 2002 CarswellNat 746 at para 12). Moreover, the hardship experienced in denying H&C grounds must be unusual and undeserved or disproportionate. The Officer's role is to determine the likely degree of hardship caused to the child of the parent's removal and balance that hardship together with other factors (*Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, 2002 CarswellNat 3444 at para 6). Simply because the children are Canadian born does not mean the Applicant should be granted exceptional relief without having demonstrated that she would suffer undue hardship if required to apply from abroad in the normal course (*Charles v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1345, 2008 CarswellNat 4629).

[15] I am satisfied that it was open to the Officer in exercising discretion to conclude that although there were negative effects for the children, these would not amount to disproportionate hardship.

Issue B: Consideration of Past Hardships

[16] The Applicant claims that the Officer did not properly consider her past hardships. This includes returning her to a country where she was raped as a child. It is also suggested that the Officer did not give credence to her concerns that her children might experience the same mistreatment.

[17] The Applicants rely on the decision in *Perez Arias v Canada (Minister of Citizenship and Immigration)*, 2011 FC 757, 2011 CarswellNat 2361). In that case, however, I find that there was

no broad proposition related to psychological hardship caused by rape, flight and general insecurity in the home country as the Applicants suggest. The *Perez* application for judicial review was granted because the Officer failed to consider the individuals' psychological assessments based on their particular experiences of activism and subsequent persecution involving rape.

[18] As the Respondent's makes clear, the Officer noted she sympathized with the abuse the Applicant experienced but there was no evidence the same hardships would inevitably be encountered by her children. This was a reasonable conclusion. Although the Applicant was not represented during her H&C application and there was an obligation on the Officer to clarify possible humanitarian grounds even if they are not well articulated (see *Baker*, above, at para 16), the onus remains on the applicant to establish those grounds (see *Bacha v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1382, 2008 CarswellNat 5456).

Issue C: Establishment in Canada

[19] The Applicant further submits that the Officer failed to properly assess her establishment in Canada as a relevant policy ground. She relies on the determination in *Knyasko v Canada (Minister of Citizenship and Immigration)*, 2006 FC 844, 2006 CarswellNat 1890 at paras 6-7 that an officer should have considered the individuals' ties to Canada favourable to their application, not solely their ability to resettle in the country of origin.

[20] The Respondent does not dispute that establishment in Canada is a relevant factor in H&C applications, but highlights that it need not be determinative (see *Lupsa v Canada (Minister of*

Citizenship and Immigration), 2009 FC 1054, 2009 CarswellNat 5128). The Officer considered the Applicant's situation in Canada and her efforts to establish herself over a 13 year period in this case; including securing employment, volunteering and seeking education. It was nonetheless possible for the Officer to conclude that she could seek out employment in St. Vincent, just as she had done in Canada, and her removal would not amount to unusual, undeserved or disproportionate hardship. The Respondent notes that the Applicant has not set out any particular factors that were not considered by the Officer relevant to her establishment in Canada. It should also be noted that this Court has been reluctant to reward individuals for time accumulated in Canada without a legal right to remain in the country and absent circumstances beyond their control (*Mann v Canada (Minister of Citizenship and Immigration)*, 2009 FC 126, 2009 CarswellNat 289 at paras 12-14).

[21] It was reasonable for the Officer to conclude that despite the Applicant's efforts to establish herself in Canada, she had not met the necessary criteria for the H&C application.

VI. Conclusion

[22] It was reasonable for the Officer to conclude that the Applicant did not qualify for the H&C exemption. The Officer properly considered and assigned weight to the best interests of the children, the Applicant's past hardships and her establishment in Canada.

[23] Accordingly, this application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-7131-10**
STYLE OF CAUSE:	**GALENE ANESTA CAINE v. MCI**
PLACE OF HEARING:	**TORONTO**
DATE OF HEARING:	**SEPTEMBER 22, 2011**
REASONS FOR JUDGMENT AND JUDGMENT BY:	**NEAR J.**
DATED:	**SEPTEMBER 27, 2011**

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