Federal Court  Cour fédérale

Date: 20150519

Docket: IMM-3821-14

Citation: 2015 FC 642

Ottawa, Ontario, May 19, 2015

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

LUCIANNA CELISE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] In this application for judicial review brought under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], Lucianna Celise challenges the decision of a Senior Immigration Officer to reject her application for permanent residence on humanitarian and compassionate [H&C] grounds. For the reasons that follow, this application is dismissed.

I. **Background**

[2] The applicant is a citizen of Saint Lucia. She entered Canada on April 14, 2001 and made a refugee claim more than ten years later, in October 2010. As it was being processed, she had a daughter, who is a Canadian citizen.

[3] The Refugee Protection Division rejected the applicant's refugee claim in May 2012. There is no indication in the record of an application for judicial review of that decision.

[4] The applicant submitted an H&C application on June 18, 2012 without the assistance of counsel. The application provided very little information about the applicant's personal circumstances.

[5] Ms Celise wrote she was living with a cousin in Toronto. In 2011, the applicant's mother came to Canada to help her raise her daughter. The applicant described herself as "being in a relationship" but said nothing about the involvement of the father in her daughter's life. She had worked as a baby sitter but was on social assistance at the time of the application. Her community involvement was limited to membership in a church and donating to the Sick Kids Foundation.

[6] The applicant's explanation of the humanitarian and compassionate reasons that prevented her from leaving Canada was brief:

> If I were to live Canada and go back to my country I would not have a comfortable home for me and my daughter to stay, because

> my mom and most of my family member lost homes as a result of hurricane Tomas which hit the island on October 30, 2010.
>
> My mom also lost her only source of income as a local farmer because her banana plants were also destroyed by the hurricane.

[7] Ms Celise further wrote that her main goal was to do the best for her daughter. She asked for a chance to raise her child in Canada where she could enjoy the great advantages of being a Canadian.

[8] By decision dated March 28, 2014, the Officer rejected the H&C application. Ms Celise applied for leave and judicial review thereafter. While the leave application was pending, the Court stayed her removal from Canada.

[9] In the decision under review, the Officer observes that the applicant bore the onus of proving that her personal circumstances are such that the hardship of having to obtain a permanent visa from outside Canada in the normal manner would be unusual and undeserved or disproportionate.

[10] The Officer recalls that the Refugee Protection Division rejected the applicant's refugee claim. Pursuant to subsection 25(1.3) of the *IRPA*, he will not consider those risk allegations when deciding whether to grant an H&C exemption. Despite saying this, the Officer immediately discusses those risks. He acknowledges the abuse suffered by the applicant in Saint Lucia but concludes that there is insufficient evidence that anyone is still interested in harming her 14 years later. Furthermore, she could benefit from the assistance of a functioning police and judicial system and various nongovernmental organizations in Saint Lucia.

[11] The Officer considers the applicant's statements and photographs pertaining to the damage a hurricane caused to her family home in Saint Lucia in 2010. The applicant did not state whether or not the home has been repaired. Moreover, the applicant's mother continued to reside in that home until she came to Canada in 2011. There is insufficient evidence to establish that the applicant could not obtain adequate living arrangements in Saint Lucia, while awaiting the normal processing of her application for permanent residence. The purpose of H&C discretion is not to facilitate convenience. In the Officer's view, the applicant did not establish that she would face unusual and undeserved or disproportionate hardship if she were to relocate to Saint Lucia.

[12] The Officer next considers the applicant's establishment in Canada. He concludes that she is an adaptable and resourceful individual who has succeeded in resettling abroad. Returning to Saint Lucia will pose some hardship but she would not be returning to an unfamiliar place, language or culture. Her establishment in Canada is not beyond the normal degree one would have expected.

[13] The Officer concludes with the best interests of the child [BIOC]. The applicant's three year old daughter is a Canadian citizen who has never visited Saint Lucia. The applicant provided no evidence about custodial arrangements with the child's father. The Officer understands that his decision will mean that the applicant will have to make a choice: "No matter the decision, it will mean that Ashley may face long-term separation from one of her parents." Neither situation is ideal but it is not contrary to her best interests: "Although in many cases the presence of two loving parents in the family is considered desirable, families exist in many forms, some through necessity and others through choice." Being raised by a single parent who

provides a safe and loving environment is not contrary to the child's best interests. Should the child go to Saint Lucia with her mother, she would also be surrounded by other family members. The Officer explains that the child is young, so the impact of relocation outside of Canada with her mother should be minimal. There is no evidence that the child will be denied access to education, medicine or other social services.

[14] Upon consideration of the BIOC and the personal circumstances of the applicant, the Officer concludes that H&C considerations do not justify granting an exemption.

II. **Issue**

[15] The determinative issue before the Court is whether the Officer erred in his analysis of the best interests of the child.

III. **Standard of Review**

[16] The applicant submitted that the Officer's choice of legal test is reviewable on correctness, while his application of the test to the facts is reviewable on reasonableness. The respondent countered that the standard of reasonableness should govern the entire application.

[17] I agree with the applicant. As I recently explained in *Gonzalez v Canada (Citizenship and Immigration)*, 2015 FC 382 at paras 23-35, I do not interpret recent appellate authorities as overturning the well-established principle that an Officer's choice of a legal test in the H&C context should be reviewed on correctness. It is uncontroversial that the application of the proper

test to the facts is reviewable on reasonableness. While *Gonzalez* only involved a hardship analysis, the jurisprudence makes no distinction between that analysis and the BIOC analysis with respect to the standard of review: see *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 at para 22.

IV. **Submissions of the Parties**

[18] The applicant argued strenuously that the Officer applied the wrong legal test when assessing the BIOC. In her view, the Officer's analysis was erroneously rooted in hardship, even though the courts have proclaimed that children will rarely deserve hardship: *Williams*; *Singh Sahota v Canada (Citizenship and Immigration)*, 2011 FC 739; *Canada (Minister of Citizenship and Immigration) v Hawthorne*, 2002 FCA 475 at paras 4, 32-33 and 40-41 [*Hawthorne*]; *Beharry v Canada (Citizenship and Immigration)*, 2011 FC 110; *Sinniah v Canada (Citizenship and Immigration)*, 2011 FC 1285; *Mangru v Canada (Citizenship and Immigration)*, 2011 FC 779; *Pearson v Canada (Citizenship and Immigration)*, 2011 FC 981.

[19] According to the applicant, it is a reviewable error to conclude that removal is not against the BIOC simply because the child may have access to the basic amenities of life outside of Canada: *Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813 at paras 13-18. It is also a reviewable error for the Officer to fail to consider the impact of non-removal on the child's best interests: *Joseph v Canada (Citizenship and Immigration)*, 2013 FC 993 at paras 15-20 and 23-24.

[20] The applicant further submitted that the Officer not only erred in his choice of legal test but also assessed the BIOC unreasonably. She contended that a BIOC analysis must begin with what a child has in Canada and what the child might lose by leaving the country with a parent: *Hawthorne*, above, at para 41; *Williams*, above, at paras 63-64; *Pokhan v Canada (Citizenship and Immigration)*, 2012 FC 1453 at paras 12-15; *Judnarine v Canada (Citizenship and Immigration)*, 2013 FC 82 at paras 45-48; *Dina v Canada (Citizenship and Immigration)*, 2013 FC 216 at paras 8-11; *Begum v Canada (Citizenship and Immigration)*, 2013 FC 824 at paras 52-63; *Thomas v Canada (Citizenship and Immigration)*, 2012 FC 1517 at paras 27-32.

[21] The applicant submitted that the Officer erred in finding that the BIOC would be met if the child were to accompany her mother to Saint Lucia. He never considered whether the BIOC would be better met by allowing the child to remain in Canada with the applicant. He unreasonably dismissed evidence that the applicant's home was damaged by a hurricane. Finally, he erred in speculating that the applicant has family members who can help her look after her daughter in Saint Lucia. Her application made clear that her mother now lives in Canada and did not mention any other family members in Saint Lucia.

[22] The respondent countered that the Officer did not subsume the BIOC analysis into a hardship analysis. Nor did the Officer conclude that the BIOC would be met in Saint Lucia simply because the child would have the basic amenities of life. To the contrary, argued the respondent, the Officer considered various factors relevant to the BIOC, namely: the applicant is the child's primary caregiver; there is no evidence of the father's involvement with the child; and

the child should be able to adjust to life in Saint Lucia. The Officer did not conduct a hardship analysis either in form or in substance.

[23] The respondent also expressed the view that *Williams* does not create a binding legal test: *Webb v Canada (Citizenship and Immigration)*, 2012 FC 1060 at para 13; *Kobita v Canada (Citizenship and Immigration)*, 2012 FC 1479 at para 50; *Diaz v Canada (Citizenship and Immigration)*, 2015 FC 373 at paras 24-25. The respondent observed that in *Hawthorne*, above, at para 7, the Federal Court of Appeal held that there is no "magic formula" for assessing the BIOC.

[24] According to the respondent, the applicant provided insufficient evidence to substantiate her allegation that her family home in Saint Lucia is uninhabitable and that she would be unable to secure housing elsewhere if that were the case. Finally, any error about the presence of family members in Saint Lucia, including the mother, was immaterial to the decision.

V. **Analysis**

[25] I have concluded that the Officer committed no reviewable error.

[26] The starting point for any BIOC analysis is the statement provided by the Supreme Court in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75: "the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them".

[27] The Federal Court of Appeal provided further guidance in *Hawthorne*. The majority reasons did not hesitate to speak of "hardship" when analyzing the BIOC. In particular, Justice Décary wrote the following at paras 4-7:

> [4] The "best interests of the child" are determined by considering the benefit to the child of the parent's non-removal from Canada as well as the hardship the child would suffer from either her parent's removal from Canada or her own voluntary departure should she wish to accompany her parent abroad. Such benefits and hardship are two sides of the same coin, the coin being the best interests of the child.
>
> [5] … The officer may be presumed to know that living in Canada can offer a child many opportunities and that, as a general rule, a child living in Canada with her parent is better off than a child living in Canada without her parent. The inquiry of the officer, it seems to me, is predicated on the premise, which need not be stated in the reasons, that the officer will end up finding, absent exceptional circumstances, that the "child's best interests" factor will play in favour of the non-removal of the parent.
>
> [6] To simply require that the officer determine whether the child's best interests favour non-removal is somewhat artificial – such a finding will be a given in all but a very few, unusual cases. For all practical purposes, the officer's task is to determine, in the circumstances of each case, the likely degree of hardship to the child caused by the removal of the parent and to weigh this degree of hardship together with other factors, including public policy considerations, that militate in favour of or against the removal of the parent.
>
> [7] …When this Court in *Legault* stated at paragraph 12 that the best interests of the child must be "well identified and defined", it was not attempting to impose a magic formula to be used by immigration officers in the exercise of their discretion.
>
> [Emphasis added]

[28] In *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189, Justice Nadon endorsed the majority reasons in *Hawthorne*. The parties have not identified any decision from the Court of Appeal which has expressed reservations with them.

[29] However, the applicant has correctly referred to cases from this Court which require something more of Officers deciding H&C applications. Specifically, my colleague Justice Russell made the following comments in *Williams*, above, at paras 63-64:

> [63] When assessing a child's best interests an Officer must establish first what is in the child's best interest, second the degree to which the child's interests are compromised by one potential decision over another, and then finally, in light of the foregoing assessment determine the weight that this factor should play in the ultimate balancing of positive and negative factors assessed in the application.
>
> [64] There is no basic needs minimum which if "met" satisfies the best interest test. Furthermore, there is no hardship threshold, such that if the circumstances of the child reach a certain point on that hardship scale only *then* will a child's best interests be so significantly "negatively impacted" as to warrant positive consideration. The question is *not*: "is the child suffering enough that his "best interests" are not being "met"? The question at the initial stage of the assessment is: "what is in the child's best interests?"
>
> [All emphasis in the original]

[30] Numerous cases have followed *Williams* and infirmed H&C decisions which did not use the formula it prescribes. While these decisions often rely on the passage found in *Hawthorne*, above, at para 9, to the effect that "[c]hildren will rarely, if ever, be deserving of any hardship", they appear to disregard the *Hawthorne* majority's other comments made at paras 4-7. I do not read *Hawthorne* as providing any authority for the test created in *Williams*. To the contrary, the Court of Appeal cautioned that there is no "magic formula" for an H&C assessment. Its comment at paragraph 9 was simply intended to explain that "unusual and undeserved or disproportionate hardship" is not a technical term and that it can be applied flexibly to children, who quite obviously never deserve hardship. In my view, it was not an invitation to scuttle the hardship analysis altogether when children are involved.

[31] This Court has not consistently applied the *Williams* test. I have already expressed the view that it may be a useful guideline but that it is not mandated by the governing authorities: *Webb*, above, at para 13. Justice Rennie (then a member of this Court) made the same point in *Beggs v Canada (Citizenship and Immigration)*, 2013 FC 903 at para 10. In *Diaz*, above, at paras 24-25, Justice Brown observed that "mention of "hardship" in the course of an analysis of the BIOC is not enough to set aside the finding", and that "even focusing on hardship may not trigger judicial review".

[32] In sum, I maintain the view that the *Williams* formula is not required by the legislative text or the appellate authorities. I am also concerned that it may reduce the BIOC analysis to a *pro forma* requirement, since the BIOC would almost always favour a grant of H&C relief at the first step. Consequently, all that would be required of Officers at that step would be the rote repetition that the BIOC favours non-removal. The real work would have to be done at the second step, i.e. weighing the BIOC against countervailing considerations.

[33] In my respectful opinion, this approach is insensitive to context. It analogizes cases where children face serious emotional and physical suffering with cases where children face nothing more than removal to a less developed country in the company of competent parents. If the latter scenario were sufficient for a grant of H&C relief – or at least a presumption that such relief should be granted, unless there are exceptional countervailing factors at the second step – the problem identified by Justice de Montigny in *Serda v Canada (Citizenship and Immigration)*, 2006 FC 356 at para 31 would materialize rather quickly:

> …the fact that Canada is a more desirable place to live is not determinative on an H & C application (*Vasquez v. Canada*

> *(M.C.I.)*, 2005 FC 91; *Dreta v. Canada (M.C.I.)*, 2005 FC 1239); if it were otherwise, the huge majority of people living illegally in Canada would have to be granted permanent resident status for Humanitarian and Compassionate reasons. This is certainly not what Parliament intended in adopting section 25 of the *Immigration and Refugee Protection Act*.
>
> [Emphasis added]

[34] Since the *Williams* formula is not mandatory, the Officer committed no reviewable error. He performed a reasonable BIOC analysis which took various relevant factors into account. Any imperfections in his analysis can be remedied by reference to the record: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

[35] Indeed, the record reveals that the applicant submitted very little evidence to the decision-maker in support of all aspects of her application, including the BIOC. As the Court of Appeal held in *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 5, "an applicant has the burden of adducing proof of any claim on which the H & C application relies". In light of the scant evidence provided overall and, in particular, the deficient evidence on the involvement of the child's father in her life and the condition of the house in Saint Lucia, the Officer rendered a reasonable decision.

[36] As I noted above, the applicant was self-represented when she completed her H&C application. At the hearing, her counsel relied on *Sebbe*, above, at para 13 to argue that the Officer should have taken on the role of *parens patriae* with respect to the child, and solicited additional information on her circumstances, before rendering his decision. With respect, I decline to follow *Sebbe* on this point. No jurisprudential or doctrinal authority was cited for the

proposition. In fact, in *Kisana*, above, at para 37, the Court of Appeal warned that analogies between immigration law and other areas of the law with respect to the BIOC analysis are often inapposite. And as has often been stated, the onus rests on the applicant to provide sufficient information upon which the Officer may make a decision as to whether the grounds for an exemption have been made out.

[37] Counsel for the applicant also argued that the Officer erred by failing to consider the possibility that she might remain in Canada and the benefits that such a decision would confer to her child. In support of his argument, he pointed to *Pokhan*, above, at para 14. It is true that the Officer's language can be read in this way. However, despite the quality of counsel's oral submissions, I cannot conclude that the Officer committed a reviewable error. In *Hawthorne*, above, at para 5, the Court of Appeal explained:

> The officer may be presumed to know that living in Canada can offer a child many opportunities and that, as a general rule, a child living in Canada with her parent is better off than a child living in Canada without her parent. The inquiry of the officer, it seems to me, is predicated on the premise, which need not be stated in the reasons, that the officer will end up finding, absent exceptional circumstances, that the "child's best interests" factor will play in favour of the non-removal of the parent.
>
> [Emphasis added]

[38] The Officer's reasons withstand scrutiny in light of this presumption. He can be understood to have decided that, although remaining in Canada with her mother would accord with the child's best interests, those interests would not be compromised by her mother's removal to such an extent that the removal ought to be avoided, in light of the factors favouring removal. Once again, the fact that it might be more desirable for a child to live in Canada as

opposed to another country cannot establish a presumption that an H&C application ought to be approved.

[39] Contrary to the applicant's assertion, her H&C application did mention the presence of other family members in Saint Lucia. She wrote: "my mom and most of my family member [sic] lost homes", thus implying that other relatives live in that country. In any event, the Officer's erroneous assumption that her mother still resides in Saint Lucia was not determinative to his BIOC analysis or his analysis of the hardship faced by the applicant herself. The other factors considered by the Officer support the outcome he reached.

[40] In the result, I am satisfied that the Officer gave due consideration to the information provided by the applicant and that there was no need for him to solicit further information in the circumstances. His conclusion that H&C relief was unwarranted falls within the range of acceptable outcomes that are defensible in respect of the facts and the law.

VI. **Conclusion**

[41] This application is dismissed.

[42] The respondent proposed a question for certification irrespective of the outcome. With minor stylistic and grammatical modifications, the question reads as follows:

> In a best interests of the child analysis, is an Officer required first to explicitly establish what the child's best interests are, and then to establish the degree to which the child's interests are compromised by one potential decision over another, in order to

> show that the Officer has been alert, alive and sensitive to the best interests of the child?

[43] The applicant opposed the certification of this question. .

[44] In light of the outcome, I believe it is appropriate to certify the question proposed by the respondent. In essence, it asks whether an Officer conducting a BIOC analysis is bound by the formula established in *Williams* and followed by this Court in certain cases but not others. It is a serious question of general importance because there is uncertainty as to the law on the appropriate BIOC test. *Hawthorne* has not received a consistent interpretation in the subsequent jurisprudence. Furthermore, the question would be dispositive of an appeal, since the Officer did not apply the *Williams* formula in the decision under review. If that formula were mandatory, the applicant could succeed in establishing a reviewable error.

[45] This case is distinguishable from others where the Court declined to certify a similar question, either because the Officer committed a reviewable error that was not connected to the *Williams* formula (e.g. *Webb*) or because the Officer did employ the *Williams* formula in rendering a negative decision which was upheld (e.g. *Martinez Hoyos v Canada (Citizenship and Immigration)*, 2013 FC 998).

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed. The following question is certified:

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

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3821-14
STYLE OF CAUSE:	LUCIANNA CELISE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 13, 2015
JUDGMENT AND REASONS:	MOSLEY J.
DATED:	MAY 19, 2015

APPEARANCES:

Richard Wazana	FOR THE APPLICANT
Ladan Shahrooz	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Richard Wazana Barrister & Solicitor WazanaLaw Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT