Federal Court  Cour fédérale

Date: 20180111

Docket: IMM-2009-17

Citation: 2018 FC 25

Ottawa, Ontario, January 11, 2018

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

JENECIA MECIAH CAMPBELL

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], for judicial review of the decision of an immigration officer in the Montreal Backlog Reduction Office [Officer], dated April 27, 2017 [Decision], which refused the

Applicant's application for permanent residence on humanitarian and compassionate [H&C] grounds.

II. BACKGROUND

[2] The Applicant is a citizen of St. Vincent and the Grenadines. She arrived in Canada on April 11, 2011 and has remained in Canada since then.

[3] After the Applicant arrived in Canada, she met Withfield Graham. The couple moved in together in November of 2011. Their daughter, Kianna, was born in 2013. Twin boys, Ayden and Jayden, followed in 2015. Tragically, Mr. Graham was diagnosed with cancer in 2015 and died in December of that year.

[4] Mr. Graham was a permanent resident of Canada and had completed an application to sponsor the Applicant for permanent residence in 2014. The application, however, was never submitted.

[5] In Canada without status, the Applicant applied for H&C relief under s 25(1) of the Act in 2016.

III. DECISION UNDER REVIEW

[6] The Officer determined that the Applicant had failed to demonstrate circumstances that justify an exemption from the Act based on H&C considerations.

[7] The Officer evaluates the Applicant's establishment in Canada and notes the letters of support from members of the community and considers them a positive consideration. Regarding employment, the Officer references a letter from the Applicant's former employer that confirms employment from 2011 to 2014, but the Officer notes that the letter is not on company letterhead and misspells the word "corporation." More importantly, the Applicant did not provide proof of employment after 2014. The Applicant's bank statements provide proof of savings, but "submissions concerning the applicant's fiscal management" were not provided. The Decision acknowledges the Applicant's volunteer work at a salon and that the owner of the salon is prepared to offer her a job if she obtains a work permit. The Officer also notes the sponsorship application signed by Mr. Graham and that it was not submitted because of Mr. Graham's death.

[8] The Officer assesses the Applicant's employment as a positive factor, but points out that the Applicant has been working without authorization. The Officer also finds that the Applicant's five years in Canada have led to a measure of establishment, but points out that she has not "demonstrated that significant obstacles exist that preclude her from being employed in St. Vincent."

[9] The Officer acknowledges the Applicant's statement that she has "no meaningful family support" in St. Vincent, but points out that she grew up in St. Vincent and has parents and siblings who reside there. The Officer finds that, absent evidence to the contrary, it is reasonable to believe that the Applicant's family could facilitate her readjustment to life in St. Vincent. The Officer states that evidence of loss of social ties in St. Vincent is limited to the Applicant's declaration. On the other hand, the Applicant only has a sister-in-law, Mr. Graham's sister, in

Canada who states that “she is unable to assist the applicant with the care of the children due to her work obligations.”

[10] The Officer finds that the evidence does not support a finding that the Applicant has been involved in the community through religious, social, cultural or charitable organizations. Nor does the evidence support a finding that the Applicant has attempted to upgrade her skills while in Canada.

[11] The Officer accepts that the Applicant does not want to return to St. Vincent, but notes that s 25(1) of the Act is meant to allow for exceptional circumstances not anticipated by the Act. The measure of establishment the Applicant has achieved in Canada is offset by her staying in Canada without authorization, and the Officer finds that the Applicant has not demonstrated that she is unable to leave Canada due to exceptional circumstances.

[12] The Officer then evaluates the best interests of the children, and states that this is an important factor that is given significant weight and consideration.

[13] The Officer notes the Ontario birth certificates the Applicant submitted for each of her children, their date of birth, and their age at the time of the Decision.

[14] The Officer states that there is limited evidence on file in relation to where the children go to school or whether they are attending daycare. The Officer finds that it is in the best interests of the Applicant’s children to gain an education and have their mother’s support, but the

Officer finds that the evidence "does not support that this cannot be achieved by the applicant returning with her children to St. Vincent." The evidence is unclear about whether the children have experienced the Canadian school system but the Officer is satisfied that, given their ages, they "are young enough to adapt to the culture and school structure in St. Vincent." Absent evidence to the contrary, the Officer finds that the children will have the support of family and friends in St. Vincent. Given that their mother is their primary caregiver, the Officer finds "that the general consequences of the applicant relocating and resettling back to her home country would not be contrary to the children's best interests."

[15] The Officer finds that the evidence does not demonstrate that: the children will have no future in St. Vincent; the children will be unable to access good education in St. Vincent; or that the Applicant would be unable to support them in St. Vincent. The Decision notes that the children will retain their Canadian citizenship even if they reside in St. Vincent and may return to Canada in the future. The Officer accepts that it is in the best interests of most children to be with their parent, but states that the decision whether the children should accompany the Applicant to St. Vincent would be a parental decision. The Officer concludes that the evidence does not support a finding that the Applicant "returning to St. Vincent with her children would be contrary to the best interest of the children."

[16] Giving a global assessment to all the factors raised by the Applicant, the Decision finds that her case is empathetic but does not justify an exemption on H&C grounds.

IV. ISSUES

[17] The Applicant submits that the following are at issue in this application:

1. Does the Officer apply the wrong test for the best interests of the children?
2. Is the Officer's assessment of the best interests of the children unreasonable?
3. Is the Officer's assessment of the Applicant's establishment in Canada and risk if returned to her country of origin unreasonable?

V. STANDARD OF REVIEW

[18] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[19] The Applicant submits that the Officer applied the wrong test when considering the best interests of the children. The Applicant says that this is a question of law and reviewable under the correctness standard. The Applicant accepts that an officer's assessment of the best interests of a child is a question of mixed fact and law, reviewable on the reasonableness standard, and

ordinarily afforded considerable deference by the Court. See *Tesheira v Canada (Citizenship and Immigration)*, 2011 FC 1417 at para 10. But the Applicant goes on to say "[t]here is no deference to factual determinations where the officer applied the wrong test to assess the best interests of the child" and that "the Court ought to reweigh the best interest factors."

[20] In reviewing the Applicant's submissions, however, his concern is with how the Officer applies the best interests of the child test. For instance, the Applicant says that "[t]he officer considered what would not be contrary to their best interest and did not consider what is in their best interest." And later, that the Officer "applied a test of whether Canadian born children will have a future in a different country" and "assessed the application with an erroneous emphasis." In *Dunsmuir*, the Supreme Court of Canada stated that deference "must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated" (emphasis added). See *Dunsmuir*, above, at para 53.

[21] Further, *Dunsmuir* also shows that simply labelling a question a question of law does not automatically render it a question subject to correctness review. The categories of questions of law always subject to correctness review are constitutional questions, true questions of jurisdiction, questions of general law both central to the importance of the legal system as a whole and outside the decision-maker's specialized expertise, and questions regarding the jurisdictional lines between two or more specialized tribunals. See *Dunsmuir*, above, at paras 58-61. The Applicant has not explained how the test for the best interests of the child, even if it is an extricable question of law, fits into one of these categories.

[22] The conclusion that reasonableness is the standard of review to be applied to the Officer's consideration of relief on H&C grounds under s 25(1) of the Act is supported by *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*]. There, the Supreme Court of Canada held the reasonableness standard applied to an H&C determination despite the existence of a certified question regarding the proper interpretation of s 25 of the Act. See *Kanthasamy*, above, at paras 43-44. While certification under s 74(d) of the Act does not expressly require a question of law, "to be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance": *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at para 9. For recent authority in this Court following *Kanthasamy*'s direction that reasonableness review applies to review of H&C determinations, see *Regalado v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 540 at para 5 [*Regalado*] and *Madera v Canada (Citizenship and Immigration)*, 2017 FC 108 at para 6.

[23] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[24] The following provisions of the Act are relevant in this application:

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this 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.	25 (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

VII. ARGUMENT

A. *Applicant*

(1) Best Interests Test

[25] The Applicant submits that the Officer applied the wrong test when considering the best interests of the children. Rather than considering what is actually in the best interests of her children, the Applicant says that the Officer considered what would not be contrary to her children's best interests. See *Judnarine v Canada (Citizenship and Immigration)*, 2013 FC 82 at paras 45-47 [*Judnarine*]. This amounts to the Officer applying a test of whether the Applicant's Canadian children will have a future in St. Vincent. The Applicant also says that, as part of this evaluation, the Officer assumed that her children are not Canadians by birth.

[26] The Applicant further submits that the Officer misconstrued his jurisdiction and mandate by asserting that the H&C process is not designed to eliminate all difficulties.

[27] The Applicant says that the Decision does not adequately consider the impact on her children of their father's death. See *Judnarine*, above, at para 48.

(2) Best Interests Assessment

[28] The Officer acknowledges the limited information on file with respect to the Applicant's children. The Applicant submits that the Officer's failure to request additional information indicates that the Decision was made based on incomplete information and therefore failed to

properly assess the best interests of her children. Factors such as whether the children go to school, what languages they are learning, and whether they attend daycare were not assessed. The Applicant says that the Officer's failure to discuss the relationship between the limited evidence on file and the other factors being assessed is unreasonable. See *Okafor v Canada (Citizenship and Immigration)*, 2010 FC 652 at para 8.

[29] The Applicant submits that the Officer applied a generic test that does not consider the individual needs of each child based on their particular age. She says that when concluding that there is no evidence that her children cannot receive education in St. Vincent comparable to Canada the Decision ignores her evidence that she is from a poor community in St. Vincent. See *Ranji v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 521 at paras 36-37 [*Ranji*].

[30] The Applicant submits that the Officer does not consider the bonds that the children have formed in Canada, whether the children attend daycare in Canada, and the medical care the children receive in Canada. The Applicant says that the impact of different standards of living between Canada and St. Vincent is considered as part of her establishment in Canada, but not with respect to the best interests of her children.

[31] The Applicant submits that the Officer misconstrues the evidence by indicating that the children's home country is St. Vincent and finding that they will have a family support system there. The evidence shows that she severed her ties with St. Vincent, that her only meaningful ties are with Canada, and that she lacks a support structure in St. Vincent.

[32] The Applicant says the Officer's indication that there are empathetic aspects of her application without explanation of why the negative factors outweigh the positive factors is unreasonable. This is exacerbated by the Officer's failure to assess the impact the "emotional hole" left by the death of the children's father will have on her and her ability to support her children. See *Paul v Canada (Citizenship and Immigration)*, 2013 FC 1081 at para 4.

(3) Establishment Assessment

[33] The Applicant submits that the Officer shows no awareness of the degree of her establishment. See *El Thaher v Canada (Citizenship and Immigration)*, 2012 FC 1439 at paras 52, 56, 71. She says that a typographical error in her letter of employment and that she worked in Canada without authorization are irrelevant to the assessment of her establishment in Canada. The Officer also misconstrues evidence about her unemployment status and level of savings while finding that she did not make submissions about her fiscal management. The Applicant points out that the Officer finds she made minimal efforts to regularize her status despite acknowledging her husband's sponsorship application. She says personal circumstances that should have been evaluated include: caring for a husband with cancer; his subsequent death; and her care for three young children. See *Ranji*, above, at paras 19-20.

[34] The Applicant says that after her husband's death an H&C application was the only appropriate application she could pursue and that the emotional effects she would suffer upon removal are particularly acute.

[35] The Applicant requests that the Decision be set aside and that the Court make an order in the nature of *mandamus* directing that her H&C application be reconsidered to arrive at a different result not inconsistent with the Court's reasons for setting aside the Decision.

B. *Respondents*

(1) Best Interests Test

[36] The Respondents submit that the Officer did not apply the wrong test when considering the best interests of the children. The Respondents say that there is no difference between what is contrary to the best interests of the child and what is in the best interests of the child as those are simply different sides of the same coin. *Judnarine* is distinguishable because in that case the officer decided the best in interests of the child solely as an element of whether there was "undue, undeserved and disproportionate" hardship. See *Judnarine*, above, at para 47.The Respondents say that in the present case the Officer does not measure the best interests of the Applicant's children in terms of that test.

[37] The Respondents submit that hardship only plays a partial role and point to instances where the Officer explicitly looks at what is in the children's best interests. The Respondents say that it is not a fair reading of the Decision to suggest that the Officer evaluates whether the children could barely survive in St. Vincent.

[38] The Respondents say that the Applicant's submission that the Officer unreasonably evaluates whether the children can live in St. Vincent instead of evaluating whether they should

live in Canada is not supported by case law endorsing her position. And the Applicant's suggestion that the Officer commits a jurisdictional error by stating that the H&C process is not designed to eliminate all difficulties contradicts the accepted proposition that H&C applications are designed to respond to exceptional circumstances. See e.g. *Adams v Canada (Citizenship and Immigration)*, 2009 FC 1193 at para 30.

(2) Best Interests Assessment

[39] The Respondents say that it is clear from the Decision that the Officer understands that the Applicant's children are Canadian and were born in Canada. The suggestion that the Officer did not understand the children's place of birth arises from the incorrect usage of the word "their" when describing the Applicant's country of origin as St. Vincent. This is corrected in the Decision shortly afterwards and the Officer notes that the children were born in Ontario. The Respondents submit that the mistaken use of the word "their" does not amount to a reviewable error or indicate that the Officer misunderstood the children's place of birth.

[40] The Respondents submit that there is no evidence regarding how Mr. Graham's death has affected the children. The assertion that the children's grief would be exacerbated by their removal from Canada comes from the Applicant's counsel and she cites case law reflecting different circumstances. In this case, there was no real evidence for the Officer to consider on this matter.

[41] The Respondents submit that the onus was on the Applicant to submit a complete application and that it was not unfair for the Officer not to request further documentation. It was

not the responsibility of the Officer to address the interests of the children not apparent on the face of the record. See *Suleiman v Canada (Citizenship and Immigration)*, 2017 FC 395 at paras 80-82. Similarly, absent evidence, the Officer could not speculate on how the Applicant's past poverty would impact the children's educational future.

[42] The Respondents say that the Officer considers the Applicant's children's ages and whether it would be in their best interests to be educated in Canada. The Applicant's argument that St. Vincent is a third world country is similarly addressed. The Respondents say that the Decision implicitly addresses the children's relationships in Canada when it finds that they would have a support system in St. Vincent. Other factors such as the children's daycare arrangements and lack of need for special medical care are not significant to the Decision. The Respondents submit that the Officer is not obliged to mention every fact in the Decision. See *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 at paras 15-17 (TD).

[43] The Respondents point out that the Officer is not incorrect about the existence of the Applicant's family in St. Vincent; the H&C application lists those family members. The Respondents say that, given the existence of these family members, it is reasonable for the Officer to require more than the Applicant's bare denial of links to her home country. Further, the Officer did not find that the Applicant could support herself in St. Vincent with the help of family and friends. Instead, the Officer finds that the Applicant did not establish that she could not live in St. Vincent while her permanent residence application is processed.

[44] The Respondents say that the Officer was not required to explicitly state why empathy for the Applicant was insufficient to outweigh the negative factors that prevent approval of her H&C application. An H&C application is the result of weighing different factors and does not require further gloss on how or why those factors balance out in favour of the result.

(3) Establishment Assessment

[45] The Respondents submit that the Applicant does not identify where the Officer failed to appreciate the difficulties she faces and what unreasonable inferences the Officer drew. The typographical error on the Applicant's letter of employment was relevant as the letter was also missing proper letterhead. Regardless, this was a minor point that did not play a significant role in the assessing the Applicant's establishment. And the Respondents say that working illegally in Canada is relevant to the determination of the undeserved hardship element applicable to H&C applications. See *Regalado*, above, at paras 9-11.

[46] The Respondents say that the Decision is not inconsistent when finding a lack of evidence of fiscal management. Evidence of current savings is not the same as historical fiscal management. Similarly, the Officer's finding that the Applicant made minimal efforts to regularize her status is reasonable considering that the Applicant's only effort was the sponsorship application that was interrupted by Mr. Graham's death.

[47] The Respondents submit that the Officer does not ignore factors when assessing the Applicant's establishment. In addition to presuming that the Officer considered all of the

evidence, the Decision is detailed and articulate. Factors that were not mentioned were not significant considering the evidence available.

VIII. ANALYSIS

[48] The Applicant has put forward a plethora of alleged errors, most of which are refuted by a simple reading of the Decision in its entirety.

[49] For example, the Applicant alleges that the Officer found, mistakenly, that her "children are not Canadians by birth and that they have a different country of origin" in St. Vincent.

[50] This allegation appears to be based upon the Officer's finding that the "applicant does not submit any objective evidence to demonstrate that her children would have no future in their country of origin." The word "their" in this finding is obviously a typo for "her" because the Officer repeatedly states throughout the Decision that the three children are all Canadian citizens who were born in Canada. An obvious typographical error is not a reviewable error when the Decision as a whole makes it clear that the Officer was well aware that the children are Canadian and this fact was taken into account in assessing the Applicant's H&C application.

[51] The Applicant also attempts to fault the Officer for noting the incompleteness of the evidence filed by the Applicant on important matters that needed to be assessed, and she complains that the "officer did not request for [*sic*] additional information in respect of these and simply made a decision on the basis of what the officer allegedly has on file." The Applicant then asserts that:

> The Officer's reasons show that the officer failed to assess the necessary factors, with the assessment done on limited evidence. Implicit in the officer's decision is that the officer failed to consider whether the children go to school, what languages they are learning and whether they attend daycare.

[52] In other words, the Applicant is here asserting that it is the Officer's responsibility to fill any gaps in her evidence and, if he does not do so, this in itself is a demonstration that the Officer has failed to assess the necessary factors and was not alert, alive and sensitive to the best interests of the children.

[53] It is the Applicant's responsibility, however, to place before the Officer the evidence needed to make the assessment and establish her case for an H&C exemption. The Applicant is, and was, represented by counsel who knows this full well. The Officer cannot be faulted for gaps in the Applicant's evidence that are the responsibility of the Applicant and her counsel. See *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 5. In addition, the Applicant's assertion in this application that there were significant gaps in her evidence that the Officer was obliged to fill is a clear admission that her evidence was not sufficient for a full and meaningful assessment. The failure of an applicant to provide an adequate evidentiary base for an H&C application is not a basis for reviewable error on the part of the decision-maker.

[54] I have carefully reviewed all of the Applicant's assertions of reviewable error and find all of them unconvincing. The only ones that require further comment from the Court are set out below.

[55] The Applicant says that the Officer applied the wrong legal test in analyzing the best interests of the children in that the "officer considered what would not be contrary to their best interest and did not consider what is in their best interest" and at no time "did the officer consider the application from the standpoint of what would be in the children's best interest but rather considered other unrelated factors." This means, she says, that the "officer simply applied a test of whether Canadian born children will have a future in a different country of origin."

[56] As I have already pointed out, the Officer assessed the best interests of the children from the perspective of their Canadian birth and citizenship.

[57] The Officer's best interests of the child analysis reads as follows:

> With respect to the best interests of the child, I am aware that it is an important factor and I have given significant weight and consideration to this factor. I have considered the children's age, their degree of establishment, their emotional, social and physical welfare, the level of dependency between mother and child and whether the children's wellbeing would be significantly negatively affected should the requested exemption be denied.
>
> In support of her application the applicant submits Ontario birth certificates for her 3 children:
>
> > Kianna Jenecia Graham Campbell (daughter) 2013-03-07 aged 4 years old
>
> > Ayden Omar Abraham Graham Campbell (son) 2015-04-02 aged 2 years old
>
> > Jayden Omarie Ezekiel Graham Campbell (son) 2015-04-02 aged 2 years old
>
> The applicant declares that the best interests of her Canadian children will be served if she remains in Canada. She states that leaving Canada will be "psychologically and emotionally damaging" for her children. She comes from a "poor community in a third world country", "she does not want to uproot her children

from the life they are accustomed to" and taking them away from Canada is "killing their dreams in life".

There is limited evidence on file in relation to the children, whether they go to school, are learning French or English or attend daycare. For Kianna, Ayden, and Jayden, I find that it is in their best interest to gain an education and have their mother's constant love and support as they journey through life. The evidence before me does not support that this cannot be achieved by the applicant returning with her children to St. Vincent. It is unclear whether her children have experience in the Canadian school system, and I find that given the children's age, they are young enough to adapt to the culture and school structure in St Vincent. I also note that the children's maternal grandparents and several aunts and uncles reside in St. Vincent, and it is reasonable to expect, absent evidence to the contrary, that they have an established support system of family and friends in their home country. As the children are still quite young and solely dependent on their primary care-giver, their mother, it is reasonable to expect that the general consequences of the applicant relocating and resettling back to her home country would not be contrary to the children's best interests.

The applicant does not submit any objective evidence to demonstrate that her children would have no future in their country of origin. She does not demonstrate that her children are unable to access good education in St Vincent, or that she could not support her children in her country of origin. I find that even if the family returned to St Vincent, her children will be well cared for and loved by their mother.

Furthermore, I note that the children will retain their Canadian citizenship regardless of where they reside and may return to Canada in the future should they choose. It is acknowledged that it is in the best interest of most children to remain with their parents and family. Ultimately, the decision as to whether the children accompany the applicant to St Vincent or remain in Canada would be a parental one.

I am satisfied that the applicant only wants the best for her children, this is a desire shared by most parents around the world; however, the evidence before me does not support that returning to St. Vincent with her children would be contrary to the best interest of the children.

[58] Once again, it is noteworthy that the Officer is obliged to conduct the best interests analysis against a background of limited evidence from the Applicant. There is nothing to suggest that the Applicant, represented by counsel, could not have provided the Officer with a better evidentiary basis, yet she chose not to and now seeks to hold the Officer responsible for her own omissions. The Officer here acknowledges the Applicant's position that the "best interests of her Canadian children will be served if she remains in Canada." The jurisprudence of this Court is that this is an assumption that can be made in the majority of cases. See *Canada (Minister of Citizenship and Immigration) v Hawthorne*, 2002 FCA 475 at para 5. The Officer is not saying here that the children would not be better off in Canada, but this assumption has to be assessed and weighed in the context of what they will face if they return with their mother to St. Vincent, at least until such time as they are old enough to exercise their rights as Canadians. The Officer's analysis and conclusions are that, on this side of the ledger, the Applicant has failed to adduce sufficient evidence to establish that these very young children will suffer any material, cultural or health care deprivations in St. Vincent, and that they will continue to enjoy their mother's constant love and support there and, in addition, will enjoy the support of an extended family.

[59] In other words, the Officer did not, as the Applicant alleges, consider "what would not be contrary to their best interest and did not consider what is in their best interest." The Officer is fully aware of the Applicant's view that "the best interests of her Canadian children will be served if she remains in Canada," but, in order to assess what weight should be given to the best interests of these young children, the Officer has to address what will happen to them if they return to St. Vincent with their mother. The Officer never says it is not in their best interests to

remain with their mother in Canada. But what is important in assessing the weight to be given to this factor is the extent to which the children will suffer any deprivations if they return with their mother to St. Vincent. This is why the emphasis in the analysis is upon what the children face in St. Vincent and the lack of evidence provided by the Applicant on this issue.

[60] There was also a paucity of evidence about the children's situation in Canada, at least as regards their experience in the Canadian school system. I think it can be safely assumed that the Officer is fully aware that Canada can offer these children more opportunities than St. Vincent. The Officer fully acknowledges that there are "different standards of living between countries." But their return to St. Vincent does not deprive them of their rights as Canadians so that the Officer is only concerned with any deprivations they might face until they are able to choose whether they wish to reside in Canada. In this regard, the Applicant did not adduce evidence to suggest that "the general consequences of the applicant relocating and resettling back to her home country would not [*sic*] be contrary to the children's best interests," obviously meaning that there was nothing in the general consequences of relocation that would be contrary to their best interests.

[61] The Applicant also says that, in assuming there was a family support system available to them in St. Vincent, the Officer overlooked her evidence that she had severed all ties with her home country and that the only meaningful ties she has left are in Canada. The Applicant's saying that she has severed ties with family in St. Vincent is not evidence, without more, that those ties cannot be re-established, particularly when she now has children. The evidence was that the Applicant has parents and siblings living in St. Vincent. Hence, further explanation and

evidence would be required to demonstrate why this group of people would not support a daughter and grandchildren. In this situation, more is required of the Applicant than a statement that she has cut ties with her family in St. Vincent. The Officer compares the family support system in St. Vincent with the evidence of what is available to the Applicant and her children in Canada:

> Although [the] applicant states she has no "meaningful family support" anywhere other than in Canada, I note she spent the majority of her life in St Vincent. The applicant's parents and siblings reside in St. Vincent, and it is reasonable to believe, absent evidence to the contrary, that they could facilitate her readjustment to her home country. Other than the applicant's declaration, I have limited details on any loss of social or family ties to St. Vincent and, in this regard, I find insufficient evidence to indicate why the applicant's family could not assist her with the re-integration process or to indicate that in doing so either she or her family members could be subjected to difficulties. Moreover submissions demonstrate that the sole family member in Canada is Ann Marie Graham, her sister in law, and she states she is unable to assist the applicant with the care of the children due to her work obligations.

[62] The Applicant's failure to provide sufficient objective evidence on the best interests factors is a general problem with her whole H&C submission. For example, she now claims that "the officer failed to adequately or reasonably consider the impact of the father's death on the children or the hardship to be faced by the children with the death of their father," and "failed to assess any emotional hole left in the lives of the children by the death of their father," but she fails to point to any evidence that she submitted on this issue that the Officer overlooked.

[63] In this application, the Applicant consistently faults the Officer for not providing a more thoroughgoing analysis on issues for which she did not provide evidence permitting any further

analysis than the Officer provided. She refuses to acknowledge the inadequacies of her own H&C application and blames the Officer for not remedying those inadequacies.

[64] The Applicant faults the Officer for not taking into account the differences in general living standards between St. Vincent and Canada, and how this will impact the Applicant and the three children. But the Officer shows that she is fully alive to this factor and provides the following response:

> With regard to the potential difficulties the applicant may experience upon her return to St. Vincent, it is acknowledged that there are different standards of living between countries. It is noted that many countries are not as fortunate to have the same social, including financial and medical, supports which can be found in Canada. The purpose of invoking subsection 25(1) of the IRPA is not to compensate for the difference in a standard of living, but rather to allow for an exceptional response to a particular set of circumstances which are unforeseen by the IRPA and where humanitarian and compassionate grounds justify the granting of relief. I do not find that the applicant's personal circumstances justify such an exemption.

[65] The Officer does not say that the Applicant and her children will experience standards of health, education and general living conditions in St. Vincent comparable to what they would experience if they remained in Canada. That is not the point of an H&C analysis.

[66] On the establishment side of the Decision, the Applicant makes two allegations that require mention here.

[67] First of all, the Applicant says that the Officer made no attempt to appreciate the difficulties the Applicant was facing and drew unreasonable inferences about the options that

were available to her. She says that the Officer "showed no awareness of the degree of the applicant's establishment in this case, or the degree of hardship that was likely to be suffered by the applicant if she was required to leave Canada." In particular, the Applicant alleges as follows:

> 35. While disregarding evidence that the applicant was earning an income (deposited bi-weekly directly into her bank account) as recently as August 2015, [the Officer] alleged that the applicant did not submit updates on her employment situation past 2014. This is [in] direct contradiction to the evidence before the Officer. Establishment was not appropriately dealt with by [the Officer] as a factor on this application. The officer erred in failing to analyze the degree of the applicant's establishment.
>
> 36. While disregarding evidence of the applicant's financial savings, [the Officer] alleged that there is no evidence of her fiscal management. The Officer clearly ignored evidence that the applicant was working as a cleaner (with evidence of her income being deposited into her bank account) and a hairdresser, while volunteering as a hairdresser and taking care of her three children. She has evidence of her declared income, confirmation from her previous employer, confirmation from her volunteering experiences and an offer of employment. She also has significant savings in her bank account. Throughout these, she was not on social assistance. The officer disregarded evidence of her fiscal management. The officer erred in failing to analyze the degree of the applicant's establishment.
>
> 37. [The Officer] erroneously assumed that fiscal management is shown by income tax assessment and ignored evidence of the applicant's financial savings in excess of $12,000.00. The officer misconstrued evidence of fiscal management. The officer erred in failing to analyze the degree of the applicant's establishment.
>
> 38. While acknowledging that there is evidence of her financial savings, the officer stated that submissions were not made with respect to the applicant's fiscal management. The statement is not only internally inconsistent but also shows there was no consideration to the applicant's establishment. While acknowledging that there was a sponsorship application that was to be made by her spouse before his death, the officer stated that the applicant made minimal efforts to regularize her status. The statement is equally internally inconsistent but also shows inadequate consideration to the applicant's situation. The officer

> did not at any time consider the application within the context of the applicant's particular circumstances or examine the unique circumstances of this particular applicant.
>
> [Citations omitted.]

[68] First of all, notwithstanding the Applicant's criticisms of the Officer's establishment analysis, the Officer makes it clear in the Decision that "employment is a positive element" even though the Applicant has been working without authorization.

[69] There are bank statements in the name of the Applicant and her deceased husband that show financial savings and two entries that appear to represent income deposits. These are not the same thing as evidence of the Applicant's own income or her fiscal management history such as would be shown in income tax statements. Contrary to the Applicant's assertion, the Officer does not disregard evidence of the Applicant's financial savings. They are specifically referred to and taken into account. But the evidence she offers on her assertions of personal income are not proved by a copy of a bank statement in the name of her deceased husband. And the bank statement from 2015 in the Applicant's name shows no evidence of income, while the 2016 statement in her name, shows no evidence of income, but does show savings.

[70] On the employment situation, the Officer has the following to say:

> With regard to employment, the applicant provides a letter dated October 8 2015 from a former employer, "Bata Group of Companies Corporation" which confirms she was in the company's employ from 2011 to 2014. The letter explains she was a "great individual and a great worker" and that she earned $18,000 yearly. I note that the applicant has not submitted updates concerning her employment beyond 2014. In addition, the aforementioned letter from the employer is not prepared on company letter-head and the word "corporation" is misspelled.

[71] There is no indication that any of this counted against the Applicant. The Officer makes it clear that "employment is a positive element," even though it has to be borne in mind that the Applicant did not have the proper authorization to work.

[72] On the other hand, the Officer had to examine the Applicant's prospects in St. Vincent. The Applicant alleges that the Officer finds she has positive prospects in St. Vincent and there is no evidence to this effect. But this is not the Officer's finding. The Officer says that "the applicant has not demonstrated that significant obstacles exist that preclude her from being employed in St Vincent. I am not persuaded that the applicant would not be able to support herself and her children if she returns to her country of origin."

[73] So, once again, what tells against the Applicant is that, notwithstanding a positive finding for employment in Canada, the Applicant did not submit sufficient information to demonstrate a lack of employment opportunities in St. Vincent. She blames the Officer for this, but the problem is that she fails to appreciate that the onus was upon her to provide evidence to support her position.

[74] The Applicant's other significant complaint is characterized as follows in her written submissions:

> 39. Nowhere in the decision did the officer really consider the personal situation of the applicant, and the circumstances under which the applicant is able to demonstrate her self-sufficiency. The officer did not consider her care for a spouse with cancer, the impact on her that the spouse died, their failed proposed sponsorship application, her care of three very young children and the contest of her still being self-sufficient. The officer did not at any time consider the application within the context of the

> applicant's particular circumstances or examine the unique circumstances of this particular applicant. The officer did not even consider the impact of the spouse's death on the applicant or the hardship faced by the applicant since and with the death of her spouse. The applicant's particular circumstances were not well-identified or defined by the Officer. Nowhere in the decision did the officer consider the impact on the applicant that she recently lost her spouse, or that the last few years have been extremely difficult ones for the applicant with a lot of time spent going back and forth between home and the hospital. The officer did not consider that, removing the applicant from Canada soon after the death of her spouse would render the emotional effects on her especially acute. This is a reviewable error.

[75] Many of the factors referred to here are, in fact, referred to in the Decision. What the Applicant appears to be complaining about is a general lack of sympathy for her personal loss of her husband and the supportive things she did for him while he was ill. The Applicant, of course, deserves everyone's sympathy and respect for her conduct in this regard, but she fails to explain how this personal suffering should have impacted the Officer's analysis of her establishment in Canada, the best interests of her children, and what they face in St. Vincent if returned. And a full reading of the Decision makes it clear that the Officer does acknowledge and take into account the Applicant's personal situation when it is relevant to the analysis.

[76] For example, the Officer acknowledges and accepts that the "applicant currently finds herself alone in Canada with 3 young children and no status" and then goes on to compare "family support" available to the Applicant in Canada and St. Vincent. The Officer points out that there is extensive family in St. Vincent, while "submissions demonstrate that the sole family member in Canada is Ann Marie Graham, her sister in law, and she states she is unable to assist the applicant with the care of the children due to her work obligations."

[77] The Officer clearly demonstrates awareness that the Applicant is a recent widow with three very young children. This is why she compares family support available in Canada and St. Vincent. Once again, the difficulty for the Officer was a lack of evidence as to how the difficult and sad experience that the Applicant and the children have been through affected the important H&C factors of establishment, conditions in St. Vincent and the best interests of the children.

[78] The Officer could have been more effusive in her sympathies for what the Applicant has been through, but that is not the Officer's job. She clearly acknowledges the sadness of the Applicant's present situation, but has to assess and analyse that situation in terms of the prevailing H&C factors, the evidence submitted by the Applicant, and the governing jurisprudence.

[79] The same goes for the Court, of course. With all sympathy for the Applicant and her children, I must, nevertheless, assess the Officer's Decision objectively in terms of the governing jurisprudence. When I do so, I can find no reviewable error with this Decision that requires it to be returned for reconsideration. As is so often the case in immigration matters, my sympathies are totally with the Applicant and her children, but my duty is to assess whether the Decision contains a reviewable error. Unfortunately, I regret to say that I cannot find one.

[80] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT IN IMM-2009-17

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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