Date: 20070531

Docket: IMM-5150-06

Citation: 2007 FC 577

[ENGLISH TRANSLATION]

Ottawa, Ontario, May 31, 2007

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

DOROTY PAYEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

This is an application for judicial review of a decision of a Pre-Removal Risk Assessment Officer (the Officer), dated August 29, 2006, determining that there were no humanitarian and compassionate considerations to grant an exemption from the obligation to obtain a permanent resident visa before coming to Canada ("H&C application").

THE FACTS

[1] Dorothy Payen, the applicant, is a citizen of Haiti. On March 17, 2000, she arrived in Canada. On June 1, 2000, she filed a claim for refugee status and the claim was denied on March 25, 2002. On December 6, 2000, she gave birth to a daughter, Dania Donalita Joseph, in Ottawa.

[2] She applied for a Pre-Removal Risk Assessment and a PRRA officer determined that she would not be at risk if she were to return to Haiti.

[3] On August 28, 2003, the applicant did not show up for a meeting with an immigration officer and, accordingly, Citizenship and Immigration Canada (CIC) issued a warrant for her arrest. The warrant was executed in January 2004 and the applicant was detained for about one month.

[4] On March 4, 2004, she gave birth to a son, Donavann Payen Azelin, in Laval.

[5] The applicant filed an H&C application. On August 29, 2006, a negative decision was made on this application, finding that the information filed in support of the application did not establish that there would be unusual, undeserved, or disproportionate hardship if she were to file her application from outside the country. With respect to the best interests of the child, the Officer determined:

> [TRANSLATION]
>
> Although a situation like this is not ideal for these children, the applicant did not establish that their development would be seriously compromised if she were to return to Haiti to file an application for permanent residence, or that a situation would affect their best

> interest to the point that an exemption would be justified, considering all the evidence of the case.

[6] It is established in the jurisprudence that the standard of review that applies to H&C applications is that of reasonableness *simpliciter, Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 (F.C.A.), and *Jovanovic v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 116.

[7] Reasonableness *simpliciter* is also the standard of review that applies to the issue of whether an immigration officer adequately considered the best interest of the child. In *Hawthorne v. Canada (Minister of Citizenship and Immigration),* [2003] 2 F.C. 555 Evans J. states the following:

> [31] Counsel agreed that, under the legal test established by *Baker* and *Legault* for reviewing officers' exercise of discretion, the refusal to grant Ms. Hawthorne's H & C application could be set aside as unreasonable if the officer had been "dismissive" of Suzette's best interests. On the other hand, if the decision maker had been "alert, alive and sensitive" to them (*Baker*, at paragraph 75), the decision could not be characterized as unreasonable.

[8] In *Baker*, above, the Supreme Court of Canada established that the best interest of the child is an important factor that must be given considerable weight and that a decision-maker must be "alert, alive and sensitive" to that interest.

[9] The Federal Court of Appeal, in *Legault v. Canada (Minister of Citizenship and Immigration),* [2002] 4 F.C. 358 (F.C.A.), stated that a decision-maker must identify and define the

best interest of the child so that it can be given the appropriate weight in the circumstances of the case.

[10] The applicant submits that there was no evidence in the record to indicate that her mother or her sisters would be disposed to take care of her children temporarily while she returned to Haiti to file her H&C application. She states that she does not have close family ties and that, without evidence, it was unreasonable for the officer to suppose that a family member would accept the responsibility of caring for the children. I share this opinion.

[11] Although it is established in the jurisprudence that it is the applicant's responsibility to provide evidence in support of an H&C application (*Owusu v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 158 (F.C.A.), the fact remains that the Officer cannot draw conclusions based on pure speculation. It was therefore unreasonable for the Officer to presume that the applicant's family members would be disposed to take care of the children during the absence of their only parent.

[12] Although the officer was not required to do so, he was open to request further evidence (*Kim v. Canada*, 2004 FC 1713). This issue was so important to the analysis of the children's best interests, that it was unreasonable to state without sufficient evidence that their development would not be seriously compromised if their mother were to leave for Haiti.

[13] I note that the jurisprudence clearly establishes that an officer does not assess the best interest of the child in a vacuum, as was done in this case. On this point, Décary J. stated in *Hawthorne v. Canada*, above, at paragraph 5:

> [5] The officer does not assess the best interests of the child in a vacuum. 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. In addition to what I would describe as this implicit premise, the officer has before her a file wherein specific reasons are alleged by a parent, by a child or, as in this case, by both, as to why non-removal of the parent is in the best interests of the child.

[14] Moreover, there was no analysis of the most important factors involving the child's best interests that must be assessed to establish the "hardship" that the child will suffer, such as social and educational adjustment, emotional support, and the financial repercussions of the parent's departure (*Hawthorne*, above).

[15] In my opinion, the Officer was not "alert, alive and sensitive" to the best interests of the applicant's children and did not carry out a balanced assessment that took into account all the relevant evidence. This error was determinative to the point that it is not necessary to review the applicant's other submissions.

[16] Accordingly, the decision is set aside, and the matter referred back for redetermination by a different officer.

JUDGMENT

[17] The decision is set aside, and the matter referred back for redetermination by a different officer.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5150-06
STYLE OF CAUSE:	DOROTY PAYEN **Applicant** - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION **Respondent**
PLACE OF HEARING:	Montréal, Quebec
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