

Federal Court



Cour fédérale

Date: 20091014

Docket: IMM-4770-08

Citation: 2009 FC 1033

Ottawa, Ontario, October 14, 2009

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

LUIS FERRERA DIAZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application involves an immigration officer's (the Officer) assessment of the best interests of Luna Lidia Diaz Van Cliffe, a four year old girl who was born on February 22, 2005. The assessment was made in the context of the dismissal of her uncle's application of March 12, 2008 for Humanitarian and Compassionate relief (H & C) under subsection 11(1) of the

Immigration and Refugee Protection Act, S.C. 2001, c. 27 (the IRPA) pending his deportation from Canada for criminality. The H & C decision under review is dated October 9, 2008 (the Decision).

[2] The Applicant is Luis Ferrera Diaz (either the Uncle or the Husband). He and his wife Patricia Ferrera, who is a Canadian citizen (the Wife), have raised Luna *in loco parentis* since she was a newborn. At that time her natural mother lost custody due to alcohol problems and she subsequently died in a car accident. Her natural father (the Father) has never had custody. His weekend visits with Luna are at the home of the Uncle and his Wife and are now supervised because the Father has been charged with sexually molesting an eight year old girl.

[3] The Uncle and his Wife do not have legal custody of Luna. The arrangements are informal.

[4] The Uncle is being deported for the second time. He was removed to Honduras on July 8, 1997 following a refugee claim that was unsuccessful due to negative credibility findings. From 1998 to 2005, he lived in the United States. During that time he was twice deported but returned to the United States. He later returned to Canada, without permission, in 2005. His convictions in Canada prior to his first deportation were as follows:

- 1991 June 4 – possession of stolen property over \$1000
- 1992 March 13 – assault – 30 days and one year probation
- 1995 August 15 – assault – 2 counts – 15 days and 18 months probation
- 1995 October 23 – assault – 1 count – 90 days and 2 year probation

- 1996 February 19 – possession of a narcotic , unlawfully at large, failure to attend court – 90 days
- 1997 April 17 – assault, failure to comply with recognizance, uttering threats – 16 months and 2 year probation

[5] In his Personal Information Form, the Uncle replied in the negative when asked if he had been charged or convicted of any crimes in any country including Canada. In his Pre-removal risk assessment dated January 8, 2008, he again answered the question in the negative although he did refer to having been charged with drinking and driving in the US in March 2004. The Officer concluded that these lies showed a lack of remorse and a risk that he would re-offend.

[6] The Officer considered the following evidence:

- The Uncle works in the construction industry and is the sole breadwinner for his Wife and Luna.
- The Uncle has not been convicted of a serious criminal offence in Canada for eleven years.
- There is no evidence that the Wife has worked or has any marketable skills.
- The Uncle and his Wife have an enduring and *bona fide* marriage.
- The Uncle and his Wife have cared for Luna in a loving manner since her birth.
- Luna considers the Wife to be her mother.
- Luna was effectively abandoned by her natural mother and, if the Uncle is deported and the Wife accompanies him, Luna will be abandoned again.

- There was no evidence that the Wife would separate from her Husband to care for Luna in circumstances in which she would not have her Husband's financial and emotional support.
- The Wife accompanied her Husband when he was previously deported from Canada to Honduras.
- The Father cannot care for Luna. His statutory declaration dated February 28, 2008, which was before the Officer, makes that clear.
- There is no evidence that any other family members have shown any interest in Luna's care.
- The psychologist's report, which the Officer accepted, indicated that Luna would be re-traumatized by the loss of her Uncle and even more affected by the Wife's departure at a formative stage in her life. These further abandonments could cause addictions and eating disorders.

[7] The Respondent is critical of the Applicant's failure to adduce evidence about the Wife's plans i.e. whether she would leave Luna and go to Honduras or stay behind in Canada with Luna. I am not persuaded that this criticism is justified. It may well be that there was no evidence about the Wife's intentions because she had not yet made a decision. It would be a heartbreaker and I can understand why she would leave it to the last possible moment.

[8] The Respondent also criticizes the fact that the Applicant's sisters were not mentioned in the H & C application. The Officer knew of their existence from other immigration documents. The

Respondent says that the Applicant was obliged to provide evidence about whether they were willing to help raise Luna. However, I question the significance of such evidence. I suspect that the sudden appearance of an unknown aunt would not materially reduce the impact on Luna of the Wife's abandonment. That said, I think as a general rule where the best interests of a child are at issue, an applicant should deal with the availability of all those who might reasonably be expected to contribute to the care of the child.

CONCLUSIONS

[9] I am mindful that this Decision is to be reviewed on a standard of reasonableness.

[10] Applying that standard, I conclude that the Decision as it relates to the best interests of Luna was unreasonable when it stated:

I am satisfied that there are a sufficient number of persons engaged in her care and adequate options to safeguard the physical and emotional well-being of the child, even in the absence of the applicant.

[11] There was no evidence to support this conclusion. The Officer's view was based, in part, on mere speculation that other family members in Canada "may" or "might" assist with Luna when there was no evidence that any relative had any such interest.

[12] The Officer also imagined that the Father might assume custody of Luna. This was an unfounded speculation in circumstances in which he had only visited her at the Uncle's home and

had been charged with molesting a child. Further, the Father acknowledged his inability to function as a parent.

[13] Finally, the Officer speculated that the Wife would stay in Canada to care for Luna. This was unreasonable given that:

- The Wife has a strong marriage and returned to Honduras with her Husband at the time of his first deportation from Canada.
- The Wife is not related to Luna and has no legal obligation to care for her.
- The Wife has no means to support herself and Luna in Canada.

[14] As well, the Officer did not consider Luna's fate if the Wife were to leave. In my view, Luna would likely be placed in foster care and would be exposed to the prospects of addiction and disease identified by the psychologist.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that, for the reasons given above, this application is allowed.

The H & C application is referred back for re-determination by an officer who has not previously considered the Applicant's file.

The Applicant is entitled to file fresh material for the H & C application.

"Sandra J. Simpson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4770-08

STYLE OF CAUSE: Luis Ferrera Diaz v. The Minister of Citizenship and Immigration

PLACE OF HEARING: Vancouver

DATE OF HEARING: June 8, 2009

REASONS FOR JUDGMENT: SIMPSON J.

DATED: October 14, 2009

APPEARANCES:

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