Federal Court  Cour fédérale

Date: 20110809

Docket: IMM-7721-10

Citation: 2011 FC 981

Ontario, Ottawa, August 9, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

KRISTY MELINDA PEARSON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the decision of a Pre-Removal Risk Assessment officer (Officer) of Citizenship and Immigration Canada (CIC), dated 1 November 2010 (Decision), which refused the Applicant's application for permanent residence within Canada based on humanitarian and compassionate (H&C) grounds.

BACKGROUND

[2] The Applicant is a citizen of Australia. She came to Canada as a visitor on 3 November 2006 and began living with a man with whom she had been having a long-distance relationship and who is now her common-law spouse. Since her arrival in Canada, the couple has had two children: Samuel, born August 2007; and Jackson, born November 2008. On 26 January 2010, CIC issued to her an exclusion order, as the Applicant had remained in Canada for a period longer than was authorized. On 12 February 2010, the Applicant filed an H&C application and, on 27 August 2010, an application for a Pre-Removal Risk Assessment (PRRA).

[3] The Applicant alleges that for 21 years prior to her arrival in Canada, she had been subject to abuse at the hands of her former spouse, Steven Carkeek. They met in 1985. Within a week, they had moved to a new city within Australia. Shortly thereafter, when Steven began abusing alcohol and drugs, the Applicant threatened to leave him, at which point he became enraged and punched a wall. However, as he did not physically abuse her, the Applicant stayed in the relationship. From then on, the relationship became cyclical: Steven would abuse the Applicant, physically, sexually or both; she would leave him or call the police, who would come and arrest him; in time, he would be released and would return to the Applicant's home, either to live or to visit; and the cycle would begin again. During the course of their relationship, they had four children.

[4] The Applicant and her children moved house multiple times in an effort to escape Steven. Each time, he would find them. The Applicant would call the police. Steven would be charged and sometimes subjected to an apprehended violence (or restraining) order, which he routinely ignored.

The Applicant estimates that she called the police approximately 30-40 times. On one such occasion, Steven assaulted seven police officers and was sent to a maximum security institution. Upon his release he sought out the Applicant, who had been relocated to another city to protect her safety and that of her children. He physically and sexually assaulted her over a period of two days. Court proceedings ensued. The Applicant appeared as a witness and arrangements were made for her and her children to join a witness protection program. After Steven was cleared of all charges, the Applicant claims that she "lost faith in the system" and refused to participate in the witness protection program. In time, Steven introduced one of their sons to drugs, and the Applicant reported Steven to the police. He was charged with drug trafficking and, as part of the investigation, the police uncovered a "huge" drug trafficking ring. The Applicant asserts that those involved in the ring now want to kill her.

[5] In 2005, the Applicant became involved in a long-distance relationship with a Canadian citizen. In 2006, she fled Australia, travelled to Canada and continued that relationship. Her four children remained in Australia, the youngest of whom was born in 1992. The Applicant's parents, ten siblings and four eldest children currently reside in Australia.

[6] On 12 February 2010, the Applicant filed an H&C application based on the following factors: hardship or sanctions that she would suffer upon return to Australia; her establishment in Canada; the best interests of her children; and personal/familial ties that would create a hardship if severed. On 1 November 2010, the Officer released her Decision on that application. The Officer found that the Applicant had not adduced sufficient evidence to demonstrate that her personal circumstances, both individually and cumulatively, were "such that the hardships of not being

granted the requested exemption would be unusual and undeserved or disproportionate, and not anticipated by the legislation." On this basis, the application was refused. This is the Decision under review.

DECISION UNDER REVIEW

[7] The Officer noted that a positive H&C decision is an exceptional response to a particular set of circumstances. The Applicant bears the onus of satisfying the decision-maker that, by virtue of her personal circumstances, including the best interests of any child directly affected by the Decision, the hardship of having to obtain a permanent resident visa from outside Canada would be unusual and undeserved, or disproportionate. The Officer distinguished these two kinds of hardship. Unusual and undeserved hardship is a hardship not anticipated by the Act or Regulations, typically resulting from circumstances beyond an applicant's control. Disproportionate hardship is a lower threshold than "unusual and undeserved" and is hardship that would have a disproportionate impact on an applicant due to personal circumstances.

[8] The Officer also noted that the risk factors cited by the Applicant were the same ones cited in her PRRA application. However, the H&C assessment involves a lower threshold of risk than a PRRA assessment. A PRRA assesses persecution: threat to life; danger of torture; or risk of cruel and unusual treatment or punishment. An H&C assesses risk and/or non-risk factors in deciding whether requiring an applicant to obtain a permanent resident visa from outside Canada would amount to unusual and undeserved or disproportionate hardship.

[9] The Officer found that, if returned to Australia, the Applicant would have state protection and "avenues of redress" such that she would not suffer unusual and undeserved or disproportionate hardship. Australia is a parliamentary democracy, in effective control of its territory and having in place a functioning security force. Although according to the US DOS Report for 2009 violence against women remains a problem, it is prohibited by laws that are enforced and there are highly organized and effective women's rights organizations at federal, state and local levels. An Amnesty International report from 2009 stated that government action includes the establishment of the National Council to Reduce Violence Against Women and Their Children.

[10] With respect to establishment, the Officer found that, although the Applicant had achieved a level of establishment, she had not "integrated into Canadian society to the extent that her departure would cause unusual and undeserved, or disproportionate hardship." She was financially supported by her husband and not employed outside the home nor had she been active within social or cultural communities. Although she has a relationship with her spouse, the Applicant does not indicate how long they have known each other. Therefore, the evidence does not show that "severing these ties" would constitute unusual and undeserved, or disproportionate hardship.

[11] With respect to the best interests of the Applicant's children, the Officer notes that the youngest two, although Canadian citizens, are also Australian citizens by virtue of their mother's citizenship. Although it is in their best interests to remain with both parents, there is no evidence to suggest that the Applicant's spouse could not accompany her to Australia. The application lacks detail regarding the children's day-to-day involvement in the community and the nature of Samuel's medical treatment and speech therapy. However, the Officer notes that, in Australia, there is free

public schooling as well as universal medical treatment and pharmaceuticals. Should the children move to Australia their adjustment should be minimal and would not amount to unusual and undeserved, or disproportionate hardship.

[12] The Officer concluded that, with the support of her parents, siblings and grown children, the Applicant could re-establish herself in Australia. Doing so may cause hardship; however, the evidence does not indicate that it would amount to unusual and undeserved, or disproportionate hardship, which is the threshold required to trigger an exercise of discretion on H&C grounds.

ISSUES

[13] The Applicant raises the following issues:

i. Whether the Officer's Decision was reasonable;

ii. Whether the Officer applied the wrong test in assessing risk as part of the H&C analysis; and

iii. Whether the Officer applied the wrong test in assessing the best interests of the children.

STATUTORY PROVISIONS

[14] The following provisions of the Act are applicable in these proceedings:

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**

25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, 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) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada, 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.

STANDARD OF REVIEW

[15] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[16] A humanitarian and compassionate decision is discretionary and dependent on the facts. The appropriate standard is reasonableness. See *Rodriguez Zambrano v Canada (Minister of Citizenship and Immigration)*, 2008 FC 481 [*Rodriguez Zambrano*] at paragraph 31.

[17] 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 paragraph 47; and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 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."

[18] The second and third issues concern the correctness of the test applied in the Officer's assessment of risk and best interest of the children. These are questions of law, which attract the correctness standard. See *Rodriguez Zambrano*, above, at paragraph 30; *Osegueda Garcia v Canada (Minister of Citizenship and Immigration)*, 2010 FC 677 at paragraph 7; and *Khosa*, above, at paragraph 44.

ARGUMENTS

The Applicant

The Decision Was Not Reasonable

Danger to the Applicant in Australia

[19] The Applicant argues that the Decision is unreasonable, primarily because it ignores relevant evidence. For example, the Officer does not address in any way the danger that the

Applicant faces as a result of her assistance to Australian police in uncovering a major drug ring. The Applicant believes that these people want to kill her and will do so if she returns to Australia.

Assessment of Establishment

[20] The Officer erred in her assessment of the Applicant's degree of establishment. The Applicant came to Canada as a victim of domestic abuse suffering from Post-Traumatic Stress Disorder. Justice Russel Zinn of this Court, in *Ranji v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 521 at paragraphs 19-21, states that section 25 of the Act requires a tribunal to assess establishment in the context of an applicant's personal circumstances. In the instant case, the Officer failed to do so. When the Applicant's personal circumstances are considered, her level of establishment was significant. She has a close and loving relationship with her common-law husband and two children, which is a strong indicator of her establishment in Canada. The Officer erred in disregarding the Applicant's unique challenges.

Best Interests of the Children

[21] Also, the Officer did not appropriately consider the fact that the Applicant's spouse relies on her ability to manage the home, care for the children and provide him with the physical and emotional support he needs as a disabled person. Moreover, the children both have special needs. Both are on the autism spectrum and both suffer from seizures. The Applicant asserts that there is "no way" that the Applicant's spouse will be able to care for himself and the children if she were to return to Australia.

[22] Further, it is not an option for the children to return to Australia with the Applicant. Her former spouse has a history of tracing her whereabouts, physically and sexually abusing her and disregarding restraining orders. It would be dangerous to introduce children, especially those requiring ongoing medical treatment and speech therapy, into such a situation. The Decision concludes that Australia has adequate medical care to meet the children's needs, but it is unlikely that the Applicant will be unable to access it on a regular basis if she is not able to maintain a stable and secure home environment due to what is likely to be recurring violence perpetrated by her former spouse.

[23] Justice Claire L'Heureux-Dubé, in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] SCJ No 39 [*Baker*] (QL) at paragraph 75, identified the treatment that a tribunal must give a child's best interests. She said:

> [F]or the exercise of the discretion to fall within the standard of reasonableness, 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. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.

[24] The Applicant argues that the Officer's analysis of the best interests of Samuel and Jackson does not meet the criteria set out in *Baker*. The Officer failed to consider how the disability of the Applicant's current spouse would affect his ability to care for these children alone in Canada and how the violent and persistent behaviour of the Applicant's former spouse would affect her ability to care for them alone in Australia.

[25] The Applicant further submits that the Officer applied the wrong test in assessing the children's best interests. In *Arulraj v Canada (Minister of Citizenship and Immigration)*, 2006 FC 529, at paragraph 14, Justice Robert Barnes held that it is a reviewable error to assess the best interest of a child using tests of unusual, undeserved or disproportionate hardship in the assessment of a child's hardship. He stated:

> The similar terms found in the IP5 Guidelines of "unusual", "undeserved" or "disproportionate" are used in the context of considering an applicant's H & C interests in staying in Canada and not having to apply for landing from abroad. It is an error to incorporate such threshold standards into the exercise of that aspect of the H&C discretion which requires that the interests of the children be weighed. This point is made in *Hawthorne v. Canada (Minister of Citizenship and Immigration)* [2003] 2 FC 555, 2002 FCA 475 (FCA) at para. 9 where Justice Robert Décary said "that the concept of 'undeserved hardship' is ill-suited when assessing the hardship on innocent children. Children will rarely, if ever, be deserving of any hardship".

[26] However, it is clear from the Decision that the Officer committed such as error. She observed:

> I have considered the best interests of all of these children, along with the personal circumstances of this applicant…. I find that the applicant has not established that the general consequences of relocating and resettling back to her home country would have a negative impact on the children which would amount to unusual and undeserved, or disproportionate hardship.

[27] The Court of Appeal in *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, observed that what is required when conducting a best interests of the child analysis in an H&C context is an assessment of the benefit the children would receive if their parent was not removed, in conjunction with an assessment of the hardship the children would face if their parent

was removed or if the children were to return with that parent. As addressed above, the Officer failed to consider properly the best interests of the children and thereby committed a reviewable error.

Test When Assessing Hardship

[28] Finally, the Applicant argues that the Officer failed to assess whether the circumstances facing the Applicant upon her return to Australia amounted to undue hardship, even if it did not amount to a risk of persecution or cruel and unusual punishment. The Officer erred by terminating her analysis after considering the availability of state protection and an internal flight alternative. Although she distinguished between the assessment of risk in an H&C and in a PRRA and acknowledged that different tests should be applied, her analysis is identical in both assessments and is limited to the assertion that Australia can provide the Applicant with adequate protection because it is a democratic state. This analysis fails to assess the effectiveness of the authorities' efforts to provide the Applicant with protection. The Applicant provided ample evidence regarding the futility of attempts to protect her from her former spouse. Although the Officer accepted the Applicant's evidence as reliable and credible, she appears to disregard this evidence in her analysis of state protection. This renders the Decision unreasonable.

The Respondent

The Decision Was Reasonable

[29] The Respondent submits that the Applicant simply disagrees with the outcome of the application, which provides no basis for the Court's intervention. The decision made by an officer on an H&C application is highly discretionary. An officer's decision not to grant an exemption under s. 25(1) takes away no right from an individual. The onus is on the applicant to adduce evidence concerning the relevant factors to show that the hardship that would result from a refusal of the application meets the unusual and undeserved or disproportionate threshold.

[30] On the instant case, the Decision was reasonable and based on a thorough review of the evidentiary record. The Officer applied the proper test in assessing the hardship and the risk that the Applicant would face with respect to her former spouse were she to return to Australia and then weighed them against all other factors. Similarly, she properly assessed the Applicant's establishment, bearing in mind that the Applicant had no right to remain in Canada but did so in circumstances not beyond her control.

[31] With respect to the best interests of the children, the Officer properly assessed them. The Supreme Court of Canada in *Baker*, above, and the Federal Court of Appeal in *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at paragraphs 11-12, clearly state that these interests do not outweigh all other factors. Provided the tribunal has adequately assessed this factor, the role of the Court on judicial review is not to re-examine the weight assigned these interests.

ANALYSIS

[32] While I cannot agree with all of the grounds raised by the Applicant (for example, I do not think the analysis of establishment falls outside the *Dunsmuir* range), I am of the view that this Decision is unreasonable and incorrect in ways that require it to be returned for reconsideration.

[33] To begin with, I agree with the Applicant that the Officer commits a legal error by assuming that the Applicant has to establish that the impact on the children of her removal and/or reestablishment in Australia would have to amount to usual and undeserved, or disproportionate hardship:

> I find that the Applicant has not established that the general consequences of relocating and resettling back to her home country would have a negative impact on the children which would amount to unusual and undeserved, or disproportionate hardship.

[34] Justice Barnes has dealt with this issue in *Arulraj*, above, at paragraph 14:

> The similar terms found in the IP5 Guidelines of "unusual", "undeserved" or "disproportionate" are used in the context of considering an applicant's H & C interests in staying in Canada and not having to apply for landing from abroad. It is an error to incorporate such threshold standards into the exercise of that aspect of the H&C discretion which requires that the interests of the children be weighed. This point is made in *Hawthorne v. Canada (Minister of Citizenship and Immigration)* [2003] 2 FC 555, 2002 FCA 475 (FCA) at para. 9 where Justice Robert Décary said "that the concept of 'undeserved hardship' is ill-suited when assessing the hardship on innocent children. Children will rarely, if ever, be deserving of any hardship".

[35] The correct approach to assessing or weighing the best interests of children in this context is set out in *Baker* at paragraph 75 and *Hawthorne* at paragraph 31ff.

[36] In addition to this legal error, there are aspects of the Decision that suggest that the Officer has overlooked the realities of the Applicant's situation in a way that renders it unreasonable.

[37] There are, generally speaking, adequate protections in Australia for women who are victims of domestic abuse. However, the evidence in the present case suggests to me that, in the Applicant's special circumstances—namely, her former spouse's extreme behaviour and his utter disregard for the law—the available state protections have consistently failed her in the long term. Persistent police and legal intervention, while well-meaning, has not been successful in containing this man and in protecting the Applicant from him. The only real protection from his behaviour is geography.

[38] The police in Australia consistently responded to the Applicant's requests for help on the 30-40 occasions when she called them. However, the state protection provided was effective only in the short-term because the Applicant's former spouse has refused to abide by state-imposed sanctions such as restraining orders. State protection need not be perfect to be adequate, as Justice Carolyn Layden-Stevenson observed in *Resulaj v Canada (Minister of Citizenship and Immigration)*, 2006 FC 269 at paragraph 20, but in assessing risk and hardship in this case, the Officer has neglected to take into account the realities of the situation and whether, notwithstanding Australia's state protection apparatus, the Applicant's situation is so unusual that she is facing a high degree of risk notwithstanding the efforts of the state to protect her. In other words, the reasons stop short at adequate state protection for women and fail to consider the Applicant's actual circumstances and the real risk she faces given the determination of her former spouse to harm her notwithstanding the best efforts of the state.

[39] I am also concerned with how the finding of state protection will impact on the best interests of the Applicant's Canadian-born children, Samuel and Jackson, whom the Officer suggests can accompany the Applicant back to Australia.

[40] As can be seen from Document 5, which is the affidavit of the Officer who heard the H&C application, the Officer did have before her documentary evidence regarding the health and developmental problems facing these children. The 9 September 2010 letter from Dr. Shih (page 99 of the Applicant's Record) is important. Dr. Shih is the boys' physician. The letter states that Samuel has behavioural problems, speech problems, developmental delay and "most likely" Attention Deficit Hyperactivity Disorder. The Officer states in paragraph 8 of her affidavit that the 9 September 2010 letter from Dr. Shih does not mention that the children have been diagnosed with autism and that it does not mention the treatment they are receiving. This is accurate. However, Dr. Shih's letter makes it clear that Samuel has problems that require the support and care of both parents and, even then, the burden of care will be onerous. Also, the 29 July 2010 letter from the Reach Early Intervention Program indicates that the development of both boys is being monitored by a resource consultant and support is provided at home. While not a detailed account of the boys' treatment, I believe this letter indicates that they are being screened and monitored and receiving regular support for the problems that have been identified thus far.

[41] Despite the absence of a detailed treatment plan, it is clear that these children require regular access to medical and speech therapy facilities on an ongoing basis. The Applicant requires a permanent address and a secure, stable home life in order to accompany her children to these appointments and to care for them properly. The actions of her former spouse made her past life in

Australia chaotic, and she coped with that chaos by pulling up stakes and moving. She moved about a dozen times to increasingly smaller and more remote communities, where treatment of the sort required by these boys is likely unavailable. If she returns to Australia, she is likely to again be faced with threats and physical and sexual abuse at the hands of her former spouse—a man who is unhinged enough to break into her house by climbing through the ceiling—and, in my view, one cannot reasonably expect her to cope with that while, at the same time, continuing to maintain a secure home and a regular schedule of medical and therapeutic appointments for her children. This is so even if her current spouse was to accompany her back to Australia. In my view, the problems that await her back in Australia and the impact that they will have on the best interests of the children are not addressed by the Officer in a realistic or reasonable way.

[42] The Officer suggests that the Applicant's current spouse could return to Australia with the Applicant and the children. However, as the Applicant's Record indicates, he fell off a truck in the course of his employment and injured his arm and right side and re-injured his back. The Officer never addresses this point nor does she address the impact that the spouse's incapacity will have on his ability to care for these children, either alone here in Canada or with the Applicant in Australia, where the pressures of life will be greater.

[43] In my view, the Decision has at best minimized the best interests of the children within the meaning of *Baker* and, at worst, failed reasonably to address the impact that living in Australia with their mother, in greater proximity to her former spouse, will have on them.

[44] In conclusion, I do not think that this Decision addresses the evidence in a realistic way. The Officer knows the language to use as a framework for her Decision but she overlooks, in my view, important evidentiary and contextual factors that should have been taken into account when considering whether the Applicant faced the required degree of hardship. In addition, her approach to analyzing the best interests of the two children was not only unreasonable in the ways described but also incorrect.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and set aside and the matter is returned for reconsideration by a different officer.
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7721-10
STYLE OF CAUSE:	**KRISTY MELINDA PEARSON** **and** **THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	July 5, 2011
REASONS FOR JUDGMENT AND JUDGMENT	**Russell J.**
DATED:	August 9, 2011

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Margherita Braccio	FOR THE RESPONDENT

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