Federal Court  Cour fédérale

Date: 20120914

Docket: IMM-9190-11

Citation: 2012 FC 1082

Ottawa, Ontario, September 14, 2012

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

HELEN VENESSA RICHARDSON

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*, SC 2001, c 27 [Act], for judicial review of a decision of a Citizenship and Immigration Officer (the Officer) dated November 22, 2011, refusing an application under subsection 25(1) of the Act made by the applicant to have her application for permanent residence processed from within Canada on humanitarian and compassionate (H&C) grounds.

[2] For the reasons that follow, the application for judicial review will be dismissed.

Factual Background

[3] Ms. Helen Venessa Richardson (the applicant) is a fifty-five (55) year-old citizen of St. Vincent and the Grenadines (St. Vincent). She entered Canada on October 7, 2000, on a six-month visitor visa and has remained in the country without status since its expiry. Not a party to this application for judicial review but included in the original H&C application was the applicant's twenty-four (24) year-old son. He returned to Barbados, his country of birth, before a decision was made on the H&C application (Decision, Tribunal Record, pp 2-6). It appears that he came to the attention of Immigration officials while visiting Niagara Falls (Letter from counsel, Tribunal Record, p 111; Applicant's Affidavit, para 32).

[4] The applicant has seven (7) other adult children: five (5) born in St. Vincent and two (2) in Barbados, where the applicant resided before coming to Canada. Unable to earn a sufficient income, the applicant moved to Barbados where she found employment at a hotel and as a domestic worker for a family.

[5] The applicant started a second family in Barbados but continued to send money back to her children in St. Vincent, who later joined her in Barbados. The applicant also worked in the United States for approximately two and a half years, using a multiple entry visa. However, she eventually returned to Barbados and built a home there.

[6] The applicant subsequently arranged to visit Louise, the sister of her first partner, who was living in Canada. Prior to her arrival, the applicant learned that Louise was suffering from breast cancer and agreed to assist her. Just over a year after arriving in Canada, the applicant began to

work as a live-in nanny, but continued to care for Louise on the weekends. After Louise passed away, the applicant decided to remain in Canada, primarily working as a nanny. In addition, the applicant pursued college courses and completed a Personal Support Worker program. The applicant also continued to send remittances to her family in Barbados.

[7] The applicant and her son submitted an application for permanent residence on H&C grounds under cover letter dated August 1, 2007. Their counsel made seven (7) additional sets of submissions, dated August 15, 2008, February 12, 2009, March 11, 2010, March 25, 2010, April 7, 2010, September 21, 2010, and October 26, 2011 (Tribunal's Record, pp. 111, 108, 40, 38, 29, 23, 12). The Officer's decision on their application is the basis of this application for judicial review.

Decision under Review

[8] In considering the applicant's H&C application, the Officer assessed establishment in Canada, hardship, and the best interests of the child. The Officer gave "limited weight" to the applicant's financial establishment on the basis that there was little detail regarding her income and expenses. In this regard, the Officer also noted that there was "little evidence [that] [the applicant] was ever authorized to work in Canada", and that there was scant evidence to support her employment (Decision, Tribunal Record, p 6). The Officer similarly found that there was insufficient detail regarding the applicant's social establishment, particularly with respect to her relationship with her Canadian children and grandchildren (Decision, Tribunal Record, p 7).

[9] The Officer found that the best interests of the children was not a "determining factor", and that there was not "sufficient information in the submissions to form an opinion about how the best

interests of the children might be affected by either a positive or a negative decision" (Decision, Tribunal Record, p 8). The Officer noted in particular that the submissions did not establish that the grandchildren's best interests would be adversely affected to an extent that would warrant an exemption, and that it was not certain that they would continue to reside in Canada as their parents' immigration status was unclear.

[10] Finally, the Officer found that the applicant would not face unusual and undeserved or disproportionate hardship if returned to St. Vincent, as her work experience in Barbados and Canada, along with the assets she had accumulated in Canada, would assist her in the transition (Decision, Tribunal Record, p 8). While acknowledging the relatively poor conditions in St. Vincent, the Officer noted that the information submitted did not establish that the applicant herself would be unable to find housing or employment, and that she had chosen to remain in Canada without status.

Issues

[11] This case raises the following issues:

1. whether the Officer ignored relevant evidence;
2. whether the Officer erred in analyzing the evidence of the applicant's establishment in Canada;
3. whether the Officer failed to be alert, alive and sensitive to the best interests of the affected children; and
4. whether the Officer erred in analyzing hardship to the applicant and her family.

[12] Subsidiary to the fourth issue, the applicant also challenges the adequacy of the reasons provided by the Officer.

Statutory Provisions

[13] Section 11(1) of the *Immigration and Refugee Protection Act* requires persons who wish to immigrate to Canada to file an application for permanent residence from outside the country:

PART 1	PARTIE 1
IMMIGRATION TO CANADA	IMMIGRATION AU CANADA
Division 1	Section 1
Requirements before entering Canada and Selection	Formalités préalables à l'entrée et sélection
11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**11.** (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
…]	[…]

[14] However, section 25 of the *Immigration and Refugee Protection Act* allows the Minister to waive any requirement on H&C grounds. In relevant part, it provides that:

Division 3	Section 3
Entering and remaining in Canada	Entrée et séjour au Canada
Status and Authorisation to enter	Statut et autorisation d'entrer
Humanitarian and compassionate considerations –	Séjour pour motif d'ordre humanitaire à la demande de

request of foreign national	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 applicant submits that decisions of H&C officers are reviewable on a standard of reasonableness *simpliciter*, relying on *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 62, 174 DLR (4th) 193 (Applicant's Memorandum, para 7). The respondent agrees that the appropriate standard of review in this case is reasonableness (Respondent's Memorandum, paras 2-3).

[16] The Supreme Court of Canada collapsed the standards of reasonableness *simpliciter* and patent unreasonableness into "a single form of 'reasonableness' review" in its decision in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 45, [2008] 1 SCR 190 [*Dunsmuir*]. The Officer's decision is accordingly reviewable on a standard of reasonableness (see e.g. *Mikhno v Canada (Minister of*

Citizenship and Immigration), 2010 FC 386 at para 21, [2010] FCJ No 583 (QL)). As taught by the Supreme Court of Canada, "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47).

[17] With respect to the adequacy of the Officer's reasons, the respondent is correct in noting that this does not provide a stand-alone basis for judicial review. In its recent decision in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62 at para 14, [2011] 3 SCR 708 [*Newfoundland Nurses*], the Supreme Court of Canada explained that analyzing the adequacy of reasons is "a more organic exercise – the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes".

Analysis

1. Did the Officer ignore relevant evidence?

[18] In her written submissions, the applicant submitted that the Officer ignored her submissions dated March 25, 2010, which discussed the decision in *Benyk v Canada (Minister of Citizenship and Immigration)*, 2009 FC 950, [2009] FCJ No 1164 (QL) [*Benyk*]. In support of her position, the applicant notes that the Officer not only failed to refer to *Benyk*, but that the March 25th submissions are not included in the Officer's list of "Sources Consulted" (Tribunal Record, p 9). Because the holding in *Benyk* contradicted the Officer's decision in her own case, the applicant submits that the Officer was obligated to distinguish it (Applicant's Memo, paras

10-13). At hearing before this Court, the applicant informed the Court that this argument would not be pursued, but the applicant further argued that three (3) pages (pp 172-174) in the Tribunal's Record were overlooked by the Officer. However, the Court notes that this argument was in no way raised in the applicant's memorandum and/or by way of a further memorandum prior to the judicial review hearing before this Court. Furthermore, the applicant acknowledged that although pages 172-174 of the Tribunal Record could have been used as a complement, they do not raise or relate to any relevant new issues. In these circumstances, the Court remains unconvinced by the applicant's argument and they will not be considered.

2. Did the Officer err in analyzing the evidence regarding the applicant's establishment in Canada?

[19] The applicant submits that, following the decision of Justice Campbell in *Lin v Canada (Minister of Citizenship and Immigration)*, 2011 FC 316 at para 2, [2011] FCJ No 395 [*Lin*], a "realistic and empathetic decision with respect to the Applicant's establishment" was reasonably necessary in light of the 11 years she has spent in Canada (Applicant's Memo, paras 14-16). In the applicant's view, the Officer failed in this task by ignoring the evidence of her sound financial management, charitable donations, volunteer work, post-secondary studies, and the adversity she has overcome. In particular, the applicant challenges the Officer's finding that there was little evidence regarding the identity of the co-owner of her joint bank account, noting that her March 11, 2010 submissions explained that all of the funds belonged to the applicant and that the account was jointly owned pursuant to the bank's policy (Applicant's Memo, paras 18-19). More generally, the applicant argues that the record contained support letters and as a whole demonstrated that she satisfied all of the factors listed in the *CIC Manual IP 5: Immigrant Applications in Canada Made on Humanitarian and Compassionate Grounds* (Applicant's Memo, paras 21-22, 31). In the

applicant's view, the Officer demonstrated "obvious bias and disregard for the Applicant's substantial establishment" (Applicant's Memo, para 19). In reply, the applicant further argues that the fact that she did not have status when she became established in Canada does not provide a basis for disregarding her establishment (Applicant's Reply at paras 15-17).

[20] In the respondent's view, the applicant is essentially seeking to reweigh the evidence, which is beyond the scope of judicial review. The respondent submits that it was open to the Officer to weigh the evidence regarding the applicant's establishment, and points in particular to the fact that her failure to pay taxes provides an "alternate explanation for her financial success". The respondent cites the decision in *Kotler v Canada (Citizenship and Immigration)*, 2011 FC 1123 at paras 10-11, [2011] FCJ No 1385 (QL), for the proposition that an illegal business does not support a finding of establishment justifying an exemption on H&C grounds (Respondent's Memo at paras 6-8).

[21] A reading of the decision clearly indicates that the Officer's reasons demonstrate justification, transparency and intelligibility, as they carefully weigh both the positive and negative evidence of establishment. For example, the Officer acknowledged the evidence of the funds which the applicant had accumulated, but noted that there was little evidence regarding details of the applicant's employment or expenses. Similarly, the Officer acknowledged the evidence of the applicant's involvement in her church and her relationship with her grandchildren, but again found that there was insufficient evidence regarding the nature of her relationship with her family to establish that the applicant "would face unusual and undeserved hardships if she were required to leave Canada" (Decision, Tribunal's Record, pp 6-7). Indeed, beyond the statements of counsel and photographs, the only evidence in the record regarding the applicant's relationship with her

grandchildren was a brief letter written by the applicant's daughter-in-law. That letter stated the following:

> Vanessa is the grandmother of two of my children LEGEND AND NAOMI RICHARDSON. She takes the time out of her busy schedule to spend time with her grandchildren always makes to time to inquire about there will being. She is always there to support and helping me with the children[,] with having Vanessa around she has also [been] a great role model for myself pushing me in [t]he right path and also knowing that she is close by to help me deal with some of the stress.
>
> [Emphasis in original]

On this scant evidence, it cannot be said that the Officer's conclusion is unreasonable.

[22] Further, the applicant's reliance on *Lin*, above, is misplaced, as that case has frequently been distinguished. As Justice Mosley noted in *Singh v Canada (Minister of Citizenship and Immigration)*, 2011 FC 813 at para 11, 393 FTR 135, the timeframe in *Lin*, above, was exceedingly long (seven years passed before a decision was made on *Lin*'s H&C application) and the applicant had become firmly established over that period. This Court agrees with the recent observations by Justice Near in *Singh v Canada (Minister of Citizenship and Immigration)*, 2012 FC 612 at para 15, [2012] FCJ No 635 (QL), is that "while applicants are entitled to use all legal remedies at their disposal, choosing to do so would not constitute circumstances beyond their control".

[23] In the case at bar, the applicant remained in Canada without status for six (6) years before submitting an H&C application. Moreover, and as acknowledged by the applicant, it took just over four (4) years, compared to seven (7) years in *Lin*, above, for a decision to be made on her application.

[24] The applicant points to only one specific piece of evidence which she says the Officer overlooked in assessing establishment, namely, the evidence regarding ownership of the joint bank account. A close analysis of the Officer's decision and the record reveals that this criticism is unjustified.

[25] In identifying the weaknesses in the applicant's evidence, the Officer noted that, "[t]here is, for example, little submitted related to ... who is the co-owner of the joint bank account which has more than $12,000 in it ...". While the applicant argues that this statement ignores her submissions regarding the co-owner, that is not the case. The only evidence in the record regarding the account co-owner appears to be counsel's parenthetical statement that "the CIBC account has her cousin's name on it as well since she was advised she could not open up the account on her own; all of the funds, however, have been deposited by Ms. Richardson" (Tribunal Record, p 41, #10). Given the information in the record, the Court is of the view that the Officer's characterization of this evidence was not unreasonable.

[26] The remainder of the applicant's arguments challenges the weight which the Officer assigned to the evidence in the record. As correctly noted by the respondent, that is not the purpose of judicial review (see *Palumbo v Canada (Attorney General)*, 2005 FCA 117 at para 11, 138 ACWS (3d) 593).

3. Was the Officer alert, alive and sensitive to the best interests of the children?

[27] The applicant argues that, instead of being "alert, alive and sensitive" to the best interests of her grandchildren, the Officer demonstrated a dismissive attitude and failed to consider the potential

effects of the applicant's removal. The applicant challenges the Officer's finding that there was little evidence regarding her relationship with her grandchildren. The applicant points in this regard to the letter written by her daughter-in-law, and submits that it, along with the photos, "at the very least illustrate a significant degree of dependence, as well as a deep and loving bond with each other". (Applicant's Memo, pp 35-41).

[28] The respondent submits that an H&C applicant bears the burden of leading evidence of the impact that removal will have on any affected children, and that in this case the applicant failed to do so. In particular, the respondent submits that the evidence adduced did not clearly indicate precisely how the applicant was involved in the grandchildren's lives, whether other caregivers or assistance would be available, and whether they would remain in Canada (Respondent's Memo at paras 9-11).

[29] While an immigration officer considering an H&C application must be "alert, alive and sensitive" to the best interests of children who may be adversely affected by the deportation of a parent or grandparent, an applicant nonetheless bears the burden of adducing evidence and argument in support of her application (*Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 5, [2004] 2 FCR 635).

[30] The applicant failed to convince this Court that the Officer erred in considering the best interests of the children in this case.

[31] After determining which children might be affected by the applicant's removal, the Officer proceeded to assess the likely effect that a negative decision would have on the applicant's two grandchildren. In this regard, the Officer found that there was little information regarding the grandchildren in the record, and that the submissions did not establish that it would be impossible for them to maintain their relationship with the applicant through "visits, letters, phone calls, emails, and/or other electronic communications". The Officer accordingly concluded that the best interests of the children was not a determining factor on the applicant's application and gave these factors little weight (Decision, Tribunal Record, p 8).

[32] With respect to the *Benyk* case, above, the applicant submits that it applies in the case at bar because a relationship is to be assessed on the basis of "quality" not "quantity".

[33] The decision in *Benyk*, above, arose out of the refusal of an H&C application made by a Ukrainian woman who had traveled to Canada ten years earlier on a temporary visitor's visa to see her daughter and granddaughters. Justice Sean Harrington found that, "[i]f not the primary care giver, Mrs. Benyk [was] one of two primary care givers". When Mrs. Benyk arrived in the country, her daughter was going through a divorce and was suffering from a brain tumor; although she recovered, she continued to live with her family and care for her grandchildren given that her daughter's job required travel and evening work (*Benyk*, above, at para 6). Justice Harrington allowed the application for judicial review on the basis that the Officer's consideration of the best interests of the children was unreasonable. In particular, he found that the Officer had failed to appreciate the hardship that would result given that Mrs. Benyk had been living with her family for eight years, that it would be extremely difficult for her daughter to find a job that did not require

evening work or travel, and that the record did not indicate that the daughter could hire someone to care for the children overnight (*Benyk*, above, at para 13).

[34] In reaching this conclusion, Justice Harrington reasoned as follows with respect to the assessment of the best interests of the child:

> [9] ... Factors which might be considered are the age of the children (13 and 15 at the time of the decision), the level of dependency, and the degree of the children's establishment in Canada (both were born and raised here).
>
> [10] Other factors which should be considered are whether the relationship is an ongoing one as opposed to the simple biological fact of relationship; where the applicant is residing in relation to the children; whether there has been any previous period of separation; and family financial interdependence.

[35] Hence, the evidentiary record in *Benyk* appears to have been much fuller and detailed than the record in this case. In summary, there is no evidence in this case to indicate that the applicant was her grandchildren's primary caregiver, nor did she live with her grandchildren, neither of whom had in fact been born at the time she submitted her H&C application.

[36] In any event, the Officer was clearly aware of the grandchildren's ages and averted to their level of establishment in noting that it was not clear whether they would remain in Canada in light of their parents' uncertain immigration status. As for the level of dependence and the other factors outlined in *Benyk*, above, at paras 9-10, the applicant failed to adduce the type of evidence that would have allowed the Officer to conduct such an evaluation. The *Benyk* case is thus distinguishable from the present case.

[37] Given the lack of detailed evidence regarding the nature of the relationship between the applicant and her grandchildren, the Court cannot agree with the applicant that the Officer's conclusion was unreasonable.

4. Did the Officer err in analyzing hardship to the applicant and her family?

[38] The applicant submits that the Officer failed to adopt the empathetic approach prescribed by the case law in assessing undue, undeserved and disproportionate hardship. In particular, the applicant argues that it was both unreasonable and unsympathetic for the Officer to conclude that her work experience and financial assets would assist her in settling in St. Vincent. Given the likelihood that the applicant would not be able to find work in St. Vincent, the applicant says that she would quickly deplete any financial assets she has accumulated in Canada.

[39] In addition, the applicant submits that the Officer erred in effectively blaming her for becoming established in Canada, when it was the respondent who took over four (4) years to process her application. The applicant argues that she should instead be given "some credit" for attempting to regularize her immigration status more than eleven (11) years after her arrival in Canada, and despite the fact that she was never ordered to leave.

[40] The respondent submits that the Officer did not err in analyzing the applicant's establishment, as the applicant failed to provide an evidentiary link between the general country conditions and her particular circumstances, or, in other words, that they would result in "unusual" or "disproportionate" hardship for her personally. The respondent cites *Hussain v Canada (Minister of Citizenship and Immigration)*, 2006 FC 719 at para 12, 149 ACWS (3d) 303, for the proposition

that it is insufficient for an applicant to simply refer to country conditions in general without linking such conditions to the personalized situations of an applicant, and that the applicant's evidence was insufficient to establish how her grandchildren's interests might be affected by her removal

[41] The applicant's reliance on Justice Campbell's recent decision in *Damte v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1212 at paras 33-34, 208 ACWS (3d) 831 [*Damte*], for the proposition that an officer must adopt an empathetic approach in assessing an H&C application is misplaced. As Justice Campbell explicitly noted in his decision, these observations were made in *obiter* and the decision under review was set aside on the basis that the Officer had made six reviewable evidentiary errors (*Damte*, above, at para 28).

[42] The applicant also seeks in particular to challenge the Officer's conclusion that her financial assets and work experience would assist her in re-establishing herself in St. Vincent. While the applicant argues that this finding is unreasonable because the applicant is unlikely to find a job in St. Vincent, the Officer found that the evidence was "general in nature" and did not establish that the applicant would not be able to find a job or housing (Decision, Tribunal Record, p 8). On the basis of the evidence, that conclusion was reasonable. The Court notes that there is little evidence in the record regarding conditions in St. Vincent. Beyond statements of counsel and the applicant's acquaintances, the only piece of evidence is an excerpt from the Central Intelligence Agency's *The World Factbook* regarding the economy of St. Vincent (see Tribunal Record at pp100-105). The Officer correctly noted that the applicant now has work experience and financial assets to assist her in transitioning to life in St. Vincent.

[43] The applicant's argument that the Officer erred by "blam[ing]" her for choosing to remain in Canada for so long is similarly unpersuasive. As noted above, the applicant lived in Canada without status for six (6) years before submitting an H&C application. Her decision to remain in Canada was of her own choosing. While the applicant now asserts that she "should be given some credit" for seeking to legalize her status, that argument ignores the fact that she made the decision to remain in Canada illegally after the expiry of her visitor's visa.

[44] Given the evidence in the record, the Officer's finding was a reasonable one, and cannot be said to lack compassion. The Officer's reasons allow a reviewing court to understand why the Officer found that an exemption on H&C grounds was not warranted and permit it to determine whether the conclusion is within the range of acceptable outcomes (see *Newfoundland Nurses*, above, at para 16).

[45] The Court's intervention is not warranted.

[46] Neither party proposes a question for certification. None will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Richard Boivin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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