Federal Court  Cour fédérale

Date: 20130927

Docket: IMM-9245-12

Citation: 2013 FC 993

Ottawa, Ontario, September 27, 2013

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

AUGUSTIN BERTHRAM JOSEPH
JINNA NADIAN CHARLERY
JOSHUA DEION JOSEPH (by his litigation guardian AUGUSTIN BERTHRAM JOSEPH)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision by an officer of the Citizenship and Immigration Canada [CIC] Niagara Falls Backlog Reduction Unit refusing the applicants' request for permanent residency on humanitarian and compassionate [H&C] grounds under section 25(1) of the IRPA.

Background

[2] Mr. Joseph arrived in Canada from St. Lucia on August 11, 2002. A single parent, he had been working as a plumber in St. Lucia. One of his sisters, a Canadian citizen, talked to him about the promising opportunities in Canada, and he decided to try to make a better life there for himself and his child. He and his then five-year old son entered the country on visitor visas in 2003.

[3] Ms. Charlery arrived in Canada from St. Lucia on June 15, 2003, also on a visitor visa. She and Mr. Joseph met in late 2003 and a relationship began. In January 2008, Ms. Charlery gave birth to the couple's daughter in Toronto, and in August 2008, the family of four moved in together.

[4] Both adults have worked since arriving in Canada, Mr. Joseph in construction and maintenance and Ms. Charlery as a housekeeper and cleaner. They have never resorted to social assistance, have paid their own medical expenses, and have saved for their children. They volunteer with their church and have provided letters of support from friends in their community.

[5] In 2011, Mr. Joseph decided that it would be best for his family if he regularized his immigration status. He retained an immigration consultant who explained that the only option was an H&C application. The family submitted one on January 24, 2012. It was rejected on June 25, 2012.

[6] Mr. Joseph's affidavit for this application contains information which was not before the immigration officer in June 2012 and which the respondent argues should therefore be inadmissible. It includes the fact that, complicating the family's situation, they sent their teenaged son to visit

family in St. Lucia in summer 2012. While he was there, CIC suddenly imposed a visa requirement for travel to Canada. The result is that their son is currently stuck in St. Lucia and cannot return to his family home.

Impugned decision

[7] The CIC officer who made the June 25, 2012 decision reviewed the family's situation and the documentation provided. In brief reasons, the officer gave positive consideration to the letters of support from family and the pastor. The officer noted the employment references and found it commendable that the applicants had been self-supporting, but also noted that this was expected of any person in Canada and that they had been working illegally, without permits. The officer noted that the applicants had a good civil record but commented that this too was expected of any person in Canada. Acknowledging that the documentation demonstrated some degree of establishment in Canada over the past eight and nine years respectively, the officer was not satisfied that this was to the extent that their removal would cause undue hardship.

[8] The officer next considered the best interests of the applicant child brought to Canada. The officer commented that the identity and whereabouts of the child's mother were unknown and that Mr. Joseph had not provided evidence to prove that he had legal custody. The officer remarked on the lack of supporting documentation of the child's integration into school and the community in Canada. As for the Canadian child, the applicants stated that the same educational opportunities and medical benefits would not be available in St. Lucia. The officer found that the evidence did not demonstrate any medical impediment to moving to St. Lucia. He concluded that the best interests of

the children were to remain with their primary caregivers and that with today's technology they would be able to maintain contact with their family and friends in Canada.

[9] The officer additionally noted that Mr. Joseph had a skilled trade, plumber, and that Ms. Charlery had been employed as a factory worker prior to coming to Canada, and stated that they had likely gained transferable skills while in this country. They had already demonstrated that they could adapt to a new environment, they had left St. Lucia as adults probably familiar with the language and customs, and reintegration would not cause undue hardship.

[10] The officer found that although removal would cause hardship, it would not be unusual and undeserved or disproportionate, warranting exceptional consideration.

Issues

[11] The issues in this application are:

a. Did the officer err in applying the wrong legal test in assessing the best interests of the children [BIOC]?

b. Did the officer err in analysing how the children's interests would be affected?

c. Did the officer err in assessing the applicants' degree of establishment?

Standard of review

[12] The standard of review for the choice of a correct legal test is correctness. See for instance *Judnarine v Canada (MCI)*, 2013 FC 82, at paras 14-16:

> **14** The standard of reasonableness is 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" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).
>
> **15** However, failure to consider the proper legal test for the best interest of the child is a question of law. It is therefore reviewable on the correctness standard (*Segura v Canada (Minister of Citizenship and Immigration)*, 2009 FC 894 at para 27 [*Segura*]; *Williams*, above, at para 22).
>
> **16** As the Supreme Court of Canada held in *Dunsmuir*, above, at paragraph 50:
> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[13] It is common ground that the standard of review for applying the BIOC and the degree of the applicants' establishment in Canada is reasonableness. See generally *Begum v Canada (MCI)*, 2013 FC 265, at paras 12-13.

Analysis

1. Did the officer err in applying the legal test in assessing the best interests of the children; and

2. Did the officer err in analysing how the children's interests would be affected?

[14] I combine the first two issues stated by the applicant inasmuch as I conclude that if the officer did not err in applying the appropriate BIOC legal test, it would appear that he erred in its

application in assessing the best interests of the children. The standard of review is irrelevant given the blatant nature of the panel's error.

[15] The officer erred in failing to express a conclusion on the best interests concerning the removal or non-removal of the children from Canada. The failure to do so leaves me to assume either that he applied the wrong test or that he misapplied the proper test to the fact situation.

[16] The officer's reasons on this point consist of reviewing the positive factors weighing in favour of granting the application and thereafter concluding by the analysis set out below that the children's best interest is for them to remain with their primary caregiver.

> While I am alive, alert and sensitive to the best interest of the children, I believe that the best interest for the children is to remain with their primary caregiver. We do have many social mediums available with today's technology for the children to continue their contact and relationship with their family and friends. I am not satisfied than an exemption is justified in this case.
>
> [Emphasis added]

[17] Putting aside for the moment the "rote" character of the reasoning, its overriding failure is not addressing the best interest of the children in terms of the impact of non-removal or removal from Canada.

[18] While the parties sparred over the particularization of the BIOC test by the Federal Court in *Williams v Canada (MCI)*, 2012 FC 166, the Federal Court of Appeal described the test, in its original iteration, in *Hawthorne v Canada (MCI)*, 2002 FCA 475 [*Hawthorne*].

[19] At paragraph 4 of *Hawthorne*, the Court spells out an analytical methodology for considering the best interests that is framed in terms of three scenarios all involving removal or non-removal of the child: (i) the non-removal of the child by remaining with the parents in Canada; (ii) the non-removal of the child by remaining in Canada following the removal of the parents, or (iii) the voluntary removal of the child by remaining with the parents who are removed:

> The "best interests of the child" are determined by considering the benefit to the child of the parent's non-removal from Canada as well as the hardship the child would suffer from either her parent's removal from Canada or her own voluntary departure should she wish to accompany her parent abroad. Such benefits and hardship are two sides of the same coin, the coin being the best interests of the child.

[20] The officer's conclusion in the present case, which describes the best interest for the children as simply remaining with their parents, fails to differentiate the best interests of the child being removed or not from Canada. Therefore, his decision does not state any conclusion on the best interests of the child remaining or parting depending upon the removal of the parents, which is the essence of the BIOC test.

[21] In an attempt to bestow some degree of relevance to the officer's BIOC conclusion, I could assume that one could read into it an implicit although unstated conclusion that the best interests of the children will favour their removal with the parents, but this would also be in conflict with *Hawthorne*. In that case, the Federal Court of Appeal described a presumption, or at least a premise to opposite effect that, absent exceptional circumstances, the child's best interests will favour the parent's non-removal. The Court of Appeal describes this conclusion as "a given". *Hawthorne*, at paras 5-6:.

> [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. These specific reasons must, of course, be carefully examined by the officer. [Emphasis added]
>
> [6] To simply require that the officer determine whether the child's best interests favour non-removal is somewhat artificial - such a finding will be a given in all but a very few, unusual cases.
>
> [Emphasis added]

[22] Accordingly, the officer has made a determination on the BIOC which is contrary to what is normally "a given", without providing any explanation or analysis for why it would be in the best interest of these children to be removed from Canada with their parents.

[23] Justice Kane recently considered a similar situation in *Chandidas v Canada (MCI)*, 2013 FC 258 where an officer had also identified the child's best interests as remaining with the primary caregiver. Her comments criticizing this result at para 69 of her reasons are as follows:

> The starting point is to identify what is the child's best interest. The officer merely stated early in his reasons that it was in the best interests of the children (which means the best interest of Rhea since the two sons were over 18) to remain with their parents. That is an odd starting point given that a nine-year-old girl would never be expected to remain in Canada alone, her status in Canada was tied to that of her family, she was part of a family that was committed to ensuring her good health, and there was never any suggestion that

> she would not remain with her parents. The officer did not identify what was in Rhea's best interests other than stating the obvious, that she would remain with her parents.
>
> [Emphasis added]

[24] Without knowing what the best interests of the children are, it is impossible to complete the analysis described in the remainder of paragraph 6 of *Hawthorne* "to determine [. . .] the likely degree of hardship to the child caused by the removal of the parent and weigh this degree of hardship together with other factors [. . .] that militate in favour of or against the removal of the parent." The officer's decision could therefore not be based on a proper analysis and was unreasonable.

[25] In passing, I also adopt the applicants' argument that the formalistic nature of the officer's reasons undermines their intelligibility, transparency and justification. Justice Mactavish, in *Adu v Canada (MCI)*, 2005 FC 565, at paras 13-14, rejected this type of decision-making in the following terms:

> **13** After reviewing the history of this case, the officer then dealt with the question of whether an H&C exemption should be granted. The operative portion of her decision states:
> I acknowledge that both applicants have established themselves in Canada. It is reasonable to expect that after more than ten years in Canada, they would become established. Both applicants have upgraded their skills in Canada and have been steadily employed. They have not had to rely on social services for financial support. Despite the positive contributions the applicants have made, I am not satisfied that their establishment in Canada constitutes grounds for which an exemption should be granted. I am not satisfied that they have sufficiently demonstrated that the requirement of applying for a visa at a visa office abroad represents unusual, undeserved or disproportionate hardship.

> **14** In my view, these 'reasons' are not really reasons at all, essentially consisting of a review of the facts and the statement of a conclusion, without any analysis to back it up. That is, the officer simply reviewed the positive factors militating in favour of granting the application, concluding that, in her view, these factors were not sufficient to justify the granting of an exemption, without any explanation as to why that is. This is not sufficient, as it leaves the applicants in the unenviable position of not knowing why their application was rejected.

3. Did the officer err in assessing the applicants' degree of establishment?

[26] The applicants presented multiple letters of reference from employers, indicating that the applicants had never applied for any type of social assistance. They also provided letters of support from a pastor and from relatives, as well as producing a copy of their lease to demonstrate that they had been residing at the same address for many years. The officer spoke of this evidence in a favourable light, then stated in a formulistic fashion, without providing any analysis, that he was not satisfied that this degree of establishment would cause a return to St. Lucia to represent undue hardship.

[27] The applicants referred the Court to the respondent's inland processing manual *Immigrant Applications to Canada made on Humanitarian or Compassionate Grounds*, which sets out in sections 11.4 and 11.5 non-exhaustive lists of criteria for considering establishment in Canada:

> **11.4. Prolonged stay or inability to leave has led to establishment**
> See also Section 5.14, *Establishment in Canada*.
> There is no hard and fast rule relating to the period of time in Canada but it is expected that a significant degree of establishment takes several years to achieve.
> Officers should consider the following factors:
> • The length of time the applicant has been in Canada.
> • Were the circumstances that led the applicant to remain in Canada beyond their control?

> • Is there a significant degree of establishment in Canada? (see also Section 11.5, *Assessing applicant's degree of establishment.*)
> • Is, or was, the applicant the subject of a temporary suspension of removal (TSR)?
> • To what degree has the applicant co-operated with the Government of Canada, particularly with regard to travel documents?
> • Did the applicant wilfully lose or destroy travel documents? (Where no valid travel or identity document has been provided, contact the local Removals Unit to determine whether this is due to an applicant's unwillingness to complete a passport application.)
>
> **11.5. Assessing applicant's degree of establishment**
> The applicant's degree of establishment in Canada may be a factor to consider in certain situations (such as former Canadian citizens, family violence, prolonged inability to leave Canada, etc.). Officers should not assess the applicant's *potential* for establishment as this falls within the scope of admissibility criteria examined at Stage 2 (e.g. A39). The degree of the applicant's establishment may be measured with questions such as the following:
> • Does the applicant have a history of stable employment?
> • Is there a pattern of sound financial management?
> • Has the applicant remained in one community or moved around?
> • Has the applicant integrated into the community through involvement in community organizations, voluntary services or other activities?
> • Has the applicant undertaken any professional, linguistic or other studies that show integration into Canadian society?
> • Do the applicant and their family members have a good civil record in Canada? (e.g. no criminal charges or interventions by law enforcement officers or other authorities for domestic violence or child abuse).
>
> The applicant's establishment up to the time of the Stage 1 assessment may be considered. The fact that the Applicant has some degree of establishment in Canada is not necessarily sufficient to satisfy the hardship test: (*Diaz Ruiz v. Canada* (Minister of Citizenship & Immigration), 2006 FC 465, 147 A.C.W.S. (3d) 1050 (F.C.); *Lee v. Canada* (Minister of Citizenship & Immigration), 2005 FC 413, 138 A.C.W.S. (3d) 350 (F.C.)).

[28] In *Raudales v Canada (MCI)*, 2003 FCT 385, at para 19, Justice Dawson, commented on the Minister's guidelines as follows:

> Establishment is, pursuant to the Minister's guidelines as found in Chapter 5 of the Inland Processing Manual, a relevant factor to consider when assessing an H&C application. Absent a proper assessment of establishment, in my view, a proper determination could not be made in this case as to whether requiring Mr. Figueroa Raudales to apply for permanent residence from abroad would constitute hardship that is unusual and undeserved or disproportionate.

[29] In the present case, it was not explained why ten years of residence in Canada, successful employment, multiple close Canadian family members, and deep involvement in the community did not constitute sufficient establishment to render removal an unusual and undeserved or disproportionate hardship. Accordingly I also find that this aspect of the decision lacks the necessary justification, transparency and intelligibility to reject the applicants' evidence demonstrating a sufficient degree of establishment to result in undue hardship in the event of removal.

Conclusion

[30] For the reasons described above, the application is allowed.

[31] The respondent proposed the following certified question in post-hearing written submissions:

> In an H&C application, is the officer required to follow the test set out in *Williams v Canada (MCI)*, 2012 FC 166, at paragraph 63, in order to demonstrate that s/he is being alert, alive and sensitive to the best interests of the child?

[32] The Federal Court of Appeal recently reiterated the test for certified questions in *Zhang v Canada (MCI)*, 2013 FCA 168, at para 9:

> It is trite law that 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. As a corollary, the question must also have been raised and dealt with by the court below and it must arise from the case, not from the Judge's reasons (*Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, 176 N.R. 4, 51 A.C.W.S. (3d) 910 (F.C.A.) at paragraph 4*; Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, [2004] F.C.J. No. 368 (C.A.) at paragraphs 11-12; *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, [2010] 1 F.C.R. 129 at paragraphs 28, 29 and 32).

[33] While the respondent argues that the proposed certified question would be dispositive of an appeal in the present case, as the applicant submitted that the failure to apply the *Williams* test was decisive, I found, as explained above, that the Board had failed to apply *Hawthorne*, regardless of the *Williams* test. The proposed question would therefore not be dispositive of an appeal and I decline to certify it.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is granted. No questions are certified.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	AUGUSTIN BERTHRAM JOSEPH, JINNA NADIAN CHARLERY, HOSHUA DEION JOSEPH (by his litigation guardian AUGUSTIN BERTHRAM JOSEPH) v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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