Federal Court  Cour fédérale

Date: 20150407

Docket: IMM-5271-13

Citation: 2015 FC 419

Ottawa, Ontario, April 7, 2015

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

DONOVAN JONES

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to paragraph 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a negative decision rendered on July 22, 2013 on an application for permanent residence based on humanitarian and compassionate [H&C] grounds. The applicant is seeking to have the decision quashed and referred back to a different officer for reconsideration.

[2] For the reasons that follow, the application is allowed.

II. Background

[3] The applicant is a 39-year-old man citizen of Jamaica, who was sponsored to Canada by his single mother in 1988. At that time, he was 15 years old. He entered Canada on June 28, 1989 as a permanent resident. He became involved in serious criminal activity including drug trafficking, assault, robbery, dangerous driving, possession of drugs, and failure to attend court.

[4] The applicant subsequently lost his status in Canada after being found to be criminally inadmissible and was ordered to be removed on October 28, 2004 by the Immigration Division.

[5] The applicant obtained a temporary stay of removal on October 28, 2006 to be reviewed on or about March 22, 2009. The applicant failed to inform the Immigration Appeal Division [IAD] of his new address as required and therefore failed to attend his appeal review hearing. On August 14, 2009 his appeal was declared abandoned. His subsequent application to have his appeal re-opened was dismissed and his judicial review application was rejected on January 25, 2011.

[6] The judge in the judicial review application indicated that the applicant would appear "to be a strong candidate for an H&C decision." On March 1, 2013, an immigration officer [the Officer] of Citizenship and Immigration Canada [CIC] refused his ensuing H&C

application pursuant to section 25 of IRPA. The applicant requested that this decision be reconsidered on the basis of new evidence regarding his support and involvement with his children. After considering the new materials, the request was denied. The original H&C decision and its reconsideration are the subject matter of this application.

III. Impugned Decision

[7] The Officer considered and assessed the evidence in both matters including the following:

a. The applicant's establishment in Canada for approximately 24 years at the time of the decision, including his employment and claims that he was the main financial support for his spouse and ten children in Canada;

b. The applicant's ability to adapt to the conditions of his home country, including his ability to support himself and to continue providing financial support to his family in Canada;

c. The applicant's community ties, including his volunteering and part-time work activities;

d. The applicant's health considerations and the treatment for his condition in his home country;

e. The applicant's family ties, including the alternate non-exclusive relationships with the mothers of his ten children and the frequency of contact with his family members, acknowledging that his family members will face some hardship if the applicant were required to leave Canada;

f. The best interests of the applicant's children, including the documentary evidence to support his presence and involvement with all of his ten children and the impact on the care and development on his children if he is required to leave Canada; and

g. The applicant's significant criminal history of convictions for multiple serious offences over a ten year period, including his risk of recidivism and evidence to indicate his remorsefulness or acceptance of responsibility for his actions.

[8] The Officer weighed all of the relevant factors and rejected the H&C application primarily due to the insufficiency of evidence. In particular, the Officer concluded that there was insufficient evidence concerning the applicant's involvement and support of his children such that it did not outweigh the negative attributes of his significant criminal record.

[9] After the H&C application was rejected, the applicant sought reconsideration of the decision based on new evidence describing how his responsibility for his children had materially and substantially changed since the evidence had been presented for the purposes of the H&C application. Letters from the Peel Children's Aid Society [CAS] specified that

on April 9, 2012, five of the applicant's children were removed from their mother's care and custody on consent and were placed in the applicant's care. This was in addition to the two children who were already residing with him. CAS indicated that the children would be at risk of harm if the mother continued to have custody due to a number of child protection concerns. The children were to remain in the applicant's care under CAS' supervision for six months. CAS stated that placing the children with their father was believed to be in their best interest. CAS also indicated that staff at the children's schools had noted that, since being in the applicant's care, the children's attendance had improved and their negative behaviors had diminished.

[10] CAS stated that, as the primary caregiver of his children, the applicant was responsible to meet all of their needs, including providing them with food, clothing shelter, and medical and dental care. CAS stressed the importance of the applicant fulfilling these responsibilities. He was also advised to readjust the Canada Child Tax Benefit [CCTB] to reflect his new responsibilities and to assist him financially to fulfill the children's needs.

[11] In June 2013, evidence was introduced from the children's schools that, according to information provided by the parents, the children were residing with the applicant. In addition, there was evidence that the applicant was receiving the CCTB and Ontario Child Benefit for the period of July 2012 to June 2013. Similarly, a drug benefit eligibility card for the children was introduced along with evidence of assistance payments from the Region of Peel to the end of June 2013, again naming the applicant as the parent.

[12] However, the Officer gave little weight to the CAS letters because they were dated in April and May 2012 and did not speak to the current status of the children's care when the matter was heard in June 2013. The Officer noted that the applicant had again failed to respond to her question as to whether alternatives of care and support were available for the children, despite asking for this information in the H&C decision.

[13] The Officer stated that the applicant had not sufficiently demonstrated that he had provided for the children's clothing, food, and housing, or that their medical and dental needs were met as was specifically stated as a requirement in the 2012 CAS letters. Beyond providing documents that he was in receipt of government funding and credits on behalf of the children, he had not provided evidence to support his financial contribution or demonstrated that he was the primary financial support for his children in Canada.

[14] The Officer referred to the applicant being sentenced to a peace bond on April 8, 2013 after being charged with assault on May 26, 2012. The Officer had asked for an update on any criminal proceedings against the applicant in the first decision and none had been provided. She gave negative consideration to the fact that the applicant was not forthcoming about these proceedings as requested. Moreover, a charge related to a domestic assault arose after the court order awarded the applicant care and custody of the children. For all these reasons, the Officer rejected the reconsideration request.

[15] In light of the children's' situation and the Federal Court of Appeal decision in *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189, [2010] 1 FCR 360

[*Kisana*], the Court requested submissions from the parties on whether there had been a failure of procedural fairness by the omission of the H&C officer to require the applicant to provide updated information from the CAS regarding the current parenting status of the children placed under the applicant's care and custody in the spring of 2013 along with any other relevant information pertaining to this issue and any in respect of certifying a question for appeal on the issue.

IV. Issues and Standard of Review

[16] The issue of whether the Officer erred in assessing the evidence and particularly, the best interests of the children in light of the new evidence introduced in the reconsideration of the case is reviewed on a reasonableness standard found to be applicable to the judicial review of H&C decisions (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9; *Kanthasamy v Canada (Citizenship and Immigration)*, 2013 FC 802 at para 10, [2014] 3 FCR 438, aff'd 2014 FCA 113).

[17] The further issue of whether the duty of procedural fairness required the Officer to request additional evidence on the best interests of the children is to be reviewed on the correctness standard (*Mission Institute v Khela*, 2014 SCC 24, [2014] 1 SCR 502 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 43). However, I adopt the hybrid standard recently enunciated by the Federal Court of Appeal in *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 245, 246 ACWS (3d) 191 (see also: *Re: Sound v Fitness Industry Council of Canada*, 2014 FCA 48 at paras 34-42, 455 NR 87 and *Maritime Broadcasting System Ltd. v Canadian Media*

Guild, 2014 FCA 59 at paras 50-56, 373 DLR (4th) 167). The procedural fairness issue is to be determined on the correctness standard, but the Court must give some deference to the Officer's procedural choices.

V. Analysis

A. *Assessment of the evidence*

[18] Based on the deferential test of reasonableness, I conclude that the Officer's assessment of the evidence, apart from the procedural fairness issue in regard to the best interests of the children in light of the new evidence introduced in the reconsideration, falls within an acceptable range of reasonable outcomes and is justified by intelligible and transparent reasons. In this regard, I disagree with the applicant's contention that the reasons demonstrate "reviewer's contempt," such as by introducing a personal and highly moral judgment into the consideration of the children's best interests in her remarks about the applicant's infidelity.

[19] As mentioned, the Officer's review of this issue was detailed in pointing out problems and lack of supporting evidence. The reference to "infidelity" related to the applicant's fathering two children within five months from different mothers while in a six-year relationship with one of the mothers, which was subsequently repeated with another woman thereafter. This is not behaviour that is to be condoned when the children, who are the basis of the applicant's claim to remain in Canada, end up being found at risk when left residing with the mother and are under the care of the applicant under the supervision of the

CAS. It is fair background evidence to a claim based on the best interests of the children. I do not find in any event, that it had any effect on the Officer's decision.

B. *Failure to Update Evidence on the Best Interests of the Children*

[20] The main point of concern is this matter is whether a breach of procedural fairness occurred when the Officer failed to seek further evidence about the children's current situation in light of her conclusion that the evidence was insufficient to demonstrate that the applicant's removal would jeopardize their best interests.

[21] In the spring of 2012, the applicant was assigned sole care and custody of five to seven of his children for six months, which included responsibility for their financial and other well-being, under CAS' supervision. At that time, CAS stated that placing the children with the applicant was believed to be in their best interest. The Officer may not be aware that an order placing the children under the care of their father, as supervised by CAS, requires the sanction of a family law court (either the Ontario Court of Justice or the Family Court of the Superior Court of Justice). Such an order is only made upon being persuaded that the children were at risk, in this case if left with their mother, and that their best interest was best served by placing them under the applicant's care.

[22] There are comments in the CAS' 2012 letters that some of the children had been experiencing behavioural issues and that these issues were mitigated by the applicant's new role as the primary caregiver. When the Officer's decision was made the fact that the children remained in the applicant's custody and care was corroborated by some evidence,

admittedly of reduced weight, from the school documents and the documents showing that the applicant received government grants and credits paid on behalf of the children in 2013.

[23] Conversely, the most probative evidence on the risk to the children that was introduced for the purposes of the reconsideration dates back to April and May 2012 and is found in CAS' files. This evidence should have been updated to June 2013 to establish that the applicant continued to have sole custody of the children and that this arrangement remained in their best interests. In particular, CAS' files would contain evidence accumulated as a result of its ongoing supervision functions that would confirm the extension of the initial six-month care and custody supervision order and describe how well the applicant had carried out his responsibilities towards his children. The absence of this evidence is significant, particularly in light of the unreported domestic assault charges which occurred after the applicant took custody of the children. Other probative evidence demonstrating that he was providing financial and emotional support for his children would also have been readily available from various reliable third-party sources, such as CAS, schools, and government agencies.

[24] In *Kisana*, the Federal Court of Appeal considered the certified question of whether "fairness imposed a duty on the officer to obtain further information concerning the best interests of the children […] if she believed that the evidence was insufficient?"

[25] Justice Nadon, speaking for the majority, concluded that the question could not be answered in the affirmative given the highly factual and variable circumstances of each

H&C application. He did not, however, rule out the possibility that there may be occasions where fairness may or will require an officer to obtain further and better information, concluding that whether fairness so requires will depend on the facts of each case.

[26] In what is admittedly a long excerpt from Justice Nadon's decision, I cite paragraphs 44 to 57 of his reasons in which he distinguished cases of this Court, without concluding they were in error. In view of my decision to apply the distinctions in *Kisana*, a fulsome description of the decision is required, with my emphasis noted:

> 44 The appellants argue that in the circumstances of this case, the officer was obliged to make an effort to obtain further information regarding the best interests of the children if she was of the opinion that what was before her was insufficient. The respondent argues that an applicant bears the burden of making his or her case on an H&C application and that, in the circumstances of this case, the officer was not under any duty to assist the appellants in discharging that onus.
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> 45 It is trite law that the content of procedural fairness is variable and contextual (see: *Baker*, above, at paragraph 21; and *Khan v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 345, [2002] 2 F.C. 413). The ultimate question in each case is whether the person affected by a decision "had a meaningful opportunity to present their case fully and fairly" (see: *Baker*, above, at paragraph 30). In the context of H&C applications, it has been consistently held that the onus of establishing that an H&C exemption is warranted lies with an applicant; an officer is under no duty to highlight weaknesses in an application and to request further submissions (see, for example: *Thandal*, above, at paragraph 9). In *Owusu*, above, this Court held that an H&C officer was not under a positive obligation to make inquiries concerning the best interests of children in circumstances where the issue was raised only in an "oblique, cursory and obscure" way (at paragraph 9). The H&C submissions in that case consisted of a seven-page letter in which the only reference to the best interests of the children was contained in the sentence: "Should he be forced to return to Ghana, [Mr. Owusu] [page381] will not have any ways to support his family financially and he will have to live every day of his life in constant fear" (at paragraph 6).

46 In support of their view that there was a duty upon the officer to make further inquiries, the appellants rely on two Federal Court decisions, namely, *Del Cid v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 326; and *Bassan v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 742, 15 Imm. L.R. (3d) 316. In *Del Cid*, above, O'Keefe J. expressed the view that the officer had an obligation to make further inquiries regarding the best interests of the children. However, he recognized this duty specifically in respect of Canadian-born children (at paragraphs 30 and 33). His finding was also contingent on his view that the evidence initially placed before the officer was sufficient to merit further inquiries (at paragraph 43 of these reasons).

47 It is important to note that in *Del Cid*, above, there was evidence before the officer that the applicant's very young children were negatively affected by the separation: they were unable to eat, cried for extensive periods of time, were integrated into the Canadian system and spoke English as their language, and would be losing the love and support of their custodial parent. Failure to balance these factors made the officer's decision unreasonable.

48 In *Bassan*, above, McKeown J. expressed a view similar to that expressed by O'Keefe J. in *Del Cid*, above, when he said at paragraph 6:

> An H and C officer must make further inquiries when a Canadian born child is involved in order to show that he or she has been attentive and sensitive to the importance of the rights of the child, the child's best interests and the hardship that may [page382] be caused to the child by a negative decision. As stated by Madam Justice L'Heureux-Dubé, such further inquiry "is essential for an H and C decision to be made in a reasonable manner".

49 For the reasons that follow, I need not express a view as to the correctness of the decisions in *Del Cid* and *Bassan*, above. However, to the extent that these decisions reached a conclusion inconsistent with these reasons, they should not be followed.

[…]

56 There can be no doubt that the officer could have asked more questions in order to obtain additional information with regard to the twins' situation in India, but, as we shall see, she was under no duty to do so in this case. It may be that the pointed and

narrow questions disclosed by the CAIPS notes probably did not constitute the most effective manner of obtaining information from these applicants, particularly in light of the lack of documentary evidence provided by them. However, the vacuum, if any, was created by the appellants' failure to assume their burden of proof. In these circumstances, the officer's poor interviewing techniques, if that be the case, are, in my view, insufficient to justify intervention on our part.

57 The appellants have failed to specify what areas of investigation or inquiry the officer should have pursued, other than in the following respects. At paragraph 3 of their memorandum, they state that although the officer asked the girls "what their lives were like with their aunt and how they were doing in school", she did not ask them "how they coped without their parents, if they missed them or if they had any particular problems because of separation from them". They then affirm at paragraph 25 of their memorandum that "it is implicit in the officer's reason for rejecting the application that had the officer been satisfied that the twins were being supported by their parents and had ongoing contact with them -- which were asserted but not supported by corroborative evidence -- the results might well have been favourable to the girls".

58 With respect to the first point, I fail to see the necessity of asking questions with regard to whether the children missed their parents or whether the separation caused them any particular problem. In my judgment, there would have been no purpose in asking these questions, considering that Mr. Carpenter, in his letter of March 6, 2006, had already indicated that the separation was having a considerable emotional impact on the family and that it "would be harsh and inhuman" to prevent the parents from raising their children in Canada. Further, one has to assume that the officer was capable of realizing that it must have been difficult for children of that age to be permanently separated from their parents.

59 With respect to the second point, it is difficult, if not impossible, to say whether the officer's decision would have been different had she received additional evidence concerning the nature of the relationship between the parents and their children and, more particularly, with regard to the frequency of their contacts, i.e. daily, weekly, monthly, etc. However, the appellants' assertion on this point does not lead to the conclusion that the officer ought to have pursued the matter further.

60 Given that the appellants were represented by an immigration consultant, that the girls were clearly asked to bring to

> the interview documents pertaining to "communication with your sponsor, e.g. cards/letters, telephone bills", and considering that their aunt had accompanied them to the interview and was also interviewed and thus had the opportunity of providing an explanation with regard to the children's plight, I cannot conclude that the officer had a duty to make further inquiries. I have not been persuaded that, in the circumstances of this case, fairness required the officer to provide them with another opportunity to produce documents and/or information in support of their application.
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> 61 The burden was on the appellants to demonstrate to the officer that there were sufficient H&C grounds to [page386] grant them an exemption from the requirements of the Act and its Regulations. They were unable to meet that burden. Hence, I conclude that the officer did not have a duty to make further inquiries.
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> 62 Because of the highly factual and variable circumstances of each H&C application, I cannot see how the certified question can be answered in the affirmative. However, I do not rule out the possibility that there may be occasions where fairness may or will require an officer to obtain further and better information. Whether fairness so requires will therefore depend on the facts of each case.
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> [Emphasis added.]

[27] The facts in this case straddle those in *Kisana*, *Del Cid v Canada (Citizenship and Immigration)*, 2006 FC 326, 146 ACWS (3d) 1055 [*Del Cid*] and *Bassan*, 2001 FCT 742, 15 Imm LR (3d) 316 [*Bassan*]. *Kisana* looms over this case inasmuch as the Officer has provided the applicant, who was represented by counsel, with a further opportunity to present evidence on the best interests of the children. It is difficult to conclude that she was not sensitive to the children's interests or that any reviewable error exists in her finding that the evidence presented was insufficient, especially when the party was represented and provided the special opportunity of a reconsideration, bearing in mind the deference owed to the Officer's procedural choices.

[28] However, the absence of proper evidence may be accounted for on any number of reasons, including poor lawyering (which may involve retainer issues, as was raised in some of the documentation in this application) or a genuine misunderstanding by the applicant as to the particularity of evidence required to demonstrate his continuing parental obligations. On the other hand, it is also possible that the situation had changed since 2012 and the applicant no longer has sole care and custody of the children. Obviously, if the absence of critical evidence is due to the first two causes described above, the applicant may very well be the central figure in the children's lives, meaning that his removal could have a serious harmful effect on their best interests. If full weight is given to such evidence, it could well result in a decision granting permanent residency to the applicant.

[29] The factors mentioned in *Kisana* that militate in favour of the imposition of a duty to make further inquiries in the present case include:

A. A duty appears to be recognized specifically in respect of Canadian-born children;

B. There was probative evidence before the Officer that the applicant's removal would negatively affect his children who had been found to be at risk of harm under their mother's care and placed in the applicant's care by qualified authorities and that this was confirmed to be in their best interests by a family law court;

C. Unlike in *Kisana*, an important purpose would be served in obtaining further information from CAS, as it would provide probative and reliable evidence on the best interests of the children in remaining with the father, including an opinion on the impact of his removal, all of which would serve to assist the H&C officer's decision; and

D. Also unlike in *Kisana*, it is not difficult, nor impossible, to say that information from CAS confirming the applicant's important role in the affected children's lives would be a highly significant factor in the Officer's decision-making process and that the decision could very well be different from that which was rendered.

[30] In my view, the evidence demonstrated that there was a serious possibility, even a probability, that the applicant's children, who had been previously determined to be vulnerable and at risk by qualified experts, would suffer unduly if the father was removed. The risks are such that they are more than comparable and probably exceed those of the children in *Del Cid* and *Bassan*, which imposed a duty to seek further information from the Officer. The fact that the children were placed with the father by CAS in 2013 is such a significant and overriding fact in relation to their best interests, that Madam Justice L'Heureux-Dubé's direction in *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817 should apply that "such further inquiry is essential for an H & C decision to be made in a reasonable manner." I conclude that the Officer could not have been alert, alive and sensitive to the affected children's interests by simply accepting that a failure to provide

updated evidence was sufficient to allow her "to determine, in the circumstances of [this] case, the likely degree of hardship to the [children] caused by the removal of the parent and to weigh this degree of hardship together with other factors, including public policy considerations, that militate in favour of or against the removal of the parent" (*Hawthorne v Canada (Citizenship and Immigration)*, 2002 FCA 475 at para 6, [2003] 2 FC 555).

C. *Should Applicants and their Counsel be Required to Certify the Provision of Complete and Updated Evidence on the Best Interests of their Children?*

[31] It is of concern to the Court that it is setting aside a decision of an H&C Officer on an issue that arises primarily because the applicant and his counsel failed to provide complete and updated evidence on the best interests of the affected children. Realistically, decision-makers in the immigration and refugee regime cannot be responsible for ensuring evidence on the best interests of children is brought before them. They do not have the mandate to place the best interests of children first and foremost as in the family courts of the provinces. In addition, they do not have the benefit of the more fulsome record on the children's best interests that normally results from the adversarial processes and the involvement of institutions like children's aid societies in custody cases.

[32] In my view, new rules should be put in place imposing obligations on applicants making submissions based on the best interests of children to provide all relevant and updated evidence that are pertinent to this issue, particulars of which should be specified in the rules. In addition, counsel acting for applicants on these cases should certify that they have explained the obligations on the applicants to bring forward all pertinent evidence on

the best interests of the children and that have understood this obligation. The exact details of such an obligation could be readily worked out with the assistance of the organizations representing refugees and other immigrants, who it is imagined would endorse such a rule.

[33] If such rules were in place, not only would cases of this nature not recur, but decision-makers in these matters would be confident that they are making decisions in relation to the best interest of the children with the knowledge that they have all the relevant information on which to make an informed and recent decision.

VI. Conclusion

[34] I allow the application and refer the matter back to a different officer for consideration. The parties agreed that this was not a case warranting certification of a question for appeal and none is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. the application is allowed and the matter is referred back to a different officer for consideration; and
2. no question is certified for appeal.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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