Federal Court  Cour fédérale

Date: 20110201

Docket: IMM-3466-10

Citation: 2011 FC 110

Ottawa, Ontario, February 1, 2011

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

ESTARDAI BEHARRY
JONATHAN NEVILLE BEHARRY
MOHANI BUDHAN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Estardai Beharry and her two children based their application for permanent residence on humanitarian and compassionate grounds on several factors. These included the best interests of the children, and the hardship that Ms. Beharry and the children would face if they were compelled to return to Guyana.

[2] The family's H&C application was rejected by a PRRA Officer, who found that they had not established that they would face unusual, undeserved or disproportionate hardship if they were required to return to Guyana in order to apply for permanent residence. For the reasons that follow, I am of the view that this decision was unreasonable.

Background

[3] Ms. Beharry and her family fled Guyana after being subjected to a brutal home invasion, during which Ms. Beharry was beaten and raped in front of her two young children. Her injuries were sufficiently severe as to require her hospitalization for several days after the attack. The family sought refugee protection on their arrival in Canada. While the Refugee Protection Division of the Immigration and Refugee Board accepted that the attack on Ms. Beharry and her family had occurred, it found that adequate state protection was available to the family in Guyana.

The Officer's Analysis of the Best Interests of the Children

[4] Ms. Beharry's daughter was 16 years old and her son was 12 at the time that the family's H&C application was assessed. The children had been in Canada since 2002, and by all accounts were doing very well in school.

[5] The family's various H&C submissions described the on-going trauma that the children have suffered as a result of having witnessed the vicious attack on their mother, and the children's fear of returning to the country where the attack occurred. The submissions also described the ways in which the children had adapted to the Canadian school system, and how they would suffer from being separated from family and friends in Canada.

[6] The Officer determined that requiring the children to return to a country where English is spoken, in the company of their mother, would not negatively affect their best interests.

[7] In coming to this conclusion, the Officer acknowledged that “the children will be upset and disappointed in having to return to Guyana”, but reiterated that the children would be cared for by their mother. The Officer also recognized that the children would be returning to an environment “with different economic and social aspects”. However, in the Officer’s view, this was not “an exceptional situation” or “unusual circumstance to justify a positive exemption”. The Officer also found that there was insufficient evidence to show that the children would not have access to basic amenities in Guyana.

[8] The Officer also discussed the fact that the children could remain in contact with family members by telephone, finding that insufficient evidence had been provided to show that the separation of the children from their family in Canada “will result in unusual, undeserved or disproportionate hardship”.

[9] The Officer concluded the analysis of the children’s best interests by stating that it had not been shown that requiring that family to return to Guyana “would have a significant negative impact to [the] children that would amount to unusual and undeserved or disproportionate hardship”.

[10] There are several problems with the Officer’s analysis.

[11] The first is the test or tests that the Officer appears to have used in assessing the children's best interests. At various points in the analysis the Officer discusses the best interests of the children in terms of whether the children would suffer "unusual and undeserved and disproportionate hardship" if they were required to return to Guyana. However, the unusual, undeserved, or disproportionate hardship test has no place in the best interests of the child analysis: see *Arulraj v. Canada (MCI)*, 2006 FC 529, [2006] F.C.J. No. 672 (QL) and *Hawthorne v. Canada (MCI)*, 2002 FCA 475, 297 N.R. 187, at para. 9.

[12] I am mindful that the mere use of the words "unusual, undeserved or disproportionate hardship" in a 'best interests of the child' analysis does not automatically render an H&C decision unreasonable. It will be sufficient if it is clear from a reading of the decision as a whole that the Officer applied the correct test and conducted a proper analysis: *Segura v. Canada (MCI)*, 2009 FC 894, [2009] F.C.J. No. 1116 (QL), at para. 29.

[13] It is not at all clear that the Officer applied the correct test in this case. In addition to the repeated use of the term "unusual and undeserved or disproportionate hardship" in the Officer's analysis of the best interests of the children, the Officer also looked at the situation of the children to see if they were in "an exceptional situation" or "unusual circumstance to justify a positive exemption". Neither of these tests is appropriate in a 'best interests of the child' analysis.

[14] As the Federal Court of Appeal observed in *Hawthorne*, immigration officers are presumed to know that living in Canada can afford many opportunities to a child that may not be available in the child's country of origin. The task of the officer is thus to assess the degree of hardship that is

likely to result from the removal of the child from Canada, and then to balance that hardship against other factors that might mitigate the consequences of removal: see also *Ruiz v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1175, [2009] F.C.J. No. 1474, at para. 31.

[15] In other words, the Officer had to determine whether the children's best interests, "when weighed against the other relevant factors, justified an exemption on H&C grounds so as to allow them to enter Canada": *Kisana v. Canada (MCI)*, 2009 FCA 189, at para. 38. That is not what happened here.

[16] I am also concerned about the failure of the Officer to appreciate or address the family's submissions with respect to the impact that returning to Guyana would have for the children's psychological well-being. The Officer does refer to the family's submission that it would be "traumatizing" for the children to have to return to Guyana. However, the Officer seems to understand this trauma to relate to need for the children to get used to a new school system, and to leave their accomplishments in Canada behind.

[17] The family's H&C submissions clearly identified the impact that witnessing the attack on their mother has had on the children, and their fear of returning to the country where the attack occurred as factors affecting the children's best interests. Nowhere in the analysis does the Officer even mention this concern, let alone address it. The failure to address such an important factor further renders the analysis unreasonable.

[18] In light of my conclusion on this issue, it is not necessary to address the other issues raised by the applicants.

Conclusion

[19] For these reasons, the application for judicial review is allowed.

Certification

[20] Neither party has suggested a question for certification, and none arises here.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, and the matter is remitted to a different Officer for re-determination; and

2. No serious question of general importance is certified.

"Anne Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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