Federal Court  Cour fédérale

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SUBJECT / OBJET :

Court File No. / N° du dossier de la Cour: **IMM-6169-13**

Between / entre: **JEANY ETIENNE ET AL v. MCI**

Enclosed is a true copy of the Judgment and Reasons issued today in this matter by the Court (Mr. Justice Rennie)

COMMENTS / REMARQUES :

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Federal Court  Cour fédérale

Date: 20141006

Docket: IMM-6169-13

Citation: 2014 FC 937

Ottawa, Ontario, October 6, 2014

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

JEANY ETIENNE
ROSE ANNETTE ETIENNE
HANNAH ETIENNE
JUDITH ETIENNE
SIMEON JEAN ETIENNE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants seek to set aside of a decision of a Senior Immigration Officer (the Officer), dated August 30, 2013, refusing their application for permanent residence from within Canada on humanitarian and compassionate (H&C) grounds pursuant to subsection 25(1) of the

Immigration and Refugee Protection Act, SC 2001, c 27 (*IRPA*). For the reasons that follow, the application is granted.

II. Background

[2] The applicants are Mr. Jeany Etienne, Mrs. Rose Annette Etienne, and their children Hanna (15 yrs), Judith (13 yrs), and Simeon (10 yrs). They are all British Overseas Territories (BOT) citizens. The principal applicant and his wife were born in Haiti, but lost Haitian citizenship upon acquisition of BOT citizenship while living in Turks and Caicos.

[3] All applicants allege they were subject to racial discrimination in Turks and Caicos due to their Haitian background. Most relevant to this judicial review is that, the youngest child, Simeon was subjected to physical and emotional abuse by his former teacher in Turks and Caicos. As a result of this abuse, Simeon developed a heart murmur and post-traumatic stress disorder. Dr. David Palframan of the Children's Hospital of Eastern Ontario commented on the post-traumatic stress disorder in a letter dated October 18, 2012, which reads:

> In my professional opinion, although he is functioning reasonably well in Canada, a return to the Turks and Caicos islands would precipitate a significant worsening of his posttraumatic stress disorder symptoms which are caused by his abusive treatment at his former address. I am very much hoping that an appropriate decision can be made to deal with this matter in such a way as to not significantly worse his health, which a return to the Turks and Caicos would surely do.

[4] The applicants entered Canada in 2010 and filed a refugee claim. It was denied by the Refugee Protection Division (RPD) on September 4, 2012. Concurrently, on June 20, 2012, the applicants requested that their application for permanent residence be considered on H&C

grounds pursuant to subsection 25(1) of the *IRPA*. The H&C application was rejected by the Officer who found that the applicants had not established that they would face unusual and undeserved or disproportionate hardship if they were required to return to Turks and Caicos.

[5] In particular, the Officer concluded that requiring Simeon to return to Turks and Caicos, with his family, would not negatively affect his best interests. The Officer further determined that the applicants' level of establishment in Canada did not merit special consideration that warranted an exemption from the *IRPA*.

III. Analysis

A. *The Standard of Review*

[6] The choice of the proper legal test in assessing the best interests of the child is a question of law reviewable on the correctness standard: *Judnarine v Canada (Minister of Citizenship and Immigration)*, 2013 FC 82 at para 15; *Joseph v Canada (Minister of Citizenship and Immigration)*, 2013 FC 993 at para 12. When applying the correctness standard, the reviewing court "will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50.

B. *The Officer Applied an Incorrect Best Interest of the Child Test*

[7] This case turns on whether or not the Officer imported an elevated hardship test into his analysis of the best interests of the child, and whether the Officer was "alert, alive and sensitive" to the child's best interests. That is, whether or not the Officer applied the incorrect legal test in analyzing the best interests of the child.

[8] The jurisprudence is clear that it is incorrect to import an elevated hardship test into the best interests of the child analysis: *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 9; *Sahota v Canada (Minister of Citizenship and Immigration*, 2011 FC 739 at para 8; *Beharry v Canada (Minister of Citizenship and Immigration)*, 2011 FC 110. The unusual and undeserved or disproportionate hardship test has no place in the best interests analysis: *Beharry* at para 11. As noted in *Hawthorne*, at para 9, "children will rarely, if ever, be deserving of any hardship". However, the mere use of the words "undue or undeserved hardship" or similar language does not constitute a reversible error: *Bustamante Ruiz v Canada (Minister of Citizenship and Immigration*, 2009 FC 1175 at paras 27-28. This Court must examine the substance of an Officer's analysis to determine whether an incorrect hardship test was applied. The substance of an officer's analysis must prevail over the form: *Hawthorne* at para 3.

[9] The Officer, in substance, incorrectly elevated the test for the best interests of the child. Although the Officer did not use the specific language of "unusual and undeserved or disproportionate hardship" in his best interests analysis, it is clear from reading the decision as a whole that the Officer was on a search for undeserved or disproportionate hardship. Further, the Officer did not turn his mind to identifying the best interests of the child. It is well-established that an officer must be "alert, alive and sensitive" to the interests of the child: *Baker* at para 75. In order for an officer to be properly "alert, alive and sensitive" to a child's best interests, the officer should have regard to the child's circumstances, from the child's perspective.

[10] The Officer in the present case did not have regard to Simeon's circumstances, nor did he at any point in his decision determine what would be in the child's best interests. Instead, the Officer stated that "despite some emotional difficulty, there is little evidence to suggest that [Simeon] would probably return to potentially harmful conditions in Turks and Caicos…". This framing suggests that the Officer was not looking to what was in the child's best interests; rather, the Officer was requiring evidence that Simeon would face more than "some" emotional difficulty if returned to Turks and Caicos. That is, the Officer required that Simeon face a significant degree of emotional difficulty – or, that he face a disproportionate level of hardship.

[11] Further, the Officer imported an elevated hardship test into the best interests analysis by requiring evidence that "Simeon's health and well-being would be severely compromised" upon a return to Turks and Caicos. Requiring evidence of severe harm or hardship to a child is incorrect in the context the analysis of the best interests of a child. The question is not: "is the child suffering enough that his 'best interests' are not being met?" As the Officer applied an elevated hardship test and did not have regard to the child's best interests, the Officer's analysis of the best interests of the child was incorrect and this application is granted.

[12] In view of my conclusion on this issue it is not necessary to address the issue of the family's level of establishment.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The style of cause as on the application for leave be amended so as to add the name of Simeon Jean Etienne as an applicant;

2. The application for judicial review is granted and the matter is referred back to Citizenship and Immigration Canada for reconsideration by a different officer of the Backlog Reduction Office; and

3. There is no question for certification.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6169-13
STYLE OF CAUSE:	JEANY ETIENNE, ROSE ANNETTE ETIENNE, HANNAH ETIENNE, JUDITH ETIENNE, SIMEON JEAN ETIENNE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 2, 2014
JUDGMENT AND REASONS:	RENNIE J.
DATED:	OCTOBER 6, 2014

APPEARANCES:

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