Federal Court  Cour fédérale

Date: 20160531

Docket: IMM-4166-15

Citation: 2016 FC 603

Ottawa, Ontario, May 31, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

JAIME ALBERTO ROCHA VALENZUELA

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is a judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], of a July 15, 2015 decision [Decision] by two Citizenship and Immigration Canada Officers [the Officers] refusing a permanent residence visa to the Applicant's daughter on the basis of Humanitarian and Compassionate [H&C] considerations.

[2] The Applicant is a citizen of Colombia and Canada. In January 2002, he and his mother fled Colombia to Cuenca, Ecuador after the Revolutionary Armed Forces of Colombia [FARC] repeatedly attempted to recruit him.

[3] In Ecuador, the Applicant entered into a relationship with Ms. Paola Gomez Valenzuela. Their daughter, Ana Paula Rocha Gomez, was born on June 28, 2004. At that time, the Applicant and his mother had fled Cuenca for Guayaquil, Ecuador after an encounter with Colombians they believed to be affiliated with FARC.

[4] The Applicant and his mother then applied for refugee status in Canada from abroad. They were granted permanent residence in Canada as Convention refugees on September 5, 2006. The Applicant became a Canadian citizen in 2014.

[5] During the 2006 application process, the Applicant did not inform Canadian immigration authorities that he had a daughter. He has since stated that this was on the instruction of his mother, who felt it might delay or derail the application.

[6] In March 2008, the Applicant returned to Ecuador and he and Ms. Gomez Valenzuela got married. In 2010, he submitted an application to sponsor both his daughter and his spouse for permanent residence as members of the family class, along with submissions on H&C considerations for an exemption from paragraph 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations], which states that:

> 117(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if:

> …
>
> (d) … the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.

[7] By March 2014, the relationship between the Applicant and Ms. Gomez Valenzuela had ended. The Applicant withdrew his sponsorship of Ms. Gomez Valenzuela but continued with the H&C request for his daughter.

[8] In the Decision, the Officers first noted that Ana Paula's application for permanent residence was barred by paragraph 117(9)(d) of the Regulations. The Officers then turned to the Applicant's request for an H&C exemption under subsection 25(1) of the Act. While the refusal letter itself did not contain any detailed assessment of the H&C considerations, there were substantial comments made by each of the Officers in the Global Case Management System [GCMS] notes that form part of the reasons for the Decision:

A. "[T]here was no support letter from the child's mother now divorced from the sponsor regarding of [sic] her young daughter immigrating to Canada to live with her father" (Application Record at 4 [AR]).

B. The "decision of the child's mother to continue to reside in Ecuador did not mention any particular hardship" (AR at 4).

C. "During interview conducted in March 2014 of [Ana Paula's] mother… her mother indicated the following about [Ana Paula's] life in Ecuador: [she] is happy, healthy and well cared for in Ecuador. [Ana Paula's] maternal grandfather is a commercial engineer and works for a company in Guayaquil. Her grandmother is a housewife and [her] mother stated that [Ana Paula] and she are very close. [Ana Paula's] aunt is a paediatrician and her uncle is an electrical engineer. She attends school and is doing very well" (AR at 5).

D. There is "no indication that the child concerned is lacking in terms of her basic needs, love, or education, or in a situation of danger" (AR at 5).

E. "A couple of months following the interview, [the Applicant] submitted a withdrawal for his spousal sponsorship undertaking in June 2014 indicating that his marriage had broken down with his wife, [Ana Paula's] mother. As per documentation on file, [Ana Paula] has demonstrated an interest in at least visiting her father… [Ana Paula] would continue to live in Ecuador part-time with her mother, but… would spend sufficient time in [Canada] with her father in order to comply with residency obligations. This scenario would entail prolonged family separation from her mother, maternal grandparents and maternal aunt/uncle in Ecuador" (AR at 5).

[9] In light of all of the above, the Officers refused the application for an H&C exemption.

II. Issues and Argument

[10] The Applicant argues that the Officers made two errors:

A. The Officers applied the wrong legal test in determining the best interests of the child [BIOC]; and

B. The Officers unreasonably ignored key evidence that the Applicant's family in Ecuador wanted his daughter to move to Canada as well.

[11] On the question of the correct legal test, the Applicant raises three issues. First, the Applicant argues that the Officers erred in not applying the test set out in *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166:

> [63] When assessing a child's best interests an Officer must establish first what is in the child's best interest, second the degree to which the child's interests are compromised by one potential decision over another, and then finally, in light of the foregoing assessment determine the weight that this factor should play in the ultimate balancing of positive and negative factors assessed in the application.
>
> (Emphasis in original)

[12] The Applicant contends that the Officers erroneously focused exclusively on the conditions of Ana Paula's life in Ecuador, entirely ignoring the benefits of residency in Canada with her father and grandmother.

[13] Second, the Applicant argues that the Officers erred in looking at whether Ana Paula's "basic needs" could be met in Ecuador, finding that there is "no indication that the child concerned is lacking in terms of her basic needs, love, or education, or is in a situation of danger" (AR at 5). The Applicant argues that applying a "basic needs" test has been rejected as a legal error by this Court. In *Sebbe v Canada (Minister of Citizenship and Immigration)*, 2012 FC 813, for example, Justice Zinn held:

> [15] In stating that "there is insufficient evidence before me to indicate that basic amenities would not be met in Brazil" the Officer is importing into the analysis an improper criterion. He appears to be saying that a child's best interest will lie with staying in Canada only when the alternative country fails to meet the child's "basic amenities." That is neither the test nor the approach to take when determining a child's best interests.

[14] The Applicant stresses that the Officers needed to focus on Ana Paula's best interests, examine how those interests would be compromised by each option, and then weigh the pros and cons of each. Simply examining whether she had basic amenities in Ecuador was an error of law.

[15] Third, the Applicant argues that the Officers applied the wrong legal test in including an assessment of hardship in their BIOC analysis. The Applicant cites *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 41 [*Kanthasamy*] for the proposition that hardship should not form any part of the BIOC analysis. Here, the Officers considered it

explicitly, stating that "the decision of the child's mother to continue to reside in Ecuador did not mention any particular hardship that would affect the child" (AR at 8).

[16] Beyond the question of legal errors, the Applicant also alleges that the Officers unreasonably overlooked key evidence regarding support for the application from Ana Paula's Ecuadorian family. This evidence included a letter from Ana Paula's maternal grandparents and a notarized declaration from her mother authorizing her immigration to Canada. The Applicant relies on *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (FC) at para 17 for the proposition that the more important the evidence that is not mentioned specifically and analyzed in the Officer's reasons, the more willing this Court should be to infer from the silence that the decision was made without regard to said evidence. The Applicant submits that the Officers even stated that Ana Paula's mother had not submitted a letter of support – a significant error considering she had, in fact, provided a signed declaration authorizing the application.

[17] The Respondent rejects the Applicant's arguments on both the selection of the test and the weighing of the evidence. On the question of the correct test, the Respondent asserts that the Officers were "alive, alert and sensitive" to Ana Paula's best interests, as is required by *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75 [*Baker*], and that this remains the correct test. Furthermore, the Officers did not err in using the language of "basic needs" or "hardship", as there are neither verbal formulas nor magic words regarding the test for BIOC (*Jaramillo v Canada (Citizenship and Immigration)*, 2014 FC 744 at para 70); instead, substance must prevail over form (*Webb v Canada (Citizenship and Immigration)*, 2012 FC 1060 at para 11).

[18] Regarding the second alleged error, the Respondent notes that the Officers are not obliged to comment on every piece of evidence made available to them (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 116 [*Newfoundland Nurses*]). The Respondent further argues that both the letter of support from Ana Paula's grandparents and the declaration of support from Ana Paula's mother pre-date the Applicant's separation from his spouse and so may not reflect their actual sentiments. Furthermore, the grandparents' letter does not show support for permanent immigration, stating only that Ana Paula should "have the opportunity to visit her father periodically in his place of residence" (AR at 153-54).

III. Analysis

[19] The question of whether a visa officer or officers selected the proper test in an H&C assessment is subject to a standard of correctness (*Taylor v Canada (Citizenship and Immigration)*, 2016 FC 21 at para 18). In a correctness review, this 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 [*Dunsmuir*]). The assessment of evidence, on the other hand, is reviewable on the deferential standard of reasonableness standard (*Veselaj v Canada (Citizenship and Immigration)*, 2015 FC 1386). If the conclusion falls within possible, acceptable outcomes, and is justifiable, transparent and intelligible, it should not be disturbed (*Dunsmuir* at para 47).

[20] Turning to the question of the correct test, I cannot agree that the *Williams* test is the standard to which decision-makers must be held. If *Kanthasamy* had determined that the

Williams test was the correct test to apply, the Supreme Court would have said so explicitly. Rather, in my opinion, it is open to the decision-maker whether or not to apply *Williams*, so long as they are, in the words of *Baker*, "alert, alive, and sensitive" to the child's best interests, a contextual approach whereby the decision-maker must consider the "multitude of factors that may impinge on a child's best interests" (*Kanthasamy* at para 15).

[21] Nor do I find that the Officers applied the wrong test. Although I agree that the Decision focused excessively on the benefits of Ana Paula's life in Ecuador, that alone does not translate to an error in the test. A weakness in the analysis of the evidence impacts the reasonableness of the decision, rather than the selection of the correct test.

[22] Furthermore, although *Kanthasamy* affirmed that it is incorrect to apply an "unusual, undeserved, or disproportionate hardship" analysis when considering BIOC in an H&C context, I do not find that the Officers did so here. The Officers' statement that "the decision of the child's mother to continue to reside in Ecuador did not mention any particular hardship that would affect the child", on its own, is insufficient to conclude that the entire analysis was structured around the notion of 'unusual, undeserved, or disproportionate hardship', or that the Officers decided this case through the lens of those three adjectives.

[23] I therefore cannot conclude that an incorrect test was applied. That said, I find that the Officers' assessment of the evidence was unreasonable. The hundreds of pages of documentary evidence made available by the Applicant painted a compelling portrait of what Ana Paula's life in Canada might be like. Little of that portrait was evident in the decision, despite the Officers' assertion that they considered all the elements on file (AR at 4). As the Supreme Court held in

Kanthasamy at para 39, the Officers needed to go beyond simply stating that they took BIOC into account:

> A decision under s. 25(1) will therefore be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered: *Baker*, at para. 75. This means that decision-makers must do more than simply state that the interests of a child have been taken into account: Hawthorne, at para. 32. Those interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence: *Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358 (C.A.), at paras. 12 and 31; *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 323 F.T.R. 181, at paras. 9-12.

[24] A good life abroad certainly was not in dispute: Ana Paula clearly has strong support in Ecuador. There are, however, two sides to every coin. The Officers should have carefully and thoroughly weighed all the relevant circumstances. Instead, they exhaustively reviewed the status quo – namely her life with her mother and maternal grandparents in Ecuador – and paid mere lip service to the prospect of living part-time with her father and paternal grandmother in Canada. As a result, key pieces of evidence in this regard went unacknowledged by the Officers. There was, for instance, no mention of either the letter from Ana Paula's grandparents or Ana Paula's mother's authorization to immigrate. The Officers even went so far as to note with disapproval that Ana Paula's mother had not provided a support letter for the H&C application – drawing an unintelligible and unjustifiable distinction between a letter of support and a signed authorization. This was precisely the kind of "perfunctory" best interests analysis that the Supreme Court warns against (*Kanthasamy* at paras 25 and 57).

[25] The Respondent argued that neither the authorization nor the grandparents' letter were of any significance since they were both signed before the Applicant's separation. However, Ms. Gomes Valenzuela signed her authorization after her relationship with the Applicant ended (but before the formal separation took place). More importantly, if the separation had affected Ana Paula's relatives' feelings about the application, the Officers should have placed the onus on them to correct their previous declarations of support, rather than assume, automatically, that that support was withdrawn. Finally, I would note that the Officers expressed concerns about "prolonged family separation from [Ana Paula's] mother, maternal grandparents and maternal aunt/uncle in Ecuador" (AR at 5) without even considering any of the countervailing effects of prolonged separation from her father and paternal grandmother in Canada.

[26] Visa officers may be presumed to know that applicants would benefit from life in Canada (*Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 5) but this does not relieve them of the obligation to identify and examine the interests of any affected child with "significant attention" and care (*Li v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 451 at para 25). The Officers, in focusing only on the positives of life in Ecuador and the negatives of life in Canada, did not conduct their examination with the necessary level of attention and care.

[27] Finally, I do not find that the Officers' failure to address key evidence can be saved by *Newfoundland Nurses*. *Newfoundland Nurses* does not relieve the decision-maker of the obligation to issue reasons that allow the reviewing Court to understand why they made their decision – an obligation which permits the Court to determine whether the conclusion is within the range of acceptable outcomes. Without the Officers' full assessment of the various interests

at play through properly addressing the positive aspects of a shared life in both Canada and Ecuador, this Court cannot make that determination. As noted above, key pieces of evidence went unacknowledged and unaddressed. As the Officers failed to consider the evidence *as a whole*, the reasons lack the balanced assessment that *Kanthasamy* and its key precursors require. As a result, I find this decision unreasonable.

IV. Conclusion

[28] To apply the contextual H&C test reasonably, the Officers needed to look beyond the strong family support available to Ana Paula in Ecuador and consider what she would experience in Canada. The fact that there was "no indication that the child concerned is lacking in terms of her basic needs, love or education, or is in a situation of danger" (AR at 5) may indeed be true but a child's best interests connote more than basic needs. Of course, one could ultimately conclude that Ana Paula's basic needs would not be met in Canada, thus tipping the balance in favour of Ecuador, but that weighting must be done by the Officers and not the reviewing judge.

[29] In light of the above reasons, I find this decision to be unreasonable. The application for judicial review is allowed, and the file will be returned for reconsideration by different officer(s) of the Respondent.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;

2. There is no question for certification;

3. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4166-15
STYLE OF CAUSE:	JAIME ALBERTO ROCHA VALENZUELA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 19, 2016
JUDGMENT AND REASONS:	DINER J.
DATED:	MAY 31, 2016

APPEARANCES:

Nicholas Hersh	FOR THE APPLICANT
Stephen Kurelek	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nicholas Hersh Barrister and Solicitor Ottawa, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT