Federal Court  Cour fédérale

Date: 20161103

Docket: IMM-1973-16

Citation: 2016 FC 1224

Vancouver, British Columbia, November 3, 2016

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

CYNTHIA MURGUIA CEREZO

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

[1] The present Application concerns a decision dated April 22, 2016 in which the Applicant's request for humanitarian and compassionate relief pursuant to s. 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 was rejected. I find that the decision is unreasonable because it is based on a fundamental misunderstanding of the grounds upon which the request was made, and a failure to apply the law with respect to finding the best interests of the Applicant's children.

I. The Officer's Fundamental Misunderstanding

[2] The uncontested facts and grounds upon which the request for relief was based are described in the following passage from Counsel for the Applicant's submission in support of the request dated September 3, 2015:

> Cynthia is a citizen of the Philippines and came to Canada on 13 March 2008 as a temporary foreign worker. She had a job offer as a sales person at "Treasures Tunes 'n Things" in Chilliwack, BC. The owner and manager of the store was Salvatore Dominelli ("Salvatore"), Cynthia's now husband.
>
> Cynthia and Salvatore worked together every day in the store and fell in love. The couple married on 20 December 2008 and their son Joseph was born on 31 October 2009. Around that time, Cynthia and Salvatore submitted a spousal sponsorship application. They mailed the application to the CIC Processing Centre from the post office in Chilliwack by regular mail.
>
> However, they recently learned that the application was either never received or processed. This came to light when CBSA officers contacted Cynthia about her lack of status about one month ago.
>
> We do not have a mail receipt or a copy of 2009 application. However, we do have a copy of the receipt for the $550 application fee, which is included at Tab 9. Also included is a copy of a letter of support that had been written for the 2009 application.
>
> The couple had been told by friends and acquaintances that spousal sponsorship applications can take some time to be processed and so they were not worried about CIC's 'silence'. They assumed that their application was in queue and that Cynthia's immigration status was regularized as she was married to a Canadian citizen and they had applied for permanent residency for her.
>
> Later, the couple learned that Salvatore may not be approved as a sponsor because he was in arrears for child support payments. See enclosed statutory declaration about the circumstances surrounding these arrears. The couple then believed that this issue became the reason for the delay in the application.

> On 18 June 2015, the couple's second child Jacob was born. Cynthia's husband is now 65 years old and is a designated person with disability. Cynthia is therefore the primary caregiver and mainstay for the family.
>
> To be considered for an exemption on humanitarian and compassionate grounds, an applicant must demonstrate that to make the application from outside Canada would cause hardship that is unusual and undeserved, or that is disproportionate. I submit that Cynthia and her Canadian spouse and children would all face disproportionate hardship if she were to be returned to the Philippines. […]
>
> [Emphasis added]
>
> (Tribunal Record. pp. 145-146)

[3] The Officer's understanding of the grounds upon which the relief was requested is established by the following statements in the decision:

> The applicant is a 33 year old woman from Roxas City in the Philippines. She has a Canadian citizen husband as well as two children who are six years old and 10 months old. Mrs. Cerezo's humanitarian and compassionate (H&C) grounds are based on her establishment, the best interest of the child (BIOC), and adverse country conditions.
>
> The applicant states that Mr. Dominelli is unable to sponsor her because he is in arrears of child support. She is seeking an exemption from the in-Canada eligibility criteria so that she may apply for permanent residence from within Canada.
>
> (Decision, p.2)
>
> […]
>
> In H&C applications, it is the applicant who bears the burden of proof. In the absence of any further supporting documentary concerning the applicant's husband, I find that the applicant's affidavit and accompanying documents are of insufficient weight to demonstrate that Mr. Dominelli is, on a balance of probabilities, ineligible to sponsor Mrs. Cerezo under the spousal category.
>
> I note that Mrs. Cerezo's separation from Mr. Dominelli need not be a permanent one. Mr. Dominelli, if eligible, could make a

> spousal sponsorship application on the applicant's behalf. The applicant has provided little information to substantiate the statement that she would be unable to immigrate to Canada under the spousal category. Therefore, Mrs. Cerezo's re-unification in Canada with Mr. Dominelli could be accomplished through a visa office. An H&C application is not meant to be an alternate means of applying for permanent resident status in Canada.
>
> [Emphasis added]
>
> (Decision, pp.3-4)

[4] From the statements, I find that the Officer misconstrued the basis of the Applicant's request for H&C relief as having to do with a sponsorship problem, and, as a result, did not properly and fairly consider the Applicant's disproportionate hardship submission.

II. The Officer's Best Interests Findings and the Law

[5] With respect to the best interests of the Applicant's children, the following paragraphs from the decision state key findings:

> Mrs. Cerezo has two children, Joseph and Jacob, who are six years old and 10 months old respectively. The oldest has begun school while the youngest is still an infant. I acknowledge that it appears that the Cerezo-Dominelli family are a tight and cohesive family unit. Moreover, I recognize that the children still depend on their parents to meet their daily needs due to their young age. Given these factors, I find that it is in the best interest of both children to remain with their parents.
>
> (Decision, p. 5)
>
> […]
>
> I have also considered BIOC in relation to the two Dominelli children. I acknowledged that it is in the best interest of the applicant's children to remain with both parents and that their interests are better served in Canada. Nevertheless, I found that the children have supportive extended family, access to education,

> housing, and health care in both Canada and the Philippines. Additionally, I am mindful that it is ultimately up to the applicant and her husband to decide where their children reside. The couple can choose to be reunited in the Philippines, Mrs. Cerezo can take the children by herself, or Mr. Dominelli could provide for the children in Canada. If Joseph and Jacob were to accompany one or both parents to the Philippines, I have found that there was insufficient evidence to conclude that the children's well-being and development are likely to be significantly negatively impacted.
>
> I also remark that BIOC is only one of many important factors that the decision-maker must consider when making an H&C decision that directly affects a child. The purpose of section 25 of IRPA is to give the Minister the flexibility to deal with extraordinary situations which H&C grounds compel the Minister to act. In this particular case, I find that the weight accorded to the BIOC is not enough to justify an exemption because of the insufficient evidence demonstrating a negative impact on the children if the applicant leaves Canada.
>
> [Emphasis added]
>
> (Decision, pp. 6-7)

[6] In my opinion the Officer's analysis of the best interests of the children is conflicted to the point of being unintelligible. Having found that "it is in the best interest of the Applicant's children to remain with both parents and that their interests are better served in Canada" it is counter-indicated to then find that, nevertheless, serious dislocation and separation is tolerable. It is this hardship upon which the H&C application is based, and which was apparently neglected. In my opinion, the decision is devoid of sensitivity towards the children.

[7] In *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61 (*Kanthasamy*) at paragraphs 39 and 40, the Supreme Court of Canada provides clear direction on reaching a reasonable determination of a child's best interests:

> 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 v. Canada (Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 817], 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 v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475], 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 [2008 FC 165], at paras. 9-12.
>
> Where, as here, the legislation specifically directs that the best interests of a child who is "directly affected" be considered, those interests are a singularly significant focus and perspective: [*A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181, at paras. 80-81].

[8] In the decision in *Kolosovs*, cited with approval in the above passage from *Kanthasamy*, at paragraph 8 the specific issues engaged in arriving at a reasonable determination of a child's best interests are stated:

> *Baker* at para. 75 states that an H&C decision will be unreasonable if the decision-maker does not adequately consider the best interests of the children affected by the decision:
>
> > The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. [Emphasis in the original]
>
> […] To come to a reasonable decision, a decision-maker must demonstrate that he or she is alert, alive and sensitive to the best interests of the children under consideration. Therefore, in order to assess whether the Officer was "alert, alive and sensitive", the content of this requirement must be addressed.

[9] *Kolosovs* at paragraph 12 states the content of sensitivity:

> It is only after a visa officer has gained a full understanding of the real life impact of a negative H&C decision on the best interests of a child can the officer give those best interests sensitive consideration. To demonstrate sensitivity, the officer must be able to clearly articulate the suffering of a child that will result from a negative decision, and then say whether, together with a consideration of other factors, the suffering warrants humanitarian and compassionate relief. As stated in *Baker* at para. 75:
>
> " ... where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable".
>
> [Emphasis added]

[10] Thus, the engagement of sensitivity is fundamental to rendering a decision on the best interests of a child. In the present case, I find that the Officer's failure to apply sensitivity to the situation faced by the children resulted in a decision which minimized their interests.

III. Result

[11] For the reasons provided, I find the decision under review is unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that

For the reasons provided, the decision under review is set aside, and the matter is referred back to a different decision-maker for redetermination on the following direction:

1. The fact be accepted that, on April 22, 2016, it was in the best interest of the Applicant's children to remain with both parents and that their interests were better served in Canada, and;
2. The fact be considered together with other evidence presented on the redetermination.

There is no question to certify.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1973-16
STYLE OF CAUSE:	CYNTHIA MURGUIA CEREZO v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	OCTOBER 31, 2016
JUDGMENT AND REASONS:	CAMPBELL J.
DATED:	NOVEMBER 3, 2016

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