Federal Court  Cour fédérale

Date: 20170519

Docket: IMM-2937-16

Citation: 2017 FC 516

Ottawa, Ontario, May 19, 2017

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

IZABELLA MOTRICHKO

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

[1] According to paragraph 11(1) of the *Immigration and Refugee Protection Act* SC 2001, c 27 (the *Act*), foreign nationals seeking permanent resident status in Canada must apply for - and obtain - a visa before entering Canada. However, paragraph 25(1) of the *Act* gives the Minister of Immigration, Refugees and Citizenship (the Minister) the discretion to exempt foreign nationals from the ordinary requirements of the *Act* when the Minister is satisfied that such exemption is justified by humanitarian and companionate (H&C) considerations.

[2] The Applicant is a 60 years old citizen of Israel who applied for an H&C exemption in September 2015. On June 17, 2016, an immigration officer acting on behalf of the Minister [the Officer] denied her application. The Applicant seeks judicial review of that decision. She claims that the Officer failed to properly apply the legal standard for assessing the best interests of her three grandchildren. She further contends that the Officer reached unreasonable conclusions in this respect, especially by failing to consider how the three children would suffer as a result of her removal from Canada. Finally, the Applicant submits that the Officer disregarded and misconstrued important evidence that spoke to highly relevant H&C considerations.

[3] For the reasons that follow, the Applicant's judicial review application is granted.

I. Background

[4] The Applicant was born in Ukraine in 1956. She divorced her first husband in 1978 due to his alcoholism and inability to provide for the family. At the time, the couple had a child, Irena, who was three (3) years old. After the divorce, the Applicant raised Irena as a single-mother for the following decade. Irena is the Applicant's only child.

[5] The Applicant re-married in 1993 and the family moved to Israel in 1996. At the time, Irena was pregnant and unmarried. She gave birth to her first child, Shany, on March 6, 1997. As Irena was then only 21 years of age and a single mother, the Applicant acted as *de facto* mother to her granddaughter. Up until the year 2000, when Irena finally got a job, the Applicant provided financial support to both her daughter and granddaughter. Caring for Shany proved

especially challenging since she was diagnosed with Type I diabetes at a very young age. Both the Applicant and Irena had to carefully manage Shany's disease.

[6] In 1998, the Applicant's second husband left the family without warning, taking with him the family's savings. In 2003, Irena met her common-law spouse, Momi Cohen [Momi] who, shortly thereafter, moved in with her and the Applicant. The following year, the couple welcomed their first child, Eden.

[7] The Applicant continued to provide care for both Shany and Eden until 2008 when Irena and Momi moved to Canada to pursue employment opportunities. The couple's second child, and Applicant's third grandchild, Kevin, was born in Canada the same year.

[8] The Applicant visited her family in Canada in 2009 for about two months and in 2011 for almost a year. During her visits, she helped Irena and Momi with the children and with the down payment on their house. The Applicant returned to Canada in June 2013 on a visitor visa valid until February 2016.

[9] Apprehending the fact that Irena and Momi might not be financially able to sponsor her for several years, the Applicant submitted the H&C application which underlies the present proceedings. Her H&C grounds were based on her establishment in Canada since 2013, her close ties to Canada through family and friends, including the level of interdependency with her family, the best interests of her three grandchildren, the hardship that would occur if her application were refused, and the limited support available to her both in Ukraine and Israel.

[10] In dismissing the Applicant's H&C application, the Officer noted that the Applicant H&C grounds were based on (i) her establishment in Canada, (ii) family dependency and (iii) the best interest of her grandchildren.

[11] On establishment, the Officer found that given the Applicant's temporary status during her visits to Canada, there was no reasonable expectation for her to remain in Canada permanently. He ruled that her establishment in Canada was not significant enough to conclude that her departure would result in any hardships as the Applicant has lived in Ukraine and Israel most her life and would be reuniting with family members, namely her father and brother, and friends.

[12] With respect to the family dependency ground, the Officer, while he acknowledged the Applicant's close bond with her daughter Irena, concluded that "in making the choice to immigrate to Canada in 2008, […] the applicant's daughter would have reasonably anticipated the difficulties that the applicant, already by then a divorced woman, would encounter in the Ukraine as she aged and is now retired". He further determined that there was little evidence that the two women would be unable to maintain their close and supportive relationship, be it through letters or via Internet. He also mentioned the possibility for the Applicant to be sponsored as a member of the family class by her daughter in the future.

[13] Finally, the Officer found that there was little evidence demonstrating that the Applicant's departure would jeopardize the best interests of her grandchildren as the latter will still have the support of their parents who have always been their primary caregivers. Given that

the Applicant has previously been separated from the children when Irena and Momi moved to Canada in 2008, the Officer determined that her departure would not deprive them from the basic necessities of life. According to him, there is insufficient evidence that Irena and her family would be unable to meet their everyday obligations or that Irena was unable to care for her children before the Applicant came to Canada. He noted that there was no indication that the oldest child, Shany, who is now an adult, would be unable to help her mother with the younger siblings.

II. Issue and Standard of Review

[14] The Applicant claims that the present case raises the following three substantive issues:

1. Did the Officer err in law in analysing the best interests of the grandchildren?
2. In the alternative, was the Officer's analysis of the best interests of the grandchildren unreasonable? and
3. Was the Officer's analysis of the H&C factors unreasonable because the Officer ignored or misconstrued important evidence?

[15] The issue of whether the Officer applied the proper legal test in assessing the "best interest of the child" [BIOC] principle is a question of law to be reviewed against the standard of correctness (*Tisson v Canada (Citizenship and Immigration),* 2015 FC 944, at para 15 [*Tisson*]; *Taylor v Canada (Citizenship and Immigration),* 2016 FC 21, at para 17).

[16] As for the second and third questions, it is well-settled that the Officer's treatment of the evidence in assessing the BIOC and the H&C factors in general is subject to the reasonableness

standard of review (*Kanthasamy v Canada (Citizenship and Immigration*), 2015 SCC 61, at paras 44-45 [*Kanthasamy*]; *Kisana v Canada (Citizenship and Immigration),* 2009 FCA 189 at para 18; *Tisson*, at para 15; *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817, [1999] SCJ No 39 at para 62 [*Baker*].

[17] As I am of the view that the Officer failed to undertake a meaningful and proper analysis of the BIOC factor as required by the case law and that this error is determinative of the present judicial review application, there will be no need to consider the second and third issues.

III. Analysis

[18] The Applicant submits that the Officer erred in law by undertaking a cursory, ill-defined assessment of the best interests of her three grandchildren. She says that according to *Kanthasamy*, the Officer was required to examine the BIOC factor in detail and having regard to their particular circumstances, not in a highly generalized fashion as he did. The Respondent disagrees. It claims that no specific formula or rigid test is prescribed for an analysis of the BIOC principle and that what *Kanthasamy* requires is that all relevant H&C factors in a particular case, including the BIOC, be considered and given weight to, not that a specific test be applied.

[19] In *Kanthasamy*, the Supreme Court of Canada held that a decision under paragraph 25(1) will be found unreasonable "if the interests of children affected by the decision are not sufficiently considered", in the sense that "decision-makers must do more than simply state that the interests of a child have been taken into account" by ensuring that those interests are "'well identified and defined' and examined 'with a great deal of attention' in light of all the evidence"

(*Kanthasamy*, at para 39). It reminded that even before the BIOC principle was expressly included in paragraph 25(1) of the *Act*, immigration officers had the duty to consider the child's best interests "as an important factor", give them "substantial weight", and "be alert, alive and sensitive to them" (*Kanthasamy*, at para 38; quoting from *Baker*, at paras 74-75).

[20] *Kanthasamy* is very much in line with *Baker* on how to approach the assessment of the best interests of the child principle with the exception perhaps that *Kanthasamy* made it clear that ministerial guidelines are not legally binding on immigration officers nor intended to be either exhaustive or restrictive although, they may assist them in the exercise of their discretion even if in the end, they can only be of limited use.

[21] The bottom line in assessing the BIOC factor is that it is not enough for an immigration officer to state that the interests of the child have been considered. In order to resist judicial scrutiny, these interests need to be "well identified and defined" and must be examined by the officer "with a great deal of attention in light of all the evidence", although immigration officers, in so doing, are not required to adhere to a specific formula. Ultimately, the officer must be "alert, alive and sensitive" to these interests in what is a "highly contextual" analysis because of the "multitude of factors that may impinge on the child's best interests" (*Kanthasamy*, at paras 35 and 38-39; *Baker*, at para 75; *Richard v Canada (Citizenship and Immigration)*, 2016 FC 1420, at para 16). However, the BIOC factor will not always outweigh other considerations or mean, when it is given consideration, that there will not be other reasons for denying an H&C application (*Baker*, at para 75).

[22] Although there is no "specific formula" for assessing the BIOC factor, there is, as we just saw, a test that needs to be met. The issue, therefore, is whether the interests of the Applicant's three grandchildren were "well identified and defined" by the Officer and examined "with a great deal of attention in light of all the evidence". If this was not done, then the Officer committed a reviewable error.

[23] The Applicant claims that the Officer failed to carry a BIOC assessment that responded to each of the three children's age, capacity, needs and maturity. In particular, she says that the Officer made no mention of the hardships any of the three children would suffer if they were separated from their grandmother, namely the negative emotional impact of the separation on the three children, the difficulties Shany is likely to experience without the Applicant's assistance to manage her diabetes and how the disruption of the family's work and school schedule would adversely impact the children. She contends that the emotional and practical hardships the children would face are clearly stated in the record and yet they were not seriously considered by the Officer or not given the weight they deserve.

[24] The Applicant further claims that the Officer failed to fully address the significant role, which the Officer characterized as being "instrumental", she plays in taking care of her grandchildren, including helping them with the day-to-day running of the household, and the impact her removal would have on Irena and Momi's ability to maintain their demanding working schedules in order to financially provide for their children.

[25] In sum, the Applicant submits that by misapprehending the central role she plays in her grandchildren's lives, the Officer failed to undertake a meaningful and proper analysis of the BIOC factor as required by the case law.

[26] I agree. The Officer's decision is deficient on a number of accounts in this respect but what stands out is the highly generalized nature of the BIOC assessment given the evidence on record. The Officer merely indicated that he had carefully considered the grandchildren's best interests and that he was not satisfied that those interests would be negatively impacted. In particular, he indicated not being satisfied that the Applicant's departure would deprive the grandchildren of the basic necessities of their lives. These conclusions appear to rest solely on the view that there was insufficient evidence to show that Irena and Momi, or even Shany, would be unable to take care of Kevin and Eden.

[27] As the Applicant claims, the analysis the Officer was called upon to undertake was not whether the grandchildren would manage or survive in the absence of their grandmother but how they would be impacted, both practically and emotionally, by the departure of the Applicant in the particular circumstances of the case. To that end, the interests of each grandchild, including those of Shany, needed to be "well identified and defined" and examined "with a great deal of attention". The Officer's BIOC analysis falls well short of this standard. In particular, the emotional and practical hardship these children would face if the Applicant is forced to leave the country is not discussed to any appreciable degree despite evidence of such hardship on record. Even if she is now a young adult, Shany's interests needed to be considered as part of the BIOC analysis since she is still very much a dependant because of her medical condition and

limitations (*Ramsawak c Canada (Citoyenneté et Immigration)*, 2009 CF 636). The Officer only referred to Shany as a potential replacement for the Applicant in assisting Irena in caring for Eden and Kevin. There is no analysis of the practical and emotional impact the departure of the Applicant would have for Shany. Yet, the evidence shows that the Applicant was instrumental in raising and caring for Shany since she was born.

[28] In *Taylor*, the Court reminded that a child affected by an H&C decision must be given the "full and careful attention of the decision-maker". This task requires, assuming relevant evidence is provided, that the "full spectrum of consequences that may result from granting, or denying, the H&C application", which includes education, accommodation, personal safety and health, will be considered (*Taylor*, at para 31). Again, the Officer's BIOC analysis does not provide this full and careful attention to the interests of the Applicant's three grandchildren in light of the evidence on record, especially given the central role played by the Applicant in the lives of these children up to now.

[29] Although I appreciate the fact that an H&C exemption is an exceptional and discretionary remedy (*Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, at para 15), I find that the Officer's failure to undertake a meaningful and proper analysis of the BIOC factor as required by the case law constitutes a reviewable error.

[30] Neither party proposed a question for certification. None will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review application is granted;
2. The decision denying the Applicant's application for permanent residence on humanitarian and compassionate grounds, dated June 17, 2016, is set aside and the matter is remitted to Immigration, Refugees and Citizenship Canada for redetermination by a different immigration officer; and
3. No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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