Date: 20071001

Docket: IMM-3766-06

Citation: 2007 FC 984

Ottawa, Ontario, October 1, 2007

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

SANDRA MARIA DE SOUSA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of a decision by an immigration officer dated June 20, 2006, which refused the applicant's application for permanent residence on humanitarian and compassionate (H&C) grounds.

[2] The applicant seeks an order setting aside the negative H&C decision and remitting the matter for redetermination before another immigration officer.

Background

[3] The applicant, Sandra Maria De Sousa, is a citizen of Brazil. The circumstances leading to the applicant's application for permanent residence on H&C grounds were set out in her affidavit. The applicant and her daughter entered Canada as visitors in December 1996, and went to live with the applicant's sister and brother-in-law in Toronto. The applicant's visa expired in June 1997; however, she and her daughter remained in Canada. The applicant sought employment as a housekeeper, and participated in volunteer activities. She was allegedly abused by her sister and brother-in-law, in that they confined her to their home and forced her to care for an elderly relative.

[4] The applicant claimed that in 1999, her sister expressed an interest in adopting her daughter. The applicant did not want to give up the legal guardianship of her daughter; however, she eventually became convinced that it would be in the child's best interest to do so. The applicant was assured by her sister that her relationship with the child would not be affected by the adoption. The adoption was finalized in 2002.

[5] The applicant and her daughter moved out of her sister's home in 2003 and the applicant remained the child's primary caregiver. She claimed that the parent-child bond between herself and

her daughter was strong as the child received no financial or emotional support from her adoptive parents. The applicant applied for permanent residence on H&C grounds in May 2004.
Her application was denied by decision dated June 20, 2006. This is the judicial review of the negative H&C decision.

Officer's Reasons

[6] By letter dated June 20, 2006, the applicant was advised that her application for permanent residence on H&C grounds had been refused. The H&C narrative form constituted the reasons for the officer's decision. The officer acknowledged that the applicant had been in Canada for ten years and might find it difficult to leave. However, she had violated IRPA by remaining in Canada without legal status.

[7] The officer also considered the applicant's level of establishment in Canada. The officer noted the applicant worked and volunteered at a senior's home, but felt that leaving Canada after having developed this level of establishment would not be an unusual hardship for the applicant. The applicant had a sister in Canada; however, there was evidence on file that she was abusive toward the applicant. The officer was not satisfied that hardship would be suffered if the applicant was forced to leave her sister. The applicant had family in Brazil, and appeared capable of becoming self-sufficient.

[8] The applicant had a biological daughter in Canada; however, the child had been adopted by the applicant's sister and brother-in-law in October 2002. The child became a Canadian citizen in September 2005. The officer noted that while the applicant no longer had any rights to the child, she was her caregiver. However, there was no evidence as to how the child felt about her relationship with the applicant. The officer was satisfied that the child's adoptive parents had her best interests at heart.

[9] The officer concluded that the applicant had not demonstrated that unusual and undeserved or disproportionate hardship would be experienced if she was asked to apply for permanent residence from outside Canada.

Issues

[10] The applicant submitted the following issues for consideration:

1. Did the officer breach the duty of fairness?
2. Did the officer fail to consider the best interests of the child?
3. Did the officer make an unreasonable decision?
4. Did the officer ignore evidence and make perverse findings concerning the hardship that would be faced by the applicant and her biological daughter?

[11] I would rephrase the issues as follows:

1. Did the officer fail to properly consider the best interests of the applicant's biological daughter?

2. Did the officer err in failing to request additional information regarding the best interests of the applicant's biological daughter?

Applicant's Submissions

[12] The applicant submitted that the officer made the following unsupported assumptions: (1) that her daughter was not neglected by her adoptive parents; and (2) that her daughter was in the care of her adoptive parents. It was submitted that the evidence demonstrated that the applicant was the only person who cared for her daughter. The applicant submitted that the officer ought to have asked the applicant questions about her daughter's caretaking and living arrangements (see *Del Cid* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 326). It was submitted that the officer breached the duty of fairness by failing to both ask such questions, and give the applicant an opportunity to respond.

[13] The applicant submitted that there was no evidence that the adoptive parents had her daughter's best interests at heart. The applicant noted that the Immigration Policy Manual IP5 states that an H&C applicant's submissions may be considered in light of international human rights standards, such as the United Nations' *Convention on the Rights of the Child*, which confirms the paramount importance of the best interests of the child in all actions concerning children.

[14] Policy Manual IP 5 also states that the relationship between an H&C applicant and a child directly affected by a decision need not necessarily be that of parent and child. One factor to be considered in assessing a child's welfare is the level of dependency between the child and the applicant. The applicant submitted that the officer failed to analyze the level of dependency between herself and her daughter, and the effects of the decision on the child. In *Williams* v. *Canada (Minister of Citizenship and Immigration)* (2006), 54 Imm. L.R. (3d) 283, 2006 FC 576, the Federal Court found that the failure to perform any analysis of a dependant child's best interests was a reviewable error.

[15] The applicant submitted that the officer erred in failing to provide her daughter with an opportunity to participate in the H&C application (see *Convention on the Rights of the Child*, Articles 9 and 12). It was noted that in *Cheema* v. *Canada (Minister of Citizenship and Immigration)* (2002), 220 F.T.R. 280, 2002 FCT 638, the Court held that an adoption was not determinative for immigration purposes of the relationship between the adopted child and his or her adoptive parents, although it was a factor to be considered. The applicant submitted that the officer erred in ignoring evidence of the hardship her daughter would suffer if she were left alone with her adoptive parents.

[16] The applicant submitted that the officer erred in finding that the applicant could apply for permanent residence from outside Canada. It was submitted that the purpose of an H&C application is to allow applicants to apply for landing from within Canada, especially if they did not meet the criteria under IRPA. The applicant submitted that she would not qualify under any prescribed

category for permanent residence other than through an H&C application, given her low level of education, lack of a sponsor, and the best interests of her child.

[17] The applicant submitted that the officer made a perverse finding in concluding that he "was not satisfied that it would be considered a hardship to leave her sister based on the submissions on file." The officer accepted that the adoptive parents abused the applicant. It was submitted that since they were her daughter's legal guardians, they would have the power to decide whether the child could leave Canada with the applicant. It was submitted that the adoptive parents would not let the child go with the applicant; therefore, they would both suffer undue hardship through separation.

[18] Finally, it was submitted that there was no evidence that the applicant could become self-sufficient in Brazil. The applicant noted the high rate of poverty and unemployment in Brazil, and submitted that the officer's conclusion was perverse in this regard.

Respondent's Submissions

[19] The respondent submitted that the standard of review applicable to an H&C decision is reasonableness (see *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, (1999) 174 D.L.R. (4th) 193). The respondent noted that the crux of the applicant's argument was that the officer failed to conduct a further inquiry as part of his evaluation of the best interests of the child. It was submitted that the onus was upon the applicant to make her case, and that the officer did not have a duty to seek out information that was not provided by the applicant (see

Owusu v. *Canada (Minister of Citizenship and Immigration)*, [2003] 3 F.C. 172, 2003 FCT 94 (F.C.A.)).

[20] The respondent submitted that the officer considered the limited information provided by the applicant about her relationship with her biological daughter. Contrary to the applicant's submission, it was submitted that the officer did not find that the adoptive parents were the child's sole caregivers, but found that the applicant was a caregiver of the child. The respondent noted that there was no evidence that the adoption was not genuine, that the child was at risk, or that the adoptive parents did not have her best interests at heart. It was submitted that a child's interests could only be assessed insofar as there was evidence of those interests (see *Anaschenko* v. *Canada (Minister of Citizenship and Immigration)*, 2004 FC 1328).

[21] The respondent submitted that it was not the role of the H&C officer to question an adoption validly enacted in Ontario (see *Cheema* above). It was submitted that there was no evidence that the applicant was forced to give up her daughter for adoption. The respondent submitted that the argument that the officer erred in failing to consider the best interests of the child was without merit. The respondent submitted that it was reasonable for the officer to conclude that based upon the evidence, the best interests of the child would be served if she stayed in Canada with her adoptive parents.

[22] The respondent submitted that the officer provided a reasonable explanation for refusing to grant her H&C application. The officer found that while the applicant had some degree of

establishment in Canada, the loss of these opportunities did not constitute undue hardship. It was submitted that the fact that the applicant would have to leave her biological daughter was not necessarily undue hardship, as it was a consequence of the risk she took in staying in Canada without status. It was submitted that the hardship faced by the applicant was no more than what was inherent in being asked to leave Canada after having lived in the country for a period of time (see *Irmie* v. *Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1906 (QL)).

Applicant's Reply

[23] The applicant submitted that *Anaschenko* above, did not apply to her case, since it concerned a parent who had never resided with his child and with whom he had regular visitation. It was submitted that there was evidence in the case at hand that the applicant had been taking care of her daughter since she was born, and that she had always resided with her.

Analysis and Decision

Standard of Review

[24] A decision with respect to an application for permanent residence on H&C grounds is reviewable on the standard of reasonableness (see *Baker* above).

[25] **Issue 1**

Did the officer fail to properly consider the best interests of the applicant's biological daughter?

Pursuant to subsection 25(1) of IRPA, the best interests of a child directly affected by an H&C decision must be taken into account by the officer responsible for the decision. The applicant submitted that the officer failed to consider the best interests of her daughter. The respondent submitted that the officer considered the evidence provided by the applicant regarding the child's best interests, and reached a reasonable conclusion in finding that it was in the child's best interests

to remain in Canada with her adoptive parents. The applicant's H&C application indicated that she had a daughter in Canada, and that they would both suffer if the applicant's application was refused:

> So not just I, but my daughter will suffer if I have to leave. I have been taking care of her since she was born. I could not leave otherwise we will suffer and it is not possible be apart from her…
>
> I have attached letters from the families that I have been working for as housekeeper, and since I left my sister's house I have support myself and my daughter without any Financial Assistance from Government and in Brazil if I have to leave, I won't be able to support myself and my daughter.
>
> (Emphasis Added).

[26] The applicant also submitted a letter from a neighbour indicating that she had met the applicant and her daughter in 2002 and noted that the applicant walked her daughter to school and all other activities. The letter also indicated that the applicant was forced to work for her sister and brother-in-law without pay.

[27] The officer's consideration of the best interests of the child constituted the following:

> Ms. De Sousa states that she has a daughter in Canada. It is noted that Ms. De Sousa gave up her rights and allowed her daughter to be sponsored by her Canadian citizen sister and brother-in-law. This adoption took place under Canadian Federal Court Law in October 2002. The child was granted permanent residence status on 12 Dec 2002. Their daughter, Amy Sita, became a Canadian citizen 17 September 2005. Therefore, Ms. De Sousa has no rights to the child. However, I note that there are still family ties. That she is a caregiver for Amy. Her biological daughter is still in her life because of the situation. I can understand that Ms. De Sousa is part of Amy's life but she is not the legal parent. There is no documents or information to state how the child feels about the relationship between her and the

> applicant. I must consider that Mr. and Mrs. Sita are the legal guardians and that they have the best interests of the child at heart.
>
> (Emphasis Added).

[28] The officer acknowledged that the applicant took care of her daughter, but noted that there was a lack of evidence regarding the daughter's relationship to the applicant. The officer concluded that as the child's legal guardians, her adoptive parents had her best interests at heart. There was evidence on file that the applicant was still in a parent-child type of relationship with her daughter; that she had continually resided with her daughter, both at her sister's home and after she moved out of that home in 2003; and that she had supported her daughter financially.

[29] The officer did not assess what would happen to the child if she were separated from the applicant and left in the care of her adoptive parents. There was no evidence on file that the daughter's adoptive parents had cared for or supported her, beyond being her legal guardians. In my view, the officer failed to properly assess the best interests of the applicant's biological daughter, regardless of the fact that legal guardianship had been awarded to her adoptive parents.

[30] I am of the opinion that the officer's decision is unreasonable as she failed to properly assess the best interests of the applicant's biological child.

[31] Because of my finding on the first issue, I need not deal with the remaining issue.

[32] The application for judicial review is therefore allowed and the matter is referred to a different officer for redetermination.

[33] Neither party wished to submit a serious question of general importance for my consideration for certification.

JUDGMENT

[34] **IT IS ORDERED that** the application for judicial review is allowed and the mater is referred to a different officer for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The United Nations' *Convention on the Rights of the Child*:

Article 9	Article 9
1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.	1. Les Etats parties veillent à ce que l'enfant ne soit pas séparé de ses parents contre leur gré, à moins que les autorités compétentes ne décident, sous réserve de révision judiciaire et conformément aux lois et procédures applicables, que cette séparation est nécessaire dans l'intérêt supérieur de l'enfant. Une décision en ce sens peut être nécessaire dans certains cas particuliers, par exemple lorsque les parents maltraitent ou négligent l'enfant, ou lorsqu'ils vivent séparément et qu'une décision doit être prise au sujet du lieu de résidence de l'enfant.
2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.	2. Dans tous les cas prévus au paragraphe 1 du présent article, toutes les parties intéressées doivent avoir la possibilité de participer aux délibérations et de faire connaître leurs vues.
3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis,	3. Les Etats parties respectent le droit de l'enfant séparé de ses deux parents ou de l'un d'eux d'entretenir régulièrement des relations personnelles et des contacts directs avec ses deux

except if it is contrary to the child's best interests.

parents, sauf si cela est contraire à l'intérêt supérieur de l'enfant.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

4. Lorsque la séparation résulte de mesures prises par un Etat partie, telles que la détention, l'emprisonnement, l'exil, l'expulsion ou la mort (y compris la mort, quelle qu'en soit la cause, survenue en cours de détention) des deux parents ou de l'un d'eux, ou de l'enfant, l'Etat partie donne sur demande aux parents, à l'enfant ou, s'il y a lieu, à un autre membre de la famille les renseignements essentiels sur le lieu où se trouvent le membre ou les membres de la famille, à moins que la divulgation de ces renseignements ne soit préjudiciable au bien-être de l'enfant. Les Etats parties veillent en outre à ce que la présentation d'une telle demande n'entraîne pas en elle-même de conséquences fâcheuses pour la personne ou les personnes intéressées.

Article 12

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

1. Les Etats parties garantissent à l'enfant qui est capable de discernement le droit d'exprimer librement son opinion sur toute question l'intéressant, les opinions de l'enfant étant dûment prises en considération eu égard à son âge et à son degré de maturité.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.	2. A cette fin, on donnera notamment à l'enfant la possibilité d'être entendu dans toute procédure judiciaire ou administrative l'intéressant, soit directement, soit par l'intermédiaire d'un représentant ou d'une organisation approprié, de façon compatible avec les règles de procédure de la législation nationale.

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27:

11.(1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document shall be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	11.(1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement, lesquels sont délivrés sur preuve, à la suite d'un contrôle, qu'il n'est pas interdit de territoire et se conforme à la présente loi.
25.(1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations	25.(1) Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.

FEDERAL COURT

SOLICITORS OF RECORD

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