Federal Court Cour fédérale

Date: 20141022

Docket: IMM-2673-13

Citation: 2014 FC 1008

Toronto, Ontario, October 22, 2014

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

ALCEMEBA BAUTISTA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Alcemeba Bautista [the Applicant] is a citizen of the Philippines bringing a judicial review for a decision rejecting her Application for permanent residence based on humanitarian and compassionate [H&C] grounds made pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act* (SC 2001, c 27) [IRPA].

[2] The Applicant is a single mother who lives in Toronto with her 10-year-old Canadian daughter, Renalyn Bautista. The Applicant arrived in Canada on December 12, 1999, obtaining permanent residency status as a result of being sponsored by her former husband, from whom she separated in 2000.

[3] In 2006, the Applicant married her current husband, a resident and citizen of the Philippines. In the course of attempting to sponsor her spouse to come to Canada, she was directed to attend an inadmissibility hearing before the Immigration Division of the Immigration and Refugee Board of Canada. The result of this hearing was inadmissibility to Canada pursuant to section 40(1)(a) of IRPA for misrepresenting material facts in the course of her permanent residency application with her first husband, who had been in a separate common law relationship at the time. The Removal Order that resulted was upheld by the Immigration Appeal Division and was not appealed further because of deficiencies in the application for judicial review.

[4] An H&C Application was submitted on September 15, 2011. The H&C Application stressed the best interests of her Canadian-born daughter, Renalyn. Many of Renalyn's close personal connections live in Canada – her aunt and uncle (the Applicant's sister) and her two cousins, whom she considers siblings, live on the same floor in her building. Renalyn's grandmother (the Applicant's mother) lives in the same building and her other aunt lives in Montréal. Her biological father also lives in Toronto, whom she sees on occasion throughout the year. Renalyn visited the Philippines twice as a child, but given that she was between 2-3 years

old at the time, she has no recollection of the trips. She has a rudimentary ability to speak Tagalog, but cannot read or write it.

[5] The Applicant also emphasized her own personal and economic establishment in Canada, having lived in the country for over 12 years. Aside from her family connections mentioned above, Ms. Bautista co-owns a convenience store with her sister, owns her own cleaning business and is an active participant in her church.

[6] Ms. Bautista's H&C application was rejected on March 5, 2012 in a decision from an immigration officer in Citizenship and Immigration Canada's Backlog Reduction Office in Niagara Falls (CIC BRO-NF). The Applicant subsequently sought Federal Court leave to judicially review the H&C refusal, which was granted on November 13, 2012. Just a few days prior to the scheduled Court hearing, the Applicant settled the matter with the Department of Justice, agreeing to a re-determination by a different officer.

[7] On March 25, 2013, another immigration officer in the same CIC BRO-NF office issued a decision denying Ms. Bautista's second H&C application. On April 9, 2013, the Applicant filed a second Federal Court application for leave and judicial review of this new H&C decision [Decision], and that forms the basis of these Reasons.

II. Decision

[8] The Decision denied the H&C application, finding that the Applicant's removal from Canada would not constitute unusual, undeserved or disproportionate hardship. With regard to

the Applicant, the CIC BRO-NF officer [Officer] found that her experiences as a business owner would enable her to support herself if removed to the Philippines and the businesses in Canada would be able to continue without her, and that the Applicant has family in the Philippines who would be able to assist with her transition back. The Officer concluded that while leaving Canada would be difficult for the Applicant, she had not integrated herself into Canadian society to the extent that her departure would cause unusual, undeserved or disproportionate hardship.

[9] In assessing the best interests of the child [BIOC], the Officer found that Renalyn would be able to integrate into the Filipino school system, in spite of her lack language skills. While separation from her family may be emotionally straining, the Officer found that these relationships could be maintained electronically and through occasional visits. Furthermore, the Officer found that while the quality of medical care would not be equivalent to Canada's, the Applicant was unable to demonstrate that Renalyn had medical issues that either required treatment in Canada or same would be unavailable in the Philippines. The Officer concluded that the BIOC would not be served in the Philippines. The Officer also concluded that the decision of the Applicant to have Renalyn accompany her to the Philippines was a parental choice.

III. Issues

[10] The Applicant raised the following issues in her written materials:

1. In rejecting the H&C, did the decision give sufficient consideration to the BIOC?
2. Did the Officer err in the assessment of the Applicant's degree of establishment?

[11] The hearing focused on the first issue, which raises serious concerns.

IV. Submissions of the Parties

[12] First, the Applicant submits that the Officer failed to conform to the structure of conducting a BIOC analysis. The Officer did not, as per the guidance of the Federal Court of Appeal in *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 15, and *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, first identify the best interests of the child and then determine the harm that would ensue, and/or apply the test in *Williams v Canada (Minister of Citizenship and Immigration)*, 2013 FC 258, which holds that in addition to the 2 steps above, the Officer must also determine the weight the BIOC factor plays in the ultimate balancing of factors in the application. The Applicant argues the Officer did not identify the best interests of Renalyn or balance various compelling factors in the overall analysis of the application.

[13] Ultimately, the Applicant submits that the BIOC will not favour the removal of the parent in all but exceptional circumstances, per the jurisprudence. The Officer characterizes Renalyn's potential relocation to the Philippines as a neutral factor but does not describe why this is an exceptional case where the BIOC would favour removal of the parent. In short, while the decision describes ways in which Renalyn could adapt to life in the Philippines, it does not provide reasons as to why this would be in her best interests. The Officer also erred by couching the matter of Renalyn's relocation as a parental choice, in contradiction to the Federal Court of Appeal guidance in *Hawthorne* that a BIOC analysis includes the hardship that a child would suffer from the decision of a child to accompany a parent abroad.

[14] Second, the Applicant contends that the Immigration Officer did not provide a cogent analysis of the Applicant's establishment in Canada as per *Lin v Canada (Minister of Citizenship and Immigration)*, 2011 FC 316 at para. 2. The Officer spoke of the Applicant's establishment in favourable light, but then came to the conclusion that her removal would not constitute unusual, undeserved or disproportionate hardship without corresponding reasons.

[15] The Respondent, on the other hand, submits that the Officer's BIOC analysis was reasonable. As stated in *Webb v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1060 at para. 13, the *Williams* test advocated by the Applicant is a useful, but optional, guideline. There is no formal requirement as to the words that must be used or the approach that must be followed in H&C applications, as long as the Officer was alert, alive and sensitive to the BIOC [*Hawthorne* at para. 7]. The Officer demonstrated this sensitivity by considering several factors, including Renalyn's familial circumstances and her ability to adapt to Filipino society. The Respondent submits that the Officer, unlike the Applicant contends, did not conclude that the BIOC favoured Ms. Bautista's removal from Canada when finding that, "….the codification of the principle of "best interest of a child" in the *Immigration and Refugee Protection Act* requires that it be given substantial weight in the assessment of an application however; it is only one of many important factors that must be considered."

[16] As for the Officer's analysis of establishment, the Respondent reminds the Court that H&C approval is an exceptional, discretionary measure: The process is not designed to eliminate hardship inherent in being asked to leave the country, but rather unusual, undeserved and disproportionate hardship. As the decision notes, leaving family and job is not unusual,

undeserved and disproportionate hardship which in this case, was a consequence of staying on in Canada without proper status.

V. Analysis

[17] The parties agreed that the standard of review with respect to this case is one of reasonableness, and hence, whether the decision was within the range of possible outcomes and evidenced transparency, justification, and intelligibility: *Dunsmuir v New Brunswick*, 2008 SCC 9.

[18] While highly deferential, the *Dunsmuir* test is often difficult for an applicant to meet in seeking redress, this Court finds the Applicant has done just that in this matter: the Officer made a clear error in its the BIOC assessment, and the framework used to undertake that analysis with respect to young Renalyn.

[19] Case law, including from all three levels of the Canadian judiciary (i.e. the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, Federal Court of Appeal in *Hawthorne* and *Kisana*, and this Court in various cases including those discussed below), speaks to the primacy of the child in any BIOC examination, assuming that adequate evidence has been provided for the Officer to look at the circumstances of the child in question. In this instance, the Applicant had provided significant evidence upon which the Officer could and should have focused in considering BIOC.

[20] Otherwise stated, with facts such as in this case, it is the child that must, first and foremost, be considered when analyzing BIOC, rather than whether the child could adapt to life in another country, accompany parents, or otherwise fit what might be in someone else's fate. It would be exceptional for relocation to be the better solution, as Justice Evans found for the Court of Appeal in *Hawthorne*:

> [5] The officer does not assess the best interests of the child in a vacuum. The officer may be presumed to know that living in Canada can offer a child many opportunities and that, as a general rule, a child living in Canada with her parent is better off than a child living in Canada without her parent. The inquiry of the officer, it seems to me, is predicated on the premise, which need not be stated in the reasons, that the officer will end up finding, absent exceptional circumstances, that the "child's best interests" factor will play in favour of the non-removal of the parent. In addition to what I would describe as this implicit premise, the officer has before her a file wherein specific reasons are alleged by a parent, by a child or, as in this case, by both, as to why non-removal of the parent is in the best interests of the child. These specific reasons, must, of course, be carefully examined by the officer.

[21] The compelling BIOC facts of this case, as mentioned in paragraphs 4 and 20 above, which were before the Officer, are that all of Renalyn's connections are to Canada: she was born in Canada, and has spent her entire life here (over 12 years). She has grown up in close proximity to all relevant family members, including her aunts, grandmother and cousins. She has only ever attended school in Canada, and all her friends are in this country. She has no meaningful contact or relationship with her father, or other relatives that are in the Philippines. She does not speak Tagalog fluently, and it is not obvious that she would be able in her adolescent years to cope with learning a new language, school system, and culture. This is especially so, given the fact that her mother has no particular ties or income stream in the Philippines that would provide for Renalyn, as she does in Canada.

[22] Regarding parental “choice”, it was simply never a credible possibility that this single mother would abandon her daughter in Canada, no more than any responsible parent would abandon their child thousands of miles away.

[23] The Federal Court of Appeal case law is clear that the BIOC will not favour the removal of the parent in all but exceptional circumstances (*Hawthorne, Kisana,* above*)*. That is not the premise or framework from which the Officer assessed this case. Rather than working from the “non-exceptional” position that would as a starting proposition, have clearly favoured Renalyn remaining in Canada with her mother, the Officer took, at best, a neutral approach by looking at whether she could overcome obstacles in returning to the Philippines. Justice Annis in *Joseph v Canada (Minister of Citizenship and Immigration),* 2013 FC 993 spoke to this flaw:

> [20] The officer’s conclusion in the present case, which describes the best interest for the children as simply remaining with their parents, fails to differentiate the best interests of the child being removed or not from Canada. Therefore, his decision does not state any conclusion on the best interests of the child remaining or parting depending upon the face removal of the parents, which is the essence of the BIOC test.

[24] Similarly, Justice Kane in *Chandidas v Canada (Minister of Citizenship & Immigration)*, 2013 FC 258 found that the child’s best interests was remaining with the primary caregiver. Like in the initial H&C review in this case, the *Chandidas* Officer was considering the BIOC of a 9 year old girl (as was the case in the first H&C decision):

> [69] The starting point is to identify what is the child's best interest. The officer merely stated early in his reasons that it was in the best interests of the children (which means the best interest of Rhea since the two sons were over 18) to remain with their parents. That is an odd starting point given that a nine-year-old girl would never be expected to remain in Canada alone.

[25] It should be noted that the instant Decision contains only one brief boilerplate-type reference of "BIOC" in 6 paragraphs, with no specific reference to Renalyn, or what her best interests might be. Rather, the focus of the Decision is all about the mother, Mrs. Bautista, with scant attention to the child. As stated recently in this Court by Justice Zinn in *Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813:

> [16] Undoubtedly placing a child in an environment where his or her basic needs are not met can never be said to be in that child's best interest. However, to suggest that the child's interest in remaining in Canada is balanced if the alternative provides a minimum standard of living is perverse. This approach completely fails to ask the question the Officer is mandated to ask: What is in this child's best interest? The Officer was required to first determine whether it was in Leticia's best interests to go with her parents to Brazil, where she had never been before, or for her to remain in Canada where she had "better social and economic opportunities." Only once he had clearly articulated what was in Leticia's best interest could the Officer then weigh this against the other positive and negative elements in the H&C application.

[26] Had the Applicant been the sole protagonist in the litigation before this Court, then the matter would be reviewed on an entirely different basis, and through an entirely different lens. However, the case law, the policy, and subsection 25(1) itself, all dictate that one has to pay equally close, if not more attention, to the young lives impacted in an H&C analysis. Children, amongst society's most vulnerable citizens, cannot be said to be minor players on the immigration stage: their destiny must necessarily be front and center in any H&C analysis, so that they too are key protagonists in H&C applications. This Court has often held that officers must be "alert, alive and sensitive" to the BIOC. As Madame Justice L'Heureux-Dubé wrote in *Baker*, where the decision below was deemed unreasonable because the Officer failed to be alert, alive and sensitive to the BIOC:

> The officer was completely dismissive of the interests of Ms. Baker's children. As I will outline in detail in the paragraphs that follow, I believe that the failure to give serious weight and consideration to the interests of the children constitutes an unreasonable exercise of the discretion conferred by the section, notwithstanding the important deference that should be given to the decision of the immigration officer.
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> …
>
> … 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. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, 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. [*Baker* at paras. 65 and 75].

[27] Another decision of this Court encapsulated this requirement to view the H&C through the child's lens, when the late Justice Blanchard found in *Mulholland v Canada (Minister of Citizenship and Immigration),* 2001 FCT 597 at para. 30:

> […]
>
> Where the Minister purports to remove from Canada a person who has dependent children, the Minister cannot ignore the fact that the practical consequence of her decision is to deprive the children of the benefit of subsection 4(2) of the *Act*. In those circumstances, is it not up to the Minister to rebut the conclusion that the presence of the children is a humanitarian factor justifying the exercise of discretion? Nothing in *Baker* would make such a presumption irrebuttable. No state can consistently excuse the misconduct of adults because of the effects on their children without creating a climate of irresponsibility both as to the adults' conduct and as to the motives for having children. But the rebuttal must be based upon facts in relation to the parent which would weigh more heavily in the balance than the dependency of the children upon the parent and their statutory, if not constitutional right, to remain

> in Canada. The bald statement that the presence of the children is the result of a parental choice does not amount to rebuttal.

[28] To see everything through the lens of whether one reasonably can overcome the inevitable hardships that accompany a new life, as the Officer did in this case, resembles the H&C test that is applied to adults. Children are malleable – far more so than adults – and starting with the question of whether they can adapt will almost invariably predetermine the outcome of the script, namely that the child will indeed overcome the normal hardships of departure, and adjust to a new life, including learning a brand new language (Tagalog in this case). Undertaking the analysis through this lens renders the requirement to take into account the best interests of a child directly affected, as statutorily required in subsection 25(1) devoid of any meaning.

[29] As the Court of Appeal state in *Owusu v Canada (Minister of Citizenship and Immigration)* (F.C.A.), 2004 FCA 38:

> [5] An immigration officer considering an H & C application must be "alert, alive and sensitive" to, and must not "minimize", the best interests of children who may be adversely affected by a parent's deportation: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 75. However, this duty only arises when it is sufficiently clear from the material submitted to the decision maker that an application relies on this factor, at least in part. Moreover, an applicant has the burden of adducing proof of any claim on which the H & C application relies. Hence, if an applicant provides no evidence to support the claim, the officer may conclude that it is baseless.

[30] The Officer in the present case had plenty of evidence about the impact of moving on the child herself, and failed to conduct an appropriate analysis given all the case law cited above,

precisely by either failing to consider, and/or misunderstanding that which was relevant to the analysis of BIOC (see, for instance, *Chandidas* above at para. 47).

[31] The conclusion on issue # 1 is that in rejecting the H&C, the Officer failed to give sufficient consideration to BIOC and the decision was therefore unreasonable.

[32] Having found the first issue (BIOC) to be determinative, and having focused on that issue at the hearing, there is no need to rule on the second issue challenged by the Applicant (establishment).

[33] Finally, it should be noted that the Court's judicial resources should be reserved to litigate serious matters, as they arise. In this case, a judicial review of the first (March 2012) H&C decision was proceeding to litigation in this Court but was then settled approximately a week before the hearing, after the expenditure of significant preparation, lawyer time, court resources, and anxiety for the Applicant and her family. One would have expected that to result in a new H&C decision that acknowledged the settlement, rather than what is essentially a repetition of the earlier H&C decision in March 2013 a year later. The parties and Court once again went through all the preparatory stages and hearing for this judicial review in order to correct errors in the Officer's approach to BIOC, that due to the file history were, in the Court's view, entirely avoidable. As the Applicant states in her Affidavit:

> 31. I was very happy to reach a settlement with the Department of Justice. But at the same time, I was upset that they had waited until a week before my judicial review hearing and after I had spent thousands of dollars to admit their mistake. Unlike the Department of Justice, I am a single mother who does not have large sums of

> money to engage in litigation for its own sake. Nevertheless, the Department of Justice required that I not seek any costs against the respondent as a condition of the settlement. Accordingly, I felt I had no choice but to agree.[Applicant's Record, pp. 24-25]

[34] It is for this reason that the Court deems it fit to endorse the Cost Order agreed to by the parties which reflects the special circumstances of this case. The Costs are nominal, to acknowledge that this is still an application that by definition involves an exemption from the normal requirements of the Act: *Ndungu v Canada (Citizenship and Immigration)*, 2011 FCA 208.

[35] It is the Court's sincere hope that the new Officer assigned to the matter properly considers the issue of BIOC, which has not been properly considered to date.

[36] Neither party suggested any question for certification, nor is there any question deserving of certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review is allowed and the matter is returned for reconsideration by a new Officer;
2. Costs are awarded to the Applicant on consent of the parties, as set out in the Order dated October 8, 2014;
3. There will be no question certified in this matter.

"Alan S. Diner"

Judge

ANNEX A

Immigration and Refugee Protection Act (SC 2001, c 27) Section 25

25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

Loi sur l'immigration et la protection des réfugiés (LC 2001, ch 27) Article 25

25. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de resident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de resident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considerations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

FEDERAL COURT

SOLICITORS OF RECORD

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