Federal Court  Cour fédérale

Date: 20190131

Docket: IMM-3816-18

Citation: 2019 FC 133

Ottawa, Ontario, January 31, 2019

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

MAYRA AGUIRRE RENTERIA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review by Mayra Aguirre Renteria [Ms. Aguirre] challenging a decision by a Senior Immigration Officer [the Officer] denying her application for permanent residency on humanitarian and compassionate [H & C] grounds.

[2] Ms. Aguirre is a 30-year-old black woman who came to Canada in 2015 from Colombia. Later that year, she claimed refugee protection but that claim was ultimately denied.

Ms. Aguirre gave birth to a daughter in Vancouver on December 18, 2015. The expectation is that both would return to Colombia if Ms. Aguirre is removed.

[3] Ms. Aguirre and her brother, Arinson, applied for H & C relief on September 25, 2017. Ms. Aguirre sought relief based on the best interests of her Canadian child, establishment factors and health considerations. Her claim was rejected on May 15, 2018. This is the decision she seeks to challenge on this application.

[4] For the reasons that follow, the application is allowed. The determinative issue concerns the sufficiency of the Officer's best interest of a child [BIOC] analysis. It is unnecessary for me to consider all of the other arguments presented by counsel beyond the observation that the Officer's treatment of Ms. Aguirre's medical situation also left something to be desired.

[5] Ms. Aguirre's challenge to the Officer's BIOC analysis raises an issue of mixed fact and law and stands to be reviewed on the standard of reasonableness: see *Kanthasamy v Canada*, 2015 SCC 61 at para 44, 391 DLR (4th) 644 [*Kanthasamy*]. I also endorse the views of Justice Alan Diner in *Miyir v Canada*, 2018 FC 73, 287 ACWS (3d) 737, where he noted that, while significant deference is owed to H & C decision-makers, deference does not constitute a "blank cheque". The reasons given must still meet the requirements of transparency, justification and intelligibility as described in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

[6] The Officer's BIOC comments contain no meaningful analysis of the evidence concerning the hardships faced by a black child living in Colombia. The decision contains a few

unhelpful truisms about the benefits of the living in the care of a supportive parent and the resilience of young children to changing circumstances, but the description of the prevailing conditions is limited to the tepid acknowledgement that "current country conditions for Afro-Colombians are less than favourable".

[7] To carry out a proper BIOC analysis it is not enough to pay half-hearted lip-service to the evidence. I reject the Minister's argument that the sufficiency of reasons concern can reasonably be disregarded on judicial review because the relevant evidence was obviously considered and weighed in favour of the family.

[8] We are told by the Supreme Court of Canada in *Kanthasamy* that the BIOC analysis required of an H & C review requires consideration of a multitude of factors relating to a child's emotional, social, cultural and physical welfare. Included on the list are country conditions, education, special needs, health care and matters related to gender. We are also told that children are often deserving of special consideration and that their interests are to be given <u>significant</u> weight in the overall H & C analysis. It is not enough to state that the best interests of a child affected by a removal from Canada have been taken into account. Where a child is to be sent to a place where conditions are markedly inferior to Canadian standards and where the expected hardship is still found to be insufficient to support relief, there must be a meaningful engagement with the evidence. This is what the Court meant in *Kanthasamy* at paragraph 25 when it said that H & C decision-makers "must substantively consider and weigh all the relevant facts and factors before them".

[9] In this case, the bare acknowledgement by the Officer of less favourable conditions in Colombia was insufficient. What Ms. Aguirre was entitled to know is why those less favourable conditions were considered to be undeserving of relief when weighed in the evidentiary balance.

[10] The record before the Officer contained a significant body of country condition evidence indicating that women, blacks and children in Colombia face significant hardships in almost all aspects of life. At the root of much of the difficulty faced by Afro-Colombians is a long-standing, pervasive history of racial inequality and prejudice.

[11] Black women and children are particularly at risk. Discrimination against Afro-Colombians is often manifested in violence [see the Certified Tribunal Record [CTR] at p 191].

[12] A 2017 United Nation's report described the situation for blacks in the following way:

> 18. Afro-Colombian representatives highlight pervasive structural discrimination, including access to quality education, employment and participation in economic life, housing, effective political participation and access to justice. The estimated illiteracy index within the Afro-Colombian population is 30 per cent, compared with the national average of 16 per cent. Nearly 10 per cent of Afro-Colombian children from 6 to 10 years of age do not access primary education, with the percentage believed to be far higher in some regions.
>
> [Footnotes omitted.]

[13] The record also disclosed that Afro-Colombian women are often the targets of sexual violence and exploitation [see CTR at p 418]. Sexual exploitation of children was also a reported problem [see CTR at p 494].

[14] The quality of educational opportunities for black students was said by one non-governmental organization to be poor or very poor [see CTR at p 437].

[15] According to another report, unemployment disproportionally affects women who also face discrimination in hiring and wages [see CTR at p 509). The United States Department of State Report for 2016 described child abuse as a serious problem along with sexual exploitation of children [see CTR at pp 35-36]. That report described the general situation for Afro-Colombians in the following way:

> Afro-Colombians are entitled to all constitutional rights and protections, but they faced significant economic and social discrimination. According to a 2016 UN report, 32 percent of the country's population lived below the poverty line, but in Choco, the department with the highest percentage of Afro-Colombian residents, 79 percent of residents lived below the poverty line. NGO Afro- Colombian Solidarity Network reported 32 percent of Choco's residents lived in extreme poverty. Choco continued to experience the lowest per capita level of social investment; ranked last among departments in terms of infrastructure, education, and health; and experienced the highest rate of income inequality in the country.

[16] A 2013 human rights report stated that Afro-Colombians are plagued by high rates of informal labour, unemployment, high drop-out rates, illiteracy, poor access to potable water and sanitation, child labour and limited access to government services [see CTR at p 206].

[17] The question the Officer failed to ask or answer is whether the return of Ms. Aguirre and her Canadian infant to the general conditions described above (and elsewhere in the record) would be considered by decent fair-minded Canadians to be unacceptable. It is not my role to answer that question but only to ensure that it receives reasonable consideration and articulation. In this case, it did not.

[18] For these reasons, the decision is set aside. The matter is to be redetermined on the merits by a different decision-maker. Given the passage of time, the Applicant will be entitled to update the evidentiary record.

[19] Neither party proposed a certified question and no issue of general importance arises on this record.

JUDGMENT in IMM-3816-18

THIS COURT'S JUDGMENT is that this application is allowed with the matter to be redetermined on the merits by a different decision-maker.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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