Federal Court  Cour fédérale

Date: 20220502

Docket: IMM-820-20

Citation: 2022 FC 632

Ottawa, Ontario, May 5, 2022

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

DORIS STELLA ALBORNOZ GAITAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

[1] The Applicant has applied for judicial review of a negative decision made by a Visa Officer [the Officer] and dated December 9, 2019 [the Decision]. The Decision disposed of her application for permanent residence on humanitarian and compassionate [H&C] grounds.

[2] The Applicant was born in Bogota, Columbia, on October 30, 1957. She was married, had a son, and later separated from her husband. After the separation, the Applicant entered into a common-law relationship, which resulted in the birth of her daughter, Monica Paola [Monica].

[3] In 2012, the Applicant fled to Canada with Monica because they had been threatened by the FARC while operating a cafeteria at the University of Cundinamarca in Soacha, Columbia.

[4] Monica's refugee claim was made with her husband and they were granted refugee status. However, although the Refugee Protection Division of the Immigration and Refugee Board [RPD] accepted the Applicant's allegations of persecution, it found that she had both state protection and a viable internal flight alternative in Bogota. For this reason, her refugee claim was refused and leave to review the negative RPD decision was denied on May 29, 2018.

[5] The Applicant also submitted a pre-removal risk assessment [PRRA]. It was refused and the Canada Boarder Services Agency issued a removal order. However, Mr. Justice Boswell stayed the removal.

[6] For 7 years, the Applicant has lived in Canada with her daughter Monica and her son-in-law. Her granddaughter, Pauline, was born in January of 2014, and the Applicant cared for her, while Monica suffered from post-partum depression.

I. The Decision

[7] The Officer acknowledged that the Applicant had formed friendships, had ties with her family members in Canada, volunteered her time with community organisations, and worked as a cleaner and a custodian. However, the Officer found that the Applicant's establishment was not remarkable and was not so entrenched that returning to Columbia would cause hardship for those left behind in Canada. In reaching this conclusion, the Officer noted that he did not have sufficient evidence to show that Monica suffered from any medical condition which required the Applicant to stay in Canada.

[8] The Officer also observed several times that there was no information provided to explain why the Applicant's daughter had not sponsored her mother.

[9] Turning to Pauline, the Officer stated that if Pauline became upset by the Applicant's move to Columbia, there was no reason why her parents could not provide emotional support, as they were her primary caregivers. Ultimately, the Officer concluded that Pauline's best interests would be met if she continued to benefit from the personal care and support of her parents.

[10] The Applicant submitted a psychological assessment prepared by Dr. Gil-Figueroa. Following a single interview she concluded that the Applicant "most likely" developed PTSD as a result of her interactions with the FARC and that her symptoms would increase should she return to Columbia. Notwithstanding his reservation about the report, and the fact that no treatment for PTSD had been prescribed in Canada, the Officer did accept the diagnosis.

However, the Officer observed that there was no evidence to show that PTSD could not be treated in Columbia.

II. The Issue

[11] The Applicant raised a number of issues, but, in my view, the determinative issue in this case concerns the Officer's analysis of Pauline's best interests. The Officer said, "there is insufficient objective evidence before me that the best interests of the granddaughter will be compromised if the Applicant were to return to Columbia". However, in the next paragraph, he stated:

> I acknowledge that grandparents and grandchildren share a special bond and I accept that the Applicant is extremely happy to be around her grandchild and that she provides childcare services to her grandchild. I also accept that the Applicant loves and adores her grandchild and wants to be with the child and help her grow up with the family. It is also understandable that emotional bonds and loving feelings have developed between the grandchild and the Applicant, and that the grandchild has become accustomed to the Applicant's presence in the home. While I appreciate that the Applicant plays a role in the life of her grandchild and that she may assist in terms of related childcare services …

[12] In conclusion the Officer said:

> I am satisfied that the best interests of the child would be met if she continued to benefit from the personal care and support of her parents.

[13] This conclusion is unreasonable because the Officer did not address the relevant question, which was whether it was better for Pauline to have her grandmother stay in Canada or go to Columbia. Given the evidence that the Officer accepted about the emotional bonds and loving

feelings between Pauline and the Applicant described above, the Officer could only conclude that it was in Pauline's best interests to have her grandmother stay in Canada. Had the Officer reached that conclusion, his next step should have been to consider whether Pauline's interests were determinative of the H&C application in a situation in which the Applicant was not Pauline's primary caregiver, Pauline would be in the care of her parents who were her primary caregivers and Pauline could stay in touch with the Applicant.

[14] The difficulty is that, as written, the BIOC analysis is confusing because the issues of Pauline's best interests in relation to her grandmother's removal and whether they should be determinative of the H&C application were conflated.

[15] In these circumstances, the application for judicial review will be allowed and an order will be made providing that the H&C application is to be reconsidered by another officer.

III. Certification

[16] No question was posed for certification for appeal.

JUDGMENT IN IMM-820-20

THIS COURT'S JUDGMENT is that the judicial review is allowed and the H&C application is to be reconsidered by another officer.

"Sandra J. Simpson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-820-20
STYLE OF CAUSE:	DORIS STELLA ALBORNOZ GAITAN v THE MINISTER OF CITIZENSHIP, AND IMMIGRATION AND, THE MINISTER OF PUBLIC SAFETY AND, EMERGENCY PREPAREDNESS
PLACE OF HEARING:	BY TELECONFERENCE USING ZOOM
DATE OF HEARING:	APRIL 5, 2022
JUDGMENT AND REASONS:	SIMPSON J.
DATED:	MAY 2, 2022

APPEARANCES:

Richard Wazana	FOR THE APPLICANT
Jocelyn Espejo-Clarke	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Wazana Law Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENTS