

**Date: 20061220**

**Docket: IMM-235-06**

**Citation: 2006 FC 1524**

**Ottawa, Ontario, December 20, 2006**

**PRESENT: The Honourable Madam Justice Dawson**

**BETWEEN:**

**AMAPOLA DEL ALBA SEPULVEDA SOTO**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This application for judicial review turns upon whether the officer who denied Ms. Sepulveda Soto's application for permanent residence from within Canada on humanitarian and compassionate grounds met the duty upon her to be alert, alive and sensitive to the best interests of Ms. Sepulveda's two Canadian children. For the reasons that follow, notwithstanding the very able submissions of counsel for the Minister, I have determined that the officer did not meet this duty. The application for judicial review is, therefore, allowed.

[2] Ms. Sepulveda is a citizen of Chile who came to Canada in June 2000 on a visitor's visa. Since the expiration of that visa she has remained in Canada without legal status. In June of 2002 Ms. Sepulveda married a Canadian citizen, Mr. Brian Lang. Ms. Sepulveda and her husband are now parents of twin sons, born in March 2003. Mr. Lang is currently ineligible to sponsor Ms. Sepulveda's application for permanent residence as a result of a criminal conviction for assault (see paragraph 133(1)(e) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227). That ineligibility was said by Ms. Sepulveda's counsel to expire in October 2008. Mr. Lang advised the officer that he supports his wife's application, and that he would sponsor her, but for his ineligibility.

[3] The submissions made in support of Ms. Sepulveda's humanitarian and compassionate application focused in large part upon the impact on her children if they were required either to leave Canada with their mother, or to remain in Canada with their father. Mr. Lang is self-employed as a carpenter. Ms. Sepulveda maintains the home, and cares for the children. It was particularly noted that Mr. Lang generally works 12 hours a day, six days a week so that he is, accordingly, unable to provide any day-to-day care for the children.

[4] Before turning to the officer's reasons, I review some settled principles of law that govern humanitarian and compassionate applications where the interests of children are raised:

- The officer's decision is to be reviewed on the standard of reasonableness.

- "For the exercise of the officer's 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 [a humanitarian and compassionate] claim even when the 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 Ministers guidelines, the decision will be unreasonable". See: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 75.
- The presence of children does not call for a certain decision. It is up to the officer to determine the appropriate weight to be accorded to this factor, in all of the circumstances of the case. It is not the role of the reviewing court to re-weigh the evidence before the officer.
- The Ministerial guidelines, now found in Chapter 5 of the Inland Processing Manual (IP 5) are of assistance in determining whether an officer's decision is reasonable. This is because the guidelines "are a useful indicator of what constitutes a reasonable interpretation of the power" conferred by what is now subsection 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act). See: *Baker*, at paragraph 72.
- Directions contained in IP 5 relevant to the present case include:
  - 5.19 Best interests of the child
  - [...]

Generally, factors relating to a child's emotional, social, cultural and physical welfare should be taken into account, when raised. Some examples of factors that applicants may raise include:

- the age of the child;
- the level of dependency between the child and the H&C applicant;
- the degree of the child's establishment in Canada;
- the child's links to the country in relation to which the H&C decision is being considered;
- medical issues or special needs the child may have;
- the impacts to the child's education;
- matters related to the child's gender.

[...]

#### 12.10 Separation of parents and children

The removal of an individual without status from Canada may have an impact on family members who do have the legal right to remain (i.e., permanent residents or Canadian citizens). Other than a spouse or partner, family members with legal status may include children, parents and siblings, among others. The lengthy separation of family members could create a hardship that may warrant a positive [humanitarian and compassionate] decision.

In evaluating such cases, officers should balance the different and important interests at stake:

- Canada's interest (in light of the legislative objective to maintain and protect the health, safety and good order of Canadian society);
- family interests (in light of the legislative objective to facilitate family reunification);
- the circumstances of all the family members, with particular attention given to the interests and situation of dependent children related to the individual without status;

- particular circumstances of the applicant's child (age, needs, health, emotional development);
- financial dependence involved in the family ties; and
- the degree of hardship in relation to the applicant's personal circumstances (see Definitions, Section 6.6, Humanitarian or compassionate grounds).

[5] Turning to the officer's decision, her consideration of the children's interests, in its entirety, is as follows:

The applicant's twin sons are almost 3 years old. Information is not before me to show that they are in receipt of specialized medical or educational services only available in Canada. The decision to leave these children in Canada with their father or take them to Chile is one that the applicant and her spouse will have to make. I note that the children are young and they have not entered into formal education and have the possibility of returning to Canada when they are older. Since the father states that he supports them here, then it is hoped that he will support them wherever they live. The issue Mr. Lang visiting these children in Chile is also an option to maintain the relationship with these boys and their father.

[6] In my respectful view, these reasons fail to balance the interests at stake as directed by section 12.10 of the IP 5.

[7] The officer did note the young age of the children. However, factors relating to their emotional, social and cultural welfare and their level of dependency upon their parents were not, as directed by section 5.19 of the IP 5, considered. It was trite for the officer to observe that the result of a negative decision would be that the children would either have to remain in Canada with their father, or travel to Chile with their mother. Missing was any assessment of the impact of either alternative upon the children.

[8] The officer was not obliged to render a positive decision. The officer was, however, obliged by subsection 25(1) of the Act to consider the children's interest as an important factor. In the present case, the officer failed to do this in the manner directed by the Minister in IP 5.

[9] As a result, the application for judicial review is allowed.

[10] Counsel posed no question for certification, and I am satisfied that no question arises on this record.

### **JUDGMENT**

#### **THIS COURT ORDERS AND ADJUDGES that:**

1. The application for judicial review is allowed and the decision of the officer dated January 3, 2006 is hereby set aside.
2. The matter is remitted for redetermination by a different officer.

“Eleanor R. Dawson”

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Judge

**FEDERAL COURT**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** IMM-235-06

**STYLE OF CAUSE:** AMAPOLA DEL ALBA SEPULVEDA SOTO  
Applicant

and

THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

Respondent

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** DECEMBER 12, 2006

**REASONS FOR JUDGMENT  
AND JUDGMENT:** DAWSON, J.

**DATED:** DECEMBER 20, 2006

**APPEARANCES:**

CYNTHIA MANCIA FOR THE APPLICANT

JAMIE TODD FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

MANCIA AND MANCIA FOR THE APPLICANT  
BARRISTERS & SOLICITORS  
TORONTO, ONTARIO

JOHN H. SIMS, Q.C. FOR THE RESPONDENT  
DEPUTY ATTORNEY GENERAL OF CANADA