Date: 20071224

Docket: IMM-2205-07

Citation: 2007 FC 1367

Ottawa, Ontario, December 24, 2007

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

FERNALINE SOMERA DUQUE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review of an Immigration Officer's (the Officer) decision rendered on May 14, 2007. The Officer denied the Applicant's request for permanent residence from within Canada on humanitarian and compassionate grounds.

[2] The Applicant is a citizen of the Philippines and was born on October 17, 1974. On July 27, 2000, she obtained a temporary resident visa from the Canadian embassy in the Philippines.

[3] On September 8, 2000, the Applicant arrived in Toronto with a work permit under the caregiver class. Under a special program, the Applicant would have been eligible, upon completing 24 months of work over a 36 month period, to make an application for permanent residency under the live-in caregiver's class.

[4] The Applicant did not abide by the conditions of the permit and worked illegally for one year (December 2000 to December 2001) for Mr. de Giorgio Damiani. She claims that Mr. Damiani hid from her the fact that he had not sent the necessary paperwork required by the program and as a consequence, a year's worth of her work was not credited towards the program.

[5] On February 18, 2002, the Applicant obtained a work permit, which was renewed on February 5, 2003 and again on February 24, 2004 until December 2004.

[6] The conditions relating to the Applicant's stay were amended on February 4, 2005 and she was granted visitor status until June 1, 2005. Her visitor's status was extended a number of times and the current extension expires on December 19, 2007.

[7] The Applicant's request for a work visa was refused by the Canadian consulate in Buffalo on April 19, 2006.

[8] On June 30, 2006, the Applicant submitted an application for permanent residency on humanitarian and compassionate grounds.

[9] On September 14, 2006, a new request for a work visa is refused by the Canadian consulate in Buffalo.

[10] On December 20, 2006, the application for permanent residency was transferred to the immigration office in Montreal. A letter asking the Applicant to update her file was sent on March 28, 2007. Subsequently, on May 14, 2007, the application for permanent residency on humanitarian and compassionate grounds was refused (the H&C decision).

[11] An application for judicial review before this Court was filed on May 30, 2007 challenging the negative H&C decision on the grounds that:

(a) The Officer violated the principles of natural justice;

(b) The Officer acted without regard for the documentary evidence; and

(c) The Officer failed to be alive and attentive to the best interests of the applicant's child.

II. The Decision

[12] The officer concluded that the Applicant had not satisfied him that he should exercise his discretion under section 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, (IRPA) and grant the Applicant an exemption from having to obtain a permanent residence visa before coming to Canada. In his reasons, the Officer considered the following factors: (1) the Applicant's immigration history; (2) findings on the Applicant's credibility; (3) the best interest of the Applicant's child; and (4) the Applicant's integration in Canada.

[13] Regarding Applicant's immigration history, the Officer noted that she had worked illegally for Mr. Damiani and gave little weight to the Applicant's explanation that Mr. Damiani had not sent the required paperwork to the authorities, finding that it is not the employer's responsibility to submit the necessary paperwork for the Applicant's work visa. The Officer noted that immigration authorities were flexible in affording the Applicant a second chance to complete the special program under the live-in caregiver's class. Notwithstanding several work permit renewals, she failed to successfully complete the program.

[14] The Officer noted several contradictions and misrepresentations in the Applicant's evidence in respect to her application for permanent residency, her work history, her understanding of a Quebec Acceptance Certificate (QAC) and her language abilities. The Officer found that the Applicant lacked credibility.

[15] On the issue of the best interest of the child, the Officer found that the child spent a very brief period of her life in Canada (a little more than two years), that her strongest link is with her mother, that she only has sporadic contact with her father, that the child does not live with the father and the father's family is not aware of her existence. Additionally, he found that the child will be able to maintain contact with her father via the telephone. He also mentioned that the best interest of the child is a factor to be weighed and does not trump all other considerations.

[16] Finally, concerning the Applicant's integration in Canada, the Officer noted that she spent the majority of her life and studied in the Philippines, had little family in Canada and

received financial assistance from her sister in the United States. Even though she has not been in the workforce for some six years, the Officer is not convinced that the Applicant would be unable to provide for her child's needs in the Philippines. He points to her education, a bachelor degree in nursing science and her work experience in that field.

[17] The Officer concluded that the Applicant would not suffer excessively if she had to apply for her visa from the Philippines.

III. Issues

[18] The Applicant raises the following two issues:

A. Did the Officer breach the principles of procedural fairness and natural justice by denying the Applicant's counsel the right to provide further evidence as to the father's relationship with the child?

B. Did the Officer err in his consideration of the best interest of the child?

IV. Standard of Review

[19] Allegations concerning procedural fairness are always reviewed as questions of law. The Applicable standard of review is therefore correctness. (*Canada (Attorney General) v. Sketchley*, 2005 FCA 404, [2005] F.C.J. No. 2056 (QL) and *Canadian Union of Public Employees v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539.

[20] The appropriate standard of review when reviewing an immigration officer's H&C decision is reasonableness. The Officer's decision must be supported by reasons that stand up to a somewhat probing examination. (*Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 and *Bouaroudj v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1530 at paragraph 9). For a decision to be considered reasonable, there must be a line of analysis that could reasonably lead from the evidence to the Officer's conclusion (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at paragraph 55).

VIII. Analysis

A. *Did the Officer breach the principles of procedural fairness and natural justice by denying the Applicant's counsel the right to provide further evidence as to the father's relationship with the child?*

[21] The Applicant claims that following a conversation on May 23, 2007 between her attorney and the Officer, she was denied the possibility to submit additional information regarding the father-daughter relationship which "was of a nature that could have impacted this conclusion and therefore the entire determination as to the best interest of the child."

[22] The Officer's evidence is that he had provided the Applicant with an extension of time to May 14, 2007, to update her file and submit additional evidence. The Officer attests that additional documents were received from the Applicant's counsel on May 9, 2007, and were considered. The Officer's decision was rendered on May 14, 2007. The May 23, 2007 telephone call by the Applicant's attorney was subsequent to the making of the final decision. At that time the Officer was *functus officio* and was not in a position to consider new evidence. In these

circumstances I find that the Officer committed no breach of the principles of procedural fairness or natural justice.

B. *Did the Officer err in his consideration of the best interest of the child?*

[23] The Applicant contends that the Officer erred in his assessment of the best interest of the child by applying the wrong standards, acting without regards to the evidence or by making a perverse finding of fact and by failing to provide sufficient reasons with regard to his analysis of the best interests of the child.

[24] The Applicant submits that the Officer conducted an incomplete evaluation of the child's interest by limiting his examination to the negative impact on the child and not considering the benefits that would derive from the child remaining in Canada with her father.

[25] The Applicant argues that the Officer misapprehended the evidence and therefore erred in finding that the father daughter relationship was "sporadic" and that the existence of the child was hidden from the father's family. The Applicant relies on her affidavit evidence, sworn on June 18, 2007. This evidence attest that the father's involvement in the child's life is frequent, stable, important and ongoing, that the father spends an average of 1.5 days a week with the child and that he provides the Applicant $800 per month in child support. The child's father has also filed affidavit evidence before this Court essentially confirming his involvement and financial support for his daughter and attesting to the fact that he will never abandon her and wished to be involved in decisions regarding her care and upbringing.

[26] The difficulty with the Applicant's submission is that the above evidence was not before the Officer at the time he rendered his decision. It is well accepted and clearly established in the jurisprudence that, on judicial review, the Court may only examine the evidence that was adduced before the initial decision-maker.

[27] The evidence before the Officer regarding the father's involvement with the child consists of the following:

(1) In her written submissions before the Officer the Applicant's indicated the following: "After I gave birth, the father was there, reassuring me that he'll never forget his obligations and responsibilities emotionally and financially, I am happy seeing my child knowing that she has a father. For that, I am relieved and happy though I have to deal with problems. He sees to it that he always gives the necessities of his child, he helped me financially, the rent of the house."

(2) In supplementary information provided to the Officer she stated "My daughter's father is Canadian and has his own family to take care of. Therefore, he would not be in contact with her if we had to leave Canada since her birth has not been disclosed to his family. It would not be in the interest of an innocent child to be separated from her father."

(3) In a follow-up telephone interview with the Officer, the Applicant further indicated, according to the Officer's notes, that the father's financial contributions for the child were sporadic;

(4) Certain photographs of the father holding the child.

[28] In his reasons for decision, the Officer made the following findings regarding the best interest of the Child:

- the child has lived in Canada for only 2 years;

- the father has limited contact with the child since he does not have custody and because her existence is not known to his family;
- that the father's financial contributions for the child were sporadic;
- the child's most important link with Canada is its mother; and
- the child will be able to maintain contact with her father over the telephone from the Philippines.

[29] The child's "2 years" referred to by the Officer represents the child's entire life. The Officer acknowledges that since the birth of the child, the father has taken care of the child. This is consistent with the Applicant's written submissions to the Officer. While the Applicant's evidence suggests that financial support from the father was sporadic, there was no evidence before the Officer to support the determination that the father's contact with the child was sporadic or limited. The Officer draws such an inference on the premise that the child does not reside with the father and her existence is not known to his family. However, these factors do not support a conclusion that contact is limited or sporadic. This determination lacks an evidentiary basis. Further, the undisputed evidence indicates that the father has taken care of the child, promised to honour his obligations and responsibilities (emotionally and financially) to her and has provided her with the necessities of life.

[30] Moreover, the Applicant's evidence that the father would not be in contact with the child refers to a situation where she and her daughter would be required to return to the Philippines. An inference that the father would not be in contact with his daughter, should the Applicant and child remain in Canada, cannot be sustained. The difficulty for the father to maintain contact

with his daughter if she lived in the Philippines, particularly given his family responsibilities, is self-evident.

[31] The finding that contact between father and his two year old daughter, can be maintained over the telephone is patently unreasonable in these circumstances. The determination does not demonstrate sensitivity to the best interests of the child.

[32] It is true that the best interests of the child cannot be assessed in a vacuum and that it is but one factor to be considered by the Officer in the context of an H&C application. That said, consideration of the best interests of the child must be assessed in a reasonable manner. 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. The applicable Minister's guidelines in this instance, IP5 at section 5:19 provide that a child's emotional, social, cultural and physical welfare should be taken into account.

[33] I find that there is a defect in the process by which the Officer's conclusions were drawn in respect to the best interests of the child and as a result, the interests of the child were minimized. Consequently, the Officer failed to accord sensitive consideration to the best interests of the child. I am satisfied that this constitutes an unreasonable exercise of discretion and warrants the Court's intervention.

[34] It is open to the Officer to conclude that other interests considered in the application outweigh the best interests of the child. However, the Officer is nevertheless required to properly consider the best interests of the child. In this case, he failed to do so.

IX. Conclusion

[35] For the above reasons the application for judicial review will be allowed. The matter shall be returned for reconsideration before a different Officer in accordance with these reasons.

[36] The parties have had the opportunity to raise a serious question of general importance as contemplated by paragraph 74(*d*) of the IRPA and have not done so. I am satisfied that no serious question of general importance arises on this record. I do not propose to certify a question.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The judicial review of the Immigration Officer's decision rendered on May 14, 2007 is allowed.

2. The matter is returned for reconsideration before a different Immigration Officer in accordance with these reasons

3. No question is certified.

"Edmond P. Blanchard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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