Federal Court Cour fédérale

Date: 20130404

Docket: IMM-6679-12
IMM-7964-12

Citation: 2013 FC 338

Toronto, Ontario, April 4, 2013

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

CORMAC JOSEPH LIDDY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Cormac Joseph Liddy seeks judicial review of two decisions refusing his application for permanent residence on humanitarian and compassionate grounds. Mr. Liddy based his H&C application on several factors, one of which was the best interests of his two young children.

[2] I advised the parties at the conclusion of the hearing that I was satisfied that the immigration officer erred in her assessment of the best interests of Mr. Liddy's children, with the result that the

applications for judicial review would be granted. What follows are my reasons for coming to this conclusion.

Background

[3] In his application for H&C relief, Mr. Liddy identified a number of ways in which the interests of his children would be negatively affected if he were required to return to Ireland. These included the fact that the children would be subjected to an indefinite or permanent separation from their father, the emotional damage that the children would suffer as a result, and the negative impact that Mr. Liddy's removal from Canada would have on his ability to provide financial support for his children.

[4] The immigration officer rendered an initial decision based upon several sets of submissions made by Mr. Liddy, addressing, amongst other things, the best interests of Mr. Liddy's children. The officer concluded that an H&C exemption was not warranted.

[5] However, before this decision could be provided to Mr. Liddy, the officer became aware that Mr. Liddy had provided her office with a further set of submissions a couple of days before the decision was made, which submissions had not been before the officer when she made her decision. Consequently, the officer decided to reconsider her decision in light of the additional submissions. This resulted in a second decision being made by the officer, which once again concluded that the circumstances identified by Mr. Liddy did not justify the granting of a humanitarian and compassionate exemption.

[6] Mr. Liddy has brought applications for judicial review with respect to each of these decisions, and these reasons pertain to both cases.

Analysis

[7] The officer accepted that until the couple separated, Mr. Liddy and his wife "had shared the primary caregiver role" in relation to their children. The officer also accepted that the break-up of Mr. Liddy's marriage had undoubtedly been a significant event in the lives of the children, who were six and seven years of age at the time of the decision. The officer further accepted that the children would likely only be able to see their father only "on occasion" if he were removed from Canada.

[8] The officer addressed each of the issues raised by Mr. Liddy with respect to the best interests of his children. In each case, the officer concluded that Mr. Liddy had failed to demonstrate that either he or his children would face unusual, undeserved or disproportionate hardship, were he to be removed from Canada.

[9] The jurisprudence teaches that where the best interests of a child are raised in an application for an H&C exemption, the task of an immigration officer is to consider the benefit to the children of the parent's non-removal from Canada as well as the hardship that the children will suffer if the parent is removed: *Hawthorne v. Canada (Minister of Citizenship & Immigration)*, [2003] 2 F.C. 555, 2002 FCA 475 (Fed. C.A.) at para. 4. The "unusual, undeserved, or disproportionate hardship" test has no place in the best interests of the child analysis: *Hawthorne*, above at para. 9; *E.B. v.*

Canada (Minister of Citizenship and Immigration), 2011 FC 110; *Sinniah v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 1285.

[10] The best interests of children will not determine the outcome of an H&C application. Rather, it is incumbent on the officer to decide the weight to be given to the interests of the children, in light of all of the other considerations raised by the case: *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, at paras. 12-14; *Kisana v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at paragraph 24.

[11] The use of the words "unusual, undeserved or disproportionate hardship" in a "best interests of the child" analysis will not automatically render an H&C decision unreasonable. It will be sufficient if it is clear from a reading of the decision as a whole that the officer used the correct approach and conducted a proper analysis: *Segura v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 894, [2009] F.C.J. No. 1116 (QL), at para. 29.

[12] That does not appear to have happened in this case. Nowhere in the officer's reasons is there any consideration of benefit that would accrue to Mr. Liddy's children if he were able to stay in Canada. Moreover, although the officer considered each of the factors identified by Mr. Liddy in relation to the best interests of his children, she concluded her analysis on each point with an express finding that Mr. Liddy had failed to show that either he or his daughters would suffer unusual, undeserved or disproportionate hardship if he were forced to leave Canada.

[13] It is thus clear from the officer's reasons that she erred by equating the position of Mr. Liddy with that of his children, applying the "unusual, undeserved or disproportionate hardship" test in both cases. The reasons simply cannot be read any other way. The error was then repeated in the officer's second decision reconsidering her original decision in light of the submissions that had been overlooked.

[14] It was also unreasonable for the officer to insist on evidence specifically addressing the impact that the separation of the children from their father would have on their well-being. Such evidence might be required if the situation of the child was unusual – where, for example, a child suffered from a disability that made him or her particularly vulnerable to disruption or separation. However, an officer can be presumed to know that a child will generally be better off living in Canada with her parent than having to live in Canada without a parent: *Hawthorne*, above at para. 5.

Conclusion

[15] For these reasons, the application for judicial review is allowed. Given my conclusion with respect to this issue, it is not necessary to address the other issues raised by Mr. Liddy in this application for judicial review, most of which relate to the fairness of the process followed in the assessment of his application.

[16] I agree with the parties that the case does not raise a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, and the matter is remitted to a different immigration officer for redetermination.

"Anne L. Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6679-12 and IMM-7964-12
STYLE OF CAUSE:	CORMAC JOSEPH LIDDY v. THE MINISTER OF CITIZENHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 2, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	MACTAVISH J.
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