Federal Court  Cour fédérale

Date: 20170615

Docket: IMM-4902-16

Citation: 2017 FC 593

Ottawa, Ontario, June 15, 2017

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

SHIRLEY-ANN MONICA DOWERS

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

[1] The present Application concerns a refusal of the Applicant's application for humanitarian and compassionate (H&C) relief pursuant to s. 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). The Respondent's Officer who rendered the decision dated November 1, 2016 found that that "having considered the circumstance of the applicant and having examined all of the submitted documentation, I am not satisfied that the H&C considerations before me justify an exemption…" (Decision, p. 9).

[2] The Officer's conclusion raises a key question: what approach was required to be applied in "considering the circumstances"? The answer is: a principled approach which applies the law. The Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paragraph 21 sets the approach:

> [21] But as the legislative history suggests, the successive series of broadly worded "humanitarian and compassionate" provisions in various immigration statutes had a common purpose, namely, to offer equitable relief in circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another": *Chirwa*, at p. 350.

[3] Thus, the approach requires that a decision-maker have the ability to empathize with an applicant for relief by placing her or himself in the applicant's shoes to clearly understand and be sensitive to the applicant's circumstances.

[4] In the present case, the Applicant is a 47-year-old single woman from St. Vincent who came to Canada as a visitor in September 1999 to assist her single mother maternal aunt with childcare, and overstayed. The Applicant's request for H&C relief was based on the closely connected issues of her establishment in Canada, and the best interests of children directly affected if relief is not granted.

[5] The outcome of the present Application concerns the quality of the Officer's decision-making, and, in particular, whether the standard set by the decision in *Kanthasamy* was met.

[6] A situation such as the Applicant's, where a person comes to Canada and stays without adhering to the immigration laws, but, nevertheless, succeeds to be a positive, productive, and valuable member of society must be given careful attention. Section 25 has no purpose if that person is easily condemned for her or his immigration history. The history must be viewed as a

fact which is to be taken into consideration, but within a serious holistic and empathetic exploration of the totality of the evidence, to discover whether good reason exists to be compassionate and humanitarian. The discovery requires full engagement:

> Applying compassion requires an empathetic approach. This approach is achieved by a decision-maker stepping into the shoes of an applicant and asking the question: how would I feel if I were her or him? In coming to the answer, the decision-maker's heart, as well as analytical mind, must be engaged
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> (*Tigist Damte v Canada (Citizenship and Immigration)*, 2011 FC 1212, para. 34).

[7] It is reasonable to approach the evidence by sorting out the "positive" from the "negative". However, once sorted, the objective is not to simply use the sorting as the end to the examination: that is, just having a list of more negatives than positives cannot mean that, *ipso facto*, no relief shall be granted. Such a clinical approach is not what the Supreme Court of Canada has set as a standard. To conform with the standard requires an empathetic effort to understand the evidence well enough to be open to a compelling feeling that relief is required regardless of the negatives. A reasonable decision must be able to communicate that this effort has taken place. This is the challenge that must be met. For the reasons that follow, I find that the Officer certainly failed to meet the challenge.

I. The Officer's Decision-Making

A. *Establishment*

[8] There exists a seriously unreasonable pattern to the Officer's evaluation of Applicant's evidence of establishment. The following paragraphs from the decision identify very positive

facts, but the evaluation of the facts is delivered with a cutting edge, that denigrates, and effectively eradicates, each of the Applicant's achievements to establish herself in Canada:

> Ms. Dowers writes that she has been a member of the Seventh-Day Adventist Church since 2003 (IMM 5669, page 2). Conversely, it appears in a letter dated 3 March 2005 that she has been a member of the church community since 2000. The Head Elder writes that while with the Scarborough church she participated in church and volunteered with various activities, including a children's vacation bible school. Additionally, since joining the Toronto church in 2007 the assistant pastor writes that "over the years she has been called upon to serve in various ministries and has consistently risen to the task" and that she has become a deaconess in March 2013. Note that these volunteer activities are unquantified. Nevertheless, I place some positive weight on these long-term church and volunteer efforts. [Emphasis added] (Decision, p. 3)
>
> […]
>
> Ms. Dowers' [sic] studied by correspondence between March 2000 and June 2002 at Thomson Education Direct. As a result she obtained a diploma in business management. It is commendable that the applicant sought to improve her knowledge and skills. Nonetheless, I note that she has never held a valid permit authorizing her study in Canada. Thus, I place some negative weight on her educational endeavours. [Emphasis added] (Decision p.4)
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> […]
>
> The applicant originally sought out uncertified counsel who took her money and did not submit her [previously prepared] H&C application. […] I do not find this rationale to be reasonable. Note that Ms. Dowers was more likely than not aware of an H&C application as a means of obtaining permanent residence since 2006/2007 since she states she attempted to submit an application to CJC. Little discussion is provided of any attempts to inquire about an H&C application process until "a couple of years" later when some unnamed individual from Ms. Dowers' church recommended her current counsel's business. CJC received the applicant's initial H&C application in May 2014, which is nearly 15 years after her entry to Canada with a visitor's record valid for six months. While it is unfortunate that she was a victim of fraud, from the information before me it appears to me that Ms. Dowers understood she needed to regularize her immigration status for the

> vast majority of her residency in Canada and she made minimal attempts to do so until 2004. I place some negative weight on the aforementioned. [Emphasis added] (Decision, p. 4)
>
> […]
>
> I find that the description of duties indicates that the applicant was engaging in work akin to a live-in caregiver during this timeframe as determined on a balance of probabilities. Additionally, when the applicant ceased her employment with her aunt she became self-employed as a cleaner. I note that the applicant has never held a work permit authorization her [sic] employment in Canada. Moreover, her last H&C application directly referred to her working without authorization. Accordingly, I note that she continued to disregard Canada's immigration laws after being informed in writing via her counsel. [Emphasis added] (Decision, p. 4)
>
> […]
>
> Rather, I am only able to establish that she more likely than not made between $679.17 and $1,467.50 per month by being self-employed. I note that little evidence has been presented to suggest that the applicant obtained a business licence or that she has ever paid Canadian taxes. While I place some positive weight on the fact that the applicant has never applied for social assistance (in fact she has accumulated $5,683 as of December 2015) and she has contributed at least $8,764.70 to her church, I find that her prolonged employment in Canada as described above is a significant negative factor in her establishment. [Emphasis added] (Decision, p. 5)

[9] In the closing Analysis portion of the decision, the following statements are made:

> Other than the simple fact of being in Canada for the last 16 and a half years, the applicant has presented establishment, BIOC, as well as hardship associated with adverse country conditions.
>
> I know that the establishment is generally created by way of an extended stay in the country. Yet, I note that it not uncommon to begin to put down roots by obtaining housing, finding employment, and participating in the community. I give credit to the applicant for these aspects as well as others listed in the establishment section. Nevertheless, I must balance these positive elements against some negative factors. Namely, her minimal efforts to regularize her immigration status, her studying without

> authorization, her work without authorization particularly after receiving the last H&C decision and the absence of documentation to suggest that she has ever registered her business or pay taxes. While I find that the applicant has made positive contributions to Canadian society over her long residency, over all, I find that there is only has [sic] some positive establishment. [Emphasis added] (Decision, p. 9)

[10] In my opinion, the Officer's well formed negative attitude towards failure to comply with immigration requirements, and fixation to apply this attitude in reaching a decision, caused an abject failure to consider the Applicant's evidence with compassion as required by *Kanthasamy*.

B. ***Best Interests of the Child (BIOC)***

[11] With respect to the Applicant's removal to St. Vincent, and the best interest of a child affected, the Officer acknowledged that the Applicant's 11 year-old nephew, Anju, in St. Vincent will be affected. Because the Applicant is established in Canada, she can afford to pay for her nephew's private school education in St. Vincent, which his parents cannot, and this will no longer be the case if she returns to St. Vincent. On this issue the Officer found as follows:

> The applicant has a nephew, Anju, who is 11 years old. He resides in St. Vincent with his parents and attends a private school where he receives excellent grades. According to his parents' letter, Anju's father is a farmer and his mother is a qualified assistant teacher who teaches throughout the week. Anju's mother also farms and assists her brother-in-law with the electrical work to "defray the financial burdens" of her family. As of 17 September 2015, Anju's mother was completing her final year of her first degree in social studies at the University of West Indies, Cave Hill campus. Ms. Dowers indicates that this education and specialization will "provide a better living for my family."
>
> Despite the lack of specific details, I accept that Anju may not attend his private school should the applicant return to her country of origin. However, the United States Department of Labor (2016) states that public education in St. Vincent is provided for free and school is compulsory until the age of 16. Consequently, I find that Anjou will still be able to further his education. There is little information before me to suggest that attending public school goes

> against Anju's best interests. Thus, I find the argument unpersuasive. [Emphasis added] (Decision, pp. 6-7)
>
> […]
>
> Overall, I have insufficient evidence before me that Anju would not continue to be clothed, fed, and educated should the applicant return as determined on a balance of probabilities. Especially since his mother should have completed her education and, therefore, enhanced the family's possible earning power. If the applicant were to return home I note she could be a physical presence in Anju's life. Something the 11 year old [sic] has not experienced. Given the lack of information of high probative value to suggest Anju's daily needs would be unmet, I find his best interest is to have the applicant physically in his life. She can do that by returning to her country of origin. [Emphasis added] (Decision, p.7)

[12] The following statement is the Officer's evaluation of the best interests of the children directly affected:

> I have also considered the BIOC in relation to the applicant's niece and nephews as well as the children associated with her volunteer work. I note that BIOC is only one of many important factors that the decision-maker must consider when making an H&C decision that directly affects a child. The purpose of section 25 of IRPA is to give the Minister the flexibility to deal with extraordinary situations which H&C grounds compel the Minister to act. In this particular case, I find that the weight accorded to the BIOC is not enough to justify an exemption because of the insufficient evidence demonstrating a negative impact on the children if the applicant leaves Canada. [Emphasis added] (Decision, p. 9)

(1) The Law on *BIOC*

[13] In my opinion, the Officer's statements disclose no understanding of the complex approach that must be adopted in reaching a determination on the best interests of a child; the opinion that as long as Anju is "clothed, fed, and educated" no concerns remain as to his best interests is conclusive proof. I find that gratuitous statement that his best interests will be met if his aunt returns to St. Vincent are not only unsupported by the evidence, but are intrusive. In my

opinion, this reasoning completely fails to respect the individuals who are depending on the Officer's fully informed and fair minded decision, but also reflects a complete failure to understand the law with respect to determining the best interests of a child.

[14] Counsel for the Applicant argues that the interests of a child directly affected must be given "singularly significant focus and perspective" (*Kanthasamy*, at para 40). In *Kanthasamy* Justice Abella made this point perfectly clear:

> [35] The "best interests" principle is "highly contextual" because of the "multitude of factors that may impinge on the child's best interest": *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, at para. 11; *Gordon v. Goertz*, [1996] 2 S.C.R. 27, at para. 20. It must therefore be applied in a manner responsive to each child's particular age, capacity, needs and maturity: see *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181, at para. 89. The child's level of development will guide its precise application in the context of a particular case.
>
> [36] Protecting children through the "best interests of the child" principle is widely understood and accepted in Canada's legal system: *A.B. v. Bragg Communications Inc.*, [2012] 2 S.C.R. 567, at para. 17. It means "[d]eciding what . . . appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention": *MacGyver v. Richards* (1995), 22 O.R. (3d) 481 (C.A.), at p. 489.
>
> [37] International human rights instruments to which Canada is a signatory, including the *Convention on the Rights of the Child*, also stress the centrality of the best interests of a child: Can. T.S. 1992 No. 3; *Baker*, at para. 71. Article 3(1) of the *Convention* in particular confirms the primacy of the best interests principle:
>
> > In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration*.
> >
> > [Emphasis in the original]

[38] Even before it was expressly included in s. 25(1), this Court in *Baker* identified the "best interests" principle as an "important" part of the evaluation of humanitarian and compassionate grounds. As this Court said in *Baker*:

> ...attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for [a humanitarian and compassionate] decision to be made in a reasonable manner...
>
> …for the exercise of the 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 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 Minister's guidelines, the decision will be unreasonable. [paras. 74-75]

[39] A decision under s. 25(1) will therefore be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered: *Baker*, at para. 75. This means that decision-makers must do more than simply *state* that the interests of a child have been taken into account: *Hawthorne*, at para. 32. Those interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence: *Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358 (C.A.), at paras. 12 and 31; *Kolosovs v Canada (Minister of Citizenship and Immigration)*, 323 F.T.R. 181, at paras. 9-12.

[Emphasis added]

[15] With respect to reaching a decision on a child's best interest, the decision in *Kolosovs* provides an explanation of the requirements:

> [8] *Baker* at para. 75 states that an H&C decision will be unreasonable if the decision-maker does not adequately consider the best interests of the children affected by the decision:
>
> > The principles discussed above indicate that, for the exercise of the 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.
> >
> > [Emphasis in the original]
>
> This quote emphasizes that, although a child's best interests should be given substantial weight, it will not necessarily be the determining factor in every case, (*Legault v. Canada (Minister of Citizenship and Immigration),* [2002] 4 F.C. 358 (C.A)). To come to a reasonable decision, a decision-maker must demonstrate that he or she is alert, alive and sensitive to the best interests of the children under consideration. Therefore, in order to assess whether the Officer was "alert, alive and sensitive", the content of this requirement must be addressed.
>
> **A. *Alert***
>
> [9] The word alert implies awareness. When an H&C application indicates that a child will be directly affected by the decision, a visa officer must demonstrate an awareness of the child's best interests by noting the ways in which those interests are implicated. Although the best interests of the child is a fact specific analysis, the *Guidelines* at s. 5.19, provide a starting point for a visa officer by setting out some factors that often arise in H&C applications:
>
> > **5.19. Best interests of the child**
> >
> > *The Immigration and Refugee Protection Act* introduces a statutory obligation to take into account the best interests of a child who is directly affected by a decision under A25(1), when examining the circumstances of a foreign national under this section. This codifies departmental practice into legislation, thus eliminating any doubt

> that the interests of a child will be taken into account. Officers must always be alert and sensitive to the interests of children when examining A25(1) requests. However, this obligation only arises when it is sufficiently clear from the material submitted to the decision-maker that an application relies, in whole or at least in part, on this factor.
>
> [….]
>
> 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:
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> • the age of the child;
>
> • the level of dependency between the child and the H&C applicant;
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> • 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 impact to the child's education;
>
> • matters related to the child's gender.
>
> [Emphasis omitted]

B. *Alive*

[10] The requirement that a child's best interests be given careful consideration was reiterated by the Federal Court of Appeal in *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, [2003] 2 F.C. 555 (C.A) (QL) at para. 52:

> The requirement that officers' reasons clearly demonstrate that the best interests of an affected child have received careful attention no doubt imposes an administrative burden. But this is as it should be. Rigorous process requirements are fully justified for the determination of subsection 114(2)

> applications that may adversely affect the welfare of children with the right to reside in Canada: vital interests of the vulnerable are at stake and opportunities for substantive judicial review are limited.

> [11] Once an officer is aware of the best interest factors in play in an H&C application, these factors must be considered in their full context and the relationship between the factors and other elements of the fact scenario concerned must be fully understood. Simply listing the best interest factors in play without providing an analysis on their inter-relationship is not being alive to the factors. In my opinion, in order to be alive to a child's best interests, it is necessary for a visa officer to demonstrate that he or she well understands the perspective of each of the participants in a given fact scenario, including the child if this can reasonably determined.

> **C. *Sensitive***

> [12] It is only after a visa officer has gained a full understanding of the real life impact of a negative H&C decision on the best interests of a child can the officer give those best interests sensitive consideration. To demonstrate sensitivity, the officer must be able to clearly articulate the suffering of a child that will result from a negative decision, and then say whether, together with a consideration of other factors, the suffering warrants humanitarian and compassionate relief. As stated in *Baker* at para. 75:

> > "… 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".

[16] In my opinion, the decision under review fails to disclose that the Officer was alert, alive and sensitive to the reality of Anju's life.

II. Result

[17] Because of a failure in decision-making on both the issues of establishment and the best interests of a child, I find that the decision under review is unreasonable.

JUDGMENT IN IMM-4902-16

THIS COURT'S JUDGMENT is that:

1. The decision under review is set aside, and the matter is referred back for redetermination by a different decision-maker.

2. There is no question to certify.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Samuel Loeb	FOR THE APPLICANT
Leanne Briscoe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Refugee Law Office Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT