

Federal Court



Cour fédérale

Date: 20190521

Docket: IMM-5099-18

Citation: 2019 FC 713

Toronto, Ontario, May 21, 2019

PRESENT: Mr. Justice Campbell

BETWEEN:

**NAYCOLL JOSE GAMBOA SAENZ
SUSAN LEYDI GONZALEZ MORENO
LAURA VALENTINA GAMBOA GONZALEZ**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The present Application concerns the Applicants' application for permanent residence from within Canada on humanitarian and compassionate (H&C) grounds. The Applicants, a couple and their 6-year-old daughter, are citizens of Colombia who fled in 2015 to escape threats from gangs. They made a refugee claim in Canada which was denied on April 30, 2015.

[2] In February 2017, the Applicants filed an H&C application which was denied in July 2017, and after asking for reconsideration, it was again denied. The Applicants filed a request for leave to proceed to judicial review of that refusal, and after consent was received from the Respondent, the application was sent back for redetermination. On September 25, 2018, the application was again refused; this refusal is the subject matter of the present Application.

[3] Counsel for the Applicants argues that the Officer made reviewable errors on two primary features of the Applicants' application: establishment and the 6-year-old daughter's best interests. For the reasons that follow, I agree with the argument.

I. Establishment

[4] The Officer found as follows:

Overall, I do not find that the applicants' H&C materials demonstrate that the applicants have an exceptional degree of establishment in Canada. I note that the applicants have only resided in Canada for approximately 3.5 years and I find this to be quite a short period of time. While I note that the applicants have some family in Canada, this being the SA's sister, Francy, who is presently residing in Canada, I note that the majority of the applicants' immediate family members, including the PA's parents, and two brothers, and the SA's mother, brother, and sister, Diana, are all citizens of Colombia who presently reside in that country. Accordingly, I do not find that the applicants' H&C materials demonstrate that the applicants' familial ties to Canada are greater than their familial ties to [Colombia]. I acknowledge that the applicants' H&C materials indicate that the PA and SA have been able to obtain employment in Canada. As well, I acknowledge that the applicants' H&C materials indicate that the PA and SA have made efforts to learn English in Canada, that the MA is enrolled in school in Canada, that the applicants are involved in their church in Canada, and that the applicants have friends and acquaintances in Canada. However, while I have given

positive consideration to these things, I do not find that they constitute a level of establishment that is greater than what individuals who are similarly situated to the applicants would acquire over the course of living and, in the case of the PA and SA, working, in Canada for several years.

[Emphasis added] (Decision, pp 5 and 6)

[5] The cursory manner in which the establishment evidence is treated is unreasonable. The Officer makes the following comment with respect to evidence of the Applicants' roots in the Canadian community:

Further, the applicants have friends and acquaintances in Canada. Several letters, as well as a petition, from the applicants' friends and acquaintances in Canada has been submitted.

[6] The Officer's words do not accurately portray the quantity and quality of the evidence presented. In fact, as argued by Counsel for the Applicants, before the Officer was 25 support letters and 250 signatures on the petition. Not one word of comment on this evidence appears in the decision under review. I find that the neglect of this cogent evidence renders the decision unreasonable.

II. Best Interests of the Child

[7] The Officer's key finding on this issue is as follows:

In addition, I am mindful that the applicants' H&C materials indicate that Laura Valentina will be negatively affected by various other adverse country conditions in Colombia, including a high rate of crime, corruption, gender based violence, and discrimination against women. However, having reviewed the applicants' H&C materials I do not find that they either indicate that Laura Valentina has, or that she would be likely to, experience

a direct, negative impact as a result of any of these country conditions. Nevertheless, I acknowledge that these country conditions are far from ideal and find that it would likely be in Laura Valentina's best interests not to reside in a country where they are occurring. However, I am mindful that this is only one element in the BIOC assessment for Laura Valentina, and that BIOC is only one of the factors for consideration on this H&C application.

[Emphasis added]

[8] I agree with Counsel for the Applicants' argument that the quoted evaluation is erroneous in both principle and content according to the following statement of the law (*Kanthasamy v Canada (MCI)*, 2015 SCC 61, at paras 37-38):

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.

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.

[Emphasis added]

[9] As a matter of principle, I find that the Officer's evaluation of Laura Valentina's best interests does not conform to the law: her best interests were minimized. The Officer's statement that "I am mindful that this is only one element in the BIOC assessment for Laura Valentina, and that BIOC is only one of the factors for consideration on this H&C application" reads as a suggestion that there is evidence which is negative towards a finding of best interests leading to a positive H&C outcome. The following question arises: what would be the negative "factors for consideration on this H&C application" that would run counter to the acknowledgement that "it would likely be in Laura Valentina's best interests not to reside in a country where they are occurring"?

[10] The existence of factors that appear to run against Laura Valentina's best interests are a mix of unsupported negative findings on establishment together with speculative statements apparently intended to convey the conclusion that no H&C relief is necessary because all will be well if the Applicants, including Laura Valentina, are required to return to Colombia. There are four findings in this direction at pages 9 and 10 of the decision.

[11] I find that each of the following emphasised findings are based on unsupported speculation and, thus, when read together constitute reviewable error.

[12] First, the Applicants provided evidence that Laura Valentina has experienced poor health in the past and concern exists for her health into the future. The Officer provided this response:

However, while I acknowledge that the applicants' H&C materials indicate that the quality of health care available in Colombia's subsidized system is poor, I note that there is little in the applicants' H&C materials to indicate that the applicants would be unable to access the contributory system of health care in Colombia, and so obtain quality medical care. In noting this, I am mindful that I have found in the second and third paragraphs of the BIOC section of this H&C decision that the applicants' circumstances make it very likely that the applicants would be able to obtain employment upon their return to Colombia that would enable them to continue to support themselves, and Laura Valentina.

[Emphasis added]

[13] Second, concern for the quality of education that will be available to Laura Valentina in Colombia is addressed as follows:

As well, I am mindful that the applicants' H&C submissions state that Laura Valentina will be negatively affected by the poor quality of education if she has to return to Colombia. In support of this statement the applicants have submitted excerpts from several research reports concerning country conditions in Colombia. I have reviewed these excerpts and note that they indicate that the quality of education in the public school system in Colombia is generally low. However, I note that there is little in the applicants' H&C materials to indicate either that private schools are unavailable in Colombia, or to indicate that the quality of education available at private schools in Colombia is not good, or to indicate that attending a private school in Colombia would be prohibitively expensive. Given my earlier finding that the PA and SA would likely be able to obtain employment in Colombia that would enable them to continue to support themselves and Laura Valentina, I find that there is little in the applicants' H&C materials to indicate that Laura Valentina would be unable to attend a private school in Colombia.

[Emphasis added]

[14] Third, the Officer speaks to a language concern:

Nonetheless, should Laura Valentina find, upon her return to Colombia, that she is behind her peers with respect to her Spanish Language Skills I note that there is little to indicate that, following a period of hard work, she will be unable to catch up to them. As well, should Valentina need to improve her Spanish Language Skills upon her return to Colombia, I find that Valentina's young age, as well as the fact that her parents (the PA and SA) are native Spanish speakers, would greatly assist her to do this.

[Emphasis added]

[15] And fourth, the Officer deals with Laura Valentina's destabilization:

Further, I am mindful that the applicants' H&C materials indicate that Laura Valentina has made friends in Canada, and I acknowledge that it might be difficult for Laura Valentina to have to leave them and return to Colombia. However, I note that there are ways, such as via Skype, email, letter, and telephone that Laura Valentina would be able to keep in touch with her friends In Canada. I find that if Laura Valentina were to keep in touch with the friends that she has made in Canada that this would help to mitigate any difficulties that she might experience in being separated from them. As well, I note that Laura Valentina has demonstrated, during the time that she has been in Canada, that she has the social skills and initiative needed to make friends in a new country. I find that the social skills and initiative that Laura Valentina has shown in being able to make friends in Canada would greatly assist Laura Valentina to make new friends upon her return to Colombia.

[Emphasis added]

III. Conclusion

[16] The reasons provided for finding the decision under review is unreasonable results in a conclusion that the decision must be set aside.

JUDGMENT in IMM-5099-18

THIS COURT'S JUDGMENT is that the decision under review is set aside and the matter is referred back for determination by a different decision-maker.

There is no question to certify.

"Douglas R. Campbell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5099-18

STYLE OF CAUSE: NAYCOLL JOSE GAMBOA SAENZ, SUSAN LEYDI
GONZALEZ MORENO, LAURA VALENTINA
GAMBOA GONZALEZ v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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