Federal Court  Cour fédérale

Date: 20190521

Docket: IMM-4168-18

Citation: 2019 FC 712

Toronto, Ontario, May 21, 2019

PRESENT: Mr. Justice Campbell

BETWEEN:

JORGE LUIS ALBERTO BONNARDEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The present Application is a challenge to a decision dated June 28, 2018 in which the Applicant's request for landing in Canada on humanitarian and compassionate (H&C) grounds was dismissed.

I. Background

[2] The Applicant is a citizen of Argentina. He applied for permanent residence on H&C grounds with his common-law spouse, Ms. Saurez, who is also a citizen of Argentina.

[3] The Applicant first came to Canada with his parents when he was 8 years old in 1988. His parents submitted a refugee claim on behalf of their family. After 7 years in Canada, during which time the Applicant completed elementary school, he returned with his family to Argentina in 1995.

[4] In around April 2001, the Applicant came to the Canadian border from the United States and asked for refugee protection. This claim was refused. Ms. Suarez also came to Canada in 2001 from the U.S. and made a refugee claim at the Canadian border. Her claim was also refused in 2002. In around 2002, the Applicant, along with his parents and siblings, submitted an H&C application. This was refused in 2008. He was then eligible for a pre-removal risk assessment, which he submitted in the summer of 2008, but this too was refused later that year.

[5] Around November 2001, shortly after both arrived in Canada, the Applicant and Ms. Suarez entered into their common-law relationship. They have two children: Sean, age 11 and Chiara, age 10. Both Sean and Chiara are citizens of Canada. They have never been to Argentina and do not speak Spanish. Much of the Applicant's extended family resides in Canada as well, including his siblings.

[6] In 2017, the Applicant and Ms. Suarez submitted an H&C application providing the following evidence and argument: they had become contributing members to Canadian society over the many years they have lived here (since 2001); their two young Canadian citizen children have many friends, are engaged in many extracurricular activities and are excelling in school in Canada; it is in their young Canadian citizen children's best interests to remain in Canada, the only home they have ever known, rather than to return to Argentina, a country they have never been, where a language is spoken that the children do not speak; the Applicants have substantial family and social ties to Canada; the physical separation from their Canadian family members would constitute hardship for all concerned; they have been active in their community, including with their church, their children's school, socializing with their many close friends and in coaching soccer teams; they pose little risk of becoming a financial burden on Canadian society as the Applicant has been gainfully employed with the same company where he is a valued employee since 2006; they have never relied on social assistance; and the entire immediate and extended family have good civil records in Canada (Applicant's Further Memorandum, para 23).

II. The Decision Under Review

[7] The following is Counsel for the Applicant's primary argument:

> The Officer erred by discounting the Applicant's establishment as not exceptional primarily because the duration, employment, skills and integration into the community and society were primarily gained during the period of time that the Applicant was not authorized to work in Canada. While decision-makers are entitled to give less weight to evidence of establishment in circumstances where it results from an applicant's choice to remain in Canada without status and not from circumstances beyond his or her control, the Officer's preoccupation with the question of whether the Applicant was in Canada for reasons beyond his control was

> unreasonable in these circumstances. This Court has recognized that such "negative factors are common to most if not all H&C applications" and that, when "the negative side of the balance sheet is so slight", a preoccupation with these negative factors, as demonstrated by the Officer in the case at hand, will call into question whether an Officer has given the required "substantial weight" to the best interests of the children, and properly considered the other grounds for an H&C exemption.
>
> (Applicant's Memorandum of Fact and Law, para 4)

[8] In the decision at page 10 there is ample evidence that the Officer was preoccupied with immigration misconduct:

> I find that the applicants remained in Canada for circumstances not beyond their control. I note that the applicants remained illegally in Canada for 15+ years and went "underground" once the Canada Border Services Agency (CBSA) started removal procedures. I find that the applicants consciously decided to evade CBSA and continued to reside in Canada without updating immigration in regards to their whereabouts. Therefore, I find that the applicant's inability to leave Canada is not considered beyond the control of the applicants. I find this to be a strong negative factor.
>
> The PA indicates that he began working as a self-employed Carpenter/Framer in Canada. He is on contract with RW Framing since January 2006 and a member of Union Local 183. While I acknowledge that the applicant has a history of stable employment, I note that the applicant only held two work permits, for a cumulative duration of 1 year. Although the applicant is eligible to apply for work permits, I note that he continued to work in Canada without authorization. The SA declares working as a Cake Maker/ Cleaner since November 2001. I note that the SA is eligible to apply for work permits, however only had [one] valid for one year. She also works in Canada without authorization. As the applicants are both working in Canada and paying for their own medical and dental services, I find that the applicants demonstrated sound financial management. While I grant little weight to their employment as they were not authorized to work, I still grant the applicants some weight as they have been self-sufficient financially and have not relied on social services/welfare.
>
> [...]

> The PA states, "We as a family have never been in trouble with police or had a conflict with any individuals." While I acknowledge that the applicants may not have criminal records in Canada, I note that the applicants have shown a disregards [sic] towards Canadian legislation, namely immigration laws. As previously stated, the applicants have remained in Canada for 15+ years without status and have worked in Canada without authorization. Therefore, I do not find this to be a positive factor.
>
> Overall, I acknowledge that the applicants resided in Canada for a significant duration of time, therefore they claim to be well established. However, I do not find that the degree of establishment demonstrated by the applicants to be exceptional. This is primarily because the duration, employment, skills and integration into their community and society were primarily gained during the period of that that the applicants were not authorized to remain and work in Canada. Further, the applicants evaded CBSA for many years and disregarded Canada's immigration laws in order to reside here. Therefore, I give little weight on the applicants' establishment in Canada.
>
> [Emphasis added]

[9] At pages 11 to 13, the Officer expresses his or her determinative approach to the best interests of the children:

> I note that Sean and Chiara (now 9 and 8) were born in Canada, they have never visited Argentina. They attend school and participate in extracurricular activities. There is evidence that they are adapting well in school and excelling in their second language classes (French) which is commendable. I also note that they are surrounded by many relatives in Canada, including their paternal uncles and aunts, who happen to be their godparents. I note that Sean and Chiara frequently see their relatives who reside in the same community and often celebrate holidays and special occasions together.
>
> If the applicants had to return to Argentina to apply for permanent residence from there, Sean and Chiara would likely move with them. I note that they would have to leave their friends, relatives, supporters and their life in Canada. There would certainly be hardship involved in removing them from these people and life in Canada and moving to a country in which they have never resided before. That being said, I note that the children are doing well in

school in Canada and excel at learning a second language. I note that they are presently at an age where they are likely to be adaptable to new situations. I find that they may be adapt to the schooling system in Argentina and learn Spanish. I also note that they would continue to have the support of their parents, who as children, also attended compulsory education in Argentina and speak Spanish.

In regards to the applicants' concerns that Sean and Chiara would suffer a psychological setback if forced to reside in Argentina, I find that the applicants should look to themselves an example of residing in a country they were not born in. I note that the PA was born in Argentina and moved to Canada at age 8, a country that he had never been to and did not speak the language. None the less [sic], I note that after his arrival in 1988, he adapted and attended school in Canada for 7 years and learned English. Further, the PA returned to Canada as an adult and successfully established his career in Canada. Therefore, with the assistance of their parents, I am satisfied that Sean and Chiara may be able to adapt to life in Argentina at their current age, as they are still young and may be able to successfully integrate into the education system.

I also note that Sean and Chiara may also be able to continue their close and supportive relationship with their godparents and relatives in Canada, who may be able to phone/video call or visit them in Argentina. I note that Sean and Chiara are Canadian citizens and may also be able to visit relatives in Canada during holidays. Further, in Argentina, I note that Sean and Chiara would be able to meet their parental grandparents and maternal grandfather and uncles. I note that they may be able to develop new relationships with their relatives in Argentina and continue to have a family network to celebrate holidays and special occasions. I note that these relatives may also be able to provide additional support to them as they adjust to life in Argentina. I am satisfied that Sean and Chiara would be taken care of emotionally, socially, culturally and physically by their parents as well as their relatives in Argentina and be able to maintain their relationship with relatives in Canada.

I find that these considerations may mitigate some of the hardships in leaving Canada and having to settle in Argentina.

If the applicants are allowed to remain in Canada, Sean and Chiara would be able to continue their education, remain with their friends, relatives and supporters and continue life in Canada. I believe that they would be taken care of emotionally, culturally,

> socially, and physically by their parents and as well as friends, relatives and supporters in their community.
>
> [Emphasis added]

[10] The conclusion to the decision reads as follows:

> Overall, I acknowledge that the applicants resided in Canada for 16+ years and have been successful in finding employment and financial stability. I accept that they have supporters in Canada. I have weight [sic] these positive establishment factors against the applicants' stay in Canada, which was for the most part was within their control. I also note that they evaded detection by CBSA for the majority of their stay in Canada. I also acknowledge that the applicants started their own family unit in Canada, however I have considered that this family unit can remain together in Argentina. I am also satisfied that they continue to have relatives in Argentina who may be able to support them if required, and may continue to have the support of their relatives in Canada. I am not satisfied, given the evidence on file and given the applicants circumstances that they would face significant difficulty re-establishing themselves in Argentina. Having carefully assessed the best interest of the children, I do not find that relocation to Argentina would have a significant negative impact on Sean and Chiara.
>
> Having considered the circumstances of the applicants and having examined all of the submitted documentation, I am not satisfied that the humanitarian and compassionate considerations before me justify an exemption under section 25(1) of the *Act*.
>
> [Emphasis added]

III. Conclusion

[11] Counsel for the Respondent argues that the Officer does not actually have to state that it is in the children's best interests to stay in Canada with their parents; that much is presumed to be the case (*Garraway v Canada (MCI)*, 2017 FC 286 at para 33; *Semana v Canada (MCI)*, 2016 FC 1082 at paras 23-27).

[12] Thus, the question becomes: what reason exists for the H&C application not to be granted? In the decision, the Officer made an intensive effort to establish, by speculation, that Sean and Chiara would be just fine if they are required to leave Canada for Argentina. In my opinion, that effort is evidence that, not only was Sean and Chiara's parents' immigration misconduct a "strong negative factor" in the Officer's mind in reaching the conclusion, it was a factor that trumped Sean and Chiara's best interests. What is so striking about this outcome is, but for their immigration choices, the parents have conducted themselves as model participants in Canadian society.

[13] I find that the Officer's extraordinary focus placed on Sean and Chiara parents' immigration misconduct caused the Officer to effectively minimize Sean and Chiara's best interests. The Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75 provides direction in this instance:

> […] 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.

JUDGMENT in IMM-4168-18

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

There is no question to certify.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4168-18
STYLE OF CAUSE:	JORGE LUIS ALBERTO BONNARDEL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 15, 2019
JUDGMENT AND REASONS:	CAMPBELL J.
DATED:	MAY 21, 2019

APPEARANCES:

Rebeka Lauks	FOR THE APPLICANT
David Joseph	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada	FOR THE RESPONDENT