Federal Court  Cour fédérale

Date: 20121023

Docket: IMM-2127-12

Citation: 2012 FC 1214

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 23, 2012

PRESENT: The Honourable Mr. Justice Pinard

BETWEEN:

GAEL MUTANDA MBIKAYI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review filed in accordance with subsection 72(1) of the *Immigration and Refugee Protection Act*, SC (2001), c 27, of a decision by an immigration officer (officer) dated February 6, 2012. The officer refused the application for permanent residence based on humanitarian and compassionate considerations of Gael Mutanda Mbikayi (applicant).

[2] The applicant is a native of the Democratic Republic of the Congo and has been in Canada since 1996.

[3] The applicant's main criticism is that the officer applied the incorrect test for the best interests of his three children aged 9 months, six years and eight years. To properly assess this argument, it is important to reproduce the relevant part of the decision in question in its entirety here:

> [TRANSLATION]
>
> The applicant's Canadian children are now five and three years old. The applicant submits evidence that his spouse is pregnant and expecting a new baby.
>
> The applicant submits letters from his children's preschool and a letter of acceptance from a new school. In a letter dated 24-5-2011 from a school that his son attended three times a week, the principal wrote that the applicant is a father who is very present and involved in his child's schooling: he drives his son every morning, participates in all extracurricular activities and attends parent meetings that he is invited to. Despite the fact that those documents show that the applicant is involved in the care of his children and that his absence may be hard for his family and his children, they do not show that his departure from Canada or his absence would cause disproportionate hardship.
>
> I note that the spouse did not sufficiently explain how the applicant is involved in his children's life to demonstrate that his absence would cause disproportionate hardship for his children.
>
> I note that the applicant has already spent approximately eight months in detention in Canada for criminal offences, that is, in pre-trial or pre-sentence custody or while serving a prison sentence. In addition, by committing several criminal offences in Canada, the applicant, without status in Canada, faced deportation from Canada. The applicant did not adequately explain how the criminal offences committed were out of his control. Despite the fact that the offences were committed before the birth of his first child in 2006, according to his own submitted information on the criminal offences, he committed obstruction of a peace officer on 2-6-2006, after he married his current spouse. The applicant was criminally convicted for that offence.

> The applicant did not adequately explain how the other members of his family in Canada, for example his mother, his brothers or his sisters, could not provide appropriate help to his children if he is required to leave Canada. Consequently, despite the fact that the applicant is involved in his children's lives and that his absence may be hard, the applicant did not sufficiently demonstrate that his departure from Canada would cause disproportionate hardship for his Canadian children.
>
> [Emphasis added.]

[4] It seems obvious from the officer's decision that he did not properly consider the best interests of the children to support that finding. The following comments by my colleague Justice Michael L. Phelan in *Sahota et al v The Minister of Citizenship and Immigration*, 2011 FC 739, apply aptly to this case:

> [7] The overarching standard of review for H&C decisions is reasonableness (*Mooker v Canada (Minister of Citizenship and Immigration)*, 2008 FC 518). The issues of proper legal test applied and procedural fairness are to be assessed under the correctness standard (*Gurshomov v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 1212).
>
> [8] The Officer's analysis of the "best interests of the child" is legally flawed. The Officer distorted the analysis and applied the wrong legal test by imposing the burden of showing "disproportionate hardship" rather than the "best interests" test mandated by *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475. While the ultimate question in an H&C application is "disproportionate hardship", the "best interests" analysis operates as a separate consideration. The Officer's failure to keep the two issues distinct results in an unreasonable assessment of the children's best interests.

[5] My colleague Madam Justice Anne Mactavish made similar comments in *Beharry et al v The Minister of Citizenship and Immigration*, 2011 FC 110:

> [11] The first is the test or tests that the Officer appears to have used in assessing the children's best interests. At various points in the

> analysis the Officer discusses the best interests of the children in terms of whether the children would suffer "unusual and undeserved and disproportionate hardship" if they were required to return to Guyana. However, the unusual, undeserved, or disproportionate hardship test has no place in the best interests of the child analysis: see *Arulraj v. Canada (MCI)*, 2006 FC 529, [2006] F.C.J. No. 672 (QL) and *Hawthorne v. Canada (MCI)*, 2002 FCA 475, 297 N.R. 187, at para. 9.
>
> [12] I am mindful that the mere use of the words "unusual, undeserved or disproportionate hardship" in a 'best interests of the child' analysis does 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 applied the correct test and conducted a proper analysis: *Segura v. Canada (MCI)*, 2009 FC 894, [2009] F.C.J. No. 1116 (QL), at para. 29.
>
> [13] It is not at all clear that the Officer applied the correct test in this case. In addition to the repeated use of the term "unusual and undeserved or disproportionate hardship" in the Officer's analysis of the best interests of the children, the Officer also looked at the situation of the children to see if they were in "an exceptional situation" or "unusual circumstance to justify a positive exemption". Neither of these tests is appropriate in a 'best interests of the child' analysis.

[6] I therefore agree with the respondent that the mere use of the expression "unusual, undeserved or disproportionate hardship" or "disproportionate hardship" in the context of an analysis of the interests of children does not vitiate, in itself, the decision if it is clear, upon reading it, that the officer applied the correct test and carried out a proper analysis, as we have learned from *Segura v The Minister of Citizenship and Immigration*, 2009 FC 894.

[7] However, in this case, it is not because there was a lack or insufficiency of evidence related to the children's best interests, as the respondent is claiming, that the officer can be considered as having correctly or even reasonably considered their best interests. The above excerpt of his

decision clearly shows several times that the officer required sufficient evidence in order find that the children would suffer "disproportionate hardship" in their father's absence. The officer did not consider the best interests of the children in any other way in light of the evidence, even the limited evidence, that was submitted to him.

[8] Given my finding on this issue concerning the best interests of the children, there is no need to consider the other arguments raised by the applicant.

[9] For these reasons, the application for judicial review is allowed and the matter is referred back to another immigration officer for redetermination.

[10] I concur with counsel that there is no question for certification arising.

JUDGMENT

The application for judicial review is allowed. The decision dated February 6, 2012, by J. Gullickson, immigration officer, Citizenship and Immigration Canada, is set aside and the matter is referred back to a new immigration officer for redetermination.

"Yvon Pinard"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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