Federal Court Cour fédérale

Date: 20161230

Docket: IMM-2454-16

Citation: 2016 FC 1420

Ottawa, Ontario, December 30, 2016

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

TYRON JOHN RICHARD

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Tyron John Richard, seeks judicial review of the decision of a Senior Immigration Officer [the Officer], made on May 27, 2016, refusing his application for permanent residence from within Canada based on humanitarian and compassionate [H&C] grounds. Mr. Richard asserts that the Officer made a number of errors, including erring in his assessment of the best interests of the child.

[2] For the reasons that follow, the application for judicial review is granted.

I. Background

[3] Mr. Richard is a citizen of Grenada. He has three (3) Canadian-born daughters with his common-law spouse with whom he has been in a relationship since 2010. He is also helping raise her two (2) daughters from a previous relationship. In addition to the five (5) girls he is raising, Mr. Richard has a son from an earlier relationship who does not live with him.

[4] Mr. Richard entered Canada in July 2003 and was granted permanent resident status after being sponsored by his father. He was sixteen at that time.

[5] In July 2009, Mr. Richard was found to be inadmissible to Canada pursuant to paragraph 36(1)(*a*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 due to criminal convictions in 2007 and 2008. As a result, he was issued a deportation order.

[6] In August 2010, the Immigration Appeal Division [IAD] of the Immigration and Refugee Board granted Mr. Richard a stay of removal for four years, subject to certain conditions.

[7] In November 2014, Mr. Richard's appeal was deemed abandoned given Mr. Richard's failure to appear at his hearing. As a result, Mr. Richard lost his permanent resident status. Mr. Richard mistakenly believed that by giving his change of address to the Canadian Border Services Agency, it would be forwarded to the IAD.

[8] A warrant for Mr. Richard's arrest was issued in December 2014 and executed in January 2015. He was then placed in immigration detention, on the ground that he was deemed unlikely to appear for removal.

[9] On May 21, 2015, Mr. Richard submitted an H&C application to Citizenship and Immigration Canada based on his level of establishment in Canada, his rehabilitation from his criminal record and the best interests of his children. Regarding the best interests of the children, Mr. Richard submitted that separation from his daughters would have a devastating impact on the financial, emotional and psychological well-being of the five (5) minor children, the oldest of which was fourteen (14) years of age. In his later representations, he submitted that an application for a protection order was brought by the Children's Aid Society [CAS] in late 2015 and that in the course of these proceedings, the CAS articulated concerns regarding the ability of the children's mother to care for them. He argued that the outcome of these proceedings could result in the children being placed in foster care.

[10] Mr. Richard's H&C application was denied on May 27, 2016. The Officer found that Mr. Richard's criminal inadmissibility outweighed the other positive factors, such as the best interests of Mr. Richard's six (6) children.

[11] On June 9, 2016, Mr. Richard filed an application for leave and for judicial review of the Officer's decision.

[12] On June 30, 2016, upon consent of the parties, Mr. Justice Russell granted a stay of Mr. Richard's removal from Canada pending a decision on the application for leave and for judicial review. Mr. Richard was subsequently released from detention in July 2016.

II. Issues and standard of review

[13] Although Mr. Richard has raised a number of issues in his written and oral submissions, the determinative issue is whether the decision of the Officer was reasonable.

[14] The appropriate standard of review in H&C applications is reasonableness (*Rodriguez Zambrano v Canada (Citizenship and Immigration)*, 2008 FC 481 at para 31. The same standard of review is applicable to the assessment of the best interests of the child (*Kanthasamy v Canada (Citizenship and Immigration*), 2015 SCC 61 at paras 44-45 [*Kanthasamy*]; *Kisana v Canada (Citizenship and Immigration),* 2009 FCA 189 at para 18; *Moya v Canada (Citizenship and Immigration),* 2012 FC 971 at paras 25-26).

[15] In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible, acceptable outcomes which are defensible in light of the facts and the law (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

III. Analysis

[16] In *Kanthasamy,* the Supreme Court of Canada provided guidance on how an officer should assess an application based on H&C grounds, particularly when the interests of children are at stake. At paragraph 39 of its decision, the Supreme Court of Canada articulated that it is not enough to state that the interests of the children have been considered. The interests have to be "well identified and defined" and they must be examined "with a great deal of attention" in light of all the evidence.

[17] The Minister argues that the Officer did a thorough analysis of the best interests of the children. The Officer acknowledged the statements made by Mr. Richard and his counsel regarding the CAS involvement with the children and the probable outcome of the Family Court proceedings. The Officer found that no documents had been provided to support the health issues of Mr. Richard's common-law partner and the concerns of the CAS regarding her ability to care for the children in the event Mr. Richard was removed from Canada. The Minister submits that Mr. Richard's claims that he has been a part of his children's life, that the CAS is seeking a protection order for the children because of his common-law partner's health problems and that the children face a risk of becoming Crown wards if he is not able to care for them constitute important grounds for his H&C application. As a result, it was reasonable for the Officer to require something more than the statements made by Mr. Richard and his counsel. The onus was on Mr. Richard to establish the claims he put forth in his H&C application, including claims regarding the best interests of his children, with relevant evidence. Lastly, the Minister states that the reasons in the decision clearly indicate that the Officer gave the best interests of the children

significant weight in the assessment of the H&C application and that he was “alert, alive and sensitive” to this factor. Therefore, the findings made by the Officer with regards to the best interests of the children are reasonable, based on the evidence and information available to him and in accordance with the jurisprudence.

[18] While I agree with the Minister that the Officer states in his decision that he considered the best interests of Mr. Richard’s six (6) children and that his reasons discuss the possibility of the children becoming wards of the Crown, I find that the Officer committed a reviewable error in finding that there was no documentary evidence before him regarding the CAS proceedings or details from the CAS regarding the ability of Mr. Richard’s common-law partner to care for the children. On the contrary, there was a sworn affidavit by Mr. Richard which provided evidence on the protective order application brought by the CAS before the Family Court. His affidavit also detailed the CAS’s involvement in the past with his common-law partner and her two (2) daughters.

[19] Similarly, the Officer also had before him a letter dated March 1, 2016 from Mr. Richard’s family lawyer who represented him in his Family Court proceedings. The letter provides information on the CAS proceedings and further indicates that the CAS had articulated “very serious concerns” regarding the ability of the children’s mother to care for them. In addition to providing further details regarding the mother’s health condition, Mr. Richard’s lawyer specifically states that the children are at risk of becoming Crown wards.

[20] Considering the presumption of truthfulness of a sworn affidavit (*Zarandi v Canada (Citizenship and Immigration),* 2015 FC 1036 at para 17) and the fact that the Officer did not raise any issues of credibility with regards to Mr. Richard's affidavit as well as the letter from Mr. Richard's family law counsel, it was unreasonable for the Officer to discount this evidence without further explanation.

[21] I also note that the Officer states in his conclusion that he has carefully considered the best interests of the children and that it is an important factor in an H&C application. However, immediately after, the Officer states that it "is certainly understandable that [Mr. Richard] would not want to be separated from his children" and then proceeds to say that he has also considered Mr. Richard's inadmissibility due to his criminality. The Officer's analysis appears to be focussing on the interests of Mr. Richard and the effect the separation will have on him. It specifically ignores the caution voiced by the Supreme Court in *Kanthasamy* at paragraph 39:

> [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.

[22] While this Court is required to review the tribunal's decision as a whole, upon review of the decision, I find that the best interests of the children have not been clearly laid out, nor assessed from their own perspective. The Officer failed to identify their interests and in particular, the ones associated with Mr. Richard's possible removal from Canada. As such, it is

not possible to know whether the Officer turned his mind to those interests and this therefore renders the decision unreasonable.

[23] Moreover, I also note that when analyzing the economic consequences of Mr. Richard's removal from Canada, the Officer discusses the consequences on other family members of Mr. Richard. There is no discussion of the impact on the children. Then, when discussing the best interests of the children, the Officer's analysis is limited to noting that Mr. Richard has been removed from his daughters' lives as a result of his detention and has not been providing any financial support to his children for a significant period of time. The Officer also observes that their situation is not unlike that of many other families today, struggling to have enough financial resources available for their family and to have the time required to raise their children. There is no other analysis on the economic impact on the children.

[24] The Supreme Court of Canada stated in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraph 75 that a decision is unreasonable if the interests of children affected by the decision are not sufficiently considered. I believe this to be the case.

[25] I also find, contrary to the Minister's submission, that the Officer committed a reviewable error in finding that Mr. Richard had not provided any objective evidence regarding his full-time employment at an automobile center from August 2014 until his detention in January 2015. In fact, Mr. Richard provided evidence by way of a Statement of Remuneration issued in 2014 by the Canada Revenue Agency. The Officer erred in discounting it because it only referred to a

corporate number and did not provide the corporate name. The Minister concedes that the Officer erred with respect to this finding but submits that the error is not determinative.

[26] I disagree. In the present case, the Officer's determination of whether Mr. Richard should be granted H&C relief involved the assessment of four (4) factors: his criminality, his establishment in Canada, the economic consequences of his removal to Grenada and the best interests of the children. The Officer found that Mr. Richard's criminality in Canada outweighed the other positive factors. To the extent that the Officer's assessment of one of those factors is based on an erroneous finding, it is reasonable to question whether the error could have had an impact on the Officer's overall assessment when balancing which factors to afford more weight to.

[27] For these reasons, the Court finds that the decision is unreasonable and must be set aside.

[28] At the hearing, Mr. Richard proposed the following question for certification:

> In special circumstances, where there is evidence before an officer that the best interests of the children are dramatically affected, as well as evidence before the officer that their interests are not being adequately advanced, in those special circumstances, does the officer have a heightened duty of fairness to inquire further about the best interests of the child?

[29] The Minister opposes the certification of the question, stating that the situation is very fact specific and does not meet the relevant criteria.

[30] In *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at paragraph 9, the Federal Court of Appeal confirmed the test for certifying questions:

> [9] It is trite law that to be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance. As a corollary, the question must also have been raised and dealt with by the court below and it must arise from the case, not from the Judge's reasons (*Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, 176 N.R. 4, 51 A.C.W.S. (3d) 910 (F.C.A.) at paragraph 4; *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, [2004] F.C.J. No. 368 (F.C.A.) at paragraphs 11-12; *Varela v. Canada (Minister of Citizenship and Immigration),* 2009 FCA 145. [2010] 1 F.C.R. 129 at paragraphs 28, 29, and 32).

[31] I agree with the Minister that the question proposed by Mr. Richard is very fact specific and is not dispositive of this matter. Accordingly, no such question shall be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted;
2. The decision is set aside and the matter is remitted back to a different Officer for redetermination;
3. No question is certified.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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