Federal Court  Cour fédérale

Date: 20170426

Docket: IMM-3741-16

Citation: 2017 FC 412

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, April 26, 2017

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

HERNANDO YAMID HERRENO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant is seeking judicial review of the decision rendered by the Immigration Appeal Division [IAD] on July 29, 2016 [the Decision]. This application for judicial review is made under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] This case underscores the conflict between a fraud committed under the Act and the establishment of the perpetrator of that fraud and the best interests of a child. The IAD resolved this conflict by upholding the decision of the Immigration Division [ID] that a removal order is appropriate under the circumstances. The removal order was the result of applying paragraph 40(1)(a) of the Act, which reads as follows:

Misrepresentation	**Fausses déclarations**
40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation	**40 (1)** Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;	**a)** directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;

[3] As part of the judicial review, the applicant is no longer filing a grievance with the panels as to the validity of the removal order issued against him. His argument concerns only the application of section 67 of the Act to the facts of this case. Thus, it is established that the applicant made misrepresentations that led to his removal order. He submits that there was a reviewable error based on the fact that the IAD did not see fit to grant special relief. The appeal of the ID's decision that is allowed under the Act can be subject to one of three provisions. Those provisions read as follows:

Appeal allowed	**Fondement de l'appel**
67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the	**67 (1)** Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :

time that the appeal is disposed of,	
(a) the decision appealed is wrong in law or fact or mixed law and fact;	**a)** la décision attaquée est erronée en droit, en fait ou en droit et en fait;
(b) a principle of natural justice has not been observed; or	**b)** il y a eu manquement à un principe de justice naturelle;
(c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	**c)** sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

The applicant submits that the IAD's consideration of the best interests of the child directly affected was flawed.

[4] Despite the applicant's admission that the removal order (in this case, an exclusion order was issued on September 13, 2011) itself was appropriate because of his misrepresentations, it is necessary to present the facts of this case.

[5] The applicant used a ploy to obtain landing in Canada. He is a citizen of Colombia and was married in July 2001 to an individual named Liliana Gamba Martinez, who is also a Colombian citizen. Their divorce was reportedly finalized on August 3, 2004. Four months later, the applicant married a Canadian citizen (December 22, 2004).

[6] Being sponsored by this second spouse, the applicant became a permanent resident of Canada on December 5, 2005.

[7] One year later, on December 6, 2006, a divorce judgment was made in Canada. Barely one month later, on January 17, 2007, the applicant re-married, this time to an individual named Nikolle Gamba Martinez. Against all expectations, Nikolle Gamba Martinez and Liliana Gamba Martinez are one and the same person. The applicant tried to sponsor his third spouse, who is in fact his first spouse, but that application was eventually withdrawn. That did not stop the government from launching an investigation to determine whether misrepresentations had been made regarding the applicant's immigration. The applicant divorced Ms. Gamba Martinez on February 12, 2011.

[8] On March 19, 2010, a report was prepared under section 44 of the Act, setting out the facts supporting the conclusion that the applicant is inadmissible in Canada. The report states that misrepresentations had been made in order to obtain status in Canada and sponsor the person who was in fact his first spouse. As indicated above, the relevant section is section 40 of the Act, which provides for inadmissibility in the event of misrepresentations. That report was subsequently referred to the ID, which was followed by an appeal to the IAD, whose decision is the subject of this judicial review.

[9] The evidence indicating that this was a plot conceived by the applicant and his accomplices leaves no room for doubt. In fact, the IAD received emails that were exchanged between the applicant and his second spouse, who sponsored the applicant, which leave nothing

to the imagination. Thus, not only do the dates of the various marriages and divorces cast doubt on the facts presented by the applicant to obtain his status in Canada, but the emails are unambiguous as to the intentions behind these fraudulent tactics. The applicant committed fraud against the Act.

[10] What complicates the situation and led to the application for judicial review is the fact that the applicant's brother and sister-in-law died prematurely and tragically, and their young child is reportedly under the legal custody of the applicant's sister. The child was born in 2007 and was 18 months old when her parents died.

[11] The applicant's sister, who was born in Colombia in 1970 but arrived in Canada in September 2006, obtained refugee status in 2008 and became a Canadian citizen in 2013, is the only person who was given legal custody of that child. However, the applicant lived with his sister during the period following the death of the child's parents, meaning that, according to the IAD, "[t]he appellant and his sister are really the only parents the girl has ever known. . ." (paragraph 24).

[12] Even though the applicant moved out in April 2014 with a new companion, the IAD found that "even though since April 2014 the appellant is not living with his sister and that they both have common-law partners, the nature of the relationship has not essentially changed." This refers to the relationship between the child, the applicant's sister and the applicant.

[13] The applicant thus alleges that the IAD's review of the best interests of the child was flawed when it considered granting special relief in accordance with paragraph 67(1)(c) of the Act.

[14] The applicant took up this cause before this Court. It is the only issue he is raising. In my opinion, he is not wrong. This case must be referred back to the ID for a more thorough review of this young child's situation. I do not intend to suggest by this that the best interests of the child should win out in this case. What I consider, with respect, to be lacking is an attentive review of what would be in the child's best interests.

[15] The fact that the best interests of the child are subject to a specific review is well established. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*], the following is stated at paragraph 75 of the decision:

> 75 The certified question asks whether the best interests of children must be a primary consideration when assessing an applicant under s. 114(2) and the Regulations. 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. 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 an H & C 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 in the original.]

This same paragraph was cited by the Supreme Court in *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 [*Kanthasamy*]. In fact, the Court requires the following:

> [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.]

[16] In this case, the IAD clearly acknowledged that the applicant had played a role in this child's life for several years. The issue of the best interests of the child was clearly submitted to the IAD with supporting evidence. However, the only analysis of that issue is found in a few sentences at paragraph 24 of the decision. The IAD simply notes that this child was financially well-off, having inherited significant assets from her parents. However, suddenly, the IAD limited the applicant's role to that of an asset administrator who takes care of the accounting and collects rents. The IAD states that "[a] handyman could take care of the repairs that the appellant now handles." The decision makes no mention of the parental role the applicant plays in its review of the best interests of the child. The IAD states that the applicant and his sister "raised their niece"; however, it makes no reference to this in the review of the best interests of the child in the applicant remaining in Canada, other than for managing the assets she inherited upon the death of her parents. This absence makes the decision unreasonable (*Kanthasamy*, paragraph 39;

Baker, paragraph 75). Upon reading the decision, we do not know whether this interest was considered, much less whether it was examined with a great deal of attention in light of all the evidence.

[17] It is true that the applicant is no longer as present in his niece's life, since he moved out from his sister's residence, where the child lives. The relative proximity (10 minutes by car) does not change the fact that it is highly likely that the relationship has changed a great deal. However, it is not for the reviewing Court to make this assessment. The decision regarding the best interests of the child does not fall to this Court. The authority to make that decision has been conferred elsewhere. However, the reviewing court must be satisfied that the interests of the child have not been minimized, which, according to the Supreme Court of Canada in *Baker* and *Kanthasamy*, would make the decision unreasonable.

[18] In *Semana v. Canada (Citizenship and Immigration)*, 2016 FC 1082, my colleague Justice Denis Gascon stated that there is no formal approach that has been adopted by the higher courts for reviewing the issue of the child's interests. I concur. Moreover, that does not in any way change the panel's obligation to be alert, alive and sensitive to the interests of the child. In addition, those interests must be identified and defined and examined with a great deal of attention. In my view, what is lacking in this case is precisely the clear identification of those interests, and particularly the attentive examination. The only reference made is to the applicant's role as administrator of the child's assets.

[19] To attempt to compensate for this deficiency, the respondent cited *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708. That decision states that the adequacy of reasons is not a stand-alone basis for quashing a decision (paragraph 14). In fact, the standard seems to be found at the end of paragraph 16 of the decision, which reads as follows:

> "[16] . . . In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met."

[20] In my view, that is precisely what is deficient in the case at bar. The review of the panel's decision does not make it possible to understand the basis of the decision. It is particularly true that, in these matters, the Supreme Court indicates the necessity of explaining what the child's best interests are and then examining everything in light of the evidence provided.

[21] Instead, the IAD dedicated the vast majority of its review to the various difficulties that the applicant would face if he had to return to Colombia, given that he is now inadmissible. It is the aspect of the best interests of the child that appears to have been overlooked. As the Supreme Court of Canada has stated, the best interests of the child are important and must be sufficiently considered. Nowhere does it indicate that this is determinative. First, the best interests may vary according to various circumstances; in addition, other considerations must be weighed in order to conclude that special relief is warranted. This is not a suggestion that the review of best interests must lead to a given result. An attentive examination in this case may lead to the same result, that is, that special relief is not warranted, or to a different result. It is not for this Court to speculate in that regard.

[22] What the reviewing court must do is ensure that the best interests of the child have been considered with a great deal of attention. Although the applicant allegedly played a role in the child's life, the review of her interests is limited to his role as administrator of her assets. That would not constitute the type of analysis required by *Baker* and *Kanthasamy*. The importance given to the best interests of the child requires that an attentive examination be demonstrated. With respect, that is not what happened in the case at bar.

[23] Consequently, I am obliged to conclude that the case must be referred back to the IAD so that the issue of the best interests of the child can be appropriately examined to determine whether special relief is warranted. In this case, it has been established that the applicant committed fraud against the Act, participating in a conspiracy with various persons in order to make misrepresentations of important facts, which led to an error in the application of the Act. Moreover, the issue of the applicant's establishment was also settled in the IAD's decision. There is no need to return to it, because it is no longer being disputed. Furthermore, it is difficult to understand how the applicant's turpitude could be favourable to him in terms of demonstrating any form of establishment in Canada. The nature of the misrepresentations is such that his establishment could be given minimal weight.

[24] It is with regard to the child's interests that the analysis is deficient, and this requires re-examination. This re-examination must be done by a different panel of the Immigration Appeal Division than the one that heard the case for which judicial review was ordered. Once that re-examination is complete, the IAD will need to weigh "all the circumstances of the case" that are not favourable to the applicant and reconsider whether special relief is warranted under

paragraph 67(1)(c) of the Act. Nothing in this Court's decision on judicial review should be interpreted as prejudicing the decision to be rendered by the IAD.

JUDGMENT in IMM-3741-16

THIS COURT'S JUDGMENT is that the application for judicial review is allowed. The issue of the best interests of the child is referred back to the Immigration Appeal Division for re-examination by a different panel. The Immigration Appeal Division will need to reconsider whether special relief is warranted under section 67 of the Act, assuming that the other issues raised have been resolved.

The parties did not identify any serious question of general importance. No such question is stated.

"Yvan Roy"
Judge

Certified true translation
This 10th day of October 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3741-16
STYLE OF CAUSE:	HERNANDO YAMID HERRENO v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	MARCH 15, 2017
JUDGMENT AND REASONS:	ROY J.
DATED:	APRIL 26, 2017

APPEARANCES:

Jacques Beauchemin	FOR THE APPLICANT
Zoé Richard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jacques Beauchemin Counsel Montréal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT