Federal Court  Cour fédérale

Date: 20170814

Docket: IMM-649-17

Citation: 2017 FC 724

Toronto, Ontario, August 14, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

ROBERT ANDRZEJ ZLOTOSZ
ANNA GIEDROJE

Applicants

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AMENDED JUDGMENT AND REASONS

I. Background

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a decision [Decision or Reasons] by an Immigration Officer [Officer] dated January 30, 2017 that denied the Applicants' permanent

residence based on humanitarian and compassionate [H&C] considerations. For the reasons that follow, I am dismissing the application.

[2] The Applicants are citizens of Poland. Mr. Zlotosz came to Canada on December 1, 2005 on a visitor's visa. He says that he was motivated to leave and remain outside of Poland due to a fear of threats he received from criminals targeting him for extortion. Mr. Zlotosz acknowledges that he overstayed his visitor visa, working in the construction industry for a period without authorization, to support himself.

[3] Ms. Giedroje has been in Canada since entering in 2004 on a visitor's visa. She has worked as a self-employed cleaner, and been without status for the majority of her stay.

[4] The Applicants met in Canada and are now common law spouses. They both searched for ways to regularize their status in Canada. Mr. Zlotosz, for a period, rectified his status in 2010, and retained valid temporary status until 2015. However, his work permit was not extended due to the failure to obtain a Labour Market Impact Assessment [LMIA]. Efforts to obtain permanent status through the Federal Skilled Worker and Federal Skilled Trades also failed.

[5] In May, 2016, the Applicants submitted their application for permanent residence on H&C grounds, seeking an exemption from the requirement to apply from overseas. This application led to the Decision under review today.

II. Preliminary Matter

[6] Counsel for the Respondent has noted that the proper Respondent in this matter is The Minister of Citizenship and Immigration, rather than The Minister of Immigration, Refugees and Citizenship as originally filed. At hearing, the Applicants concurred with this correction, but the decision inadvertently failed to reflect the amended style of cause. This clerical error is therefore now being corrected pursuant to R397(2) of the *Federal Courts Rules*, SOR/98-106, to reflect the proper Respondent.

III. Decision under review

[7] In her Reasons for refusal, the Officer found that Ms. Giedroje, in her 12 years in Canada, failed to attempt to regularize her status.

[8] The Officer noted that while the Applicants "show a degree of establishment, that they provide for themselves, and that they have strong ties with family and friends in Canada", their establishment was facilitated by "disregarding Canadian laws" having both overstayed, and also worked without authorization for a number of years.

[9] As for best interests of the child [BIOC], which is where the Applicants focused the arguments for this judicial review, the Officer noted that while the Applicants do not have children themselves, they have strong ties with the two children of Ms. Giedroje's sister, aged 18 (Agnieszka) and 4 (Sophie). The Officer considered BIOC for Sophie, finding:

> The evidence submitted demonstrates that Sophie is part of a family unit made up of her parents and her sister, in addition to the applicants. It is generally in the best interest of the child to be with her/his parents and siblings and to have a degree of stability. I note that the female applicant seems to be part of that stability for Sophie. However, it has not been demonstrated that Sophie's parents and sister could not continue to provide an adequate environment if the applicants were to leave. In addition, it is reasonable to assume that they could maintain their relationship by keeping in touch through various means of communication. I am therefore of the opinion that the applicants have not demonstrated that the child would be adversely and significantly affected.

[10] Finally, the Officer considered conditions in Poland, including unemployment, which had dropped from nearly 20% to about 10%. The Officer acknowledged challenges that the Applicants would face, but found that they know the language, culture and have family in Poland. Further, Mr. Zlotosz honed a number of skills in Canada that would assist in finding employment in Poland.

IV. Issues and Analysis

[11] The Applicants raise two issues. First, they submit that the Officer erred in applying the wrong legal test in assessing hardship and BIOC, which is to be reviewed according to the correctness standard. Second, even if the test was correctly applied, they state that the Decision was also unreasonable in light of the evidence.

[12] The Respondent replies that the applicable standard for H&C review is reasonableness, both as to the 'test' chosen, and the factual assessment.

[13] The leading case on H&C applications to exempt applicants from the normal requirement to apply for permanent residence abroad is *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para. 44 [*Kanthasamy*]. According to *Kanthasamy*, an immigration officer's conclusions with respect to an H&C application under section 25(1) of the Act involve the exercise of discretion and involve questions of mixed fact and law. They are reviewable on the standard of reasonableness.

[14] I agree with the parties that the standard of review to be applied to the selection of a legal test by an H&C officer has been the subject of some disagreement. One line of post-*Kanthasamy* authorities continues to apply a correctness standard: *Shrestha v Canada (Citizenship and Immigration)*, 2016 FC 1370 at para 6; *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at para 27; *Gomez Valenzuela v Canada (Citizenship and Immigration)*, 2016 FC 603 at para 19; *Gonzalez v Canada (Citizenship and Immigration)*, 2015 FC 382 at paras 23-35.

[15] Other decisions, however, have determined that *Kanthasamy* directs that the reasonableness standard be applied. For instance, in *Roshan v Canada (Citizenship and Immigration)*, 2016 FC 1308 at para 6, Justice Bell stated that "[t]he Court in *Kanthasamy* never departed from its opinion in *Dunsmuir* that the reasonableness standard of review applies to questions of law related to the interpretation of a tribunal's home statute". And in *Tang v Canada (Citizenship and Immigration)*, 2017 FC 107 at para 11, Justice McDonald remarked that "jurisprudence from this Court supports the application of a reasonableness standard of review when the issue is whether the correct legal test has been applied to the H&C considerations".

[16] Although there is clearly some debate on the matter, there is no need for me to pronounce on the applicable standard because I find the Officer both applied a correct approach to BIOC, and reasonably assessed the facts based on the evidence.

A. *Did the Officer apply the BIOC "correct legal test"?*

[17] The Supreme Court of Canada [SCC] reiterated the principles established in *Chirwa v Canada (Minister of Citizenship and Immigration),* [1970] IABD No 1 [*Chirwa*] as governing in H&C matters, to be read in conjunction with the Guidelines for immigration officers. Justice Abella held at paragraph 13 of *Kanthasamy*:

> The meaning of the phrase "humanitarian and compassionate considerations" was first discussed by the Immigration Appeal Board in the case of *Chirwa v. Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338. The first Chair of the Board, Janet Scott, held that humanitarian and compassionate considerations refer to "those facts, established by the evidence, which would excite in a reasonable man [sic] in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the Immigration Act": p. 350. This definition was inspired by the dictionary definition of the term "compassion", which covers "sorrow or pity excited by the distress or misfortunes of another, sympathy*": Chirwa*, at p. 350. The Board acknowledged that "this definition implies an element of subjectivity", but said there also had to be objective evidence upon which special relief ought to be granted: *Chirwa*, at p. 350.

[18] In the case at hand, the Officer effectively found that neither of the two key criteria mentioned in *Kanthasamy* at para 13 – namely (i) the basis for warranting of special relief, nor (ii) the objective evidence – to be sufficient. And as the SCC held above in *Kanthasamy*, the exercise of H&C discretion ultimately requires a subjective analysis. In other words, another officer might have concluded differently by weighing the evidence differently. Certainly, this

reality is not exclusive to section 25 H&C determinations; it applies equally to the discretion exercised by the Immigration Appeal Division of the Immigration and Refugee Board (see, for instance, *Canada (Citizenship and Immigration) v Gallardo*, 2017 FC 714 and *Ugwueze v Canada (Immigration, Refugees and Citizenship*), 2017 FC 713.

[19] It should be noted that in *Kanthasamy*, the majority of the Supreme Court did not reject the mere mention of the "unusual and undeserved or disproportionate hardship" test within an H&C analysis. In any event, contrary to the assertions of the Applicants, in the Decision at hand, the Officer did not use that phrase anywhere in the Decision, or otherwise assess BIOC under an analogous approach to hardship.

[20] A brief review of *Kanthasamy* on this point is worthwhile. There, the majority found that the concept of "unusual and undeserved or disproportionate hardship" cannot be determinative in the H&C analysis (*Kanthasamy* at paras 31, 32 and 41; see also *Nguyen v Canada (Citizenship and Immigration)*, 2017 FC 27 at paras 26-28 [*Nguyen*]). As stated by the SCC at para 33 of *Kanthasamy*, what decision-makers cannot do is "look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds, and use the language of 'unusual and undeserved or disproportionate hardship' in a way that limits their ability to consider and give weight to *all* relevant humanitarian and compassionate considerations in a particular case [emphasis in original]" (see also: *Ordonez v Canada (Citizenship and Immigration)*, 2017 FC 135 at para 19 [*Ordonez*]).

[21] An assessment of hardship can, therefore, form part of the BIOC assessment, even if it cannot be used as a threshold that requires demonstrating that the hardship imposed on a child must reach a particular level. In my view, a fair reading of *Kanthasamy* and the jurisprudence of this Court interpreting it, shows that there is no merit to the Applicants' submission that the Officer applied a wrong or incorrect test. Indeed, hardship a child may or may not face can support a favourable outcome based on BIOC (*Kanthasamy* at para 41; *Liang v Canada (Citizenship and Immigration)*, 2017 FC 287 at para 26 [*Liang*]; *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 12.).

[22] Here, the Officer observed that the Applicants did not show the child would be "adversely and significantly affected". This does not equate to using the wrong lens identified in *Kanthasamy*. It is perfectly clear that while the Applicants would have preferred that the Officer come to a different conclusion, the Officer's approach was justifiable based on the evidentiary record presented. The Federal Court of Appeal has rejected the notion that consideration of the BIOC simply requires that the officer determine whether the child's best interests favours non-removal, as this will almost always be the case (see for instance *Louisy v Canada (Citizenship and Immigration)*, 2017 FC 254 at para 11 [*Louisy*]; *Garraway v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 286 at paras 46-47; *Nguyen* at para 7). Rather, the law is clear that the onus rests squarely with the applicant to provide sufficient evidence on which to exercise positive H&C discretion. Here, the Officer applied a contextual approach to BIOC and found that the Applicants failed to provide such evidence.

[23] Contrary to the arguments of the Applicants, there was no requirement to apply the test articulated in *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 [*Williams*]: in *Kanthasamy*, the Supreme Court had the opportunity to adopt *Williams* or any other particular test, but stayed away from that. To deviate now from the SCC and the FCA's guidance would be inappropriate, as it would offend the doctrine of *stare decisis*.

[24] As a result, the Court has consistently held since *Kanthasamy* that there is no formula that must be used in considering BIOC. The framework for BIOC analysis remains largely unchanged since *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, in that the legal test is whether the officer was alert, alive and sensitive to child's best interests (*Ordonez* at para 19).

[25] I now turn to the issue of whether the Decision was reasonable.

B. *Is the decision reasonable with respect to the BIOC and Establishment factors?*

(1) BIOC

[26] First, with respect to the Officer's BIOC analysis, I will start by noting that *Kanthasamy* emphasized that there will inevitably be some hardship associated with being required to leave Canada, but that this alone will generally not be sufficient to warrant relief on H&C grounds.

[27] And in post-*Kanthasamy* jurisprudence, this Court has rejected the proposition that the Supreme Court brought an end to the principle that H&C relief is extraordinary. As Justice

Brown recently stated in *Nguyen* at para 29, "[s]ince section 25 of IRPA is not a parallel or "alternative immigration scheme", it seems to me that H&C considerations are still properly considered to be extraordinary and, as *Chirwa* put it, a form of 'special relief'".

[28] The Applicants rely strongly on the recent decision of this Court in *Dowers v Canada (Immigration, Refugees, and Citizenship)*, 2017 FC 593 [*Dowers*]. In that case, however, Justice Campbell found that the officer had not engaged with the evidence presented regarding BIOC and thus failed to be alert, alive and sensitive to the child's interests as directed by *Kanthasamy*. (see *Dowers* at paras 13, 14 and 16). As explained above, this is not a flaw of the Officer in this Decision.

[29] The Officer's reasons show care was taken to address all evidence put before her, which only consisted – with respect to Sophie's BIOC – of short statements in (i) an Affidavit from Sophie's mother, (ii) a letter from Sophie's older sister, and (iii) the representative's cover submissions to the H&C application. All three documents spoke in brief terms that Ms. Giedroje was a close family member, and Sophie would find separation very difficult. However, these brief assertions were not supported by further evidence – similar to what occurred in *Louisy* at para 10.

[30] It is settled law that BIOC can be balanced against removals (*Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at para 28 [*Semana*]; *Mack v Canada (Citizenship and Immigration)*, 2017 FC 98 at para 18 [*Mack*]). In the context of the limited evidence presented, the Officer's two primary observations here were not unreasonable, i.e. that (i) the

Applicants failed to demonstrate that Sophie's immediate family (her primary caregivers) could not provide an adequate environment if her aunt and uncle were to leave Canada, and (ii) communication could not continue from abroad. The mere fact that the Officer found that the family has "forged strong ties" and are very close does not render a positive outcome a foregone conclusion. This is particularly so in the circumstances where the applicants are neither the child's primary caregivers nor financial providers (*Mack* at paras 18, 20; *Louisy* at para 13).

[31] Without evidence to substantiate that the exceptional remedy be granted, the Applicants do not meet the burden for the exceptional H&C remedy under section 25(1) of the Act. That burden is theirs to overcome, not vice versa: the law requires that applicants, subject to certain discreet programs, apply for permanent residence from abroad – rather than coming as visitors and deciding they want to stay permanently. The onus thus does not shift to the government to prove why the family must apply for immigration from abroad, when scant evidence is provided. Justice Simpson's conclusion in *Mack* at para 20 is instructive: "The BIOC analysis is brief, but I find it is reasonable in the circumstances of this case in which the Applicant is not a parent, does not reside with either Son, is not a full-time care giver and is not a source of financial support".

[32] In sum, I find the Officer conducted a reasonable BIOC assessment in light of all the evidence and with the view to understanding the impact on the minor child if the Applicants were returned to Poland *(*see: *Liang* at para 26).

(2) Establishment

[33] Second, on the degree of establishment, just as per my comments about the BIOC analysis, the court cannot simply reweigh this particular factor in support of a favourable outcome.

[34] Here, the Officer was entitled to draw a negative inference from the fact that the Applicants were able to accrue the benefits of living and working in Canada by violating immigration laws for a substantial portion of their time (*Semana* at para 48; *Nguyen* at paras 32-34; *Mack* at para 14). It was the Applicants' choice to come to Canada and work without status – even when for several years, Mr. Zlotosz tried different avenues to regularize his status, and also managed to obtain temporary (work) status for some of his time in Canada.

[35] An applicant's degree of establishment – including the number of years spent in Canada forming employment and social ties – is not sufficient in and of itself to justify exempting the applicant from the requirement to obtain an immigrant visa from outside Canada (*D'Souza v Canada (Citizenship and Immigration)*, 2017 FC 264 at para 13). Several post-*Kanthasamy* cases have upheld decisions rejecting similar establishment arguments, despite the applicants having spent similar, lengthy periods of time in Canada establishing themselves (including *Mack*, *Semana*, *Nguyen* and *D'Souza*).

[36] In any event, re-assessing which factors should or should not be given more or less weight is not the role of a reviewing Court: that exercise would offend well-established

administrative law principles governing judicial reviews, which caution against the judicial re-weighing of evidence properly before an administrative decision-maker.

(3) Hardship of Return

[37] Third, the Officer was entitled to conclude that based on the evidence, the unemployment rate in Poland has significantly declined since the time when the Applicants first came to Canada in 2004 and 2005 (to about half of what it was then). The Applicants failed to adduce evidence that they would be personally affected by the unemployment rates such that they would be unable to find work upon their return. Therefore, it was also open to the Officer to infer that the skills acquired by Mr. Zlotosz would assist him in finding employment in Poland.

V. Certified Question

[38] The Applicants proposed the following question for certification:

> In any H&C application involving the issue of best interests of the child, is an officer required to clearly state what are the best interests of the child?

[39] I agree with the Respondent, who replied that the proposed question has already been answered by the Supreme Court in *Kanthasamy*, thus failing to meet the test established in *Zhang v Canada* (*Citizenship and Immigration*), 2013 FCA 168 at para 9.

VI. Conclusion

[40] The inferences and conclusions drawn by the Officer are transparent and supported by the evidence. It is clear that the Applicants are hard-working people who want to stay in Canada. This, however, does not impact a determination of whether the Officer's Decision was reasonable.

[41] The application will accordingly be dismissed. No question will be certified.

JUDGMENT in IMM-649-17

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. The Style of Cause in this application for judicial review is amended, removing The Minister of Immigration, Refugees and Citizenship as Respondent, and naming the Minister of Citizenship and Immigration as Respondent.

3. No question will be certified.

4. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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