Federal Court  Cour fédérale

Date: 20180419

Docket: IMM-3483-17

Citation: 2018 FC 420

Ottawa, Ontario, April 19, 2018

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

ALMA MARY SALAZAR ZAFRA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Ms. Zafra [the Applicant] seeks review of the decision of an Immigration Officer [the Officer] removing her son [AJ] from her application for permanent residence in the Live-In Caregiver Class. Ms. Zafra asked that her son be considered as a "de facto" child based upon humanitarian and compassionate [H&C] factors.

[2] For the reasons that follow, the judicial review is dismissed as the decision of the Officer is reasonable.

I. Background

[3] The Applicant is a citizen of the Philippines and works in Canada as a live-in caregiver. In her application for permanent residence she listed her husband [Mendoza] and son [AJ] as dependents.

[4] In 2014, Citizenship and Immigration Canada asked for further information regarding the Applicant's family members. In response, the Applicant and Mendoza provided a letter and an affidavit claiming that Mendoza is the biological father of AJ. The Applicant and Mendoza also provided an affidavit from AJ's biological mother.

[5] In March 2017, a procedural fairness letter was sent to the Applicant regarding the biological relationship between Mendoza and AJ.

[6] In June 2017, the Applicant replied to the procedural fairness letter with a statutory declaration where she admitted that AJ was not Mendoza's biological son, but rather a "de facto" son. According to the declaration, AJ was offered by his biological mother (Mendoza's niece) to the Applicant and Mendoza at the time of his birth. The Applicant requested that the Officer exercise H&C discretion to allow the inclusion of AJ as a "de facto" child in the Applicant's permanent resident claim.

II. Decision Under Review

[7] The decision under review is comprised of the July 5, 2017 letter of the Officer, and the Global Case Management System [GCMS] notes.

[8] In the letter, the Officer notes that Mendoza was notified that AJ did not appear to meet the definition of a dependent child under the *Immigration and Refugee Protection Regulations* [IRPR]. The Officer also notes that it was acknowledged that AJ was not the biological or legally adopted child of Mendoza or the Applicant. The Officer concluded that AJ did not meet the requirements of the IRPR and that there were insufficient H&C considerations warranting special relief. AJ was therefore removed from the application.

[9] In the GCMS notes, the Officer considered the submissions that AJ has been a "de facto" child of the Applicant since birth. The Officer also noted the affidavits indicating that AJ was the biological son of Mendoza. According to the Officer, this called into question the credibility of the more recent statements of "de facto" status.

[10] The Officer noted an affidavit from the Applicant's employer and statements regarding the relationship between the Applicant and AJ. The affidavit claimed that the Applicant and AJ communicate online and that the Applicant provides financial support to AJ. However, the Officer notes that there was limited third party evidence to support the statements made in these and limited evidence to establish the stability, dependency and bona fides of the relationship between the Applicant and AJ.

[11] The Officer noted the evidence from the Applicant, including photographs, remittance slips, and a hospital bill from the birth of AJ. However, the Officer stated that there was no third party evidence indicating ongoing financial support since 2012. The Officer also noted that there was no ongoing communication between the Applicant and AJ, except for one in-person visit in 2014. The Officer concluded that it appeared that a dependency relationship was not initiated until a request for relationship documents was made in 2014, and so it was unclear if the relationship was established "for immigration purposes." The Officer noted that the Applicant made the conscious decision not to pursue the legal adoption of AJ.

[12] On the best interests of the child [BIOC] considerations, the Officer stated that his task is to assess the hardship that would result if the Applicant is not granted the H&C exemption or a permanent resident visa. The Officer noted that AJ, as a five year old boy, has lived his entire life in the Philippines, and has access to education there. There was no evidence that AJ ever visited Canada. The Officer noted that the Applicant's financial support of AJ could continue while he is in the Philippines. The Officer concluded that the best interests of AJ would favour a continued relationship with his biological family in the Philippines.

[13] The Officer also noted that since AJ was born out of wedlock, he is considered an illegitimate child and is not accorded the same rights as a legitimate child under Filipino law. Therefore, a legal adoption would be in AJ's best interests.

[14] The Officer concluded that there are insufficient H&C factors to grant the relief sought.

III. Issues

[15] The Applicant raises the following issues:

A. What is the appropriate standard of review?

B. Is the finding that AJ is not a de facto child reasonable?

C. Were AJ's best interests properly considered?

IV. Analysis

A. *What is the appropriate standard of review?*

[16] The Applicant submits that the questions of law are reviewable on a correctness standard. The Respondent submits that all issues are reviewable on the reasonableness standard.

[17] In *Smith v Alliance Pipeline Ltd.*, 2011 SCC 7 at para 37, the Supreme Court confirmed that questions of law are not reviewable on a standard of correctness except where they fall into a category identified in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] as reviewable on a correctness standard.

[18] None of the categories identified in *Dunsmuir* arise in this case. Therefore the reasonableness standard of review applies to the Officer's consideration of H&C factors in determining whether a person is a "de facto" family member (*Zhong v Canada (Citizenship and Immigration)*, 2017 FC 223 at para 17 [*Zhong*]).

[19] The standard of reasonableness also applies to the Officer's consideration of the BIOC (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44 [*Kanthasamy*]).

B. *Is the finding that AJ is not a de facto child reasonable?*

[20] The Applicant argues that there was evidence to establish that AJ was financially and emotionally dependant on her and her husband and therefore the Officer's assessment of the "de facto" relationship is not reasonable.

[21] Under the IRPR, a dependent child is defined as a biological or adopted child. However, in considering H&C relief, the Officer must take into account facts which arise in the application, including whether a child is a "de facto" one: *Okbai v Canada (Citizenship and Immigration)*, 2012 FC 229 at paras 18-19.

[22] In *Frank v Canada (Citizenship and Immigration)*, 2010 FC 270 at para 29, the Court defined a "de facto" family member as: "…limited to vulnerable persons who do not meet the definition of family members in the [Immigration and Refugee Protection Act] and who are reliant on the support, both financial and emotional, that they received from persons living in Canada."

[23] In assessing eligibility for H&C relief on these grounds, Officers have the OP-4 Guideline which outlines a number of relevant factors which define a "de facto" relationship, including the bona fides of the relationship, the level of dependency, the stability and duration of the relationship, and the impact of separation. This guideline frames the Officer's discretion and

is a benchmark against which the reasonableness of the decision can be assessed (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 72) [*Baker*].

[24] In this case, the Officer considered the relevant factors put forward by the Applicant as against the Guidelines. The Officer noted that there was limited evidence of a dependency relationship which was stable and bona fide. He noted that the Applicant only visited once with AJ, in 2014. On financial dependency, the Officer noted that the remittance slips only showed a financial contribution in 2012. He also noted that only the Affidavit from the Applicant's employer addressed the dependency relationship between the Applicant and AJ. The Officer also noted that the Applicant and Mendoza only began documenting their relationship with AJ in 2014, in support of their immigration claim.

[25] Overall the Officer concluded that the Applicant did not meet her evidentiary onus and that there was not sufficient evidence to grant the exceptional relief. The onus is on the Applicant to offer enough evidence to warrant the exercise of exceptional H&C discretion: *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 45 [*Kisana*]; *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 5.

[26] The Applicant argues that the Officer misapprehended the statutory declarations and relied upon the previous statutory declarations which claimed that Mendoza was AJ's biological father to impugn their credibility. The Applicant claims that the issue of truthfulness regarding the statutory declarations is not relevant on the H&C application. The Applicant also argues that

the Officer erred by requiring "third party" corroboration of evidence of the employers' affidavit which spoke to a dependency relationship between the Applicant and AJ.

[27] However, H&C applications, like all administrative decisions, must be reviewed holistically (*Kanthasamy*; *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd.*, 2013 SCC 34 at para 54). Though the Officer impugned the statutory declarations on the basis of credibility, the Applicant was given an opportunity to respond to these concerns via a procedural fairness letter. Beyond this the Officer found the evidence lacking in other respects, in particular, aside from the employer's affidavit, there was no corroborating evidence of the supposed "de facto" relationship.

[28] Specifically, the Officer conducted an assessment of the evidence in totality by noting:

> I note there are several affidavits, other than those already addressed only one, from Kerri McKean and Andrew Balahura, the PA's employers, addresses the relationship between the PA and AJ….I note there is limited third party evidence to support the statements made in these affidavits and limited evidence to establish the stability, dependency, and bona fides of the relationship between the PA and AJ…
>
> […]
>
> I note that the dependency and documented parent-child relationship between the PA, spouse and AJ was not initiated until a request for relationship documents from IRCC was made in 2014…I note that it was not until the 2014 IRCC document request that the PA/spouse sought to acknowledge AJ's status as their dependent.

[29] Here, the Officer's credibility concerns formed one part of the analysis, but the Officer did not dismiss the application solely because of credibility. Rather, he conducted an assessment

of the evidence. The employer's affidavit was rejected not only because it was self-serving, but also because it lacked corroboration. In *Fadiga v Canada (Citizenship and Immigration)*, 2016 FC 1157 at para 14 [*Fadiga*], the Court noted that little weight can be given to so-called "self-serving" evidence, the effect of which "can be mitigated if the document is corroborated by other objective evidence…" Here, there was no such evidence. The Officer's credibility findings based on inconsistencies are owed deference (*V.S. v Canada (Citizenship and Immigration)*, 2017 FC 109 at para 13).

[30] The Applicant relies upon *Zhong* to argue that the Officer failed to assess the relevant evidence and made negative credibility findings based on prior inconsistent statements. However *Zhong* is distinguishable. In *Zhong* the Officer failed to assess relevant evidence and factors in the "de facto" relationship analysis (*Zhong*, at para 30). Here, however the Officer considered the evidence provided by the Applicant and did not dismiss the application solely on the basis of credibility.

[31] The Applicant also relies upon *Abusaninah v Canada (Citizenship and Immigration)*, 2015 FC 234[*Abusaninah*], where the Officer erred because he rejected affidavits only because they were not arm's length (*Abusaninah*, at paras 35, 39). Here, however, the Officer assessed all the evidence and rejected the affidavits because they failed to stand up to scrutiny in light of the previous credibility issues and the other evidence offered. Crucially, the non-arm's length evidence could not overcome the other issues. In this way, this case is more similar to *Fadiga*, at para 22, where the Court noted the following:

> [25] Courts reviewing these cases, on the other hand, should not view an officer's decision to diminish the weight placed on

> evidence described as "self-serving" when uncorroborated as an incorrect attribution of weight to the evidence or a reviewable ground to overturn the decision. With respect, stated in this way the issue becomes merely one of semantics. There is an unavoidable reliability issue in respect of any out-of-court evidence, and it is usually significantly increased when its source is a family member or another person with an interest in the outcome.

[32] The reasonableness of an H&C decision must be assessed holistically, having regard to all relevant facts and factors (*Kanthasamy*, at paras 25, 33). H&C relief is exceptional and discretionary: *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 15 [*Legault*]). On judicial review, it is not the role of the Court to reweigh the H&C factors (*Kisana*, at para 24).

[33] As such, the Officer did not err in the "de facto" analysis.

C. *Were AJ's best interests properly considered?*

[34] The Applicant argues that the Officer erred in the BIOC assessment. She argues that the Officer did not properly consider the benefits that would come from AJ's relocation to Canada as compared to the negative conditions in the Philippines. The Applicant argues that the Officer misapprehended the evidence regarding the conditions in the Philippines and also erred by stating that AJ could reunite with his biological family.

[35] An H&C decision will be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered (*Kanthasamy*, at para 39), and decision-makers must

be “alert, alive, and sensitive” to the BIOC (*Baker*, at para 75). However a BIOC does not mandate a certain result (*Legault*, at para 12).

[36] Here the Officer notes that an H&C assessment is not a comparison between life in Canada and in the Philippines, but rather, it is an assessment of “the hardship that would result if the applicant is not granted the exemption or a permanent resident visa.” The Officer did not err staring from this position (*Miyir v Canada (Citizenship and Immigration)*, 2018 FC 73 at paras 18-19 [*Miyir*]).

[37] The Officer then assessed the conditions in the Philippines and noted that AJ was not within the class of persons who are at risk of martial law. Although the Applicant takes issue with this finding and argues that all citizens of the Philippines are at risk, the Officer noted that the evidence specifically points to “increased human rights violations against civilians, including leftist activists, indigenous leaders, and environmental activists, who have long been targets of military abuses.” The Officer concluded that there was no evidence that AJ was directly affected by martial law and that relocation was a possibility.

[38] It is the Applicant’s onus to demonstrate hardship based on compelling evidence. The Officer was bound to take the underlying hardship facts into consideration in determining whether relief was warranted (*Chaudhary v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 128 at paras 41-42). Here, the Officer reasonably concluded that the scant documentary evidence did not justify an exercise of H&C discretion. Hardship must be “assessed equitably, flexibly, and as part of an applicant’s circumstances as a whole” (*Miyir*, at para 16). While the

Applicant is not mandated to show that AJ is affected more than the average population as a whole (*Miyir*, at para 33), here there was little evidence to show he was affected at all.

[39] On the other BIOC factors, the Officer noted that AJ had never been established in Canada and had never visited Canada. The Officer also noted that AJ has potential for education in the Philippines, and still is in contact with his biological mother. This was all supported by the evidence. The fact that the Officer referred to the benefits of becoming a "legitimate child" in the Philippines is not an error, given that the Officer must assess whether it would be inequitable to decline H&C relief.

[40] The Officer is entitled to deference in the BIOC analysis and here he was alert to the relevant evidence. The Applicant has not demonstrated that the Officer's conclusion is unreasonable and therefore there is no basis for this Court to intervene.

JUDGMENT in IMM-3483-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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