Date: 20071004

Docket: IMM-842-07

Citation: 2007 FC 1002

BETWEEN:

NENITA ENRIQUEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

Pinard J.

[1] This is an application for judicial review of the decision of an immigration officer (the Officer), dated February 15, 2007, wherein it was determined that there were no humanitarian and compassionate (H&C) factors which would allow the applicant to apply for permanent residence within Canada.

[2] Nenita Enriquez, the applicant, is a citizen of the Philippines. She entered Canada in May 1999 to visit her brother, who was a permanent resident. While she was in Canada she applied for and received a student visa through the Buffalo visa office. After completing her studies the applicant received an offer of employment as a live-in caregiver, and that offer was approved by Human Resources and Development Canada (HRDC) in February 2000. She received employment authorization in July 2000 and this authorization was renewed twice. The applicant applied for permanent resident status in August 2002, and in March 2003 was advised she may not be eligible for permanent resident status because she failed to meet a requirement of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, which requires a person seeking permanent residence as a member of the live-in caregiver class to have entered Canada in that capacity.

[3] The applicant brought an application for judicial review of the decision rejecting her application for permanent residence. The application was dismissed and the Court held that the immigration officer had not committed any reviewable error in denying her application. At paragraph 10 of that decision, the Court held:

> The fact that the Applicant did not seek entry into Canada as a member of the live-in caregiver in Canada class cannot be remedied by subsequent errors or misunderstanding of employees of either HRDC or the Respondent in assessing the Applicant's status in Canada. She did not apply to enter Canada as a member of the “live-in caregiver in Canada class”, as defined by the governing legislation when she entered Canada in 1999, that is the former Act. The history of the Applicant's receipt of an employment authorization from the Respondent in 2000 and renewals of that work authorization in 2001 and 2002 may be relevant upon an application for admission into Canada on humanitarian and compassionate grounds but such application is not the subject of this application for judicial review.

On October 13, 2006, the applicant made an H&C application.

[4] The applicant submits, *inter alia*, that the Officer failed to properly consider the best interests of the children in this case by failing to recognize that the applicant is the primary caregiver to the Betel children.

[5] The Federal Court of Appeal in *Hawthorne v. Minister of Citizenship and Immigration*, 2002 FCA 475, held that an H&C decision will be found to be unreasonable if the officer was dismissive to the best interests of the child and was not "alive, alert and sensitive" to the best interests of the child.

[6] Here, the Officer based his conclusion that the applicant is not the primary caregiver to the Betel children on the fact that Ms. Betel said the applicant was like a second mother to her children. The applicant submits that this reasoning is unsound, and that the evidence before the Officer established that the applicant is the children's primary caregiver and has been since they were infants.

[7] In my view, it was unreasonable for the Officer to interpret Ms. Betel's statement that the applicant was like a second mother to her children to mean that she was not the primary caregiver. Mother and primary caregiver are not synonyms. Moreover, the evidence indicated that the applicant cared for Ms. Betel and it is reasonable to assume that if Ms. Betel needed to be cared for by the applicant, then she could not herself assume the role as a primary caregiver.

[8] I agree with the applicant's further submission that an H&C officer must give particular consideration to a decision to remove a child's primary caregiver, whether the caregiver is a biological parent or not (*Momcilovic v. Canada (M.C.I.)*, 2005 FC 79, [2005] F.C.J. No. 100 (T.D.) (QL); *Jakhu v. Canada (M.C.I.)*, 2006 FC 329, [2006] F.C.J. No. 452 (T.D.) (QL)).

[9] Consequently, I consider in reading the Officer's decision that he did not give proper consideration to the impact the applicant's departure from Canada would have on the Betel children. In my view, the applicant has succeeded in establishing that the Officer was not "alive, alert and sensitive" to the children's best interests.

[10] As the above conclusion is sufficient to warrant the intervention of the Court, it will not be necessary to consider the other arguments made by the applicant.

[11] Consequently, the application for judicial review is allowed and the matter is remitted to a different immigration officer for reconsideration.

"Yvon Pinard"

Judge

Ottawa, Ontario
October 4, 2007

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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