Date: 20080108

Docket: IMM-1646-07

Citation: 2008 FC 19

Ottawa, Ontario, January 8, 2008

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

MARIA THERESA PHILLIP

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. OVERVIEW

[1] This is the case of a 64-year old grandmother who has resided in Canada for 19 years and is the *de facto* mother of her daughter's children (if not the only caregiver). The Respondent says she is not entitled to an H&C decision in her favour to remain in Canada. At the very least, the Respondent committed reviewable error.

II. BACKGROUND

[2] The Applicant, a 64-year old citizen of Trinidad and Tobago, but born in Grenada, has been in Canada since October 1988. Her claim for permanent residence was denied in 2004. Her PRRA was negative in 2007 and her H&C application, the subject of this judicial review, was started after her PRRA application was commenced.

[3] The bases of the H&C claim were *de facto* residence (19 years in the country), family ties, sponsorship, best interest of Canadian children (her two Canadian-born grandchildren are in her care and custody), financial establishment by virtue of her work and tax payments, community establishment, other aspects of establishment, and hardship if she is returned due to her age and lack of job prospects.

[4] The record is replete with evidence in support of the H&C application. Most importantly, there is evidence of her daughter surrendering custody of the two grandchildren, a custody order of the Ontario Court of Justice giving the Applicant joint custody along with the father (who also had to pay support). The court order stated that the grandchildren's primary residence would be with the Applicant.

[5] In the Respondent's decision, the officer noted the Applicant's accomplishments but did not regard her establishment as "exceptional". The officer also noted that much of the Applicant's

problems were caused by her remaining in Canada illegally and now facing the consequences of removal as required by law.

[6] On the issue of the best interests of the grandchildren, the officer assumed that the grandchildren would be taken care of by extended family and that their father would be involved. The officer countered the allegations of lack of financial and moral support by the father by referring to the father's successful H&C application in which he included another daughter as evidence of the father's commitment to his two other children, the Applicant's grandchildren. The officer concluded the analysis of the best interests of the children with a comment that the children's mother should have thought of the potential removal of the Applicant before surrendering custody.

III. ANALYSIS

[7] There are two significant and interrelated problems with the Respondent's decision – one procedural, the other substantive.

[8] The procedural problem is that the Respondent relied upon the content of the father's successful H&C application to conclude that the best interests of the children would not be significantly harmed by removal of the Applicant. That H&C application was not in the Applicant's H&C filing and was never put to the Applicant for comment.

[9] If any support is needed for the obvious proposition that the Applicant was entitled to notice of this document and an opportunity to respond, it can be found in *Bara v. Canada (Minister of*

Citizenship and Immigration), [1998] F.C.J. No. 992 at paragraph 15 (per Richard A.C.J. as he then was):

> The officer is not required to put before the applicant any tentative conclusions he may be drawing from the material before him, not even as to apparent contradictions that concern him. However, if he relies on extrinsic evidence, not brought forward by the applicant, he must give him a chance to respond to the evidence.

[10] Not only was the use of the father's H&C application a breach of fairness, it led to or compounded a substantive error in the consideration of the best interests of the children.

[11] To state, as the officer did, that she was "alert, alive and sensitive to the best interests of the child" does not make it so (*Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125). The best interests' consideration rested firstly on the $119.00 monthly support payments required by court order. However, there was no analysis of the father's ability to care for the children despite the father's admission that he had not been able to care for them. There was no consideration that the grandmother was their virtual mother over the past seven years.

[12] The officer's comment that the mother should have thought of the Applicant's possible removal before surrendering custody of the children, while apt, tends to focus the issue on the best interests of the children towards the questionable conduct of the parent and not on to the needs of the children.

[13] The officer's reliance on the father's H&C application and the inclusion of another daughter therein, was not only procedurally unsound but led to a *non sequitur* of reasoning. One wonders how the father's inclusion of another child on his application is evidence of the father's care, attention and concern for these two children, a matter that no doubt could have been addressed if the Applicant had been given an opportunity to address the point. There may be an explanation but it is not one which is immediately apparent.

IV. CONCLUSION

[14] Therefore, this judicial review will be granted, the decision quashed and the matter remitted to a different officer for a new decision.

[15] The Applicant has asked for costs in this matter. Submissions subsequently filed addressed a number of grounds related to costs. The fact that the Applicant is a 64-year old grandmother who has been in Canada for 19 years is not relevant. She was not entitled to a favourable H&C as a reward for many years of undetected presence in Canada.

[16] However, in this case the Applicant has had to commence two judicial reviews and to obtain two stays. Her judicial review of the PRRA decision was withdrawn on consent while the H&C was pending. Upon withdrawal of that judicial review, the Applicant was advised that the H&C was denied.

[17] While this conduct may not be bad faith, it has a certain air that causes one concern. The Applicant is now faced with another H&C application. There are special reasons for costs in respect of the Respondent's handling of this whole file. An award of $5,000.00 out of the $13,000.00 requested is an equitable award. Therefore, there will be costs of $5,000.00 to the Applicant.

[18] There is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review will be granted, the decision is quashed and the matter is to be remitted to a different officer for a new decision. Costs are to be awarded to the Applicant in the amount of $5,000.00.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1646-06
STYLE OF CAUSE:	MARIA THERESA PHILLIP and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 13, 2007
REASONS FOR JUDGMENT AND JUDGMENT:	Phelan J.
DATED:	January 8, 2008

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