Date: 20090409

Docket: IMM-3940-08

Citation: 2009 FC 356

Toronto, Ontario, April 9, 2009

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

JOSELITO RAMOS FERRER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The present Application challenges a decision of the Immigration Appeal Division of the Immigration and Refugee Board (IAD) dated August 20, 2008 which dismissed Mr. Ferrer's plea for humanitarian and compassionate relief pursuant to s.67(1)(c) of the *IRPA*. Mr. Ferrer applied to the IAD for this special relief because on September 26, 2006 an Immigration Division Member issued an exclusion order against him based on a finding of inadmissibility for a misrepresentation made in September 1998 with respect to his permanent residence application. In his permanent

residence application Mr. Ferrer testified that he was single with no children. It is not disputed that, indeed, at that time he was the father of two dependent children living with their mother in the Philippines.

[2] Under s.67(1)(c) of the *IRPA*, the IAD is required to be satisfied that at the time of decision "taking into account the best interest of the child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case". Therefore, together with other factual features of the present case such as the nature of the Mr. Ferrer's conduct and his establishment in Canada, the IAD was required to determine the best interests of the two children residing in the Philippines. With respect to these children the IAD made the following important findings:

> The appellant has been back to the Philippines to visit his own children twice since landing in Canada in early September 2001. In addition to his four-month visit in 2002, the appellant spent about six weeks in the Philippines in 2004. Both the appellant and his sister testified the appellant missed his children terribly. The appellant would have more contact with his children if he was removed to the Philippines where his children presently reside.
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> […]
>
> It is in the best interest of the appellant's children to have close contact with their father. It is also in the best interest of the appellant's children to be provided with an appropriate level of financial support.
>
> […]
>
> The best interests of the appellant's children are a neutral factor in this appeal. They presently do not have status to reside in Canada. Their emotional needs are best met by living in close contact with their father in the Philippines. However, the appellant is able to

> provide a higher level of financial support for his children working in Canada than working in the Philippines.
>
> The preservation of the integrity of the Canadian immigration system is an important public policy consideration raised in this appeal. The appellant did not disclose the existence of his children to Canadian immigration authorities at the visa post or at the port of entry. He withheld information about the birth of his children to avoid delay and possible problems in obtaining his permanent resident visa. The panel assigns weight to the policy objective of preserving the integrity of the Canadian immigration system.
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> Taking into consideration the best interest of children directly affected by the decision, the appellant has not established sufficient humanitarian and compassionate grounds to warrant the granting of special relief in light of all the circumstances of the case.
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> (IAD Decision, p.5, p.7)

[3] I find that the IAD's consideration of the best interests of Mr. Ferrer's children is wholly deficient.

[4] In my opinion, the appropriate approach to determining the best interests of children is stated in *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, [2008] FC 165. While *Kolosovs* addresses the care required of visa officers in making such a determination, I find that the criteria set out at paragraphs 8 to 12 are applicable to any decision-maker who has this responsibility, including IAD members:

> **I. Requirements for Determining the Best Interests of the Child**
>
> *Baker* [*Baker v. Canada (Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 817] at para. 75 states that an H&C decision will be unreasonable if the decision-maker does not adequately consider the best interests of the children affected by the decision:

> 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.
>
> [Emphasis added]

This quote emphasizes that, although a child's best interests should be given substantial weight, it will not necessarily be the determining factor in every case, (*Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358(C.A). To come to a reasonable decision, a decision-maker must demonstrate that he or she is alert, alive and sensitive to the best interests of the children under consideration. Therefore, in order to assess whether the Officer was "alert, alive and sensitive", the content of this requirement must be addressed.

A. *Alert*

The word alert implies awareness. When an H&C application indicates that a child that will be directly affected by the decision, a visa officer must demonstrate an awareness of the child's best interests by noting the ways in which those interests are implicated. Although the best interests of the child is a fact specific analysis, the *Guidelines* at s. 5.19, provide a starting point for a visa officer by setting out some factors that often arise in H&C applications:

> **5.19. Best interests of the child**
> The *Immigration and Refugee Protection Act* introduces a statutory obligation to take into account the best interests of a child who is directly affected by a decision under A25(1), when examining the circumstances of a foreign national under this section. This codifies departmental practice into legislation, thus eliminating any doubt that the interests of a child will be taken into account.
> Officers must always be alert and sensitive to the interests of children when examining A25(1) requests. However, this obligation only arises when it is sufficiently clear from the material submitted to the decision-maker that an application relies, in whole or at least in part, on this factor.

> ….
> Generally, factors relating to a child's emotional, social, cultural and physical welfare should be taken into account, when raised. Some examples of factors that applicants may raise include:
> • the age of the child;
> • the level of dependency between the child and the H&C applicant;
> • the degree of the child's establishment in Canada;
> • the child's links to the country in relation to which the H&C decision is being considered;
> • medical issues or special needs the child may have;
> • the impact to the child's education;
> • matters related to the child's gender.
>
> [Emphasis added]

B. *Alive*

The requirement that a child's best interests be given careful consideration was reiterated by the Federal Court of Appeal in *Hawthorne v. Canada (Minister of Citizenship and Immigration*, [2003] 2 F.C. 555 (C.A) (QL) at para. 52:

> The requirement that officers' reasons clearly demonstrate that the best interests of an affected child have received careful attention no doubt imposes an administrative burden. But this is as it should be. Rigorous process requirements are fully justified for the determination of subsection 114(2) applications that may adversely affect the welfare of children with the right to reside in Canada: vital interests of the vulnerable are at stake and opportunities for substantive judicial review are limited.

Once an officer is aware of the best interest factors in play in an H&C application, these factors must be considered in their full context and the relationship between the factors and other elements of the fact scenario concerned must be fully understood. Simply listing the best interest factors in play without providing an analysis on their inter-relationship is not being alive to the factors. In my opinion, in order to be alive to a child's best interests, it is necessary for a visa officer to demonstrate that he or she well understands the perspective of each of the participants in a given fact scenario, including the child if this can reasonably determined.

> **C. *Sensitive***
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> It is only after a visa officer has gained a full understanding of the real life impact of a negative H&C decision on the best interests of a child can the officer give those best interests sensitive consideration. To demonstrate sensitivity, the officer must be able to clearly articulate the suffering of a child that will result from a negative decision, and then say whether, together with a consideration of other factors, the suffering warrants humanitarian and compassionate relief. As stated in *Baker* at para. 75:
>
> > " … 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"

[5] With respect to the application of this standard in the present case, Counsel for Mr. Ferrer made a focussed practical argument to the IAD which was not accepted. This argument is restated in the present Application in support of the challenge to the IAD's decision as follows:

> It is clear from the above statement that the Tribunal considered only two possibilities with respect to the best interests of the children. The first possibility that the Tribunal considered was that the children could remain in the Philippines and that their father, the Applicant will continue to have a geographically distant relationship with them while at the same time supporting them financially at a higher level than possible if he were to return to the Philippines.
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> The second alternative the Tribunal considered was that the Applicant could be returned to the Philippines where he would be able to better meet their emotional needs by having close contact with them, though he would not be able to provide the higher level of financial support in the event that he is removed from Canada.
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> It is submitted that the above analysis is erroneous in that it does not take into consideration the most probable outcome should the Applicant's appeal be allowed.
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> At the hearing of his appeal, the Applicant spoke of his desire to be reunited with his family, including his children in Canada.

Should the Applicant's appeal be allowed, he would be in a position to sponsor both of his children to Canada as members of the family class as dependents of this spouse, Divina Pote.

Obviously, the Minister was not aware of the existence of the Applicant's dependent children at the time the Applicant was granted permanent resident status in Canada and they were not examined by a visa officer, they are excluded from the family class by virtue of s.117(9)(d) of the *Immigration and Refugee Protection Regulations* […]

As the Tribunal noted in its reasons for decision, the Applicant has married his spouse who is the mother of his two children on a trip back to the Philippines after he was granted permanent resident status in Canada. Due to this series of events, the Applicant's spouse is not excluded from the family class pursuant to section 117(9)(d) of the Regulations. Accordingly, the Applicant's two children would be eligible to be included on the Applicant's spouse's application for permanent residence as her dependent children.

During the course of his testimony, the Appellant indicated his desire to ultimately bring his wife and children to be with him in Canada. It is submitted that the *Act* and *Regulations* would function in such a way as to allow him to sponsor them to Canada with little difficulty.

The Tribunal's failure to consider this likely chain of events led to its conclusion that the best interests of the children were a neutral factor when in fact the best interests of the Applicant's children were a positive factor which weighed in favour of allowing the appeal. This is because the two factors that the Tribunal balanced on either side of either allowing or dismissing the appeal namely, the Applicant's ability to better meet the emotional needs of this children by being physically near them versus the Applicant's ability to provide a higher level of financial support by virtue of his employment in Canada, would in fact both be met should the Applicant's appeal been allowed and he permitted to sponsor his children to Canada as dependents of this spouse who is a member of the family class.

In other words, the Tribunal failed to appreciate that the Applicant's children could have the best of both worlds by being reunited with him in Canada. Had the Tribunal not committed this error, it would certainly have considered the best interests of the Applicant's children to be a factor in favour of allowing his appeal and not a neutral factor - thereby negating its value.

> It is submitted that the foregoing consideration of the best interests of a child directly affected by its decision conducted by the Tribunal is not in accordance with the law in that it is overly simplistic and perfunctory. The Tribunal also failed to take into consideration the evidence that was before it.
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> The Tribunal's failure in this regard constitutes a reviewable error of law and renders the herein decision unreasonable.
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> (Applicant's Application Record, pp. 173 – 176)

I find this to be a persuasive argument.

[6] In my opinion, the IAD failed to seriously consider the best interests of Mr. Ferrer's children as required by the standard set in *Kolosovs* and by the terms of s.67(1)(c) of the *IRPA*. Indeed, the failure to engage in a critical analysis of the nuanced argument advanced by Counsel for Mr. Ferrer is evidence of this fact. It appears that the IAD's reasoning was dominated by a consideration of the "integrity of the Canadian immigration system". I agree that this might be an important factor to consider, but only after the best interests of the children are properly addressed; only in this way can a fair and balanced approach be taken to this important statutory requirement. In my opinion, the failure of the IAD to follow this approach renders the decision as unreasonable, and, therefore, I find that the decision is rendered in reviewable error.

ORDER

Accordingly, I set aside the IAD's decision and refer the matter back for redetermination before a differently constituted panel. There is no question to certify.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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