Date: 20090324

Docket: IMM-3433-08

Citation: 2009 FC 303

Montréal, Quebec, March 24, 2009

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

MARIA CECILIA CANLAS
LAIZA CANLAS PINEDA
MARIA CELINE CANLAS PINEDA

Applicants

and

MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of the decision of a member of the Immigration Appeal Division of the Immigration and Refugee Board (IAD), dated July 11, 2008

which dismissed the applicants' appeal of a removal order made against them pursuant to subsection 40(2) of the IRPA.

II. The facts

[2] The principal applicant, Maria Cecilia Canlas (applicant), entered Canada with her two daughters on January 9, 1999, at the Vancouver International Airport. She then obtained permanent resident status for herself and her daughters under false representations about their civil status and their identities as well as her own identity.

[3] The applicant obtained false birth certificates for her two daughters in order for them to leave the Philippines without the knowledge of their biological father, and misrepresented their paternity by indicating falsely that she was married to Mr. Alberto Perez Pangilinan and that he was their biological father.

[4] In 2002, the applicant gave birth in Canada to her third child, a son named Kyler, who unfortunately suffers from physiological and mental illnesses that require constant care, as well as the help of health care providers.

[5] The applicant no longer lives with Kyler's father, from whom she received little help to meet Kyler's needs. While making monthly support payments for his son's financial needs, Kyler's

father sees him twice a month and is never available for his visits to the doctor. However with the assistance of her two minor daughters, the applicant remains her son's primary caregiver.

[6] The Canadian authorities discovered the applicants' false representations only in September 2004, when Mr. Pangilinan applied for a temporary resident visa in which he declared that his wife and children were Maria Stella Pangilinan, Stefano Alberto Pangilinan, Paolo Alberto Pangilinan and Carlo Alberto Pangilinan.

[7] Following an inquiry as to the alleged false representations made by the applicant, the Immigration Division issued exclusion orders on February 14, 2006 against her and her daughters.

[8] The applicants requested that the exclusion orders issued against them be quashed on the basis of sufficient humanitarian and compassionate grounds (H&C) warranting special relief supported by the best interests of her Canadian-born son.

III. The impugned decision

[9] In its decision dismissing the appeal, the IAD concludes as follows:

> The panel finds the misrepresentations are material and extra-ordinarily egregious. Furthermore, they did induce an error in the administration of the *IRPA*. Thus while Kyler's circumstances are highly sympathetic, given the applicant's pattern of misrepresentation and the absence of evidence from Kyler's father, the panel is not persuaded that he is as uninvolved with Kyler as he was painted. The panel finds, on a balance of probabilities that Kyler could be cared for in Canada by his father.

IV. Issue

[10] In the exercise of its H&C discretion, did the IAD make an erroneous finding of fact by ignoring or misconstruing evidence before it?

V. Analysis

Standard of Review

[11] The appropriate standard of review of a decision on an H&C application is reasonableness with respect to matters of fact or mixed fact and law. The decision must therefore be justifiable, transparent and intelligible within the decision-making process. It should be vacated only if it is perverse, capricious, not based on the evidence or based on an important mischaracterization of material facts (*Dunsmuir v. New Brunswick*, 2008 SCC 9).

[12] When it is sufficiently clear from the material submitted to the decision maker that an application relies on the H&C factor, at least in part, the immigration officer considering the application must be "alert, alive and sensitive" to, and must not "minimize" the best interests of children who may be adversely affected by a parent's deportation (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 75).

[13] The best interests of the child are determined by considering the benefits to the child of the parent's non-removal from Canada, as well as the hardship the child would suffer from either the

parent's removal from Canada or from the voluntary departure of the child should he accompany the parent abroad (*Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475).

[14] Given however the discretionary nature of H&C decisions, considerable deference must be accorded to such decisions. Intervention is therefore only warranted if the decision cannot withstand a somewhat probing examination.

The seriousness of the offences leading to the deportation order

[15] The applicants made false representations about their civil status and identities in their application for permanent residence in Canada.

[16] The misrepresentations, which are not contested by the applicants, ultimately led to the issuance of an exclusion order pursuant to paragraph 40(1)(*a*) of IRPA, and relate to the fact that the applicant, Ms. Canlas, has never been married to Alberto Perez Pangilinan and her two daughters' names are not Liza Pangilinan nor Maria Celine Pangilinan but are respectively Laiza Canlas Pineda and Maria Celine Canlas Pineda.

[17] The IAD thought it important to comment on the "number of serious misrepresentations" made by the applicant both outside of and inside Canada, which "undermine Canada's ability to realise the objective of maintaining the security of Canadian society by controlling entry into its

borders". The IAD portrayed the applicant as a conniving criminal who has deliberately continued her misrepresentations in order to circumvent the requirements of Canadian immigration authorities to ensure her entry into the country with her two daughters.

[18] The Court finds these accusations very harsh and inappropriate in the context of an application relying on H&C factors in relation with the applicant's young son's situation, although the Court cannot condone the applicant's actions that permitted her entry in Canada with her daughters. No doubt the offences committed are serious, but instead of using harsh terms to condemn the applicant's actions, it might have been preferable for the IAD to try to comprehend why the applicant acted as she did, and to be more sensitive and alert to the negative effect the Canadian-born child would suffer as a result of the execution of the removal order.

The Best Interest of the child

[19] The IAD clearly stated its position on the seriousness of the offence leading to the removal order when it said:

> Were it not for the principal appellant's Canadian-born child, Kyler Power, and his physical limitations, the decision would be clear. On the evidence presented, the panel finds that absent Kyler, the humanitarian and compassionate considerations raised would be patently insufficient to offset the legal impediment occasioned by the misrepresentations, since they are both intentional and material.
> [Emphasis added)]

It is clear from this statement and the material submitted to the IAD and from the IAD's understanding of the issue that the application relies strictly on H&C factors, and that in order to maintain its objectivity, the IAC should have focused more on the H&C considerations favouring the Canadian-born child rather than on the applicant's unacceptable illegal actions to enter Canada with her two daughters.

[20] However and in order to answer negatively the issue of the best interests of the Canadian-born child most affected by its decision, the IAD circumscribed the questions raised by the issue as follows:

> Clearly, Kyler's need for medical and social services is large, but is at issue is whether:
> - these needs can only be met in Canada? and
> - whether it is only the appellants who can care for him?

[21] By narrowing the best interests of the Canadian-born child to these two questions the IAD applied the wrong factors to the test of "the best interests of the child " as defined in *Hawthorne*, above. Nothing in the impugned decision indicates that the IAD was sensitive to the benefits to the child of the parent's non-removal from Canada, as well as the hardship the child would suffer from his mother's and his sisters' removal from Canada, or from the voluntary departure of the child should he accompany them to the Philippines.

[22] It is patently clear that the IAD failed to give serious and due consideration to the factors previously cited as defined in *Howthorne* and to attribute them substantial weight as prescribed in *Baker*, above. The IAD as a consequence committed a reviewable error.

[23] Indeed the IAD did not dispute that Kyler's medical condition and developmental issues require specialised treatment and social services and that his social services needs are presently met by a medical center serving children with physical disabilities. The IAD did not ignore also that the mother remained the custodial primary caregiver, while assisted by her two daughters and a competent medical team.

[24] But how could the IAD ignore the medical report stating that since his early age Kyler was followed and treated in a Canadian paediatric clinic with specialized multidisciplinary care, and that two of the medications needed for his treatment are not readily available in developing countries such as Philippines.

[25] How could the IAD remain insensible to the statement from a social worker at the ErinoakKids Centre for Treatment and Development, that "It would be devastating to Kyler if his mom and his two older sisters were made to leave Canada" without him, and alternatively, " if he were to leave with his family to the Philippines, he would not receive the quality of care that he's currently receiving and benefiting from in Canada".

[26] In addition, the IAD found that there was no reason why the Canadian-born child could not remain with his father in Canada. The father, however, was not called as a witness and no material or information was filed on his behalf to confirm his willingness and/or ability to care for his son. The IAD's only information was that the father visited his son twice a month and contributed financially to his material needs.

[27] The obligation to inquire as to whether a child will be adequately looked after if a parent is removed from Canada stems from the following dicta in *Munar v. Canada (Minister of Citizenship and Immigration)*, [2005] FC 1180, dated November 9, 2005:

> Similarly, I cannot bring myself to the conclusion that the removal officer should not satisfy himself that provisions have been made for leaving a child in the care of others in Canada when parents are to be removed. This is clearly within his mandate, if section 48 of the IRPA is to be read consistently with the Convention on the Rights of the Child. To make enquiries as to whether a child will be adequately looked after does not amount to a fulsome H&C assessment and in no way duplicates the role of the immigration officer who will eventually deal with such an application. [Emphasis added)]

[28] The IDA did not discharge its obligation to inquire as to whether Kyler will be adequately looked after once his mother and sisters are removed from Canada by simply stating that:

> …there is little reliable evidence before the panel to persuade her that Kyler's father is either unable or unwilling to care for him.

[29] Furthermore, the respondent never contested before the IAD that Kyler's mother was the custodial parent and primary caregiver of her son, nor did the respondent find it necessary to call Kyler's father as a witness or file any material on his behalf to demonstrate his willingness and /or ability to care for his son.

[30] Should the applicants be removed, Kyler would be deprived of the applicants' consistent custodial attention, care and monitoring due to the child's seizure disorder, his tender age and his serious health problems. He would be deprived of the expertise of a specialized medical team he has learned to know and trust. Contrary to the IAD's conclusion, the Court does not believe it would be in the best interest of the child to leave him in his father's care, in view of the evidence indicating

that his son is and has been since his birth almost the applicant's sole responsibility, and this in the absence of any evidence on the father's willingness, capacity and ability to care for his son.

[31] It was also argued that Kyler, could accompany his mother and sisters to the Philippines, since despite having Canadian citizenship, nothing compelled him to stay in Canada. The Court notes however from a medical report that Kyler requires:

- four anticonvulsants two of these medications are not readily available in developing countries;
- specialized multidisciplinary care;
- the service of a paediatrician for his overall healthcare;
- MRI scan of the head periodically to monitor growth of the tubers in the brain;
- he may require neurosurgical intervention if the tubers cause intractable seizure, compression of the cranial nerves or brain parenchyma, or increase in intracranial pressure;
- the service of a paediatric neurologist to monitor his neurodevelopmental progress and titrate the anticonvulsants he is taking for seizure control;
- physiotherapy, occupational therapy, speech therapy and special education;
- and he may require the service of paediatric cardiologist, paediatric ophthalmologist, and paediatric nephrologist if he develops tumours in other organs.

[32] While all these services are in place and offered at the medical center where the child is being treated, the evidence on the other hand does not provide much information on the availability of these required services in the Philippines. The Court cannot ignore though, according to the Department of Health for the Republic of the Philippines, that "the prevailing high cost and wide price variation of drugs impede the access of the greater majority of Filipinos to timely and quality healthcare. Many essential drugs are unaffordable to the average Filipino, thereby depriving them of health by curtailing treatment, prevention, and control of illnesses".

[33] The applicant has been the sole custodian for her three children for many years. An accommodated work schedule along with the support she has obtained within her community has enabled her to provide for her three children's well being. Should these exclusion orders be upheld and ultimately executed, the Court believes that young Kyler's particular needs would be compromised.

[34] The IDA acknowledged that in *Adams*, above, the facts were "strikingly similar, to those in the instant case", inasmuch as the Canadian-born child is concerned. In order to be able to distinguish the present case from the *Adams* case, the IDA erred in assuming the father was available to care for the minor child in Canada in replacement of the mother and her two daughters, and this without any evidence to support such finding.

[35] Borrowing a statement from Mr Justice Shore in the *Adams* case, above:

> …this is a case on its own very particular merits (cas d'espèce), unique unto itself, where solely due to the mother's immigration-file history, the (Canadian-born) child's well-being, becomes the issue. Recognizing, full well, that the situation of the child must reach a degree of severity, where it is not, acceptable hardship that occurs in such a case, but extraordinary hardship, which then touches and seriously affects the best interests of the child.

Conclusion

[36] Due to the most unusual and exceptional circumstances of this case, the Court concludes that the negative appeal decision results from a reviewable error in law, in that the IDA was not sensitive enough to the "factor of the best interests" of a young and seriously handicapped Canadian

child about to be permanently separated from its sole custodial parent and primary caregiver, and this, at a critical time in his young and vulnerable life.

[37] In fact the Court is convinced that a separation of the child from his mother and sisters at this sensitive time of his life, or his departure with them to be treated and taken care in the Philippines, would be devastating in view of his mental and physical health situation and the medical and moral support he beneficiated since the very early days of his life in Canada.

[38] For all these reasons, the Court finds the impugned decision unreasonable, and as a result, will set it aside, while agreeing with the parties that there is no important question of general interest here to certify.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application is allowed, the decision dated July 11, 2008, is set aside, and the matter is referred to another immigration officer for rehearing.

"Maurice E. Lagacé"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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