Federal Court  Cour fédérale

Date: 20090707

Docket: IMM-4516-08

Citation: 2009 FC 706

Ottawa, Ontario, July 7, 2009

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

KELLY PALUMBO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision of an immigration officer (the officer) dated October 3, 2008, where the officer refused the Applicant's request for an exemption from the permanent resident visa requirements on humanitarian and compassionate (H&C) grounds.

Issues

[2] This application raises the following issue: did the officer err in fact and in law in deciding the Applicant's case?

[3] For the following reasons, the application shall be dismissed.

Impugned Decision

[4] Generally, an application for permanent residence must be made from outside Canada. However, taking into account H&C reasons, subsection 25(1) of the Act authorizes the Minister to issue a permanent residence permit from within Canada.

[5] In the case at bar, the Applicant has been residing in Canada since 1990 but she has not been employed for longer than 8 months while residing here. The Applicant stated that she did some volunteer work for over a year in 2007 and 2008 but she has not provided any documents to indicate that she has assets in Canada. Although the Applicant has resided in Canada for an extensive amount of time, the officer accorded significant weight to the fact that she is not contributing to Canadian society by way of employment, but drawing from it in the form of welfare benefits which she is still receiving. Since the Applicant is an American citizen, the officer found it was reasonable to believe that should she be required to return to the United States (US), she would be able to continue to receive social service benefits from her country of nationality.

[6] The Applicant has three Canadian children; two of them have US citizenship. The officer noted that there is a possibility that the youngest child could also have American citizenship given that his mother is an American citizen and by meeting certain criteria and registration requirements.

[7] The Applicant stated that her two older sons ran away because of conflicts with their father. She also indicated that although the father does not want custody of the children, he maintains a good relationship with their youngest son. She states the father will not allow her “to move that far away with them”. However, given the fact that the two oldest children are over the age of 18, it is reasonable to believe that custody is no longer an issue with them.

[8] With respect to separation between the youngest child and his father, the officer noted that this is a decision to be left with the parents and/or the courts. According to the officer, relationships are not bound by geographical location and there are several methods by which the youngest child could maintain a relationship with his father should the parents determine that he would accompany the Applicant to the United States.

[9] The information provided for the two oldest sons indicate that they are not in secondary school, they are not working and they are in receipt of social assistance. Given their age and their Canadian citizenship, it is reasonable to believe that they could engage in some form of employment, full time or part time, in order to assist the family financially. Since these two oldest children also have American citizenship, it is reasonable to believe they could find employment in the United States should they decide to accompany their mother if she were to return to her country

of origin. The officer also notes that all three children will maintain their Canadian citizenship regardless of where they reside.

[10] Having considered all the information regarding the application, the officer was not satisfied sufficient humanitarian and compassionate grounds exist to approve the exemption requested.

Relevant Legislation

[11] The relevant legislation can be found at Annex A at the end of this document.

Standard of Review

[12] In light of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the standard of review of an H&C decision is reasonableness and the decision is owed considerable deference (*Lee v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1152, [2008] F.C.J. No. 1632 (QL) at paras. 16-17; see also *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 17 and 62).

Analysis

[13] There is a presumption that the immigration officer has considered all the evidence. Although the officer is not obliged to recite all the facts in its decision, the relevant facts should be mentioned and these facts must be considered and discussed. A general statement to the effect that the officer considered all the evidence may be sufficient to meet this requirement (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, 83 A.C.W.S. (3d) 264

(F.C.T.D.); *Bains v. Canada (Minister of Employment and Immigration)*, 63 F.T.R. 312, 40 A.C.W.S. (3d) 657 (F.C.T.D.).

[14] In the case at bar, the immigration officer has considered the evidence and has provided relevant and sufficient reasons to justify her refusal to grant the Applicant's application considering the little information that was available to her. It has to be noted that the Applicant was provided assistance in filing her H&C claim.

[15] Regarding the best interests of the children, the officer considered the factors found at section 5.19 of the Operational Manual.

[16] However, the best interests of a child will not necessarily be the determining factor in all cases (*Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 F.C. 358). Once the immigration officer has identified and defined the best interests of a child and has been alert, alive and sensitive, she can give the appropriate weight in relation to the circumstances of the case that she has to decide and it is not for this Court to reconsider the value that the officer assigned to these factors (*Legault*, above at paras. 11-12).

[17] In the present case, the Court does not find that its intervention is warranted.

[18] The Applicant submits the following questions for certification:

> Does the Minister of Citizenship and Immigration's delegate have a duty to obtain further information concerning the best interests of the Canadian born children if the delegate believes the information presented by the applicant to be insufficient to assess the best interests of the children?

[19] The Respondent opposes such a question because it is not determinative. Also, the Federal Court of Appeal recently declined to answer a very similar certified question in *Kisana v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189.

[20] Even though the Court of Appeal in *Kisana* wrote at paragraph 62 "… However, I do not rule out the possibility that there may be occasions where fairness may or will require an officer to obtain further and better information. Whether fairness so requires will therefore depend on the facts of each case", the present Court is of the opinion that such is not the case here.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed. No question is certified.

"Michel Beaudry"
Judge

ANNEX A

Relevant Legislation

Section 25 of the Act governs applications for permanent residence based on humanitarian considerations:

25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.

25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

Operational Manual IP 5 – Immigration Applications in Canada made on Humanitarian and Compassionate Grounds (Operational Manual) provide the following guidelines:

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. An applicant has the burden of proving the basis of their H&C claim. If an applicant provides insufficient evidence to support the claim, the officer may conclude that it

is baseless. As with all H&C decisions, the officer has full discretion to decide the outcome of a case.

It is important to note that the codification of the principle of **best interests of a child** into the legislation **does not mean** that the interests of the child outweigh all other factors in a case. The best interests of a child are one of many important factors that officers need to consider when making an H&C or public policy decision that directly affects a child.

In reaching a decision on an H&C application, officers must consider the best interests of any child **directly affected** by the decision. "Any child directly affected" in this context could mean either a Canadian or foreign-born child (and could include children outside of Canada).

The relationship between the applicant and "any child directly affected" need not necessarily be that of parent and child, but could be another relationship that is affected by the decision. For example, a grandparent could be the primary caregiver who is affected by the immigration decision, and the decision may thus affect the child.

The outcome of a decision under A25(1) that directly affects a child will always depend on the facts of the case. Officers must consider all evidence submitted by an applicant in relation to their A25(1) request. Thus, the following guidelines are not an exhaustive list of factors relating to children, nor are they necessarily determinative of the decision. Rather, they are meant as a guide to officers and illustrate the types of factors that are often present in A25(1) cases involving the best interests of the child. As stated by Madame Justice McLachlin of the Supreme Court of Canada, "... The multitude of factors that may impinge on the child's best interest make a measure of indeterminacy inevitable. A more precise test would risk sacrificing the child's best interests to expediency and certainty... ." (*Gordon v. Goertz*, [1996] 2 S.C.R. 27).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.

The facts surrounding a decision under A25(1) may sometimes give rise to the issue of whether the decision would place a child directly affected in a situation of risk. This issue of risk may arise regardless of whether the child is a Canadian citizen or foreign-born. In such cases, it may be appropriate to refer to sections 13.1 to 13.6 of this chapter for further guidance.

12.4 Factors related to links with family members

- Officers should consider the following factors:

- what are the effective links with family members (children, spouse, parents, siblings, etc.) in terms of ongoing relationship as opposed to simple biological fact of relationship;

- where the applicant is residing in relation to the family members, particularly their children;

- if there has been any previous period of separation, what was the duration and the reason;

- if the applicant and their spouse are separated or divorced, was there a court order in relation to custody arrangements;

12.10 Separation of parents and children

The removal of an individual without status from Canada may have an impact on family members who do have the legal right to remain (i.e., permanent residents or Canadian citizens). Other than a spouse or partner, family members with legal status may include children, parents and siblings, among others. The lengthy separation of family members could create a hardship that may warrant a positive H&C decision.

In evaluating such cases, officers should balance the different and important interests at stake:

- Canada's interest (in light of the legislative objective to maintain and protect the health, safety and good order of Canadian society);

- family interests (in light of the legislative objective to facilitate family reunification);

- the circumstances of all the family members, with particular attention given to the interests and situation of dependent children related to the individual without status;

- particular circumstances of the applicant's child (age, needs, health, emotional development);

- financial dependence involved in the family ties; and

- the degree of hardship in relation to the applicant's personal circumstances (see Definitions, Section 6.6, Humanitarian or compassionate grounds*).*

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Jamie Liew	FOR APPLICANT
Agnieszka Zagorska	FOR RESPONDENT

SOLICITORS OF RECORD:

Galldin Liew LLP Ottawa, Ontario	FOR APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Ontario	FOR RESPONDENT