Federal Court  Cour fédérale

Date: 20120807

Docket: IMM-9573-11

Citation: 2012 FC 971

Ottawa, Ontario, August 7, 2012

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

DUGLY MEDINA MOYA,
CLAUDIA BENEVIDES GOMEZ,
DUGLHY MEDINA, AND MARILYN MEDINA
BY HER LITIGATION GUARDIAN CLAUDIA
BENEVIDES GOMEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of a Senior Immigration Officer of Citizenship and Immigration Canada dated November 9, 2011 wherein the Applicants' application for permanent residence in Canada on humanitarian and compassionate grounds was not granted. The Applicants seek to set aside that decision and have it redetermined by a different Officer. For the reasons that follow I find that I will allow the application and will certify a question.

[2] The Applicants are a family. The father and mother are citizens of Colombia. They fled to the United States where their first child was born; they were deported to Colombia where their second child was born; they returned to the United States where their third child was born; then the family came to Canada where their fourth child was born.

[3] This case turns upon the "best interests of a child" as provided for in section 25 of the *Immigration and Refugee Protection Act*, SC 2001, as amended (IRPA); therefore, it is important to note the status of each child at the time that the decision under review was made:

- Duglhy (son) - dual citizen of Colombia and the United States, age 20, living at home, has part-time work and is enrolled at Humber College in Toronto
- Melanie (daughter) - citizen of Colombia- age 18, living at home, enrolled in the University of Toronto
- Marilyn (daughter) - dual citizen of Colombia and the United States, age 11, living at home and going to school
- Michelle (daughter) - born in Canada, less than one year old, living at home

[4] In the "Factors for Consideration" portion of the decision at issue, the Officer noted the following as to "Establishment in Canada":

> *-The family received social assistance until the applicant obtained work as a janitor in November of 2010*
> *-Applicant and spouse have taken language training and performed volunteer service at a food bank.*
> *-All members of the family attend and volunteer at church*

> *-Children have been attending school with good results in Canada. --*
> *-Son is beginning college.*
> *-Some family members in Canada: Co-applicant's half-brother and his family. The applicant's sister-in-law and her children are also resident in Canada.*
> *-Personal reference from language teacher, pastor, community organization and a personal acquaintance*

As to "Best Interest of the Child (BIOC)" the Officer noted:

> *The eldest child of this family is a dual U.S. and Colombian citizen: The second child is a Colombian citizen and Convention refugee in Canada. Neither is eligible for BIOC as they were over 18 years of age when application was received. The third child is a U.S. and Colombia dual citizen, aged 11, who has adapted well to life in Canada. The fourth child is a Canadian-born infant.*

[5] The Officer provided much detail later in the reasons. I will refer to this detail when discussing the issues.

ISSUES

[6] The argument as presented by Counsel for each party at the hearing focused on two issues:

1. What is a "child" for the purposes of section 25 of the IRPA, and was the Officer correct in not considering the son, Duglhy (20) and daughter, Melanie (18) in dealing with section 25?

2. Did the Officer err in considering the "best interests" of the two young children against a standard of unusual or disproportionate hardship?

I will consider these issues, in turn.

ISSUE #1: What is a "child" for the purposes of section 25 of the IRPA, and was the Officer correct in not considering the son, Duglhy (20) and daughter, Melanie (18) in dealing with section 25?

[7] In the summary of the Officer's reasons respecting best interests of the child (BIOC), which have been set out earlier, the Officer wrote in respect of Duglhy (20) and Melanie (18):

> *Neither is eligible for BIOC consideration as they were over 18 when the application was received.*

[8] In the more detailed portion of the reasons, the Officer wrote:

> *I note for the record that Melanie, born 17 November 1992, was 18 years of age and Duglhy, born 05 December 1990, was 20 years of age when this application was received. Their respective ages at that time prevent me from assessing their particular situations under BIOC criteria. I have assessed Marilyn, aged eleven, and Michelle, born in Canada this year, under BIOC provisions. Duglhy is assessed under other factors raised in this application. Melanie is a protected person in Canada and is not a part of this application, but her circumstances speak to family reunification and will be considered in that part of this assessment.*

[9] This position is consistent with the Guidelines published by Citizenship and Immigration Canada, IP 5, which states, in part:

> ***5.12 Children – Best interests of a child***
>
> *In an examination of the circumstances of a foreign national under A25(1), IRPA introduces a statutory obligation to take*

> *into account the best interests of a child who is directly affected by a decision under this section. This codifies departmental practice into legislation, eliminating any doubt that the interests of a child will be taken into account. This applies to children under the age of 18 years as per the Convention on the Rights of the Child.*
>
> . . .
>
> ***Children 18 years and over***
>
> *BIOC must be considered when a child is under 18 years of age at the time the application is received. There may, however, be cases in which the situation of older children is relevant and should be taken into consideration in an H&C assessment. If, however, they are not under 18 years of age, it is not a best interests of the child case.*

[10] Guidelines are, at best, what has sometimes been called "soft law". If they have incorrectly interpreted or applied the law, then they should not be followed. The question here is whether the law has been correctly set out in the Guidelines or correctly or reasonably followed by the Officer.

[11] Neither IRPA nor its Regulations define a "child", whether for the purposes of section 25 or otherwise. I note that in 2001 a Bill was introduced in Parliament, Bill C-384 that would have amended a number of Federal statutes to conform with the *Convention on the Rights of the Child* including a provision that would have defined a "child" by means of the *Interpretation Act* to be a person less than eighteen years old (Section 17 of the Bill). The Bill was never passed. Manitoba's *Interpretation Act, CCSM c. 180,* does provide such a definition. In a sense everyone is a "child" of their parents and never stops being a child in relation to one's parents. However it is reasonable to interpret a "child" as provided for in section 25 as something different than any person whatsoever.

[12] Counsel for the Applicants urges that a "child" as provided for in section 25 of IRPA is the same as a "dependant child" as defined in the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPR), section 2 "dependent child", which includes, among other persons, a biological child less than 22 years of age who has been and is financially dependent on the parents. Counsel points out that both section 2(2) and 25 of the IPRA provide that the definitions in the *Regulations* can apply to and be considered to be incorporated into the *Act*.

[13] IRPA also refers to a "minor child" (sections 30 & 60) without defining what a "minor child" is. Is a "minor" child something different than a "child"? There is no clear answer to this question.

[14] Justice Shore has recently made an extensive review of the law respecting the meaning of the word "child" in the context of section 25 of IRPA "best interests of the child" in *Leobrera v Canada (MCI)*, 2010 FC 587. He concluded that a "child" must be considered in the context of the *Convention on the Rights of the Child*; he wrote at paragraphs 77 to 80:

> *77 The courts have a specific role to play in the Canadian system of constitutional supremacy. Acknowledging the roles of the executive branch, the legislative branch and recognizing the judiciary's role as one of interpretation of the law. It is, thus, incumbent on the Federal Court to follow the interpretation of the legislation in jurisprudence issued by the Federal Court of Appeal and the Supreme Court.*
>
> *78 It is the Court's conclusion that the definition of "dependent child" is not determinative of whether a person is deserving of a best interests of the child analysis. The Court finds, based on the entirety of section 2 of the IRPR, that the definition of "dependent child" was not intended to apply to the IRPA.*

> *79 As has been shown, the definition of "child" is undefined in the IRPA and the jurisprudence makes it clear that the best interests of the child analysis has a special relationship with the Convention on the Rights of the Child. Therefore, the Court is of the opinion, based on the above reasoning, that the importance that the Convention on the Rights of the Child has been unduly minimized by the earlier jurisprudence on this matter.*
>
> *80 Although the Court is sympathetic to the position of the Applicant, as the policy behind analyzing the best interests of the child is, as recognized by the Convention on the Rights of the Child, partially based on the physical and mental vulnerabilities of children; and it also recognizes that persons with disabilities may also be vulnerable, to varying degrees, the Court cannot agree that dependency and vulnerability are the defining characteristics of "childhood" for the purposes of section 25. The Court consequently finds that dependent adults should not be included in the analysis of the best interests of the child.*

[15] The *Convention on the Rights of the Child*, Article 1, states:

> *For the purposes of the present Convention, a child means every human being below the age of eighteen years, unless under the law applicable to the child, majority is earlier attained.*

[16] Applicants' Counsel argues first that Justice Shore's conclusions are *obiter* since, in looking at paragraphs 74 and 83 of his Reasons, it is clear that he determined the case on the basis that the Officer had improperly removed evidence from the file and not on the basis of a definition of a "child". Second, Counsel argues that Article 41 of the *Convention* permits a broader interpretation of the word "child" under the law of an adhering State such as Canada. He argues that case law such as *Naredo v MCI* (2000), FCJ No 1250; *Swartz v Canada* (2002), FCJ No 340; *Ramsawak v MCI*, [2009] FCJ No 1387; and *Yoo v Canada*, 2009 FC 343, are representative of cases where the Court has considered persons over the age of eighteen in dealing with "best interests of a child" under

section 25, thus the law of Canada has broadened to include children of the age of 18 in considering the best interests of a "child".

[17] However I find that I agree with the reasoning of Justice Shore in *Leobrera* , supra, and find that a "child" as referred to in section 25 of IRPA is a person under the age of 18 years.

[18] I conclude in respect of ISSUE#1 that the Officer was correct in not considering Duglhy (20) and Melanie (18) under the provision of section 25 of IRPA, "best interests of the child."

ISSUE #2: Did the Officer err in considering the "best interests" of the two young children against a standard of unusual or disproportionate hardship?

[19] Consideration was given by the Officer to Marilyn (11) and Michelle (newborn) in respect of "best interests of the child" under section 25 of IRPA. The Officer set out those considerations in the detailed part of the Reasons, parts of which I will set out with emphasis added to illustrate what is at issue:

> *Marilyn Medina was born in the U.S. and has never been to Colombia, where she also holds citizenship (Record of Examination of Claudia Denevides Gomez, 16 September 2008.) Based upon her parents need to take extensive ESL training upon their arrival in Canada, it is reasonable to presume that she speaks Spanish. In 2008, at the age of eight years, she left the United States and took up residence in Canada. While there is little information before me particular to her circumstances, I accept counsel's submission that she, along with her older siblings, has "been studying at school and doing very well," This evidence supports a finding that Marilyn did, and likely could again, adapt to the circumstances of a move to what would be, to her, an unfamiliar country – Colombia. While I do not discount the difficulties and hardships that would be encompassed for a young girl in a compulsory international move, I find little to*

*support a finding that the specific **hardships** posed to Marilyn in relocating would be particularly **unusual or disproportionate.***

I find the best interests of the infant Canadian-citizen child Michelle lies with her parents, and it is presumed that she would accompany her parents to Colombia in the event they are unsuccessful in this application. While it may be argued the two younger children in this family would have better access to education and health care in Canada, I find little evidence of circumstances, such as particular health concerns, to indicate that any comparative shortcomings in these areas in Colombia would significantly compromise the best interests of these children. As previously noted, the principal applicant was a businessman in Colombia, comes from an entrepreneurial family, and has family members – parents and siblings – to assist them in Colombia. As such, there is little reason to believe the children will fall into poverty or that their fundamental health and education needs will not be met in Colombia.

. . .

*I have also considered the hardships that would result for these children – and Marilyn in particular – as a result of a break-up of the family unit. The refusal of this application would separate her from her older sister, and very likely also her brother as he is an adult and a U.S. citizen and might choose to return to the United States rather than accompany his family to Colombia. Such separations are not unusual in families when older children reach their maturity, but I am cognizant these separations typically arise in a natural or gradual fashion and that a sudden and potentially lengthy separation from her older siblings would pose a hardship to Marilyn. These emotional **hardships** have been factored into my decision, but I do not find them to be **unusual or disproportionate** so as to warrant the exercise of my discretion solely on grounds of best interests of the children affected.*

. . .

*I have considered the best interests of the two minor children and have found that both the act of relocating to what is an essentially foreign country, in conjunction with a separation from her eldest sister and a possible separation from her brother, would likely pose hardships to the third child, Marilyn, in particular. I do not, however, find that such **hardships** have been demonstrated to be **unusual or disproportionate** in view of the fact that Marilyn has previously demonstrated the ability to adapt well to a similar change and in view of the fact that her older siblings have matured and are*

> *now pursuing adult endeavours which would inevitably lead to changes in the existing domestic arrangements and sibling relationships, though admittedly not typically such significant or lengthy separations as may result here.*
>
> *In considering family reunification, I have given particular attention to the emotional and practical hardships that would accrue to the two adult children through a severance of family relationships, as these hardships principally arise from the actions of their parents and are thus undeserved by them. The consideration in this case, however, is whether the* ***hardships*** *of the separation would be both* ***unusual and undeserved or disproportionate****. I find, after careful consideration that they are not. These children are not, in fact, children any longer. The son is an adult who has options for education or employment in the U.S. and Colombia. The eldest daughter is admittedly young to live at a great distance from her parents, but if she were resident in Colombia and was offered a place at a Canadian university in a city where she had close family members, I find it is unlikely her family would discourage her from going on the basis that she is too young or would be at risk of harm including drugs and prostitution, or that the hardships of separation from her family would be too great. I comprehend that the separation resulting from a refusal of this application may be longer than what might be normally experienced by a young person embarking on an education abroad: I can not speculate in what manner or in what time frame the family may resolve the barriers to their reunification that have resulted from choices made over time by the principal and co-applicant.*
>
> *I have both individually and globally considered the circumstances of each of the applicants as well as those of the two family members not included in this application with specific regard to their establishment, the* ***best interests of the children affected****, and the* ***hardships*** *that would arise from the severance of family relationships. While I have not found* ***unusual and undeserved or disproportionate hardships****, I have identified a number of sympathetic factors. Against these factors, I have weighed the acts and omissions of the principal applicant and his spouse which have led the family to their current circumstance.*

[20] It is clear from reading these reasons that the Officer considered the "best interests of the children" against a criteria of unusual or undeserved or disproportionate hardship. No such criteria are provided for in section 25(1) of IRPA, which I repeat:

25.1 (1) The Minister may, on the Minister's own initiative, examine the circumstances concerning a foreign national who is inadmissible or who does not meet the requirements of this Act and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	*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, sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.*

[21] By way of contrast, section 97(1)(b) of IRPA clearly, when dealing with a "person in need of protection", speaks of a "risk to life or a risk of cruel and unusual treatment or punishment". That criteria does not apply to section 25, which deals with humanitarian and compassionate considerations. Section 25 requires that the Officer "examine the circumstances concerning a foreign national" taking into account the best interests of a child directly affected.

[22] The Federal Court of Appeal in *Hawthorne v Canada (MCI)*, 2002 FCA 475 has set out how an Officer is to consider the best interests of a child in the context of a humanitarian and compassionate application under section 25 of IRPA. Décary JA, for the majority, wrote at paragraphs 4 to 6 and 9:

4 The "best interests of the child" are determined by considering the benefit to the child of the parent's non-removal from Canada as well as the hardship the child would suffer from either her parent's removal from Canada or her own voluntary departure should she wish to accompany her parent abroad. Such benefits and hardship are two sides of the same coin, the coin being the best interests of the child.

5 The officer does not assess the best interests of the child in a vacuum. The officer may be presumed to know that living in Canada can offer a child many opportunities and that, as a general rule, a child living in Canada with her parent is better off than a child living in Canada without her parent. The inquiry of the officer, it seems to me, is predicated on the premise, which need not be stated in the reasons, that the officer will end up finding, absent exceptional circumstances, that the "child's best interests" factor will play in favour of the non-removal of the parent. In addition to what I would describe as this implicit premise, the officer has before her a file wherein specific reasons are alleged by a parent, by a child or, as in this case, by both, as to why non-removal of the parent is in the best interests of the child. These specific reasons must, of course, be carefully examined by the officer.

6 To simply require that the officer determine whether the child's best interests favour non-removal is somewhat artificial - such a finding will be a given in all but a very few, unusual cases. For all practical purposes, the officer's task is to determine, in the circumstances of each case, the likely degree of hardship to the child caused by the removal of the parent and to weigh this degree of hardship together with other factors, including public policy considerations, that militate in favour of or against the removal of the parent.

. . .

9 Fourth, "hardship" is not a term of art. As noted in section 6.1 of Chapter IP 5 of the Immigration Manual (reproduced at para. 30 of my colleague's reasons), the administrative definition of "unusual and undeserved hardship" and "disproportionate hardship" in the Manual are "not meant as 'hard and fast' rules" and are, rather, "an attempt to provide guidance to decision makers when they exercise their discretion". It is obvious, for example, that the concept of "undeserved hardship" is ill-suited when assessing the hardship on innocent children. Children will rarely, if ever, be deserving of any hardship.

[23] The Guidelines IP 5 previously referred to set out a number of factors which, generally, *may* be considered in respect of the "best interests of a child". They are:

> *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 but are not limited to:*
>
> - *the age of the child;*
> - *the level of dependency between the child and the H&C applicant or the child and their sponsor;*
> - *the degree of the child's establishment in Canada;*
> - *the child's links to the country in relation to which the H&C assessment is being considered;*
> - *the conditions of that country and the potential impact on the child;*
> - *medical issues or special needs the child may have;*
> - *the impact to the child's education; and*
> - *matters related to the child's gender.*

[24] There is nothing set out in these Guidelines indicating that there must be unusual or disproportionate hardship inflicted on a child before a "best interests" consideration is applicable.

[25] I am mindful of the recent decision of the Supreme Court of Canada in *Smith v Alliance Pipeline Ltd*, 2011 SCC 7, which somewhat blurs the bright line distinction made by that Court in *Dunsmuir v New Brunswick*, 2008 SCC 9, as to the standard of review. Fish J, for the majority, in Smith wrote at paragraph 26:

> *26 Under Dunsmuir, the identified categories are subject to review for either correctness or reasonableness. The standard of correctness governs: (1) a constitutional issue; (2) a question of "general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'" (Dunsmuir, at para. 60 citing Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62); (3) the drawing of jurisdictional lines between two or more competing specialized tribunals; and (4) a "true question of jurisdiction or vires" (paras. 58-61). On the other hand, reasonableness is normally the governing standard where the question: (1) relates to the interpretation of the tribunal's enabling (or "home") statute or "statutes closely connected to its function, with which it will have particular familiarity" (para. 54); (2) raises issues of fact, discretion or policy; or (3) involves inextricably intertwined legal and factual issues (paras. 51 and 53-54).*

[26] I would afford a standard of reasonableness in dealing with the Guidelines cited above; however, the Officer has not applied those Guidelines when adopting a standard of unusual or disproportionate hardship in considering the best interests of a child.

[27] This Court has repeatedly held in cases, including *Sinniah v Canada (MCI)*, 2011 FC 1285; *Mangru v Canada (MCI)*, 2011 FC 779 and others, that it is unreasonable and incorrect for an Officer to consider the "best interests of a child" against a standard of unusual or disproportionate hardship.

[28] Therefore, in the present case, the Application must be allowed in that the Officer applied the wrong test in considering the best interests of the minor children.

[29] I have considered whether this is a proper case for a certified question. In respect of ISSUE #1, a question will be certified. I have received submissions from Counsel for both parties in this

regard. I will accept a simpler version of the question proposed by Counsel for the applicants: *"Is the "child" spoken of in section 25 of IRPA restricted to a person under the age of 18 years?"*

[30] ISSUE #2 is fact-specific to the considerations of the Officer in this particular case. No question will be certified as to this Issue.

[31] There is no special reason for awarding costs.

JUDGMENT

FOR THE REASONS PROVIDED:

THIS COURT ORDERS AND ADJUDGES that:

1. The Application is allowed;

2. The matter is returned for reconsideration by a different Officer;

3. The following question is certified:

> *"Is the 'child' spoken of in section 25 of IRPA restricted to a person under the age of 18 years?"*

4. No Order as to costs.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	DUGLY MEDINA MOYA, CLAUDIA BENEVIDES GOMEZ, DUGLHY MEDINA, AND MARILYN MEDINA BY HER LITIGATION GUARDIAN CLAUDIA BENEVIDES GOMEZ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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APPEARANCES:

Ronald Poulton	FOR THE APPLICANTS
David Cranton	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Poulton Law Office Toronto, Ontario	FOR THE APPLICANTS
Myles J. Kirvan Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT