Federal Court  Cour fédérale

Date: 20130423

Docket: IMM-7619-12

Citation: 2013 FC 415

Ottawa, Ontario, April 23, 2013

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

GABRIELA GONZALEZ VILLAGRANA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicant seeks judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a decision of a Canada Border Services Agency [CBSA] Officer [the Officer], dated July 30, 2012, wherein the Officer denied the Applicant's request to defer her removal from Canada which was scheduled to take place on August 1, 2012 [the Decision].

[2] For the reasons which follow, the application will be allowed with a direction that removal be deferred pending a decision on the Applicant's application for permanent residence on humanitarian and compassionate grounds [the H&C Application].

Background

[3] The Applicant is a 25 year-old woman who fled Mexico, her country of citizenship, because she feared her former partner. She arrived in Canada while pregnant and gave birth to her daughter Paloma on March 21, 2008. Paloma was diagnosed at birth with a congenital condition known as Pierre-Robin Sequence Syndrome [PRSS] and was born with a cleft palate. PRSS involves facial abnormalities which cause other developmental malformations, affecting speech, hearing, and breathing. PRSS has required Paloma to undergo medical treatments since birth. In September 2009, Paloma had surgery for her cleft palate. She has also been receiving speech therapy and has had a number of other procedures to address the myriad of problems associated with the underlying condition.

[4] The Applicant's claim, based on domestic abuse in Mexico, was refused in June 2009 on the grounds of state protection. Two subsequent pre-removal risk assessment [PRRA] applications were also dismissed. However, none of these proceedings addressed Paloma's circumstances and, to date, no assessment of her long-term best interests has been undertaken by Canadian immigration authorities.

[5] The Applicant's removal from Canada was initiated after the refusal of her first PRRA application in May 2010, however, removal arrangements were suspended to allow Paloma to attend medical appointments.

[6] Removal of the Applicant became a priority again after the refusal of the second PRRA application in June 2012. In response, the Applicant requested more time to allow Paloma to attend an appointment for a nasendoscopy. This diagnostic surgical procedure was scheduled for October 2012. A letter from Dr. Zuker of Sick Children's Hospital in Toronto, dated June 14, 2012, attested to this appointment and indicated that Paloma would be assessed in August 2013 to determine her further surgical needs. The letter also made it clear that Paloma's medical condition is ongoing and that she will need to be followed by an interdisciplinary team throughout her developmental years. Nevertheless, the Applicant was told on July 17, 2012 to report for removal on August 1, 2012. Her counsel submitted the request to defer removal the following day.

[7] The request to defer was based on three grounds. The first two grounds, the Applicant's pending judicial review of the negative PRRA decision and the nasendoscopy became moot in October 2012 when the application for leave to judicially review the PRRA decision was dismissed and Paloma had the procedure. However, the third ground is an outstanding H&C Application, filed on June 15 2012, and based largely on Paloma's long-term health needs.

The H&C Application

[8] An H&C application filed when an individual is deemed removal ready is generally viewed as an untimely application which is brought to try to frustrate removal from Canada. The

Applicant's H&C Application appears to fit that description. However, the evidence before the Officer, which he addressed in the Decision, indicated that the Applicant had been working towards submitting her H&C Application well before June 2012 but had not been able to do so because of her former counsel's negligence. The pertinent evidence included receipts which showed that the Applicant had paid $1,500 to her former counsel in June 2010 for an application for judicial review of the first negative PRRA decision. The Applicant could not reach her counsel and did not learn until September 2011 that the application was never filed. Communications between the Applicant and her former counsel indicate that it was agreed in September 2011 that the money for which the Applicant had never received any services would be used towards an H&C application as well as a new PRRA application. However, her counsel failed her again because the H&C application was never filed and the money, which was a combination of the Applicant's own savings and donations from a church group, was never returned to her. Without this money, the Applicant could not pay the $500.00 filing fee which must accompany an H&C application. The Applicant's current counsel filed an official complaint against former counsel to the Law Society of Upper Canada in March 2012 but the matter remains under investigation. Is it reasonable to assume that, but for her lawyer's negligence, the H&C Application would have been filed in September 2011.

The Decision

[9] The Officer's reasons for refusing the request to defer acknowledge that Paloma has not had her best interests fully assessed, but note correctly that a CBSA officer does not have the jurisdiction to defer removal because of long-term medical conditions. With respect to the pending H&C Application, the Officer considered that the application was not submitted until the Applicant was deemed removal ready and noted that there is no statutory stay of removal in relation to an

outstanding H&C application. The Officer referenced the circumstances which led to the late filing of the H&C Application and stated that he was sympathetic to the Applicant's situation, but then noted that Citizenship and Immigration Canada's [CIC] processing times for H&C applications ran anywhere from 30 to 42 months. The Officer also took into account medical opinions provided by CIC medical officers to address Paloma's readiness to fly and the availability of treatment for PRSS in Mexico. The first medical opinion stated the treatment in Mexico was "likely available" while the second indicated that medical services for her nose and throat disorder were "listed as available in Mexico".

Analysis

[10] In my view, this case falls squarely under the heading "exceptional circumstances". Counsel for both parties acknowledged that there are no cases dealing with a situation involving:

- A five year-old Canadian child;
- Evidence of a need for ongoing treatment during her developmental years;
- A young single mother who is removal ready;
- An outstanding H&C application; and
- No assessment of the child's long term needs.

[11] In my view it is unreasonable to remove the single mother of a special needs Canadian child with an outstanding H&C application when the child's long term needs have never been assessed. Accordingly, the Decision will be set aside and the matter is referred back to a removal officer who will be directed to defer removal until the H&C Application had been decided.

[12] I note in closing that it is open to CIC to expedite the H&C Application once it has given the Applicant a reasonable opportunity to make further submissions.

[13] The Respondent has asked me to amend the style of cause to remove the Minister of Citizenship and Immigration as a responding party because responsibility for the CBSA was transferred to the Minister of Public Safety and Emergency Preparedness by the *Department of Public Safety and Emergency Preparedness Act*, SC 2005, c 10. I accept that the proper respondent is in fact the Minister of Public Safety and Emergency Preparedness and will order that the Minister of Citizenship and Immigration be removed from the style of cause.

[14] No question was posed for certification pursuant to section 74(d) of the Act.

ORDER

THIS COURT ORDERS that

1. The application for judicial review of the Decision is allowed.

2. The request to defer the Applicant's removal is sent back to a CBSA officer who is hereby directed to defer her removal until a decision is made on the H&C Application.

3. The Minister of Citizenship and Immigration is hereby deleted from the style of cause.

"Sandra J. Simpson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7619-12
STYLE OF CAUSE:	GABRIELA GONZALEZ VILLAGRANA v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
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REASONS FOR ORDER AND ORDER:	SIMPSON J.
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