Federal Court  Cour fédérale

Date: 20170323

Docket: IMM-3108-16

Citation: 2017 FC 303

Ottawa, Ontario, March 23, 2017

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

KAREL ONDRAS,
MALGORZATA ONDRASOVA,
ANETA ONDRASOVA, TOMAS ONDRAS,
AND RUZENA ONDRASOVA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Mr. Karel Ondras, his wife, Malgorzata Ondrasova, his mother, Ruzena Ondrasova, and his two adult children: Tomas Ondras and Aneta Ondrasova, are citizens of the Czech Republic and of Roma ethnicity. They arrived in Canada in May 2009.

[2] After failed refugee claims, the family was provided with three-year temporary residence permits and the opportunity to file applications for permanent residence based on humanitarian and compassionate [H&C] grounds.

[3] Mr. Ondras' daughter, Aneta, has entered into a common-law relationship. She and her partner have a son, born in January 2012.

[4] In 2016, the applicants initiated an H&C application. The application was refused and that decision is now before the Court. The applicants have raised a number of issues, however, the Officer's best interests of the child [BIOC] analysis is determinative and the only issue that I need address.

[5] For the reasons that follow, the application is granted.

II. Standard of Review

[6] The standard of review to be applied where the Court is considering an H&C decision is reasonableness (*Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at para 44 [*Kanthasamy FCA*]). Deference is to be accorded to the outcome reached by the Officer on the record of evidence before him or her. If the Officer's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law, the Court will not intervene (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

III. Analysis

A. *Was the Officer's BIOC Analysis Reasonable?*

[7] In considering the H&C application, the Officer addressed the applicants' establishment in Canada, the best interests of Mr. Ondras' four year-old grandson, and the hardship the applicants would face on return to the Czech Republic as a result of their Roma ethnicity.

[8] In considering the best interests of the child, the Officer noted that the identified concern was that the child would be placed in a segregated class or school for the mentally disabled in the Czech Republic due to his Roma ethnicity. The Officer then noted that the child is not subject to removal from Canada and his father is a permanent resident. The Officer concluded that: (1) the child is a Canadian citizen and would not be required to leave Canada; (2) if the child were to leave Canada, there was insufficient evidence to demonstrate that the child, whose father is of Pakistani ethnicity, would be discriminated against in the education system; and (3) it is in the child's best interests to remain in Canada. The Officer was persuaded that it was in the child's best interests to reside with his father and was not persuaded that the child could not travel to visit his mother and the remainder of the family or maintain contact with his mother by electronic means.

[9] The respondent submits that the Officer's analysis and conclusion were reasonable. The respondent argues that the decision reflects the limited evidence in support of the applicants' BIOC submissions, the Officer having considered the child's best interests in context

(*Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy SCC*]). I do not agree.

[10] The BIOC evidence was admittedly limited, however, the Officer's analysis failed to fully consider the limited evidence. The Officer concluded that it may be in the child's best interests to reside in Canada with his father "…while his mother is required to leave Canada and apply for permanent residence." In reaching this conclusion, the Officer does not address evidence indicating the mother is the child's primary caregiver. Similarly, the Officer does not address the father's employment circumstances and the impact they may have on his ability to take care of the child on a full-time basis. The record indicates that the father is a full-time employee at a fast food restaurant and has been employed in that role since 2013. The analysis also fails to address the impact upon a four year-old child of his extended family being removed. Finally, in referring to the mother being required to leave Canada, the decision suggests that the BIOC analysis was undertaken on the basis that the mother and family would be removed.

[11] The Officer's BIOC analysis was unquestionably impeded by the paucity of evidence. However, within the framework of the evidence provided, the Officer was required to identify and define the child's best interests and examine those interests "with a great deal of attention" in light of all the evidence (*Kanthasamy SCC* at para 39). That did not occur here. Instead, the analysis minimalized the child's best interests by starting from the position that the mother would be removed. The presumption of removal was exacerbated by a failure to fully address the evidence that was relevant to the child's interests.

IV. Conclusion

[12] A child's best interests will not always outweigh other considerations in an H&C application. However, it is an important factor to be given substantial weight (*Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 at para 75). Having concluded that the Officer's BIOC analysis was unreasonable, I am unable to conclude that the outcome of the H&C application would not have been different.

[13] In oral submissions, the parties advised that the applicants' H&C application had been considered under the terms of an arrangement between the parties. The parties agreed that should the matter be returned for redetermination, that redetermination should be carried out by the unit established under the terms of that arrangement if that unit remains in place.

[14] The applicants also requested that the Court order any redetermination be completed within a prescribed time in recognition of the fact that the applicants' temporary residence permits will expire in November 2017. The respondent was not opposed to the Court requiring that the redetermination take place on an expedited basis but was opposed to the Court imposing a defined time period for completion of the redetermination.

[15] In the circumstances, the matter will be returned for redetermination by a different Officer within the unit set out in the arrangement between the parties, should that unit remain in operation. The redetermination shall be conducted by the respondent in an expedited manner

mindful of the spirit and intent of the arrangement and prior to the expiration of the applicants' temporary residence permits.

[16] The parties did not identify a question of general importance and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is granted;
2. The matter is returned for redetermination by a different Officer;
3. Should the unit established pursuant to the arrangement between the parties that governed the Humanitarian and Compassionate application remain in operation, the redetermination shall be undertaken by an Officer within that unit;
4. The redetermination shall be conducted by the respondent in an expedited manner mindful of the spirit and intent of the arrangement between the parties and prior to the expiration of the applicants' temporary residence permits; and
5. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3108-16
STYLE OF CAUSE:	KAREL ONDRAS, MALGORZATA ONDRASOVA, ANETA ONDRASOVA, TOMAS ONDRAS, AND RUZENA ONDRASOVA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 19, 2017
JUDGMENT & REASONS:	GLEESON J.
DATED:	MARCH 23, 2017

APPEARANCES:

Rocco Galati	FOR THE APPLICANTS
Prathima Prashad	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Rocco Galati Law Firm Professional Corporation Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT