Federal Court Cour fédérale

Date: 20171107

Docket: IMM-2161-17

Citation: 2017 FC 1005

Ottawa, Ontario, November 07, 2017

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

KELLY PAOLA GIRALDO ZULUAGA
ARIEL ANTONIO GANDULLA SARRIA
SEBASTIAN PATINO
GABRIEL GANDULLA GIRALDO
DANIEL GANDULLA GIRALDO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

[1] The Applicants are a family of five, holding citizenship in three separate countries: Colombia, Cuba, and the United States [US]. This is a judicial review of a decision of a Senior Immigration Officer [the Officer] dated April 5, 2017 denying their application under s.25 of the

Immigration and Refugee Protection Act [*IRPA*] for permanent residence based on humanitarian and compassionate grounds [H&C]. For the reasons that follow, this judicial review is allowed as the Officer erred in the best interests of the children [BIOC] analysis.

I. Background

[2] The male Applicant, Ariel Gandulla [PA] became a US permanent resident in 1995. The female Applicant, Kelly Giraldo Zuluaga [FA] became a US permanent resident in 2008. The three minor Applicants [MAs] were born in the US. Sebastian [12], is the son by the FA's former husband. Gabriel [7] and Daniel [6] are the sons of the PA and FA. In 2004, the PA was convicted of possession of cocaine in the US. In 2011, he was charged with marijuana-related offences and battery on law enforcement. The PA alleges that in connection with these charges, a gang organization known as the Latin Kings began threatening the family.

[3] In June 2012, with the US criminal charges pending against the PA, the Applicants came to Canada. In December 2014, their refugee claims were denied and in May 2015, their H&C application was also denied.

[4] In August 2015, the Applicants were advised that the PA could not be removed to either the US or Cuba, his country of origin, because neither country would authorize his re-entry. In September 2015, the Applicants submitted a request for a reconsideration of their H&C application based on the PA's inability to be removed and the assumption that the FA lost status in the US. This reconsideration request was refused, and the Applicants filed an application for judicial review of the reconsideration refusal.

[5] By agreement, the judicial review application was discontinued and the Minister of Citizenship and Immigration agreed to reconsider the H&C application.

[6] On April 5, 2017 the reconsideration of the H&C application was denied.

II. Decision Under Review

[7] The Officer outlined the test for H&C relief from *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61[*Kanthasamy*].

[8] With respect to establishment, the Officer noted positive factors for the Applicants, including the PA's training and work as a welder, and the FA's establishment of a new business. The Officer also noted their involvement in their local church. The Officer noted the lack of recent notices of assessment or bank account statements.

[9] Regarding the FA's status in the US, the Officer determined that the legal opinion from a US lawyer which stated that the FA was likely to lose her status was not conclusive, and that there was no evidence from US authorities that they would take action to revoke her status. Further, the Officer was satisfied that US immigration procedure provides that the FA would have the opportunity to appear before an immigration judge before her status was officially revoked. As such, the Officer chose not to conduct hardship analyses of either Cuba or Colombia because there was no evidence that any of the Applicants would be deported to those countries.

[10] On the issue of family separation, the Officer noted that while it was accepted the family would experience some temporary hardship, as the PA was not removable to the US, this hardship was one factor in the overall analysis to be weighed in relation to the rest. The Officer reasoned that any hardship would be mitigated because the PA could be removed in the future, and the FA and MAs could visit the PA in Canada.

[11] The Officer then assessed hardship in the United States. The Officer reviewed the history of the PA's alleged involvement with the Latin Kings, concluding that the cited evidence is the same as what was before the RPD, and the PA did not have sufficient subjective fear of any reprisal by the Latin Kings. Further, there was no evidence of any discrimination against the children because of their Afro-Colombian heritage in the US.

[12] Notably, the Officer extensively reviewed the history of the PA's criminality in the US, and assigned negative weight to the fact that the PA has outstanding criminal charges in the US. He reasoned that Canadian immigration processes should not provide a safe haven for individuals who are fugitives from justice, such as the PA.

[13] The Officer considered the BIOC for each of the three children, including the children's health issues, possibility of treatment in the US, and support letters from schools. The Officer concluded that the BIOC could be upheld in the US, and that there would be opportunities for the FA and MAs to visit the PA in Canada.

[14] As noted above, the Officer did not consider the BIOC as it related to a possible removal of the children to Colombia with the FA. In any event, the Officer concluded that upon removal to the US, there would be support for the FA and MAs in from the FA's family, even in the absence of the PA.

III. Issues

[15] The Applicants raise a number of issues with the decision. However, the Officer's assessment of the BIOC is dispositive of this application.

IV. Analysis

A. Standard of Review

[16] The parties agree that the standard of review for an H&C application is reasonableness (*Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 18 [*Kisana*]).

B. BIOC

[17] *Kanthasamy*, at paras 33-39 requires that the Officer be "alert, alive, and sensitive" to the BIOC and clearly examine them by giving weight to all relevant H&C considerations which arise on the evidence. In my view, the Officer failed to do so, and erred in two regards: first, he did not consider the possible removal of the children to Colombia, and second, he failed to explain why the PA's criminality outweighed the BIOC.

(1) *Possible Removal of Children to Colombia*

[18] The assessment of hardship in Canadian immigration and citizenship law is a "forward-looking exercise" (*Dandachi v Canada (Citizenship and Immigration)*, 2016 FC 952 at para 16). In a BIOC analysis, the Court must consider the "full spectrum of consequences" that may result from granting or denying the H&C application (*Taylor v Canada (Citizenship and Immigration)*, 2016 FC 21 at para 31). This includes the assessment of consequences of deportation to a third country for the children, as here.

[19] The Applicants argue that the Officer's BIOC analysis is flawed because it assumes that the FA still has legal status in the US. The Applicants argue that the Officer should have considered the BIOC from the possibility of deportation to Colombia, the FA's country of origin.

[20] I agree that while the Officer considered the test from *Kanthasamy*, he applied it incorrectly. By failing to consider the consequences of removal to Colombia, the Officer did not consider all relevant factors as required by *Kanthasamy* and unreasonably narrowed the BIOC considerations.

[21] Further, the Applicants provided a legal opinion from an American lawyer who states that the FA is likely to be deemed to have "abandoned" her permanent resident status because of her request to be granted refugee status in Canada. This letter supported other corroborative evidence in the record about abandonment at US law. If the FA was deemed to have abandoned her

American permanent status, she would be inadmissible to the US and would be sent back to Colombia.

[22] In the refugee context, this Court has held that an applicant need not establish conclusively that they have lost their permanent residency status in the US as a result of the abandonment provisions (*Canada (Citizenship and Immigration) v Tajdini*, 2007 FC 227 at para 37). Rather, if there is a *possibility* that the US authorities would consider the status abandoned, it should be taken into account (*Mahdi v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 1623 (FCA) at para 12). In my view, there is no reason to treat H&C applications differently, especially in light of the fact that the children are applicants, whose best interests are a “significant factor” in the H&C analysis (*Kanthasamy*, at para 41).

[23] Here, the letter from American counsel is sufficient to demonstrate a possibility of removal to Colombia. The Officer did not consider the real risk that the FA would be found to have abandoned her US status. Consequently, the Officer failed to consider the potentially adverse consequences to the BIOC in the likely scenario of a finding of abandonment.

(2) *Failure to Explain How the PA’s Criminality Outweighed the BIOC*

[24] It is unclear from the Officer’s analysis why the “negative inference” drawn from the PA’s criminality outweighed the BIOC and other positive factors in the application.

[25] The PA’s criminality was the only expressly negative inference drawn in the application, but the Officer did not justify why this factor outweighed the BIOC. Nonetheless, the Officer

relied exclusively upon the criminality of the PA, who cannot be removed, as the basis to justify the refusal of H&C relief for the other Applicants.

[26] Based on this reliance, the Officer failed to consider the possibility that separation of the MAs and PA may be permanent. There was no evidence that the MAs could visit the PA in Canada. The Officer fails to assess how the BIOC would be impacted in a case of permanent separation. Given the Officer's conclusion that "it is in the best interests of every child…to have the constant love and support of their parents…" it cannot be said that the Officer examined the BIOC with a "great deal of attention" if he did not consider the possibility of permanent separation (*Kanthasamy*, at para 39).

[27] H&C decisions must be justified, transparent and intelligible in order to be reasonable (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). In this case, the decision is not justified, transparent, or intelligible because the Officer failed to provide reasons why the PA's criminality, which will not impact the MAs H&C claim, outweighed the BIOC.

[28] While it is true that the weight assigned to various factors in the discretionary H&C process cannot be reweighed on judicial review (*Kisana*, at para 24), the error in this case lies in the Officer's inability to explain *how* the factors were weighed in the first place (*Gonzalez v Canada (Citizenship and Immigration)*, 2017 FC 448 at para 24).

[29] As such, the decision is unreasonable.

JUDGMENT in IMM-2161-17

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted. The decision of the Officer is set aside and the matter is remitted for redetermination by a different officer;
2. No question of general importance is proposed by the parties and none arises; and
3. There will be no order as to costs.

"Ann Marie McDonald"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2161-17
STYLE OF CAUSE:	KELLY PAOLA GIRALDO ZULUAGA, ARIEL ANTONIO GANDULLA SARRIA, SEBASTIAN PATINO, GABRIEL GANDULLA GIRALDO, DANIEL GANDULLA GIRALDO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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APPEARANCES:

Peter Edelmann	FOR THE APPLICANTS
Ed Burnet	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Edelmann & Company Barristers and Solicitors Vancouver, British Columbia	FOR THE APPLICANTS
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENTS