Federal Court  Cour fédérale

Date: 20180723

Docket: IMM-4691-17

Citation: 2018 FC 772

Ottawa, Ontario, July 23, 2018

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

BANADOS SALOME DAUGDAUG

Applicant

and

THE MINISTER CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant is a citizen of the Philippines who arrived in Canada in 2007 as a temporary foreign worker under the Live-in Caregiver program. She first applied for permanent residence two years later but her application was denied because she failed to provide the medical examination results of her son who remained in the Philippines when she came to Canada. She sought reconsideration of that decision but her request was denied in 2014. The

Applicant subsequently entered into a common-law relationship from which she has two children, Ryker and Marissa, aged 6 and 3 respectively. In 2015, she submitted a new application for permanent residence, this time in the Family Class. She was sponsored by her common-law partner. However, the common-law relationship came to an end in August 2016.

[2] In November 2016, the Applicant filed yet another permanent residence application from within Canada, this time on humanitarian and compassionate grounds [H&C]. Her H&C application was denied on October 25, 2017, by a Senior Immigration Officer [the Officer]. This is the decision which is the subject of the present judicial review application.

II. The Officer's Decision

[3] The Officer first considered the Applicant's degree of establishment in Canada. She concluded that despite having spent 10 years in Canada and maintaining a good civil record, as evidenced by the letters of support provided by her friends and colleagues, the Applicant had provided scant evidence of community integration and a minimal degree of establishment. The Officer noted in that regard that the Applicant had periods of unemployment totalling approximately six of the 10 years she had spent in Canada, that her earnings, ranging from $2,000 to $18,000 annually, did not show a progressive pattern and that she had 10 changes to her residential address over that period of time; although the Officer acknowledged that as a live-in caregiver, one may be required to move as employers change.

[4] The Officer then considered the Best Interests of the Child [BIOC] component of the H&C application. She examined the Applicant's relationship with the children's father and the

court mediation agreement [Mediation Agreement], dated May 2015, where custody, parenting and child support were negotiated. The Officer also examined the situation the children would be in if the Applicant left Canada. The Officer noted that the children would remain in Canada with their father and paternal grandparents, and that there would be little adverse financial impact on them. She also noted that the father had agreed, in the Mediation Agreement, to make means of online communication available to the children but acknowledged that though it would allow the Applicant to maintain some relationship with her children, it was a poor substitute for hands on parenting.

[5] The Officer then underscored the importance of having both parents in a child's life, but was not persuaded that the Applicant's removal from Canada would compromise the children's best interests to a degree that justifies granting an exemption.

[6] The Applicant claims that the Officer's assessment of the BIOC factor is her primary concern with the impugned decision. She contends that this assessment is flawed as the Officer failed to assess whether the best interests of both children were met, limiting herself to determining that their basic needs were met, conflating the two when the best interests and basic needs of a child are not the same thing. The Applicant further claims that the Officer erred in heavily relying on the fact that the children would remain with their father while failing to assess the impact of their mother's absence from their lives and of placing significant focus on selectively chosen aspects of the Mediation Agreement. The Applicant also submits that the Officer failed to consider the role that the Applicant plays in her children's lives, notably her importance at their developmental stage. Finally, the Applicant argues that the Officer lacked

sensitivity in her BIOC assessment and erred in that assessment by applying a hardship threshold.

[7] The Applicant is also dissatisfied with that the Officer's analysis of the Applicant's establishment in Canada. She claims that this assessment was unreasonable as her income history and the number of times she has changed address should not be weighed against her, particularly given that the Applicant has supported herself the whole time she has been in Canada. The Applicant further contends in that regard that the Officer summarily dismissed her evidence, contained in her sworn statement, that she was a victim of domestic violence.

III. Issue and Standard of Review

[8] The issue to be determined in the present case is whether the Officer committed a reviewable error in her assessment of the BIOC factor and of the Applicant's degree of establishment in Canada.

[9] It is well established that the applicable standard of review in matters regarding H&C decisions is reasonableness (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 43-44 [*Kanthasamy*]; *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 at paras 16-18 [*Williams*]). In order to satisfy that standard, the decision under review must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47)

IV. Analysis

A. *Was the Officer's assessment of the BIOC factor reasonable?*

[10] In any case where it is at issue, the BIOC factor should be given substantial weight, although it has been held not to be determinative (*Motrichko v Canada (Citizenship and Immigration)*, 2017 FC 516 at para 21[*Motrichko*]). In assessing this factor, the BIOC "must be 'well identified and defined' and examined 'with a great deal of attention' in light of all the evidence" (*Kanthasamy* at para 39).The best interest of any given child is highly contextualized and should be guided by the child's age, needs and capacity to determine the circumstances in which that child will have the best opportunity to receive the care and attention they need (*Kanthasamy* at paras 34-36).

[11] In the present case, the Officer did discuss the BIOC factor at some length. However, assessing that factor requires identifying and defining the best interests particular to each child in question, in this case Ryker and Marissa (*Motrichko* at para 27). Once this has been determined, the Officer has to assess the "full spectrum of consequences that may result from granting, or denying, the H&C application" (*Motrichko* at para 28, citing *Taylor v Canada (Citizenship and Immigration)*, 2016 FC 21 at para 31; *Williams* at para 63). Here, in my view, the Officer failed to so as her decision contains no references to the particular needs of either child, nor is there consideration of the impact on the children should the Applicant remain in Canada, or of the emotional or psychological effect of her departure on the children.

[12] I agree with the Applicant that the Officer focused too heavily on the Mediation Agreement between the Applicant and her former partner instead of focusing on the interests of the children. The Officer notes that according to the agreement, the children's primary residence is with their father, and that in the case that the Applicant should have to leave Canada, the father would have full custody of the children but would continue to consult with the Applicant on major and significant decisions and make available on a consistent basis the technology necessary for interaction between the Applicant and her children. What the Officer failed to consider, however, is that according to this agreement, the parents currently have joint custody with the father's house being their primary residence and that the holidays are divided evenly between the parents. The Mediation Agreement, therefore, accounts for the Applicant being a significant presence in her children's lives (Certified Tribunal Record [CTR], at 97-98).

[13] The Officer concluded that the children's best interests could be met by remaining with their father should their mother leave Canada based in part on evidence on file that persuaded her "that this environment was found preferable by the courts" (CTR at 5). However, the Officer failed to grasp the context or nature of the court proceedings to which she refers. The sole court "decision" before the Officer was an order on consent between the Applicant and her former partner from a previous separation, dated November 2012, in which both parents agreed that the residence of their only child at the time would be with the father, that the Applicant would have supervised visitation rights on alternating weekends and that the Applicant would obtain counselling or treatment for post-partum depression (CTR at 112-113). I note that this agreement was clearly temporary, that the Applicant's post-partum depression likely factored into the

decision of the child's primary residence, and that a custody order on consent can hardly be equated with a court finding that a particular environment is preferable.

[14] The Respondent claims that the Applicant submitted insufficient evidence of her close relationship with her children. I do not agree. The Applicant's affidavit speaks of finding accommodations near her children's father after the breakdown of her relationship so that she can care for her children close to their father and grandparents and of being there for her children for everything since they were born, especially her son who spent an extended period of time in the hospital after his premature birth. The letters of support submitted by the Applicant's friends and members of her community, which the Officer considers but briefly in relation to the Applicant's degree of establishment, also mention her dedication as a mother and her role as primary caregiver to her two young children.

[15] In sum, I agree that the Officer over-relied on the father's rights under the Mediation Agreement and failed, in so doing, to take into account the important role the Applicant continues to play in her children's lives and assess the impact, from the children's perspective, that the Applicant's departure from Canada would have on their lives and best interests. It was not enough to say that the father would be there to care for them as this Court has held that it is unreasonable to focus on the presence of an alternative care-giver for the children (*Sivalingam v Canada (Citizenship and Immigration)*, 2017 FC 1185 at para 17). In other words, a BIOC analysis being contextual, I am satisfied that the BIOC in this case were not "well identified and defined" and examined "with a great deal of attention in light of all the evidence" (*Kanthasamy* at para 39). This, alone, justifies the Court's intervention.

B. *Did the Officer err in her assessment of the Applicant's degree of establishment in Canada?*

[16] The Officer concluded, despite the 10 years the Applicant has legally resided in Canada, her two Canadian-born children, and the six letters of support submitted by friends, members of her community and a former employer, that the Applicant had provided "scant evidence of community integration" (CTR at 4-5). Having examined the file, I find the Officer's characterization of the Applicant's evidence on that point to be unreasonable. In particular, I find that the Officer failed to engage with some important evidence of community integration by acknowledging the letters of support provided without considering that these letters speak to established friendships of more than five years, of maintained contact with former employers and of the nature of the work she performed as live-in caregiver.

[17] The Officer counts the number of times that the Applicant changed residential addresses against her, despite acknowledging that such changes of address are likely, as a live-in caregiver would move as employers change, and without taking into account that most of the other changes to the Applicant's residential address correspond to changes in the Applicant's relationship with the father of her children.

[18] Although I am mindful of the fact that it is not the role of the Court to reassess the Applicant's case and substitute its own findings to those of the Officer, I find that the Officer erred in her assessment of the Applicant's degree of establishment by failing to adequately consider all of the evidence before her (*Cepeda-Gutierrez v Canada (Citizenship and Immigration)* (1998), 157 FTR 35 (TD) at paras 15-17).

[19] The Applicant's judicial review application will therefore be granted and the matter referred back to a different Senior Immigration Officer for redetermination. Neither party has identified a question of general importance for certification. I agree that none arises.

JUDGMENT in IMM-4691-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;

2. The decision of the Senior Immigration Officer, dated October 25, 2017, denying the Applicant's application for permanent residence from within Canada on humanitarian and compassionate grounds is set aside and the matter is referred back to a different officer for redetermination;

3. No question is certified.

"René LeBlanc"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. Aris Daghighian	FOR THE APPLICANT
Ms. Ada Mok	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Green and Spiegel LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT