**Date: 20081020**

**Docket: IMM-666-08**

**Citation: 2008 FC 1171**

**OTTAWA, Ontario, October 20, 2008**

**PRESENT: The Honourable Louis S. Tannenbaum**

**BETWEEN:**

**SANDRA MARIA DE SOUSA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is a Brazilian citizen who arrived in Canada with her 14 month old daughter Amy on a six month visitor's visa in late 1996 and failed to leave at the end of that time. In May, 2004, she applied for exemption from the requirement that she apply for permanent resident status from outside Canada on humanitarian and compassionate (H&C) grounds pursuant to section 25 of the *Immigration and Refugee Protection Act*, 2001, c. 27 (*IRPA*).

[2] That application was denied on June 26, 2006. Judicial review of that decision was allowed, however, on the basis that the officer failed to adequately assess the best interests of Amy, were she to be separated from her mother. This application concerns the second consideration of this file.

[3] Ms. de Sousa initially lived with her sister, a permanent resident, and brother-in-law, taking care of her brother-in-law's ill mother in return for room and board for herself and Amy. During that period, she claims that she was being mistreated and abused both verbally and physically. The sister and brother-in-law convinced Ms. de Sousa that Amy would be able to receive health care, Canadian citizenship and better education if they adopted her. The application for adoption was submitted in 1999 and the adoption finalized in October 2002. Amy was granted Canadian citizenship in September 2005.

[4] In December 2003, the applicant moved out of her sister's home with her daughter and had become self-sufficient by January 2004, working as a cleaner. She eventually applied for legal custody of Amy, which she received on April 19, 2007, after the first officer's decision.

[5] Ms. de Sousa provided updated submissions and documents to Citizenship and Immigration Canada on March 14 and June 15, 2007 for the redetermination of her H&C application. Further documents were submitted early in 2008.

[6] The officer began by reciting the history of the applicant's case and noted that the grant of sole custody of Amy on April 19, 2007 resolved the legal issue which caused such complications in the first H&C assessment: that the applicant was the caregiver but not the legal guardian of her daughter.

[7] In her reasons, the officer noted that there was little information about Amy's father but noted that the applicant's actions had denied the girl a relationship with him or her other relatives in South America. The officer then described the adoption and found that the mother / daughter relationship between the applicant and Amy was never severed. The officer noted that submissions about Amy's psychological state largely focused on the outcome of separation due to the deportation of her mother. It was also noted that she was in sixth grade and was young enough to adapt easily to new friends and surroundings.

[8] As for Ms. de Sousa's claim that she would be unable to provide financially for Amy in Brazil, the officer noted that she had been able to find employment and become self-sufficient while living in a foreign country despite dealing with a new language. It was thus found reasonable to believe that she would be capable of doing the same in her country of birth.

[9] The officer was not satisfied that Ms. de Sousa was well established in Canada. It was noted that she had friends in the community and was employed, but there were still not sufficient indicia of establishment to show that she would be unable to re-establish herself in Brazil. Finally, it was found that the psychological problems she submitted that she suffers due to abuse in her sister's home and anxiety regarding separation from her daughter as a result of deportation were self imposed. The applicant was free to return to Brazil at any time and there was no impediment to taking Amy with her following the grant of custody.

[10] The officer noted that the adoption was undertaken for the purpose of providing Amy with status in Canada, which is contrary to *IRPA*, and that facts were misrepresented in her sponsored permanent resident application. The applicant's sister and brother-in-law would be investigated for misrepresentation, but no action would be taken against the applicant, who was not directly involved and cannot be held accountable, or the child.

[11] The applicant asserts that the Immigration officer improperly fettered her discretion and that her analysis of the best interests of the applicant's daughter was erroneous. The respondent counters that the applicant's attack on the officer's decision amounts to nothing more than an attempt to evade the requirements of the immigration system.

[12] Improperly fettering discretion is an error of jurisdiction which is reviewable on a correctness standard. The allegedly erroneous assessment of Amy's best interests dealt with facts and the application of law to those facts and is thus to be set aside only if found not to be within the spectrum of reasonable results which the officer could have reached.

[13] The applicant asserts that the officer made speculative findings in coming to her decision on Amy's best interests, rendering it unreasonable. The findings she challenges include that children of twelve years of age "adapt readily to new friends and surroundings, as well as new schools", for which she notes that no evidence was cited. She also argues that the officer's reference to Amy's possible acquaintance with her father was an unreasonable implication that the applicant and her estranged husband may reconcile, despite the applicant's evidence that he has another family.

[14] The respondent submits that the officer made reasonable observations based on common sense and logic. She asserts that the applicant is challenging the weighing of the evidence, which is not a ground of review.

[15] In reply, the applicant raises her daughter's post-traumatic stress disorder and asserts that the failure of the officer to consider the evidence of that illness was in error.

[16] Contrary to the applicant's submissions, the respondent asserts that the officer did not ignore the evidence of Amy's psychological stress, as the letter which describes her symptoms and her need to remain with her mother is directly cited in the decision.

[17] In his submissions, the respondent argues that "the Immigration officer committed no reviewable error since an examination of the Officer's lengthy reasons discloses a careful consideration of the best interests of the applicant's child". (see para. 33 of the Respondent's Further Memorandum of Argument, dated August 21, 2008)

[18] The respondent further argues that the officer was alert and sensitive to the impact on the child if she were to move to Brazil with her mother. (see para. 33 of the Respondent's Further Memorandum of Argument, dated August 21, 2008)

[19] I do not agree with the respondent's contention.

[20] The record contains a letter from the child's physician, who has been treating her since her arrival in Canada. (letter dated November 4, 2006 from Dr. Trudy Chernin, Tribunal Record, p. 142)

[21] In her decision, the Immigration Officer states the following:

> "There is no information on file to suggest Amy suffers from any physical deformity or ailments. In fact, there is a letter on file from the family doctor, Dr. Trudy Chernin dated Nov. 4, 2006 stating, I last saw Amy Oct. 30, 2006 and she seemed well cared for and denied any physical distress."

[22] The officer however did not consider Dr. Chernin's letter in its entirety. In the letter, Dr. Chernin goes on to state:

> "… If Ms. Sousa was to be deported it would have a devastating impact on Amy because she'd either have to go with her mother and leave Canada or stay with her aunt. This would be an intolerable situation for her."

[23] We see therefore that Dr. Chernin's conclusion is that Any would be devastated by either having to go to Brazil, or by remaining in Canada without her mother. This evidence has not been contradicted by any other expertise.

[24] To devastate and devastation are defined as "to cause great destruction to, - to overwhelm with shock, - crushingly effective; overwhelming". (Canadian Oxford Dictionary)

[25] In my view, the officer did not consider the above evidence given by Dr. Chernin and therefore committed a reviewable error respecting the best interests of the child.

[26] Accordingly, the application for judicial review will be granted.

[27] Given my conclusion respecting the best interests of the child, it is not necessary that I deal with the other ground invoked by the applicant, namely that the officer fettered her decision.

[28] No questions were submitted for certification.

[29] It is to be noted that this is the second successful application for judicial review by the applicant respecting her request for an exemption from the requirement that an application for permanent residence be made from outside Canada.

[30] Accordingly, I do not believe it to be in the interests of justice that the matter be referred back for a simple re-determination of the applicant's request for an exemption. Rather, considering the best interests of the child, I am of the view that the applicant's H & C application be processed from within Canada. An order in this respect will issue.

[31] No question of general importance was submitted for certification.

## JUDGMENT

**THIS COURT ORDERS AND ADJUDGES that** this application for judicial review is granted and the decision of the immigration officer dated January 23, 2008 is annulled and set aside for all legal purposes. The matter is referred back to the respondent so that the application for permanent residence be processed from within Canada, taking into consideration the conclusion of the undersigned respecting the best interests of the child Amy.

"Louis S. Tannenbaum"
Deputy Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-666-08 |
| **STYLE OF CAUSE:** | Sandra Maria De Sousa v. M.C.I. |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | September 11, 2008 |
| **REASONS FOR JUDGMENT:** | TANNENBAUM D.J. |
| **DATED:** | October 20, 2008 |

**APPEARANCES:**

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| Ada Mok | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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