Federal Court Cour fédérale

Date: 20151113

Docket: IMM-4542-14

Citation: 2015 FC 1270

Ottawa, Ontario, November 13, 2015

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

SELVIN DE JESUS BERMUDEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the April 28, 2014 decision of Senior Immigration Officer M. Campbell [the Officer] to refuse the Applicant's application for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds.

I. Background

[2] The Applicant is a citizen of El Salvador, born on June 16, 1981. He was granted Convention refugee status with his family in 1988 and resettled in Canada.

[3] In 1992, his parents separated and he moved to the United States with his mother.

[4] Beginning in 1995, when the Applicant was fourteen, he was a member of a localized street gang in Phoenix Arizona called the "LCM-13". He ceased membership in 2000, when he was eighteen.

[5] The Applicant was deported from the United States to El Salvador in 2008, after serving a five year sentence for an assault occurring in 2003. Since that time he has not had any serious convictions.

[6] The Applicant resided in El Salvador from May to August of 2008. While there he was threatened by gang members and police who suspected him of being a gang member (he alleges due to his tattoos).

[7] In August of 2008, the Applicant fled El Salvador and arrived in Canada in December of 2008 without documentation, to join his father and brother, and has remained here since that time.

[8] In January of 2012, a member of the Immigration and Refugee Board [IRB] issued a removal order against the Applicant, finding him inadmissible pursuant to section 37(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The Canada Border Services Agency [CBSA] is seeking the Minister's opinion that the Applicant should be removed, despite his refugee status pursuant to section 115(2) of the IRPA.

[9] In January of 2013, the Applicant applied for permanent residence on H&C grounds.

[10] In a decision dated April 28, 2014, an officer of Citizenship and Immigration Canada [CIC] denied his H&C application.

[11] Amendments to section 25 of the IRPA came into effect making H&C considerations no longer available to exempt an applicant from the application of section 37(1). The Applicant's application was filed prior to these amendments. Accordingly, this judicial review is his final opportunity for consideration of an exemption.

[12] The Applicant has four children (three biological daughters and one step-daughter). Two of them, Jazmine and Ariel, reside in the United States with their mother, the other two, Kendra and his step daughter Angelina, reside in Canada with their mother, his current wife.

[13] The Officer refused the Applicant's application largely based on his failure to establish that he would face unusual, undeserved, or disproportionate hardship if forced to apply for permanent residence from outside of Canada. It is notable that the Applicant was incarcerated for

five years for assault in the United States, and was deported from there to El Salvador in 2008, after having served his sentence.

II. Issues

[14] The issues in the present application are as follows:

A. Did the Officer err in assessing the best interests of the Applicant's children?

B. Was the Officer's decision reasonable with respect to the best interests of the children and considering unusual, undeserved or disproportionate hardship to the Applicant and his family?

III. Standard of Review

[15] The appropriate standard of review to be applied in assessing the issues is reasonableness. The issues involve questions of fact and discretion, and the tribunal is interpreting its home statute and associated statutes (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 6).

IV. Analysis

A. *Best Interests of the Children*

[16] The Applicant argues that the Officer failed to be alert, alive and sensitive to the best interests of his four children (two American, and two Canadian), as required by section 25(1) of the IRPA. This factor must first be considered before it can be weighed against other

considerations. It was acknowledged in *Hawthorne* that in most cases the best interests of the children will favour them remaining in Canada with their parents (*Hawthorne v Canada (Citizenship and Immigration)*, 2002 FCA 475 at paras 5-6).

[17] The Officer noted the following points regarding the Applicant's American daughters:

a. they are aged twelve and fifteen;
b. they reside with their mother in the United States;
c. the Applicant is not their primary caregiver;
d. the Applicant expressed a plan to move them to Canada but showed no evidence from them or their mother that they wish to do so;
e. the Applicant stated he supports them financially but provided no evidence to support this assertion.

[18] Regarding the Applicant's Canadian daughter and step daughter, the Officer noted:

a. they are one and eight years old;
b. they reside with the Applicant's spouse, their mother in downtown Toronto;
c. the Applicant resides with his father in Vaughan as a term of his probation;
d. the Applicant is not their primary caregiver;
e. the Applicant has not expressed when or if he plans to live with his spouse and daughters again;
f. the Applicant used to take his step daughter to school every day and give her gifts, but there was no evidence of how often or when he spends time with her and his daughter presently;

[19] The Officer correctly applied the appropriate test in assessing the best interests of the Applicant's children. First, their best interests are to be established, and second, the degree to which those interests will be compromised must be considered (*Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 at para 63). There is no strict analytical formula in assessing the best interests of children.

[20] The Officer in the case at bar considered that the children's best interests would be to remain where they are with their father in Canada, but went on to consider the degree to which the children's interests would be adversely affected if the Applicant's application were refused would not be sufficient to outweigh other factors in the H&C analysis.

[21] The Officer noted that the Applicant is not a primary caregiver to his children, nor does he live with them. While he has stated intentions to move his American daughters to Canada, he did not state an intention to reside with his Canadian daughters again, and he provided no evidence of either potential change in circumstances.

[22] The Applicant further provided no evidence of fiscal support for his children, and included only vague affidavits speaking to the influence he has on his children's lives, without details of continuing contact or regular support, be it emotional, physical or fiscal. Overall, the Applicant provided insufficient evidence of the hardship his daughters would face if his application were refused.

[23] The Officer also noted that the Applicant's children and their mothers are free to remain in North America. It is the parents' decision together whether or not to accompany the Applicant, who is not a primary caregiver, to El Salvador, and not a necessity or foregone conclusion.

[24] The Officer was reasonable in the decision of determining the best interests of the children.

B. *Was the Decision Reasonable?*

[25] The Applicant also argues that the Officer did not properly assess the hardship his family would face if his application were refused. The Applicant noted several relevant considerations to this analysis:

a. risk from crime in general;
b. risk due to the perception that the Applicant is a gang member;
c. risk due to the perception that he is wealthy as a North American deportee.

[26] The Applicant argues that the Officer dismissed his establishment in Canada on several unreasonable grounds:

a. criminal record;
b. supporting evidence;
c. establishment through family.

[27] The Officer's decision was reasonable. While the assessment of generalized conditions could have been more clearly articulated, the Officer was working with inadequate evidence submitted by the Applicant.

[28] Moreover, the Officer's consideration of general country conditions in El Salvador was also reasonable. The evidence dealing with hardships that the Applicant might face upon returning to El Salvador: including perception of wealth, of gang membership, and of poor socioeconomic conditions, were reasonably considered.

[29] General conditions were not ignored simply because they faced the population as a whole, as the Applicant alleges. There is no evidence that evidence was ignored in reaching this conclusion, and it was within the range of reasonable outcomes available to the Officer.

[30] Further, while the Applicant stated that he was harassed by police as well as gang members in El Salvador, the Officer noted a lack of evidence on this point, and reasonably determined that avenues of redress had not been ruled out should the Applicant be harassed again upon his return.

[31] In considering establishment, the Officer again analyzed the evidence on record and concluded that while the Applicant has lived the majority of his life in North America, and has most of his immediate family here, he failed to evidence a level of establishment that would warrant the granting of an H&C exemption.

[32] The Applicant provided little evidence of his employment while in Canada. He further admitted to never having paid income taxes, and despite a stated desire to do so he provided no evidence to that effect. He further stated that he supports his children and wife financially but provided no evidence to that effect either.

[33] Criminal behavior has persisted in the Applicant’s life. The Officer noted a number of charges, and acknowledged their result (i.e. whether or not they resulted in convictions). If the results of these charges had not been listed then it could be interpreted that the Officer mischaracterized them, but since it was carefully clarified that they had not resulted in

convictions, they were reasonably considered (i.e. not used as evidence of criminality in and of themselves).

[34] The evidence provided by the Applicant's family was not ignored, but it was reasonably afforded little weight: the details in the affidavits submitted were vague, and since they were not based on first-hand knowledge, it was reasonable to take into consideration that they did not include the sources of their information.

[35] The Officer acknowledged that while some factors weighed in favor of granting the Applicant's application, overall he had failed to establish that the level of hardship he and his family would face rose to the level of undue, undeserved or disproportionate. In addition, while the best interests of his children weighed in favor of him staying in Canada, they did not weigh so heavily as to displace the other factors considered by the Officer.

[36] The Respondent proposed a question for certification which was opposed by the Applicant, as found in the decision of Justice Richard Mosley in *Celise v Canada (Citizenship and Immigration)*, 2015 FC 642:

> In a best interests of the child analysis, is an officer required first to explicitly establish what the child's best interests are, and then to establish the degree to which the child's interests are compromised by one potential decision over another, in order to show that the Officer has been alert, alive and sensitive to the best interests of the child?

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. The following question is certified "In a best interests of the child analysis, is an officer required first to explicitly establish what the child's best interests are, and then to establish the degree to which the child's interests are compromised by one potential decision over another, in order to show that the Officer has been alert, alive and sensitive to the best interests of the child?"

"Michael D. Manson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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