Federal Court Cour fédérale

Date: 20211020

Docket: IMM-2677-20

Citation: 2021 FC 1111

Ottawa, Ontario, October 20, 2021

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

IMELDA MUNETON GUTIERREZ
OCTAVIO FLORES RODRIGUEZ
ALFONSO FLORES MUNETON
RAUL FLORES MUNETON
MARIA FERNANDA FLORES MUNETON
OCTAVIO FLORES MUNETON

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Imelda Muneton Gutierrez [Applicant], her husband, Octavio Flores Rodriguez and their four (4) children [collectively, the Applicants] seek judicial review of a decision rendered

on November 21, 2018, by a Senior Immigration Officer [Officer] refusing to grant them an exemption, based on humanitarian and compassionate [H&C] considerations, from the requirement of having to apply for permanent residence from outside Canada.

[2] The Applicants are all citizens of Mexico. They came to Canada in March 2009 and claimed refugee protection. The Refugee Protection Division dismissed their claim for protection in October 2011 due to credibility concerns. Leave to judicially review the decision was denied by this Court in March 2012.

[3] The Applicants applied for a pre-removal risk assessment in October 2012, which was also denied in April 2013. Their removal from Canada was scheduled for July 2013, but they failed to appear for removal.

[4] In November 2016, the Applicants submitted an application for permanent residence from within Canada on H&C grounds, pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Their application was based on their establishment in Canada, the best interests of the children and the hardship they would face upon returning to Mexico. Their application was rejected on May 25, 2017. That decision was, however, set aside on judicial review and sent back for re-determination in 2018 (*Gutierrez v Canada (Citizenship and Immigration)*, 2018 FC 906 [*Gutierrez*]).

[5] The Applicants provided further submissions and evidence in 2018. Their application was once again dismissed in November 2018. The Officer determined that there were insufficient

H&C considerations to allow the Applicants to apply for permanent residence from within Canada. For unknown reasons, the decision was not communicated to the Applicants or their counsel. It was only after the Applicants' counsel communicated with counsel at the Department of Justice, who then investigated the matter, that the Applicants learned that the decision was rendered in November 2018.

[6] The Applicants raise several issues in their memorandum of argument, which can be reduced to and summarized as follows:

i. The Officer violated procedural fairness in the assessment of the Applicant's ownership of her business;
ii. The Officer erred by importing substantive refugee law into the hardship analysis;
iii. The Officer committed the same reviewable errors as those identified in *Gutierrez*;
iv. The Officer unreasonably assessed the best interests of the minor Applicants; and
v. The Officer unreasonably assessed the Applicants' establishment.

II. Analysis

A. *Standard of Review*

[7] The decision to grant or refuse an exemption on H&C considerations is reviewable on a standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 16-17 [*Vavilov*]; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44 [*Kanthasamy*]. The Court's focus is on "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome"

(*Vavilov* at para 83). It must ask itself "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). Also, the "burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov* at para 100).

[8] With respect to the issue of procedural fairness, the Federal Court of Appeal clarified in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*Canadian Pacific*] that issues of procedural fairness do not necessarily lend themselves to a standard of review analysis. Rather, the role of this Court is to determine whether the proceedings were fair in all the circumstances (*Canadian Pacific* at paras 54-56; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

B. *Preliminary Issue*

[9] The Respondent raises a preliminary issue, being the admissibility of the Applicant's further affidavit. The Respondent requests that I give it no weight as it provides information that post-dates the Officer's decision.

[10] I have reviewed the further affidavit of the Applicant. She discusses the Applicants' current situation, the strain the COVID-19 pandemic has put on her family, and their plans for the years to come. Although I am sympathetic to their situation, the law is clear that in a judicial review application, barring certain well-defined exceptions, the only material that should be considered is that which was before the decision maker (*Association of Universities and Colleges*

of Canada v Canadian Copyright Licensing Agency (Access Copyright), 2012 FCA 22 at para 20). The Applicants have not demonstrated that the information contained in the further affidavit falls within a permitted exception to inadmissibility. Accordingly, I have not considered the information in my review of the Officer's decision.

C. *Breach of Procedural Fairness*

[11] The Applicants submit that the Officer breached their right to procedural fairness when assessing the ownership of the Applicant's painting business. In finding there was no evidence to support the statement that the Applicant had opened a successful painting and decorating company, the Officer doubted the genuineness of the business licence provided in evidence or believed that the Applicant was not credible regarding her business ownership. In both situations, the Officer should have either convoked the Applicants for an oral interview or provided notice of its concern and an opportunity to respond to it.

[12] The Applicants' argument must fail.

[13] When the Officer indicated that "[n]o supporting evidence has been provided for this statement", the Officer was not referring to the ownership of the business, but rather to the lack of evidence to demonstrate that the company was indeed successful. The business licence, which the Officer specifically mentioned as one of the documents considered in reaching the decision, only demonstrated that a business was registered. It did not show that it was operational or that it was successful. The Officer's statement must be interpreted in its proper context. When the statement was made, the Officer was considering the Applicants' overall fiscal management

within Canada. I am not satisfied that the Officer's statement raises an issue of procedural fairness.

D. *Refugee Law and Assessment of Hardship*

[14] The Applicants submit that the Officer relied on aspects of refugee law to reach the decision, such as state protection, forward-looking personalized risk and the availability of an internal flight alternative.

[15] I am not persuaded by the Applicants' argument.

[16] In their application for H&C relief, the Applicants alleged they would face significant hardship due to the adverse conditions in Mexico. The Applicants indicated that they had come to Canada to escape the cartel violence and crime in Mexico and that, despite the passage of time, the situation in Mexico had not much improved. They relied on reports indicating that the violence and crime rates remained high and expressed their fear of returning to Mexico. Given the fear alleged by the Applicants, the issue of whether they would become victims of crime upon their return and whether the authorities could assist them was relevant to the assessment of hardship alleged by the Applicants.

[17] Likewise, the Officer did not refer to a forward-looking personalized risk as it did not require the Applicants to prove they would personally be targeted in Mexico. The Officer was being responsive to the Applicants' submissions. The Officer then found that the general country condition documentation was insufficient to connect the Applicants to the hardship they alleged

they would incur if they returned to Mexico and then went on to assess the application based on the information provided. It was also reasonable for the Officer to consider the fact that the evidence demonstrated that the conditions of hardship alleged by the Applicants were not the same throughout Mexico and that they could decide where to live and work in Mexico.

[18] Therefore, on my reading of the decision, I am not persuaded that the Officer improperly imported notions of refugee law into the decision-making process or that the Officer confused the criteria set out in sections 25, 96 and 97 of the IRPA. The Applicants had the burden of establishing a link between the difficulties they alleged in their H&C application and their personal situation (*Nashir v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 147 at para 39; *Pena Mora v Canada (Citizenship and Immigration)*, 2018 FC 297 at para 18; *Bakenge v Canada (Citizenship and Immigration)*, 2017 FC 517 at para 32; *Paul v Canada (Citizenship and Immigration)*, 2017 FC 744 at para 24). The Officer reasonably found that they had not met their burden.

[19] The Applicants also argue that the Officer's assessment focuses exclusively on the hardship they would face if required to leave Canada, without regard to their evidence and any appreciation of the approach based on compassion set out in *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338 [*Chirwa*], and discussed in *Kanthasamy*.

[20] I cannot agree with the Applicants. The Officer's reasons do not reflect the attitude of a person who was unresponsive and insensitive to the Applicants' circumstances. The Officer specifically referred to the *Chirwa* test in noting that the "purpose of s. 25(1) is to offer equitable

relief in a situation that would excite in a reasonable person, in a civilized community a desire to relieve the misfortune of others". The Officer also considered the personal circumstances of each member of the family as well as all of the relevant H&C considerations. In the end, the Officer was not satisfied that the Applicants' circumstances, when considered globally, justified an exemption allowing them to apply for permanent residence from within Canada. Applying the *Chirwa* approach does not mean that the Officer will automatically find in favour of granting H&C relief. I do not consider that the evidence being weighed in an unfavourable manner to the Applicants implies that the Officer lacked compassion or that the wrong test was applied.

E. *Errors Identified in* Gutierrez

[21] In *Gutierrez*, the Court found that the Officer had unreasonably "focused upon the issue of unauthorized employment in assessing the H&C application". The Court also was not satisfied that the Officer had reasonably assessed the issue of generalized hardship in failing to recognize that an H&C applicant may raise hardship that is also faced by others in the country of removal (*Gutierrez* at paras 7-8). The Applicants submit that the errors identified in *Gutierrez* were equally committed by the Officer in the redetermination.

[22] I disagree.

[23] The Officer explicitly stated twice that the application did not "turn" on whether or not the Applicants worked illegally. The Applicants justified their irregular status by indicating that if they had had work permits, they would not have violated Canadian laws. It was not unreasonable for the Officer to address their argument. The Officer considered all of the

evidence on establishment and did not focus exclusively on the Applicants working without authorization.

[24] As noted in *Joseph v Canada (Citizenship and Immigration),* 2015 FC 904 [*Joseph*], "lengthy illegal residence and participation in its economy are both reasonable and relevant facts for an H&C Officer to consider". Applicants cannot be expected to profit from the years they live underground and be better placed than those who respect Canadian immigration laws and processes (*Joseph* at paras 28-29).

[25] As for the Officer's assessment of the generalized hardship in Mexico, the Applicants have failed to persuade me that the Officer was of the view that the Applicants could not raise hardships that were also faced by others in Mexico. The Officer's reasons demonstrate that the evidence of generalized hardship provided by the Applicants was considered. However, it found that the Applicants did not prove the existence of a link between their personal circumstances and the alleged hardship. The Officer explicitly stated that he did not discount their fear and that he considered it as part of his assessment.

F. *Reasonable Assessment of the Best Interests of the Children*

[26] Contrary to the submissions of the Applicants, the Officer did not misconstrue or selectively read the record. In addition, the Officer did not unduly focus on the minor Applicants' ability to speak Spanish. The Officer considered all of the evidence and submissions submitted by the Applicants, including the country condition documentation regarding the effect on the children of returning to Mexico. The Officer acknowledged that there are conditions in

Mexico that affect children negatively and that a life in Canada would be in the children's best interests. The Officer reasonably noted, however, that the best interests of a child is only one of the many important factors to be considered in an H&C determination. The Officer ultimately found that, while the children's interests would be best served by remaining in Canada, the evidence presented did not persuade him that the children's interests should override all the other considerations in the application.

[27] The Applicants rely heavily on the Officer's reference to the difficulty the adult child would encounter if required to leave Canada. They argue that there is an internal inconsistency in the decision because the Officer's reasons regarding the second eldest and minor child do not allow the reader to understand why the adult child would be subjected to greater hardship if required to leave Canada, but not his younger brother.

[28] There is no inconsistency in my view. When the Officer considered the application, the eldest child was twenty-one (21) years old. He had created a support network of friends and family in Canada and had established a long-term relationship. He had also been working for two (2) years. The second eldest child was fifteen (15) years old when the Officer considered the application. The two (2) were clearly not at the same place in their lives. It was not unreasonable for the Officer to find that the adult child would be very much affected by having to leave his girlfriend in Canada.

[29] As rightly stated by the Officer in the decision, it is a well-established principle that the best interests of a child are an important factor, but not a determinative one. It is to be weighed

together with all other relevant factors (*Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at paras 24, 39 [*Kisana*]). The Applicants have not persuaded me that the Officer's assessment was unreasonable in light of their evidence and submissions.

G. *Reasonable Assessment of Establishment*

[30] The Applicants allege that the Officer failed to engage with their submission and evidence regarding their establishment. The Officer simply listed parts of the Applicants' establishment and then concluded that their establishment is typical of a family who has lived in Canada. They argue that establishment was a central part of their application and a proper assessment was required. The Applicants also submit that the Officer erred by using their establishment against them.

[31] I disagree. The Officer fully and fairly considered the Applicants' submissions and evidence with respect to their establishment. While the Officer noted several positive aspects of the Applicants' establishment, such as their work, their friendships, their community ties and their attendance at English classes, it also raised the lack of supporting evidence to demonstrate the success of the Applicant's painting and decorating company and the Applicants' good fiscal management in Canada. Moreover, the Officer observed that the Applicants had been in Canada for nine (9) years and had evaded removal for five (5) of those years. Contrary to the Applicants' argument, the Officer was entitled to consider the Applicants' extended stay in Canada without authorization in assessing their establishment. Furthermore, it was open to the Officer to consider the skills the Applicants had acquired in Canada in assessing their hardship in returning to Mexico (*Zhou v Canada (Citizenship and Immigration)*, 2019 FC 163 at para 17).

[32] An H&C exemption under subsection 25(1) of the IRPA is an exceptional and discretionary remedy (*Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 15) and the onus of establishing that such exemption is warranted lies with the applicant (*Kisana* at para 45). If an applicant fails to adduce sufficient relevant information and evidence in support of their H&C application, he or she does so at his or her own peril (*Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at paras 5, 8). H&C relief is not intended to be an alternative immigration scheme (*Kanthasamy* at para 23).

[33] I am satisfied that, in the circumstances of this case, the Officer considered and weighed all the factors raised by the Applicants, including their particular circumstances. In light of the evidence and submissions presented, the Officer could reasonably find that they did not justify an exemption from the requirement of having to apply for permanent residence from outside Canada. While the Applicants may disagree with the Officer's overall assessment of the evidence and the weight given to each H&C factor, it is not open to this Court to reweigh the evidence and attribute a different level of importance to the relevant H&C factors in this application (*Kisana* at para 24).

[34] To conclude, the Applicants have failed to demonstrate a reviewable error in the Officer's decision. When read holistically and contextually, I am satisfied that the Officer's decision meets the reasonableness standard set out in *Vavilov*.

[35] Accordingly, the application for judicial review is dismissed. No questions of general importance were proposed for certification and I agree that none arise.

<u>JUDGMENT in IMM-2677-20</u>

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed; and

2. No question of general importance is certified.

"Sylvie E. Roussel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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