

Federal Court



Cour fédérale

Date: 20090512

Docket: IMM-4869-08

Citation: 2009 FC 489

Ottawa, Ontario, May 12, 2009

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

OLGA MARIA GONZALEZ MACHADO

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C., 2001, c. 27 (the Act) of the decision of an Immigration Officer (the Officer) dated August 14, 2008, concluding that the Applicant would not suffer disproportionate hardship should she be forced to apply for a permanent residence visa from outside

of Canada, thus denying her request for exemption based on humanitarian and compassionate (H&C) grounds under section 25 of the Act.

Issues

Did the Officer err law in rejecting the H&C application and determining that there would be no excessive and undue hardship involved for the Applicant if she were to return to Ecuador?

Factual Background

[2] The Applicant is a 75 year old woman who is a citizen of the state of Ecuador. She is childless, has never married and has never worked outside the family home.

[3] After her mother's death in 1985 and having no revenue of her own, the Applicant lived with her older brother, Vidal.

[4] In 1995, the Applicant's niece Maria Nunez separated from her spouse and in the years that followed, the Applicant acted as nanny for her two and then three young children. In 2005, Maria Nunez came to Canada as a permanent resident with her children.

[5] In February 2005, when the Applicant was leaving church in Ecuador, she saw several young men who are members of a gang called the Latin Kings who were attempting to force a young woman into a vehicle. By reflex, the Applicant screamed, which alerted the neighbours to call the police.

[6] The police arrived and arrested one of the gang members. Following this incident, the gang painted threats on the Applicant's house, killed her dog and threatened to kill her as vengeance for her intervention.

[7] The Applicant did not feel safe asking for local protection so she accepted her niece's offer to come to Canada to join her. The Applicant obtained a visitor visa and arrived in Canada in on May 8, 2005. Since her arrival, the Applicant has lived with her niece's family, continuing to act as nanny to the children.

[8] In May 2006, after having obtained one visa extension, the Applicant's second request was denied.

[9] The Applicant applied for refugee protection in June 2006. On January 25, 2007, the Immigration and Refugee Board (the Board) concluded that although her story could be believed, the Applicant had failed to rebut the presumption of state protection since she did not file any complaint to the authorities.

[10] On May 10, 2007, the Federal Court denied her application for leave and for judicial review.

[11] On November 14, 2007, the Applicant applied for permanent residence based on the following humanitarian and compassionate grounds (H&C):

- a. She has no place to live and no source of revenue in Ecuador. Her 90 year old brother is very ill and no longer able to provide her with shelter and support. In fact, the Applicant has since learned that her brother passed away on October 8, 2008.
- b. She has never worked in her country and she depended on her brother. She will now have to become a beggar in order to survive.
- c. This situation is beyond the Applicant's control. The Board pointed out that this justifies the qualification of her situation as a humanitarian and compassionate application.
- d. The Applicant's niece kindly welcomed her into her home in Canada and she is willing to continue this arrangement. The Applicant has developed a bond with her niece's children during the years that she has been their nanny.
- e. The Applicant continues to fear violent reprisals from the criminal gang who threatened her with death and the Board has confirmed the likelihood of the alleged facts and threats. She is too old and frail, and will become homeless and penniless.

[12] The Applicant had applied for a pre-removal risk assessment (PRRA), which was also denied on August 14, 2008. The Officer concluded that the Applicant did not demonstrate that she was at risk should she return to Ecuador because state protection was available to her.

[13] She did not contest the PRRA negative decision.

[14] The Applicant's removal was initially scheduled for December 29, 2008, but a stay was granted by this Court on December 22, 2008.

[15] While dismissing the Applicant's claim, the Immigration and Refugee Board (IRB) noted that the age and the loneliness of the applicant demonstrate that it was faced with a humanitarian case which was not of its province.

[16] The Officer accepted that the age factor was important but was not satisfied that the applicant had developed sufficient financial, social and cultural ties to Canada, excluding those to her niece and great nephews.

[17] He also stated that the separation of the children and their great aunt would be difficult and it would be in their best interest (especially the young one being four and half years) that she remains with them in Canada.

[18] The Court agrees with the defendant that the officer committed a reviewable error by not making any reference to negative factors that might outweigh the age element, the personal situation of the applicant, the best interest of the children and the difficulty to seek protection in her country.

[19] No certified questions for certification were proposed and none arise in this case.

JUDGMENT

THIS COURT ORDERS that

1. The application for judicial review is granted and the matter is returned for re-determination by another Officer. No question is certified.

“Michel Beaudry”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-4869-08

STYLE OF CAUSE: **OLGA MARIA GONZALEZ MACHADO
and
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: May 7, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** Beaudry J.

DATED: May 12, 2009

APPEARANCES:

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