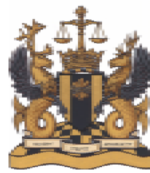
Federal Court



Cour fédérale

Date: 20110921

Docket: IMM-885-11

Citation: 2011 FC 1083

Calgary, Alberta, September 21, 2011

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ALONSO ELENES GAONA
SUSANA GASTELUM OCHOA AND
ALONSO ELENES GASTELUM

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, of a decision denying the applicants' application to permit them to apply for permanent residence from within Canada on Humanitarian and Compassionate grounds (H&C application).

[2] The applicants, Alonso Elenes Gaona, his wife Susana Gastelum Ochoa, and their son Alonso Elenes Gastelum, age 12 are citizens of Mexico. Not party to this application is their Canadian born son, Pierre-Alexandre Elenes, now nearly two years of age.

[3] They came to Canada in 2005. Their claim for refugee protection was denied in 2006. A recent PRRA application was also dismissed. Their application for judicial review of the PRRA decision, heard together with this application, will be dismissed.

[4] Many issues were raised in the written memorandum; however, only two were pursued at the hearing and, in my view, only one was worth serious consideration:

1. Did the officer err in the assessment of the facts by not correctly weighing the positive factors put forth by the applicants, thus making the decision unreasonable?
2. Did the officer apply the wrong test in assessing the children's best interests by merely determining what was adequate for them?

[5] The applicants submit that the officer did not properly consider all the positive factors pertaining to their H&C application. They refer to the officer's decision where it was noted, in part, that:

> 1. The applicants are hard working individuals who demonstrated a willingness to integrate into the Canadian workforce;

2. The applicants have integrated into the community through community organizations, volunteer work and other community activities;

3. The applicants submitted letters from Calgary Police Service, demonstrating that they have a good civil record in Canada;

4. The applicants submitted letters of support demonstrating that they have made many friends during their stay in Canada, and that people have expressed their recommendation for permanent residency.

[6] The test on an H&C application is not whether the applicants are worthy of staying in Canada, but rather whether the applicants will face undue and undeserved or disproportionate hardship in being removed from Canada to apply for permanent residence from outside the country as is the norm. The test is not whether the applicants are deserving. Justice Paul Rouleau in *Nazim v Canada (Minister of Citizenship and Immigration)*, 2005 FC 125 at para 15, stated that:

> The H&C process is designed to provide relief from unusual, undeserved or disproportionate hardship. The test is not whether the applicant would be, or is, a welcome addition to the Canadian community. In determining whether humanitarian and compassionate circumstances exist, immigration officers must examine whether there exists a special situation in the person's home country and whether undue hardship would likely result from removal. The onus is on the applicant to satisfy the officer about a particular situation that exists in their country and that their personal circumstances in relation to that situation make them worthy of positive discretion.

[7] It was reasonable for the officer to determine that the positive factors put forth by the applicants did not amount to undue and undeserved or disproportionate hardship should they be removed from Canada. The officer was guided by section 5.16 of the IP5 Manual which states that

positive consideration should be given "if the applicant has been in Canada for a significant period of time *due to circumstances beyond the applicant's control*" [emphasis added]. In this case the applicants have remained in Canada since at least 2006 by their own choosing, not through anything beyond their control. I therefore find that the officer did not fail to properly weigh the positive factors in support of the application or reach an unreasonable decision even considering the establishment of these applicants in Canada.

[8] The officer does engage in an analysis of the best interests of the two minor children; however, I find that the analysis fails to meet the requirements set out in the jurisprudence.

[9] The officer finds with respect to 12-year old Alonzo that "[t]here is little questioning that his best interests would be met were he to remain in Canada." The officer then goes on to examine the impact on Alonzo if he is returned to Mexico and finds that if he were to be removed to Mexico his interests would not be "compromised." As for the younger son, Pierre-Alexandre, the officer finds that his best interests are to "remain as a family unit, with the emotional, physical and financial support of his parents." This is hardly surprising. It would be a very unusual case where an infant's best interests are that he be removed from his parents and family. Contrary to his brother's situation, the officer makes no finding as to whether his interests are best served by remaining in Canada or being removed to Mexico. The officer fails to clearly and specifically address how Pierre-Alexandre would be affected by his removal to Mexico with his parents. The officer ought to have initially considered Pierre-Alexandre's best interests and then subsequently considered

whether his removal from Canada would compromise those interests, such that the family ought to remain in Canada on H&C grounds.

[10] The officer acknowledged that the evidence "demonstrates that corruption, violence and human rights violations are problems in Mexico." The officer states that "[t]hese are risks unfortunately faced by all people residing in Mexico." Accordingly, these would be risks faced by Pierre-Alexandre if he is removed. As such, the officer needed to examine them in order to be alert, alive and sensitive to this child's interests. The officer did not. He or she fails to deal with this child's interest as a Citizen of Canada in not being removed to such an environment. Accordingly, I find a failure to properly weigh this child's interests. Simply, the analysis of the impact on this child of his removal to Mexico is wanting and for that reason this application is allowed.

[11] Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is allowed, the H&C application is remitted to be determined by a different panel, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-885-11
STYLE OF CAUSE:	ALONSO ELENES GAONA et al. v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	September 19, 2011
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