Federal Court Cour fédérale

Date: 20131119

Docket: IMM-1111-13

Citation: 2013 FC 1172

Montréal, Quebec, November 19, 2013

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

LUIS OSORIO LOPEZ
CORA CANCINO DIAZ

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicants seek a judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] of a decision of an Immigration Officer, dated January 23, 2013, refusing the Applicants' application for permanent residence on humanitarian and compassionate grounds [H&C application] pursuant to section 25 of the *IRPA*.

II. Background

[2] The Applicants, Mr. Luis Osorio Lopez and Ms. Cora Cancino Diaz, are Mexican citizens. They have nine children who live in Canada as Canadian citizens or permanent residents.

[3] They arrived in Canada on May 16, 2009, and applied for refugee protection in December 2009. This application was rejected on August 12, 2011.

[4] The Applicants also applied for a Pre-Removal Risk Assessment, which was also rejected on March 28, 2012.

[5] Neither decision was challenged.

[6] On November 7, 2011 the Applicants submitted an H&C application on the basis that they are elderly and have no one to provide for them in Mexico.

[7] On January 23, 2013, the Officer refused the Applicants' H&C application.

III. Decision under Review

[8] The Officer reviewed the circumstances of the Applicants' H&C application and determined that their personal circumstances could not justify a statutory exemption under section 25 of the *IRPA*. Despite the numerous support letters submitted by the Applicants' children, the Officer found that they had not provided sufficient evidence of unusual and underserved or disproportionate hardship if returned to Mexico.

[9] Based on the evidence before him, the Officer observed that the Applicants would not, as a result of their advanced age, be victims of discrimination or encounter other difficulties if returned to Mexico.

[10] Under the heading of "Établissement au Canada", the Officer further noted that the Applicants had provided no evidence that a rupture from their family in Canada would cause excessive difficulties for them. On the contrary, the Officer stated that the Applicants had successfully lived without most of their children for the majority of their lives in Mexico, as their children began immigrating to Canada in 1983. There was no evidence that the Applicants were not able to provide for themselves after the departure of their children from Mexico. They also managed to remain in contact with their children in Canada through regular visits. The Officer concluded that the Applicants had the option to continue visiting Canada on a super visa, which would allow them to remain in Canada for 2 years at a time.

[11] In addition to the Applicants' establishment, the Officer also considered the best interest of their grandchildren; however, he found that there was insufficient evidence provided as to the relationship between them. Moreover, the Officer doubted that the removal of the Applicants would jeopardize the well-being of their grandchildren in any significant way, as the grandchildren were now teenagers and adults and benefited from an already large family network in Canada.

[12] Finally, the Officer assessed the Applicants' submissions regarding their health. The Officer found that there was no evidence on file to corroborate that the Applicants were in poor health. The

Officer also noted that there was no evidence on file that the Applicants would not be able to access medical services in Mexico or that they would be unable to continue any ongoing medical treatments if returned to Mexico.

[13] Based on the above, the Officer determined that the Applicants did not meet the requirements of the *IRPA* to apply for permanent residence from within Canada.

IV. Issue

[14] Did the Officer err in assessing the hardship the Applicants would face if returned to Mexico?

V. Relevant Legislative Provisions

[15] The following legislative provision of the *IRPA* is relevant:

25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any	**25.** (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et

applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

VI. Position of the Parties

[16] The Applicants argue that the Officer ignored the evidence they provided. They submit that the evidence on the record clearly demonstrates that they are afraid to return to Mexico because none of their children live there; and, therefore, no one is able to provide for them.

[17] The Applicants stipulate that this factor, when taking into account their age and fragile health, establishes that their return to Mexico would have an unreasonable impact on them, and that these circumstances are beyond their control.

[18] The Applicants allege that the Officer misunderstood the basis of their fear of returning to Mexico. They explain that it is not the absence of medical assistance that they fear if returned to Mexico, but rather the absence of family members to provide for them.

[19] The Applicants submit that the Officer failed to consider their financial dependence on their children and whether support is available in Mexico for them. They claim that the Officer also failed to consider that they are de facto family members within the meaning of section 12.6 of Inland Processing 5 Guidelines [Guidelines].

[20] The Applicants do not contest the Officer's findings with regard to the best interest of their grandchildren.

[21] The Respondent submits that the Applicants did not provide sufficient evidence to substantiate their allegations; and, thus, failed to meet the burden to prove they would suffer unusual and underserved or disproportionate hardship. The onus rested entirely upon the Applicants.

[22] The Respondent asserts that the Applicants did not provide any evidence that demonstrates that they would encounter any unusual difficulties or be subject to discrimination in Mexico due to their age.

[23] The Respondent also specifies that no medical documentation was submitted to corroborate that the Applicants are presently ill, in need of treatment or that medical services would not be available for them in Mexico.

[24] The Respondent further submits that the Applicants did not provide evidence that they were financially dependent on their children in Canada, and notes that the male Applicant has a brother and daughter who may still reside in Mexico.

[25] Citing *Odafe v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1429, the Respondent contends that this general lack of evidence made it impossible for the Officer to conduct the analysis that the Applicants are now seeking, and that they must bear the consequences of failing to provide sufficient evidence to support their claim.

[26] In reply to the Respondent's memorandum, the Applicants state that it is incorrect for the Respondent to claim that they still have family members in Mexico, as the Officer's reasons only refer to those family members as "living outside Canada", without reference to where they live.

[27] The Applicants also reiterate that the Officer did not consider their dependency on their children in Canada in accordance with the Guidelines.

VII. Standard of Review

[28] The standard of review applicable to a decision relating to an H&C application is that of reasonableness (*Ramirez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1404, 304 FTR 136; *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2010] 1 FCR 360; *Frank v Canada (Minister of Citizenship and Immigration)*, 2010 FC 270 at para 15).

[29] A heavy burden rests on an applicant to satisfy the Court that a decision under section 25 requires its intervention (*Mikhno v Canada (Minister of Citizenship and Immigration)*, 2010 FC 386; *Cuthbert v Canada (Minister of Citizenship and Immigration)*, 2012 FC 470, 408 FTR 173).

VIII. Analysis

[30] The jurisprudence on H&C applications is clear: section 25 of the *IRPA* is an exceptional provision. It is an exemption that is granted only in circumstances where an applicant can prove that he/she would face "unusual and undeserved or disproportionate hardship" if required to file an

application for permanent residence from the country of origin. It is the applicant who has the burden of providing clear and convincing evidence of such hardship.

[31] As the onus of establishing that H&C grounds exist rests with an applicant, courts must refrain from reweighing the different grounds relied upon. As stated in *Lee v Canada (Minister of Citizenship and Immigration),* 2005 FC 413:

> [10] … the weighing of relevant factors is not the function of a court reviewing the exercise of ministerial discretion. Therefore, as long as the totality of the evidence was properly examined, the question of weight remains entirely within the expertise of the immigration officer. …

[32] In the present case, the Court finds that the totality of the evidence was examined in good faith but not reasonably. The Officer did not fully consider the relevant factors set out in the Guidelines and arrived at a conclusion which is not supported by the evidence on the record. The Officer was to consider the Applicants' establishment in Canada, their financial dependence on their family, the best interest of their grandchildren, the country conditions of their country of origin and the resulting degree of hardship they would face if returned.

[33] With regard to their establishment in Canada, the Applicants did not provide any evidence to the Officer that they were dependent on their family in the past or that they had not provided for themselves when they were in Mexico; the evidence on record simply suggests that they would "<u>not be a burden on the government as they can support themselves</u>" [Translated] (Certified Tribunal Record [CTR] at p 83); that is speaking for the past; however, the growing age factor of the aging Applicants with the passage of years suggests that their situation appears to have indeed changed and where they would not have been dependent in the past, the situation of dependence has in fact

changed in the present. It would therefore appear to stem from the file that the Applicants are now individuals differently situated from whom they had been in the past in that they had not been a burden on their society in their country of origin previously, yet they would not appear to be able to look after their needs at the present time. The support letters provided by the Applicants' family clearly indicate that they are willing to support the Applicants if they are accepted as permanent residents in Canada; that, again, appears to demonstrate clearly from the evidence in the file that the Applicants are living with their children and grandchildren in the same household in Canada, whereas if in Mexico it would mean subsidizing one more household for the children of the Applicants which it is suggested is much less or not at all feasible from statements made by the Applicants' children.

[34] The Applicants, with the passage of time and advancing years, did provide supporting evidence to demonstrate that their advanced age in their twilight years and declining health would cause an unusual or disproportionate hardship on them if returned to Mexico. The evidence submitted by the Applicants in this regard is the support letters from the Applicants' children which speak of the Applicants' advanced age and the fact that they are at a time in their lives where dependence becomes more the norm; that is in addition to the attachment to the family members, recognizing that all nine of their children as well as their grandchildren reside in Canada. Therefore, the Officer's assertion and insinuation that if the Applicants have managed since 1983, why would they not be able to do so now? Well, thirty years have passed since then and the passage of time takes its toll wherein they no longer appear to be able to manage and subsist on their own, whereas when younger that was not the case. The notorious passage of time which does not need evidence to substantiate appears to have taken its toll where they were able to travel there and back previously,

that appears to be an option that has declined after their last arrival to be reunited with their family in Canada.

[35] It was unreasonable, having regard for the evidence as a whole, for the Officer to determine that the separation of the Applicants from their family would not cause unusual and undeserved or disproportionate hardship. At this stage in the life of the Applicants, it would appear to cause unusual and undeserved or disproportionate hardship to the Applicants; whereas, it would not appear to create an undue burden either of a financial nature or create an excess of such on health services in Canada further to the affirmations (and sponsorship application) of their family in Canada.

[36] The Court recognizes that the Applicants have lived with their children in Canada for a number of years now; although they had spent decades living in Mexico without their children since 1983. There are clear arguments and evidence on the record that demonstrate that the degree of hardship faced by the Applicants would be greater than what they have habitually faced since their children immigrated to Canada.

[37] The Court finds that the Officer's reasoning , when read together with his conclusions, falls outside of a range of possible outcomes, when read together with Guidelines 12.5, 12.6, and 12.8 to which consideration should be given when grandparents, in the circumstances of the Applicants, live with their children and grandchildren. If humanitarian and compassionate considerations are not applied in circumstances described in the file, then the very reasons for the legislation and policy behind them would not appear to be given their proper due. This case is a case onto itself, "un cas

d'espèce", based on its own facts which must be read in complete context rather than dissected piecemeal, and, thereby made devoid of its whole, wherein it becomes devoid of its overall substance and meaning of the very narrative from which it flows.

IX. Conclusion

[38] For all of the above reasons, the Applicants' application for judicial review is granted.

JUDGMENT

THIS COURT ORDERS that the Applicants' application for judicial review be granted; and, thus, it be referred to another immigration officer to be decided anew. No question of general importance is given for certification.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mark J. Gruszczynski	FOR THE APPLICANTS
Pavol Janura	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gruszczynski, Romoff Barristers and Solicitors Westmount, Quebec	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT