Federal Court  Cour fédérale

Date: 20131219

Docket: IMM-2087-12

Citation: 2013 FC 1267

Ottawa, Ontario, December 19, 2013

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

BESIM GUXHOLLI
YLVIE GUXHOLLI

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

OVERVIEW

[1] This is an application for judicial review pursuant to section 72.1 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*, or the *Act*] of a decision made by an immigration officer of Citizenship and Immigration Canada dated January 26, 2012 rejecting the Applicants' application for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds. For the reasons that follow, I have come to the conclusion that this application

ought to be dismissed. The Officer applied the correct legal test in assessing the H&C application, and his or her decision was entirely reasonable.

FACTS

[2] The Applicants, Besim and Ylvie Guxholli, are husband and wife and citizens of Albania. They were issued temporary resident visas in Rome in July 2008 and arrived in Canada in August 2008. In September 2008, they filed a refugee claim based on the risk they would face at the hands of people, including corrupt government officials, who opposed their claim to recover family land seized by the former Albanian communist regime in the 1940's.

[3] The Applicants' claim was rejected by the Refugee Protection Division in March 2011. The Applicants sought judicial review of that decision but leave was denied by this Court in July 2011.

[4] On August 31, 2011, the Applicants submitted a Pre-removal risk assessment [PRRA] and an H&C application. Both applications were refused by the same CIC officer on January 26, 2012. On February 29, 2012, the Applicants filed an application for judicial review of both decisions. On March 14, 2012, the Applicants were issued a direction to report for removal, scheduled for March 31st, 2012. On March 16, 2012, the Applicants submitted a deferral request, which was denied on March 27, 2012.

[5] By Order dated March 29, 2012, Justice Gleason granted a stay of removal. Leave concerning the PRRA decision was refused on June 11, 2012, while leave concerning the H&C decision was granted on September 5, 2012. In a separate file heard the same day as the present

application for judicial review, I dismissed the Applicants' challenge of the Canadian Border Services Agency's decision of March 27, 2012 not to defer their removal (IMM-2874-12).

THE H&C APPLICATION

[6] In their H&C application, the Applicants explain that Mr. Guxholli had suffered a heart attack in August 2011, which requires regular follow-up. They argue that his health condition would be jeopardized if he was to return to Albania and rely on that country's ineffective healthcare system.

[7] The Applicants also claimed they would face hardship resulting from the land claim which was at the core of their failed refugee claim. They fear being killed by the leader of the Union of Miners, Gezim Kalaja, and his associates, from whom he and his family have tried to take back the land that had been confiscated by the Communist regime in 1946.

[8] The Applicants mentioned the following incidents which they claim occurred as a result of the land dispute:

- In 1999, Mr. Guxholli was detained and beaten by the police;
- In 2002, Mr. Guxholli's cousin Fatjon was arrested on false allegations and beaten by police. He suffered brain damage;
- In 2008, Mr. Guxholli's cousin Artur was intentionally struck and killed by an automobile while riding his motorcycle;
- In 2010, the Applicants' son was attacked; and
- In 2011, Mr. Guxholli's cousin Albert was killed by gunfire.

[9] With regards to the best interests of the child [BIOC], the Applicants argued that they have two sons currently residing in Albania who are also in danger as a result of the land dispute.

[10] As for the establishment factor, the Applicants explained that they have both learned English, have made many friends in Canada, and are employed full-time; Mr. Guxholli in the construction industry and Ylvie as a kitchen assistant in a restaurant. They also do some volunteer work. They submitted six letters of reference from friends and employers.

THE IMPUGNED DECISION

[11] The Officer gave positive consideration to the establishment factor. The Officer noted, however, that there was no indication that the degree of hardship imposed on any party would be significant and that the Applicants had the option of maintaining contact with their friends through telephone or mail.

[12] In a section entitled "Risk", the Officer noted that the Applicants had presented the same risk that was presented in their refugee claim and their concurrent PRRA application (a risk to their life or risk of harm related to the land dispute). The Officer wrote that risks that fall under sections 96 or 97 of *IRPA* are now excluded from the H&C analysis pursuant to subsection 25(1.3) and that no consideration is to be given to those risks. The Officer did however go on to address the hardships resulting from those risks and concluded that little additional information was provided with regard to hardship.

[13] The Officer gave no consideration to the BIOC because both of the Applicants' children are over the age of 18 and are considered adults.

[14] Finally, with regard to Mr. Guxholli's medical condition, the Officer accepted that Mr. Guxholli required medical check-ups following his heart attack. However, the Officer concluded that the Applicants provided no corroborating evidence of the ineffectiveness of the prohibitive cost of healthcare in Albania and gave little weight to this factor.

[15] Overall, the Officer concluded that, although positive consideration was given to Mr. Guxholli's health condition and establishment, the evidence submitted does not demonstrate that the Applicants would experience unusual and undeserved or disproportionate hardship if they were to return to Albania.

ISSUE

[16] This case raises only one issue, that is, whether the Officer applied the correct legal test in assessing the H&C application.

ANALYSIS

[17] This Court has consistently held that the standard of correctness applies to the issue of whether the correct legal test was applied in the context of an H&C application. The following quote from Justice Russell in *Awolope v Canada (Minister of Citizenship and Immigration)*, 2010 FC 540, is but one illustration of this long line of cases in that respect:

> [30] In *Dunsmuir*, the Supreme Court ruled that questions of law may be reviewable on a reasonableness standard, if they are not

> "legal questions of central importance to the legal system as a whole and outside a decision-maker's specialized area of expertise." See *Dunsmuir* at paragraphs 55 and 60. Jurisprudence of this Court, however, has determined that an Officer's application of the correct test in assessing risk in a humanitarian and compassionate application is reviewable on a standard of correctness. See *Zambrano v Canada (Minister of Citizenship and Immigration)*, 2008 FC 481, [2008] F.C.J. No. 601. As stated by Justice Dawson in *Zambrano*,
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> > Having regard to the absence of a privative clause, the relative lack of expertise on the part of an officer to appreciate whether he or she has applied the wrong test at law, and the importance of ensuring that officers apply the test that Parliament has prescribed, I conclude that the question of whether the officer applied the correct test is reviewable on the correctness standard.

[18] As such, correctness is the appropriate standard of review in considering whether the Officer applied the correct legal test and legal threshold in assessing risk in the context of the H&C application: see also *Hillary v Canada (Minister of Citizenship and Immigration)*, 2010 FC 638 at para 20; *Okoye v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1133 at para 3; *Walcott v Canada (Minister of Citizenship and Immigration)*, 2011 FC 415 at para 58; *KMP v Canada (Minister of Citizenship and Immigration)*, 2011 FC 981 at para 18; *Premnauth v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1125 at para 20; *Barrak v Canada (Minister of Citizenship and Immigration)*, 2008 FC 962 at para 18; *Jogia v Canada (Minister of Citizenship and Immigration)*, 2009 FC 596 at para 39; *Ambassa v Canada (Minister of Citizenship and Immigration)*, 2012 FC 158 at para 24.

[19] There is no dispute between the parties that pursuant to subsection 25(1.3) of the *Act*, an immigration officer does not have the authority to take into account allegations of persecution that fall under sections 96 and 97. Subsections 25(1) and (1.3) of *IRPA* read as follows:

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
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 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.	**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 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.
Non-application of certain factors	**Non-application de certains facteurs**
(1.3) In examining the request of a foreign national in Canada, the Minister may not consider	(1.3) Le ministre, dans l'étude de la demande faite au titre du paragraphe (1) d'un étranger se

the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national.	trouvant au Canada, ne tient compte d'aucun des facteurs servant à établir la qualité de réfugié — au sens de la Convention — aux termes de l'article 96 ou de personne à protéger au titre du paragraphe 97(1); il tient compte, toutefois, des difficultés auxquelles l'étranger fait face.

[20] The Applicants argue that the Officer applied the wrong legal test and wrongly interpreted subsection 25(1.3) by not considering the hardship that the Applicants might face on account of the ongoing property dispute and by considering that it is improper to assess any hardship factors which could also relate to an analysis under sections 96 or 97 of the *Act*. The Applicants further contend that subsection 25(1.3) merely codifies the existing jurisprudence with regard to the distinction between an H&C analysis and a section 96 and 97 analysis. In other words, subsection 25(1.3) does not excuse the H&C Officer from assessing hardship associated to a fear of persecution or to a risk of torture, a risk to life or a risk of cruel and unusual punishment.

[21] There exists some uncertainty with regard to the effect of subsection 25(1.3). Indeed, a question has been certified in three cases with respect to the nature of the risk, if any, to be assessed in the context of H&C considerations under section 25 of *IRPA*: see *Caliskan v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1190; *JMSL v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1274; *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2013 FC 802. Only the last of these three decisions was appealed, and the Federal Court of Appeal heard oral arguments in that case in early November of this year.

[22] Having carefully considered the Applicant's record and the decision of the H&C Officer, however, I am of the view that the answer to the certified question put to the Federal Court of Appeal will be of no impact on the resolution of the case at bar. The Officer considered the risk to life and the risk of harm at the hands of Gezim Kalaja as a risk falling under sections 96 and 97 and excluded by subsection 25(1.3). This is consistent with the objectives of the H&C application as well as with the wording of subsection 25(1.3). Such a risk falls squarely within section 97 of the *Act*, and is to be excluded from the H&C assessment. The Applicants do not really submit that the Officer wrongly excluded that risk factor *per se*.

[23] What the Applicants argue, though, is that subsection 25(1.3) does not go as far as excluding hardship elements arising from excluded risk factors, and that the Officer therefore had to assess elements of hardship whether or not they were associated with or originated from the excluded risks. Yet, on close reading, it is apparent that the Officer did just that and considered hardship elements associated with the excluded risks, as is made clear from the following quote of the decision:

> Regarding hardship arising from the risk presented, the applicant's provide very little information. The principal applicant states that he "will suffer various, excessive hardships that would put my life in imminent danger." However, the hardship he presents (i.e. "my life and well being and the life of my wife would also be at risk") are considered risk factors rather than hardship factors. As I am unable to assess risk, and because the applicant provides little additional information about the hardship he may face as a result of living in the same country as the persons he fears, I give little positive consideration to the hardship arising from the risk factor presented.
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> Decision at p 6.

[24] This citation clearly establishes two things. First, the Officer considered the issues of risk and hardship separately. After having rightly considered that the hardship alleged were risks to the principal Applicant's life and his wife's life which fall under sections 96 and 97 of *IRPA*, the Officer went on to note that little positive consideration could be given to the hardship arising from the risk factor presented, as the Applicants provided little information about the hardship. This is distinguishable from the cases cited by the Applicants where the officers made no reference to hardship in their decisions: see e.g. *Singh Sahota v Canada (The Minister of Citizenship and Immigration)*, 2007 FC 651; *Sha'er v Canada (The Minister of Citizenship and Immigration)*, 2007 FC 231. As the issues of hardship and risk were considered separately, it is clear that the Officer applied the correct test in assessing hardship and was well aware of the distinction between risk and hardship.

[25] Second, the Officer correctly noted that the Applicants provided very little information regarding hardship arising from the risk presented. It is the responsibility of an applicant to satisfy the decision-maker that there are grounds for an exemption. An officer is only required to consider and decide on the evidence adduced before him or her. There is no obligation on an officer to gather and seek additional evidence or make further inquiries: see *Robertson v Canada (Minister of Citizenship and Immigration)*, [2002] FCJ No 1028 at para 12; *Gallardo v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 45 at para 29.

[26] The extent of the analysis in the within proceeding was commensurate with the extent of the submissions put forth by the Applicants. Regarding any hardship arising from the risk presented, the Applicants only mentioned the risk to their lives in their H&C submissions. In those

circumstances, the Officer had no obligation to infer hardship. In the absence of sufficient evidence, it was open for the Officer to draw the conclusions reached in this decision.

[27] For all of the above reasons, this application for judicial review is therefore dismissed. No question was proposed for certification, and none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed. No question is certified.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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