Federal Court  Cour fédérale

Date: 20140520

Docket: IMM-2176-13

Citation: 2014 FC 481

Ottawa, Ontario, May 20, 2014

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

GEFRI LANDAZURI MORENO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Gefri Landazuri Moreno (the Applicant) seeks judicial review of a decision dated February 28, 2013, by a Senior Immigration Officer (the Officer) of Citizenship and Immigration Canada (CIC), whereby the Officer rejected the application for permanent residence from within Canada on humanitarian and compassionate (H&C) grounds.

[2] The Officer refused the application because he determined the Applicant's fears of kidnapping of his children, sexual exploitation and slave labour amounted to factors that were ineligible for consideration under subsection 25(1.3) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), while the remaining evidence pertaining to the best interests of the children and their establishment in Canada were insufficient to justify granting an H&C exemption under subsection 25(1) of that Act.

[3] For the reasons that follow, I find that this application ought to be dismissed.

I. **Facts**

[4] The Applicant is a 49 year old male citizen of Columbia employed in the construction industry. According to the documentation submitted for this application, the Applicant arrived in Canada on June 15, 2008 from the United States, where he had remained illegally since February 1, 1999.

[5] While in Canada, the Applicant met Gabriela Adame Camacho, a 44 year old citizen of Mexico and refugee claimant who had arrived in Canada on May 9, 2008.

[6] The Applicant claims to have entered into a common law relationship with Ms. Adame Camacho as of April 1, 2009, and the couple had two Canadian born children thereafter. The first, Isaac Landazuri-Adame, was born in April 2010, while the second, Andrea, was born in February, 2012.

[7] On May 14, 2010, the Applicant's claim for refugee status was refused. In refusing the Applicant's claim, the Refugee Protection Division (RPD) panel found that he lacked credibility and a subjective fear of persecution as a result of his failure to seek asylum in the United States during the nine years he was in that country without status. Ms. Adame Camacho also filed a claim for refugee status in April 2011, which was dismissed on September 10, 2013.

[8] On February 23, 2012, the Applicant applied for permanent residence from within Canada on H&C grounds. In his application, the Applicant included his common law wife, Ms. Adame Camacho, and his son, David Eduardo Landazuri Ruiz, born September 24, 1993 in Columbia and living with his mother in the United States as a permanent resident.

[9] In a letter from counsel accompanying his application, the Applicant submitted the following as H&C factors that amount to hardship justifying the application: (1) separation of the couple and their children should they be forced to leave Canada since the Applicant and his common law spouse do not have status in each others' home countries; and (2) should the entire family return to either Columbia or Mexico, based on submitted country condition documents, a risk of kidnapping of the children exists in both countries, as well as risk of murder, forced prostitution, and slave labour in Mexico.

[10] The Applicant submitted that the ability of both he and his spouse to maintain employment in the construction industry and the absence of any criminal convictions, amount to evidence of positive factors that justify remaining in Canada. In support, he submitted letters from colleagues and employers establishing his employment in various positions in the

construction industry, copies of his 2010 Notice of Assessment from the Canada Revenue Agency as proof of income and family photographs.

[11] On February 28, 2013, the Applicant's application was ultimately refused and the Applicant seeks judicial review of this decision.

II. **Decision under review**

[12] In rejecting the Applicant's application, the Officer considered the evidence submitted by the Applicant with respect to: (1) the risk factors in the country of origin; (2) their establishment in Canada; (3) the best interests of the children; and (4) family separation.

[13] With respect to the risks the Applicant claimed his family would face should they return to Mexico or Columbia, the Officer found that the submissions pertaining to kidnapping, sexual exploitation, and slave labour in Mexico and Columbia amounted to factors to be considered in applications for refugee status under section 96 and 97(1) of the Act. As a result, the Officer found subsection 25(1.3) of the Act prevented consideration of those submissions for the purposes of the Applicant's H&C application.

[14] With respect to the best interests of the Applicant's two infant children born in Canada, the Officer found that it would be in their best interests to remain with their parents, and that there was insufficient evidence that they could not relocate with their parents. The Officer found the Applicant had not submitted sufficient evidence to establish that the best interests of those children could not be met in Columbia or Mexico. Given their young age, the Officer found any

hardship associated with relocation would be minimal, and the Applicants had not submitted evidence establishing the children would not have access to education, health care or other services, or the children's welfare would otherwise be compromised should they return to either country.

[15] Regarding the Applicant's now 20 year old son living in the United States, the Officer found the Applicant had neither made submissions, nor submitted evidence to establish how that son would experience hardship, should the Applicant leave Canada.

[16] With respect to establishment, the Officer acknowledged the positive factors related to the Applicant's establishment in Canada, noting his employment in Canada and volunteer efforts in the community. However, the Officer found the Applicant's establishment did not attain the level of undue hardship required to warrant an exemption because he found the Applicant's establishment was not beyond what normally would have been expected. His establishment was neither the result of a prolonged inability to depart Canada, nor the result of circumstances beyond his control.

[17] With respect to family separation, the Officer found the Applicant had not met his burden to provide sufficient objective evidence to establish the family were prevented from remaining together as a unit in either Mexico or Columbia. Nor did the Applicant provide sufficient evidence that returning to either country where they had each been born, raised, educated and employed, would amount to a hardship sufficient to justify the application.

[18] Consequently, the Officer found insufficient factors overall to justify granting the exemption.

III. **Issue**

[19] The only question at issue in this application for judicial review is whether the Officer's decision was reasonable.

IV. **Analysis**

[20] It is well established that the standard of review to be applied to an officer's exercise of discretion in decisions on H&C grounds, including an officer's application of subsection 25(1.3) of the Act, is that of reasonableness: see *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 [*Kisana*], at para 18; *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113, at para 37 [*Kanthasamy*].

[21] Under subsection 25(1) of the Act, exemptions on H&C grounds are exceptional and discretionary decisions that require immigration officers to consider situations not envisaged by the Act: *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, at para 15. In assessing applications, officers are to determine whether the applicants would face unusual, and undeserved or disproportionate hardship if they were to leave Canada and apply for permanent residency abroad using the factors set out in sections 5.10 and 5.11 of Chapter 5 of the CIC's *Inland Processing Manual: Immigrant Applications in Canada made on Humanitarian*

or Compassionate Grounds (*IP5 Manual*) as guides: *Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356, at para 20 [*Serda*]; *Kanthasamy*, above, at paras 45-55.

[22] There is a high threshold to meet when requesting an exemption from the application of the Act, and the onus is on an applicant to advance the grounds on which their H&C claims are based and establish the facts therein: *Kisana*, above, at para 28; *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, at para 8.

[23] In the case at bar, the Applicant submits that the Officer made three reviewable errors, namely: (1) he erred in finding that subsection 25(1.3) of the Act precluded him from considering the risk of kidnapping of the Applicant's children; (2) he erroneously applied the "similarly situated individuals" test during the course of the establishment analysis; and (3) he did not reasonably apply the test for the best interests of the children in his analysis.

[24] With respect to the first argument, it was submitted that the Officer fettered his discretion by failing to consider the risk of kidnapping that the Applicant claims his children would face should they return to Mexico or Columbia. Since the RPD had not yet determined the refugee claim of the Applicant's spouse at the time of the H&C decision, the Officer's failure to assess the risk of kidnapping could give rise to an absurd result where the risk may never be assessed by either an H&C officer or by an RPD panel. Alternatively, the RPD panel could find that the risk factors raised by the Applicant were merely generalized risk, or that they amounted to harassment or treatment but fell short of persecution. Finally, the Applicant contended that the

Officer failed to consider the objective documentary evidence that was provided showing the potential risk of kidnapping for the two children in Columbia.

[25] These arguments are without merit. Subsection 25(1.3) of the Act, which came into effect on June 29, 2010 (prior to the Applicant's submission of his application), specifically prohibits consideration of factors related to sections 96 and 97 of the Act in the evaluation of H&C claims, but must consider the elements of hardship affecting applicants. That subsection reads as follows:

Non-application of certain factors	Non-application de certains facteurs
25 (1.3) In examining the request of a foreign national in Canada, the Minister may not consider 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.	25 (1.3) Le ministre, dans l'étude de la demande d'un étranger se 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.
[emphasis added]	

[26] The permissible evidence pertaining to risk, and the manner in which officers are to consider that evidence has very recently been explained by the Federal Court of Appeal as follows:

> In my view, that is a useful way of describing what must happen under section 25 now that subsection 25(1.3) has been enacted – the evidence adduced in previous proceedings under sections 96 and 97 along with whatever other evidence that applicant might wish to adduce is admissible in subsection 25(1) proceedings.

> Officers, however, must assess that evidence through the lens of the subsection 25(1) test – is the applicant personally and directly suffering unusual and undeserved, or disproportionate hardship?
>
> The role of the officer, then, is to consider the facts presented through a lens of hardship, not to undertake another section 96 or 97 risk assessment or substitute his decision for the Refugee Protection Division's findings under sections 96 and 97. His task is not to perform the same assessment of risk as is conducted under sections 96 and 97. The officer is to look at facts relating to hardship, not factors relating to risk.
>
> Matters such as well-founded fear of persecution, risk to life, and risk of cruel and unusual treatment or punishment – factors under sections 96 and 97 – may not be considered under subsection 25(1) by virtue of subsection 25(1.3) but the facts underlying those factors may nevertheless be relevant insofar as they relate to whether the applicant is directly and personally experiencing unusual and undeserved, or disproportionate hardship.
>
> *Kanthasamy*, above, at para 73-75.

[27] In the case at bar, the only evidence the Applicant submitted in support of his assertion was objective country condition documentary evidence of kidnapping in Mexico and Columbia. Such evidence does not amount to evidence establishing the Applicant would personally and directly suffer as a result of those risks as required under the *Kanthasamy* test. Consequently, the Officer's conclusion that assessment of risk was beyond the scope of the H&C application is reasonable in light of the record.

[28] Indeed, I note that the RPD has since dismissed the refugee claim of the Applicant's wife on the basis that her fear that her children would be kidnapped should she return to Mexico was speculative. The panel found that the alleged agents of persecution did not actually do anything other than follow the claimant and her sister, and that the claimant had not established a serious possibility of persecution or a risk of harm in the event she returns to Mexico. While that

decision had not been made when the Officer assessed the H&C application, it nevertheless demonstrates that it was reasonable to assume the RPD would consider whatever risk allegations were made on the refugee claim. It cannot be said, therefore, that the Officer fettered his discretion or washed his hands of the risk allegations: it was clearly beyond his mandate to look into risk factors, and it could safely be presumed that the RPD would make a determination in that respect.

[29] The Applicant's second argument is that the Officer erred by assessing establishment against a "similarly situated individuals" threshold. He claims that the evidence he and his wife submitted regarding their employment in Canada, community reference letters, leases, notice of assessment, and family photos amounts to sufficient evidence of establishment on an individualized basis.

[30] Once again, I am unable to agree with the Applicant, who is in effect arguing that the Officer ought to have assigned weight to the evidence in a different manner. As stated above, H&C decisions are discretionary decisions where officers are to determine whether applicants would face unusual and undeserved or disproportionate hardship. Section 11.5 of the *IP5 Manual* clearly indicates that "[t]he fact that the Applicant has some degree of establishment in Canada is not necessarily sufficient to satisfy the hardship test". Applicants have the burden of advancing the grounds underlying their claims and establishing the facts therein.

[31] The Applicant in this matter failed to satisfy the Officer that his personal circumstances were such that the hardship of having to apply for permanent residence from outside of Canada

in the normal manner would be unusual and undeserved or disproportionate. The Officer considered the evidence submitted by the Applicant in support of his establishment in Canada, namely the Applicant and his spouse's record of employment and their efforts to volunteer in the community. He also noted that their establishment was not the result of prolonged inability to depart Canada, or due to circumstances beyond their control. Analyzing all these factors, the Officer concluded the Applicant's establishment did not attain an exceptional level.

[32] I find the Officer's conclusion was reasonable based on the record before him, as it clearly falls within the range of possible, acceptable outcomes defensible on the law and facts of the Applicant's circumstances. In the letter supporting the Applicant's H&C application, counsel asserted that the couple is facing separation should they be forced to leave Canada. However, the letter is brief and contains no evidence or explanation as to why the family could not be reunited either in Columbia or Mexico. When specifically questioned at the hearing on this matter, counsel for the Applicant acknowledged that she was not aware of any obstacle preventing either spouse to sponsor each other and their children in Columbia or in Mexico.

[33] Finally, the Applicant contended that the Officer erred in finding insufficient evidence existed to conclude the children's best interests could not be met in either Columbia or Mexico. The Applicant claims that their documentary evidence, namely the *Child Development Index Report* by Save the Children (an NGO), establishing that Canada ranks higher in development factors than either Columbia or Mexico, amounts to such evidence. Since the Officer failed to refer to that report explicitly, it is submitted that he was not "alert, alive and sensitive" to all issues related to the best interests of the children and that he failed to consider relevant evidence.

[34] I cannot accede to this argument. The legal test for assessing the best interests of the child do require that officers considering H&C applications be "alert, alive, and sensitive" to the children's interests: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 75. However, this analysis does not occur in a vacuum, and must be done as part of an officer's assessment of an applicant's H&C application: *Canada (Minister of Citizenship and Immigration) v Hawthorne*, 2002 FCA 475, at para 5.

[35] In light of the limited information submitted by the Applicant regarding his minor children, the Officer's application of this test was reasonable. The Applicant's H&C application makes no reference to his two minor children as being part of his application. In the letter from his counsel accompanying his H&C application, the only reference to the children (apart from the generalized risk of kidnapping already alluded to) is the fact that they do not have status in the country of either of the parents. The Applicant did not explain how his children's personal best interests would not be served should they return either to Mexico or Columbia.

[36] It is not enough to simply describe general conditions which are worse in the country of removal than conditions in Canada. The Applicant must show that he and the children would likely be subject to these conditions personally. As I wrote in *Serda* at para 31:

> Finally, the Applicants have argued that conditions in Argentina are dismal and not good for raising children. They cited statistics from the documentation, which were also considered by the H&C Officer, to show that Canada is a more desirable place to live in general. But the fact that Canada is a more desirable place to live is not determinative on an H&C application (…); if it were otherwise, the huge majority of people living illegally in Canada would have to be granted permanent resident status for Humanitarian and Compassionate reasons. This is certainly not

> what Parliament intended in adopting section 25 of the *Immigration and Refugee Protection Act*.

[37] In the absence of any personalized evidence to the contrary, the Officer could reasonably conclude that the best interests of the children were to remain in the care of their parents, and that the hardships associated with relocation could reasonably be expected to be minimal given their young ages. There was no evidence that the children would not be able to access health care and education in Columbia or Mexico, and it was certainly not sufficient to show that Canada is a more favourable country to live than the country of origin of their parents. It is also to be presumed that the Officer considered the report submitted by the Applicant, even though he did not specifically address it.

[38] For all of the above reasons, I find that there is no basis for judicial intervention and the application for judicial review is dismissed. The Applicant has failed to persuade me that the Officer erred in the exercise of his discretion, or that his decision is unreasonable in light of the facts that were before him and of the applicable law. No question has been proposed for certification purposes, 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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