Federal Court  Cour fédérale

Date: 20150324

Docket: IMM-6590-13

Citation: 2015 FC 373

Toronto, Ontario, March 24, 2015

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

MANUEL ALEJANDRO OSORIO DIAZ
CAROLINA RODRIGUEZ GUTIERREZ &
ALEJANDRO ALFONSO OSORIO
RODRIGUEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review by Manuel Alejandro Osorio Diaz, Carolina Rodriguez Gutierrez and Alejandro Alfonso Osorio Rodriguez [the Applicants] under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA] of a decision by an Immigration Officer [the Officer], dated September 27, 2013, wherein the Officer refused the

Applicants' application for permanent residence in Canada on humanitarian and compassionate grounds [H&C]. In my opinion it should be dismissed for the following reasons.

I. Facts

[2] Manuel Alejandro Osorio Diaz was born on March 20, 1979. His wife, Carolina Rodriguez Gutierrez, was born on August 21, 1978. Their son, Alejandro Alfonso Osorio Rodriguez, was born on October 6, 2004. The Applicants are all citizens of Mexico.

[3] The Applicants entered Canada as temporary residents on April 27, 2008 (the father) and in August 2008 (the mother and the son). They claimed refugee protection on September 30, 2008, and a departure order was issued on the same date. The Immigration and Refugee Board, Refugee Protection Division [RPD] rejected their refugee protection claims on September 30, 2009. The Applicants sought leave for judicial review of the negative decision by the RPD, but were denied leave by this Court on February 1, 2010. Their Pre-Removal Risk Assessment application was rejected on December 16, 2010. A warrant for their arrest and removal was issued on February 24, 2011 because they failed to report to Canada Border Services Agency [CBSA], as directed, for a pre-removal interview on January 20, 2011.

[4] They applied for permanent residence in Canada on H&C grounds on June 14, 2012. The Officer refused their application on September 27, 2013. The Applicants applied for leave to apply for judicial review of the Officer's decision which was granted December 19, 2014.

II. Decision under Review

[5] The Officer first summarized the Applicants' arguments, summarizing the facts of the case in some detail under the heading of the form used, namely "Factors for Consideration". The arguments relating to both "Establishment in Canada", and "Best Interest of the Child" are summarized separately on the form. The Applicants do not argue that either of these two summaries is inadequate. The Officer summarized the facts relating to "Risk and adverse country conditions" under a separate heading on the form, which findings are not challenged on this application.

[6] The Officer then set out the analysis and reasons in the next heading on the form entitled "Decision and Reasons". The Officer correctly noted that the Applicants bore the onus of satisfying the decision-maker that their personal circumstances are such that the hardship of having to obtain a permanent resident visa from outside Canada in the normal manner would be 1) unusual and undeserved; or 2) disproportionate. The Officer also noted the immigration procedural history of the Applicants in Canada including the fact that a warrant for their removal was active at the time of this H&C decision.

A. *Establishment in Canada*

[7] The Officer acknowledged that the Applicants have developed relationships with friends and members of their community since their arrival in Canada, but found that the severing of these new relationships would not cause hardship which would justify an exemption for the

legislative requirement to apply for immigrant visa from abroad. The Officer noted that all of the Applicants' family members and former friends and colleagues still reside in Mexico and reasonably may be expected to offer support to the Applicants upon their return to Mexico. The Officer found that even if the Applicants might experience some difficulties in readjusting upon return to Mexico, such adjustment did not constitute hardship that is unusual and underserved or disproportionate and would not warrant a positive exemption under H&C considerations.

[8] The Officer acknowledged the Applicants' steady employment, their study of the English language, improvement of their skills, good civil record, community involvement, volunteer efforts, and support among their friends and community in Canada, helped the Applicants' social and economic integration in Canada. The Officer found that the Applicants took positive steps in establishing themselves in Canada, but found their integration and establishment to be as expected and not exceptional. The Officer consequently found that the Applicants' establishment in Canada did not justify an exemption under H&C considerations. The Officer further noted that he had been presented with insufficient evidence to indicate that the Applicants' establishment was as a result of circumstances beyond their control or a prolonged inability to leave Canada, such that it would cause them unusual or disproportionate hardship to apply from outside Canada.

B. *Best Interest of the Child (or BIOC)*

[9] The Officer acknowledged that the minor Applicant, after removal, will be in an environment with different socioeconomic conditions, but found that this situation was not "an

exceptional situation" or that it was "an unusual circumstance to justify a positive exemption". The Officer found that, as the minor Applicant is quite young and is still learning customs and culture in Canada, moving to Mexico at this time and having the chance to develop relationships with extended family members would not be detrimental to his development and would not be considered unusual and underserved or disproportionate hardship. The Officer acknowledged that Mexico may not have the same living standard as Canada and is experiencing high degree of violence in some areas, but found that these factors would not "have a direct adverse impact" on the minor Applicant. The Officer considered:

> the best interests of [the child] along with the personal circumstances of this family, and find that the applicants have not established that the general consequence of relocating and resettling back to their home country would have a significant negative impact on him. I have carefully examined the best interest of [the child], and having regard to his circumstances, it is my finding that they do not justify and exemption under humanitarian and compassionate considerations.

C. *Risk and Adverse Country Conditions*

[10] Regarding the Applicants' allegations that there is widespread levels of discrimination against women and that Mrs. Rodriguez in particular would face hardship upon returning to Mexico, the Officer noted that the Applicants had not detailed or documented Mrs. Rodriguez's personal history of discrimination in Mexico to allow him to assess the extent that she had been personally or directly impacted. The Officer was consequently not satisfied that having to return to Mexico would result in hardship for Mrs. Rodriguez that is unusual and undeserved or disproportionate as a result of gender-based discrimination.

[11] Regarding the level of violence and crime, as well as unfavourable economic conditions the Applicants would face upon returning to Mexico, the Officer found that such conditions are generally faced by the population. The Officer further found that Applicants had failed to establish by means of the evidence that the hardships associated with general country conditions amounted to unusual and undeserved or disproportionate hardship.

III. Issues

[12] This matter raises the following issues:

(1) Whether the Officer erred in assessing the Applicants' degree of establishment in Canada?

(2) Whether the Officer erred in assessing the best interest of the child?

IV. Standard of Review

[13] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." The standard of review to be applied to an H&C decision is reasonableness: *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 18 [*Kisana*]. Reasonableness is also the standard of review applicable to the issue of whether the proper test was applied by an H&C Officer, which are issues of the Officer's interpretation of his home statute: *Dunsmuir* at para 54; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 34. In *Dunsmuir* at para

47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

(1) Whether the Officer erred in assessing the Applicants' degree of establishment in Canada?

[14] The Applicants submit that the Officer failed to properly review their evidence in relation to their degree of establishment in Canada. The Applicants contend that, in the present case, the Officer had a duty to discuss the specific factors in their evidence that led the Officer to make a particular decision relating to whether an exemption for H&C grounds was warranted. The Applicants also contend that the Officer failed to give weight to their establishment in Canada at all. I am obliged to disagree with both submissions.

[15] First of all, these issues are essentially "inadequacy of reasons" arguments. Adequacy of reasons is not a stand-alone basis for quashing a decision, as both parties agreed and the Supreme Court decided. Any challenge to the reasoning and/or result of a decision must instead be made within the reasonableness standard of review: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14, 22 [*Newfoundland Nurses*]. In this connection, the Supreme Court explained what is required of a tribunal's reasons in order to meet the *Dunsmuir* criteria in *Newfoundland Nurses* at para 16:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion […]. In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

In understanding why the tribunal made its decision and assessing whether its conclusion is within the range of possible and acceptable outcomes, this Court may look at the factual components reported in the very decision under review itself even where those components are set out in different boxes on the same form. In my view it is a mistake to read only what is stated in the Reasons and Decision part of the decision as if that part of the decision was divorced from the factual considerations set out in the Establishment, BIOC and Risk components of the form, i.e., as set out by the Officer under "Factors for Consideration." In my view a decision of this nature, whether written in a continuous narrative, or written in boxes on a form as here, must be read contextually as a whole.

[16] In the present case there is no complaint with the facts set out under the heading of Establishment, which I take to accurately summarize the evidence going to the Applicants' degree of establishment in Canada. The Officer found that the Applicants' degree of establishment was "expected and not exceptional". While under no duty to either recite every fact or argument or to make explicit findings on each constituent element, the Officer set out relevant evidence of establishment. When that evidence (reported on the Establishment part of the form) is read together with the discussion under Decision and Reasons as I have found must

be done, the reasons for the Officer's conclusion on establishment are readily determinable. Although the Applicant's disagree with the Officer's conclusion, it is not the role of this Court to substitute its own opinion and weighing of the evidence for that of the Officer, provided the reasons meet the *Newfoundland Nurses'* test and are reasonable per *Dunsmuir*. These tests are met, and in my view the Officer was within his or her jurisdiction to conclude that establishment was "expected and not exceptional".

[17] The Applicants allege that they were not given reasons only conclusions. They say that the finding their establishment was "expected but not exceptional" is a conclusion, not a reason. I disagree. A conclusion would be a bald statement of a result, such as for example a statement that "the test for establishment is not made out" without more. But here, the Officer tells us why it was not made out – because establishment was as expected but not exceptional. In addition, the Officer gave several other reasons on the issue of establishment. He gave them credit for steady employment, study of the English language, improvement of their skills, good civil record, community involvement, volunteer efforts, and support of friends and community – and did so having identified evidence is support earlier in his reasons. Identification of these factors lets us know what was weighed in the balance in coming to the conclusion establishment was not exceptional. The Officer goes further to note there was insufficient evidence to indicate that the inadequate establishment was caused by circumstances beyond their control, or prolonged inability to leave Canada such that it would cause them unusual or disproportionate hardship to apply from outside Canada.

[18] These reasons support the conclusion on establishment. I find that these reasons allow me to determine, as I do, that the decision falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and law.

[19] The Applicants second main argument on the reasons issue is that the Officer erred in discounting what establishment they achieved while pursuing legal means to remain in Canada. The impugned statement is as underlined below:

> I now turn to the applicants' degree of establishment in Canada since their arrival in April 2008 (the father) and August 2008 (mother and minor child). I have taken into consideration the applicants' steady employment; their study of the English language; improvement of their skills; good civil record; community involvement; volunteer efforts; and support among their friends and community, all of which have helped both in their social and economic integration in Canada. <u>While I acknowledge that the applicants have taken positive steps in establishing themselves in Canada, I also note that they have received due process through the refugee and immigration program and were accordingly afforded the tools and opportunity to obtain a degree of establishment into Canadian society.</u> I have carefully reviewed the circumstances and submissions provided by the applicants and based on the evidence provided, the applicants' establishment in Canada was as expected and not exceptional. Consequently, I do not find the applicants' establishment in Canada justifies an exemption under humanitarian and compassionate considerations. Furthermore, I have been presented with insufficient evidence to indicate that the applicants' establishment was as a result of circumstances beyond their control or a prolonged inability to leave Canada, such that it would cause the applicants unusual or disproportionate hardship to apply from outside Canada.
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> [emphasis added as noted above]

[20] It was suggested that such a finding is impermissible and gives rise to judicial review in light of a passage in *Sebbe v Canada (Minister of Citizenship and Immigration)*, 2012 FC 813 [*Sebbe*]. I disagree. *Sebbe* calls for an analysis that gives credit to refugee claimants for

initiatives they take, and other relevant circumstances, together with an analysis and assessment of the degree of a claimant's degree of establishment. The analysis and assessment must of course take place within the parameters laid down by the Supreme Court of Canada in *Newfoundland Nurses*, which in this case it did. In my view an Officer does not err in noting that delays occasioned by lawful engagement of our immigration system have assisted applicants to become more established, because in most if not all such cases that statement will be true. In the same way it is not an error for the Officer to refer to an applicant as having the support of friends and community. More generally, the Officer's statement is a true statement because establishment is a function of many factors over time. The more time one has, usually the more one will become established. More time generally tends to equal, or should in most cases, lead to a greater level of establishment.

[21] On review of the record, I do not see the Officer as having improperly discounted time legitimately spent within the Canadian refugee system. Indeed, the Officer's treatment of the Applicants may also be viewed in light of the fact that the Officer could have, but appears not to have, discounted the Applicant's establishment after they unlawfully failed to appear and an arrest warrant was issued for them in January, 2011. This Court has indicated on several occasions that Officers should be reluctant to reward individuals for time accumulated in Canada without a legal right to remain, absent circumstances beyond their control: *Caine v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1110 at para 20; *Mann v Canada (Minister of Citizenship and Immigration)*, 2009 FC 126 at paras 12-14; *Millette v Canada (Minister of Citizenship and Immigration)*, 2012 FC 542 at para 41. Although the Officer did not reject the H&C on these grounds, the Applicants failed to appear and remain in Canada in the face of an

active removal order. There is no need to supplement the Officer's reasons on this account, although the Court takes note of such unlawful conduct as did the Officer.

[22] Taken as a whole, the Officer outlined the establishment considerations in a manner not complained of, and thereafter came to an intelligible and transparent conclusion that falls within the range of reasonable possible and acceptable outcomes per *Dunsmuir*.

(2) Whether the Officer erred in assessing the best interest of the child?

[23] The Applicants submit that the Officer applied the wrong legal test when assessing the best interest of the child, particularly by referring to hardship when making the BIOC determination. They allege that the Officer failed to demonstrate that he was alert, alive and sensitive to the best interest of the child.

[24] In *Kisana* at para 30 the Federal Court of Appeal dealt with a case in which the officer "focused" on hardship in her consideration of the best interests of the children. The Court of appeal held that "[t]he fact that the officer focused her consideration of the children's best interests on the question of hardship does not necessarily lead to the conclusion that she failed to consider their best interests". From this, it is apparent that mention of "hardship" in the course of an analysis of BIOC is not enough to set aside the finding. This finding alone may very well determine this ground for judicial review against the Applicants.

[25] In addition, however, the reasons as a whole must be reviewed to determine if the Officer strayed from a proper BIOC analysis. Mentioning hardship is not enough to trigger judicial

review, as the Federal Court of Appeal said. Indeed, even focusing on hardship may not trigger judicial review in its view. Very often if not almost invariably, as the Applicants did here for example, H&C applicants in their BIOC submissions allege numerous negative adverse consequences for the child if he or she is removed, including inferior education, lower standard of living, criminality, and possible violence. Where, as here, the Applicants themselves alleged what may properly be characterized as "hardship" to the child if removed, an H&C Officers should not generally be faulted for using the word hardship in his or her analysis because doing so is simply and accurately summarizing the very consequences alleged by the Applicants.

[26] Instead, a contextual analysis of the Officer's reasons is required where it is argued that the Officer has applied an impermissible "hardship" analysis. This case has similarities in this respect with *Jaramillo v Canada (Minister of Citizenship and Immigration)*, 2014 FC 744 at paras 69-73, where I held:

> [69] After a fairly detailed review of the evidence filed, the Officer concluded his BIOC analysis stating: "Overall, I am unable to conclude from the information before me that having to relocate to Columbia or Brazil would have a significant negative impact on" the Applicants. Regarding the BIOC analysis, I do not accept the Applicants' submission that the Officer applied the wrong legal test.
>
> [70] Quite properly, there are neither verbal formulas nor magic words regarding the test for BIOC. However on judicial review, it is established that an officer must show that he or she is "alert, alive and sensitive" to the best interests of the child or children concerned. I conclude that the Officer met and applied this test in this case.
>
> [71] I agree, as the Respondent submits, that "the fact that the children might be better off in Canada in terms of general comfort and future opportunities cannot […] be conclusive in an H&C Decision that is intended to assess undue hardship" because the outcome would almost always favour Canada (*Vasquez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 91 at para 43;

> *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 5 [*Hawthorne*]; *Li v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1292 at para 28; *Yue v Canada (Minister of Citizenship and Immigration)*, 2006 FC 717 at para 9; *Ramotar v Canada (Minister of Citizenship and Immigration)*, 2009 FC 362 at para 37; *Miller v Canada (Citizenship and Immigration)*, 2012 FC 1173 at para 25).
>
> [72] For example, the Federal Court of Appeal in *Kisana*, *supra* at para 30, dealt with considerations of hardship under the rubric of BIOC and held that an officer who "focused her consideration of the children's best interests on the question of hardship does not necessarily lead to the conclusion that she failed to consider their best interests." To the same effect is *Hawthorne, supra*, quoted in *Kisana*, above.
>
> [73] Given the acceptance of "hardship" as an element in the BIOC analyses in this jurisprudence, I conclude that reference by this Officer to "significant negative impact" does not constitute legal error in terms of the applicable legal test.

[27] In the case at bar, the Officer set out the evidentiary considerations at the beginning of the decision form, in respect of which no complaint is made. The Officer charged him or herself with the proper test, namely best interest of the child, at the start of the BIOC assessment. The Officer noted that removal will not put the child in an exceptional situation. He found the child will not be in an unusual circumstance to justify a positive exemption. He noted the child is quite young and is learning the customs and culture in Canada, he noted he will have a chance to develop relationships with extended family members. The Officer found there will be no direct and adverse impact on the child. The Officer was entitled to make these findings in the course of giving his BIOC reasons. And I note that as the Officer reached his or her conclusion, he or she once again stated the proper test, namely best interest of the child.

[28] Reading the BIOC factual considerations and the subsequent BIOC analysis and conclusion together and as a whole and in their entirety; I do not agree that the use of the words "unusual and undeserved or disproportionate hardship" in the discussion is grounds for judicial review. While such reference was not appropriate, as conceded at the hearing, I am unable to find that the Officer mis-stated or mis-applied the legal test for BIOC.

[29] Additionally, and importantly in my view, the Officer found the Applicants had not established that the general consequences of relocating and resettling back to their home country would have a significant negative impact on the particular child in question. It is important to reiterate that the burden lies on the Applicants to establish the BIOC claim and to do so with relevant evidence. This Court recently addressed this issue in words that are appropriate for the case at bar, in *Landazuri Moreno v Canada (Minister of Citizenship and Immigration)* 2014 FC 481 at paras 36-37:

> [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.

[30] I wish to add that counsel for the Applicant made submissions respecting the suggested protocol for assessing the best interest of the child formulated in *Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166 [*Williams*]. In my view, H&C officers are not required to follow a formula. I considered this issue in *Edward Sarian Monje v Canada (Minister of Citizenship and Immigration)*, (IMM-6067-13):

> [*Williams*] constitutes an articulation of but one of many approaches to the [best interest of the child] analysis. This Court upheld other approaches to a [best interest of the child] analysis subsequent to the *Williams* decision: *Adetunji v Canada (Minister of Citizenship and Immigration)*, 2012 FC 708 at para 49; *Walker v Canada (Minister of Citizenship and Immigration)*, 2012 FC 447 at paras 36-37, 39, 41. In *Webb v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1060 at para 13, this Court confirmed that the test set out in *Williams* was a useful guideline, but was only one method of assessing the [best interest of the child]. What really matters in assessing the [best interest of the child] is whether the Officer is "alert, alive and sensitive" to that children's interests (*Marteli Medina v Canada (Minister of Citizenship and Immigration)*, 2010 FC 504 at para 55; *Leonce v Canada (Minister of Citizenship and Immigration)*, 2011 FC 831 at para 17; *Pannu v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1356 at para 38).

[31] In summary, on the issue of BIOC, I find the Officer applied the correct legal test, and I also conclude that the Officer's BIOC finding falls within the range of possible, acceptable

outcomes which are defensible in respect of the facts and law. The reasons are transparent and intelligible. Judicial review is not open on BIOC.

V. Conclusion

[32] Overall, I find that the Officer's decision was justified, transparent and intelligible both with respect to establishment and best interests of the child. It falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. Therefore, this application for judicial review is dismissed.

VI. Certification of Question

[33] Orally and at the end of her submissions, counsel for the Respondent requested that I certify questions relating to the *Williams* decision in the event I found *Williams* was applicable. Counsel for the Applicants opposed the request, noting that *Williams* was but one example of how to approach the issue of the best interests of the child. Given that neither I nor the Officer have accepted the *Williams* analysis, *Williams* is not dispositive of this case and, accordingly, no question is certified. No other question was proposed or arises.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, no question is certified and there is no order as to costs.

"Henry S. Brown"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Leigh Salsberg Rosemary Gallo	FOR THE APPLICANTS
Judy Michaely	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Leigh Salsberg & Rosemary Gallo Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT