Federal Court  Cour fédérale

Date: 20170504

Docket: IMM-4415-16

Citation: 2017 FC 448

Ottawa, Ontario, May 4, 2017

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

ISRAEL OCHOA GONZALEZ
NORA EVELYN TRUENA ALTAMIRANO

Applicants

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants have applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for judicial review of the decision dated July 22, 2016 [Decision] of a Senior Immigration Officer [the Officer] who refused their application for permanent residence on humanitarian and compassionate grounds [H&C Application].

[2] The Applicants are nationals of Mexico, who first arrived in Canada on May 8, 2005, as visitors at a time when no visa was required. On September 6, 2005, they made a claim for refugee protection. However, they never submitted a Personal Information Form, and their claim was declared abandoned on June 16, 2006. The Applicants worked as cleaners for Harbour Sixty Steakhouse [Harbour Sixty] for eight and a half years, starting in January 2007. Before that, they worked as cleaners in various homes. On June 29, 2015, the Applicants started their own cleaning business, Israel Cleaner Company. Other than a brief period of receiving social assistance prior to obtaining work permits on May 4, 2016, the Applicants have been employed or self-sufficient while in Canada.

[3] The Applicants have also had three children while in Canada. The children are Canadian citizens. They are Carlos, born in 2007, Luka, born in 2011, and Kayden, born in 2012. At the time of the H&C Application, Carlos was in grade three at St. Helen Catholic School and Luka was at the same school in Junior Kindergarten. Kayden was at St. Helen Parenting, a daycare centre.

[4] The Applicants attempted to regularize their status by filing an H&C Application on July 8, 2015. On October 26, 2015, the H&C Application was refused. The Applicants' sought judicial review on November 13, 2015, and served and filed their application record on January 11, 2016. The Respondent consented to having the Applicants file a Notice of Discontinuance, in exchange for which the H&C Application was remitted to a new officer for evaluation, resulting in the decision under review.

[5] For the reasons that follow, this application is allowed as the Officer's analysis of the best interests of the children failed to analyse those interests, show how they were weighed or make clear why the Officer made the determinative findings.

II. **The Decision Under Review**

[6] The Applicants filed updated extensive submissions to support their H&C Application. The submissions addressed the Applicants' establishment in Canada, the children's best interests and the hardship the family would face if returned to Mexico both from adverse country conditions as well as the inability to find work or have a social support network.

[7] The Officer noted that the onus is on the Applicants to show why an exemption is warranted from the rule requiring permanent residence applications to be submitted from within Canada. The Officer divided the reasons for refusing the exemption into three areas: (1) establishment in Canada; (2) best interests of the children; and (3) factors in country of origin.

[8] On establishment, the Officer noted the Applicants' long work history in Canada, but also noted that while tax returns had been provided for 2015, no documentation had been provided to validate employment earnings or business income before then. The Officer gave the Applicants credit for being active with their church, volunteering with the Salvation Army, upgrading their language skills and having a pattern of sound financial management.

[9] However, the Officer also found that the integration and establishment of over 11 years was based on a wilful disregard of Canadian immigration law, by continuously remaining and working in Canada without authorization. The Officer therefore found that the Applicants had

assumed their establishment efforts while knowing that their immigration status was uncertain and removal could become an eventuality.

[10] Regarding the best interests of the children, the Officer found that the children were dependent on their parents and assumed that the children would have to return to Mexico with the Applicants. The Officer noted that Kayden's student application records for Junior Kindergarten indicated that Spanish was the language of the home, so the Officer found that the children likely had some Spanish ability, though they were unlikely to be fluent. The Officer found that with education presumptively available for them in Mexico, their initial Spanish skills, combined with their resiliency as young children and the support of their parents, would allow them to assimilate after a period of adjustment. They would be able to adapt to a country that was not culturally unfamiliar to their parents.

[11] The Officer also considered that the socio-economic environment in Mexico was likely to be inferior to Canada's, but that the comparative socio-economic advantage that would be enjoyed in Canada was not a determinative factor in the application.

[12] The Officer acknowledged that Mexico had a serious problem with crime and violence, but these conditions were generally faced by other Mexicans since they could indiscriminately face any citizen.

[13] Regarding the Applicants' poor employment prospects, the Officer found that while regrettable, difficulty finding employment is an ordinary consequence of removal to a country with less viable economic conditions than Canada. The Officer found that the hardships associated with removal to Mexico were not sufficient to warrant H&C relief.

[14] The Officer found that considered cumulatively, the factors in the H&C Application did not warrant an exception under subsection 25(1) of the *IRPA* and denied the Applicants' application. Concluding, the Officer did "not find that the applicants have provided sufficient objective evidence to demonstrate that their removal from Canada would be contrary to the best interests of their three sons".

III. **Issue and Standard of Review**

[15] The only question for determination is whether the Officer erred in arriving at the Decision. Within that issue, the Applicant raises a failure to properly consider the best interests of the children and an erroneous assessment of the Applicants' establishment in Canada.

[16] The parties agree, as do I, that the standard of review is reasonableness as the Decision involves questions of mixed fact and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53 [*Dunsmuir*].

[17] A decision is reasonable if the decision-making process is justified, transparent and intelligible, resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir* at para 47.

IV. **Submissions of the Parties**

[18] The Applicants submit that the establishment analysis by the Officer was inadequate. The Officer simply listed the positive establishment evidence, and then found it to be insufficient. The Applicants say that the Officer's analysis of the best interests of the children did not have regard to the children's circumstances from each child's perspective.

[19] The Applicants also submit the Officer erred with respect to whether the children speak and understand some Spanish. They indicate they have clarified a number of times that the children do not speak Spanish. Included in the record was a handwritten letter from the eldest son Carlos confirming that fact. The Applicants also point out that the Officer did not take into account whether the children could write or read in Spanish.

[20] The Respondent's position is quite simple: the Applicants failed to meet the evidentiary burden upon them to convince the Officer to exercise discretion in their favour. With respect to speaking Spanish, the Officer reasonably noted the student application record for youngest child, Kayden, indicated that Spanish was the primary language spoken most often at home. The Officer rightly found it was in the best interests of the children to remain with their parents, as they were dependent upon the parents.

[21] The Applicants, in reply, point to the Officer's statement that the Applicants had not provided "sufficient objective evidence to demonstrate that the removal from Canada would be contrary to the best interests of their three sons" is unreasonable; it is not transparent given that the Officer failed to identify what were the best interests of each child. The Officer merely said, "I have taken the best interest of the child into account". The Applicants provided as an example of this the fact that the Officer failed to address that their son Carlos, in his handwritten letter expressing a desire to remain in Canada, specifically stated he did not speak Spanish.

V. **Analysis**

[22] In reviewing the impact on the three Canadian-born boys of leaving Canada for Mexico, the Officer noted the parents were concerned about the children's safety, health, education and overall well-being if they had to accompany their parents back to Mexico rather than remain in

Canada. The Officer noted the two older children appeared to be happy, well-adjusted and progressing well in school, recognized that they have integrated themselves into the Canadian school system and acknowledged that it may be difficult for them to leave a familiar environment. However the Officer found it reasonable to expect that continued education would be available to them in Mexico and given their young ages, they were "resilient" and capable of "assimilating to a new scholastic environment after an initial period of adjustment". As they spoke some Spanish, the Officer found it would mitigate any social or academic hardships associated with transferring to the Mexican school system. Ultimately, the Officer found that the Applicants had not provided "sufficient objective evidence to demonstrate that their removal from Canada would be contrary to the best interests of their three sons".

[23] One problem with the Officer's overall analysis is that with respect to the difference between living in Canada and living in Mexico the Officer had this to say:

> I have also considered the existing socio-economic environment of the three boys in Canada *vis-a-vis* the realities identified on record by counsel that they could face in Mexico including inferior educational prospects, healthcare availability and security conditions. In doing so, I recognize that societal factors in Mexico may not be favourable relative to those in Canada for raising children. Canada could be considered a more desirable place to live for Carlos, Luka and Kayden. It stands to reason that they may enjoy better future opportunities and find greater comfort in Canada than in Mexico. However, the comparative socioeconomic advantage that Canada offers is not in and of itself a determinative factor in this application.

[24] The Officer fails to explain how the evidence was weighed and does not justify the conclusion that the socio-economic environment advantage in Canada was not determinative. The Officer's analysis on the children's best interests is neither intelligible nor transparent; it is unclear how the various factors that were reviewed and accepted as indicating that Canada was a

better place for the children than Mexico were weighed in arriving at the Officer's conclusion. The Officer fails to identify a best interest either in staying in Canada or being removed to Mexico – the analysis is simply missing.

[25] To arrive at a finding that the children's best interests do not lie in remaining in Canada, there ought to have been factors expressed along the way which, when added together, outweigh the clear finding by the Officer that Canada is a more desirable place for the children to live. The Officer fails to explain why removal to Mexico would not be contrary to their best interests. I am unable to identify any factor mentioned by the Officer indicating that Mexico is a better place for the children, particularly when viewed from the perspective of these young, English-speaking, Canadian children who have never been to Mexico.

[26] The Officer clearly stated that Mexico has "inferior educational prospects, healthcare availability and security conditions", all of which plainly are important to young children. Moreover, the Officer indicated receipt of numerous articles and reports from various sources describing numerous human rights abuses, violent crime linked to drug-trafficking organizations, and corruption at the state and local levels of the security forces and judicial sector. It is hard therefore to believe that, on a cumulative basis, the Officer decided that the best interests of the children would be to go to Mexico with their parents rather than stay in Canada.

[27] The same lack of analysis is present in the Officer's conclusion which states:

> I have examined all the factors the Applicants have put forth within this application. Considered cumulatively, I am not of the opinion that granting the requested exemption under subsection 25(1) of the Act is justified by humanitarian and compassionate considerations.

[28] At no point does the Officer seem to weigh the negative consequences on the children of their parents' removal to Mexico in either determining where their best interests lie or directly against the other H&C factors to determine whether an exemption from the *IRPA* is warranted. The outcome may or may not be defensible on the facts and law, but the reasons given for it are neither transparent nor intelligible, and it is not clear that the Officer paid sufficient mind to the perspective of the children in arriving at the Decision.

[29] As a result, the application is allowed and the matter will be remitted to a third different officer for re-determination.

JUDGMENT IN IMM-4415-16

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the matter is to be remitted to a third different officer for re-determination.

2. Neither party posed a question for certification and none arises on these facts.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4415-16
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