Federal Court  Cour fédérale

Date: 20171213

Docket: IMM-2286-17

Citation: 2017 FC 1140

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Winnipeg, Manitoba, December 13, 2017

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

JOSE GIOVANNY PENA PENA
SANDRA MILENA RESTREPO PEREZ
JUAN SEBASTIAN PENA PARRA
SARA SOFIA PENA RESTREPO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This decision concerns four applications for leave and judicial review of four decisions by a Citizenship and Immigration Canada senior immigration officer (the officer), ruling that the

factors submitted by the applicants in support of their permanent residence application on humanitarian and compassionate grounds (HC application) did not warrant an exemption under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

II. Facts

[2] This is a family of 10 of Colombian origin: the principal applicant, his spouse, their two children, his parents, his brother, his sister and his two nieces. The following table provides a complete list of the applicants, as well as their current status in Canada:

1	Jose Giovanny Pena Pena	Principal applicant	Deportation order in effect
2	Sandra Milena Restrepo Perez	Spouse	Deported
3	Juan Sebastian Pena Parra	Son	Deportation order in effect
4	Sara Sofia Pena Restrepo	Daughter (minor)	Deported
5	Jose de Jesus Pena Leon	Father	Deported
6	Herlinda Pena de Pena	Mother	Deported
7	Omar Jesus Pena Pena	Brother	Deportation order in effect
8	Fanny Stella Pena Pena	Sister	Deportation order in effect
9	Julieth Stefany Obando Pena	Niece	Deported
10	Maria Paula Obando Pena	Niece	Deported

Note: The son (Juan Sebastian) was a minor until April 3, 2017. One of the nieces (Maria Paula) was a minor until December 31, 2016.

[3] The applicants allegedly fled Colombia, fearing for their lives, and arrived in Canada on January 23 and 24, 2016. The applicants filed two refugee claims, which were denied by the

Refugee Protection Division (RPD) on June 27, 2016. This Court dismissed their application for leave and judicial review of the RPD's decision on October 20, 2016. The applicants subsequently filed an HC application, which was also denied. That HC application is the subject of this judicial review; Prothonotary Richard Morneau ordered that the four cases filed by each family unit be joined on August 18, 2017.

[4] At the same time, a removal order was executed and confirmed on December 30, 2016, against six of the family members (see table above), but not for the principal applicant, his son, his sister, and his brother, who chose not to comply with that removal order and are currently subject to arrest warrants for removal issued on February 22, 2017, and April 5, 2017 (for the son).

III. Decision

[5] The applicants cited the best interests of the minor children, the union of the four family units, the degree of establishment and certain medical circumstances. The applicants argued that removal to Colombia would cause them serious financial problems, destroy their efforts to integrate into Canadian society and aggravate certain reported medical conditions.

[6] The officer considered the evidence submitted by the applicants, including evidence on their establishment in Canada, the best interests of the children, family circumstances and adverse conditions in Colombia.

[7] The officer was not satisfied that the humanitarian and compassionate grounds warranted an exemption.

[8] With respect to the applicants' establishment factor, the officer took into account the applicants' efforts to integrate into Canadian society and the support of their social and family networks, but found that the applicants' submissions failed to demonstrate sufficient establishment in Canada. The officer refused to give significant weight to the evidence that suggested a potential for establishment in the future, such as an offer of employment that the principal applicant had reportedly received. The officer noted that the applicants had been in Canada for approximately one year and that the ties they had developed in the country were relatively recent and did not warrant an exemption as part of an HC application.

[9] With respect to the best interests of the children, the officer considered the fact that the principal applicant's minor daughter and niece had left Canada in December 2016 and noted the lack of evidence and explanations regarding their situations since being removed from Canada. The officer found that the children had resources and family ties available to them in Colombia and concluded that [TRANSLATION] "the information and evidence in the record do not tend to satisfactorily establish how the well-being of the children would be particularly compromised."

[10] With respect to family circumstances, the officer noted that the family members were close, but also that the family's separation resulted from the decision of certain members not to leave Canada at the same time as the others following the removal order.

[11] Finally, with regard to adverse conditions in Colombia and the connection with some of the applicants' medical conditions, the officer noted the lack of probative evidence regarding the applicants' current medical situation. For one, the officer doubted the authenticity of the applicants' medical records, since the documents had been written in Spanish and translated into French, but did not bear an official seal. Moreover, the medical conditions described in their Canadian medical records did not require ongoing or advanced medical supervision.

IV. Issues

[12] The applicants raise four issues:

1. Was there a breach of procedural fairness? In other words, did the officer err by assessing the HC application on the date of her decisions instead of on the date the HC application was filed, and without requiring additional information or conducting independent research using the tools that were at her disposal?
2. Did the officer err in her analysis of the best interests of the children?
3. Did the officer err in her analysis of the risks and adverse conditions in Colombia?
4. Did the officer err in her analysis of the applicants' establishment in Canada?

V. Analysis

A. *Standard of review*

[13] There is no debate about the standard of review that applies in this case. Procedural fairness is subject to the correctness standard of review: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at paragraph 43. The other issues involve analyzing the evidence and

questions of mixed fact and law and are subject to the reasonableness standard: *Rocha v. Canada (Citizenship and Immigration)*, 2015 FC 1070 at paragraph 19.

B. *Procedural fairness*

[14] The applicants argue that any consideration of the facts dating from after the filing date of the HC application constitutes an *ex post facto* analysis of the application and is erroneous. The applicants also argue that, in the event that it were permitted to consider facts from after the date the HC application was filed, the officer was required to seek additional information, either by asking the applicants or by conducting independent research using the tools at her disposal. The applicants argue that such research would have revealed that the principal applicant had obtained his work permit in December 2016. The applicants submit that this fact might have changed the officer's finding regarding the issue of establishment in Canada.

[15] Furthermore, the applicants submit that it is unfair to consider certain facts that date from after the HC application was filed without considering others (such as the lack of evidence regarding the children's situation after their removal to Colombia versus the fact that the principal applicant was granted a work permit).

[16] On the issue of the officer's duty to request additional information, the case law is clear. The burden rests on the applicants to prove any allegation on which they base their application: *Owusu v. Canada (Citizenship and Immigration)*, 2004 FCA 38 at paragraph 5; *Kisana v. Canada (Citizenship and Immigration)*, 2009 FCA 189 at paragraph 35 [*Kisana*]. There is no

general obligation requiring an officer to request additional information: *Kisana* at paragraphs 42 to 45 and 61. An officer's duty to make such a request depends on the facts of each case.

[17] In the applicants' case, I am not satisfied that there were specific facts that required the officer to make such a request. I therefore find that the officer did not err by not conducting independent research.

[18] With respect to the date on which an HC application should be analyzed, the applicants do not cite any authority to support their argument that the applicable date would be that on which the application was filed. Furthermore, the authorities cited by the applicants relating to the concept of an *ex post facto* analysis do not apply to the facts in this case.

[19] Since the applicants, in their memorandum, did not take a clear position that HC applications must be analyzed as of the filing date, the respondent did not provide any case law on this point.

[20] Although there is the concept of a fixed date in certain immigration contexts (where the filing date may be relevant), I am satisfied that this is not the case for HC applications. Therefore, the date on which an HC application should be analyzed is the date of the decision.

C. *Best interests of the children*

[21] The applicants have two arguments under this heading. First, they argue that the officer erred in her consideration of the letter from the social worker who was caring for one of the

principal applicant's nieces (Maria Paula). More specifically, the applicants argue that it was unreasonable to consider the absence of the psychologist's report to which the social worker referred. The second argument is that the officer's analysis of the children's best interests was unreasonable because she failed to give adequate consideration to the hardship that the children would face in Colombia and the benefits for them in Canada.

[22] Before considering the applicants' arguments under this heading, I would like to note that the courts have consistently held that HC applications are to be allowed only in exceptional circumstances: *Tindale v. Canada (Citizenship and Immigration)*, 2012 FC 236 at paragraph 9; *Jurado Tobar v. Canada (Citizenship and Immigration)*, 2011 FC 1111 at paragraph 4. Moreover, given the highly discretionary nature of any HC decision, this Court demonstrates a high level of deference towards this type of decision, especially since they lend themselves to a wider range of possible, acceptable outcomes.

[23] Having considered the applicants' arguments on this issue, I am not satisfied that this is a case in which the Court should intervene. Although the officer noted the absence of the psychologist's report to which the social worker refers in her letter, I note that the officer still gives this letter some weight and that her finding on this issue is based on a lack of clarification concerning Maria Paula's circumstances in Colombia.

[24] It is also clear that the officer weighed the considerations relating to the issue of the children's best interests, including the hardship faced by the children in Colombia and the benefits for them in Canada.

D. *Risks and adverse conditions in Colombia*

[25] The applicants do not clearly describe the errors they allege that the officer made under this heading. In their memorandum, they argue that the officer failed to consider the evidence as a whole but provide few details supporting this position. No details were added at the hearing of this application.

[26] I am not satisfied that the officer erred in her analysis of the risks and adverse conditions in Colombia.

E. *Establishment in Canada*

[27] Under this heading, the applicants submit that:

1. The officer should not have focused on the amount of time spent in Canada, but rather on what the applicants had built while they were in the country;
2. The officer allegedly erred in stating that the applicants had been in Canada for approximately one year (which was the case when the HC application was filed) instead of 15 months (which was the case when the decision was made);
3. The officer should have noted that the length of the stay, either 11 months or 15 months, is more significant for a child than for an adult.

[28] In my view, the officer clearly indicated that she considered [TRANSLATION] "what the applicants built during their stay." Essentially, the applicants are disputing the weight that the

officer gave to the various aspects of the evidence on this subject. This is not a reason to overturn the decision.

[29] With respect to the second and third arguments, I am satisfied that the officer understood the evidence. It was reasonable not to mention the facts raised in these arguments.

VI. Conclusions

[30] For the above reasons, the applications for judicial review in dockets IMM-2286-17, IMM-2287-17, IMM-2290-17 and IMM-2291-17 must be dismissed.

[31] The applicants submit two questions that they are asking me to certify as serious questions of general importance:

1. In an HC application, can an officer undertake an *ex post facto* analysis when the applicant is removed from Canada?
2. Is the officer required to request additional information when undertaking an *ex post facto* analysis?

[32] As noted above, the applicants state that by "*ex post facto*" they mean after the date on which the HC application was filed.

[33] I refuse to certify both of the applicants' questions. In my view, the case law is clear on both points. Therefore, there are no serious questions of general importance.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The applications for judicial review in dockets IMM-2286-17, IMM-2287-17, IMM-2290-17 and IMM-2291-17 are dismissed.

2. No serious question of general importance is certified.

3. A copy of this judgment and reasons will also be filed in dockets IMM-2287-17, IMM-2290-17 and IMM-2291-17.

"George R. Locke"
Judge

Certified true translation
This 9th day of October 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2286-17
STYLE OF CAUSE:	JOSE GIOVANNY PENA PENA, SANDRA MILENA RESTREPO PEREZ, JUAN SEBASTIAN PENA PARRA, SARA SOFIA PENA RESTREPO v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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JUDGMENT AND REASONS:	LOCKE J.
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