Federal Court  Cour fédérale

Date: 20220323

Docket: IMM-5586-20

Citation: 2022 FC 402

Ottawa, Ontario, March 23, 2022

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

MARIANA JOSEFINA MALAVE TURMERO
FRANCISCO MARTIN GONZALEZ CORREA
ARIANA ELEJANDRA GONZALEZ MALAVE

Applicants

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants challenge a decision of a Senior Immigration Officer [Officer] dated October 14, 2020 refusing the Applicants' application for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The Applicants assert that the Officer's decision was unreasonable on the basis that: (a) the Officer inappropriately assessed their establishment through a hardship lens by noting their establishment in Canada and then discounting it on the basis that they possessed the ability and experience to become equally established in Venezuela or Spain; (b) the Officer improperly imported the requirements of a section 97 claim into the H&C analysis and failed to properly assess the evidence of adverse country conditions in Venezuela, and in particular in relation to the specific medical needs of two of the Applicants; and (c) the Officer erred in weighing the best interests of the Applicants' nieces/cousins.

[3] For the reasons that follow, I find that the Officer's decision is unreasonable. The application for judicial review shall be allowed.

I. Background

[4] The Applicants are citizens of Venezuela. Mariana Josefina Malave Turmero [Principal Applicant] and Francisco Martin Gonzalez Correa are spouses and Ariana Elejandra Gonzalez Malave is their 28 year old daughter. The Principal Applicant and her daughter are also citizens of Spain.

[5] The Principal Applicant and her daughter came to Canada in June of 2017 and submitted their H&C application on June 18, 2018. The spouse/father arrived in Canada in November 2019 and was added to the H&C application in July of 2020.

[6] Since arriving in Canada, the Principal Applicant and her daughter have been living with the Principal Applicant's sister, brother-in-law and three nieces. At the time of the application, the nieces were approximately nine, six and four years old [Nieces].

[7] The Applicants based their H&C application on: (a) their establishment in Canada; (b) the hardship they would suffer if forced to return to Venezuela given the poor country conditions in Venezuela, particularly the collapsing health care system and the effect that it would have on the daughter (who suffers from a mental and learning disability) and the Principal Applicant (who is a cancer survivor and requires regular cancer screenings); and (c) the best interests of the Nieces.

II. Decision at Issue

[8] The Officer described the exceptional nature of granting relief on H&C grounds pursuant to section 25(1) of the *IRPA.* After considering the Applicants' small business, supports in Canada and community involvement in Canada, the Officer gave some favourable consideration to the Applicants' establishment in Canada but noted that the Officer did not find their establishment to be exceptional. While the Applicants had support of friends and family in Canada, the Officer was not satisfied that the Applicants could not return to Venezuela or Spain and maintain their relationships from a distance. Moreover, the Officer found that there was insufficient evidence put forth to support that the relationships with friends and family can be characterized by a degree of interdependency and reliance to such an extent that if separation were to occur, it would justify granting an exemption under H&C considerations.

[9] With respect to the best interests of the Nieces, the Officer founds that insufficient evidence had been put forth to support that the relationships with the Nieces are characterized by a degree of interdependency and reliance to such an extent so as to provide more than moderate weight to this factor.

[10] With respect to adverse country conditions, the Officer was not satisfied that the Applicants had demonstrated how documents describing the general conditions in Venezuela relate to their personal circumstances and accordingly only gave some favourable weight to this factor.

[11] The Officer found that the Applicants had not demonstrated that the Principal Applicant would be unable to receive medical care for her cancer screenings in Venezuela or that such care would be inadequate, nor had the Applicants submitted any objective evidence that health care plans in Venezuela are prohibitively expensive. While treatment may be limited, the Officer was satisfied that the Principal Applicant would still have the ability to access her required treatment. The Officer also noted that the Principal Applicant had received a significant amount of treatment in Venezuela in the past. The Officer ultimately held that the Officer was unable to provide more than some weight to this factor.

[12] With respect to the Principal Applicant's daughter, the Officer found that the information provided by the Applicants did not indicate that the daughter would be denied additional needed support in Venezuela. Moreover, the Officer noted that the daughter had resided in Venezuela with her disability for over 22 years prior to coming to Canada. The Officer was not satisfied that returning to Venezuela would have a significant negative impact on the daughter and was not

persuaded that she would be unable to adapt or reintegrate or that her best interests would be compromised in Venezuela.

[13] The Officer found that there was insufficient objective evidence to establish that the Principal Applicant and her husband would be unable to find employment in Venezuela. The Officer noted that the Principal Applicant had commenced a business in Canada and there was insufficient evidence to establish that she would be unable to do the same in Venezuela. Moreover, the Officer found that there was insufficient evidence that the Principal Applicant could not return to Venezuela and use her existing skills and knowledge obtained in Canada to obtain employment. The Officer noted that the Principal Applicant's husband had been supporting the family from Venezuela (prior to arriving in Canada) and that there was insufficient evidence to establish that he would be unable to continue to do so if they returned to Venezuela.

[14] While noting that it may be difficult to return to Venezuela, the Officer noted that the Principal Applicant's sister continued to reside in Venezuela and the Applicants had spent the majority of their lives in Venezuela. Moreover, the Applicant had demonstrated that they are resourceful and enterprising individuals by resettling themselves in Canada. The Officer was equally confident that they would be able to do the same in Venezuela or in Spain. The Officer found that the Applicants' family ties in Spain are significant and ascribed favourable consideration to this factor.

[15] The Officer concluded by stating that they conducted a global assessment of the H&C factors and after reviewing the evidence and submissions and taking into account the

circumstances of this case, the Officer was not satisfied that the Applicants had provided sufficient evidence to establish that a positive exemption was warranted on H&C grounds.

III. Analysis

[16] Subsection 25(1) of the *IRPA* gives the Minister discretion to exempt foreign nationals from the ordinary requirements of that statute and grant permanent resident status in Canada if the Minister is of the opinion that such relief is justified by H&C considerations. An H&C determination under section 25(1) of the *IRPA* is a global one, where all the relevant considerations are to be weighed cumulatively in order to determine if relief is justified in the circumstances. Relief is considered justified if the circumstances would excite in a reasonable person in a civilized community a desire to relieve the misfortunes of another [see *Kanthasamy v Canada (Citizenship and Immigration*), 2015 SCC 61 at paras 13, 28; *Caleb v Canada (Citizenship and Immigration)*, 2020 FC 1018 at para 10].

[17] The granting of an exemption for H&C reasons is deemed to be exceptional and highly discretionary and therefore "deserving of considerable deference by the Court" [see *Qureshi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 335 at para 30]. There is no "rigid formula" that determines the outcome [see *Sivalingam v Canada (Citizenship and Immigration*), 2017 FC 1185 at para 7].

[18] The sole issue for determination on this application is whether the Officer's decision was reasonable.

[19] The applicable standard of review of an H&C decision is reasonableness [see *Kanthasamy*, *supra* at para 44]. In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale, in order to ensure that the decision as a whole is transparent, intelligible and justified [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 15].

[20] Although the Applicants raise a number of issues with the Officer's decision, the reasonableness of the Officer's treatment of the adverse country conditions in Venezuela and of the best interests of the Applicants' Nieces are determinative of this judicial review.

A. Adverse Country Conditions

[21] The Applicants relied heavily on the adverse country conditions in Venezuela in support of their application, which conditions included rampant kidnappings, violent crimes and a health care system that was "on the verge of collapse". The concern regarding the health care system in Venezuela was particularly acute for the Applicants, given the medical needs of both of the Principal Applicant and her daughter, which were well established in the supporting documentation and not questioned by the Officer.

[22] In support of their application, the Officer noted that the Applicants had provided country condition reports from Amnesty International Venezuela, the US Department of State and other articles outlining the conditions in Venezuela vis-à-vis crime, violence, poverty and human rights practices. The Applicants also provided articles about children and mental disabilities in Venezuela and an article about the healthcare system in Venezuela, which stated that the entire healthcare

system (as of 2018) was on the verge of collapse, with an 85% shortage of medicine and a 90% deficit of other medical supplies and drugs used to treat more serious conditions, like cancer.

[23] After considering the evidence put forward by the Applicants, the Officer found, in part, as follows:

> The applicants have not indicated how these documents relate to their personal circumstances in Venezuela. Rather, the documentary evidence includes general country conditions in Venezuela which are experienced by most persons in that country. While I acknowledge that the conditions in Venezuela may not be favourable; insufficient evidence has been provided to satisfy me that the applicants' fundamental rights will be denied. I acknowledge the submissions describing the conditions the applicants may face in Venezuela. Although the environment in Venezuela may have different economical, medical and financial aspects and thus not comparable to Canada; I do not find this to be an exceptional circumstance to justify a positive exemption. Different standards of living exist between countries and many countries are not as fortunate to have the same social, including financial and medical, supports as can be found in Canada. However, Parliament did not intend for the purpose of Section 25 of the Immigration and Refugee Protection Act (IRPA) to be to make up for the difference in standards of living between Canada and other countries. Rather, the purpose of section 25 of the Act is to give the Minister the flexibility to deal with extraordinary situations which are unforeseen by IRPA where humanitarian and compassionate grounds compel the Minister to act. With the evidence before me, I am not satisfied that the applicants have established that the hardships associated with general country conditions amounts to more than some favourable weight for this factor.

[24] I find that the Officer's determination that the conditions in Venezuela "may not be favourable" and the Officer's equating of a severe crisis in medical care to a difference in standards of living is unintelligible in light of the evidence that was before the Officer (which included a

specific need for the Applicants to obtain medical treatment and support), thus calling into question whether the Officer properly considered the evidence supporting the application.

[25] Moreover, since January of 2019, Venezuela has been subject to an Administrative Deferral of Removal [ADR]. As a result, there is a temporary suspension of removals to individuals from Canada to Venezuela, except in certain prescribed circumstances, owing to a situation of humanitarian crisis. While an ADR does not preclude the refusal of an H&C application, this Court has repeatedly affirmed that it is a relevant consideration in the context of country conditions and the assessment of hardship [see *Camacho Valera v Canada (Minister of Citizenship and Immigration)*, 2021 FC 1087 at para 26; *Milad v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1409 at paras 34, 36-37; *Rubayi v Canada (Minister of Citizenship and Immigration)*, 2018 FC 74 at paras 22-24]. There is no mention of the ADR in the Officer's decision.

[26] The Applicants assert that the Officer erred in failing to consider the ADR, as it was a policy enacted by the Government and the Officer was obligated to apply Canada's laws and policies in rendering their decision, regardless of whether it was included in the Applicants' materials. The Respondent asserts that the onus was on the Applicants to place the ADR before the Officer if they intended to rely upon it in support of their application and that the onus did not rest with the Officer to locate and apply the ADR.

[27] In this case, it is critical to recall that the Applicants submitted their H&C application on June 18, 2018 and the ADR was only put in place in January of 2019. The Applicants could

therefore not have included the ADR in their application materials. In the unique circumstances of this case, I am satisfied that the Officer should have had regard to the ADR in rendering their decision, notwithstanding that it was not included in the Applicants' application.

[28] I find that the Officer's unintelligible conclusions noted above, coupled with the Officer's failure in assessing the application to take into consideration the fact that there is a moratorium on removals to Venezuela, render the decision unreasonable.

[29] In the circumstances, I need not consider the additional errors raised by the Applicants regarding this aspect of the Officer's decision.

B. Best Interests of the Nieces

[30] In *Kanthasamy v Canada (Citizenship and Immigration),* 2015 SCC 61, the Supreme Court of Canada confirmed that in s 25(1) applications, the decision-maker "…should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them" [see *Kanthasamy, supra* at para 38]. While the Court notes that this does not mean that this factor must always outweigh other considerations or that an H&C claim will be successful, a decision under s 25(1) will be unreasonable if the "well identified and defined" interests of children affected are not sufficiently examined "with a great deal of attention" [see *Kanthasamy, supra* at para 39]. Once that is done, it is up to the officer to determine what weight those interests should be given in the circumstances [see *Legault c Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 12].

[31] I agree with the Respondent that the Applicants provided little evidence and made few submissions as to the best interests of their Nieces. However, officers are under a duty to consider children's best interests when conducting H&C determinations when, as here, there is some evidence before them that would engage the interests of a child. An officer is required to clearly articulate what is in the best interests of the child and then weigh this against the other positive and negative elements in the H&C application [see *Sebbe v Canada (Minister of Citizenship and Immigration)*, 2012 FC 813 at paras 13, 16].

[32] The evidence before the Officer included letters from the Principal Applicant's sister and two of her Nieces. The evidence supported the Applicants' submissions that the Principal Applicant and her daughter have been residing with the Nieces and their parents. The Principal Applicant has become very close with her Nieces and plays a unique role in their lives, providing them with love, affection and a safe haven for them to approach and discuss issues affecting their lives. The family considers the Principal Applicant as an alternative caregiver for the Nieces. The Nieces have also developed a strong bond and special relationship with their cousin (the Principal Applicant's daughter), based on play, positive affection and support. The Principal Applicant's daughter is considered to be like a sibling to the Nieces.

[33] In terms of the best interests of the three Nieces, the Officer's reasons are limited to the following:

> I have considered the best interests of the PA's nieces, Fernanda Lobo (11), Ivana Lobo (8), Amanda Lobo (6). A letter from the PA's sister states that the PA occasionally acts as a caregiver to her young children. While I acknowledge that the PA helps take care of her nieces in Canada, there has been insufficient evidence presented to establish that alternative arrangements cannot be arranged, such as

> other family members or babysitters. I acknowledge that the PA daughter has built relationships with her aunt, uncle and her cousins in Canada. I sympathize with the difficulties that would arise if the applicants were to be separated from their relatives in Canada, specifically the separation from the PA daughter and her cousins. However, insufficient evidence was advanced to indicate that by virtue of returning to Venezuela, the applicants would sever bonds with their relatives. Relationships are not bound by geographical locations and while separations from family in Canada can be difficult, there is insufficient evidence before me that these relationships could not be maintained via other means of communication i.e. telephone, various social media outlets, letters, etc. Furthermore, I find insufficient evidence has been put forward to support that the aforementioned relationships are characterized by a degree of interdependency and reliance to such an extent to provide more than moderate weight to this factor.

[34] I agree with the Applicants that the Officer fails to identify what was in the best interests of each of the Nieces. Moreover, the Officer's analysis seems more framed to address the impact of separation on the Applicants, rather than on the Nieces. I find that such an approach to the best interests of the Nieces is not in keeping with the requirements set out in *Kanthasamy* and thus renders this portion of the Officer's decision unreasonable.

IV. Conclusion

[35] Having found that the aforementioned errors render the Officer's decision unreasonable, the application for judicial review is allowed, the decision of the Officer is set aside and the matter is remitted to a different officer for redetermination.

[36] The parties have proposed no certified questions and I agree that none arise.

JUDGMENT in IMM-5586-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The decision of the officer is set aside and the matter is remitted to another officer for redetermination.

2. The parties proposed no question for certification and none arises.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5586-20
STYLE OF CAUSE:	MARIANA JOSEFINA MALAVE TURMERO, FRANCISCO MARTIN GONZALEZ CORREA, ARIANA ELEJANDRA GONZALEZ MALAVE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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