Federal Court Cour fédérale

Date: 20230116

Docket: IMM-3331-21

Citation: 2023 FC 61

Ottawa, Ontario, January 16, 2023

PRESENT: Madam Justice Pallotta

BETWEEN:

LARRY JAVIER CONSUEGRA PULIDO
CAROL JOHANNA RAMOS ROMERO
ISAELLA CONSUEGRA RAMOS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants, Larry Javier Consuegra Pulido, his spouse Carol Johanna Ramos Romero, and their daughter Isaella Consuegra Ramos, apply for judicial review of an immigration officer's (Officer) decision that refused their application for permanent residence made from within Canada. The Officer was not satisfied that humanitarian and compassionate (H&C) considerations warranted an exemption, under subsection 25(1) of the *Immigration and Refugee*

Protection Act, SC 2001, c 27 [*IRPA*], from the requirement that applications for permanent residence must be made from outside of Canada.

[2] The applicants are citizens of Colombia. They arrived in Canada in June 2017 via the United States and claimed refugee protection, alleging they had been targeted by members of the National Liberation Army (ELN). The applicants filed an H&C application in August 2020 after the Refugee Protection Division (RPD) of the Immigration and Refugee Board found they were not Convention refugees or persons in need of protection under sections 96 or 97 of the *IRPA*, because they have an internal flight alternative (IFA) within Colombia.

[3] Mr. Consuegra Pulido and Ms. Ramos Romero have another daughter who is not a party to this application. She was born in Canada in 2019, and she is a Canadian citizen.

[4] The applicants submit the Officer's decision to refuse their H&C application was unreasonable, and they ask this Court to set it aside. The applicants allege the Officer did not consider the H&C factors holistically and erred in assessing each factor, namely the hardship they would experience if they returned to Colombia, the degree of establishment they have attained in Canada, and the best interests of their children (BIOC).

[5] The respondent submits the Officer comprehensively assessed the H&C application in accordance with the proper principles, and made reasonable findings. While the applicants disagree with the result, the respondent states their arguments invite the Court to make alternative findings, and do not establish a basis for the Court's intervention.

[6] The parties agree that the Officer's decision to refuse an H&C exemption is reviewable on a standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 16, 17 [*Vavilov*]; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 10, 44 [*Kanthasamy*]. The reasonableness standard of review is a deferential but robust form of review: *Vavilov* at paras 12-13, 75 and 85. The reviewing court does not ask what decision it would have made, attempt to ascertain the range of possible conclusions, conduct a new analysis, or seek to determine the correct solution to the problem: *Vavilov* at para 83. Instead, the reviewing court must focus on the decision actually made, including the reasoning process and the outcome, and consider whether the decision as a whole is transparent, intelligible, and justified in relation to the relevant factual and legal constraints that bear on the decision: *Vavilov* at paras 15, 83, 99. The party challenging the decision bears the burden of establishing sufficiently central or significant flaws to render the decision unreasonable: *Vavilov* at para 100.

[7] For the reasons below, I find the applicants have not established that the Officer's decision is unreasonable.

[8] The applicants have not explained how the reasons demonstrate that the Officer failed to consider the H&C factors holistically. The Officer conducted a global assessment by considering the applicants' circumstances and the H&C factors they had put forward to support their application. The Officer found the factors of establishment, hardship and BIOC were insufficient, separately or cumulatively, to justify an exemption. The applicants have not established a reviewable error on this basis.

[9] With respect to the hardship assessment, the applicants submit the Officer failed to follow the guidance in *Kanthasamy* that “unusual, undeserved or disproportionate hardship” are descriptive terms, and do not limit an officer’s ability to consider and weigh all relevant H&C considerations in context. The applicants say that although the Officer professed to do otherwise, the reasons reflect a rigid, pre-*Kanthasamy* framework, in that the Officer (i) used a framework for assessing refugee protection under sections 96 and 97 of the *IRPA* that heavily relied on the RPD decision, particularly as it pertains to the applicants’ risk in the IFA; and (ii) used a “general versus specific risk analysis” that effectively required the applicants to demonstrate they would face a risk not faced by the general population, instead of considering whether they would face undue or disproportionate hardship in returning to Colombia. Furthermore, the applicants submit their situation demonstrates they would face both personal and generalized risks, even though this was not the test they had to meet. With respect to personal risk, the applicants contend the Officer failed to consider the danger the ELN presents to them, such as evidence that they had been forced to relocate in Colombia because their lives were in danger, and continued to received threats. The Officer failed to consider that being constantly uprooted would impact the applicants’ ability to work and go to school, and become established in Colombia.

[10] The applicants submit that officers may take the underlying facts of a refugee claim into account on an H&C application, but must do so within a framework of determining whether the applicant’s circumstances warrant humanitarian and compassionate relief, not whether the applicant will face persecution or specific targeting in their home country. According to the applicants, statements such as “it would be speculative to suggest that the applicants would find

themselves victims of crime" and "I have insufficient evidence before me to demonstrate that the applicants would be personally affected by the ELN" suggest that the Officer engaged in the type of risk analysis this Court has found to be in error: *Shah v Canada (Citizenship v Immigration)*, 2011 FC 1260 at paras 71 and 73; *Diabate v Canada (Citizenship and Immigration)*, 2013 FC 129 at para 36; *Acoucar v Canada (Canada and Immigration)*, 2014 FC at paras 3-4.

[11] The respondent submits the Officer did not applying the wrong test. The Officer did not expect the applicants to prove they would be more affected than the general population, but did expect a personal link between the country condition evidence of crime and the applicants' circumstances. An applicant is required to establish a link between country condition evidence and his personal circumstances; otherwise, every H&C application by a national of a country with problems would have to be assessed positively, regardless of the individual's personal situation: *Lalane v Canada (Citizenship and Immigration)*, 2009 FC 6 at para 1; *Piard v Canada (Minister of Citizenship and Immigration)*, 2013 FC 170 at para 19; *Gonzalez v Canada (Minister of Citizenship and Immigration)*, 2015 FC 382 at paras 55-56. The Officer addressed the applicants' submissions, and did not err in finding that the objective evidence of crime in Columbia was not, in and of itself, sufficient to demonstrate that the applicants would be personally affected and face hardship as a result.

[12] The respondent submits the applicants' arguments do not address the RPD's finding that they have an IFA in Colombia, which is relevant to their personal circumstances. In considering hardship, the Officer reasonably found that the applicants did not overcome the RPD's finding.

[13] I agree with the respondent. I am not persuaded by the applicants' argument that, despite stating the correct test, the Officer in fact adopted an incorrect approach that required them to meet a higher burden of proof.

[14] There is a distinction between an unreasonable, heightened legal standard that requires an applicant to show personal hardship above the generalized risk, and a personalized assessment of the applicant's likely hardships: *Obodoruku v Canada (Citizenship and Immigration)*, 2022 FC 224 at para 27. Section 25(1) of the *IRPA* states that an exemption from the requirements of the act may be granted where it is justified by the H&C considerations relating to the foreign national. The Officer did not err in considering how the H&C considerations relate to the applicants in view of their personal circumstances, including how they would be affected by adverse country conditions.

[15] The Officer noted the applicants' reliance on objective country condition evidence of violence and crime, and the fact that they experienced issues with the ELN in the past. The Officer was aware that hardship could include "adverse country conditions that have a direct negative impact on the applicant" and found that, although the applicants' fears regarding their return to Colombia may constitute some hardship, it would be speculative to suggest the applicants would find themselves victims of crime. The Officer also found there was insufficient evidence that the applicants would be personally affected by violence inflicted by the ELN if they were returned to Colombia, noting that aside from indicating that they experienced issues with the ELN in the past, they provided insufficient evidence to overcome the RPD's decision. It was open to the Officer to conclude that the evidence was insufficient to demonstrate that the

applicants would be personally affected by the ELN and face serious hardship if they were returned to Colombia.

[16] The reasons do not suggest the Officer required evidence of personal targeting, and I disagree with the applicants that the Officer's statements are suggestive of a section 96 and 97 approach, particularly when the statements are considered in light of the applicants' submissions in the H&C application. The applicants argued that the family would be exposed to new risks since the RPD made its decision over a year earlier, in that the volatility and territorial expansion of armed groups, particularly the ELN, would pose a substantial risk to the family's safety and "leave the feasibility and long term viability of internal flight alternatives in question". In my view, the reasons were responsive to the applicants' arguments of risk based on having been threatened by ELN members in the past.

[17] With respect to the assessment of establishment, the applicants submit the Officer provided inadequate reasons for finding that "their degree of establishment is unremarkable and modest" and allocating minimal weight to establishment. The applicants argue the Officer undervalued their establishment by characterizing four years in Canada as a "short period of time", and overlooking important evidence. According to the applicants, the Officer found they did not meet a required level of establishment, but failed to specify what that level is, contrary to the principles in *Ndlovu v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 878 at paragraph 15, *Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813 at paragraph 21, and *Chandidas v Canada (Citizenship and Immigration)*, 2013 FC 258 at paragraph 80. Also, the applicants submit that before they left Colombia their lives were constantly uprooted because of

the danger they faced, and it was unreasonable for the Officer to find they would be able to re-establish themselves in Colombia.

[18] The applicants have not established a reviewable error with the Officer's assessment of establishment. I am not persuaded that the Officer overlooked important evidence, or discounted this factor because the applicants failed to meet a required "level" of establishment. I agree with the respondent that while the applicants believe the Officer should have afforded more weight to their establishment, it is squarely within the Officer's role to weigh the evidence and the H&C factors, and the Officer's reasons are clear and intelligible. The Officer assessed and weighed the applicants' employment history in Canada, the length of time spent in Canada, the applicant child's education, the applicants' good character and work ethic, letters of recommendation from employers, colleagues, and friends, and the applicants' integration into the community in Canada. The Officer also considered factors relating to the applicants' re-establishment in Colombia. The reasons demonstrate that the Officer assessed the evidence of establishment, and considered how the applicants' establishment in Canada and the disruption of that establishment weighed in the overall analysis of whether their circumstances warranted an exemption from the requirements of *IRPA*.

[19] The applicants submit the Officer did not adequately consider and weigh the BIOC. They argue the Officer "paid lip service" to having considered BIOC, but was not alert, alive and sensitive to the interests of both children affected by the decision. They contend the Officer relied on a "supposed lack of evidence" that the children would be unable to enjoy the same or similar forms of education in Colombia or that they would be denied access to necessities such as

healthcare. They submit this finding is "perverse and utterly distant from the reality of the applicants' previous life in Colombia" and their need to flee from place to place, as the children will be disadvantaged by being unable to remain in the same residence for longer than a few months. This will affect their education and also the parents' ability to find jobs to be able to afford to feed, house and clothe them. Also, the applicants submit the Officer adopted a rigid approach in assessing the applicant child's time at school in Canada, and undermined the significance of the evidence of threats the children would face from gang violence, recruitment by gangs, and violence against women.

[20] I agree with the respondent that the applicants have not established a reviewable error in the BIOC analysis. The Officer considered the applicant child's education in Canada, extracurricular activities, future education in Colombia, familiarity with the language, culture and society in Colombia, access to healthcare, access to familial support, and development. The Officer identified deficiencies in the evidence—for example, although the applicant child left Colombia when she was 8 years old, the H&C application did not identify or provide details of her education there. The Officer also assessed the BIOC of the non-applicant child who would accompany the applicants given her age and level of dependency, and concluded there was little evidence to suggest she would be denied access to necessities such as education, housing, and healthcare in Colombia. The applicants have not established that the Officer overlooked important evidence.

[21] The Officer addressed the risk of hardship due to the risk of recruitment by armed groups and sexual violence and concluded the children would not likely face such hardship, and

furthermore, there was little evidence to suggest the applicants could not seek redress from state officials if required.

[22] The Officer engaged with the evidence, and the reasons demonstrate a coherent and rational chain of analysis. The Officer found there was insufficient evidence to demonstrate a negative impact on the children, and reasonably concluded that the weight afforded to the BIOC was not enough to justify an exemption.

[23] In conclusion, the applicants have not established that the decision refusing their H&C application was unreasonable. Accordingly, this application for judicial review is dismissed. The parties did not propose a serious question of general importance for certification. I find this case does not involve such a question.

JUDGMENT in IMM-3331-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no question to certify.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3331-21
STYLE OF CAUSE:	LARRY JAVIER CONSUEGRA PULIDO, CAROL JOHANNA RAMOS ROMERO, ISAELLA CONSUEGRA RAMOS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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