Federal Court Cour fédérale

Date: 20230321

Docket: IMM-2799-21

Citation: 2023 FC 382

Ottawa, Ontario, March 21, 2023

PRESENT: Mr. Justice Norris

BETWEEN:

JOSE SAUL MONTES TORRES
LUISA MARGARITA GARCIA
MATTHEW JOSE MONTES AND
ELIZABETH JOY MONTES GARCIA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The adult applicants (Jose Saul Montes Torres and Luisa Margarita Garcia) are citizens of El Salvador. Their children, eight-year-old Matthew and 11-year-old Elizabeth, are citizens of the United States.

[2] The family entered Canada from the United States in January 2018. Mr. Torres had been living in the United States without status since October 2002. Ms. Garcia had been living there without status since May 2010. The minor applicants were both born in the United States.

[3] In Canada, the adult applicants made claims for refugee protection on the basis of their fear of the *Mara Salvatrucha* (also known as MS-13), a criminal gang in El Salvador. On April 9, 2019, the claims were rejected by the Refugee Protection Division ("RPD") of the Immigration and Refugee Board of Canada ("IRB") on credibility grounds. On July 25, 2019, an application for leave and judicial review of the RPD's decision was dismissed at the leave stage (Federal Court File No. IMM-2713-19). (On May 23, 2019, the Refugee Appeal Division of the IRB had dismissed an appeal of the RPD's decision for want of jurisdiction under paragraph 110(2)(d) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").)

[4] In October 2019, the applicants submitted an application for permanent residence in Canada on humanitarian and compassionate ("H&C") grounds under subsection 25(1) of the *IRPA*. They based this application on their establishment in Canada, the hardship they would face in El Salvador given the general country conditions there and their fear of the *Mara Salvatrucha*, and the best interests of the children. A Senior Immigration Officer refused the application in a decision dated April 12, 2021.

[5] The applicants now apply for judicial review of this decision under subsection 72(1) of the *IRPA*. They contend that the decision is unreasonable. For the reasons that follow, I am unable to agree. This application must, therefore, be dismissed.

[6] Subsection 25(1) of the *IRPA* authorizes the Minister to grant relief to a foreign national seeking permanent resident status who is inadmissible or otherwise does not meet the requirements of the Act. The Minister may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations under the Act only if the Minister "is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national." This discretion to make an exception provides flexibility to mitigate the effects of a rigid application of the law in appropriate cases (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 19). Whether relief is warranted in a given case will depend on the specific circumstances of that case (*Kanthasamy* at para 25). Subsection 25(1) expressly requires a decision maker to take into account the best interests of a child directly affected by a decision made under this provision.

[7] H&C relief is a highly discretionary measure (*Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 15; *Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4). The onus is on an applicant to present sufficient evidence to warrant the exercise of such discretion in his or her case, including information regarding the best interests of the children (*Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 45; *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 5; *Ahmad v Canada (Minister of Citizenship and Immigration)*, 2008 FC 646 at para 31; *Zlotosz v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 724 at para 22).

[8] It is well-established that the merits of an H&C decision should be reviewed on a reasonableness standard (*Kanthasamy* at para 44). That this is the appropriate standard has been reinforced by *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10.

[9] A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). A decision that displays these qualities is entitled to deference from the reviewing court (*ibid.*). On the other hand, "where reasons are provided but they fail to provide a transparent and intelligible justification [. . .], the decision will be unreasonable" (*Vavilov* at para 136). The onus is on the applicants to demonstrate that the officer's decision is unreasonable.

[10] When applying the reasonableness standard, it is not the role of the reviewing court to reweigh or reassess the evidence considered by the decision maker or to interfere with factual findings unless there are exceptional circumstances (*Vavilov* at para 125). As well, it follows from the discretionary nature of decisions under subsection 25(1) of the *IRPA* that generally the administrative decision maker's determinations will be accorded a considerable degree of deference by a reviewing court (*Williams* at para 4). At the same time, reasonableness review is not a rubber-stamping process; it remains a robust form of review (*Vavilov* at para 13).

[11] In refusing the application for H&C relief, the officer made the following key determinations:

- Since settling in Canada in January 2018, the applicants had achieved "a modest level of establishment from an integration perspective."

- The applicants' fear of the *Mara Salvatrucha* is the same risk allegation advanced in support of the claims for refugee protection. While the legal test the officer must apply is not the same as the one applied by the RPD, the officer noted that the RPD had made several findings of fact that are relevant to the hardship assessment, including: the gang had harassed Mr. Torres and his brother but the adult applicants were not credible in their allegation that, after targeting Mr. Torres as a potential recruit 18 years earlier, it continued to personally target him; Mr. Torres had not established that he is being targeted by the gang because he is a welder; and the adult applicants' allegation that the gang continues to inquire about their whereabouts is not credible. The H&C officer found "a scarcity of information to address the findings of the RPD."

- The officer noted "the considerable passage of time since the [adult] applicants departed El Salvador and in this regard [found] insufficient evidence which provides a linkage to the adult applicants' fear of hardships linked to the MS-13 gang." The officer also noted that, while the adult applicants continued to maintain that the gang was still making inquiries about them, there was "a scarcity of details to elaborate the said inquiries including how the applicants learnt of this information."

- Mr. Torres's brother had been granted refugee protection in Canada but there was "a scarcity of documentary evidence to elaborate on the specifics of that claim and to link it to forward looking fear of hardship for the applicants."

- Overall, there was "insufficient evidence to elaborate the applicants' fear of hardships linked to being harmed in El Salvador or to indicate that their children's best interests could be compromised on account of safety considerations."

- The officer accepted that the adult applicants suffered from Post-Traumatic Stress Disorder and that the prospect of returning to El Salvador caused them significant levels of anxiety (as reflected in a psychological assessment completed in January 2019 in connection with their refugee claims). However, the officer gave this factor reduced weight because, among other things, the opinion was premised on risks in El Salvador that were not otherwise established (see above) and there was no evidence that the applicants had followed through with the recommended treatment. The officer also noted that the adult applicants had been coping well with their precarious immigration status since they left El Salvador many years earlier. Consequently, the officer found "insufficient evidence to elaborate on the hardships linked to the applicants' mental health considerations if they returned to El Salvador."

- With respect to the best interests of the children, the officer accepted that there are notable differences between the standards of living in Canada and El Salvador, including economic conditions, personal safety, education, and health care. The officer also accepted that leaving Canada would be difficult for the children. The officer found, however, that the applicants had adduced insufficient evidence to establish that, in their particular circumstances, remaining in Canada would be in the children's best interests.

[12] On the basis of a "global assessment" of all the factors presented by the applicants in light of the supporting evidence, the officer was not satisfied that the applicants had provided sufficient evidence to establish that an exemption on H&C grounds was warranted in their case. Accordingly, the officer refused the application.

[13] I have carefully reviewed the record before the officer, the officer's decision, and the submissions made in this application for judicial review. The applicants have not persuaded me that the officer's decision is unreasonable. The key findings set out above were all open to the officer to make. They are all supported by detailed and intelligible reasons that were responsive to the submissions and evidence presented to the officer. On key issues such as the interplay between the findings of the RPD and the factual basis of the H&C application, the officer's approach is entirely consistent with the jurisprudence: see *Shah v Canada (Citizenship and Immigration)*, 2018 FC 537 at para 54; and *Oladekoye v Canada (Citizenship and Immigration)*, 2022 FC 449 at paras 18-20.

[14] As required, the officer carefully assessed the various factors relied on by the applicants both individually and globally. The officer concluded that the applicants had not provided sufficient evidence to establish that an exemption on H&C grounds from the usual requirements of the law was warranted in their case. There is nothing to suggest that the officer misunderstood or misapplied the test for H&C relief. Nor is there anything to suggest that the officer overlooked or misconstrued relevant evidence. The decision turned on the officer's assessment of the evidence and weighing of the relevant factors, matters on which the officer is owed considerable deference. In essence, the applicants' submissions boil down to disagreements with

how the officer weighed the relevant factors. Unless that weighing is unreasonable, which is not the case here, there is no basis for me to interfere with the decision.

[15] While this may be little comfort to the applicants, I would add only this. Although I am satisfied that the best interests of the children were "well identified and defined and examined with a great deal of attention in light of all the evidence" (*Kanthasamy* at para 39, internal quotation marks and citations omitted), the reasonableness of the officer's assessment of this factor was a close call. In the end, it turned on the evidence (or lack of evidence) in the record before the officer concerning how the children's interests would be affected by having to leave Canada. As I have explained, given my limited role on judicial review, there is no basis on which to interfere with that determination. Nevertheless, should the applicants apply for H&C relief again, a reasonable decision maker, presented with a different evidentiary record, could well reach a different conclusion regarding the best interests of the children and even on the application as a whole. The fact that the present decision withstood review should have little, if any, bearing on the merits of any subsequent applications.

[16] For these reasons, the application for judicial review must be dismissed.

[17] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that no question arises.

[18] Finally, the original style of cause names the respondent as the Minister of Immigration, Refugees and Citizenship. Although that is how the respondent is now commonly known, its

name under statute remains the Minister of Citizenship and Immigration: *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, s 5(2) and *IRPA*, s 4(1). Accordingly, as part of this judgment, the style of cause is amended to name the respondent as the Minister of Citizenship and Immigration.

JUDGMENT IN IMM-2799-21

THIS COURT'S JUDGMENT is that

1. The style of cause is amended to reflect the Minister of Citizenship and Immigration as the correct respondent.

2. The application for judicial review is dismissed.

3. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2799-21
STYLE OF CAUSE:	JOSE SAUL MONTES TORRES ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
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