Date: 20080609

Docket: IMM-5221-07

Citation: 2008 FC 720

Ottawa, Ontario, June 9, 2008

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

EDGARDO MONTIVERO, ROSA NORA ROSALES DE MONTIVERO, WALTER ALJANDRO MONTIVERO, YESICA PAULA MONTIVERO AND JUAN GABRIEL MONTIVERO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants seek to quash the decision of an Immigration Officer denying their application for an exemption on humanitarian and compassionate (H&C) grounds.

[2] The applicants arrived in Canada in 2000 and applied for refugee status on the basis of a fear of persecution by corrupt police officers whom Edgardo had denounced in Argentina. Their refugee claims were dismissed on May 3, 2002. A request for an exemption from the requirement to apply for permanent resident status from outside Canada was made on April 9, 2003. The applicants applied for a Pre-Removal Risk Assessment (PRRA) on June 30, 2006, after being informed of the opportunity to do so. The PRRA decision issued on October 25, 2007 was negative and leave for judicial review of that decision was denied.

Impugned decision

[3] On October 26, 2007, the same Immigration Officer who came to a negative determination on the PRRA application rejected the H&C application. The latter application had been based on the best interests of the minor son and daughter of the adult applicants and the daughter's child, Canadian citizen by birth, their establishment in Canada and their claims of personalized risk. In a thorough decision running 13 pages in length, the Officer assessed the hardship which would be faced by the applicants on each point should they be returned to apply for permanent residence from Argentina.

Issues

[4] The applicants raise two issues:

a. Did the Immigration Officer apply the correct test?

b. Are the reasons given by the Officer sufficient?

Standard of review

[5] The insufficiency of reasons is a matter of procedural fairness, which, if found to have been breached, will require the decision to be set aside and the matter returned for reassessment. The selection of the appropriate legal test, however, is a question of law which may be decided on a correctness standard if it is of central importance to the legal system as a whole and outside a decision-maker's specialized area of expertise: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9. If a question of law fails to reach this threshold, it may be reviewed on a reasonableness standard.

[6] My colleague Justice Eleanor R. Dawson recently determined that the selection of the appropriate test in the context of an H&C application should be assessed by the Court on a correctness standard: *Zambrano v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 481, [2008] F.C.J. No. 601. In coming to this conclusion, she noted the importance of holding officers to the tests prescribed by Parliament. This aptly describes a central role of the Court in its exercise of judicial review and I agree that the correctness standard should be applied here.

Adequacy of reasons

[7] The applicants alleged that the reasons provided were inadequate, citing *Adu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 565. As noted above, I found the reasons given by the Officer in this instance to be detailed and thorough. This was not a case, as in *Adu,* where the officer had simply described the material factors and delivered a conclusory decision without any

explanation as to how they had been analysed. In my view, the reasons here were sufficient for the applicants to understand the Officer's analysis of the relevant considerations and did not fall short of the standard required for procedural fairness.

[8] *As* a consequence, I informed the parties on reserving my decision on the question of whether the correct test was applied that the reasons would not be found to have been inadequate.

Was the correct legal test used?

[9] The applicants submit that the test for personalized risk under sections 96 and 97 of the *IRPA* is different from that of undue hardship under section 25 H&C applications. They claim that the assessment of the availability of state protection to the applicants is unnecessary under a section 25 undue hardship analysis. They assert that the Officer's assessment of this factor shows that the Officer erroneously imposed the higher section 96 and 97 threshold to the applicants' section 25 application.

[10] The respondent counters that the Officer properly applied section 13.6 of the IP 5 Manual which directs that risk, in the assessment of an H&C application, must be considered where raised in the context of hardship. The Officer considered the hardship which might arise from the risks alleged by the applicants and found that it was not undue or disproportionate. Such analysis does not show that the Officer assessed their application on the basis of an incorrect test.

[11] I agree with the respondent that the applicants have not shown that the Officer applied an incorrect test or threshold to their application. I note that the applicants raised the question of state protection in their submissions on the H&C application. They cannot now argue that such an issue was irrelevant to that assessment.

[12] The Officer did not simply state that there was insufficient evidence of risk or of inadequate state protection for the applicants and end the analysis there, as in *Ramirez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1404, [2006] F.C.J. No. 1763. Had that occurred, I would have found that there had been an error of law requiring the decision to be vacated. In the present case, it is noted several times in the Officer's analysis that the question of alleged risk on an H&C assessment must be considered in the context of hardship. The decision ends with the following:

> I am not satisfied that the hardship associated with returning to Argentina constitutes unusual and undeserved or disproportionate hardship.

[13] Accordingly, I do not agree that the decision was made on the basis of the wrong legal test and will not set it aside. No questions were proposed for certification and none are found on the facts of this case.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5221-07
STYLE OF CAUSE:	EDGARDO MONTIVERO, ROSA NORA ROSALES DE MONTIVERO, WALTER ALJANDRO MONTIVERO, YESICA PAULA MONTIVERO AND JUAN GABRIEL MONTIVERO AND THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 4, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	MOSLEY J.
DATED:	June 9, 2008

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