Date: 20090127

Docket: IMM-3678-08

Citation: 2009 FC 81

Ottawa, Ontario, January 27, 2009

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

HECTOR PENA GONZALEZ, ELIDA ALICIA NUNEZ SOTO, DAIANA GISSEL PENA NUNEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of a Pre-Removal Risk Assessment Officer (PRRA Officer) dated June 24, 2008, denying the applicants' application for an exemption on humanitarian and compassionate grounds (H&C) to the requirement that persons seeking admission to Canada must make their application before entering the country.

FACTS

[2] The principal applicant, the female applicant and their daughter are citizens of Uruguay. They arrived in Canada on June 25, 2002, and made a claim for refugee protection. In March 2005, the Refugee Protection Division of the Immigration and Refugee Bard rejected their claims. The applicants' application for leave for judicial review of the negative Board decision was dismissed by the Federal Court in July 2005. The applicants' PRRA application was denied on June 20, 2008, and their H&C application was denied on June 24, 2008. The applicants now seek judicial review of the decision to deny their H&C decision.

Decision under review

[3] The PRRA officer reviewing the applicants' H&C application had previously reviewed and rejected the applicants' PRRA application. The PRRA officer considered the following factors:

a. hardship or sanctions upon return to Uruguay;

b. spousal, family or personal relationships that would create hardship if severed;

c. degree of establishment in Canada;

d. best interests of the child;

e. establishment, ties or residency in any other country; and

f. feasibility of return to country of nationality.

[4] The PRRA officer noted at page 3 of her decision that the RPD panel rejected the applicants' refugee claims on the basis that state protection was available in Uruguay, and canvassed the evidence on state protection in Uruguay. She found at page 9 of her decision:

> With some notable shortcomings, adequate state protection exists in Uruguay, and is available for the applicants' recourse. Further, it would not be a hardship for the applicants to access state protection should it be necessary. I am not of the opinion that the hardships relating to risk constitute unusual and undeserved or disproportionate hardship.

[5] On the issue of family or personal ties that would create hardship if severed, the PRRA officer found that while the applicants had formed meaningful relationships in their local community in Canada, severing these ties would not constitute undue hardship for the applicants.

[6] The PRRA officer held that the applicants had established a "measure of establishment" in Canada, noting the letters of support from the adult applicants' employers as well as their volunteer work and English studies, but found at page 5 of her decision:

> While the positive aspects of the applicants' establishment in Canada have been noted, there is insufficient evidence before me to support that the applicants integrated into Canadian society to the extent that their departure would cause unusual and undeserved, or disproportionate hardship, or not anticipated by the Act.

[7] The PRRA officer then considered the best interests of the minor applicant, who at the time of the H&C application was completing her final year of high school and had been accepted into the Hotel Management Programs at George Brown College, Humber College and Seneca College in Toronto. The PRRA officer stated at page 6 of her decision:

> Although the MA has been in Canada for several years, learning the English language and adapting to North American culture, it is reasonable to expect that she has been exposed to the Spanish language and Uruguayan culture by her parents. The MA has demonstrated her ability to adjust to new environments. It is noted that the MA has spent some important developmental years in Canada; however, given her age and experiences in Canada related to

> employment and education, it is reasonable to expect that adjustments in Uruguay would be minimal. Further, there is a network of extended family including her grandparents and aunts and uncles, who may facilitate and asset with the MA's adjustments in Uruguayan society.

[8] Regarding the establishment of ties or residency in another country, the PRAA officer found that the applicants had resided in Uruguay prior to coming to Canada; they had also resided in Spain for a period of time with their son, who lives there currently; the adult applicants were employed and educated in Uruguay; and they have immediate family members, including parents and siblings, living in Uruguay. Finally, the PRRA officer found that there was no evidence that return to Uruguay was not a feasible option for the applicants. The PRRA officer stated that at page 11:

> The fact that Canada is a more desirable place to live than the country of return is not determinative on an H&C assessment.

[9] The PRAA officer therefore concluded that the applicants had not established that their personal circumstances were such that the hardships of not being granted the exemption would be "unusual and undeserved or disproportionate".

ISSUE

[10] The applicant submits that the PRAA officer erred in denying their application because she failed to properly consider:

a. the best interests of the child;
b. the degree of the applicants' establishment in Canada; and
c. the hardship to the applicants upon return.

STANDARD OF REVIEW

[11] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of [deference] to be accorded with regard to a particular category of question."

[12] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the Supreme Court of Canada established that reasonableness is the appropriate standard of review for H&C application decisions. The Court stated at paragraph 62:

> **¶ 62** … I conclude that considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language. Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court – Trial Division and the Federal Court of Appeal in certain circumstances, and the individual rather than polycentric nature of the decision, also suggest that the standard should not be as deferential as "patent unreasonableness". I conclude, weighing all these factors, that the appropriate standard of review is reasonableness *simpliciter*.
>
> [Emphasis added]

[13] In reviewing the Board's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir* at paragraph 47).

ANALYSIS

Issue No. 1: Did the officer fail to properly consider the best interests of the child?

[14] The applicants submit that the PRRA officer ignored extensive submissions relating to the economic situation and the status and treatment of women in Uruguay, and that both these issues adversely affect the best interests of the minor applicant. They state that the PRRA officer's conclusion that there was insufficient evidence that similar opportunities would be available to the minor applicant in Uruguay is therefore unreasonable.

[15] The PRRA officer noted at page 11 of her decision that the adult applicants were educated and employed in Uruguay:

> The PA completed eight years of schooling. While in Uruguay, the PA worked as a Tailor with Textile Sadil and was self-employed as a painter. The FA completed six years of schooling and was employed as a Machine Operator in Uruguay. The applicants appeared to be established during their residency in Uruguay. They also have immediate family members living in Uruguay including parents and siblings.

[16] Thus, the PRRA officer concluded that the applicants would not face significant hardship upon return. Despite the generalized evidence regarding the poor economic situation in Uruguay, and particularly the 30% unemployment rate there, the applicants did not provide any evidence to establish that they would face any particular hardship in gaining employment or re-establishing themselves in Uruguay as a result of their circumstances. The evidence before the PRRA officer was that they had no particular difficulties finding and maintaining employment while residing in Uruguay and that they had family connections there as well. It was reasonable for the officer to

conclude that there was insufficient evidence that the applicants would face particularized hardship in finding employment or re-establishing themselves in Uruguay.

[17] While the applicants included information on the status and treatment of women in their submissions, including the rates of domestic violence against women in Uruguay, they again did not make any submissions regarding the difficulties the minor applicant might face as a female in Uruguay. The fact that there are more favourable social and economic conditions in Canada cannot suffice to establish that an H&C exception is warranted. The PRAA officer stated on page 10:

> Although the MA residing in Canada may enjoy better social and economic opportunities than she would in Uruguay, there is insufficient evidence before me to indicate that her basic amenities would not be provided for in her home country.

[18] This conclusion was reasonable based on the evidence before the PRRA officer.

[19] The applicants' submissions in relation to the best interests of the child primarily focused on the minor applicant's admission into several community colleges and her strong academic achievements as a high school student. The PRRA officer made note of these achievements and stated at page10:

> The MA's establishments, relationships with friends, and positive contributions have been noted. The applicants have provided insufficient documentation to support that the applicant would not be afforded similar opportunities in Uruguay.

[20] The PRRA officer then cited the 2006 US Department of State Country Report on Human Rights Practices for Uruguay, which states:

> The government was committed to protecting children's rights and welfare, and it regarded the education and health of children as a top

> priority. The National Institute for Adolescents and Children (INAU) oversees implementation of the government's programs for children. The government provided free compulsory kindergarten, primary, and secondary education, and 95 percent of children completed their primary education. Girls and boys were treated equally. Free education was available through the undergraduate level at the national university.

[21] The respondent notes that the minor applicant has completed her high school education in Canada and is now moving to the next chapter in her educational career. The evidence cited by the PRRA officer indicates that education at this level is very much available in the applicants' home country. The applicants provided no evidence that the minor applicant could not study at this level in Uruguay. The PRRA officer's finding that similar opportunities would be available to the minor applicant in Uruguay is, therefore, a fully reasonable conclusion.

[22] The applicant states that Justice Zinn's recent ruling in *Ranji v. MCI*, 2008 FC 521, 167 A.C.W.S. (3d) 163, wherein the applicants needed an H&C to facilitate their children's education, is applicable here. In that case, the applicants provided evidence that, if returned to India, as farmers, they would have to return to a rural area where access to educational institutions would be very limited. In *Ranji*, the children were not even in Canada. They were in India at a private school. If the applicants were returned to India, the adult applicant would lose his Canadian income which allowed him to afford a private school in India for his children. Ironically, the alleged "best interests" of the children were to be in India by allowing the adult applicant to remain in Canada with an H&C. I might have thought these "best interests" of the children too indirect for an H&C on behalf of their father.

[23] If there is similar evidence in this case, it was incumbent on the applicants to provide it. There is no evidence showing that the minor applicant would be subject to any circumstances preventing her from availing herself of the cost-free undergraduate education available at Uruguay's national university, or attending any other institution providing post-secondary education.

[24] Finally, the applicants submit that the minor applicant would face "severe hardship" in reintegrating into the Uruguayan system, as she has studied in Canada in English for six years, and that it will be very difficult for her to adjust socially to living in Uruguay. They state that the PRRA officer's finding that the minor applicant adjusted well to her relocation to Canada and that she would therefore be able to adjust to returning to Uruguay is unreasonable. However, the PRRA officer's conclusion was based not only on the minor applicant's previous experience with relocating to a different country but also her familiarity with the language and culture in Uruguay. The PRAA officer stated:

> Although the MA has been in Canada for several years, learning the English language and adapting to North American culture, it is reasonable to expect that she has been exposed to the Spanish language and Uruguayan culture by her parents. The MA has demonstrated her ability to adjust to new environments. It is noted that the MA has spent some important development years in Canada; however, given her age and experiences in Canada related to employment and education, it is reasonable to expect that adjustments in Uruguay would be minimal.

[25] The minor applicant has immediate family in Uruguay; she resided there until she was twelve years old and speaks the language. It was reasonable for the PRRA officer to conclude that she could re-adjust to life in Uruguay without undue hardship and that her successful adjustment to

life in Canada demonstrates that she does not have any special difficulties that would pose undue hardships above those normally accompanying any relocation.

Issue No. 2: Did the PRRA officer fail to properly consider the applicants' degree of establishment in Canada?

[26] The applicants submit that the PRRA officer erred by failing to consider their special circumstances in evaluating their degree of establishment. The PRRA officer stated on page 9:

> The applicants have presented evidence to indicate a measure of establishment in Canada since June 2002. During their time in Canada, the applicants received due process in the refugee protection program, and therefore a measure of establishment is expected to occur. The applicants have maintained a good civil record in Canada…

[27] The applicants submit that the finding that they had achieved a "measure of establishment" is unreasonable, and that under their special circumstances, they had achieved a very high degree of establishment. The applicants have provided letters of support from their employers, and a Labour Market Opinion stating that the male applicant's job as a painter is in high demand. They have taken courses to upgrade their qualifications and have a social network. They submit that the PRRA officer failed to take into account the "particular circumstances" of their application in finding that their degree of establishment was not so high as to render returning to Uruguay an undue hardship.

[28] With respect, the applicants have not established that the PRRA officer ignored any evidence pertaining to their degree of establishment. The PRRA officer acknowledged all the above facts, but also noted that the applicants had immediate family in Uruguay, and had resided and been employed in Uruguay until six years ago. The PRRA officer found that the applicants had remained

in Canada voluntarily after their refugee claim had been denied in 2005 and had chosen to make their PRRA and H&C applications after that date. It was open to the PRRA officer to find that the applicants had not shown that their establishment and integration into Canadian society was such that being required to apply for permanent resident status from outside the country would constitute undeserved or disproportionate hardship.

[29] While persons may be allowed to remain in Canada pending their refugee claim, PRRA, H&C, and Federal Court appeals, the elapsed time (from 2002 to 2008 in this case) cannot be a basis for them to remain in Canada as permanent residents. That would condone "backdoor" immigration. In granting H&C applications, immigration officers and the Courts must consider and weigh in the balance the public policy of respecting the immigration laws.

Issue No. 3: Did the PRRA officer fail to properly consider the hardship to the applicants upon return using the criteria appropriate in evaluating an H&C application?

[30] The applicants submit that the PRRA officer erred by failing to apply the appropriate criteria for an H&C application in considering the hardship, instead applying the same criteria and reasoning that she used in evaluating the applicants' PRRA application. The PRRA officer stated on page 7:

> I have considered the applicants' H&C and PRRA applications and submissions in this decision as risk has been cited. However, I recognize that the threshold is one of hardship for an H&C application and not section 96 or 97 of the Immigration and Refugee Protection Act (IRPA). This H&C application has been assessed on the basis of unusual and undeserved, or disproportionate hardship.

[31] Thus, the PRRA officer was clearly aware of the distinction between the PRRA and H&C applications and the appropriate standard for evaluating risk in an H&C application. The applicants submit that the PRRA officer discounted the applicants concerns based on a "refugee-like analysis" and that the decision contained "verbatim excerpts from [the PRRA officer's] PRRA decision." (Applicant's Record, p, 460). The applicants cite Justice de Montigny's ruling in *Ramirez*, which stated:

> While it may be that violence, harassment and the poor health and sanitary conditions may not amount to a personalized risk for the purposes of a PRRA application, these factors may well be sufficient to establish unusual, undeserved, or disproportionate hardship.

[32] However, in this case, the applicants did not provide evidence that they would personally face economic and social hardship upon returning to Uruguay. The PRRA officer did not make any finding that poor economic and social conditions would not suffice to establish the level of hardship required for an H&C application. However, the applicants had been employed in Uruguay prior to their arrival in Canada, and had provided no evidence that they would personally be living in an area where they would face severe economic or social conditions. The evidence does not indicate that such conditions are present in most of the country. It was reasonable for the PRRA officer to conclude that the better social and economic conditions in Canada did not form the basis for an H&C application, and it was reasonably open to the PRRA officer to conclude that it would not pose an unusual or undeserved hardship for the applicants to return to Uruguay.

CONCLUSION

[33] The evidence about the economic and social conditions in Uruguay was not presented as particular to the applicants' likely future if returned to Uruguay. These conditions were presented as the general economic and social conditions. While these conditions are widespread, they do not apply to everyone and the evidence failed to link these conditions to the personal experience which the applicants would suffer if returned. Accordingly, the Court does not find that the PRRA officer failed to consider important and significant evidence relevant to the applicants as Justice Zinn found in *Ranji*, supra. For these reasons the Court must dismiss this application for judicial review.

[34] Neither party proposed a question for certification. The Court agrees that this application does not raise a serious important issue which ought to be certified on appeal.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

This application for judicial review is dismissed.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Lorne Waldman	FOR THE APPLICANTS
Laoura Christodoulides	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lorne Waldman, Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANTS
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT