Date: 20090910

Docket: IMM-1038-09

Citation: 2009 FC 894

Ottawa, Ontario, September 10, 2009

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

MARIA GUADALUPE LOPEZ SEGURA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a negative decision on an application for permanent residence based on humanitarian and compassionate (H&C) grounds. The Officer making the negative decision determined that the grounds put forward for the exemption did not constitute unusual and undeserved or disproportionate hardships. For the reasons that follow, this application for judicial review is dismissed.

Background

[2] Maria Guadalupe Lopez Segura is a citizen of Mexico. On September 11, 1999, she came to Canada on a one-year student permit. She overstayed her study permit and on January 17, 2001, made a refugee application. Ms. Lopez Segura's refugee claim was based on sexual, physical, and psychological abuse from her ex-common law partner in Mexico. On February 27, 2004, the Refugee Protection Division (RPD) rejected the application, finding that although she had a well-founded objective fear of persecution an internal flight alternative was available to her in Mexico. Leave to judicially review that decision was denied by this Court on May 22, 2004.

[3] In the intervening period, Ms. Lopez Segura gave birth to her son, Issa Alecio Nievas Lopez, who was born January 4, 2002.

[4] After her refugee claim was rejected, on February 7, 2005, Ms. Lopez Segura filed an H&C application and subsequently on April 27, 2007, an application for a Pre-Removal Risk Assessment. Both of these applications were rejected by the same Officer in early 2009. A removal date was set for March 16, 2009; however, Ms. Lopez Segura successfully sought a stay of removal pending the disposition of this application for leave and judicial review.

[5] The Officer noted that an applicant bears the onus of demonstrating that the overseas permanent residence application requirement would cause unusual and underserved or disproportionate hardship to the applicant. The Officer stated that the

relevant factors to be considered in this Applicant’s case were her allegations of hardship upon return to Mexico, her degree of establishment, her spousal, family or personal relationships, and the best interest of the Applicant's Canadian-born child. The Officer stated explicitly that the assessment of her application was being considered on the basis of unusual and undeserved, or disproportionate hardship.

[6] The Officer began his assessment by examining hardship or sanctions that Ms. Lopez Segura faced upon return to Mexico. He noted that the alleged hardship of abuse from her ex-partner was that which had been set out in her refugee claim, and with respect to which the RPD had determined that an internal flight alternative was available to her in Mexico to avoid this risk.

[7] The Officer determined that there was insufficient evidence to show that the ex-partner of Ms. Lopez Segura was still interested in her or had made threats to her or her family. The Officer then engaged in a lengthy analysis on the availability of state protection in Mexico, presumably in the event that the ex-partner did wish to harm her. The Officer found such protection to be available, although not perfect. The Officer also then considered whether it would be a hardship on the Applicant to access state protection should it be required and found that it was not a hardship.

[8] The Officer considered a psychological report that the Applicant had submitted but gave it little weigh, noting that there was "insufficient evidence to show whether the applicant has had further follow-up treatment or that she is on medication for her illness."

[9] The personal relationships that the Applicant had formed during her time in Canada were considered as well as the hardship that would be caused by severing them. It was noted that the Applicant had informed the authorities that if her application was unsuccessful then her seven-year-old son would return to Mexico with her. The Officer also noted that the Applicant has a partner who is the father of her son, but that this person does not have status in Canada, and that they are not currently living together but that they are undergoing counselling. The Officer recognized that the Applicant had also made many friends during her time in Canada, but concluded that there was "insufficient evidence to establish that severing these ties would have a significant negative impact on the applicant that would constitute an unusual and undeserved or disproportionate hardship."

[10] The Officer then considered the best interests of the Applicant's seven-year-old son. The Officer noted that the child is in grade one of a French immersion program, that he has never been to Mexico, that all his friends and memories are in Canada, and that his father is currently in Canada, albeit without status. The Officer found that it was reasonable to expect that the child had been exposed to the Spanish language, and that at his young age he would adjust to Mexico with minimal problems. The Officer also determined that the state protection available to the Applicant, as well as the internal flight alternative, would be available to her son, if needed. The Officer held that the child would have access to education and Mexican citizenship. While the Officer recognized that a child in Canada likely enjoys better social and economic opportunities than he

would in Mexico, he found that there was little evidence to suggest the child would not have his basic needs met in Mexico, especially given the presence of an extended family in Mexico. The Officer concluded that Ms. Lopez Segura had not established that the hardships of relocating and resettling to Mexico would have a significant impact on the child that would amount to unusual and undeserved hardship, nor would the hardship be disproportionate.

[11] Finally, the Officer considered her degree of establishment in Canada and observed that a certain level of establishment is to be expected of a person living in Canada for seven years, that the applicant had been steadily employed, that she had started her own small business, that she had taken steps to improve her English language abilities, that she had been active in volunteer and community work in Canada, that she owns a home in Canada, and that she assists her partner in his business. However, the Officer held that the Applicant would have anticipated the consequences that might result from her removal from Canada, and that there was insufficient evidence to suggest that closing her business would negatively impact the Canadian economy.

[12] Considering all this information as a whole, the Officer determined that the grounds forwarded by the Applicant did not constitute as unusual and undeserved or disproportionate hardship and that therefore there were insufficient humanitarian and compassionate grounds warrant granting the exemption request.

Issues

[13] The Applicant raises three issues:

1. Whether the Officer erred in applying the wrong test when assessing risk in the H&C application;
2. Whether the Officer made unreasonable conclusions with respect to the Applicant's establishment in Canada; and
3. Whether the Officer failed to conduct an adequate assessment of the best interests of the child directly affected by the H&C decision.

Analysis

A. *Test When Assessing Hardship*

[14] The Applicant submits that the Officer failed to assess whether the circumstances upon return amounted to undue hardship, even if it did not amount to a risk of persecution or cruel and unusual punishment. She asserts that the Officer erred by terminating his analysis after considering the availability of state protection and an internal flight alternative in Mexico.

[15] In *Pinter v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 296, 44 Imm. L.R. (3d) 118, Chief Justice Lutfy held that it is an error of law to treat a PRRA and an H&C application as circumscribing the same legal test. The question of whether the decision-maker applied the appropriate legal test is a pure question of law, and therefore reviewable on a standard of correctness. Subsequent to *Pinter*, there have been many

decisions on this matter, many of which were cited by the parties in this application. Justice Gauthier in *Melchor v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1327, characterized the difference between evaluating risk in the context of an H&C application and evaluating risk in the context of a PRRA as a "subtle difference". However, as was noted by Justice Mosley in *Pacia v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 804 at para. 13, that subtle distinction may be immaterial where there is insufficient evidence of risk or the allegations of risk lack credibility. In my view, that observation applies here.

[16] The harm alleged by the Applicant in her H&C application was the following:

(a) She will be found and harmed by her ex-partner; and

(b) According to a psychologist's report, she is suffering from Post-Traumatic Stress Disorder due to her previous experience of partner abuse and, her psychological condition is exacerbated by the stress of possible return to Mexico even if no further abuse is experienced.

[17] The Officer found that there was insufficient evidence to support her claim that she would be found and harmed by her ex-partner. That finding involved a weighing of the evidence submitted by the Applicant. In my view, it was a reasonable finding based on that evidence and cannot be disturbed on review.

[18] The Officer could have ended his examination of this alleged harm at that point; however, he went on to consider whether there was any harm likely to attach to the

Applicant if she had to either seek an internal flight alternative or avail herself of state protection. Risk of abuse at the hand of her ex-spouse was considered by the RPD and it held that there was an available internal flight alternative available to her in Mexico that would ameliorate, if not eliminate, the risk of harm to her from him. As this was an available option, the Officer correctly went on to examine what, if any, harm the Applicant would suffer if the abusive ex-spouse did locate her. He found that there was no evidence that the Applicant would suffer any harm in seeking out the internal flight alternative. As the Applicant made no submissions on this issue, that finding was reasonable and open to the Officer.

[19] The Officer then considered what protection (in the context of a harm analysis) was available to her if it was needed to keep her safe from the ex-partner. The Officer noted that the main issue in the PRRA decision was the availability of state protection. State protection, while not perfect, was found to be available to her. The Officer then considered whether the Applicant would experience any hardship in accessing that available state protection and found that there was none. That was a finding open to him on the evidence.

[20] Accordingly, the Officer found that the Applicant would experience no unusual and undeserving or disproportionate hardship in either seeking out the internal flight alternative or in accessing state protection if, as was found to be unlikely, the ex-partner sought her out. That was a reasonable, and in my view a correct finding, on the evidence.

[21] The Officer then examined the second alleged hardship. The Applicant stated that she lives in constant fear of her ex-partner believing that he will do whatever it takes to find her and harm her. Whether rational or not, she claims this fear exists even if her partner is unable to locate her and even if state protection is available. In support of her claim she relied on a psychological report dated in 2003.

[22] It was open to the Officer to assign low probative value to the psychological report that was submitted. This report is dated in 2003 and therefore was not the best evidence of her current psychological vulnerability. Further, as the Officer noted the evidence showed that the Applicant was seen by a psychologist in Canada once and that there was no recommendation for further counselling. There was no evidence that she had any follow-up treatment or medication for the alleged psychological condition. In the face of this evidence, the Officer's assessment of the psychological report cannot be said to be unreasonable.

B. *Establishment*

[23] The Applicant relies on my decision in *Ranji v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 521, for the proposition that section 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 requires an assessment of establishment in the context of an applicant's personal circumstances. She submits that the Officer failed to consider her starting point, and the degree of establishment that she had achieved from that starting point.

[24] The Officer did consider a number of establishment factors forwarded by the Applicant, but concluded that a certain level of establishment was to be expected, and that this level did not warrant the exercise of discretion. It is submitted that the Officer failed to acknowledge that the Applicant came to Canada as a victim of domestic abuse and that she suffered from Post-Traumatic Stress Disorder resulting from this abuse and that when these personal circumstances are considered, the level of establishment was not obviously that which could be expected from anyone living in Canada over that period of time. It is true that the Applicant managed to start a small business - a housekeeping company employing two permanent residents as sub-contractors - and to purchase a house, all the while raising her son in a period in Canada of the same duration as Mr. Ranji.

[25] Mr. Ranji had only a grade eight education and had been a farmer in India. He was neither well-educated nor skilled; nonetheless, he had been continuously employed in unskilled positions earning no more than $50,000 annually but had managed to accumulate a sizable bank account, co-purchase a residence with his brother, develop a significant equity in the residence, purchase an RRSP, and financially support his family in India including sending his two children to private school. His establishment evidence was quite exceptional by any standard, but particularly given his personal circumstances. The same cannot be said of this Applicant, in my view.

[26] The Applicant was educated and skilled. She had worked in Mexico as a reporter and proof reader prior to coming to Canada. Further, she improved her education while in Canada including improving her business and language skills. While all of this was

admirable, it shows that she did not start with the same level of disadvantage as Mr. Ranji. Further, while her accumulation of assets is equally admirable, Mr. Ranji was supporting an entire family including his two children in private school, whereas the Applicant was supporting only one child. Further, there is evidence that the father of the child had been living with her at the time and although he was without status presumably assisted with the child care. Accordingly, I do not find the Officer's assessment of establishment to be unreasonable.

C. *Best Interests of the Child*

[27] There are two issues here: (1) whether the Officer applied the correct legal test, and (2) whether the Officer's best interests finding was adequate. Failure to consider the proper legal test is a question of law, and therefore reviewable on a correctness standard whereas the Officer's conclusion on best interests is to be reviewed on a standard of reasonableness.

[28] In *Arulraj v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 529, at para. 14, Justice Barnes held that it is a reviewable error to assess the best interest of a child using tests of 'unusual', 'undeserved' or 'disproportionate' hardship in the assessment of a child's hardship:

> It is apparent that the Visa Officer felt that, in considering the best interests of the two Canadian children, it was necessary to find that they would be irreparably harmed by their father's "temporary" removal from Canada. This was an incorrect and, therefore, unreasonable exercise of the officer's discretion. There is simply no legal basis for incorporating a burden of irreparable harm into the consideration of the best interests of the children. There is

> nothing in the applicable Guidelines (Inland Processing 5, H & C Applications (IP5 Guidelines)) to support such an approach, at least insofar as the interests of children are to be taken into account. The similar terms found in the IP5 Guidelines of "unusual", "undeserved" or "disproportionate" are used in the context of considering an applicant's H & C interests in staying in Canada and not having to apply for landing from abroad. It is an error to incorporate such threshold standards into the exercise of that aspect of the H & C discretion which requires that the interests of the children be weighed. This point is made in *Hawthorne v. Canada (Minister of Citizenship and Immigration)* [2003] 2 FC 555, 2002 FCA 475 (F.C.A.) at para. 9 where Justice Robert Décary said "that the concept of 'undeserved hardship' is ill-suited when assessing the hardship on innocent children. Children will rarely, if ever, be deserving of any hardship".

[29] As Justice Mosley observed in *De Zamora v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1602 at para. 18 substance ought to prevail over form. “I do not read *Hawthorne* as deciding that the use of [the term ‘undeserved hardship] by an immigration officer in considering the children's best interests constitutes reviewable error or renders the decision as a whole unreasonable.” I agree. It is not the use of particular words that is determinative; it is whether it can be said on a reading of the decision as a whole that the officer applied the correct test and conducted a proper analysis.

[30] In this case the Officer concludes his section entitled ‘Best Interests of the Child’ with the statement of which the Applicant complains:

> I have considered the best interests of the child along with the personal circumstances of this family and find the applicant has not established the hardships pf (*sic*) relocating and resettling to Mexico would have a significant impact on the child that would amount to

> unusual and undeserved hardship. Nor would the hardship be disproportionate.

[31] The Applicant submits that it is evident from this passage, and particularly the final passage, that the Officer applied the test of unusual and undeserved, or disproportionate hardship when examining the hardship to the child, rather than examining the hardship *simpliciter* to the child and weighing that with the other H&C factors.

[32] The Court of Appeal in *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, observed that what is required when conducting a best interests of a child analysis in an H&C context is an assessment of the benefit the children would receive if their parent was not removed, in conjunction with an assessment of the hardship the children would face if their parent was removed or if the child was to return with his or her parent.

[33] In my view, that is what this Officer did. The Officer examined the following benefits of non-removal: the child is doing well in school, he has never been to Mexico, his friends and memories are in Canada, and his father is in Canada although he is without status. He also looked at the impact on the child of removal to Mexico: the child is young, he has been exposed to the Spanish language and culture from his mother, he would adjust to Mexico with minimal problems, he would have access to public education, he would have the right to Mexican citizenship, and he will have an extended family in Mexico.

[34] In *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 165 the Court described the level of analysis necessary to be alive, alert and sensitive to a child's best interests when assessing the two-sides of the best interests coin described in *Hawthorne*. Justice Campbell describes what it means to be alert to the child's best interests as "an awareness of the child's best interests by noting the ways in which those interests are implicated." The aspects of the child's life in Canada and in Mexico examined by the Officer as briefly set out above shows that he was alert to this child's interests.

[35] Justice Campbell found that "in order to be alive to a child's best interests, it is necessary for a visa officer to demonstrate that he or she well understands the perspective of each of the participants in a given fact scenario, including the child <u>if this can reasonably determined</u>" (emphasis added). The child in this case is 7 years of age and there was no evidence submitted that directly spoke to anything that was unique to this child that would differentiate him from other 7 year old children born in Canada to an immigrant mother.

[36] In my view, the Officer did understand the perspective of the child, to the extent that it could be determined. He considered his friends, family, school-life. He also acknowledges that the child may enjoy a better social and economic opportunities in Canada than in Mexico, but that is true in virtually all H&C applications. As Justice Décary noted in *Hawthorne*: "The inquiry of the officer, it seems to me, is predicated on

the premise, which need not be stated in the reasons, that the officer will end up finding, absent exceptional circumstances, that the "child's best interests" factor will play in favour of the non-removal of the parent."

[37] Lastly, Justice Campbell observed that the sensitivity requirement requires an articulation of the suffering that the child would experience. There is no precise articulation by the Officer of the suffering that the child would experience. However, in my view that such articulation is not necessary where there is no evidence that "suffering" the child will experience will be different than the usual and common-place suffering any child would be expected to experience when being removed with a parent to a country which is unknown to the child. On the other hand, the officer was sensitive to the factors in Mexico which would lessen that usual and ordinary suffering including the presence of an extended family in Mexico, the child's familiarity with the language and culture, and the availability of school. It is clear from a reading of the decision as a whole that the Officer finds that the child will suffer little if at all as he finds "it is reasonable to expect that the child … would adjust to Mexico with minimal problems."

[38] I find that it is evident from a reading of the decision as a whole, and most particularly the section on the best interests of the child, that the Officer applied the correct test and analysis. Further, having applied the proper test, I cannot find that his assessment of the best interest factor was unreasonable or not in accord with the evidence submitted.

[39] It would have been preferable had the Officer not said when speaking of the child's hardship that it would not amount to unusual and undeserved hardship, nor would it be disproportionate. However, as noted, it is my view that when the decision is read as a whole the Officer's analysis reveals that the hardships this child would experience were not more significant than those any child would experience if removed to a foreign country. To quash this decision on the basis requested would be to elevate form over substance and to assign greater weight to the child's interests than the weight assigned to the other H&C factors which were found by the Officer to not to reach the level of unusual and undeserved, or disproportionate hardship to the Applicant.

[40] Neither party proposed a question for certification; there is none on these facts.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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