Date: 20050120

Docket: IMM-1880-04

Citation: 2005 FC 91

Ottawa, Ontario, this 20th day of January, 2005

Present: The Honourable Justice James Russell

BETWEEN:

GERARDO GARCIA VASQUEZ

NANCY IRENE LIBREROS OCHOA

SERGIO GERARDO GARCIA LIBREROS

SOFIA ALEJANDRA GARCIA LIBREROS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

and

THE SOLICITOR GENERAL OF CANADA

Respondents

REASONS FOR ORDER

[1] This is an application for a judicial review of a decision by a Pre-Removal Risk Assessment Officer ("Officer") dated February 3, 2004 ("Decision") that denied the Applicants' exemption application on humanitarian and compassionate grounds for permanent residence within Canada.

BACKGROUND

[2] Gerardo Garcia Vasquez is a citizen of Mexico and Honduras. He was born on June 20, 1961. His wife, Nancy Irene Libreros Ochoa, and their children are citizens of Mexico.

[3] The Applicants arrived in Canada on August 27, 2000 and made a claim for Convention refugee status on August 30, 2000. The basis of their claim was Mr. Vasquez's alleged fear of persecution in Mexico and Honduras on perceived political grounds and membership in a particular social group as a former bank employee involved in a bank fraud investigation.

[4] On May 14, 2002, the Convention Refugee Determination Division ("CRDD") determined that the Applicants were not Convention Refugees and that there was no basis for their claim. The CRDD concluded that Mr. Vasquez's evidence about his fear of persecution in Mexico and Honduras was not credible, and that any evidence which could be found reliable showed that he may have been involved in unlawful dealings at his bank, and that the bank may have had a legitimate interest in prosecuting him or in compelling him to give evidence about matters within his sphere of responsibility. His decision to leave Mexico for Honduras arose from fear of prosecution, rather than from a fear of persecution, for his activities at the bank or his failing to aid in the investigation in which he could have been a material witness. With respect to his claim against Honduras, the CRDD found that Mr. Vasquez's evidence concerning his situation in Honduras appeared to be "wholly contrived" and inconsistent with his established character and behaviour patterns as revealed in his own testimony.

[5] The Applicants filed an application for leave and for judicial review of the CRDD decision, which this Court dismissed on September 19, 2002.

[6] On October 11, 2002, Mr. Vasquez and Ms. Ochoa made their H & C Application.

[7] On December 19, 2003, Mr. Vasquez was notified that he and his family were ready to be removed from Canada and that he had an opportunity to make a PRRA application prior to removal.

[8] Mr. Vasquez and Ms. Ochoa submitted PRRA applications on January 2, 2004, with further written submissions and documentation filed on January 16, 2004. In his PRRA submissions, Mr. Vasquez reiterated the same basis of his refugee claim as he had before the CRDD.

[9] On February 3, 2004, a PRRA officer ("Officer") determined that the Applicants would not be subject to risk of persecution, torture, risk to life or risk or cruel and unusual treatment or punishment if returned to their country of nationality pursuant to ss. 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*"). Based upon the same meeting, the same Officer also refused the H & C Application that day.

[10] The Applicants sought leave from the Court to commence an application for judicial review of the Officer's decision with respect to their PRRA Application (Federal Court File IMM-1879-04). On June 21, 2004, Mr. Justice Gibson dismissed that application.

[11] On August 12, 2004, Mr. Justice Campbell granted leave to the Applicants regarding their application for judicial review of the Officer's decision with respect to their H & C Application.

ISSUES

[12] The Applicants say that the issue that forms the basis of this application for judicial review is whether the Officer erred in reaching her conclusion that there were not sufficient humanitarian and compassionate grounds to warrant the processing of the applications for permanent residence ("H & C applications") of the Applicants from within Canada. More particularly, did the Officer err by:

a) failing, in her determination made February 3, 2004 concerning the Pre-Removal Risk Assessment applications of the Applicants ("PRRA decision"), which she later adopted in the Decision and reasons relating to the H & C applications, to identify a specific geographic location when considering whether an internal flight alternative was available to the Applicants?

b) failing in the PRRA decision to consider the emotional and psychological state of the Applicant Nancy Irene Libreros Ochoa when she assessed the reasonableness of the purported, yet unidentified, internal flight alternative?

c) considering, in the PRRA decision, the large population of Mexico as an "insulating factor" in her assessment of the existence of an internal flight alternative?

d) ignoring, in the PRRA decision, risks particular to the minor Applicants?

e) ignoring and/or misconstruing other evidence provided in support of the PRRA applications of the Applicants?

f) not providing the Applicants an opportunity to comment on the conclusions reached in her PRRA decision prior to relying on the same in her Decision with respect to the H & C applications?

g) failing, in the H & C Decision, to properly consider the best interests of the minor Applicants?

h) characterizing, in the H & C Decision, the establishment of the Applicants in Canada as "minimal"?

ANALYSIS

Scope of Review

[13] Most of the issues raised by the Applicants are to do with perceived inadequacies in the PRRA decision of February 3, 2004. However, Mr. Justice Gibson refused leave for judicial review of that decision on June 21, 2004. Only the Officer's Decision with respect to the H & C application was granted leave for judicial review by Mr. Justice Campbell on August 12, 2004.

[14] In my view, issues with respect to the PRRA decision are not properly before the Court on this application. Hence, my analysis is confined to those issues raised by the Applicants with respect to the H & C Decision only.

The H & C Grounds

[15] As regards the H & C Decision, the Applicants have raised three issues that require review:

1. did the Officer breach procedural fairness by not giving the Applicants the opportunity to review the PRRA determination and to provide comments before she rendered the H & C Decision?

2. did the Officer adequately address the best interests of the minor Applicants?

3. did the Officer overlook and fail to appreciate the full extent of the Applicants' establishment in Canada?

Procedural Fairness

[16] The Applicants say that the Officer should have disclosed the PRRA decision to them for review and should have given them the opportunity to comment on that decision before she rendered her Decision with respect to the H & C application.

[17] The rationale offered by the Applicants for this position is that where an H & C decision maker relies upon extrinsic information in reaching a conclusion, he or she has a duty to disclose the information in question so that the applicant has an opportunity to respond to any issues raised by the information. The Applicants also point to ss. 6.4, 13.5 and 13.6 of IP5 of Citizenship and Immigration Canada's *Inland Processing Manual* to support and highlight this obligation.

[18] In support of their position, the Applicants cite the Federal Court of Appeal decision in *Haghighi v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 407 (QL) at paras. 37-38:

37. In my opinion, the duty of fairness requires that inland applicants for H & C landing under subsection 114(2) be fully informed of the content of the PCDO's risk assessment report, and permitted to comment on it, even when the report is based on information that was submitted by or was reasonably available to the applicant. Given the often voluminous, nuanced and inconsistent information available from different sources on country conditions, affording an applicant an opportunity to comment on alleged errors, omissions or other deficiencies in the PCDO's analysis may well avoid erroneous H & C decisions by immigration officers, particularly since these reports are apt to play a crucial role in the final decision. I would only add that an opportunity to draw attention to alleged errors or omissions in the PCDO's report is not an invitation to applicants to reargue their case to the immigration officer.

38. In view of the potentially grave consequences for an individual who is returned to a country where, contrary to the PCDO's report, there is a serious risk of torture, the increased accuracy in the decision likely to result from affording the respondent the procedural right sought here justifies whatever administrative [page424] delays might thereby be occasioned. In order to minimize delay, it would be appropriate for immigration officers to give to applicants a relatively short time within which to submit written comments on the report.

[19] *Haghighi* has been followed in *Soto v. Canada (Minister of Citizenship and Immigration*, [2001] F.C.J. No. 1207 (QL) and *Singh v. Canada (Minister of Citizenship and Immigration*, [2004] F.C.J. No. 216.

[20] In these cases, however, the PRRA risk assessment was completed by another officer who did not make the final H & C decision. In the case at bar, the same Officer made both decisions.

[21] The Applicants say this should not matter because, although the same Officer made both decisions, she was fulfilling two very distinct roles and was applying very different criteria to each decision. Hence, if the Officer relied upon her own PRRA

decision, it should have been shared with the Applicants. In fact, the Applicants argue that disclosure is even more important where an officer relies upon her own decision because she is hardly likely to question or assess her own conclusions.

[22] As for the extrinsic aspect, the Applicants say that the PRRA decision relies upon and makes use of country reports that were not advanced by the Applicants themselves, and the PRRA decision is itself extrinsic because it contains conclusions and assumptions of which they had no knowledge.

[23] In reply, the Respondents point to a line of cases from this Court that has held there is no duty to disclose a PRRA decision when the same officer also decides the H & C application. See *Zolotareva v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1596 (QL), 2003 FC 1274 (T.D.); *Akpataku v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 862, 2004 FC 698 (T.D.); and *Chowdhury v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 503 (QL), 2002 FC 389 (T.D.).

[24] In *Chowdhury*, Mr. Justice Blanchard had the following to say on the issue:

19. I am of the view that, on the facts of this matter, the principles enunciated in *Haghighi, supra*, do not extend to recognize an obligation on an officer to disclose to an applicant notes that include; the risk(s) identified by the applicant(s), the officer's analysis of his decision and the publicly available references relied upon. I am of the view, again, on the facts of this matter, that the principles regarding the duty of fairness that were enunciated by the Supreme Court of Canada, in *Baker, supra*, do not extend that far.

[25] The issue before me in this case was faced squarely by Mr. Justice Martineau in *Zolotareva* where the applicant argued that an officer violated the duty of fairness and breached the principles of natural justice by failing to provide her with an opportunity to respond to the decision on the risk of her return to Israel. The applicant in *Zolotareva* also relied upon *Haghigi*.

[26] Referring to the decision of Mr. Justice Blais in *Majerbi v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 1145 (T.D.) (QL), Mr. Justice Martineau came to the following conclusions on this issue at para. 24 of his decision:

I am of the opinion that in this case the PRRA Officer had no duty to disclose the analysis of the risk of return and to give the applicant an opportunity to make comments before reaching a final decision on her application. Specifically, there was no obligation for the PRRA Officer to do so where there was no third party involved in the decision making.

[27] In the case at bar, "there was no third party involved in the decision making." In addition, I cannot distinguish this case in any meaningful way from *Zolotareva* or from

recent decision of this Court in *Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 872, [2004] F.C.J. No. 1134, and *Monemi v. Canada (Solicitor General)* 2004 FC 1648.

[28] The Decision is not reviewable on this ground.

The Best Interests of the Children

[29] The Applicants say that s. 25(1) of *IRPA* adds to the principles in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39 (QL) by imposing a mandatory duty on the Minister in an H & C application to take into account the best interests of any child affected by the decision, and that s. 3(3)(*f*) of *IRPA*, in effect, makes the best interests of any such child a primary consideration because it requires that *IRPA* be applied in a manner that complies with international instruments to which Canada is a signatory including Article 3 of the *Convention on the Rights of the Child*.

[30] Section 3(3)(*f*) of *IRPA* says that "This Act is to be construed and applied in a manner that ... complies with international human rights instruments to which Canada is signatory."

[31] Relying upon *Baker*, the Respondents say that for the exercise of the discretion to fall within the standard of reasonableness, the Officer was obliged to consider the children's best interests as an important factor, to give them substantial weight, and to be alert, alive and sensitive to them. However, while the children's interest should not be minimized, there may well be other considerations for denying an H & C application. In short, the Respondents say that the Officer was not bound to consider only the interests of the children in this case. She was bound to determine the application on all of the evidence before her.

[32] But the Applicants say that, even by the standards set in *Baker*, the Officer did not consider the children's interests correctly in this case. This is because the only risks addressed for the children are derived from those faced by the parents. The Officer, say the Applicants, never asked what would happen to the children themselves if they are required to leave Canada. The Applicants insist that the Officer was obliged to weigh the benefits of their remaining in Canada against the hardships of their going back to Mexico or Honduras.

[33] In the Decision itself, the Officer does make the point that the "Allegations of risk are those that are cited in their PRRA application," and that the "spouse's and children's allegations of risk are derivative ones on the basis of being family members of the PA."

[34] The Officer also goes on to consider the children in the context of the family's establishment in Canada:

The applicants have adduced evidence to indicate a measure of establishment and integration into the community, including gainful employment, courses taken to upgrade their linguistic and employment skills as well as support from friends. I also recognize that their children have adapted to the Canadian school system and community - doing well in school, participating in extra-curricular activities and have also made friends. However, in consideration of the evidence before me, I do not find the applicants have reached a considerable level of integration and establishment in Canada that would warrant a positive visa exemption.

[35] In view of the submissions made on behalf of the children by the Applicants in their counsel's letter of October 12, 2002, it cannot be said that the Officer was not alert, alive and sensitive to the interests of the children in terms of the test set in *Baker*.

[36] So the issue before me is whether ss. 25(1) and 3(3)(*f*) of *IRPA* placed a much higher burden upon the Officer to consider the interests of the children and render those interests "primary" or "paramount."

[37] To support their position on this point, the Applicants place considerable store by the judgment of Madam Justice Simpson in *Martinez v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1695 (T.D.) and, in particular the following paragraphs:

...

9. In this context, I have been asked to consider the relevance of the United Nation's Convention on the Rights of the Child, GA Res. 44/25, UN GAOR, 20 November 1989 (the "Convention"). I note that the Convention deals with the human rights of children and, to paraphrase, it recognizes in its preamble that, inter alia, childhood is entitled to special care and assistance, the family should be protected as it is the natural environment for the growth and well-being of children and children should grow up in a family environment.

10. In my view, the following articles are relevant:

Article 3(1): In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 7(1): The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

Article 9(4): Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

11. Article 9(4) of the Convention recognizes that there will be situations in which children are separated from their parents by state actions including deportations and I have found nothing in the Convention which prohibits a parent's removal. In other words, in spite of the Convention, Canada is entitled to separate children from their parents in situations in which the parents have no legal status in Canada.

12. I now turn to Article 1 of the Convention and note that, although judges have differed about the scope of a removals officer's discretion to defer a removal, they have generally agreed (I) that a removals officer is not required to conduct a full scale humanitarian and compassionate review and (ii) that, in most circumstances, a pending H & C application will not justify the deferral of a removal. That said, the question in this case is whether, when the father is being removed and the children are remaining in Canada, should the removals officer defer the removal pending the outcome of the H & C Application in order to give effect to Canada's obligations under Article 1 of the Convention? In my view, the answer is "yes" for the reasons which follow.

13. Section 3(3)(f) of the IRPA has incorporated the Convention into our domestic law to the extent that the IRPA must be construed and applied in a manner that is consistent with the Convention. In my view, it is contrary to Article 1 of the Convention to use the provisions of the IRPA to separate the Applicant and his children before a decision is made on the H & C Application. This is so because it is only during the assessment of that application that the best interests of the children can be fully addressed and treated as a primary consideration. I have therefore concluded that there is a serious issue in this case. It is whether the existence of the undecided H & C Application is a bar to the removal of the Applicant because the completion of the H & C assessment is required to fulfill Canada's Convention obligations.

...

[38] First of all, it has to be recognized that Madam Justice Simpson reached these conclusions in the context of a stay application where a removal order would have had the effect of separating Mr. Martinez from his wife and two children. Madam Justice

Simpson was deciding whether there was a "serious issue" for purposes of satisfying the stay criteria, and she decided that there was "because it is only during the assessment of that [H & C] application that the best interests of the children can be fully addressed and treated as a primary consideration."

[39] This is different from the case before me where I am reviewing an H & C Decision that does address the interests of the children involved. In effect, the Applicants seek to convert Madam Justice Simpson's reference to a "primary consideration" in *Martinez* into a general rule that in H & C decisions the interests of the children must be the "paramount" consideration because of ss. 25(1) and 3(3)(*f*) of *IRPA*.

[40] The answer to this is that, on the evidence before me, the interests of the children in this case were considered as primary, if primary is given its usual dictionary meaning as something of the first rank or importance. The Officer fully considered the PRRA risks to the children as well as those factors identified by the Applicants as being of relevance when considering the relative benefits and hardships of removing the children from Canada.

[41] What the Applicants are really saying in this case is that the children would obviously be better off in Canada than in Mexico or Honduras and, because they would be better off, Canada's international Convention obligations dictate that factor be given paramountcy in an H & C Decision that involves both parents and children.

[42] I do not think that law, logic or established authority dictates the result urged upon the Court by the Applicants.

[43] On the facts of this case, there is nothing to suggest that the children would be at risk or could not successfully re-establish themselves in Mexico or Honduras. The fact that the children might be better off in Canada in terms of general comfort and future opportunities cannot, in my view, be conclusive in an H & C Decision that is intended to assess undue hardship.

[44] I am of the view that the guidance of the Federal Court of Appeal in *Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358 (QL), 2002 FCA 125, at para. 12 remains applicable to this case:

In short, the immigration officer must be "alert, alive and sensitive" (Baker, supra, at paragraph 75) to the interests of the children, but once she has well identified and defined this factor, it is up to her to determine what weight, in her view, it must be given in the circumstances. The presence of children ... does not call for a certain result.

[45] The Decision in the case at bar was well within the legal parameters recognized for considering the best interest of the children. There was no reviewable error in this regard.

Establishment

[46] I have carefully reviewed each ground of complaint put forward by the Applicants, but the only further issue that I feel requires some discussion is the Applicants' contention that the Officer made a reviewable error when she described the Applicants establishment in Canada as "minimal."

[47] The Applicants point out that they offered undisputed evidence of stable employment, involvement with community organizations, English and other studies, and remarkable community support. The Applicants also say that they satisfied every criterion for assessing establishment found in the *Inland Processing Manual*.

[48] In short, the Applicants say that the Officer's "characterization of their establishment and integration into Canadian society as minimal was not made in accordance with the evidence before her, nor even with the Respondents' own guidelines."

[49] In effect, of course, this amounts to a request that I re-weigh the evidence presented in this regard and conclude that the Officer's Decision was unreasonable. I am fully aware that it is not the role of this Court to merely re-weigh evidence and substitute its own opinion for that of the Officer in question.

[50] The Applicants are asking the Court to isolate the word "minimal" as it is used in that section of their H & C application dealing with "Supportive and Non-supportive Considerations." This section calls for a truncated listing of the factors supporting a positive decision and those against a positive decision. I agree with the Applicants that the comment on the non-supportive side of the leger "Establishment and integration into Canadian society is minimal" hardly accords with the evidence before the Officer.

[51] However, the essence of an H & C determination involves an appropriate weighing and balancing of a wide range of factors as they manifest themselves in the particular case. The heart of the Decision occurs in the "Decision and Reasons" section where that weighing and balancing takes place. If I review the Decision as a whole, I am satisfied that all of the circumstances of the case were taken into account and that the appropriate weighing of relevant factors was done in this case, and occurs under the final section of the Decision, notwithstanding the unfortunate use of the word "minimal" in another section of the application. In other words, the Decision and Reasons" section of

the form reveals that due regard was paid by the Officer to establishment factors and they were not, in fact, treated as minimal. There was no reviewable error in this regard.

Conclusions

[52] In view of the foregoing, it is my view that this application must fail.

[53] Counsel are requested to serve and file any submissions with respect to certification of a question of general importance within seven days of receipt of these reasons. Each party will have a further period of three days to serve and file any reply to the submission of the opposite party. Following that, an order will be issued.

"James Russell"

JFC

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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REASONS FOR ORDER : The Honourable Mr. Justice Russell

DATED: January 20, 2005

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