Federal Court  Cour fédérale

Date: 20121031

Docket: IMM-2593-12

Citation: 2012 FC 1274

Ottawa, Ontario, October 31, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

JOSE MARIA SERRANO LEMUS,
ENMA ALVARADO DE SERRANO,
JOSE MARIA SERRANO ALVARADO

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicants seek judicial review of the February 7, 2012, decision of a Citizenship and Immigration Canada (CIC) Officer ("the Officer") refusing the Applicants' application for an exemption on humanitarian and compassionate (H&C) grounds pursuant to section 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) that would allow them to apply for permanent residence from within Canada.

[2] For the following reasons, this application is dismissed.

I. Facts

[3] The Applicants – Jose Maria Serrano Lemus, his wife, and their son – are citizens of El Salvador who entered Canada as visitors on February 1, 2008.

[4] The Applicants applied for refugee protection on February 23, 2008, under sections 96 and 97 of IRPA on the basis of their experience with the Mara Salvatrucha (MS) gang in El Salvador. The Applicants were extorted for money by the gang, and the female Applicant was robbed and raped by five individuals connected with it.

[5] The application for refugee protection was rejected on October 26, 2010. Mr. Serrano Lemus was excluded from refugee protection on the basis of Article 1(F)(b) of the 1951 Refugee Convention for his commission of a serious non-political crime in the 1980s. The remainder of the Applicants were denied refugee status because, while they were victims of crime, there was neither a nexus to Convention grounds in their application, as required under section 96, nor a personalized risk, as required under section 97. Leave for judicial review of these two decisions was granted, but judicial review was ultimately denied in both cases (*Lemus v Canada (Minister of Citizenship and Immigration)*, 2011 FC 702, [2011] FCJ No 868; *E.A.DS. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 785, [2011] FCJ No 1110).

[6] The Applicants applied for a Pre-Removal Risk Assessment (PRRA) in July 2011, which was refused on February 6, 2012. The officer considering the PRRA application found that the Applicants would not be subjected personally to a risk to their lives or to a risk of cruel and unusual treatment or punishment if returned to El Salvador. The Applicants' application for leave for judicial review was dismissed on July 9, 2012.

[7] The Applicants' H&C application was received by CIC on October 25, 2011. In their application, the Applicants relied on the information submitted in their two previous applications to demonstrate the severe hardship they would face should they return to El Salvador, as well as on submissions with respect to the best interests of their minor child, and their establishment in Canada.

II. Decision under Review

[8] The Officer refused the Applicants an H&C exemption on February 7, 2012, finding that the grounds of establishment, the best interests of the child, and the hardship they would face in returning to El Salvador did not amount to unusual and undeserved or disproportionate hardship.

[9] The Officer first noted that she did not have jurisdiction to reassess claims due to a fear of risk, as set out in sections 96 and 97 of IRPA. Consequently, she did not consider the evidence pertaining to the Applicants' fear of returning to El Salvador, including whether the minor Applicant would be particularly at risk for recruitment by MS, given the gang's primary and

aggressive recruitment and targeting of youth. The Officer did, however, consider the "non-risk factors" submitted by the Applicants.

[10] On the question of establishment, the Officer found that, while the Applicants took positive steps to establish themselves in Canada, their level of integration was "as expected and not exceptional."

[11] The Officer considered the best interests of the Applicants' son, who was seventeen at the time of application. While recognizing that the minor Applicant may enjoy better social and economic opportunities in Canada, the Officer was not convinced that his basic amenities would not be met in El Salvador. The Officer further noted that, beyond his sister who is being sponsored for Canadian permanent residence by her Canadian spouse, the minor Applicant's family is all in El Salvador, and that he would thus have a network of support.

[12] Finally, the Officer found that the hardship stemming from the general country conditions in El Salvador were also faced generally by the entire population. The Officer specifically considered the situation of the female Applicant, particularly the Post-Traumatic Stress Disorder and depression that were the result of the sexual assault she suffered, and found that there was no evidence to suggest that she could not receive the treatment she needed in El Salvador, as she had done before coming to Canada.

III. Issues

[13] The sole issue raised in this application can be framed as follows: Was the Officer's decision reasonable?

IV. Standard of Review

[14] Contrary to the Applicants' assertions, the appropriate standard of review for the questions of mixed fact and law relating to H&C decisions is that of reasonableness (see *Bichari v Canada (Minister of Citizenship and Immigration)*, 2010 FC 127, [2010] FCJ No 154 at para 25; *Inneh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 108, [2009] FCJ No 111 at para 13). Reasonableness is concerned with the justification, transparency and intelligibility of the decision-making process, but also with whether the decision falls within a range of possible, acceptable outcomes defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

V. Analysis

[15] The Applicants raise two arguments with respect to the Officer's decision. They submit that the Officer failed to consider "all the facts that could lead the Applicants to face undue, undeserved or disproportionate hardship" and that she failed to consider evidence central to the matter that was properly before her. The Applicants identify "the problems they face at the hands of the Mara

Salvatruchia [*sic*]" as the missing facts, and point to pages 145 to 188 of the Application Record as the evidence not considered by the Officer.

[16] In assessing their application, the Applicants argue that the Officer should have used the test enunciated by the Immigration Appeal Board in *Chirwa v Canada (Minister of Citizenship and Immigration)*, [1970] IABD No 1, rather than the test of unusual and undeserved or disproportionate hardship set out in CIC's Operation Manual for Inland Processing, *IP 5 -- Immigration Applications in Canada made on Humanitarian or Compassionate Grounds*. This Court has firmly rejected that view (*Rizvi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 463, [2009] FCJ No 582 at para 14), recognizing that the language of the Manual provides useful guidance to officers considering H&C applications under subsection 25(1) of IRPA.

[17] When reviewing the decisions of officers on H&C applications, it is important to remember the role of the provision within the broader legislative scheme. Section 25 of IRPA carves out an exemption to the general rule in section 11 of IRPA that foreign nationals must apply for visas from outside of Canada. While section 25(1) provides that humanitarian and compassionate grounds are the basis for this exemption, section 25(1.3) now excludes certain factors from an officer's consideration of such applications:

Non-application of certain factors	Non-application de certains facteurs
(1.3) In examining the request of a foreign national in Canada, the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee	(1.3) Le ministre, dans l'étude de la demande faite au titre du paragraphe (1) d'un étranger se trouvant au Canada, ne tient compte d'aucun des facteurs servant à établir la qualité de réfugié — au sens de

under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national.	la Convention — aux termes de l'article 96 ou de personne à protéger au titre du paragraphe 97(1); il tient compte, toutefois, des difficultés auxquelles l'étranger fait face.

[18] I am satisfied in this case that the Officer considered all of the evidence before her and came to a reasonable conclusion. Her cognizance of the "problems [the Applicants] face at the hands of the Mara Salvatruchia [*sic*]" is clear from her identification of the decisions pertaining to their refugee and PRRA applications. Given subsection 25(1.3) of IRPA, it was reasonable for the Officer to determine that the Applicants' fears had already been addressed in those other applications, and to focus on the hardship that might be suffered by the Applicants if returned to El Salvador to apply for permanent residence.

[19] As the Respondent rightly points out, the documents referred to in pages 145 to 188 of the Application Record consist primarily of identification documents and police record checks. The only document that relates to the particular problems the Applicants might face with respect to MS is a single affidavit sworn by Mrs. Rosa Elbira Alvarado de Carranza, which alleges that she received threatening phone calls asking for the Applicants' whereabouts. There was no specific mention of this document in the Applicants' submissions, and there is no other corroborating evidence. The Officer is entitled to weigh the evidence before her, and need not mention every piece of evidence she considers. It is clear from the decision that the Officer considered the hardship that might specifically be faced by the minor Applicant and by the female Applicant. Her conclusion that this hardship did not amount to unusual and undeserved or disproportionate hardship was reasonable.

VI. Conclusion

[20] The Officer considered the evidence before her and properly exercised her jurisdiction to come to a reasonable conclusion that is defensible in respect of the facts and law.

[21] Additionally, the Court recognizes that this application raises an issue of general importance. After due consideration of the material filed by the Applicants and the Respondent with respect to a certified question, the Court will certify the following two questions:

> (i) *What is the nature of the risk, if any, to be assessed with respect to the humanitarian and compassionate considerations under section 25 of IRPA, as amended by the Balanced Refugee Reform Act?*
>
> (ii) *Does the exclusion from consideration on humanitarian and compassionate grounds of the "factors" taken into account in the determination of whether a person needs protection under section 96 or 97 of IRPA mean that the facts presented to the decision-maker in the application for protection may not be used in a determination of the "elements related to the hardships" faced by a foreign national under subsection 25(1.3) of IRPA?*

[22] I note that Justice Roger Hughes also recently certified question (i) in the case *Caliskan v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1190.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed;

2. The following two questions are certified:

   (i) *What is the nature of the risk, if any, to be assessed with respect to the humanitarian and compassionate considerations under section 25 of IRPA, as amended by the Balanced Refugee Reform Act?*

   (ii) *Does the exclusion from consideration on humanitarian and compassionate grounds of the "factors" taken into account in the determination of whether a person needs protection under section 96 or 97 of IRPA mean that the facts presented to the decision-maker in the application for protection may not be used in a determination of the "elements related to the hardships" faced by a foreign national under subsection 25(1.3) of IRPA?*

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-2593-12**
STYLE OF CAUSE:	**JOSE MARIA SERRANO LEMUS ET AL v MCI**
PLACE OF HEARING:	**TORONTO**
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