Federal Court  Cour fédérale

Date: 20131001

Docket: IMM-1301-13

Citation: 2013 FC 1002

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 1, 2013

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

DAISY JANE VERA FLORES

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION AND MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [IRPA] for judicial review of the decision made on August 13, 2012, by an immigration officer, which rejected the applicant's application for permanent residence based on humanitarian and compassionate considerations [H&C application].

I. Facts

[2] The applicant is a 23-year-old Mexican citizen who arrived in Canada on November 1, 2007, at which time she sought refugee protection.

[3] The applicant left her country of origin with her mother, her two young brothers and her sister in order to flee certain problems; having suffered physical and sexual abuse in Mexico at the hands of her former father-in-law, the applicant submits that she would still be at risk in that country if she had to return.

[4] On September 6, 2011, the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] rejected her refugee claim. The RPD found that state protection was available and that there was an internal flight alternative [IFA]. The applicant and her family then filed an application for leave, which was granted, and judicial review of the RPD's decision, but they discontinued it on the recommendation of their former counsel because the applicant's mother had initiated an application for sponsorship and permanent residence.

[5] The applicant then filed a pre-removal risk application [PRRA], which was rejected. The applicant did not dispute the rejection of her application.

[6] On June 21, 2012, the applicant submitted an H&C application, relying on her degree of establishment in Canada, the best interests of the children involved, the risks and hardship in Mexico and her medical condition caused by the sexual violence she had suffered.

[7] The H&C application was dismissed. The applicant was informed of this on February 12, 2013, and she filed an application for leave and judicial review of that decision on February 18, 2013.

[8] The applicant also requested and obtained a stay of enforcement of the removal order scheduled for March 25, 2013.

II. Impugned decision

[9] The immigration officer began his review of the case by stating that, under subsection 25(1.3) of the IRPA, he had excluded from his review the risks invoked concerning sections 96 and 97 of the Act. The decision points out that, to be exempted from her obligation to submit her application for permanent residence from outside the country and her obligation to satisfy the requirements of a particular class of permanent residents, the applicant had to convince the immigration officer that she would face unusual and undeserved or disproportionate hardship if she had to submit her application from outside the country.

[10] The officer rejected the H&C application after examining the applicant's relationship with her family, her health, the issue of the best interests of the children involved and the potential hardship that a return to Mexico would represent for her. In the officer's opinion, the hardship that the applicant would experience in returning to Mexico would not be undeserved and unusual or disproportionate.

[11] First, the officer studied the issue of the applicant's level of establishment in Canada. Relying on the documentation submitted, the officer stated that the applicant had not filed an application for a work or study permit since 2010 and that she had not worked or volunteered in Canada. The officer noted that the applicant assisted her young brothers, in particular with their homework, and that a number of acquaintances had prepared letters in support of her application. However, the officer noted that no such letters had been written by her mother or sister or any close friend. The decision also states that the applicant had lived with her common-law spouse from August 2009 to April 2012 and thus had lived apart from members of her family for two and a half years although she had probably stayed in contact with them. The documentation also supported a finding that the applicant had a group of friends and that her family got together to celebrate birthdays, *inter alia*.

[12] While recognizing the family's difficulties, the officer found that the applicant's level of establishment appeared insufficient to grant the exemption set out in section 25 of the IRPA. Certainly, the applicant would be separated from her family for some time, but she could stay in contact through various means of communication. The officer ended his analysis of this point by stating that the applicant would not be a total orphan in Mexico because there were still members of her family there.

[13] Then, the officer focused on the best interests of the children involved. The decision recognized that the applicant had played an increasingly important role in the her brothers' lives for the last few months but found that there was nothing to suggest that the applicant's absence would

be fundamentally harmful for the children, who would still be surrounded by their family and their social network.

[14] The officer also addressed the issue of the hardship the applicant would face if she returned to Mexico. The decision states that the applicant is no longer a child and that she should be able to look after herself. After taking into consideration the documentation submitted, the officer said that he was not satisfied that the fact the applicant is a woman would cause hardship within the meaning of the IRPA. The decision recognizes that the applicant would not return to Mexico under the best circumstances and that she would face some hardship in reintegrating into the country but nonetheless adds that, considering her abilities and the presence of members of her family, this hardship is not undeserved, unusual or disproportionate.

[15] Finally, the officer reviewed the issue of the applicant's health, specifically the therapy that she began because of the sexual abuse she had suffered at the hands of her former father-in-law. The officer stated that resources are offered to women, particularly in Mexico City, and that the applicant showed no sign of a medical condition that would interfere with her return to Mexico.

III. Applicant's arguments

[16] The applicant states that the immigration officer erred in his decision on the H&C application and that therefore he did not correctly apply section 25 of the IRPA.

[17] First, relying on the relevant jurisprudence, she states that the officer did not use the correct test for assessing hardship for the purposes of section 25 of the IRPA. He should have examined the humanitarian and compassionate grounds as a whole rather than in isolation.

[18] The applicant also argues that the officer improperly assessed the hardship she would face if she had to apply for permanent residence from outside the country. She points out that her credibility was never challenged, either by the IRB when the refugee claim was reviewed or by the immigration officer. The applicant adds that the officer accepted as true the allegations regarding the sexual abuse suffered at the hands of her former father-in-law in the city of Leon, Mexico. In his analysis, the officer also stated that the applicant could count on the support of her family members in Leon, that is, in the city where she had been sexually assaulted. The applicant says that she needs to be surrounded by her immediate family.

[19] Moreover, the applicant agrees that she lived apart from her family in Montréal but states that it cannot be said, as the immigration officer did, that the fact she lived with her spouse outside of the family home while keeping personal contact with the family is tantamount to living alone outside the country without direct contact with the family.

[20] The applicant states that a return to Mexico would have serious consequences for her. The officer misapprehended the evidence that was presented to him because he was required to analyze the case by taking into account not only the situation of women in Mexico but specifically the situation of women who have been physically and sexually abused. The National Documentation Package on Mexico contains articles about this. Also, the officer carried out a general analysis of

the situation whereas he should have considered the circumstances that are unique to her: the applicant is a young 23-year-old woman; she was sexually assaulted by her former father-in-law; she will be alone without the support of her family and has no occupation or means to support herself.

[21] The applicant also alleges that the immigration officer used the wrong test in his analysis of the impact that the applicant's return to Mexico would have on the children. Rather than applying the best interests of the children test as the jurisprudence mandates, the officer analyzed the situation by requiring her to demonstrate the existence of excessive hardship for the applicant's brothers and sisters.

[22] Last, on several occasions, the officer referred to the decision he had made on the applicant's PRRA application even though the two procedures require separate analyses. Thus, in the applicant's view, including the previous decision in the decision that is the subject of this review was an error.

IV. Respondent's arguments

[23] The respondent states that the officer applied the correct test in assessing hardship for the purposes of section 25 of the IRPA and that it was reasonable for him to find that there would be no unusual and undeserved or disproportionate hardship for the applicant if she had to apply for permanent residence from outside the country.

[24] The respondent submits that the officer consistently applied the correct test, i.e. unusual and undeserved or disproportionate hardship, throughout his analysis and that, moreover, this test is explicitly set out in the decision. He adds that the fact that the officer simply referred to the PRRA decision and the decision on the refugee claim is not sufficient to demonstrate that the officer did not consider the issue of whether the risk could result in hardship.

[25] Furthermore, the respondent asserts that the applicant is inviting the Court to re-examine the evidence and to reach a different conclusion, which is not the role of the Court.

[26] As regards the level of establishment issue, the respondent is of the view that the officer's decision was reasonable and was based on a review of the evidence because the officer considered a great deal of evidence before concluding that the applicant's level of establishment in Canada was not sufficient to grant an exemption under section 25 of the IRPA.

[27] The respondent also states that the officer properly considered the applicant's personal situation in his analysis and that the impugned decision refers to numerous factors pertaining to her personal situation. The respondent also refutes the applicant's argument, which he characterizes as misleading, about the officer's statement that the applicant could count on the support of family members in Leon, even though that is the city where she was sexually assaulted. In this regard, the respondent points out that the RPD found that state protection was available to the applicant in Mexico. Moreover, the respondent adds that the officer did take the applicant's family ties into account but that he was simply not convinced that physical proximity was necessary since the applicant had already lived apart from her family. Accordingly, it was reasonable to conclude that

the applicant's return to Mexico would not prevent her from maintaining relationships with the assistance of various means of communication.

[28] Also, the respondent is of the opinion that the officer applied the correct test in his analysis of the best interests of the children and that he made his decision after properly examining the evidence. Furthermore, contrary to the case law that the applicant relies on, the children involved in this case are her brothers and sisters, not her own children. She is not the primary person supporting them.

[29] In addition, with regard to the issue of the applicant's alleged hardship, the respondent sets out a series of factors that the officer considered and states that, as a result, the decision is reasonable.

[30] Last, with respect to the applicant's health, the respondent states that the Court does not have the diagnosis and opinion of a health professional indicating that a return to Mexico would jeopardize the applicant's health. She submitted only her counsel's allegations and a letter written by an organization that assists victims of rape and incest; the officer took this evidence into consideration, but it simply was not sufficient to find that the applicant would face unusual and undeserved or disproportionate hardship if she had to apply for permanent residence from outside the country.

V. Applicant's reply

[31] In addition to repeating in large part the arguments in her initial memorandum, the applicant added some clarification.

[32] She states that the purpose of her application to the Court is not to obtain reconsideration of the evidence but rather an assessment of its treatment by the immigration officer who, in the applicant's view, made an unreasonable decision. She repeats that the humanitarian and compassionate considerations presented in support of her H&C application must be examined as a whole and that the officer did not correctly assess the applicant's hardship and all her personal circumstances. She also reiterates that the officer did not use the correct test in his analysis of the best interests of the children involved.

VI. Issues

[33] This case raises two issues:

i. Did the immigration officer apply the correct test in assessing hardship for the purposes of section 25 of the IRPA?

ii. Was it reasonable for the immigration officer to find that the applicant would not face unusual and undeserved or disproportionate hardship if she had to apply for permanent residence from outside the country?

VII. Standard of review

[34] As the respondent indicates, the appropriate standard for determining whether the officer stated the correct test in his assessment of the humanitarian and compassionate considerations, that

is, the first issue in this case, is correctness because this is a question of law (see *Pereira* ***v*** *Canada (Minister of Citizenship and Immigration)*, 2011 FC 1413 at para 8, [2011] FCJ No 1784; see also *Ebonka v Canada (Minister of Citizenship and Immigration)*, 2009 FC 80 at para 16, [2009] FCJ No 122 [*Ebonka*] and *Premnauth v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1125 at para 20, [2009] FCJ No 1594 [*Premnauth*]).

[35] However, the second issue in this case, that is, the application of this test to the applicant's situation, must be judicially reviewed on a reasonableness standard because it is a question of mixed fact and law (see *Pereira* at paras 8-9; see also *Ebonka*, above, at para 16 and *Premnauth*, above, at para 21). Accordingly, the Court must show deference to the officer's decision and intervene only in situations where the impugned decision does not fall within "a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

VIII. Analysis

A. *Did the immigration officer apply the correct test in assessing hardship for the purposes of section 25 of the IRPA?*

[36] In the first paragraphs of his decision, the immigration officer set out the test he intended to apply to his analysis of hardship for the purposes of section 25 of the IRPA, namely, the test of "unusual and undeserved or disproportionate hardship", and that is the correct test to apply in this case. Indeed, as the applicant rightly notes, the Court has already established, in *Singh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 11 at paras 1-2, [2009] FCJ No 4, the test to be used in examining hardship in the context of an application for permanent residence based on humanitarian and compassionate considerations:

> **1** One of the cornerstones of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), is the requirement that persons who wish to settle in Canada must, prior to their arrival in Canada, submit an application from outside Canada and qualify for and obtain a permanent resident visa. Section 25 of the IRPA gives the Minister the discretion to approve deserving cases for processing within Canada. This is clearly an exceptional remedy, as is made clear by the wording of this provision (*Doumbouya v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1186, 325 F.T.R. 186, at paragraph 6).
>
> **2** To obtain this exemption, the applicants had to prove that they would face unusual, undeserved or disproportionate hardship if they were required to file their respective applications for permanent residence from outside the country (*Doumbouya*, above, at paragraph 8; *Akinbowale v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1221, at paragraphs 14 and 24; *Djerroud v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 981, 160 A.C.W.S. (3d) 881, at paragraph 32). [Not underlined in the original.]

[37] Therefore, it is appropriate to find that the officer based his decision on the correct test.

[38] In addition, the applicant states that the officer was required to examine the humanitarian and compassionate grounds as a whole rather than in isolation. However, as the respondent properly notes, the immigration officer concluded his decision by stating the following: "Individually and cumulatively, I am not satisfied, based upon the information provided, that any hardship Ms. Vera Flores may face in returning to Mexico would be either disproportionate or unusual and undeserved. [Not underlined in the original.]" It appears, then, from this passage that contrary to the applicant's argument the immigration officer examined the humanitarian and compassionate grounds, on both an individual and cumulative basis, prior to making his decision.

[39] Accordingly, the first issue in this case does not warrant the Court's intervention.

B. *Was it reasonable for the immigration officer to find that the applicant would not face unusual and undeserved or disproportionate hardship if she had to apply for permanent residence from outside the country?*

[40] This conclusion of the immigration officer was reasonable.

[41] To begin, it should be noted that the exemption under section 25 of the IRPA is the exception, not the rule, and that the onus is, in fact, on the person submitting an H&C application to adduce evidence that supports the person's allegations (see *Kisana v Canada (Minister of Citizenship and Immigration)* 2009 FCA 189 at para 35, [2009] FCJ No 713; *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 5, [2004] 2 FCR 635). Thus, it was incumbent on the applicant to convince the officer that her personal situation was such that having to apply for permanent residence from outside the country would cause unusual and undeserved or disproportionate hardship.

[42] The applicant states that the immigration officer committed various errors in assessing the case that make the decision he gave unreasonable, in particular, with respect to her establishment in Canada, the best interests of the children involved, the hardship she would encounter in Mexico and her health. She says that the officer did not take her personal situation into account in the decision. From reading the decision, it is possible to ascertain that the officer conducted a valid examination of the various points the applicant raised. Indeed, the officer's decision refers to a series of factors concerning the applicant's personal situation, factors that he weighed in his analysis, including her family relationships, the hardship she had experienced and the circumstances in which she would return to Mexico. The same is true for her level of establishment in Canada, which the officer reasonably found to be insufficient to grant an exemption under section 25 of the IRPA. Moreover,

the officer concluded that the hardship the applicant would encounter in Mexico and the state of her health could not justify granting an H&C application only after examining a considerable amount of evidence on this subject.

[43] As for the argument concerning the city of Leon, the place where the applicant was born and where she was abused by her former father-in-law, the Court notes that there was no evidence before the decision-maker that he was in that city. In her own letter in support of her application, the applicant did not discuss the issue of returning to her native city. She had the burden of presenting the situation, and she did not do so. In addition, the applicant's family in Mexico does not just live in the city of Leon. The decision shows that she has family elsewhere in Mexico City. The immigration officer cannot be faulted for not considering that the applicant's former father-in-law was still in the city of Leon. Moreover, it is appropriate to note that the RPD, in its decision, had concluded that state protection was available.

[44] The immigration officer also noted that the applicant had lived with her spouse for almost 32 months. For him, this demonstrated a certain autonomy on the part of the applicant, who had thus lived away from her family. He used this situation to explain that this separation was comparable to the one she will experience in returning to Mexico except for the fact she will be unable to visit her family members who remain here. However, he added that she will be able to communicate with them by telephone, Internet and mail. The applicant disagrees with this finding. Considering the decision in its entirety, the connection the officer made between these two situations is reasonable. Certainly, it will be more difficult to live at a distance, but the applicant will be able to continuously keep in touch with her mother and her family in Canada.

[45] The applicant also complains that the decision does not really take into consideration the fact that the person being forced to return to Mexico is a young 23-year old woman who has experienced painful events. After reading the decision, I disagree with this. The officer considered these facts in his decision. The applicant would have preferred that the issue be addressed in a more elaborate manner, but in the circumstances the comments made were reasonable.

[46] It is also submitted that the officer referred to information from the PRRA decision. As the respondent states, such references are acceptable and do not justify the Court's intervention on this issue (see *Chowdhury v Canada (Minister of Citizenship and Immigration)*, 2012 FC 943, para 15, [2012] FCJ No 1012).

[47] In addition, the applicant believes that her psychological condition caused by her former father-in-law's assaults should have led the officer to conclude that it was better that she remain in Canada. Like the officer, the Court notes that the therapy sessions are quite recent and that there are psychological services in Mexico. Such a finding is reasonable.

[48] Finally, regarding the more specific question of the test that applies to the issue of the interests of the children involved, I am of the view that the officer applied the correct test. As the Federal Court of Appeal stated in *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 4, [2002] FCJ No 1687: "The 'best interests of the child' are determined by considering the benefit to the child of the parent's non-removal from Canada as well as the hardship the child would suffer from either her parent's removal from Canada . . .". In this case, the officer did in fact discuss the benefits of the applicant's presence for her brothers and sisters. Moreover, the

officer was alert, alive and sensitive to the best interests of the child (see *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 12, [2002] FCJ No 457; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75; *Kolosovs v Canada (Minister of Citizenship and Immigration)*, 2008 FC 165 at paras 8-12, 323 FTR 181). Indeed, he examined the evidence presented to him but concluded that the best interests of the children did not justify granting the applicant's H&C application. Moreover, as the respondent points out, the applicant is not the mother of the children involved, and she is not their primary support.

[49] In his decision, the immigration officer showed that he was alive to the applicant's situation and recognized that she would certainly experience hardship in returning to Mexico. However, after examining the evidence before him, he nonetheless found that he was not satisfied, based on this evidence, that Vera Flores would face unusual and undeserved or disproportionate hardship if she had to apply for permanent residence from Mexico. He reasonably assessed the grounds submitted by the applicant and, considering the examination he conducted, it was completely reasonable for him to reach that conclusion. In addition, as the respondent points out, the role of the Court is not to re-examine the evidence.

[50] Accordingly, the second issue in this case does not justify the Court's intervention.

[51] The parties were invited to submit a question for certification, but no question was proposed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed. No question is certified.

"Simon Noël"

Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1301-13
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