Federal Court  Cour fédérale

**Date: 20140227**

**Docket: IMM-12885-12**

**Citation: 2014 FC 194**

**Toronto, Ontario, February 27, 2014**

**PRESENT: The Honourable Mr. Justice Shore**

**BETWEEN:**

**MARTHA GLADYS BAQUERO RINCON**
**GABRIEL ANDRES SANTOS BAQUERO**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] The anatomy of humanitarian and compassionate (H&C) grounds is based on exceptional criteria in a differently constituted framework. The framework is established to examine extenuating (or extraordinary) circumstances. It is Canada unique response to the fragility of the human condition.

II. Introduction

[2] The Applicants seek a judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] of a decision of an Immigration Officer, dated November 26, 2012, refusing the Applicant's application for permanent residence based on humanitarian and compassionate [H&C] grounds pursuant to section 25 of the *IRPA*.

III. Background

[3] The Principal Applicant, Mrs. Martha Gladys Baquero Rincon, and her son, Mr. Gabriel Andres Santos Baquero, are citizens of Columbia.

[4] In her home country, the Principal Applicant had worked as an occupational therapist in a mental health hospital where she was a health professional, treating the mentally ill and substance and abusers. She also has worked with learning-disability children, teenagers and seniors. In addition, she has also worked as an alcohol and substance abuse counsellor. The state of her health has not allowed her to continue this type of work in Canada.

[5] The Principal Applicant currently suffers from Myasthenia Gravis, a condition that causes muscle weakness. She is also in remission from thyroid and lymphatic cancer.

[6] The Principal Applicant and her family (her son, Gabriel, daughter, Carolina, and husband, Gabriel), migrated to the United States in November 2000 seeking refugee status. They remained in the United States for 6 years. Their refugee claim was ultimately unsuccessful, and they left the United States in early 2006.

[7] After leaving the United States, the Principal Applicant and her family made their way to Canada. They arrived in Canada on March 16, 2006, and made a refugee claim about a month later, on April 25, 2006. This refugee claim was refused on March 16, 2007, on the basis that they lacked credibility. The Principal Applicant and her family sought judicial review of this decision, however, leave was denied by this Court.

[8] The Principal Applicant and her family next requested a Pre-Removal Risk Assessment [PRRA].

[9] In March 2008, they received a negative PRRA and received direction to report to the Canada Border Services Agency for removal to Columbia.

[10] In the same month, the Principal Applicant was diagnosed with thyroid cancer. On the basis of this condition, a deferral of her removal was granted.

[11] Shortly after the granting of this deferral, the Principal Applicant's husband returned to Columbia following a removal order, and her daughter became a permanent resident through a spousal sponsorship.

[12] On June 30, 2008, the Principal Applicant and her son, Gabriel, submitted an H&C application to remain in Canada due to the Principal Applicant's health issues and risk related to ongoing violence in Columbia.

[13] In 2009, the Principal Applicant was diagnosed with lymphatic cancer and underwent surgery to remove it. (The Applicant has had no reoccurrences of cancer since this time.)

[14] On November 26, 2012, the Applicants' H&C application was refused, which is the underlying application before this Court.

IV. Decision under Review

[15] In his decision, the Officer determined that most of the Applicants' allegations of hardship were not sufficiently supported by evidence to conclude that they amounted to unusual and undeserved or disproportionate hardship.

[16] With regard to the Applicants' allegation of hardship resulting from their establishment in Canada, the Officer recognized that the Applicants had "very successfully" integrated themselves into Canadian society; the Applicants had worked and supported themselves and their family, made friends, paid taxes, immersed themselves into their community by volunteering, maintained a residence in Canada, attended school, etc. Although the Officer gave this factor some weight, he concluded that it was insufficient to overcome the requirements to apply for permanent residence from outside Canada. Moreover, the Officer concluded that the hardship caused by their establishment was not due to circumstances beyond their control as they remained in Canada despite a failed refugee claim and a negative PRRA; therefore, the hardship could not be considered unusual or undeserved.

[17] The Officer also found that the Applicants' ability to resettle in Columbia would be a lesser, thus, not a disproportionate hardship to overcome given that the Principal Applicant's spouse and three brothers reside in Columbia, as well as some of her spouse's family members. The Officer determined that this support system could provide adequate emotional support, and possibly financial support, to the Applicants upon their return to Columbia.

[18] With regard to the Applicant's allegation of hardship due to ongoing violence in Columbia, the Officer found that such hardship was not a result of conditions that applied to the Applicants personally, but rather, of general country conditions. Without further evidence relating to how these conditions applied to the Applicants' personally, the Officer concluded that any hardship resulting from these general country conditions was not considered disproportionate.

[19] Likewise, the Officer was not satisfied, based on the evidence, that the Applicants would face disproportionate economic hardships if returned to Columbia. The Officer determined that the Applicants should be in a position to find reasonable employment upon their return to Columbia, particularly due to their work experience and skills acquired while in the United Stated and Canada, which gave them a competitive advantage.

[20] Lastly, the Officer concluded that the Principal Applicant had not provided sufficient evidence to demonstrate that she would not receive adequate medical care in Columbia for her health issues.

[21] The Officer noted that both of the Principal Applicant's tumours had been successfully removed and that she had been cancer-free since 2009; although she was still undergoing regular follow-ups with her doctor as part of a 5-year treatment plan. The Officer did not, therefore, consider the Principal Applicant's earlier battle with cancer to cause her unusual and undeserved or disproportionate hardship upon her return to Columbia. Likewise, the Officer noted that the Principal Applicant's other medical condition, Myasthenia Gravis, would not cause unusual and undeserved or disproportionate hardship as it pre-existed her migration to Canada, and had been successfully managed prior to her leaving Columbia.

## V. Issues

[22] While the Applicants advance a number of arguments in attacking the decision, the Court is of the view that they can be rephrased and concisely restated as two questions:

1) Did the Officer apply the correct test in assessing hardship for the purposes of section 25 of the *IRPA*?
2) Did the Officer err in assessing the Applicants' degree of establishment?

## VI. Relevant Legislative Provisions

[23] The following legislative provision of the *IRPA* is relevant:

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| 25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and | 25. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se |

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| may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected. | conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché. |

VII. Position of the Parties

[24] The Applicants raise a number of issues in respect to the decision. In particular, the Applicants argue that the Officer:

a) Applied the wrong test in considering adverse country conditions in Columbia, particularly by assessing the risk posed to the Applicants as opposed to hardship;

b) Provided inadequate reasons in his finding on the Applicants' establishment in Canada;

c) Mischaracterized the issue raised by the Applicants regarding health care in Columbia, and, in doing so, disregarded relevant evidence;

d) Misappreciated the Principal Applicant's health condition (Myasthenia Gravis);

e) Ignored a hardship factor by not considering the Principal Applicant's dependence on her daughter;

f) Made unreasonable findings of fact on the Principal Applicant's ability to return to her previous profession in Columbia, the financial hardship she would endure there, and whether there was a possibility of familial support in Columbia.

[25] In response to the Applicant's submissions, the Respondent submits that:

1) The Officer applied the correct test in assessing the country conditions in Columbia. The Officer considered what was meant by "unusual and undeserved or disproportionate hardship" and then considered whether each circumstance advanced by the Applicants satisfied the requisite level of hardship;

2) The Officer's reasons regarding the Applicants' establishment in Canada were reasonable, as they made it very clear why the Applicants' establishment was not, in and of itself, sufficient to warrant an exemption of the IRPA;

3) The Officer reasonably assessed the issue of health care in Columbia. There was no evidence before him that the medication or treatment for Myasthenia Gravis was not

available in Columbia. Evidence of general concerns with the Columbian health care system was not sufficient to show that the Principal Applicant would suffer disproportionate hardship as a result of her medical condition;

4) The Officer properly considered the Principle Applicant's medical condition (Myasthenia Gravis), and concluded that she could reasonably be expected to have access to treatment in Columbia;

5) The Officer did not ignore the support the Principal Applicant receives from her daughter in Canada in his reasons. The Officer's analysis considered the emotional support she receives from her daughter, however, there was little evidence that the Principal Applicant was emotionally dependent on her;

6) The Officer did not err in his findings of fact regarding the Principal Applicant's ability to work in Columbia, the financial hardship she would endure there, or whether there was a possibility of familial support in Columbia for the Applicants.

VIII. Standard of Review

[26] The standard of correctness applies to the first question of whether the correct legal test was applied in the Applicants' H&C application (*Guxholli v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1267; *Pereira v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1413; *Premnauth v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1125).

[27] The second question, regarding the Officer's findings of fact and his refusal to grant the H&C application, is assessed on the standard of reasonableness (*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2009] 1 FCR 360).

IX. Analysis

1) Did the Officer apply the correct test in assessing hardship for the purposes of section 25 of the *IRPA*?

[28] In the Court's view, the Officer reasonably assessed the country conditions in Columbia, and the impact such conditions would have on the Applicants. The Officer considered each circumstance advanced by the Applicants to determine if it satisfied the requisite level of hardship.

[29] As correctly pointed out by the Respondent, the onus was on the Applicants to demonstrate that the general country conditions of Columbia could rise to the requisite level of hardship required for an exemption of the *IRPA*.

[30] It is clear throughout the Officer's decision that he was not satisfied by the little evidence provided by the Applicants substantiating their claims of possible hardship in Columbia.

[31] For instance, with regard to the Principal Applicant's main allegation that she would not have access to treatment for Myasthenia Gravis in Columbia, the Officer stated that the Principal Applicant "provided little evidence that she would not be able to receive the kind of care she needs" for her condition; a condition, which, based on the evidence, she had been able to manage successfully prior to leaving Columbia (Reasons for decision at p 11). The Court sees no error in this finding.

[32] As recently reminded by Justice Yvan Roy in *Berthoumieux v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1200:

> [16] … The applicant carries the burden of showing that she will suffer disproportionate hardship, not merely that the country situation is difficult. There is a gap between the evidence of the general country situation and disproportionate hardship that must be filled by the evidence presented by an applicant about his or her particular circumstances.
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> [17] It is one thing to argue that an H&C application ought not to be denied because the particularized circumstances of the applicant would not be any worse than those of the rest of the population. It is quite another to argue generally that it is enough to lead evidence of the country's general situation and then require that the Minister, for all intents and purposes, prove that the general situation will not apply to this applicant. Not only is that a burden that is just about impossible to discharge, but this whole approach does not account for the requirement that the H&C considerations be those relating to the foreign national who is the one who makes the request (section 25 of the Act). [Emphasis added.]
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> (Reference is also made to *Dorlean v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1024; *Ramaischrand v Canada (Minister of Citizenship and Immigration)*, 2011 FC 441, 388 FTR 109; *Lalane v Canada (Minister of Citizenship and Immigration)*, 2009 FC 6, 338 FTR 224)

[33] While the Applicant provided some general information regarding access issues to the health care system in Columbia, she did not provide any evidence that these issues would have a direct impact on her. The Officer was therefore open to find as he did; particularly in light of the objective evidence before him that the Principal Applicant had managed her condition previously in Columbia.

[34] The Applicants' argument that the Officer was required to demonstrate whether the country conditions in Columbia could create hardship on the Applicants considering their personal

circumstances is simply untenable (see Applicants' Application Further Memorandum of Argument at para 27-31). To accept such an argument would mean that "every H&C application made by a national of a country with problems would have to be assessed positively, regardless of the individual's personal situation, and this is not the aim and objective of an H&C application" (*Lalane*, above, at para 1).

[35] The Court recognizes that, prior to her departure from Columbia, the Principal Applicant was employed in a position that allowed her to contribute to a health care program, making it more affordable for her to obtain medical treatment; however, the possibility that the Applicant may now have to pay for her medication out of pocket does not, in the Court's view, meet the requisite level of hardship to be considered unusual and undeserved or disproportionate. This is particularly so in light of the evidence on record, which demonstrates that the Principal Applicant would be able to work.

[36] In her affidavit to the Officer, the Principal Applicant made it clear that she could work despite suffering from Mysthenia Gravis:

> 5. A job that I am able to do is working as a counsellor, because it involves a variety of tasks, movements and physical positions. This is why I was able to work as a drug and alcohol counsellor for about three and a half years while living in the United States. I was able to do this work despite the Mysthenia Gravis because I was not on my feet all day and was not required to perform repetitive movements…
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> (Applicants' Application Record at pp 669-670.)

[37] The Applicant argues that her condition has worsened, and that she is today unable to work; however, no evidence was brought before the Officer demonstrating this fact. As such, the Court cannot find that the Officer's finding on this issue was unreasonable.

[38] In light of the insufficient evidence provided by the Applicants, it was open to the Officer to conclude that the Applicants would be subject to no more than the usual hardship associated with leaving Canada after a prolonged period of time. The Court cannot fault the Officer for not reaching a different conclusion in this respect, nor can it find that the Officer applied the incorrect test in assessing hardship. The Officer assessed the relevant facts very clearly against the standard of undeserved, unusual or disproportionate hardship.

2) Did the Officer err in assessing the Applicants' degree of establishment?

[39] While the Court may not agree with the various issues raised by the Applicants regarding the Officer's other findings, this decision must be returned for reconsideration as the Officer failed to provide adequate reasons in support of his conclusion on the Applicants' establishment in Canada.

[40] In his decision, the Officer noted that there were a number of positive factors related to the Applicants' establishment; however, the Officer concluded, without providing any analysis, that such factors were not "sufficient to overcome the requirement to apply for permanent residence from outside of Canada" (Reasons for Decision at p 12). The Court does not know why or how the Officer came to this conclusion.

[41] The Officer was required to provide adequate reasons in order to allow the Applicants to know why their application was refused and to allow consideration as to whether to seek leave and judicial review of that decision. This duty has been reiterated by this Court numerous times (*VIA Rail Canada Inc v National Transportation Agency*, [2001] 2 FC 25 at para 21 (CA)). In, *Via Rail*, the Federal Court of Appeal stated:

> [22] The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. (*Northwestern Utilities Ltd. v. Edmonton (City)*, [1979] 1 S.C.R. 684 at 706, 89 D.L.R. (3d) 161.) Rather, the decision maker must set out its findings of fact and the principal evidence upon which those findings were based. (*Desai v. Brantford General Hospital* (1991), 87 D.L.R. (4th) 140 (Ont. Div. Ct.) at 148). The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out (*Northwestern Utilities*, supra at 707) and must reflect consideration of the main relevant factors (*Suresh v. Canada (Minister of Citizenship and Immigration)*, [2000] 2 F.C. 592 at 637 and 687-688, 183 D.L.R. (4th) 629 (C.A.)).

[42] In the present case, the Applicants appear to be very well established in Canada and provided considerable evidence of the hardship that they would suffer if uprooted from their community. In particular, the Applicants provided numerous support letters from community organizations and members of their community, in addition to a petition signed by over 500 individuals against their removal. The Principal Applicant also provided evidence indicating she relies heavily on her daughter, who resides in Canada, for emotional and financial support. The Officer dismissed this evidence without providing any reasoning for why he considered these factors insufficient to warrant an exemption from the *IRPA*. This was unreasonable.

[43] In *Raudales v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 385, this Court stated: "[a]bsent a proper assessment of establishment … a proper determination could not be made … as to whether requiring [the Applicant] to apply for permanent residence from abroad would constitute hardship that is unusual and undeserved or disproportionate." (at para 19) (Reference is also made to *Judnarine v Canada (Minister of Citizenship and Immigration)*, 2013 FC 82, 425 FTR 312).

[44] The Court finds that this view applies here. A proper determination cannot be made as to whether requiring the Applicants to apply for permanent residence from Columbia would constitute unusual and undeserved or disproportionate hardship, as no assessment was done regarding the hardship they would endure from being removed from Canada.

[45] The Court finds that this decision lacks the justification, transparency and intelligibility identified in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

X. Conclusion

[46] For all of the above reasons, the Applicants' application for judicial review is granted and the matter is returned for determination anew (*de novo*) before another Immigration Officer.

**JUDGMENT**

**THIS COURT ORDERS that** the Applicants' application for judicial review be granted and the matter be returned for determination anew (*de novo*) before another Immigration Officer with no question of general importance for certification.

"Michel M.J. Shore"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-12885-12 |
| **STYLE OF CAUSE:** | MARTHA GLADYS BAQUERO RINCON, GABRIEL ANDRES SANTOS BAQUERO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
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