

Federal Court



Cour fédérale

Date: 20140320

Docket: IMM-3132-13

Citation: 2014 FC 274

Calgary, Alberta, March 20, 2014

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**GERSON RAMIREZ AGUIRRE
ROSA MARIA SANDOVAL**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] For the reasons that follow, this application for judicial review is allowed and the decision of an immigration officer, dated April 2, 2013, determining the Applicants should not be granted a humanitarian and compassionate exemption under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the H&C decision], is set aside.

[2] The Applicants are Mexican citizens with a Canadian-born child. They first entered Canada in June 2007 on the basis of a student visa issued to Mr. Ramirez Aguirre. In August 2007, the couple returned to Mexico. On October 31, 2007, Mr. Ramirez Aguirre obtained a temporary work permit and reentered Canada; Ms. Sandoval entered Canada as a visitor in November 2007.

[3] On October 21, 2008, they had a son, Luis Olegario Ramirez Sandoval. He is a Canadian citizen by birth and at the time of the H&C decision, was four and a half years old.

[4] In August 2009, the couple asked for Canada's protection as refugees, claiming persecution due to an incident involving the army and a brutal assault on Ms. Sandoval's brothers. She testified that her brothers were attacked by the Mexican army, doused with gas, and set on fire. One of her brothers died. The couple claimed they feared the army would persecute and murder them if they returned to Mexico. The Board accepted their story as credible, but did not find that the family would continue to be persecuted. The claim was denied on November 10, 2011.

[5] In February 2012, the couple made their application for an H&C exemption to permit them to apply for permanent residency from within Canada. They claimed they would face hardship if returned to Mexico. They referenced the violence in Mexico, the poverty in the areas where they had lived, and the lack of opportunity to peacefully raise their family. Included with the application was a letter from a counselor at the Calgary Immigrant Women's Association that stated that Ms. Sandoval suffered from post traumatic stress disorder [PTSD] arising from her brothers' treatment at the hand of the Mexican military, and which recommended that she remain in Canada.

[6] It was further claimed in the H&C application that the best interests of their Canadian child favoured the family remaining in Canada, because Luis would be forced to endure risk and hardship, and would not have the safe and secure life he enjoys in Canada.

[7] The officer determined that the Applicants had not shown undue, undeserved or disproportionate hardship, and that the hardship to the child was not determinative. I agree with the officer that the child's best interest is not dispositive; however, the officer's analysis of those best interests and of the hardship to Ms. Sandoval is otherwise lacking in intelligibility.

[8] The officer's examination of Ms. Sandoval's PTSD and hardship on her if she were required to return to Mexico is captured in the following statement: "Objective documentary evidence obtained through independent research shows that treatment is available for [Ms. Sandoval] in Mexico and that accessing such treatment would not constitute an unusual and undeserved or disproportionate hardship." However, treatment was never the issue; rather, the focus of the expert opinion which the officer accepted, was that Ms. Sandoval would suffer psychological harm if returned to the country that was the cause of her PTSD. This is evident from the following passage in the opinion letter:

It is my recommendation that she remains in Canada, where she feels safe and secure. In Canada, she can restore her ability to make choices, taking back control of her life and becoming self-reliant. Once she feels safe, she will be able to continue supporting and contributing positively to her family of origin. The role of community for healing PTSD survivors is extremely important. Unfortunately, in Mexico, she won't be able to find that sense of security and safety that is crucial for her recovery. If she returns to Mexico, which is where her family was assaulted, it is almost sure that she will remain in a state of hyperarousal, hypervigilance and recurrent thoughts which will perpetual [*sic*] the traumatic

experience. Without this sense of safety and ability to control her own life, recovery can't start for Rosa.

[9] The officer's failure to properly assess this evidence is a reviewable error.

[10] Further, I find that the officer's assessment of the child's best interest also constitutes a reviewable error.

[11] First, the officer only assessed Ms. Sandoval's PTSD through the lens of undue and undeserved or disproportionate hardship, not through the lens of the best interests of the child.

Justice O'Reilly recently dealt with a similar situation in *Perez Alcocer v Canada (Citizenship and Immigration)*, 2013 FC 3, where at paras 9 and 10 he stated:

The officer considered a psychological report in which Mr. Perez Alcocer was diagnosed with Post Traumatic Stress Disorder (PTSD). She noted that there was no evidence that Mr. Perez Alcocer was being treated for his condition or that treatment was unavailable in Mexico.

However the officer did not consider some of the report's key findings. It states that Mr. Perez Alcocer sleeps poorly and worries about his family's safety; he experiences dissociative behaviour and memories of traumatizing events; if he returns to Mexico, Mr. Perez Alcocer's condition will worsen because of his fear for his family; the entire family will feel the psychological effects of a return to Mexico. The officer did not refer to these factors.

[12] In this case, the officer accepted the professional opinion that Ms. Sandoval will "remain in a state of hyperarousal, hypervigilance and recurrent thoughts" but failed to note the other aspects of the report, set out below, that go to the best interest of the child:

During the first sessions, she presented anxiety symptoms: constant crying and difficulty speaking. In addition, she could not keep eye contact. She was experiencing overwhelming helplessness, terror and guilt. Rosa has been subject to a very traumatic experience. She has constant nightmares and she presents emotional detachment. She also shows shame and survivor guilt. She said that she was constantly alert and worried about safety in general. She also had anxiety symptoms such as a rapidly beating heart and sweating. These are symptoms of hypervigilance and hyperarousal which are common of PTSD. Her sense of self and safety has been shattered. It seems that she is in an existential crisis where the fundamental assumption about safety doesn't exist. Regaining in a sense of safety and basic trust is imperative for her recovery.

Rosa has been working very hard in her recovery. We have established a very good rapport and a safe environment where she has been able to tell her story and display emotions. We have worked together to make sense of her experiences. This has allowed her to reconnect with herself and to be aware of herself in relation to her experience. She is now able to control some of her anxiety using breathing and relaxation techniques. She also has been working on recognizing distorted thinking, and she is more aware of her self talk.

Before she was very isolated, now she is participating in different programs in the community. Rosa is able to participate more actively in her son's life, and she has very good support from her husband. (emphasis added)

[13] In the best interests of the child analysis, the officer overlooks the impact that a relapse of PTSD symptoms in Ms. Sandoval would have on the Canadian child, and whether this amounts to hardship.

[14] The Respondent submits that psychological reports are a form of advocacy, and an officer is entitled to determine the weight given to it for immigration purposes: *Palka v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 165 [*Palka*] at para 17.

[15] *Palka* is a case about irreparable harm required for a stay of removal. It was said by the Federal Court of Appeal at para 17 that:

Jadwiga relies on a report from a psychologist stating that a return to Poland would cause her psychological harm. In my view, this is an insufficient evidential basis to establish irreparable harm. First, the report was based largely on what Jadwiga told the psychologist about her experiences; however, the Board has found her evidence of spousal abuse to be non-credible, a decision which the PRRA officer held was not overcome by new evidence. Second, Jadwiga and the psychologist had only one meeting and there was no evidence of any follow-up treatment. Third, the report was prepared in 2006 to assist Jadwiga in her efforts to remain in Canada on H&C grounds and is thus, to an extent, self-serving. Fourth, stress and depression caused by the prospect of removal from Canada are of little relevance in this context since they are inherent in the enforcement of the Act.

[16] Justice Shore has explained *Palka* in *Roh v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 1273 para 52, as follows:

In addition, Ms. Roh argues that news of her potential deportation has exacerbated the deterioration of her mental health and that there would obviously be irreparable harm if she were to act on her suicidal thoughts upon confirmation of her deportation from Canada; however, the Federal Court of Appeal has held that psychological stress, depression or anxiety arising solely from the removal does not constitute irreparable harm (*Palka v Canada (MPSEP)*, 2008 FCA 165, at para 17). (emphasis in original omitted)

[17] The Respondent's reliance on *Palka* is misplaced. It dealt with a psychological report alleging damaging psychological conditions arising solely from removal, based on a single interview, designed for an H&C application, and from a non-credible applicant. In those circumstances the Court of Appeal held that it may be discounted.

[18] In this case, the Board found the Applicants credible in their refugee protection claim. The report, though written to advocate for Ms. Sandoval in her H&C application, was written after more than 20 sessions, and does not mention stress solely from removal. The PTSD in this case is based on the violence perpetrated against Ms. Sandoval's family in Mexico and her survivor's guilt associated with that violence. *Palka* does not apply.

[19] In sum, the officer overlooks the impact that a relapse of prior PTSD symptoms in Ms. Sandoval would have on the best interests of the Canadian child, and whether this amounts to hardship.

[20] The officer also fails to consider and assess how the child's best interests would be served on a return to Mexico, given the documentary evidence submitted by the Applicants on violence targeted towards school children and teachers.

[21] The Applicants submitted a number of articles, some of which I will highlight:

- "Mexican schools appear increasingly vulnerable to the country's drug violence, with five human heads dumped outside one school and threats of a grenade attack on another in the past week alone": "Fears of violence shake Mexico schools," *Agence France-Presse* (2 October 2011);
- "Suspected drug hitmen dumped six headless bodies outside a school in northern Mexico Monday.... Assaultants left the bloodied, beheaded men outside the secondary school in the colonial city of Durango just before dawn and sprayed threatening messages on a nearby

wall, hours before students were due to put on a show to celebrate Mother's Day...":

"Gunmen dump beheaded bodies outside school in Mexico," *Reuters* (9 May 2011);

- "In Mexico's drug war, children are getting increasingly sucked into the violent narcotics trade. Middle-school-age kids are working for the cartels as couriers, lookouts and even assassins. Others are being killed, injured or orphaned in the crossfire": "War turning Mexican kids into targets, killers," *National Public Radio* (1 May 2011); and
- "The demand is the same: teachers have until Oct. 1 to start handing over half of their pay. If they do not, they risk their lives": "As gangs move in on Mexico's schools, teachers say 'enough'," *New York Times* (25 September 2011).

[22] The officer found that it is in the best interests of the child to get an education, and that Mexico provides free public education for 11 years. Further, the officer noted that "[n]o country, including Canada ... can provide a guarantee that poverty and hurtful incidents of a criminal or prejudicial nature will not occur in a child's lifetime."

[23] The decision neglects to mention the grizzly violence, the use of children for narcotics trafficking, and how such an environment would affect the Canadian child on moving to Mexico and partaking in the country's educational system.

[24] The officer is required to conduct a more thorough analysis. The officer should have examined the options for the child, either by remaining in Canada without his or her parents or by returning to Mexico to enter a school and education system which appears over-run with corruption,

extortion, and violence. Merely stating that it is in the best interests of children to be educated does not explain why the child would or would not face hardship on return to Mexico. The decision is not justified, transparent and intelligible; I have no way of knowing whether it is a possible acceptable outcome. As such, it is unreasonable.

[25] The decision will be set aside. Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed, the officer's decision on the Applicants' H&C application is set aside, and their application is remitted to another officer for a fresh determination, in keeping with these Reasons.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3132-13

STYLE OF CAUSE: GERSON RAMIREZ AGUIRRE ET AL v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

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**REASONS FOR JUDGMENT
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