Federal Court  Cour fédérale

Date: 20140618

Docket: IMM-1265-13

Citation: 2014 FC 579

Ottawa, Ontario, June 18, 2014

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

MARIO QUINTANAR PARDO
INGRID MARIA VARGAS GHINES
REGINA QUINTANAR VARGAS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is the judicial review of a decision by an Immigration Officer dismissing the Applicants' application for permanent residence on humanitarian and compassionate [H&C] grounds made pursuant to s 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

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 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.

…

(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 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.

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 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.

…

(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 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.

II. Background

[2] The male Applicant was kidnapped for ransom in Mexico, held 10 days and then released. When his kidnappers continued to harass him, he and his family escaped to Canada in 2009. Their refugee claim was rejected but thereafter they had a Canadian born child. They then applied for permanent residence on H&C grounds.

[3] The H&C decision rejected the application. It was noted that the H&C application was received on November 23, 2011 following the enactment of the *Balanced Refugee Reform Act* of June 29, 2010. A critical new provision is s 25(1.3) as above.

[4] The Immigration Officer found that there was positive establishment but nothing exceptional.

[5] The Immigration Officer did a thorough analysis of country conditions noting in particular that crime and drug-related violence was a problem in Mexico as was corruption. However, despite these general problems, some areas were less affected such as Mexico City – the Applicants' home town. The Immigration Officer also effectively held that the Applicants have internal flight alternatives because other cities/areas were also safe. The Immigration Officer considered factors such as resettlement and employment, violence against women and discrimination.

[6] On the critical determination of the best interest of the children [BIOC], the BIOC is a substantial factor in an H&C analysis but not the overriding one. It must be considered along with other factors. The Immigration Officer found the Applicants' fear to be speculative, that they have family in Mexico City and that the children were young enough to adapt. While remaining in Canada is the preferred option, return to Mexico is not contrary to the BIOC concept.

[7] In terms of country conditions/personal safety, while there may be concerns, the generalized country conditions in Mexico were not sufficient to reach the disproportionate, unusual and undeserved hardship test in part because the conditions were faced by all residents.

[8] Having examined the case by separate factors, the Immigration Officer concluded that on the whole the Applicants did not face unusual, undeserved and disproportionate hardship in returning to Mexico. The H&C application was dismissed.

III. Analysis

[9] The issues in this judicial review are:

- Did the Officer apply the correct test for hardship and was the Immigration Officer's conclusion in respect of generalized country conditions reasonable?
- Was the decision reasonable with respect to the evidence of crime and best interests of the children?

[10] The issue of the correct test for hardship is reviewable on a standard of correctness (*Ambassa v Canada (Minister of Citizenship and Immigration)*, 2012 FC 158, 211 ACWS (3d) 434).

Whether the discretion was exercised properly is reviewable on a standard of reasonableness (*Lemus v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1274, 221 ACWS (3d) 966).

A. *Re: Correct Test*

[11] The Immigration Officer, having considered the considerable evidence, determined that the concerns for personal safety did not constitute a hardship that was unusual, undeserved or disproportionate.

The Immigration Officer did not dismiss evidence of hardship just because it was the same level of hardship faced by the general population in Mexico.

[12] In the Immigration Officer's analysis, she reviewed the country conditions and noted that while crime and drug violence were problems, the level of such violence is different depending on the location in Mexico. The Applicants' home state of Mexico City experienced significantly less violence and was better equipped to deal with crime than any other state.

[13] The Immigration Officer is entitled to consider what conditions prevail in different parts of the country and what the impact of such conditions (in this case crime and drug violence) would have on an applicant.

In the present case, the Immigration Officer concluded that the Applicants would not suffer unusual, undeserved or disproportionate hardship given the levels of crime and drug violence in their home area.

[14] The Immigration Officer applied the proper legal test to the facts and did not just repeat the wording of the test without regard to the facts.

B. *Re: Reasonableness of Decision*

[15] The Applicants challenge the decision by arguing that the Immigration Officer ignored crimes other than murder and reached an unreasonable result after doing the "best interests of the children" analysis.

[16] In effect, the Applicants want this Court to reweigh the evidence and substitute the Court's judgment for that of the Immigration Officer. It is simply inaccurate to suggest that the Immigration Officer focused the analysis of risk solely on crimes of murder when the reality is that the Immigration Officer referred to crimes generally, drug crime, corruption and human rights violation.

[17] Likewise, the challenge to "the best interests of the children" finding is not one where the Court can or should substitute its analysis. The Immigration Officer was "alert, alive and sensitive" to the children. The Immigration Officer noted the risks children face in Mexico including violence, poverty, sexual exploitation and lack of educational opportunities. The Immigration Officer even found that the children would be better off in Canada but that

conclusion is not tantamount to finding that a less preferable country is the basis for a hardship finding.

[18] The "best interests of the children" conclusion was based on proper legal grounds and was reasonable on the facts of this case.

IV. Conclusion

[19] Therefore, this judicial review will be dismissed. There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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