Federal Court  Cour fédérale

Date: 20140619

Docket: IMM-2071-13

Citation: 2014 FC 585

Ottawa, Ontario, June 19, 2014

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

MIGUEL LUIS ANTUNEZ VILLANUEVA, SONIA ROSARIO HUAMAN VEGA, CARLO ANDRE HERMIAS ANTUNEZ NUNEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

UPON an application for judicial review of a decision by the Senior Immigration Officer of Citizenship and Immigration Canada (Officer) dated March 1, 2013 (Decision), which refused the Applicants' application, based on humanitarian and compassionate (H&C) grounds pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), for permanent residence from within Canada;

AND UPON reading the materials filed and hearing the submissions of counsel for the parties;

AND UPON the Court having considered the following in reaching its decision:

[1] The Applicants are a husband and wife and their 16 year old grandson of whom they have custody. They are citizens of Peru. They resided in the United States on a visa from 2003 to 2010, entered Canada on October 27, 2010 and made a refugee claim at that time which was denied. Their H&C application was based on their degree of establishment, the best interests of the child and age discrimination in the Peru labour market. The Officer denied the application finding that, individually and globally, the elements presented by the Applicants were insufficient to establish that they would suffer unusual and undeserved or disproportionate hardship if they were to apply for permanent residence from outside Canada.

[2] The Officer found that the evidence established that the adult Applicants' employers spoke well of them and he viewed their employment and their sound financial management positively. He also gave some positive weight to the female Applicant's volunteer work and was satisfied that the Applicants contributed positively to their church community and had developed close friendships and ties. However, their degree of establishment was consistent with what would usually be developed by persons who had resided in Canada for a similar period of time.

[3] As to the best interests of the child, the Officer acknowledged that the Applicants' grandson had moved to the United States when he was six years old and that, were he to return to Peru, he would likely have to improve his Spanish which could delay his progression and

adjustment in school. The Officer noted that the Applicants had provided very little information to substantiate their submission that their removal would have a detrimental impact on their grandson's health and that there was very little indication that he had any medical issues that could not be met by the medical recourses available in Peru. The Officer gave little weight to this or the assertion that because their grandson's father had suffered difficulties and depression upon return to Peru, that the grandson would suffer the same fate. The Officer also noted that the grandson's father and great grandparents were living in Peru and that the Applicants have no family members in Canada. The Officer found that, while there was little evidence before him that suggested that any challenges that would face the grandson if he returned to Peru could not be overcome, remaining in Canada to apply for permanent residence status would result in the least disruption to his education, plans and day to day life. On that basis, the Officer was satisfied that it would be in the grandson's best interests to remain in Canada.

[4] As to age discrimination in the Peru labour market, the Officer found that the Applicants presented very little documentary evidence to support this assertion and independently consulted various reports, but was unable to locate corroborating information. The Officer noted that the Applicants have university degrees and speak English which may be advantageous to them when seeking employment. The Officer found that any age discrimination contributed minimally, if at all, towards the overall degree of hardship that the Applicants might face if they were required to apply for permanent residence from outside of Canada.

[5] The Officer concluded that the best interests of the grandson was only one of several factors that must be considered. Minimal to no weight could be attributed to allegation of age

discrimination in the labour market and, while the Officer gave some weight to the Applicants' degree of establishment, this was partially offset by the fact that it was what would be expected of persons in their position. The modest amount of information and evidence concerning the potential consequences to the Applicants, their employers, church, friends and others arising from their departure did not enable the Officer to find that they would suffer unusual and undeserved or disproportionate hardship because of this factor.

[6] The Applicants have sought judicial review of the Officer's decision on the basis that the analysis fails to demonstrate, in an intelligible and transparent manner, how the best interests of the child did not outweigh the other factors considered and that the Officer was not alert, alive and sensitive to the interests of the child. Further, the Officer did not take into consideration the establishment of the Applicants' grandson or explain what is considered a typical establishment in Canada when discounting the weight of their establishment. And, finally, that the Officer failed to consider further evidence pertaining to age discrimination in Peru which was submitted after his decision was rendered, in breach of natural justice and procedural fairness.

[7] An immigration officer's H&C decision under section 25 of the IRPA is reviewable on the standard of reasonableness (*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 18; *Kambo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 872 at para 22; *Norbert v Canada (Minister of Citizenship and Immigration)*, 2014 FC 409 at para 17). When reviewing an H&C decision, "considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the fact that the

decision-maker is the Minister, and the considerable discretion evidenced by the statutory language" (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 62 [*Baker*]). Applying the standard of reasonableness, the Court will be concerned with "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47 [*Dunsmuir*]).

[8] Pursuant to subsection 25(1) of the IRPA, exemptions on H&C grounds are exceptional and are discretionary decisions where immigration officers consider situations not envisaged by the IRPA (*Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 15 [*Legault*]; *Baker*, above, at paras 51-53). Officers are to determine whether the applicants would face unusual, and undeserved or disproportionate hardship if they were to leave Canada.

[9] In this case, the Officer concluded that the best interests of the Applicants' grandson was a positive factor in the overall assessment of the H&C application. The Officer found, however, that this one positive factor did not outweigh all of the other factors. Such a finding was open to the Officer as it is consistent with the decision of the Supreme Court in *Baker*, above, where Justice L'Heureux-Dubé found (at para 75) that the children's best interests will not always outweigh other considerations (see *also Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at paras 2-3; *Legault*, above, at paras 12, 13; *Kisana*, above, at para 37). As Justice Tremblay-Lamer stated in *Wang v Canada (Minister of Citizenship and Immigration)*, 2014 FC 304 at para 28:

> [28] Regardless of the Officer's final determination on the best interests of the children, it must be noted that it is settled law that

> while the best interests of the child factor must be given substantial weight, it is not determinative in the context of an H&C decision (*Hawthorne*, at para 3; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 (CanLII), 2002 FCA 125; *Kisana*, at para 37). The question before the Officer is not whether the best interests of the children would require the applicant be allowed to stay in Canada. Rather, the correct question is whether the children's best interests, when weighed against the other relevant factors, justified an exemption on H&C grounds (*Kisana*, at para 38). The Officer's weighing of the factors to be considered in an H&C application, including the best interests of the children was reasonable and should not be disturbed.

[10] In my view, the Applicants essentially seek to have this Court reweigh the evidence which is not its task, and nor is it able to do so (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at paras 59, 61).

[11] Similarly, I see no error in the Officer's analysis of the Applicants' establishment in Canada. The Officer has the expertise and experience necessary to permit him or her to identify the level of establishment that is typical of persons who have resided in Canada for the same approximate length of time as the Applicants and, therefore, to use this as a yardstick in assessing their establishment. In that regard, the Officer stated that it is not uncommon for individuals to be employed, pay taxes, do volunteer work, participate in a church and in other activates, similar to those undertaken by the Applicants, upon moving to a new country. The Officer is to be afforded deference in this regard. There was also no error in the Officer's assessment of the Applicants' allegation of age discrimination. The Officer assessed the evidence that was submitted and stated why it was insufficient to support their submissions.

[12] Essentially, the Officer found that the Applicants would not face unusual and undeserved or disproportionate hardship if they applied for permanent residency from outside Canada. Absent any error in the Officer's decision, this finding, based on the record, falls within a range of reasonable and acceptable outcomes.

[13] The Applicants also submit that the Officer failed to consider their evidence on age discrimination in Peru which they adduced after the hearing. They submit that the Officer had a duty to review this information even if it was submitted after the decision had been made. The failure to do so breached their right to natural justice and procedural fairness. Further, that the doctrine of *functus officio* does not apply in non-adjudicative proceedings and, in appropriate circumstances, the decision-maker can reconsider their decision (*Kurukkal v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 230 [*Kurukkal*]). The Applicants also submit that there is no basis for the Respondent's position that the material submitted post-decision was too late for reconsideration by the Officer because it was submitted after the judicial review was instituted. The Officer proceeded improperly by putting the reconsideration request on hold until the judicial review is completed.

[14] In my view, it must be kept in mind that here, the Applicants sought judicial review and then sought a reconsideration of the decision that is under review. The H&C decision was rendered on March 1, 2013. The Applicants filed their application for leave and judicial review of the negative H&C decision on March 19, 2013. On April 5, 2013, the Applicants submitted further documentary evidence and, on the basis of same, requested a reconsideration of the H&C decision. In effect, the Applicants have two processes in play pertaining to the H&C decision.

[15] Further, the affidavit of Steve Macdonald, Manager, Backlog Reduction Office, CIC, states that "as the request for reconsideration was received after litigation had commenced, the request to reconsider was put on hold until after litigation of the negative H&C decision is concluded." Thus, not only was the application for judicial review made prior to the request for reconsideration, a decision on the Applicants' request for reconsideration has not been made.

[16] In *Medina v Canada (Minister of Citizenship and Immigration),* 2010 FC 504, Justice Mainville stated the following:

> [32] I agree with the Minister that a decision refusing to reopen an H&C application is a distinct decision from the actual decision on the H&C application decision, and may thus be challenged as a distinct decision in a judicial review proceeding. Here the Applicant only sought leave pursuant to subsection 72(1) of the Act with respect to the May 11, 2009 decision, and leave was granted solely in regard to that decision. Consequently, I am not called upon to undertake any judicial review of the subsequent refusal to reopen the matter.

[17] In this situation, there is no decision on the reconsideration, nor was there even a request for a reconsideration when the application for leave and judicial review of the negative H&C decision was filed. I am unable to see how I could find, on a judicial review of the H&C decision, that the Officer somehow erred in failing to consider a reconsideration request that was not before him when he made the decision that is under review.

[18] The Applicants rely on the Federal Court of Appeal's decision in *Kurukkal,* above. There, four days after a negative H&C decision was rendered, the applicant sought reconsideration. The officer refused the request on the basis that he was *functus officio*. The Court found that, in appropriate circumstances, officers have the discretion to reconsider their

decisions. The error in that case was that the officer had failed to recognize the existence of any discretion. The officer's obligation was to consider, taking into account all relevant circumstances, whether to exercise the discretion to reconsider (see also *Gil Arago v Canada (Minister of Citizenship and Immigration)*, 2014 FC 370).

[19] Unlike *Kurukkal*, above, this is not a situation where an applicant filed a new document immediately following a H&C decision having been rendered, but the officer refused a reconsideration request on the basis of *functus officio* or otherwise. Here, the Applicants submitted the new information over a month after the H&C decision was rendered and no decision on the request for reconsideration has been made.

[20] In that regard, *Marr v Canada (Minister of Citizenship and Immigration)*, [2011] FCJ No 520 at para 56 (QL)(TD) [*Marr*] is also distinct from the present case. There, the applicant applied to come to Canada as a skilled worker. When his application was refused, he immediately provided the officer with a copy of a letter which answered one of the concerns raised and requested a reconsideration of the decision. The officer denied the request. Relying on *Kurukkal*, above, Justice Zinn found that the officer fettered his or her discretion as the officer had the ability to consider the new evidence, but was operating under the mistaken assumption that he or she was unable to do so. Therefore, Justice Zinn found that the Court should review the determination on the reconsideration request, finding that it was essentially part of the same decision. Here, there has been no determination on the reconsideration request nor have the Applicants sought to compel the Officer to make a determination as to whether or not he should exercise his discretion to reconsider his decision.

[21] To my mind, there may be an issue as to whether by putting the reconsideration request "on hold" while the judicial review process was ongoing, the Officer was, in effect, declining to exercise or was fettering his or her discretion. However, in these circumstances, that issue need not be addressed as the request for reconsideration had not been made when the application for leave and judicial review was filed. The Officer, therefore, could not have erred in his H&C determination based on a non-existent reconsideration request, nor can this Court review his decision on that basis.

[22] Exemptions under subsection 25(1) from the application of the requirements of the IRPA are discretionary and exceptional. The Applicants had a heavy burden to meet in order to demonstrate that the Officer carried out an unreasonable assessment. The Officer considered the factors submitted by the Applicants and found these insufficient to justify an exemption from the application of the Act. The decision falls within the range of reasonable and acceptable outcomes defensible in respect to the facts and the law (*Dunsmuir*, above, at para 48; *Marr*, above at paras 26, 30-32).

[23] Neither party proposed a question for certification nor does one arise.

ORDER

THIS COURT ORDERS that

1. the application for judicial review is dismissed; and

2. no question of general importance is certified.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Howard P. Eisenberg	FOR THE APPLICANTS
IIdikó Erdei	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Eisenberg & Young LLP Barrister and Solicitors Toronto, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT