Federal Court  Cour fédérale

Date: 20140725

Docket: IMM-3374-13

Citation: 2014 FC 744

Ottawa, Ontario, July 25, 2014

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

SANDRA PATRICIA GOMEZ JARAMILLO
EMILY SOPHIA RILEY
SARAH ELIZABETH RILEY

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

OVERVIEW

[1] This is an application for judicial review by Sandra Patricia Gomez Jaramillo (the Principal Applicant) and her daughters, Emily Sophia Riley and Sarah Elizabeth Riley, under ss. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*), seeking to set aside a decision made by Senior Immigration Officer K. Bilkevitch (the Officer) of Citizenship and

Immigration Canada (CIC) at the Backlog Reduction Office at 1148 Hornby Street in Vancouver, British Columbia (File Number 5290-5752). In the decision dated April 9, 2013, the Officer refused the Applicants' application for permanent residence from within Canada on humanitarian and compassionate (H&C) grounds.

[2] In my opinion, this application for judicial review should be dismissed for the reasons set out below.

FACTS

[3] The Principal Applicant is a citizen of Colombia. The two minor applicants are the Principal Applicant's daughters. One is a citizen of the United-States of America and the United Kingdom, and the other one is a citizen of Brazil and the United Kingdom.

[4] The Principal Applicant originally left Colombia in 1997 with her husband, who is a citizen of the United Kingdom. They lived and visited various countries over the next 12 years.

[5] The Principal Applicant separated from her husband in 2005 and they divorced in 2009.

[6] The Principal Applicant entered Canada as a visitor in 2003, 2004, 2006, and 2007.

[7] The Principal Applicant, with her daughters, entered Canada as visitors on August 18, 2009.

[8] On September 3, 2009, the Applicants filed a claim for refugee protection.

[9] The Refugee Protection Division rejected this claim on the grounds that the Applicants' evidence was inconsistent with a genuine subjective fear or objective risk.

[10] The Applicants applied for judicial review of the Refugee Protection Division's decision denying her refugee claim, but leave to appeal was dismissed by this Court April 10, 2013 (Court File No. IMM-12366-12).

[11] On June 10, 2012, while waiting for determination of their refugee claim, the Applicants applied for permanent residency from within Canada on H&C grounds. More specifically, the Applicants based their H&C application on their establishment and ties to Canada, on the best interest of the children, and disproportionate hardship if removed from Canada.

[12] On April 9, 2013, the Officer held that "the elements presented by the applicants in this case are insufficient to establish that the applicants would suffer unusual and undeserved or disproportionate hardship if they apply for permanent residence from outside Canada. I am satisfied that a visa exemption under section 25 of IRPA is not justified in this case."

[13] The Applicants applied for leave and judicial review of the Officer's decision on May 9, 2013. Leave was allowed by Justice Kane on May 2, 2014.

DECISION UNDER REVIEW

[14] In a letter dated April 9, 2013, the Officer refused the Applicants' application for permanent residence from within Canada on H&C grounds.

A. *Risk and Discrimination*

[15] The Officer first noted that since June 29, 2010, due to statutory amendments, officers assessing H&C application must limit their assessment to risks that don't fall under s. 96 and s. 97 of the *IRPA*. However, he did consider and rule upon discrimination.

[16] Regarding the risk the Applicants could face in Colombia, the Officer noted that the Applicants failed to provide details as to what kind of risk they could face in Colombia. The Officer was therefore unable to conclude that any of the Applicants will face any discrimination upon their return to Colombia. Furthermore, the Officer concludes that there was too little information before her that demonstrated that current conditions in Colombia would impose unusual and underserved or disproportionate hardship on the Applicants.

[17] Regarding the risk the Applicants could face in Brazil, the Officer noted a copy of a denunciation filed on June 1, 2005 in which the Principal Application stated that her husband had slapped her across the face once. The Officer then noted that there is little information before her to demonstrate that the Applicants will face risk of harm or discrimination should they return to Brazil. No complaint was filed. Further, her spouse had been civil in the remaining years and

visited the children six times a year. There was no allegation that the Applicant was afraid of her ex-spouse nor that the children would be at risk in Brazil.

B. *Establishment*

[18] The Officer noted a copy of a separation agreement and copies of bank statements, which confirmed that the Principal applicant receives $4200 in child support payments each month. There was no allegation of default. However, the Officer considered this to be a neutral factor as the Principal Applicant may continue receiving child support payments from her former husband in any location at which she and the children will reside.

[19] The Officer noted a copy of an Ontario Business Licence issued to the Principal Applicant's company, "Saremy Jewelry Design" in 2010. After assessing the company website at the web address provided by the Principal Applicant, the Officer noted that the overall information before her did not demonstrate that the Principal Applicant was actively developing her jewellery design business in Canada.

[20] The Officer gave a positive consideration to the Principal Applicant's purchase of a house in London, Ontario, but noted that she had adduced little evidence to demonstrate that having to sell this property in the event that she had to depart Canada would create hardship that is unusual and undeserved or disproportionate.

[21] The Officer considered the Principal Applicant's community involvement with Museum London and with CIBC Run for the Cure to be positive factors in assessing the Applicant.

[22] The Officer gave some positive consideration to the Applicants' involvement with the St. Michael's Roman Catholic Church in London, Ontario, but was unable to conclude that separating the Applicants from this parish would impose unusual and undeserved or disproportionate hardship on either the Applicants or the parish.

[23] The Officer gave some positive consideration to the Principal Applicant's sponsoring of a child in Indonesia, but was unable to conclude that the she would be unable to continue this sponsorship from Colombia or Brazil.

[24] The Officer noted that the Applicants' had family ties in Canada and the difficulties related to separating them from their family. However, given the evidence, the Officer was unable to conclude that their emotional ties to Canada were such that it would cause them unusual and undeserved or disproportionate hardship to separate from their extended family.

[25] The Officer considered the reference letters to be a positive factor in her assessment, but noted that there was very little evidence to suggest the degree of hardship that would be imposed on the Applicants or any other parties in the event of the family's removal from Canada.

[26] After having considered the Applicants' degree of establishment as a whole, the Officer was not satisfied that their degree of establishment was greater that what would be expected of other individuals attempting to adjust to a new country. The Officer found that the Applicants' degree of establishment in Canada is such that it would not cause them unusual, undeserved or disproportionate hardship to apply for permanent resident from outside Canada.

C. *Best Interests of the Child (BIOC)*

[27] The Officer recognized the need to assess the best interests of the child. He noted the Principal Applicant's view that leaving Canada would dramatically affect the lives of her children and herself and destabilize them. The Officer noted that both the minor applicants have never lived in Colombia. The Officer acknowledged that they are doing well both academically and socially, and have adapted well in Canada. The Officer also noted that the minor applicants have done well in relocating in the past. The Officer was unable to conclude that the minor applicants would not fare well in either Colombia or Brazil upon relocation.

[28] The Officer acknowledged that the two children underwent rehabilitative program from February 2012 until June 2012 after a car accident. However, the Officer found that there was insufficient information to demonstrate that they have not successfully completed the recommended rehabilitation, nor that they still received or required further rehabilitation, or whether such services would not be available in Brazil or Colombia.

[29] The Officer noted that the eldest child had received counselling services between May 2012 and June 2012. However, the Officer found no evidence to show whether the child received counselling services beyond June of 2012, whether she still required counselling services, or that counselling services would not be available to them in Colombia or Brazil.

[30] The Officer noted that neither of the minor applicants submitted a statement to indicate their opinion on the issue or to express their desire to stay in Canada.

[31] Overall, the Officer was unable to conclude from the information provided that relocating to Colombia or Brazil would have a significant negative impact on the minor applicants.

D. *Best Interest of Third Party*

[32] The Officer also considered the best interest of Jared, a Canadian-born child with a disability. The Officer noted a letter from Jared's mother, in which she indicates that her son has a very special bond with one of the minor applicants. The Officer acknowledged that the two share a special bond, but added that they could maintain their friendship through modern communication technology. The Officer concluded that, given the information provided, she was unable to conclude that the minor applicant's departure from Canada would have a significant negative impact on Jared.

E. *Conclusion*

[33] The Officer relied on the following passage from Justice Strickland in *Begum v Canada (Citizenship and Immigration)*, 2013 FC 265 at para 9:

> The H&C process is not meant to eliminate the hardship inherent in being asked to leave after one has been in place for a period of time, but to provide relief from unusual, undeserved and disproportionate hardship that would be caused if an applicant was required to leave Canada and apply from abroad in the normal fashion.

[34] After having "carefully assessed" all of the factors and evidence brought forward by the Applicants, the Officer concluded that the Applicants were similarly situated to other prospective immigrants to Canada who must apply abroad in the normal fashion. The Officer added that:

"individually and cumulatively, the elements presented by the applicants in this case are insufficient to establish that the applicants would suffer unusual and undeserved or disproportionate hardship if they apply for permanent residence from outside Canada." The Officer was satisfied that a visa exemption under s. 25 of the *IRPA* was not justified in this case.

ISSUES

[35] The Applicant submits the following issues:

(i) Did the Officer err in incorporating the personalized risk test in the analysis under s. 25?

(ii) Did the Officer err in assessing the Applicants' potential hardship in the country of origin?

(iii) Did the Officer act without jurisdiction, act beyond their jurisdiction or refuse to exercise their jurisdiction?

(iv) Did the Officer fail to observe a principal of natural justice, procedural fairness or other procedure that they were required by law to observe?

(v) Did the Officer err in assessing the Applicants' establishment in Canada?

(vi) Did the Officer err by failing to consider evidence of the Applicant's establishment in Canada?

(vii) Did the Officer err in assessing the best interest of the child?

(viii) Did the Officer fail to properly assess the child's best interest?

(ix) Did the Officer err by ignoring relevant evidence?

(x) Whether the decision of the Officer to refuse the applicant's H&C application is reasonable per *Dunsmuir v New Brunswick*, 2008 SCC 9 (*Dunsmuir*)?

[36] The Respondent submits that the issue for this Court to decide is whether the Officer's decision was reasonable in the circumstances?

[37] In my respectful view, there are only two issues:

(i) Was the Officer's decision regarding the Applicants' application for permanent residence from within Canada on H&C grounds reasonable?

(ii) Did the Officer apply the right legal test to assess the BIOC?

STANDARD OF REVIEW

[38] In *Dunsmuir* at para 62, the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question."

[39] The issue of determining whether the Officer erred in her decision concerning the Applicants' application for permanent residence from within Canada on H&C grounds from within Canada is a mixed question of fact and law to which the reasonableness standard apply (*Adams v Canada (Citizenship and Immigration)*, 2009 FC 1193 at para 14; *Akinbowale v Canada (Citizenship and Immigration)*, 2007 FC 1221 at para 10; *Ramirez v Canada (Citizenship and Immigration)*, 2006 FC 1404 at para 31).

[40] In *Dunsmuir* at para 47, the Supreme Court of Canada explained:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[41] The issue of determining whether the Officer applied the right legal test in assessing the Applicants' application for permanent residence from within Canada on H&C grounds is a question of law, and is therefore to be reviewed on a correctness standard (*Williams v Canada (AG)*, 2010 FC 701 at para 10; *Mcdonald v Canada (Minister of Human Resources and Skills Development)*, 2009 FC 1074 at para 6).

A. *Applicants' Submissions*

[42] The Applicants submit that the Officer owed a duty of care to unrepresented applicants.

[43] The Applicants submit that the Officer failed to conduct additional research with respect to issues identified in the application for permanent residence from within Canada on H&C grounds. Such additional research is allowed by the Respondent's manual IP 5. Sources available to the Officer include the National Documentation Package provided on the Immigration and Refugee Board of Canada website.

[44] The Applicants submit that the National Documentation Status for Colombia supports the Principal Applicant's allegations that the minor applicants would be subject to harsh, unsafe

conditions if returned to Colombia. The National Documentation Status for Colombia also demonstrates, according to the Applicants, that a single mother with two young daughters would face social discrimination and discrimination at the work place.

[45] The Applicants submit that the National Documentation Status for Brazil provides that there is widespread violence and discrimination against women, violence against children, including sexual abuse, and discrimination based on gender in employment. It also provides that Brazil is a destination for sex tourism, that it is confronted with serious human rights challenges and that the Brazilian criminal Code criminalizes abortion.

[46] The Applicants submit that the Officer erred in determining that the Principal Applicant still had right to permanent residency in Brazil.

[47] The Applicants submits that the Officer failed to assess how the removal from Canada would affect the whole family, given that there is no country where every family member might have right to live in. The Applicants submit that the Officer failed to apply an empathetic approach (*Paul v Canada (Citizenship and Immigration)*, 2013 FC 1081).

[48] The Applicants submit that there is no evidence that the Principal Applicant's husband would pay child support if the children were to be removed from Canada. Furthermore, the Applicants submit that nothing in the separation agreement prevents the minor applicants' father to seek custody if they were to be removed from Canada.

[49] The Applicants submit that the Officer erred in assessing the Applicants' degree of establishment, notably as demonstrated by the letters of support. These letters, the Applicants allege, constitute evidence that their degree of establishment is exceptional and that the degree of hardship they would suffer if they were to be removed from Canada would be exceptional.

[50] The Applicants submit that the Officer had to proceed to an analysis and assessment of degree of establishment and how it weighs in favour of granting an exemption. (*Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813; *El Thaher v Canada (Citizenship and Immigration)*, 2012 FC 1439). The Applicants further submit that the Officer only made passing remarks regarding their family ties in Canada.

B. *Best Interests of the Child (BIOC)*

[51] Regarding the BIOC analysis, the Applicants submit that the Officer used the wrong test and instead used an approach which is unreasonable.

[52] The Applicants submit that the starting point to a BIOC analysis is to identify what is the child's best interest, the degree to which the child's interests are compromised by one potential decision over another, and then determine the weight that this factor should play in the ultimate balancing of positive and negative factors (*Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 [*Williams*]).

[53] The Applicants allege that the Officer failed to identify what is the BIOC. They further allege that the Officer failed to apply the Respondent's manual IP 5 guidelines regarding the factors that need to be taken into account in the BIOC analysis.

[54] The Applicants submit that the Officer was not alert, alive and sensitive to the children's interests in not being removed from Canada and sent to Colombia or Brazil (*Gaona v Canada (Citizenship and Immigration)*, 2011 FC 1083).

[55] The Applicants submit that the Officer used a factor that was supposed to militate towards granting the permanent residence from within Canada on H&C grounds – the degree of establishment – and used it against granting the exemption by noting that the minor applicants' successful establishment and integration in Canada meant that they would adapt quickly to a new environment if they were to be removed from Canada. The Applicants further submit that to speculate that they would successfully integrate a new society is a primary error (*Sosi v Canada (Citizenship and Immigration)*, 2008 FC 1300; *Kneasko v Canada (Minister of Citizenship and Immigration)*, 2006 FC 844).

[56] The Applicants submit that the Officer committed a reviewable error in requiring a significant negative impact on the children (*Junarine v Canada (Citizenship and Immigration)*, 2013 FC 82; *Moya v Canada (Citizenship and Immigration)*, 2012 FC 971).

[57] The Applicants submit that the Officer failed to analyse the evidence, such as many letters of support that speak about the hardship the children would face if removed from Canada.

[58] The Applicants submit that while the Officer noted some of the evidence provided by them in support of their application, The Officer failed to provide reasons regarding how the factors were weighted. The Applicants submit that a summary restatement of the factors considered by the Officer followed by a conclusion, does not constitute sufficient analysis (*Bajraktarevic v Canada (Minister of Citizenship and Immigration)*, 2006 FC 123; *Kim v Canada (Minister of Citizenship and Immigration)*, 2006 FC 244).

[59] The Applicants further submit that the Officer ignored much of their application without providing any explanation as to why the material provided on the application was ignored or unworthy of consideration. The Applicants allege that the Officer did not provide reasons for her conclusions (*Grant v Canada (Minister of Citizenship and Immigration)*, 2005 FC 955; *Tindale v Canada (Citizenship and Immigration)*, 2012 FC 236).

ANALYSIS

[60] The basic issue in this judicial review is whether as the Supreme Court of Canada stated in *Dunsmuir, supra*, the decision below meets the reasonableness test that is, whether "the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".

[61] In this connection the granting of an H&C exemption constitutes an exceptional measure that is warranted if an applicant satisfies an officer that, in their personal circumstances, the requirement to apply for permanent residence status from outside Canada in the normal manner would cause "unusual and undeserved or disproportionate hardship" (*Pannu v Canada (Minister*

of Citizenship and Immigration), 2006 FC 1356 at paras 26, 29; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 15; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817). The test of "unusual and undeserved or disproportionate hardship" was recently affirmed and applied by the Federal Court of Appeal and by this Court: see *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113, *Diabate v Canada (Citizenship and Immigration)*, 2013 FC 129, and *Aboubacar v Canada (Citizenship and Immigration)*, 2014 FC 714.

[62] As to the duty of care alleged to lie on the officer in a case involving an unrepresented applicant, it is clear that the onus lies on an applicant to satisfy the decision-maker that his or her circumstances are such that the hardship involved would be unusual and undeserved or disproportionate. Moreover, the Federal Court of Appeal held in *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 9 [*Owusu*] that an oblique, cursory or obscure allegation is insufficient to place a positive duty on the officer to inquire further. In *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 35 [*Kisana*], the Federal Court of Appeal confirmed *Owusu* in this regard noting: "Moreover, an applicant has the burden of adducing proof of any claim on which the H&C application relies. Hence, if an applicant provides no evidence to support the claim, the officer may conclude that it is baseless." And see *Buio v Canada (Minister of Citizenship and Immigration)*, 2007 FC 157.

[63] In this case the allegation of country and personal risk was insufficiently detailed in the application to engage a duty of further inquiry.

[64] Many of the other alleged errors invite the Court to assess de novo or retry the various submissions and evidence filed in the original submission. Because this is not an appeal, such a relitigation of the case is not within the purview of a judicial review court. As this Court stated in *Maksim v Canada (Minister of Citizenship and Immigration)* (2000), 183 FTR 280 at para 37:

> When deciding the issue of whether such a decision is unreasonable, the reviewing court cannot overstep its role. This is not an appeal but a judicial review. I cannot review the evidence and substitute my opinion for that of the immigration officer. The perspective of the review judge is to examine the evidence before the immigration officer and determine, in this case, whether there was absence of evidence or was the decision made contrary to the overwhelming weight of the evidence. I cannot reach that conclusion.

[65] With respect to country risk, the same considerations apply and the Officer's assessment of itself was reasonable in the circumstances. Little or no evidence was filed, and certainly not enough to demonstrate the imposition of unusual and undeserved or disproportionate hardship.

[66] The Officer's assessment with respect to the Principal Applicant's Brazilian residency again reasonable in the circumstances given the sketchy evidence in that regard.

[67] The Officer's assessment with respect to treatment of the family unit, and the husband's payment of child support if the children were removed from Canada, were reasonable in and of themselves.

[68] In terms of assessing the Applicants' degree of establishment, the Officer clearly had in mind and indeed quoted from some of the letters of support filed by the Applicants. In fact, they were given positive consideration. Likewise the Officer clearly had in mind and referenced the

family and faith ties to Canada. The Officer considered the Principal Applicant's community and charitable work, the regard in which she and the children were held by their peers, the Applicant's business, her home ownership, the children's medical, education, social and other history, and the other factors noted in the introduction above. These elements were weighed individually, after which the Officer undertook the collective weighing of factors raised. The approach was reasonable and the result falls within the range of acceptable reasonable outcomes.

A. *Best Interests of the Child (BIOC)*

[69] After a fairly detailed review of the evidence filed, the Officer concluded his BIOC analysis stating: "Overall, I am unable to conclude from the information before me that having to relocate to Columbia or Brazil would have a significant negative impact on" the Applicants. Regarding the BIOC analysis, I do not accept the Applicants' submission that the Officer applied the wrong legal test.

[70] Quite properly, there are neither verbal formulas nor magic words regarding the test for BIOC. However on judicial review, it is established that an officer must show that he or she is "alert, alive and sensitive" to the best interests of the child or children concerned. I conclude that the Officer met and applied this test in this case.

[71] I agree, as the Respondent submits, that "the fact that the children might be better off in Canada in terms of general comfort and future opportunities cannot […] be conclusive in an H&C Decision that is intended to assess undue hardship" because the outcome would almost always favour Canada (*Vasquez v Canada (Minister of Citizenship and Immigration)*, 2005 FC

91 at para 43; *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 5 [*Hawthorne*]; *Li v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1292 at para 28; *Yue v Canada (Minister of Citizenship and Immigration)*, 2006 FC 717 at para 9; *Ramotar v Canada (Minister of Citizenship and Immigration)*, 2009 FC 362 at para 37; *Miller v Canada (Citizenship and Immigration)*, 2012 FC 1173 at para 25).

[72] For example, the Federal Court of Appeal in *Kisana*, supra at para 30, dealt with considerations of hardship under the rubric of BIOC and held that an officer who "focused her consideration of the children's best interests on the question of hardship does not necessarily lead to the conclusion that she failed to consider their best interests." To the same effect is Hawthorne, supra, quoted in *Kisana*, above.

[73] Given the acceptance of "hardship" as an element in the BIOC analyses in this jurisprudence just, I conclude that reference by this Officer to "significant negative impact" does not constitute legal error in terms of the applicable legal test.

[74] In any event I am not convinced that the Officer used any test but that of the best interests of the children in this regard, and I cannot conclude that a reference to "significant negative impact" in the BIOC analysis points otherwise. On review of the Officer's entire BIOC discussion and analysis, I conclude that the Officer was alert, alive and sensitive to the best interests of the children in this case. Therefore judicial review is not available in connection with the BIOC assessment and analysis.

CONCLUSION

[75] In summary, I do not accept the argument that the Officer failed to appreciate or properly assess, weigh or evaluate the many and various points advanced by the Applicants. Having assessed each factor individually, including BIOC, the Officer was entitled and indeed required to weigh them collectively in order to come to a conclusion on the H&C application as a whole, provided only that he or she applied the correct legal tests, which the Officer did, and that the conclusion falls within the acceptable range of reasonable outcomes referred to in *Dunsmuir*, above.

CERTIFICATION OF A QUESTION

[76] The Respondent requested that this Court certify a question if the Court relied upon the reasons in *Williams,* above, and in that event proposed the same question the Minister's counsel proposed but was not stated in *Martinez Hoyos v Canada (Citizenship and Immigration)*, 2013 FC 998 at para 40. The Applicants opposed certification.

[77] Given the reasons for this decision, the Respondent's request is no longer applicable. No question will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed and no question is certified.

"Henry S. Brown"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Alla Kikinova	FOR THE APPLICANTS
Kareena Wilding	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Michael Loebach Barrister and Solicitor London, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT