Federal Court  Cour fédérale

Date: 20150423

Docket: IMM-3804-13

Citation: 2015 FC 527

Ottawa, Ontario, April 23, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

ABIMELECH FIGUEROA JIMENEZ
MIRIAM RODRIGUEZ JIMENEZ
NOE FIGUEROA RODRIGUEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter and Background

[1] The Applicants applied for permanent residence from within Canada and, claiming humanitarian and compassionate [H&C] grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*Act*], asked for exemptions from any criteria of the *Act* which they did not satisfy. Their request was refused by a senior immigration officer [Officer]

and they now seek judicial review pursuant to subsection 72(1) of the *Act*, asking the Court to set aside the Officer's decision and return the matter to a different officer for re-determination.

[2] The Applicants are a married couple from Mexico and their 10-year-old son; their daughter is not party to the H&C application because she is a Canadian citizen, having been born here in 2006 after the Applicants arrived in Canada on April 19, 2005.

[3] After the authorized period of their admission to Canada ended, the Applicants lived here without status for several years and, eventually, the female Applicant was detected by immigration officials and removal orders were issued against the family on June 23, 2009. On the same day, the Applicants applied for refugee protection, claiming that they feared they would be abducted by criminals if they returned to Mexico. On March 30, 2011, the Refugee Protection Division [RPD] dismissed the Applicants' claims because it found they were not credible and did not subjectively fear persecution, and that the risk of abduction was generalized. A pre-removal risk assessment was also refused on September 13, 2011.

[4] In the meantime, the Applicants had applied for H&C consideration on August 22, 2011, saying that it would not be in the best interests of their children to remove them from Canada and that it would cause the Applicants hardship to disturb their establishment and expose them to the adverse country conditions in Mexico.

II. Decision under Review

[5] On April 25, 2013, the Officer refused to grant the Applicants any exemptions from the requirements of the *Act*.

[6] The Officer dealt first with the Applicants' claims that they would suffer hardship because of adverse country conditions, particularly with regard to discrimination against women, crime, poverty, and corruption. The Officer accepted that, while all were serious problems in Mexico, there were mechanisms for victims of crime to obtain redress. As for the other adverse country conditions, the Officer determined that the Applicants had not proven that "their personal circumstances are such that the general country conditions will directly affect them to a greater extent than the general population or that the general country conditions will cause a hardship for the applicants that is unusual and undeserved or disproportionate." As the onus was on the Applicants, the Officer rejected this aspect of their claims.

[7] The Officer was not convinced that the Applicants' degree of establishment warranted relief. Although Mr. Figueroa Jiménez had said that he was employed in Canada for all but a few months since his arrival here, the Officer noted that there was only documentation to support employment since 2009. His wife, Mrs. Rodriguez Jiménez, had also claimed to have been employed as a cleaner for two years, but there was no documentation that that was the case. The Officer did accept, however, that she was involved in the community and that her volunteer work was appreciated. The Officer also accepted that the Applicants had made friends here, but noted that there was no proof that severing those relationships would cause any hardship. Furthermore,

the Officer noted that during their time in Canada the Applicants "have received due process in the refugee protection system and therefore a measure of establishment is expected to have occurred." Ultimately, the Officer was not satisfied that the Applicants "have integrated into Canadian society to the extent that their departure would cause unusual and undeserved or disproportionate hardship."

[8] The Officer then addressed the adult Applicants' claim that removal to Mexico would negatively affect their son, who was 8 years old at the time, and their daughter, who was then 7. The Officer observed that the best interests of these children was a significant factor which should be given substantial weight, but it was not determinative. Here, the children were doing well in school, but the Officer said that both children were still of an age where their lives revolved around their parents. There was also no evidence that they had developed "relationships in Canada that if severed, would have a significant negative impact."

[9] The Applicants had also claimed that their children could be affected by crime and poverty and that their daughter could suffer from gender discrimination. With respect to crime, the Officer again said that the government was making serious efforts to protect its citizens. As for poverty and gender discrimination, the Officer noted that both of the adult Applicants were educated and employed in Mexico prior to their departure, and that Mrs. Rodriguez Jiménez had gone to university for two years. The Officer expected the children to have similar opportunities in Mexico, and said that: "[w]hile I note that children may enjoy better economic and social opportunities in Canada, the evidence before me does not support that they will be denied education, health care or would be targeted for abuse, trafficking or kidnapping in Mexico."

[10] The Officer then noted that the children would probably need some time to adjust to life in Mexico, but said that it is "reasonable that they have been exposed to the language and culture of Mexico through their parents." While they might miss the friends they have made in Canada, they will still be with their primary caregivers and may benefit from the support of their extended family in Mexico. The Officer therefore concluded that the Applicants "have not established with objective documentary evidence that the best interest of the children in this application will be negatively affected to the extent that an exemption is warranted."

[11] The Officer further found that the Applicants could re-establish themselves in Mexico. Not only did they have reasonably transferable skills and employment experiences, but they also have family in Mexico who could likely support them emotionally.

[12] The Officer thus refused the application, noting that while the Applicants' desire to remain in Canada was understandable, the H&C process is not intended to eliminate all hardship, just that which is unusual and undeserved or disproportionate. The Applicants chose to remain in Canada after the RPD rejected their claims in April, 2011, to pursue other immigration avenues, so the Officer said that it could not be "argued that the resulting hardship was not anticipated by the Act or that it was beyond their control."

III. Issues and Analysis

A. *Issues*

[13] The following issues emerge from the parties' submissions:

1. What is the standard of review?

2. Did the Officer erroneously assess the best interests of the children [BIOC]?

3. Did the Officer erroneously assess the Applicants' establishment in Canada?

B. *Standard of Review*

[14] The appropriate standard of review for an H&C decision generally is reasonableness since it involves questions of mixed fact and law: see, e.g., *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at paragraph 18, [2010] 1 FCR 360 [*Kisana*]; *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at paragraphs 30, 32 and 37, 372 DLR (4th) 539 [*Kanthasamy*]. The Applicants assert, however, that correctness applies when assessing whether the Officer applied the wrong "test" for assessing the BIOC, and in this regard relies upon *Sahota v Canada (Citizenship and Immigration)*, 2011 FC 739 at paragraph 7 [*Sahota*] and upon *Sinniah v Canada (Citizenship and Immigration)*, 2011 FC 1285 at paragraph 26, 5 Imm LR (4^{th}) 313 [*Sinniah*]. In my view, such reliance is misguided since *Sinniah* and *Sahota* have been eclipsed by decisions of the Supreme Court of Canada in recent years which have narrowed the types of questions of law subject to a standard of correctness: see e.g. *Alberta (Information and Privacy Commissioner) v Alberta Teachers'* Association, 2011 SCC 61, [2011] 3 SCR 654, at paragraphs 37-39 and 45-46 [*Alberta Teachers*]; and *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at paragraphs 25-26 and 31-33, [2013] 3 SCR 895.

[15] Furthermore, the Federal Court of Appeal has recently confirmed that a standard of reasonableness applies when reviewing an officer's interpretation and application of section 25

of the *Act* (*Kanthasamy* at paragraphs 30 and 32). In this regard, Mr. Justice James Russell recently made the following observations in *Blas v Canada (Citizenship and Immigration*, 2014 FC 629, 26 Imm LR (4th) 92 [*Blas*]:

> [15] Up to now, there has been a preponderance of authority from this Court holding that a standard of correctness applies to the issue of whether an officer applied the proper legal test in making an H&C decision under s. 25(1) of the Act: see *Guxholli v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1267 at para 18; *Alcin v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1242 at para 35. Some have noted a tension between this position and the presumption of reasonableness review noted above (see *Diabate v Canada (Minister of Citizenship and Immigration)*, 2013 FC 129)[*Diabate*], and others have concluded on that basis that a standard of reasonableness should now apply (see *Tarafder v Canada (Minister of Citizenship and Immigration)*, 2013 FC 817).
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> [16] In a pair of recent decisions dealing with s. 25 of the Act – and in particular with the proper interpretation of the recently added s. 25(1.3) – the Federal Court of Appeal has confirmed that a standard of reasonableness applies when reviewing an officer's interpretation and application of s. 25 of the Act: see *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 [*Kanthasamy*] and *Lemus v Canada (Citizenship and Immigration)*, 2014 FCA 114. Justice Stratas writing for the Court in *Kanthasamy* observed that the Supreme Court applied a standard of reasonableness to an officer's decision under the Act in *Agraira*, above, and there was no basis to distinguish *Agraira* in the case at hand (at para 30). Thus, it is now clear that a standard of reasonableness applies to an officer's interpretation of s. 25 of the Act and the test to be applied in giving effect to it.

[16] I am aware that whether a reasonableness standard applies when reviewing an officer's interpretation of section 25 is still open to some questions. In *Gonzalez v Canada (Citizenship and Immigration)*, 2015 FC 382 at paragraphs 23-34, Mr. Justice Richard Mosley disagreed with Justice Russell's conclusion that a reasonableness standard applies to the test to be applied in making H&C decisions, and said that the correctness standard was applied to the questions of

statutory interpretation in *Kanthasamy*. He therefore followed previous authority and concluded "that the standard of correctness applies to the Officer's choice of legal test" (*Gonzalez* at paragraph 34).

[17] However, while the Court of Appeal did apply the correctness standard in *Kanthasamy*, it confined the use of this standard to situations where a question had been certified. As Justice Stratas explained at paragraph 36 of that decision:

> [P]roviding the definitive answer to a certified question on a point of statutory interpretation is the functional equivalent of engaging in correctness review. But this is merely an artefact of having a certified question put to us. It is not a comment on the standard of review of Ministers' interpretations of statutory provisions generally.
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> [Emphasis added]

[18] In my view though, it is not necessary to comment on this issue further, as the choice of standard of review will not affect the disposition of this case. As noted in *Blas* at paragraph 20, even the reasonableness standard is constrained since "certain legal principles to be applied when assessing the best interests of a child directly affected by an H&C decision are firmly established by the jurisprudence, including that the threshold of unusual and undeserved or disproportionate hardship has no application to this factor." Indeed, there may well be only one reasonable choice of test when an issue involves a serious question of general importance that has previously been answered by the Court of Appeal, since "the resulting 'definitive interpretation' is meant to be binding on administrative decision-makers faced with the same issue in the future, and binding on this Court" (*Blas* at paragraph 22).

[19] With that in mind, the Court should not interfere if the Officer's decision is intelligible, transparent, justifiable, and falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] 1 SCR 190. A reviewing Court can neither reweigh the evidence that was before the Officer, nor substitute its own view of a preferable outcome: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraphs 59 and 61, [2009] 1 SCR 339. Furthermore, the Court does not have "carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result" (*Alberta Teachers* at paragraph 54).

C. *Did the Officer erroneously assess the best interests of the children?*

(1) The Applicants' Arguments

[20] The Applicants argue that the Officer applied the wrong test to assess the BIOC, and they urge the Court to apply the correctness standard of review to this issue. In their view, the Officer introduced a hardship threshold into the BIOC analysis, which they argue is contrary to the guidance in *Canada (Minister of Citizenship and Immigration) v Hawthorne*, 2002 FCA 475 at paragraphs 41-45, [2003] 2 FCR 555, Evans JA [*Hawthorne*]; *Velji v Canada (Citizenship and Immigration)*, 2014 FC 467 at paragraphs 4 and 7; and *Etienne v Canada (Citizenship and Immigration)*, 2014 FC 937 at paragraph 9 [*Etienne*]. The Applicants further point to the formula for assessing the BIOC in *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 at paragraph 63 [*Williams*], which they submit is not a rigid new test but, rather, a synthesis of the existing law.

[21] The Applicants say that the Court must look at the substance of the Officer's assessment and not the form of the analysis. Specifically, the Applicants argue that the Officer never identified whether it would be in the children's best interests to go to Mexico, and instead required the Applicants to show that "the best interest of the children in this application will be negatively affected to the extent that an exemption is warranted." The Applicants say that the Officer failed to look at the stable income of the male Applicant in this case and, in view of *Pokhan v Canada (Citizenship and Immigration)*, 2012 FC 1453 at paragraphs 13-14, never even considered the benefits that the children will receive in Canada, such as financial stability, community support, and better access to health care.

(2) The Respondent's Arguments

[22] The Respondent argues that the Officer's assessment of the facts and his or her interpretation of the test with respect to the BIOC are to be reviewed on the basis of reasonableness (*Faisal v Canada (Citizenship and Immigration)*, 2014 FC 1078 at paragraph 13). Whatever standard is applied though, the Respondent says that the Officer did not err in assessing the BIOC.

[23] According to the Respondent, it is appropriate for an officer to look at what hardship might be faced by children (*Hawthorne* at paragraph 6), so long as that officer does not require the hardship to be unusual and undeserved or disproportionate (citing *Kisana* at paragraphs 30-31). In its view, the Officer in this case simply weighed all the factors together, and only referred to negative impacts to reject the Applicants' factual claims that removal would expose their children to crime, poverty, and discrimination. The Respondent argues that does not mean the

Officer was requiring the Applicants to prove that the children would face some particular level of hardship before relief could be granted.

[24] The Respondent states that the evidence did not show that the children would face any dangers in Mexico based on the general country conditions. The Applicants failed to personalize these potential dangers to their children. The Respondent submits that the Officer did not need to explicitly state that it would be in the BIOC to stay in Canada, since it can be presumed that the Officer knows that the BIOC favours non-removal of the parents (*Hawthorne* at paragraph 5). To the extent that *Williams* suggests otherwise, the Respondent emphasizes that there is no "magic formula" for assessing the BIOC, and argues that the framework presented in *Williams* should not be followed since it contradicts *Hawthorne* and *Kisana* (citing *Webb v Canada (Citizenship and Immigration)*, 2012 FC 1060 at paragraph 13 [*Webb*]).

(3) Analysis

[25] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193, the Supreme Court of Canada set out what the reasonableness standard requires when an officer assesses the best interests of children:

> 75 …for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.
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> [Emphasis added]

[26] In *Kisana*, the Federal Court of Appeal clarified that:

> [24] … an applicant is not entitled to an affirmative result on an H&C application simply because the best interests of a child favour that result. It will more often than not be in the best interests of the child to reside with his or her parents in Canada, but this is but one factor that must be weighed together with all other relevant factors. It is not for the courts to reweigh the factors considered by an H&C officer. On the other hand, an officer is required to examine the best interests of the child "with care" and weigh them against other factors. Mere mention that the best interests of the child has been considered will not be sufficient (*Legault*, *supra*, at paragraphs 11 and 13).

[27] While the Officer here acknowledged that he or she was "required to be alert and sensitive to the interests of children…through identification and examination of all factors related to the child's life," he or she was neither alert nor sensitive to all such factors. The Officer did not look to any scenario by which it might be in the children's best interests to stay in Canada with their parents and maintain the status quo. As Mr. Justice Donald Rennie noted in *Etienne* at paragraph 9: "In order for an officer to be properly 'alert, alive and sensitive' to a child's best interests, the officer should have regard to the child's circumstances, from the child's perspective."

[28] Not only did the Officer here not do that, but he or she also did not properly identify the BIOC and examine them "with a great deal of attention" or "with care" (*Canada (Citizenship and Immigration) v Legault*, 2002 FCA 125 at paragraphs 13 and 31, [2002] 4 FCR 358) [*Legault*]. The Officer acknowledged that the documentary evidence showed that "the high crime rates in Mexico include violence in which children are often affected" (emphasis added); yet, he or she unreasonably discredits this objective evidence by stating in the very next sentence that the adult Applicants "have not established that they or their children will be targeted or that they will experience violence should they return to Mexico"; and adding further in the sentence after that, that the Mexican "government is making serious efforts to protect its citizens, including children, and that laws are in place to protect children from sexual exploitation." In the face of this evidence, the children would face risks if removed to Mexico and the Officer needed to examine this possibility with care. The Officer here did not reasonably do that.

[29] Furthermore, the Officer's reasons with respect to the BIOC are replete with references to whether the children would be subjected to a "significant negative impact" if the requested exemption was not granted, and he or she introduced a hardship threshold by requiring the Applicants to prove that "the best interest of the children in this application will be negatively affected to the extent that an exemption is warranted" (emphasis added). The Officer's focus on negative impacts and effects clouds and confuses the assessment of the BIOC, and nowhere in the reasons is there any clear identification of what really might be in the children's best interests other than to remain with their parents.

[30] Accordingly, on this basis alone, the application for judicial review should be granted.

D. *Did the Officer erroneously assess the Applicants' establishment in Canada?*

[31] In view of the reasons above, I find it unnecessary to address this issue.

E. *Certified Question*

[32] At the hearing of this matter, the Respondent proposed the following question of general importance to be certified:

> In their BIOC analysis, is an officer required first to explicitly establish what is the child's best interest then establish the degree to which the child's interest are compromised by one potential factor over another in order to show that the officer has been alert, alive and sensitive to the best interests of the child?

[33] This question is in large part based on the framework for analysis of the BIOC stated by Mr. Justice James Russell in *Williams*, where it is stated:

> [63] When assessing a child's best interests an Officer must establish <u>first</u> what is in the child's best interest, <u>second</u> the degree to which the child's interests are compromised by one potential decision over another, and then finally, in light of the foregoing assessment determine the weight that this factor should play in the ultimate balancing of positive and negative factors assessed in the application.
>
> [64] There is no basic needs minimum which if "met" satisfies the best interest test. Furthermore, there is no hardship threshold, such that if the circumstances of the child reach a certain point on that hardship scale only *then* will a child's best interests be so significantly "negatively impacted" as to warrant positive consideration. The question is <u>*not*</u>: "is the child suffering enough that his "best interests" are not being "met"? The question at the initial stage of the assessment is: "what is in the child's best interests?" [emphasis in original]

[34] I agree with the Applicants that the test for certification has not been met. In *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168, [2014] 4 FCR 290, the Federal Court of Appeal stated as follows:

> [9] It is trite law that to be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance. As a corollary, the question must also have been raised and dealt with by the court below and it must arise from the case, not from the Judge's reasons…

[35] The question proposed by the Respondent is not dispositive of the case now before the Court, since the Officer erred by not following the guidance from *Kisana* and *Legault*.

[36] Furthermore, this Court has declined on several occasions to certify a question similar to that stated above: see, e.g., *Onowu v Canada (Citizenship and Immigration)*, 2015 FC 64 at paragraphs 75-76; *Jaramillo v (Minister of Citizenship and Immigration)*, 2014 FC 744 at paragraphs 76-77; *Joseph v Canada (Citizenship and Immigration)*, 2013 FC 993 at paragraphs 31-33; *Webb* at paragraphs 33-35; and *Martinez Hoyos v Canada (Citizenship and Immigration)*, 2013 FC 998 at paragraphs 40 and 45.

IV. Conclusion

[37] In the result, the Applicants' application for judicial review is granted, and the matter is returned for re-determination by another immigration officer. No question of general importance is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted and the matter is returned for re-determination by another immigration officer, and that no serious question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3804-13
STYLE OF CAUSE:	ABIMELECH FIGUEROA JIMENEZ, MIRIAM RODRIGUEZ JIMENEZ, NOE FIGUEROA RODRIGUEZ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 15, 2015
JUDGMENT AND REASONS:	BOSWELL J.
DATED:	APRIL 23, 2015

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