Federal Court Cour fédérale

Date: 20150608

Docket: IMM-5825-14

Citation: 2015 FC 639

Ottawa, Ontario, June 8, 2015

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

JOSE DE JESUS BERMUDEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AMENDED JUDGMENT AND REASONS

I. INTRODUCTION

[1] Canada extended its protection to Jose de Jesus Bermudez in 2006 because of horrific events he and his family had suffered in his native country, Colombia. He entered this country as a permanent resident but now stands to lose that status and be declared inadmissible because a delegate of the respondent Minister decided to refer his case to the Refugee Protection Division

for a cessation determination under subsection 108 (2) of the *Immigration and Refugee Protection Act,* SC 2001, c 27 [*IRPA*]. Mr Bermudez seeks judicial review of that decision.

II. **BACKGROUND**

[2] Mr Bermudez's family was victimized during a massacre committed by paramilitaries on May 31, 2001. His aunt and cousin were killed. Mr Bermudez's father was murdered two years later because he intended to act as a witness in the prosecution of some of the perpetrators. Mr Bermudez and his immediate family were approved for refugee protection from within Colombia as members of the Source Country Class. Mr Bermudez entered Canada on August 18, 2006 as a refugee and permanent resident. When he left Colombia, he was engaged. He wished to bring his fiancée to Canada but Canadian officials told him that only a married spouse could accompany him.

[3] Mr Bermudez returned to Colombia on two occasions in 2008 and 2009 in order to marry his fiancée and bring her with him to Canada. While there, he took measures in order to avoid detection. However, his fiancée's mother fell ill and the wedding was postponed and the engagement ultimately ended. He returned to Canada and has never gone back to Colombia . In June 2011, he applied for Canadian citizenship and declared his trips to Colombia at that time. He is now engaged to the mother of his two Canadian born infant sons, one of whom is disabled. He also assists his mother and a sister, both of whom are disabled.

[4] On February 5, 2014, Mr Bermudez was returning from a vacation to Mexico when he was questioned by Officers from the Canada Border Services Agency [CBSA]. They noticed his

Colombian passport and previous trips to Colombia and forwarded his case for cessation consideration.

[5] On May 26, 2014, counsel for the applicant sent extensive written submissions to the CBSA requesting that a cessation application not be filed for humanitarian and compassionate [H&C] reasons.

[6] However, on July 7, 2014, Ms Connell, identified as counsel for the Minister of Citizenship and Immigration, applied to the RPD for a determination that Mr Bermudez's refugee protection has ceased. The notice sent to Mr Bermudez provides no reasons but lists as relevant factors that Mr Bermudez had used his Colombian passport to travel to Colombia twice, to the United States at least eight times and to Mexico once. For this reason, the delegate submitted that Mr Bermudez had voluntarily re-availed himself of the protection of his country of nationality, as described in paragraph 108(1)(a) of the *IRPA*.

[7] Attached as evidence in support of the application was: (1) the Field Operation System client history; (2) the applicant's confirmation of permanent residence; (3) the applicant's ICES traveller history, which records his travel to the United States; (4) a copy of the applicant's Colombian passport stamps; (5) excerpts from the applicant's affidavit (two pages from the extensive package submitted by his counsel); (6) excerpts from a United Nations handbook; and (7) the *UNHCR Cessation Guidelines* on the application of the cessation clauses.

III. **ISSUES**

[8] The applicant raised an argument of abuse of process in his written submissions but did not press the issue at the hearing based on his understanding that it was the Minister's position that he could raise the issue before the RPD or in any subsequent judicial review application.

[9] The issues addressed at the hearing were:

1. Is the Certified Tribunal Record complete?
2. Is the application for judicial review premature?
3. Was the Minister's delegate required to consider humanitarian and compassionate factors?

A. *Standard of Review*

[10] The standard of reasonableness is appropriate where a decision-maker interprets his home statute or a statute closely connected to his function: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 53-54. This presumption has been applied to decisions rendered by Ministers and Minister's delegates: see e.g. *Kinsel v Canada (Citizenship and Immigration)*, 2014 FCA 126 at para 26. The presumption is not rebutted when a delegate files an application for cessation with the Immigration and Refugee Board: *Olvera Romero v Canada (Citizenship and Immigration)*, 2014 FC 671 at para 16. The decision must be reviewed on reasonableness.

IV. **RELEVANT LEGISLATION**

[11] Section 108 of the *IRPA* provides for the cessation of refugee protection.

108. (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:	108. (1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants :
(a) the person has voluntarily reavailed themself of the protection of their country of nationality;	a) il se réclame de nouveau et volontairement de la protection du pays dont il a la nationalité;
(b) the person has voluntarily reacquired their nationality;	b) il recouvre volontairement sa nationalité;
(c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;	c) il acquiert une nouvelle nationalité et jouit de la protection du pays de sa nouvelle nationalité;
(d) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada; or	d) il retourne volontairement s'établir dans le pays qu'il a quitté ou hors duquel il est demeuré et en raison duquel il a demandé l'asile au Canada;
(e) the reasons for which the person sought refugee protection have ceased to exist.	e) les raisons qui lui ont fait demander l'asile n'existent plus.

(2) On application by the Minister, the Refugee Protection Division may determine that refugee protection referred to in subsection 95(1) has ceased for any of the reasons described in subsection (1).	(2) L'asile visé au paragraphe 95(1) est perdu, à la demande du ministre, sur constat par la Section de protection des réfugiés, de tels des faits mentionnés au paragraphe (1).
(3) If the application is allowed, the claim of the person is deemed to be rejected.	(3) Le constat est assimilé au rejet de la demande d'asile.
(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.	(4) L'alinéa (1)e) ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré.

[12] Paragraph 46(1)(c.1) provides that permanent residence is lost upon a positive cessation decision. This provision has been in force since December 15, 2012.

46. (1) A person loses permanent resident status (c.1) on a final determination under subsection 108(2) that their refugee protection has ceased for any of the reasons described in paragraphs 108(1)(a) to (d)…	46. (1) Emportent perte du statut de résident permanent les faits suivants : c.1) la décision prise, en dernier ressort, au titre du paragraphe 108(2) entraînant, sur constat des faits mentionnés à l'un des alinéas 108(1)a) à d), la perte de l'asile…

[13] Subsection 40.1(2) renders a person inadmissible upon a positive cessation decision. This amendment was brought into effect on December 15, 2012

40.1 (2) A permanent resident is inadmissible on a final determination that their refugee protection has ceased for any of the reasons described in paragraphs 108(1)(a) to (d)	40.1 (2) La décision prise, en dernier ressort, au titre du paragraphe 108(2) entraînant, sur constat des faits mentionnés à l'un des alinéas 108(1)a) à d), la perte de l'asile d'un résident permanent emporte son interdiction de territoire

[14] Section 44 governs reports on inadmissibility.

44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.	44. (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.
(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.	(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.
(3) An officer or the Immigration Division may impose any conditions,	(3) L'agent ou la Section de l'immigration peut imposer les conditions qu'il estime

including the payment of a deposit or the posting of a guarantee for compliance with the conditions, that the officer or the Division considers necessary on a permanent resident or a foreign national who is the subject of a report, an admissibility hearing or, being in Canada, a removal order.	nécessaires, notamment la remise d'une garantie d'exécution, au résident permanent ou à l'étranger qui fait l'objet d'un rapport ou d'une enquête ou, étant au Canada, d'une mesure de renvoi.

[15] Section 25 provides for humanitarian and compassionate [H&C] relief. This is subject to exceptions in subsection 25(1.2), including a twelve month waiting period after the time a claim was last rejected (25(1.2)(c)) – which is in turn now subject to exceptions listed at 25(1.21).

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	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.

account the best interests of a child directly affected.

(1.2) The Minister may not examine the request if…

(1.2) Le ministre ne peut étudier la demande de l'étranger faite au titre du paragraphe (1) dans les cas suivants:

(c) subject to subsection (1.21), less than 12 months have passed since the foreign national's claim for refugee protection was last rejected, determined to be withdrawn after substantive evidence was heard or determined to be abandoned by the Refugee Protection Division or the Refugee Appeal Division.

c) sous réserve du paragraphe (1.21), moins de douze mois se sont écoulés depuis le dernier rejet de la demande d'asile, le dernier prononcé de son retrait après que des éléments de preuve testimoniale de fond aient été entendus ou le dernier prononcé de son désistement par la Section de la protection des réfugiés ou la Section d'appel des réfugiés.

(1.21) Paragraph (1.2)(c) does not apply in respect of a foreign national

(1.21) L'alinéa (1.2)c) ne s'applique pas à l'étranger si l'une ou l'autre des conditions suivantes est remplie :

(a) who, in the case of removal, would be subjected to a risk to their life, caused by the inability of each of their countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, to provide adequate health or medical care; or

a) pour chaque pays dont l'étranger a la nationalité — ou, s'il n'a pas de nationalité, pour le pays dans lequel il avait sa résidence habituelle —, il y serait, en cas de renvoi, exposé à des menaces à sa vie résultant de l'incapacité du pays en cause de fournir des soins médicaux ou de santé adéquats;

(b) whose removal would have an adverse effect on the best interests of a child directly affected.	b) le renvoi de l'étranger porterait atteinte à l'intérêt supérieur d'un enfant directement touché.

V. **ARGUMENTS AND ANALYSIS**

A. *Is the Certified Tribunal Record complete?*

[16] The applicant alleged in his further memorandum of argument that the Certified Tribunal Record [CTR] produced by the respondent on January 8, 2014 is incomplete. Rule 17 (b) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 requires that upon receipt of an order granting leave, a tribunal shall prepare a record containing, among other things, all papers relevant to the matter that are in the possession or control of the tribunal.

[17] In this instance, the applicant had submitted approximately 200 pages of material to a Hearings Advisor at the CBSA on May 27, 2014. It appears that the advisor forwarded only two pages to the Officer who made the decision to apply for cessation. Accordingly, the remainder of the material was not contained in the Rule 17 production. The applicant argues that even if the Court accepts the Minister's position that only a *prima facie* case is required for referral to the Board, that *prima face* case must be assessed on all of the evidence before the Officer – not on a small extract from the applicant's submissions and supporting materials. It is unclear whether these submissions were considered at all. He contends that this is reason enough to quash the decision.

[18] The respondent submits that the CTR complies with Rule 17. The Minister's Delegate included only an extract with the cessation application because the rest of the applicant's submissions went to irrelevant H&C considerations outside her jurisdiction. In any event, the respondent argues, the issue is inconsequential because the materials which the applicant wishes to include in the CTR are presently before the Court as exhibits to the affidavit sworn by the applicant on September 12, 2014.

[19] The relevance of the material is for the Court to determine, not the tribunal. The relevance of H&C considerations is an issue to be determined in these proceedings. The Hearings Advisor should not have presumed that the material submitted by the applicant was not relevant simply because that was the position taken by the respondent.

[20] Rule 17 provides a summary way of putting relevant material before the Court and avoids the delays that might occur if this were left to the parties, as is customary in judicial review applications. In immigration matters, the Court is accustomed to receiving everything that was before the tribunal, including materials submitted by the applicant. Rule 17 (c) makes that clear in relation to hearings conducted by a tribunal. To limit the material produced to that considered relevant by the Minister has the appearance of unfairness. That said, the material is before the Court as an exhibit to the applicant's affidavit and he is not prejudiced by the failure to include it in the CTR.

B. *Is the application for judicial review premature?*

[21] The respondent's position is that the application is premature as the applicant can make his arguments to the RPD at the cessation hearing. The outcome in those proceedings is not inevitable and courts have consistently declined jurisdiction and dismissed applications to judicially review tribunal decisions where the process before the tribunal had not been exhausted: *Canada (Border Services Agency) v CB Powell*, 2010 FCA 61 at paras 30-33.

[22] The respondent insists that the administrative process is still ongoing. The applicant has not exhausted all the effective internal remedies available to him. In particular, he may avail himself of a cessation hearing before the Board, with all the procedural protections that will entail. If he obtains a negative decision, he can seek judicial review of that decision. If that fails, it is also open to him, the respondent submits, to make an application for an exemption on H&C grounds as a foreign national. He can seek a stay from this Court should the government attempt to remove him while his application is pending.

[23] The applicant points out that the RPD does not have the jurisdiction to look behind the decision to refer. The effect of a cessation decision on him would be profound. The consequences were described by Justice Strickland in *Olvera Romero*, above, at paras 22 and 23:

> The Applicant submits that the effect of ss. 108(2), 46(1)(c.1), 40.1(2), and 21(3) of the IRPA is, if the cessation application is successful, that she would immediately lose her permanent residence status and become inadmissible. Because the cessation decision is not made in the context of an admissibility hearing or an examination, there is no appeal available pursuant to s. 63(3) of the IRPA and s. 110(2)(c) precludes appeal to the RPD **[***sic*, RAD**]** and a potential of a stay under s. 23(1). Further, pursuant to s.

> 108(3), the Applicant's claim is deemed to be rejected with the result that all of the consequences that follow the rejection of a refugee claim also follow a positive cessation finding. This includes being unable to apply for permanent residence on H&C grounds for twelve months (s. 25(1.2)(c)) unless one of the s. 25(1.21) exceptions apply. Even in that event, there is no statutory stay of removal while an H&C application is made and no impediment to immediate removal pursuant to s. 48(2).
>
> The loss of permanent residence also results in the loss of the right to work in Canada without authorization. Even if there is a pending H&C application and she can apply for a work permit, this could take several months to be issued. Thus, a well-established former permanent resident such as the Applicant would have to leave their employment in the interim. The Applicant would also be precluded from applying for a temporary resident permit pursuant to s.24(4) of the IRPA, and would not be eligible for a Pre-Removal Risk Assessment (PRRA) pursuant to s. 112(2)(c), both for a period of twelve months.

[24] There is no dispute between the parties that under the law as it read when Mr Bermudez returned to Colombia, he would not have been at risk of losing his Permanent Residence status upon a cessation decision being rendered against him. That result would have only followed upon a vacation decision by the RPD under section 109 of the *IRPA*, upon a finding of misrepresentation or withholding of material facts when the refugee claim was allowed – neither of which occurred in this case. As noted above, this was changed by the amendments to the *IRPA* brought into force on December 15, 2012 (SC 2010, c 8 and SC 2012, c 17).

[25] Mr Bermudez had declared his travel to Colombia upon his return to Canada in 2008 and 2009 and in his application for citizenship. The fact that neither the CBSA nor CIC chose to act upon his travels back to his country of origin when the law was more favourable to him is, in part, one of the grounds for the abuse of process argument that he will make if the cessation application proceeds.

[26] It is clear that the recourses available to a protected person after a finding of cessation are extremely limited. In the circumstances, I am not prepared to find that this application is premature. I note that Justice Strickland, in *Olvera Romero*, chose to deal with the matter on the merits despite a prematurity argument by the respondent. I will do so as well.

C. *Was the Minister's delegate required to consider humanitarian and compassionate factors?*

[27] The applicant submits that the Minister's delegates possess the discretion to apply for cessation or not. They are not compelled by the statute to make an application in any and all circumstances. Indeed, prior to the recent amendments, this discretion was exercised only rarely. The applicant reproduces data alleging that there were 108 applications for cessation and 304 applications for vacation between 2007 and 2011, inclusively. Evidence in the *Olvera Romero* case, which was filed in these proceedings, indicates that the Minister of Public Safety and Emergency Preparedness has set a target of 875 applications for cessation per year, based on numbers from 2011.

[28] These cases, including this one, were apparently within the knowledge of the Minister prior to December 15, 2012 but not acted upon. Part of the reason for this, according to the evidence of a senior policy advisor in the Refugee Affairs Branch of Citizenship and Immigration Canada, was that cessation decisions would not have led to removal at that time. This suggests that the Department has been lying in the weeds waiting for the legislative change to pursue permanent residents such as Mr Bermudez. There may be cases in which that would be appropriate – where residence in Canada has been treated as a mere convenience while the

individual concerned remained established elsewhere – but this does not appear to be one of them on the record before me.

[29] The applicant argues that the delegates may consider, in determining whether to make a cessation application, factors that are not explicitly captured by section 108, such as H&C considerations. By failing to take these factors into account, the Officer in this case committed a reviewable error, he contends.

[30] The applicant draws an analogy with *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429, which accepted this view when interpreting section 44. The Minister points to apparently contradictory decisions, which Justice Strickland cited in *Olvera Romero*, but those cases did not involve permanent residents. The applicant argues, correctly in my view, that permanent residence is a status "that attracts much greater stability, longevity and associated rights" than that of a foreign national. It is given preferred status in several pieces of legislation – including the *IRPA*.

[31] The applicant notes that in *Canada (Minister of Public Safety and Emergency Preparedness) v Cha*, 2006 FCA 126 at paras 13 and 22-23 [*Cha*], the Federal Court of Appeal expressly declined to extend its reasoning about the limited discretion in section 44 to permanent residents. Nor was the applicant a permanent resident in *Nagalingam v Canada (Citizenship and Immigration)*, 2012 FC 1411. In *Richter v Canada (Citizenship and Immigration)*, 2008 FC 806 at paras 14-15, aff'd 2009 FCA 73, the distinction between permanent residents and foreign

nationals was again emphasized. As such, *Hernandez* remains good law for permanent residents such as Mr Bermudez, the applicant contends.

[32] The respondent argues that the present case is substantively indistinguishable from *Olvera Romero*. The Court ought to follow that precedent, the respondent urges, in accordance with the principle of judicial comity: *Apotex Inc v Allergan Inc*, 2012 FCA 308 at paras 43-48; *Almrei v Canada (Citizenship and Immigration)*, 2007 FC 1025 at paras 61-62.

[33] In *Olvera Romero*, above, at para 55, Justice Strickland found that the Hearings Officer's decision to file the cessation application attracted a duty of fairness. It is a decision that may have a significant potential impact on the applicant, as it commences the cessation application process. Justice Strickland went on to find, however, that the duty was minimal. At paragraph 68, she expressly disagreed with the position of the applicant that a higher duty should be supported because the RPD has no discretion to consider mitigating factors and because the consequences of an adverse decision to the individual will be devastating. She arrives at this conclusion, in paragraph 69, for the following reasons:

> …The Hearings Officer's decision is not a quasi-judicial decision. It is a preliminary decision based on a reasonable belief that the factual circumstances indicate that one or more of the s. 108(1) criteria have been met. This is not determinative of the Applicant's refugee status. …While in many cases the final outcome, being loss of permanent residence status and removal, may follow I do not agree with the Applicant that this is inevitable. The RPD must consider whether re-availment was voluntary, intentional and actual when making its decision… Further, in circumstances where the decision may adversely affect the best interests of a child and where this factor must be accounted for (s. 25(1.21)(b)), that H&C consideration may prevail.

[34] As counsel pointed out, the last sentence of this paragraph must be taken to refer to a separate application process for a section 25 exemption, since the RPD does not have the authority to consider H&C factors.

[35] I agree with Justice Strickland that the participatory rights required by the duty of fairness in this context did not call for an interview or oral hearing. In my view, however, given the importance of the decision to the applicant, the duty of fairness required that the applicant be given an opportunity to present full submissions as to why the application to the RPD should not be made. As the record shows, he attempted to do so but the Hearings Officer chose to ignore the bulk of that material on the ground that the Minister considered it irrelevant. She made her decision solely on the basis of information showing the applicant's travels out of the country. In doing so, in my view, she fettered her discretion.

[36] There is a distinction to be drawn between permanent residents and other categories of non-citizens. The former have been granted status in this country just short of citizenship. It was for that reason, I believe, that the Court of Appeal in *Cha*, above, at para 13 was careful to point out that its reasoning did not extend to matters involving permanent residents.

[37] The procedural manual applicable to the exercise of discretion by the Hearings Officer, ENF-24, had not been updated to reflect the change in legislation at the time the decision under review was made. As it read at the relevant time, Table 5 referred to a two stage analysis:

- Is the person a permanent resident?
- Is there a cause of ineligibility that would make it possible to obtain a removal order?

> If the answer to the first question is “yes”, there is no need to pursue the application for cessation of refugee protection. If the answer if “no”, evaluate the additional factors listed below.
>
> If the answer to the second question is “yes”, it is probably appropriate to pursue the application for cessation. The following factors must be evaluated:
>
> - the period of time elapsed since the claimant’s arrival in Canada, and since refugee protection was granted
> - the presence of a spouse or children who benefit from status in Canada
> - the frequency and duration of trips to the country of nationality
> - evidence of settlement in the country of nationality (e.g. work, school, properties, family)
> - the existence of mitigating factors (e.g. illness of a family member)
> - the nature and frequency of contacts with the authorities of the country of nationality.

[38] The manual contemplates that a cessation application need not be pursued if the individual in question is a permanent resident. Even where the individual is not a permanent resident, the Officer is directed to consider factors of an H&C nature such as establishment. Evidence from the *Olvera Romano* case introduced in these proceedings indicates that the manual was a still valid direction and was still found on the Citizenship and Immigration Canada’s website at the relevant time. There is no indication that these factors were taken into consideration by the Hearings Officer in making the decision to apply for cessation in the present matter. In particular, the applicant’s submissions with respect to the presence of a spouse and children who benefit from status in Canada and the evidence of his settlement in Canada were highly relevant to the question of whether he had voluntarily reavailed himself of the protection of his former country under paragraph 108(1)(a).

[39] In my view, a Hearings Officer retains the discretion not to make a cessation application when she is of the view that the evidence before her does not support a reavailment determination under section 108. To arrive at that determination, she must have regard to the submissions of the individual concerned and not simply to their travel history. The Officer in this instance failed to consider relevant submissions and for that reason the application must be granted and the matter remitted for reconsideration by another Officer.

VI. **CERTIFIED QUESTION:**

[40] In *Olvera Romero,* Justice Strickland certified three questions. The first two dealt with whether a CBSA officer was obliged to provide notice of the purpose of an interview and an opportunity to make submissions when a cessation application was being considered. Neither, in my view, would be dispositive of an appeal in this case. The third question, slightly modified to limit its scope to permanent residents, is a serious question of general importance arising from the facts of this case and would be dispositive of an appeal in this matter.

> Does the CBSA hearings officer, or the hearings officer as the Minister's delegate, have the discretion to consider factors other than those set out in s. 108(1), including H&C considerations and the best interests of a child, when deciding whether to make a cessation application pursuant to s. 108(2) in respect of a permanent reside

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. the application is granted and the matter is remitted for reconsideration by another Hearings Officer; and

2. the following serious question of general importance is certified:

   Does the CBSA hearings officer, or the hearings officer as the Minister's delegate, have the discretion to consider factors other than those set out in s. 108(1), including H&C considerations and the best interests of a child, when deciding whether to make a cessation application pursuant to s. 108(2) in respect of a permanent resident?

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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