Federal Court  Cour fédérale

Date: 20151118

Docket: IMM-1550-15

Citation: 2015 FC 1295

Toronto, Ontario, November 18, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MONICA PAOLA SIERRA ALARCON
ANGEL ALEXI SANCHEZ
ANA PAOLA SANCHEZ
ALAN MAURICIO SANCHEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] It cannot be said, as suggested by the Applicants, that the Officer did not properly consider whether the Applicants would be better off staying in Canada. The Officer's decision clearly demonstrates that she took into consideration the benefits of staying in Canada for the

minor Applicants but, as stated by the jurisprudence; however, the simple fact that living in Canada is more desirable for the children is not sufficient, in and of itself, to grant a H&C application (*Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356 [*Serda*]):

> [31] Finally, the Applicants have argued that conditions in Argentina are dismal and not good for raising children. They cited statistics from the documentation, which were also considered by the H & C Officer, to show that Canada is a more desirable place to live in general. But the fact that Canada is a more desirable place to live is not determinative on an H & C application (*Vasquez v. Canada (M.C.I.)*, [2005] F.C.J. No. 96, 2005 FC 91; *Dreta v. Canada (M.C.I.)*, [2005] F.C.J. No. 1503, 2005 FC 1239); if it were otherwise, the huge majority of people living illegally in Canada would have to be granted permanent resident status for Humanitarian and Compassionate reasons. This is certainly not what Parliament intended in adopting section 25 of the *Immigration and Refugee Protection Act*. [My emphasis.]

II. Introduction

[2] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of the decision of a Senior Immigration Officer [Officer] rejecting the Applicants' claims for permanent residence from within Canada based on humanitarian and compassionate [H&C] grounds pursuant to subsection 25(1) of the IRPA.

III. Background

[3] The adult Applicant, Monica Paola Sierra Alarcon (age 31) [Principal Applicant], is a citizen of Colombia. She left Colombia for the United States in 2004 due to an alleged fear of the Revolutionary Armed Forces of Colombia [FARC]. While in the United States, she gave birth to

Angel Alexi Sanchez (age 9), Ana Paola Sanchez (age 8) and Alan Mauricio Sanchez (age 5). The minor Applicants are citizens of the United States of America.

[4] Alleging physical and psychological abuse by her ex-partner, the Principal Applicant fled, with the minor applicants, from the United States and arrived in Canada on December 11, 2011. The Applicants made a claim for refugee protection from Colombia. The Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada rejected their claim on October 11, 2013; and, their application for leave and for judicial review to the Federal Court (IMM-7037-13) was rejected on February 10, 2014.

[5] In November 2014, the Applicants' applications were received by Citizenship and Immigration Canada. In a decision dated January 16, 2015, the Officer rejected their H&C applications on the basis that the Applicants did not demonstrate unusual and undeserved or disproportionate hardship and that the best interests of the children [BIOC] did not warrant that the Applicants be allowed to submit their permanent resident visa applications from within Canada.

IV. Issues

The Court considers that the determinative issues are as summarized below:

1) Does the impugned decision adequately consider the best interests of the children?
2) Does the impugned decision adequately consider the hardship of the Applicants if they were forced to return to Colombia?

V. Legislation

[6] The following are the relevant legislative provisions for the IRPA:

Application before entering Canada	**Visa et documents**
11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**11**. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
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	**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 of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	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.

VI. Position of the Parties

A. *Position of the Applicants*

[7] The Applicants submit that the Officer did not use the proper test in assessing the best interests of the children (*Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166 [*Williams*]). Moreover, the Applicants submit that the Officer committed several reviewable errors in her analysis of the best interests of the children. Firstly, the Officer unlawfully fettered her discretion by proposing the scenario of the Principal Applicant leaving her children to a guardian in the United States but failed to address the consequences of this scenario on the best interests of the minor applicants (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*]; *Phyang v Canada (Minister of Citizenship and Immigration)*, 2014 FC 81 at paras 20-21 [*Phyang*]). Secondly, the Officer was wrong to conclude that the children's best interests would be met simply because they would be accompanied by their mother if they were forced to leave to Colombia. Thirdly, the Officer did not consider how the best interests of the Applicants would be met if the Applicants were to stay in Canada (*Phyang*, above at paras 20-21; *Kobita v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1479 at para 53); the fact the children were exposed to violence in the United States; and, having benefited from a stable life in Canada had not been examined (*Cepeda-Gutierrez v Canada (Minister of*

Citizenship and Immigration), [1998] FCJ No 1425 at para 17). Fourthly, the Officer did not properly assess the effect of the country conditions on the family in Colombia (*Walcott v Canada (Minister of Citizenship and Immigration)*, 2011 FC 415).

[8] Regarding the analysis of "unusual, undeserved or disproportionate hardship", the Officer unreasonably minimized the Applicants' establishment in Canada (*Sebbe v Canada (Minister of Citizenship and Immigration)*, 2012 FC 813); and, made perverse conclusions by taking factors which should weigh in favour of granting the H&C applications (*Sosi v Canada (Citizenship and Immigration)*, 2008 FC 1300 at para 18) and "turning them on their heads".

B. *Position of the Respondent*

[9] Conversely, the Respondent submits that it is trite law that section 25 of the IRPA is a highly discretionary measure; and, it is not designed to eliminate hardship but to provide exceptional relief for "unusual and undeserved or disproportionate hardship" (*Ahmad v Canada (Minister of Citizenship and Immigration)*, 2008 FC 646 at para 49; *Nazim v Canada (Minister of Citizenship and Immigration)*, 2005 FC 125 at para 15). It is also recognized by this Court that there is no "magic formula" in the assessment of the best interests of children and an Officer may be presumed to consider that living in Canada can offer a child opportunities in contrast to that which may await a child who is sent out of the country (*Jaramillo v Canada (Minister of Citizenship and Immigration)*, 2014 FC 744; *Hawthorne v Canada (Minister of Citizenship and Immigration)*, [2003] 2 FCR 555, 2002 FCA 475 [*Hawthorne*]). In her assessment of the best interests of the children, the Officer was alert, alive and sensitive to the best interests of the children and her review of the H&C applications was thorough and detailed.

[10] The Respondent submits that the onus is on the Applicants to provide all relevant evidence to support their H&C applications (*Owusu v Canada (Minister of Citizenship and Immigration)*, [2004] 2 FCR 635, 2004 FCA 38 at para 5); and, as a result, the burden of proof was on the Applicants to submit any evidence from any objective source relating to the trauma which the minor applicants may experience due to their domestic situation in the United States. Contrary to the allegations of the Applicants, the Respondent submits that the Officer did in fact address the best interests of the children as to the Applicants remaining in Canada. Regarding the issue of establishment of the Applicants in Canada, the Officer's assessment was reasonable as she found that their level of establishment was not such that they would experience unusual and undeserved or disproportionate hardship if they had to apply for permanent residence from outside Canada (*Irimie v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1906).

VII. Standard of Review

[11] The standard of reasonableness must be applied to the Officer's determination of fact and mixed law and fact in respect of H&C considerations (*Singh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 11, at para 21).

[12] The standard of review of correctness applies to determination of the legal test applied by the Officer with regard to the best interests of the children. Conversely, the Officer's conclusions with regard to the best interests of the children are subject to the standard of review of reasonableness (*Mckenzie v Canada (Minister of Citizenship and Immigration)*, 2015 FC 719; *Miller v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1173).

VIII. Analysis

[13] The H&C decision-making process provided at subsection 25(1) of the IRPA is one of exceptional relief (*Azziz v Canada (Minister of Citizenship and Immigration)*, 2015 FC 850); it is not intended to be an alternative immigration stream or an appeal mechanism for failed asylum claimants (*Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 at para 40).

A. *Best interests of the children*

[14] There is no magic formula that an Officer must use when assessing the best interests of the children (*Hawthorne*, above at para 7). The guiding principle in a BIOC assessment is whether the Officer was alert, alive and sensitive to the best interests of the children (*Baker*, above at paras 73 and 75).

[15] The Applicants submit that the Officer's decision is unreasonable as the Officer did not employ the proper test in assessing the best interests of the children as illustrated by Justice James Russell in *Williams*, above at para 63:

> [63] When assessing a child's best interests an Officer must establish first what is in the child's best interest, second 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.

[16] While it is true that the test explained in *Williams* provides a clear framework to guide an Officer assessing a BIOC application, it is not a formula which each Officer necessarily follows. The test, in and of itself, is whether the Officer was alert, alive and sensitive as stated by the Supreme Court of Canada in *Baker*, above:

> [44] However, I agree with the respondent, the caselaw is clear: there is no requirement that a decision-maker employ the *Williams* approach in order to demonstrate she was "alert, alive and sensitive" to the "best interests of a child", as required by *Baker*. Consistent with *Hawthorne v Canada (Minister of Citizenship and Immigration)*, [2003] 2 FC 555 [*Hawthorne*], this Court has upheld a variety of different approaches and has explicitly confirmed the *Williams* test as only one of those several methods available to decision-makers in assessing the "best interests of the child" (*Webb v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1060 [*Webb*] at para 13).
>
> (*Onowu v Canada (Minister of Citizenship and Immigration)*, 2015 FC 64 at para 44)

[17] In determining whether the Officer applied the proper test and conducted a proper analysis, this Court has the obligation to read the decision as a whole (*Segura v Canada (Minister of Citizenship and Immigration)*, 2009 FC 894 at para 29). After a careful review of the decision and a thorough review of the evidence, the Court is convinced that the Officer's decision is reasonable as she properly assessed the best interests of the children.

[18] It cannot be said, as suggested by the Applicants, that the Officer did not properly consider whether the Applicants would be better off staying in Canada. The Officer's decision clearly demonstrates that she took into consideration the benefits of staying in Canada for the minor Applicants but, as stated by the jurisprudence, the simple fact that living in Canada is

more desirable for the children is not sufficient, in and of itself, to grant a H&C application (*Serda*, above):

> [31] Finally, the Applicants have argued that conditions in Argentina are dismal and not good for raising children. They cited statistics from the documentation, which were also considered by the H & C Officer, to show that Canada is a more desirable place to live in general. But the fact that Canada is a more desirable place to live is not determinative on an H & C application (*Vasquez v. Canada (M.C.I.)*, [2005] F.C.J. No. 96, 2005 FC 91; *Dreta v. Canada (M.C.I.)*, [2005] F.C.J. No. 1503, 2005 FC 1239); if it were otherwise, the huge majority of people living illegally in Canada would have to be granted permanent resident status for Humanitarian and Compassionate reasons. This is certainly not what Parliament intended in adopting section 25 of the *Immigration and Refugee Protection Act*. [My emphasis.]

[19] The Applicants also submit that the Officer fettered her discretion by failing to consider the impact of the various possible scenarios on the best interests of the minor applicants. In her decision, the Officer stated:

> Counsel submits that the adult applicant will be forced to leave the minor applicants with a guardian in the USA. I am aware and have also taken into account that the children are citizens of the United States, and as such, if this application was to be refused, the decision as to which country the children would return to would ultimately rest with their mother. At the end of the day it is in fact the mother who decided what is in the best interests of her children. Moreover, if the mother decided to leave her children in the case of a guardian in the United States, that is her choice.
>
> (Applicant's Record, p 14)

[20] While the Court agrees with the Applicants that it might have been more prudent for the Officer to use different words, the Court respectfully rejects the Applicants' submission that the Officer erred in law and committed a reviewable error. By her statement, the Officer simply acknowledged that the children are citizens of the United States and, as such, if the Principal

Applicant would find that it is in their best interests to stay in the United States with a guardian than with their mother in Colombia, the decision will ultimately be hers. Simply put, the Officer found that it would be in the best interests of the children to stay with their mother but was cognizant that ultimately the Principal Applicant, as the mother of the children, is the one who will ultimately decide what is in the best interests of her children if the Applicants' H&C application is rejected.

[21] The Applicants also submit that the Officer erred in finding that the minor applicants' best interests would be met in Colombia even though the Officer stated in her decision that the country conditions in Colombia are less favourable than in Canada. This argument must be rejected. Firstly, as mentioned previously, it is not because it would be more desirable for the minor applicants to stay in Canada than in Colombia that the H&C applications should be granted (*Serda*, above). Secondly, the burden is on the Applicants to demonstrate that the country conditions would have a direct and personal negative impact on them; the Applicants have not submitted sufficient evidence to that effect (*Singh v Canada (Minister of Citizenship and Immigration)*, 2014 FC 10 at paras 24-25).

B. *Unusual and undeserved or disproportionate hardship*

[22] The Principal Applicant is arguing that she has been in Canada for more than three years; she found employment; has learned to communicate effectively in English; and, the Principal Applicant's children are doing well in school and are healing from the alleged trauma they suffered in the United States.

[23] While the Court understands that leaving Canada would be difficult for the Principal Applicant and her children, the Applicants did not raise sufficient evidence demonstrating that according to the interpretation of the law, their H&C applications should have been allowed on the basis of establishment because their hardship would be more than the usual consequences of leaving Canada:

> The Federal Court has repeatedly interpreted subsection 25(1) as requiring proof that the applicant will personally suffer unusual and undeserved, or disproportionate hardship arising from the application of what I have called the normal rule: see, e.g., *Singh v. Canada (Minister of Citizenship & Immigration)*, 2009 FC 11. The hardship must be something more than the usual consequences of leaving Canada and applying to immigrate through normal channels: *Rizvi v. Canada (Minister of Employment and Immigration)*, 2009 FC 463. [My emphasis.]

IX. Conclusion

[24] For all the above reasons, the application for judicial review is dismissed.

JUDGMENT

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

There is no serious question of general importance to be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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