Federal Court  Cour fédérale

Date: 20161206

Docket: IMM-1856-16

Citation: 2016 FC 1345

Ottawa, Ontario, December 6, 2016

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

JINETH MONTERO CARDONA
CARLOS LANDAZURI CANO
MARIAN LANDAZURI MONTERO

Applicants

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

[1] The Applicants, Jineth Montero Cardona, Carlos Landazuri Cano, and Mariana Landazuri Montero [the Applicants], challenge a senior immigration officer's [the officer] decision dated March 24, 2016, that an exemption under humanitarian and compassionate [H&C] grounds was not warranted.

I. Background

[2] The Applicants are citizens of Colombia and came to Canada in September of 2013. Their refugee claim was rejected by the Refugee Protection Division [RPD] on August 19, 2014. Having found the Applicants to be credible, the determinative issue before the RPD was the availability of state protection in Colombia.

[3] The RPD found that the Applicants did not go to the authorities about threats made against them and the Applicants failed to demonstrate that the state was unable to protect them. Despite a minor error in procedural fairness, the RPD decision was upheld at the Federal Court on July 2, 2015.

[4] The Applicants' pre-removal risk assessment [PRRA] was rejected on March 24, 2016. On the same day they received a refusal of their application for H&C relief which is the subject of this judicial review.

II. Issue

[5] The issue to decide is whether the officer reasonably balanced the appropriate factors in the H&C application?

III. Standard of Review

[6] The applicable standard of review for H&C applications is reasonableness (*Baker v Canada*, [1999] 2 SCR 817 at para 62 [*Baker*]).

IV. Analysis

[7] I am granting this application for the reasons that follow.

[8] The RPD found that the female Applicant was sexually assaulted in 2010. Her assailant was convicted and sentenced to eleven years and four months incarceration. As a result, she was diagnosed as having post-traumatic stress disorder [PTSD] by a psychologist as well as other mental health challenges including possible suicidal tendencies. The officer found her claims of poor mental health caused by the traumatic events that occurred in Colombia to be credible. The Applicants filed several medical reports that spoke to her diagnosis and evidence to how removing her back to Colombia would negatively affect her mental health.

[9] The Supreme Court of Canada [SCC] in *Kanthasamy v Canada*, 2015 SCC 61 [*Kanthasamy*], provided guidance on how an officer is to assess an H&C application. The applicant in that instance was a 17 year old male Tamil from Sri Lanka. The applicant had been found credible but did not fit within a risk profile so his H&C application was denied. The officer determined that the applicant had "not satisfied [them] that return to Sri Lanka would result in hardship that was unusual and undeserved or disproportionate".

[10] The SCC, in *Kanthasamy*, above, at paragraph 23, confirmed earlier decisions of this court that "There will inevitably be some hardship associated with being required to leave Canada. This alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under s. 25 (1): see Rizvi v. Canada (Minister of Citizenship and Immigration), 2009 FC 463, at para 13 (CANLII); Irmie v. Canada (Minister of Citizenship and immigration) (2000), 10 Imm. LR 206 (FCTD) at par 12."

[11] The court said that the words "unusual, undeserved or disproportionate" hardship test in the Guidelines (Citizenship and Immigration Canada, *Inland Processing*, "IP 5: Immigrant Applications in Canada made on Humanitarian and Compassionate Grounds" (online) s. 5.10) is merely to provide assistance to officers and are not intended as a hard and fast rule that would fetter their discretion. The equitable underlying principal in section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] led the court to say that those three words should be treated as descriptive and not new thresholds. Officers must consider the totality of the evidence.

[12] In *Kanthasamy*, the medical reports were unreasonably discounted in contrast to clear uncontroverted evidence of discrimination and as a result the officer did not do the requisite analysis in light of the humanitarian nature of s. 25, the "evidence as a whole justified relief" which fettered the officer's discretion and made the decision unreasonable.

[13] The Applicants argued that as in *Kanthasamy*, the officer erred in the treatment of the female Applicant's health issues. As well, the Applicants argue that the best interests of the child

[BIOC] analysis was cursory and not given the serious consideration required. The Applicants submit that the officer failed to assess in the BIOC, if they were sent back to Colombia, how the female Applicant's mental health issues would affect her then 3 1/2 year old child and her ability to care for the child given the uncontroverted evidence that her PTSD would worsen if returned to Colombia where the violent trauma occurred.

[14] The Applicants rely on *Kanthasamy*, and argue just as happened in *Kanthasamy*, the officer unreasonably discounted the medical and psychological reports with uncontroverted evidence of the harm that would happen if the female Applicant returned to Colombia.

[15] The Respondent equally relies on *Kanthasamy* for support that some hardship cannot be avoided when individuals are removed from Canada. They argue that the officer weighed all of the factors including giving significant weight to the BIOC and in doing so made a reasonable decision.

[16] There was argument presented by the Applicants that the officer could have used a step approach as stated in *Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166 [*Williams*]. The Respondent, relying on *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 [*Legault*], submitted that there is no magic formula to be used in determining an H&C application. According to the Respondent, it is sufficient that the officer is alert, alive and sensitive to the BIOC and give it considerable weight. Both agree that a child's best interests do not outweigh all other considerations.

[17] *Kanthasamy* did not confirm the step approach advocated in *Williams*, above. I agree with the Respondent that there is no magic formula but that the officer must be alert, alive and sensitive to the BIOC and give it considerable weight but not such that it always outweighs all other factors.

[18] The Applicants argue that the female Applicant's medical evidence was dismissed without proper consideration. The Respondent counters that the officer acknowledged her situation may deteriorate but that she could receive protection and treatment in Colombia at women shelters and hospitals.

A. *Mother*

[19] The medical reports before the officer were: Dr. Devins, Clinical Psychologist, July 17, 2014 and September 7, 2015; Dr. K. Asayesh, Psychiatrist, September 7, 2015, September 21, 2015, October 7, 2015; Sarah Kipp, Nurse Practitioner, dated August 31, 2015, November 17, 2015. There was also a report from Karla Velis, Nurse Practitioner, dated September 16, 2015, that was not mentioned at all in the decision.

[20] A summary of the medical findings in the reports filed that relate to this issue follow. Dr. Gerald M. Devins filed a detailed five page report that concludes with the doctor's clinical impression that the female Applicant "satisfies diagnostic criteria for major depressive disorder of moderate severity (296.22 [F32.1], posttraumatic stress disorder (309.81 [F43.10]), and acquired genito-pelvic pain/penetration disorder with moderate distress (302.76 [F52.6] in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders)".

The report said that the female Applicant requires mental health treatment that may include stress-management training, behavioural activation, cognitive-behavior therapy as well as other treatments. The doctor concluded that if she does not stay in Canada "her condition will deteriorate; suicide risk will increase."

[21] The psychiatrist report (Dr. K. Asayesh) to the referring doctor indicated that her husband expressed her condition to him at the meeting but she did not express her feelings. As a result, the psychiatrist indicated he had to conduct a thorough interview with the female Applicant with the assistance of a Spanish interpreter. After that second interview, the psychiatrist found her story to be genuine and indicates he needs to see her again with the interpreter and then offer a treatment plan for her. In his final report, after another session with the female Applicant, he indicates that she is still "having bad dreams mostly about her daughter being threatened, harmed or killed; as well as about her own rape" as well as getting flashbacks at least once a week, especially at night if her husband is working shift work. The psychiatrist concluded that "[t]his lady has been subject to severe sexual and emotional trauma and still clearly suffering from Post-Traumatic Stress Disorder. She is afraid that if she and her family return to their home country they will most likely be targeted for harassment and violence by the same people 'because of the information we have about them.' Unfortunately, she is probably correct."

[22] In the Karla Veils report dated September 16, 2015, she indicated the female Applicant is followed for symptoms of depression, anxiety and PTSD. That report says the female Applicant states that she is scared and is living in fear for her safety but "most important her daughter's safety". Further it states that the female Applicant is "seeing a psychiatrist due to her current

mental health status for further assessment and treatment." Sarah Kipp on November 17, 2015, relates that "her ability to manage her symptoms is negatively impacted by her anxiety related to her fear of being deported to her country of origin where she feels unsafe." The report says the female Applicant is on pharmacotherapeutic treatment but is continuing to experience significant anxiety.

[23] The doctors' assessment of risk of harassment and violence faced by the Applicants is of no probative value as that is not their expertise or role. However, their assessment of psychological risk is well within their field of expertise and Nurse Practitioners and should be considered.

[24] In *Kanthasamy*, the officer accepted that the applicant had PTSD but asked for additional evidence about whether the teenager sought treatment or whether treatment was available in Sri Lanka. The SCC said this made the factor conditional rather than significant. The officer ignored the effect removal to Sri Lanka would have on the mental health of the applicant. The SCC found that a worsening of the applicant's mental health if removed to Sri Lanka was a consideration that should have been weighed by the officer whether treatment was available or not.

[25] In this case the officer does accept that the female Applicant's condition may have worsened in November 2015, but dismisses the lack of specific detail concerning the treatment plan, medications and prognosis. The officer acknowledged that if removed to Colombia the female Applicant's risk of suicide would increase. The officer stated that this was taken into consideration but that redress options are available in Colombia. What remains unclear is why

the officer required additional evidence about what treatment was or was not available in Colombia. Once the officer accepted that the female applicant had PTSD and a risk of suicide based on her experiences in Colombia, requiring further evidence of the availability of treatment, either in Canada or in Colombia, undermined her assessment. It made the female Applicant's mental health a conditional rather than a significant factor.

[26] Furthermore, in the officer's focus on whether treatment was available in Colombia, he ignored what the effect of removal from Canada would be on her mental health. Regardless of whether treatment is available in Colombia, the very fact that the female Applicant's mental health would likely worsen were she removed to Colombia is a relevant consideration that must be identified and weighed.

[27] The SCC has said that it is not reasonable to focus on whether treatment was available making it a pre-condition type factor rather than one of many factors to weigh.

[28] In conclusion, the officer minimized the risk to the female Applicant's health were she returned to Colombia, on the basis that she could access victim services. The officer does canvas objective documentary evidence but given the uncontroverted evidence of several well trained medical experts, the officer's reliance solely on the use of redress was unreasonable.

B. *Best Interests of the Child*

[29] The Federal Court of Appeal [FCA] has directed that it is insufficient to merely state that the BIOC have been taken into account (*Hawthorne v Canada (Minister of Citizenship and*

Immigration), 2002 FCA 475 at para 32 [*Hawthorne*]). Quoting *Legault*, above, the FCA stated that an officer must examine the BIOC with a great deal of attention in light of all the evidence; it should be treated as a significant factor. Unusual and underserved hardship is inapplicable to the assessment of the child's interests, children will rarely, if ever, be deserving of any hardship. A decision is unreasonable if the interests of children affected by the decision are not sufficiently considered (*Baker*, above, at para 75).

[30] The officer's reasons in total regarding the BIOC are :

> I have also been alert, alive and sensitive in regards to the best interests of the children in this application and conclude that Mariana`s interests would be best serve if she remains with her primary caregivers and maintains positive and close relationships with her aunt, uncle and cousins in Canada. Similarly, I find that the interests of Paul and David LANDAZURI would be best served if they continue the close bond they have with the applicants. I have given this consideration some weight. However, to this end, I find that although not perfect, the close relationships can still be maintained through alternative channels such as email, Skype and telephone communication.
>
> [Emphasis added]

[31] Simply stating that the officer is alert, alive and sensitive to the BIOC is insufficient (*Hawthorne*, above, at para 32). Here the officer did an analysis of the BIOC but failed to accord it with "serious weight and consideration" (*Baker*, at para 65). The gives "some weight" to the BIOC rather than the serious weight it deserves.

[32] In *Kanthasamy*, the SCC found that the officer took a narrow approach to the assessment and failed to consider the applicant's circumstances as a whole. The SCC instructed that the evidence as a whole is to be weighed when doing a BIOC and looked at in total.

[33] On our facts, the officer failed to address how the very young daughter will be affected given the medical evidence that their mother's mental health will deteriorate upon return to Colombia. The officer further fails to mention how the death threats against the child could impact the child or the mother's mental health.

[34] I am aware that the onus is on the Applicants to provide evidence and it is not for the officer to extrapolate the evidence. However, evidence was included in the H&C application that the daughter had been threatened. This evidence included a condolence card in July 2013 for the daughter regarding her death. The child was also subject to a direct threat by FARC when she was born. The medical report of Karla Velis dated September 15, 2016, was not mentioned by the officer even though it speaks directly to the fear the female Applicant has for her child's safety. The reports of Sarah Kipp also speak to the fear the female Applicant has regarding her daughter's safety and welfare. The daughter's safety is noted in several of the medical reports as being a trigger or certainly a factor in the female Applicant's PTSD. The medical reports indicate that the exacerbation of the symptoms the mother exhibits would impact the care of her very young child.

[35] Even though the written submissions did not specifically address the effect on then 3 1/2 year old child if her mother's mental health deteriorates further if removed from Canada the evidence was before the officer. The medical reports indicate that the mother is very fearful of her daughter's safety in Colombia and the symptoms the mother exhibits would impact the care of her very young child. Nowhere does this aspect of the BIOC appear in the officer's analysis nor is this evidence considered in the officer's assessment.

[36] I do not find that the officer was alert, alive and sensitive to the BIOC. The significant weight accorded to the BIOC should be weighed against countervailing factors and then a final determination made. The officer's consideration of the BIOC was unreasonable.

[37] Reasonableness requires that the decision must exhibit justification, transparency and intelligibility within the decision making process and also the decision must be within the range of possible, acceptable outcomes, defensible in fact and law (*Dunsmuir v New Brunswick,* 2008 SCC 9; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12).

[38] The decision was not reasonable in the treatment of the medical evidence of the mother or the BIOC. As a result, I am granting the application.

[39] In granting this application, the Applicants will be able to file additional material if they choose to that will be considered in the reconsideration.

[40] No certified question was presented and no question will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The matter is granted and sent back to be re-determined by a different officer.

2. No question is certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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