Federal Court  Cour fédérale

Date: 20170119

Docket: IMM-2564-16

Citation: 2017 FC 69

Ottawa, Ontario, January 19, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

MOISES MALVAEZ MARTINEZ ET AL

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review by Moises Malvaez Martinez [the Principal Applicant] pursuant to s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*], of a decision made by an Immigration Officer, dated May 2, 2016, denying the Applicant's application for Permanent Residency [PR] status on humanitarian and compassionate

[H&C] grounds, pursuant to s. 25(1) of the *IRPA* [the Decision]. The Application is granted for the following reasons.

[2] The Principal Applicant and his wife [the Applicant Spouse] are citizens of Mexico. The husband arrived in Canada on March 24, 2009 and the Applicant Spouse arrived in Canada on June 28, 2009. They made a claim for refugee status on January 25, 2010. The Refugee Protection Division [RPD] found the determinative issues to be credibility and state protection. On November 3, 2011, the Applicants' claim was denied on the bases of credibility and state protection. The Applicants applied to this Court for leave and judicial review of the RPD decision; leave was denied.

[3] They did not leave the country, nor does it appear any efforts were made to remove them. In July 2015, they applied for PR status on H&C grounds, based on their ties to Canada, factors in their country of origin and the best interests of their young, Canadian-born child [BIOC], a daughter born a few months after the mother arrived in Canada. At the time of the H&C application, the Principal Applicant also had a Pre-Removal Risk Assessment [PRRA] application that was being considered.

[4] Their H&C application was turned down and they were so notified on June 2, 2016. By then, a second child had been born, a son; the Applicants informed the Respondent of this birth before they received the Decision but after it was signed and dated.

[5] In terms of the standard of review applicable in this case, in *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." A review of an officer's H&C decision is conducted on the reasonableness standard: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44. The decision of whether to grant or deny an exception for humanitarian and compassionate reasons is "exceptional and highly discretionary; thus deserving of considerable deference by the Court": *Qureshi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 335 at para 30. The highly discretionary nature of H&C assessments results in a "wider scope of possible reasonable outcomes": *Holder v Canada (Minister of Citizenship and Immigration)*, 2012 FC 337 at para 18; *Inneh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 108 at para 13.

[6] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

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

[7] The Applicants alleged numerous instances of unreasonableness in the Decision, however only one of these needs to be addressed because, in my view, it is determinative of this application. It is as follows.

[8] Under the heading "Factors in Country of Origin", the Officer stated:

> Counsel further submits that the family's safety will be threatened by a return to Mexico. The documentary evidence filed by counsel describes a precarious public security situation in the nation. Widespread impunity and corruption remained serious problems, particularly at the state and local levels of the security forces and in the judicial sector. Notwithstanding, the applicants have not shown that they would experience greater insecurity than the general population. While unfortunate, social problems exemplified by crime and violence are generalized country conditions that are indiscriminately faced by all Mexicans and are not unique to the applicants.
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> [emphasis added]

[9] The use of the underlined language is indistinguishable from that used by the H&C officer whose reasons were subject to judicial review in *Diabate v Canada (Minister of Citizenship and Immigration)* 2013 FC 129 [*Diabate*]. In that case, Justice Gleason, then of this Court, and after a thorough analysis, held that it is a reviewable error for H&C officers to require, as part of an H&C analysis, that an applicant establish that the circumstances he or she will face are not generally faced by others in their country of origin:

> **Did the officer commit a reviewable error in her assessment of the hardship Mr. Diabate might face if returned to the Ivory Coast?**
>
> [32] …. I do find that the officer committed a reviewable error in her assessment of the hardship that the applicant would face if returned to the Ivory Coast. In assessing this factor, the officer reviewed the current country conditions in the Ivory Coast, which paint a picture of improving democratic conditions but ongoing violence. She then concluded, "Although there are still some problems in Ivory Coast, I note that they apply to the entire population. The applicant has not shown in what respect his situation is different from that of the population as a whole". With respect, this formulation of the applicable test under section 25 of the IRPA is neither correct nor reasonable.

[33] I agree with the applicant that such an interpretation of section 25 frustrates its purpose. As indicated, section 25 exists to provide relief from the provisions of other sections of the IRPA. To impose those requirements on an applicant seeking relief from them entirely frustrates the section and is thus an interpretation that the Act cannot reasonably bear. The officer imported a requirement of section 97 – that, to be eligible for protection, an individual must face a risk "not faced generally by other individuals in or from that country" – into her section 25 analysis. Such an interpretation strips section 25 of its function.

[34] Justice Mandamin addressed a similar issue in *Shah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1269, [2011] FCJ No 1553 [*Shah*], where he was reviewing a decision of an H&C officer regarding an applicant from Trinidad. In that case the officer had reasoned that the applicant had "provided insufficient objective evidence that she would be personally targeted by the criminal elements upon her return to Trinidad" and concluded that H&C consideration was not warranted because "the situation and hardship the applicant fears is faced generally by other individuals in the country" (Shah at para 70). In determining that this decision must be set aside, Justice Mandamin concluded (at para 73):

> I find the Officer applied a higher standard than appropriate for H&C decisions by incorrectly requiring the Applicant to establish a personal risk beyond that faced by other individuals in Trinidad. The test of risk causing unusual, underserved or disproportionate hardship is not limited to personal risks to an Applicant's life or safety, and the Officer failed to properly consider whether the overall problem of criminality constituted unusual and undeserved, or disproportionate hardship in the circumstances. This constitutes a reviewable error.

[35] In coming to this conclusion, Justice Mandamin relied upon the reasoning of Justice Pinard in *Rebaï v Canada (Minister of Citizenship & Immigration)*, 2008 FC 24 [*Rebaï*], where Justice Pinard distinguished between the proper scope of a PRRA analysis and an H&C analysis (at para 7):

> When performing a PRRA analysis, the question to be answered is whether the applicant would personally be subjected to a danger of torture or to a risk to life or to cruel and unusual treatment or punishment […] On an H&C application, the

> underlying question is whether the requirement that the applicant apply for permanent residence from outside of Canada would cause the applicant unusual and undeserved or disproportionate hardship […] While the officer can adopt the factual findings from the PRRA analysis, the officer must consider these factors in light of the lower threshold of risk applicable to H&C decisions, of "whether the risk factors amount to unusual, undeserved or disproportionate hardship" […]
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> [citations omitted]
>
> [36] I find the present case to be on all fours with *Shah*. The officer's role in an H&C analysis is to assess whether an individual would face "unusual and undeserved or disproportionate hardship" if required to apply for permanent residence outside of Canada. It is both incorrect and unreasonable to require, as part of that analysis, that an applicant establish that the circumstances he or she will face are not generally faced by others in their country of origin. Rather, the frame of analysis for H&C consideration has to be that of the individual him or herself, which involves consideration of whether the hardship of leaving Canada and returning to the country of origin would be undue, undeserved or disproportionate.
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> [37] In the particular circumstances of this case, it might well be an undue hardship for the applicant to be forced to return to the Ivory Coast, a country struggling with violence, in which the applicant has no family and has not lived for 26 years. This consideration, though, would need to be balanced with the choices made by the applicant, which involved disregard of the law and thereby lengthened the period of the applicant's absence from the Ivory Coast. The officer failed to squarely address these issues as she focussed instead on the general conditions faced by all Ivorians, a consideration that is wholly foreign to the required analysis, for the reasons stated above.

[10] On this basis, Justice Gleason granted judicial review.

[11] The Respondent however points to *Ramaischrand v Canada (Citizenship and Immigration)*, 2011 FC 44 [*Ramaischrand*], which contains the following discussion:

> [8] This is the only reference made to crime in the entire record. The applicants have alleged that the Officer failed to consider the "country condition documentation which confirms the lack of police protection and lawlessness". However, no such documentation is included in the record. It was only in their application for judicial review that the applicants included evidence of this kind. Instead, the H&C application focused on establishment and the best interests of the child. As such, and based on the lack of evidence, it cannot be said that the Officer erred in concluding that the applicants would not face unusual and undeserved or disproportionate hardship by reason of the crime levels in Guyana.
>
> [9] Even if generalized risk could be proven, this is not enough to succeed in an H&C claim: *Paul v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1300 at para. 8. As noted by Justice Shore in *Lalane*, above, at para. 38, there must be a link between evidence supporting generalized risk and that of personalized risk. Otherwise, "every H&C application made by a national of a country with problems would have to be assessed positively, regardless of the individual's personal situation, and this is not the aim and objective of an H&C application". The Officer therefore reasonably concluded that the applicants did not establish that their circumstances indicate personal risk.

[12] The Applicant correctly notes, and I accept that *Ramaischrand* deals with this issue only in obiter. I accept the law as stated in *Diabate*.

[13] In my respectful view, it is not safe to allow the decision of the officer to stand. Reviewed as an organic whole and not as a line-by-line treasure hunt for errors, in my respectful view it is impossible to tell what conclusion would have been drawn but for the officer's erroneous and unreasonable requirement noted above: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. The Decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the law, as required by *Dunsmuir*. Therefore judicial review must be granted.

II. Certified Question

[14] Neither counsel proposed a question to certify, and none arises.

III. Conclusions

[15] The application for judicial review is granted, the matter must be remanded for redetermination, and no question will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the Decision of the Immigration Officer dated May 2, 2016 is set aside, the matter is remanded to a different decision-maker for redetermination, no question is certified and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Patricia Wells	FOR THE APPLICANT
Tamrat Gebeyehu	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Patricia Wells Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT