Federal Court Cour fédérale

Date: 20170203

Docket: IMM-2145-16

Citation: 2017 FC 135

Ottawa, Ontario, February 3, 2017

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

LUIS ALFREDO DOTA ORDONEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Luis Alfredo Dota Ordonez, is a citizen of Ecuador. He entered Canada in September 2011 after living in the United States since April 2005.

[2] In November 2011, the Applicant claimed refugee protection on the basis that he feared that he would be murdered like his cousin whose death he witnessed in 2004. His refugee claim was denied by the Refugee Protection Division [RPD] on September 16, 2013 as there was insufficient evidence to show that the men he feared were still alive, or that they would want to harm him, considering that neither the Applicant nor his parents had received any threats since the Applicant left Ecuador in February 2005.

[3] In February 2015, the Applicant applied for permanent residence from within Canada requesting an exemption on humanitarian and compassionate [H&C] grounds citing his establishment, the best interests of his eleven-year-old son in Ecuador and a five-year-old child in India sponsored through Plan Canada, the risk he faces if he returns to Ecuador, and the conditions in his country of origin. His application was refused on March 10, 2015 on the basis that he had failed to establish he would suffer "unusual and undeserved or disproportionate hardship" if returned to Ecuador.

[4] The Applicant sought judicial review of the March 2015 decision. In a decision dated November 25, 2015, Mr. Justice Boswell granted the application for judicial review and ordered the matter be returned for redetermination by a different Officer.

[5] On May 11, 2016, the Applicant's H&C application was rejected a second time. In refusing the H&C application, the Officer considered three grounds: 1) establishment in Canada; 2) the best interests of the children; and 3) risk and adverse country conditions. The Officer found that the Applicant had provided insufficient evidence to establish "a pattern of sound

financial management" or that he had sufficiently established himself financially to fund his long-term stay in Canada. The Officer also found that it was in the best interests of the Applicant's son that he be reunited with his father in Ecuador and that there was insufficient evidence to establish that the Applicant could not continue to sponsor the child in India if he returned to Ecuador or that Plan Canada could not find another sponsor if the Applicant was unable to continue the sponsorship. Finally, the Officer also held that the Applicant had failed to establish that he would experience hardship in Ecuador at the hands of the individuals who had killed his cousin or that he could not seek assistance from state authorities if required to do so.

[6] The Applicant now challenges the decision of the Officer rejecting his application for H&C relief and submits that the Officer erred in her assessment of the best interests of the children and in her assessment of the evidence regarding his establishment in Canada.

II. Analysis

[7] Both parties agree that the applicable standard of review in H&C applications is reasonableness (*Kisana v Canada (Citizenship and Immigration*), 2009 FCA 189 at para 18 [*Kisana*]). The same standard of review is applicable to the assessment of the best interests of the children (*Kanthasamy v Canada (Citizenship and Immigration*), 2015 SCC 61 at paras 44-45 [*Kanthasamy*]; *Moya v Canada (Citizenship and Immigration),* 2012 FC 971 at paras 25-26).

[8] In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible, acceptable outcomes which are defensible in light of the

facts and law (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

[9] An H&C exemption is an exceptional and discretionary remedy (*Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 15) and the onus of establishing that an H&C exemption is warranted lies with the applicant (*Kisana* at para 45). If an applicant fails to adduce sufficient relevant information in support of an H&C application, he does so at his own peril (*Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at paras 5 and 8).

(1) Best interests of the children

[10] The Applicant submits that in assessing the best interests of the children, the Officer "did not truly address" the concerns identified by Mr. Justice Boswell with respect to the initial H&C application. In particular, he argues that the Officer failed to undertake any analysis from the perspective of the Applicant's son and his desire to be with his father in Canada and secondly, that the Officer applied the wrong legal test with respect to the sponsored child and ignored the emotional bond that exists between the child and the Applicant.

[11] I disagree. In my view, the Officer's reasons clearly indicate that she considered a number of factors in reviewing the best interests of the children, including addressing the concerns identified by Mr. Justice Boswell.

[12] In his decision, Mr. Justice Boswell found that although the Officer stated that he had considered the best interests of the Applicant's son, his assessment of such interests was deficient as he had not considered any scenario by which it might be in the best interests of the Applicant's son to be reunited with his father in Canada. He found that the Officer had either ignored or failed to address the best interests of the Applicant's son from his perspective, including his desire to come and live with the Applicant and to make a snowman at Christmas. Mr. Justice Boswell also found that the Officer had entirely ignored the assistance the Applicant provided the sponsored child and particularly, the impact his return to Ecuador would have on the child.

[13] Here, unlike in the first H&C decision, the Officer did consider the best interests of the Applicant's son from the child's perspective. The Officer acknowledged the close bond between the Applicant and his son and considered the wish of the Applicant's son to be reunited with his father in Canada so that he could see the snow and build a snowman at Christmas. The Officer also noted that the Applicant's son missed his father "a lot" and that he was making efforts to improve his English. The Officer further noted the financial support that the Applicant had been providing to his son.

[14] While these factors weighed in favor of the Applicant's son being reunited with his father in Canada, the Officer also considered that the Applicant's son was doing very well in school and that he has an extensive network of relatives in Ecuador. The Officer ultimately found that while the child would be reunited with his father if he came to Canada, he would be separated from his family network and be required to adjust to a new educational system, community and

language, which could then affect his best interests. Without evidence to the contrary, the Officer concluded that it was in the child's best interests that he remain in Ecuador.

[15] Moreover, responding to the failures noted by Mr. Justice Boswell in the first H&C decision, the Officer considered the child's letters where he expressed his desire to see the snow in Canada. The Officer noted, however, that in an undated letter, the child wrote that he had been on vacation with one of his aunts and that he had a "great time" with his cousin. The child described his vacation with his family as follows: "everything was great and the only thing I needed was you". The Officer ultimately found that in the absence of evidence to the contrary, it would greatly benefit the child if he was reunited with his father in Ecuador, where he could continue to thrive with his extended family.

[16] The Applicant also contends that the Officer failed to consider that the Applicant's life would be in danger if he returned to Ecuador and that it was in his son's best interests that he be alive and continue to provide for him. While the Officer did not explicitly address this argument in the context of assessing the child's best interests, the Officer did find that the Applicant had provided little objective and corroborative evidence to demonstrate that he faced a risk of serious harm if he returned to Ecuador or that the state authorities would not extend their assistance if required. In the absence of evidence demonstrating that either the Applicant or his son were at risk, it was reasonably open to the Officer not to discuss this issue in addressing the best interests of the Applicant's son.

[17] Upon review of the Officer's reasons, I am satisfied that the Officer properly considered the best interests of the Applicant's son. She identified his interests, examined them with a great deal of attention and considered them as a whole, in light of the evidence adduced by the Applicant (*Kanthasamy* at paras 39 and 45).

[18] I am also satisfied that the Officer properly considered the best interests of the Applicant's sponsored child. Relying on letters from the sponsored child and his mother, the Officer noted that the Applicant's support has assisted them with their basic needs and that it was in the child's best interests that these continue to be provided to him. However, the Officer found that in the absence of evidence to the contrary, it was reasonable to conclude that the Applicant would be able to continue to sponsor the child upon his return to Ecuador and securing employment. The Officer equally found that there was little evidence to suggest that if the Applicant was no longer able to sponsor the child, Plan Canada would be unable to attract another sponsor for him. In the end, the Officer was not satisfied that the best interests of the sponsored child would be severely compromised if the Applicant returned to Ecuador.

[19] The Applicant argued that by using the words "severely compromised" in relation to the interests of the sponsored child, the Officer applied the wrong test. I disagree. The use of these particular words is not determinative. The words must be read together with the rest of the analysis which clearly demonstrates that the Officer considered the best interests of the sponsored child, in light of the evidence adduced by the Applicant (*Lopez Segura v Canada (Citizenship and Immigration)*, 2009 FC 894 at para 29).

[20] The Applicant also argued that the Officer failed to consider the emotional bond he has with the sponsored child. While the Applicant may feel a close connection with the sponsored child, the evidence adduced by the Applicant does not demonstrate a relationship with the sponsored child outside of Plan Canada. The sponsored child is not a dependant in the legal sense of the term. Also, the letter provided by Plan Canada indicates that the Applicant donates to Plan Canada, who then distributes the funds to the sponsored child and his family. The letters and drawings also show that all communications between the Applicant and the sponsored child passed through Plan Canada.

[21] As this Court stated in *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at paragraph 35, the best interests of the child factor "is not meant to be used to rescue a claim raising H&C considerations in cases where the proximity and the nature of a claimant's involvement in the life of a child is at best distant, remote and marginal". In the absence of any other evidence demonstrating that the Applicant enjoyed a relationship with the sponsored child other than through Plan Canada, it was reasonable for the Officer to conclude that Plan Canada would not abandon the child if the Applicant was no longer able to continue sponsoring him.

(2) Establishment in Canada

[22] The Applicant submits that the Officer failed to conduct a proper analysis of the factors concerning his establishment in Canada, or the hardship he would face if returned to Ecuador. Specifically, he argues that in assessing his level of establishment in Canada, the Officer glossed over positive factors while picking on minor omissions in the evidence and elevating these into determinative factors.

[23] I disagree.

[24] The Officer first noted the positive factors. She acknowledged the relatively long duration for which the Applicant has been in Canada, as well as his efforts towards establishment and integration into his community. Notably, the Officer gave positive weight to the fact that the Applicant has been gainfully employed for most of his time in Canada and that he has been paying his taxes. The Officer also noted that the Applicant made a number of close friends in Canada, registered for English as a Second Language classes, was of good character, was an asset to his employer, and provided assistance in the 2013 Alberta floods.

[25] However, the Officer was unable to conclude that the Applicant had “established himself financially to fund his long-term stay in Canada”. The Officer noted that there were gaps in the Applicant’s employment evidence and that the Applicant had not provided evidence of sound financial management. She noted that the letters from the Applicant’s employer did not indicate when the Applicant started working, his tenure, hours of work, or salary. The Officer further noted that the Applicant had failed to provide notices of assessments or pay stubs for 2014 or beyond and evidence of savings or financial management.

[26] The Applicant attempted to introduce additional evidence of his income before this Court that was not before the Officer at the time the decision was made. It is well-established that the judicial review of a tribunal decision is to be considered on the basis of the material that was before the tribunal when it made its decision (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright*), 2012 FCA 22 at para 19).

While there are a few recognized exceptions to the general rule, the Applicant has not demonstrated that any of those exceptions apply in the present case.

[27] I agree with the Respondent that the 2014 notice of assessment could have been made available to the Officer when the Applicant provided new documents in support of his application on redetermination in January 2016. In addition, the Applicant could have provided updated evidence of income, such as his pay stubs or bank statements, to demonstrate his employment status and financial situation. The onus was on the Applicant to demonstrate his establishment in Canada and it was the Officer's duty to consider and weigh the evidence adduced by the Applicant. The Officer concluded that the Applicant had not established himself financially to fund his long-term stay in Canada. It was open to the Officer to make this finding in light of the evidence adduced by the Applicant.

[28] The Applicant further submits that the Officer failed to appreciate the magnitude of hardship that would befall on the Applicant if he returned to Ecuador. He argues that the Officer failed to engage in any analysis regarding the country conditions that were directly relevant to an assessment of hardship and the likelihood that relocating to Ecuador would cause the Applicant to face cruel and unusual treatment. The Applicant contends that if the Officer had engaged in a proper analysis, she would have found that the Applicant had no recourse to seek protection given the widespread corruption in Ecuador and the ineffectiveness and inability of the police to protect citizens against crime.

[29] The Applicant's contention is simply unfounded. The Officer properly noted that pursuant to subsection 25(1.3) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], she could not consider the factors that are taken into account in the determination of whether a person is a Convention refugee or a person in need of protection under sections 96 and subsection 97(1) of the IRPA but could consider elements of hardship that would affect the Applicant if he returned to Ecuador. The Officer further noted that the Applicant's risk had already been assessed and dismissed by the RPD in September 2013.

[30] The Officer then considered the Applicant's allegation that hardship would result from being pursued by the individuals who were responsible for the death of his cousin and his aunt. She noted the Applicant's submissions which stated that he had witnessed the killing of his cousin when he was working on his farm in 2004, that his aunt was run down by a car and killed while waiting for the bus after his departure from Ecuador, and that there was "strong speculation within the community" that she was killed by the same men who were responsible for the death of the Applicant's cousin. However, the Officer found that the Applicant had provided little objective and corroborative evidence demonstrating that the same aggressors who had attacked his cousin would still be interested in seeking him harm some twelve (12) or thirteen (13) years later and that "a strong speculation within the community" did not constitute sufficient evidence that the deaths of his aunt and cousin were related.

[31] The Officer then examined the Applicant's contention that he could not seek protection in Ecuador given the widespread corruption. The Officer properly noted that the Applicant, by his own admission, had filed a witness statement and a police report with the authorities regarding

the individuals responsible for his cousin's death, thus demonstrating that the Applicant had been able to seek assistance from the authorities. Given the insufficiency of evidence demonstrating that the authorities would not extend their assistance to the Applicant in the future if requested, the Officer concluded that the redress options available to the Applicant mitigated the hardship he might face upon return to Ecuador.

[32] Having considered the Officer's findings and the evidence on the record, I find no basis for overturning her decision. While the Applicant may disagree with the Officer's overall assessment of the evidence and the weight she gave to each H&C factor, it is not open to this Court to reweigh the evidence and attribute a different level of importance to the relevant H&C factors in this application (*Kisana* at para 24).

[33] For all of the above reasons, I find that the Officer's decision is reasonable and that it falls within the range of possible, acceptable outcomes based on the facts and law (*Dunsmuir* at para 47). As a result, the application for judicial review is dismissed.

[34] No question of general importance has been proposed by the parties. None will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed and no question of general importance is certified.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2145-16
STYLE OF CAUSE:	LUIS ALFREDO DOTA ORDONEZ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	JANUARY 10, 2017
JUDGMENT AND REASONS:	ROUSSEL J.
DATED:	FEBRUARY 3, 2017

APPEARANCES:

Shirzad S. Ahmed	FOR THE APPLICANT
David Shiroky	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Shirzad S. Ahmed Barrister & Solicitor Calgary, Alberta	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Calgary, Alberta	FOR THE RESPONDENT