Federal Court  Cour fédérale

**Date: 20170731**

**Docket: IMM-4620-16**

**Citation: 2017 FC 748**

**Ottawa, Ontario, July 31, 2017**

**PRESENT: The Honourable Mr. Justice Manson**

**BETWEEN:**

**LILIANA FERNANDA VALENCIA MARTINEZ, JAIMIE ALEJANDRO FERNANDEZ VALENCIA, AND ISBAELLA FERNANDEZ VALENCIA, BY HER LITIGATION GUARDIAN LILIANA FERNANDA VALENCIA MARTINEZ**

**Applicants**

**and**

**THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP**

**Respondent**

## JUDGMENT AND REASONS

## I. Introduction

[1] This is an application for leave and judicial review, under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2002, c 27 ("IRPA"), of a decision by a Senior

Immigration Officer (the "Officer"), dated October 20, 2016 (the "Decision"), refusing the Applicants' application for permanent residence on humanitarian and compassionate ("H&C") grounds under section 25 of the IRPA.

## II. Background

[2] The Applicants, Liliana Fernanda Valencia Martinez (the "Principal Applicant"), Jaime Alejandro Fernandez Valencia ("Jaime"), and Isbaella Fernandez Valencia ("Isabella"), are citizens of Colombia. They came to Canada in December 2011, and applied for refugee protection on the basis of the Principal Applicant's claims of being threatened and assaulted by the Revolutionary Armed Forces of Colombia ("FARC").

[3] The Applicants' refugee claim was heard in September 2015, and was refused on January 18, 2016, based upon a finding that the Principal Applicant's evidence lacked credibility. The Applicants made an application for leave and judicial review, which was dismissed by the Court in April 2016. Shortly thereafter, the Applicants submitted their application for permanent residence on H&C grounds.

[4] On or about August 4, 2016, the Applicants requested a deferral of their removal from Canada, pending the determination of their H&C claim and an updated risk assessment. This request was denied on August 29, 2016. However, their motion for a stay of removal was granted, based on their litigation of the negative deferral decision.

[5] The Applicants arrived in Canada destitute—they knew little English, lived in shelters, and received welfare. In the approximately six years since their arrival, the Applicants have managed to establish themselves in Canada. The Principal Applicant owns two small businesses, a cleaning company and a small general contracting company; Jaime attends Conestoga College and is enrolled in Business Administration; and Isabaella has just finished high school and hopes to attend a Canadian University to study medicine.

[6] The Applicants argue that the Decision is unreasonable and does not consider the circumstances of these particular Applicants, particularly the best interests of both Jaime and Isabella.

## III. Issues

[7] The issues are:

A. Did the Officer err in failing to identify any standard upon which she based her decision?

B. Were the Officer's assessments of the Applicants' establishment, risk, and the best interests of the child reasonable?

## IV. Standard of Review

[8] The standard of review is reasonableness (*Kanthasamy v Canada*, 2015 SCC 61 at para 44 [*Kanthasamy*]).

V. Analysis

A. *Did the Officer err in failing to identify any standard upon which she based her decision?*

[9] The Applicants argue that the Officer erred because she did not define what she believes "compassion" means, as it is used in section 25 of the IRPA. Further, they assert that the Officer erred in not explicitly applying either a test for hardship or the test of the reasonable man from *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 1 IAC 338 [*Chirwa*]. The Applicants state that the dissenting reasons in *Kanthasamy* leave no doubt that the *Chirwa* reasonableness test is now part of section 25.

[10] The Respondent contends that the Officer did not err, and that there is no clear test that must be applied when an officer is considering whether H&C relief is to be granted. The Respondent refers to paragraph 25 of *Kanthasamy*, wherein Justice Abella, writing for the majority, wrote "what does warrant relief will clearly vary depending on the facts and the context of the case, but officers making humanitarian and compassionate determinations must substantively consider and weigh all the relevant fact and factors before them". The Respondent thus argues that the Supreme Court of Canada has not mandated the use of specific tests or language in H&C determinations.

[11] I agree with the Respondent that it was not an error for the Officer to neither provide a definition of "compassion" nor apply a specific test when determining whether granting H&C relief is appropriate.

[12] In *Kanthasamy*, at paragraphs 30 to 33, Justice Abella held that it was appropriate to treat the *Chirwa* reasonableness test less categorically, using the language in *Chirwa* co-extensively with the Ministerial Guidelines—which talk about unusual, undeserved, and/or disproportionate hardship—as guidelines that provide decision makers with assistance when exercising their discretion. The *Chirwa* test and the Guidelines are, therefore, meant to turn the Officer's mind to the factors, including equitable principles, which must be considered in an H&C determination, not create a specific test.

[13] Not creating a specific test allows a decision maker to use section 25(1) "to respond more flexibly to the equitable goals of the provision" (*Kanthasamy* at para 33). As such, a decision maker is not fettered by a specific test or definition, but rather must "consider and give weight to *all* relevant humanitarian and compassionate considerations in a particular case" (*Kanthasamy* at para 33).

B. *Were the Officer's assessments of the Applicants' establishment, risk, and the best interests of the child reasonable?*

(1) Establishment

[14] The Applicants argue that the Officer did not assess their establishment in a manner that engaged the Applicants' personal evidence of establishment. As such, the Officer did not consider whether leaving Canada would result in personalized hardships that would warrant H&C relief. Additionally, the Applicants state that the Officer erred in considering their level of establishment in relation to other refugee claimants.

[15] The Respondent asserts that the Officer did not err in stating that she did not find the Applicants' establishment to be beyond the normal establishment one would expect of applicants in their circumstances, because it is reasonable for the Officer to consider that there will always be some degree of establishment as applicants engage in the refugee determination process. Moreover, the Respondent submits that the Officer did reasonably consider the Applicants' personal establishment and found that, when weighed with the other factors, the total circumstances did not warrant H&C relief.

[16] I agree with the Respondent that the Officer did not err in comparing the level of the Applicants' establishment to that of similarly situated refugees. This case is distinguishable from the cases cited by the Applicants regarding establishment. In those cases, the Court found that the officers in question did not engage sufficiently with the facts and evidence showing that the applicants were established in Canada, and that on the particular facts of each case the decisions were unreasonable.

[17] In this case, the Officer did explain why she disagreed that the Applicants' level of establishment was exceptional. Although the Officer made the comment that the "degree of establishment is of a level that was naturally expected of them", she did not come to this conclusion without demonstrating that she considered the personal circumstances of the Applicants. The Officer noted that Principal Applicant had started businesses in Canada, and that Jaime and Isabella had made many good friends and were attending school in Canada. However, she stated that the Principal Applicant's self-employment was not sufficient to demonstrate

exceptional integration in to Canadian society, and similarly that Jaime's and Isabella's integration into the Canadian school system did not warrant granting an exception.

[18] Further, the Officer considered that Jaime and Isabella would be leaving good friends in Canada. However, she found that the relationships that the Applicants have formed in Canada, while numerous, are neither bounded by geographical location nor characterized by an exceptional degree of interdependency or reliance. Therefore, they are relationships that they will be able to maintain over distance.

[19] Moreover, the Officer noted that the employment and entrepreneurial skills that the Principal Applicant's obtained in Canada would help her find employment or start a business in Colombia, making her return less of a hardship. She also considered the fact that the Applicants have strong familial ties to Colombia and stated that Isabella would be able to integrate back into the Colombian school system—although I note that, given time between the application for H&C relief and this hearing, Isabella has graduated from high school.

[20] A reviewing court is to show "respectful attention to the reasons offered or which could be offered in support of a decision" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 48). It is not for a reviewing court to reweigh the evidence. As such, I find that the Officer's treatment of the Applicants' establishment evidence was reasonable.

(2) Risk

[21] The Applicants submit that the Officer erred in her consideration of the hardships due to risks faced by the Applicants upon their return to Colombia. They state that the Officer did not explain why the new evidence does not rebut the credibility determination made by the Refugee Protection Division ("RPD"). Further, they assert that if the new evidence is believed that it directly rebuts the RPD's decision.

[22] The Respondent argues that, because the new evidence is a continuation of the allegations that the RPD found to lack credibility, it was reasonable for the Officer to find that the evidence tendered was insufficient to establish that the Applicants' hardship due to risk was such that H&C relief should be granted.

[23] Before the RPD, the Applicants argued that the Principal Applicant had been threatened and kidnapped by the FARC. However, the RPD held that the Principal Applicant had not provided credible evidence regarding key aspects of her narrative. Ultimately, the RPD did not believe that the Applicants' story that they were currently being pursued by the FARC.

[24] It is not the place of the Officer to reassess the findings of the RPD. Section 25 "is not meant to duplicate refugee proceedings under s. 96 or s. 97(1)"; that is, "the officer does not determine whether a well-founded fear of persecution, risk to life, and risk of cruel and unusual treatment or punishment has been established" (*Kanthasamy* at paras 24 and 51). In the

assessment of risk, as part of the global H&C determination, the Officer is to take the underlying facts into account in determining whether H&C relief is warranted (*Kanthasamy* at para 51).

[25] The Officer noted that the underlying facts relating to the Applicants' claims of hardship arising from allegations of risk are the same as those the RPD found to lack credibility and held that the new evidence was insufficient to demonstrate that the Applicants would face hardship warranting H&C relief, in light of the RPD's findings. She further considered the fact that Colombia has a functioning police force and judicial system. Given the role of the Officer, her assessment of the evidence relating to the Applicants' risk in Colombia is reasonable.

(3) Best interests of the child

[26] The Applicants argue that the Officer did not engage with the interests of Jaime and Isabella. They assert that she dismissed them by stating "I am satisfied that the best interests of the children would be met if they continued to benefit from the personal care and support of their mother". The Applicants state that the Officer does not explain how being forced to give up their lives in Canada is in the best interests of Jaime and Isabella.

[27] The Respondent contends that the Officer's reasons show that she was engaged with the evidence concerning the Principal Applicant's children and acknowledged the difficulties they would face in returning to Colombia. The Respondent further submits that the Officer did not err in not specifically mentioning the letter of Dr. Fox, since the letter provides no clear medical diagnosis and only speaks to difficulties that the Officer already acknowledged.

[28] Justice Abella, in *Kanthasamy*, at paragraph 39, states:

> A decision under s. 25(1) will therefore be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered. This means that decision-makers must do more than simply state that the interests of a child have been taken into account. Those interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence.
>
> (citations omitted)

[29] I do not find that the Officer was dismissive of Jaime's and Isabella's interests. The Officer accepted that Jaime and Isabella may face some difficulties in moving to Colombia. The Officer acknowledged that different standards of living exist between Canada and Colombia, and also that Colombia may not offer the same social, financial, and medical supports as could be found in Canada. However, as Justice Abella commented, "there will inevitably be some hardship associated with being required to leave Canada [but] [t]his alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under s. 25(1)" (*Kanthasamy* at para 23).

[30] The Officer discussed the Applicants' concerns about Jaime's and Isabella's education, their ability to adapt to living in Colombia, and the existence of social supports such as family and friends. She found that Jaime and Isabella would have their basic needs met and stated that there was no evidence to suggest that Jaime or Isabella would face significant hardship because of their ages and circumstances. The Officer also held that the evidence supported a conclusion that Jaime and Isabaella would be able to reintegrate into Colombia because they would not be returning to an unfamiliar place, language, or culture. Therefore, given the level of hardship they

would face upon their return to Colombia, the Officer concluded that it was in Jaime's and Isabella's best interests to remain with their mother.

[31] I find the Officer's best interest of the child analysis to be reasonable. The Decision shows that the Officer did engage with the particular details of Jaime's and Isabella's circumstances, despite the fact that the details are not explicitly mentioned in the Decision, and demonstrates that she fully considered the factors raised by the Applicants in relation to the best interest of the child.

[32] Having found that the Officer's analyses of establishment, risk, and the best interest of the child were reasonable, I find that it was reasonable for the Officer to conclude that the Applicants' circumstances do not establish that a positive exemption is warranted on H&C grounds.

**JUDGMENT in IMM-4620-16**

**THIS COURT'S JUDGMENT is that:**

1. The application is dismissed;

2. There is no question for certification.

"Michael D. Manson"
Judge

**FEDERAL COURT**

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| **DOCKET:** | IMM-4620-16 |
| **STYLE OF CAUSE:** | LILIANA FERNANDA VALENCIA MARTINEZ ET AL v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | JULY 26, 2017 |
| **JUDGMENT AND REASONS:** | MANSON J. |
| **DATED:** | JULY 31, 2017 |

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| Ms. Amy King | FOR THE RESPONDENT |

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