Federal Court  Cour fédérale

Date: 20171102

Docket: IMM-1896-17

Citation: 2017 FC 990

Ottawa, Ontario, November 2, 2017

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

JORGE ALBERTO VELASCO QUINTEROS
MARIA RUTHDEY ARGUETA DE VELASCO
TATIANA ARLETTE VELASCO ARGUETA
GEORGINA MICHELLE VELASCO ARGUETA

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] 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 a decision made by an immigration officer (the "Officer") refusing the Applicants' request to defer their removal from Canada pursuant to

subsection 48(2) of the IRPA until their humanitarian and compassionate ("H&C") application is determined.

II. Background

[2] The Applicants are a family from El Salvador. Mr. Velasco Quinteros and Ms. Argueta de Velasco are married and have two children named Tatiana and Georgina.

[3] The Applicants have allegedly experienced death threats and extortion in El Salvador from the Mara Salvatrucha (the "Mara"), an international gang whose members are principally of El Salvadorian ethnicity.

[4] In January 2016, a Mara gang member allegedly called the Applicants and threatened to kill them if they did not pay $1,500 dollars. The Applicants made a police complaint and went into hiding at a family member's house.

[5] The following month, Mara gang members allegedly stopped the Applicants on the street outside their home. The Mara demanded a $2,000 monthly payment and threatened the family with death. The Mara also demanded that Georgina and Tatiana help deliver messages and drugs and made it clear that they knew where all four members of the family worked and studied. The Applicants made a second police complaint.

[6] In March 2016, the Applicants arrived in Canada and made a refugee claim based on their experiences with the Mara. Shortly after their arrival, Georgina discovered she was pregnant.

[7] In June 2016, the Applicants' refugee claim was refused by the Refugee Protection Division ("RPD"). The RPD did not have concerns with the Applicants' credibility, or the basis of their claim; however, the RPD found no nexus between their experiences and the enumerated grounds of persecution (pursuant to section 96 of the IRPA) and found that their risk was a generalized risk, common to residents of El Salvador (pursuant to section 97 of the IRPA). In September 2016, this Court denied leave for judicial review of the RPD's decision.

[8] Subsequent to the failed refugee claim, the Applicants allegedly learned that Mara gang members were looking for them, broke into their home and stole personal information.

[9] In November 2016, Georgina gave birth to a boy named Milan.

[10] On March 8, 2017, the Applicants submitted an H&C application.

[11] On March 30, 2017, the Applicants were scheduled to be removed from Canada on April 30, 2017.

[12] On April 7, 2017, the Applicants submitted a request to defer their removal. On April 27, 2017, the Applicants' deferral request was denied by the Officer.

[13] On April 27, 2017, the Applicants filed a motion to stay their removal as well as an application for judicial review of the Officer's decision. This Court ordered a stay of removal until the application for judicial review is fully determined.

[14] In her written reasons for denying the deferral request, the Officer noted her limited discretion to defer removal under subsection 48(2) of the IRPA and that even if she chose to exercise her discretion, the removal order would still have to be enforced as soon as possible.

[15] The Officer acknowledged the H&C application and its supporting submissions; however, the Officer found that processing of the application would not require the Applicants' presence in Canada. Furthermore, H&C applications do not give rise to any impediment to or statutory stay of removal; public policy enables processing of these applications after removal.

[16] The Officer also acknowledged the recent birth of Milan and that his best interests must be seriously considered. The Officer noted that Milan is a Canadian citizen and is not subject to removal, enjoys mobility rights and is entitled to healthcare and other social programs. As well, there was insufficient evidence to suggest Milan would not benefit from being reunited with his father, who was located in El Salvador.

[17] Furthermore, the Officer found no new and compelling evidence of risk. The Applicants' submissions did not show that conditions in El Salvador had deteriorated since the RPD reviewed the Applicants' claim. As well, there was insufficient evidence to show that the recent break-in at their house in El Salvador was perpetrated by members of the Mara. The Officer noted that a deferral of removal is a temporary measure intended to alleviate exceptional circumstances and is not the appropriate avenue to circumvent legislated measures to preserve the integrity of Canada's immigration system.

[18] Finally, the Officer dismissed a report submitted by a registered psychotherapist, which diagnosed the Applicants with post-traumatic stress disorder ("PTSD"), generalized anxiety disorder and major depressive disorder, related to their experiences in El Salvador. The Officer noted that the report was completed on the same day as a 60-minute interview, was not made on the recommendation of a healthcare provider and appeared to have been prepared at the request of counsel to support the H&C application. As well, there was no evidence to suggest the Applicants could not address their mental health issues in El Salvador.

[19] The Officer concluded that the challenges arising from removal were not irreparable and the evidence did not establish an exceptional case that justified deferral of removal.

III. Issues

[20] The issues are:

A. Did the Officer fail to reasonably consider the Applicants' mental health and their physical safety?

B. Did the Officer fail to assess the best interests of the child Milan?

IV. Standard of review

[21] The standard of review is reasonableness (*Canada (Minister of Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 [*Shpati*] at para 27; *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 [*Baron*] at para 25).

V. Analysis

A. *Did the Officer fail to reasonably consider the Applicants' mental health and their physical safety?*

[22] The Applicants argues that the Officer had discretion to consider a broad range of circumstances and by failing to consider and/or give adequate weight to the Applicants' evidence concerning their compelling mental health and physical safety, the Officer fettered her discretion and rendered an unreasonable decision. The Applicants rely on the report of the psychotherapist Nancy Riback for asserting the Officer did not reasonably deal with the mental health issues of the Applicants.

[23] The Respondent argues that the evidence of risk and mental health to the Applicants was previously put before the RPD and this Court, both of which rejected the Applicants' claim. The Officer reasonably found that conditions in El Salvador had not seriously deteriorated since that claim was rejected. As well, the Officer's reasons for dismissing the psychotherapist's report were reasonable.

[24] The discretion of an enforcement officer under section 48 of the IRPA is very limited. As this Court stated in *Simoes v Canada (Minister of Citizenship and Immigration)*, [2000] 187 FTR 219 [*Simoes*] at para 12:

> […] the discretion that a removal officer may exercise is very limited, and in any case, is restricted to when a removal order will be executed. In deciding when it is "reasonably practicable" for a removal order to be executed, a removal officer may consider various factors such as illness, other impediments to travelling, and

> pending H&C applications that were brought on a timely basis but have yet to be resolved due to backlogs in the system.

[25] As well, this Court identified a number of principles with respect to deferrals in *Wang v Canada (Minister of Citizenship and Immigration)*, [2001] 3 FCR 682 [*Wang*] at paras 44-45 and 48:

- A range of factors can validly influence the timing of removal on even the narrowest reading of section 48 of the IRPA, such as making effective travel arrangements, medical conditions affecting the ability to travel, children's school years and pending births or deaths;
- The exercise of deferral requires justification for failing to obey the positive legal obligation to execute a valid removal order. In considering the duty to comply with section 48, the availability of an alternate remedy, such as a right to return, should be given great consideration because it is a remedy other than failing to comply with a positive statutory obligation; and
- One example of a policy that respects both the duty to execute and the discretion to defer, is that deferral should be reserved for those applications or processes where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment. In those cases, the consequences cannot be remedied by readmitting the person to Canada.

[26] This Court's statements in *Simoes* and *Wang* have been cited with approval by the Federal Court of Appeal (*Baron* at paras 49 and 51; *Shpati* at paras 43-44). Moreover, section 48 of the IRPA has more recently been amended to replace the words "as soon as is reasonably practicable" with "as soon as possible".

[27] The Officer's justification for dismissing the psychotherapist's report was reasonable. She gave little weight to this evidence due to the circumstances in which it was created, as well as the lack of evidence to suggest that the Applicants could not access mental health services in El Salvador. She was entitled to make that finding and it is not the Court's role to re-weigh the evidence.

[28] Moreover, I agree with the Respondent that Ms. Riback is not qualified to opine on the diagnosis of PTSD and other medical conditions properly diagnosed by psychiatrists, psychologists and medical doctors.

[29] Further, in stating that "given the danger and hardship this family will likely face it they are forced to return to the El Salvador" (at page 241 of the Applicants' Record), Ms. Riback clearly crossed the line and became an advocate, providing an opinion she had no foundation for or expertise to give; her opinion on this point has no probative value (*Egbesola v Canada (Minister of Citizenship and Immigration)*, 2016 FC 204 at paras 13-15).

[30] However, it was unreasonable for the Officer to conclude there was no new and compelling evidence of risk. The Applicants submitted new evidence to support their claim of a serious and personalized risk that would be faced upon returning to El Salvador. The Officer dismissed this evidence because it did not "provide sufficient evidence that the unknown perpetrators are affiliated with [the Mara]" but did not provide further explanation and did not refer to any contradictory evidence.

[31] The new evidence relates to a break-in at the Applicants' house that occurred several months after their refugee claim had been denied. A relative of the nephew had been living in the Applicants' house since they arrived in Canada. In an affidavit, that relative submitted two photos showing the condition of the house after the break-in as well as the following statement:

> …I found the two doors had been forced to the point in which they were no longer functional. The inside of the house was completely turned upside down, and they had taken the television sets and computers, later noticing that they had also taken photographs,

> important documents, credit cards and personal contracts – all of those documents were only those pertaining to my aunt and uncle and their daughters, which seemed to me difficult to understand, given that my personal documents were complete. I could not file the report given they told me that my uncle's case was already at the Attorney General's Office, due to the report that was previously filed as such only my uncle […] could expand upon the report.

[32] In their written submission to the Officer, the Applicants' wrote:

> [..]The Velasco family is certain it was members of the Mara because their personal documents were stolen and only a few valuable items taken. The Mara members were likely searching for the documents to track down the Velasco family. As the Velasco family notes in their affidavit, if the intruders had simply been common thieves they would have, in all likelihood, stolen more items and left the personal documents alone.
>
> I refer you to the photos in Exhibit "E" of the damaged doors where the Mara forced themselves in to the house and the affidavit by Angel Rivera Argueta in Exhibit "F" of the Velasco family's affidavit.
>
> This information is new and was not available for the RPD to consider. It is particularly relevant because it shows the Velasco family does, in fact, face a personalized risk in El Salvador. Not only did the Mara target them over the phone and in person when the family lived in El Salvador, but they now continue to target them even after their departure. Again, the only reason the RPD refused the family's section 97 claim was because of a finding of generalized risk. The new evidence that the Velasco family now has directly weighs against this previous finding. It is evidence that ought to be assessed by a PRRA officer authorized and qualified to make risk assessments. Given that the Velasco family will be entitled to a PRRA as of June 7, 2017, deferring their removal to allow time for a PRRA application to be submitted and decided upon would be reasonable.

[33] The new evidence shows a likelihood of personalized risk and therefore could impugn the previous decision of the RPD. Given that the Applicants' have experienced repeated threats and

extortion from members of the Mara, it is reasonable to believe this break-in was related to those previous experiences. As well, the Mara may now have many documents containing the Applicants' personal information.

[34] The RPD had no credibility concerns with the Applicants and dismissed their section 97 claim only on the basis of a generalized risk. Not only does this new evidence support a finding of personalized risk, but the Officer's decision was rendered less than two months before the Applicants' were eligible for a PRRA application.

[35] Apart from stating that the evidence was "insufficient", the Officer made no reference to this significant development. The Officer did not provide further explanation for that finding, nor did the Officer refer to any contradictory evidence or the fact the RPD made no adverse credibility findings with respect to the Applicants.

[36] Furthermore, the Officer failed to refer to this new evidence with respect to the Best Interest of the Child ("BIOC"). As I explain below, the Officer was only required to perform a truncated analysis of short-term interests rather than a full BIOC analysis as required on an H&C application as set out in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] . However, the Officer was not "alert and sensitive" to the short-term BIOC considering this new evidence of risk and its impact on the RPD's previous decision or a forthcoming PRRA application.

B. *Did the Officer fail to assess the best interests of the child Milan?*

[37] The Applicants argue that the Officer conducted an inadequate BIOC analysis because she did not consider the family's risks and mental health issues as they directly relate to the child.

[38] The Respondent argues that the Officer was only required to consider the immediate, short-term interests of the child, and that obligation is limited to circumstances where there is no practical alternative to deferral in order to ensure the care and protection of the child.

[39] In dealing with a deferral request, enforcement officers cannot engage in a full-blown BIOC analysis because doing would usurp the function of H&C officers under section 25 of the IRPA (*Lewis v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 FCA 130 [*Lewis*] at para 57). Furthermore, the Supreme Court of Canada's holding in *Kanthasamy* applies only to H&C decisions made under section 25 of the IRPA (*Lewis* at para 74).

[40] However, enforcement officers may be required to engage in a truncated consideration of the short-term best interests of children who might be affected by their parents' removal (*Lewis* at para 58). As this Court stated in *Munar v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1180 [*Munar*] at paras 38 and 40:

> 38. […] the consideration of the best interests of the child is not an all-or-nothing exercise, but should be seen as a continuum. While a full-fledged analysis is required in the context of an H&C application, a less thorough examination may be sufficient when other types of decisions are made. Because of section 48 of the Act and of its overall structure, […] the obligation of [an enforcement]

> officer to consider the interests of Canadian-born children must rest at the lower end of the spectrum […].
>
> 40. […] What [an enforcement officer] should be considering […] are the short-term best interests of the child. […]

[41] Such short-term interests have been found to include: the need for a child to finish a school year during the period of the requested deferral (*Munar* at para 40); maintaining the well-being of children who require specialized ongoing medical care in Canada (*Danyi v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 FC 112 at paras 36-40); ensuring that there will be someone to care for the child after his or her parent(s) are removed if the child is to remain in Canada (*Munar* at paras 40-42); and the need of an indigenous child to maintain some connection with his or her culture, heritage and territory (*Lewis* at 85-88).

[42] In this case, the Officer noted that Milan is entitled to the benefits of a Canadian citizen and there was insufficient evidence to suggest Milan would not benefit from being reunited with his father in El Salvador, if returned with his mother. While those considerations may be relevant, the more significant short-term interests of Milan relate to the risks to him and his family. The Officer did not directly address those risks in the context of Milan's best interests, and the Officer's consideration of Milan's best interests in this light was unreasonable.

JUDGMENT in IMM-1896-17

THIS COURT'S JUDGMENT is that:

1. The application is allowed, and the matter is remitted to a different officer for reconsideration;

2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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