Federal Court  Cour fédérale

Date: 20180413

Docket: IMM-2856-17

Citation: 2018 FC 402

Ottawa, Ontario, April 13, 2018

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

EMMANUEL REYES MONTALVO, LIZBETH HERNANDEZ CARMONA AND LIZBETH HERNANDEZ CARMONA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] On October 20, 2005, Mr. Emmanuel Reyes Montalvo (the Principal Applicant) fled to Canada after being tortured by Ministerial police in Mexico. His wife and daughter later fled the country as well and joined him in Canada. After his refugee claim was refused because of a viable internal flight alternative (IFA), the Principal Applicant submitted an humanitarian and

compassionate [H&C] application made under section 25(1) of the *Immigration and Refugee Protection Act,* SC 2001, c 27 [IRPA] on April 23, 2012.

[2] The resulting negative H&C decision was sent back on consent by the Respondent, as was the subsequent negative H&C decision. The matter now before the Court is the Principal Applicant's third negative H&C decision.

[3] I find that this decision was unreasonable and will grant this application for the reasons that follow.

II. Background

[4] Emmanuel Reyes Montalvo, his wife (Lizbeth Hernandez Carmona), and their 11 year old daughter (also named Lizbeth Hernandez Carmona), were born in Mexico and are all Applicants in this judicial review. They also have a son, 8 year old Emmanuel Junior, who was born in Canada. The family resided in Calgary, Alberta, but due extreme downturn in the Albertan economy, the family moved to Surrey, British Columbia (BC) in 2016.

[5] On October 20, 2005, the Principal Applicant fled Mexico and came to Canada where he made a refugee claim after being tortured by police in Veracruz. He suffers from Post-Traumatic Stress Disorder (PTSD) due to those events.

[6] On October 24, 2007, the Refugee Protection Division (RPD) accepted that the Principal Applicant was tortured, but it denied his refugee claim because he had an IFA to Mexico City.

The Principal Applicant's wife and daughter fled to Canada on August 7, 2008. They have since made three H&C applications (this judicial review being the third). The first two decisions were returned on consent by the Respondent.

[7] The third H&C application that is before this Court on judicial review was reviewed by a Senior Immigration Officer (the Officer). The Officer gave little weight to the family's establishment factor since the Applicants recently moved from Calgary, Alberta (where they had been firmly established), to Surrey, BC. This move, made due to the Alberta economy, weakened the establishment factors because the family could no longer demonstrate the same community involvement, volunteering, or strong social relationships in their new city of residence. The Applicants' family ties to Canada were also afforded little weight.

[8] The Officer reviewed a psychological report dated September 27, 2010, written by Dr. Davis, a Registered Psychologist who specializes in PTSD/Trauma. The Officer accepted the Principal Applicant's PTSD diagnosis in the report, but also found the report did not address other concerns, such as the Principal Applicant's current mental health status. Because the Principal Applicant deals with PTSD poorly in Canada (where he also comes into contact with people who may resemble his torturers), the Officer found the Principal Applicant did not face any risk of worsened PTSD if he returned to Mexico.

[9] Although the Principal Applicant said he might have a difficult time finding employment, the Officer found insufficient evidence to substantiate this, and noted his significant financial resources as well as his successful Canadian business.

[10] The Officer's Best Interest of the Child (BIOC) analysis reviewed letters written by Lizbeth about her Canadian ties, her fear of Mexico, and letters from the children's school in Surrey. The Officer found that there was little evidence she maintained ties with her Calgary friends, or about her relationship with her grandfather and uncle who also reside in Canada. The Officer found that seeing their father stressed in Mexico would cause them stress, and the best interests for the children were for the family to remain in Canada.

[11] On June 8, 2017, the Officer decided that H&C relief was not warranted.

[12] Before this judicial review could be heard, the Applicants were required to leave Canada on October 5, 2017, as set out in their deportation orders. Justice Diner issued a stay order on that same day.

III. Issue

[13] The issue is whether the Officer's decision was reasonable?

IV. Standard of Review

[14] The standard of review of H&C decisions is reasonableness (*Basaki v Canada (Citizenship and Immigration*), 2015 FC 166 at para 18).

V. Analysis

[15] What permeates throughout this decision is the Principal Applicant's failure to file an updated medical report. For example, the Certified Tribunal Record (CTR) contains correspondence from the Applicants' counsel stating they would be filing updated medical reports. Although the Officer gave them a lengthy deadline to do so, no report or other updated material was filed. Of course an officer does not have to blindly follow every medical report, but that was not the Officer's concern in this case as he had no problem relying on the Doctor's report that was on file. The Officer just expected to receive another report.

[16] The Officer cannot be faulted for the Principal Applicant's failure to file updated medical reports or other updated documentation. The Principal Applicant does have the onus to provide evidence for his application, and the Officer does not have to research and provide evidence (such as country condition documentation) to support the Principal Applicant's allegations.

[17] Due to a lack of updated evidence, the Officer gave little weight to the Applicants' establishment factors. For example, little evidence was submitted to show that the children were established in Surrey. Moving is not an excuse for not providing evidence. Yet the context of the family's weak establishment is important: The family recently moved to BC because of the economic downturn in Alberta and so they provided little more in the way of recent information other than BC school registrations and business vehicles licences. The context of this case also includes the fact the Applicants' H&C application has been sent back for re-determination twice before. The first H&C application was made on April 23, 2012 and, as can be expected, things

have changed over time. Logically, the family's establishment factors such as their church, their school, their business, and medical professionals—which were strong in Alberta— changed upon moving.

[18] The backdrop of all this is a medical report about the effect of the bone-chilling torture endured by the Principal Applicant while in Mexico. The medical report explains that not only is there a lasting effect on him, but consequently on his family life also. The RPD and the previous H&C officers have all accepted the torture happened and had no credibility concerns.

[19] What is concerning is that, after gleaning the CTR and the medical report, this Officer determined that the Principal Applicant could return to the IFA of Mexico City while making the following conclusion that I can only find inexplicable. Though the quotation is long it will give context and for ease, I have bolded the conclusions that are troubling:

> ….. My concerns are not based on doubt of Dr. Davis' clinical assessment and professional knowledge but rather the absence of a clear link between the applicant's mental condition and life in Mexico. Dr. Davis indicates that the applicant's "PTSD symptoms and suffering would not have abated with internal flight" but I note that the applicant's symptoms persist even after significant time spent in Canada and it is not clear to me that living in Mexico would expose the applicant to circumstances that would worsen his PTSD. While the traumatic events experienced by the applicant occurred in Mexico, the country is large and diverse, both culturally and geographically. It is unclear to me why living in a complete different city in Mexico, such as Mexico City, would exacerbate the applicant's PTSD in the absence of continuing threats from the people that assaulted him. I acknowledge that the associations made in the context of mental illness are not always logical or rational, but there is little indication that the applicant associates his experience with the country of Mexico as a whole rather than the specific interactions he had with the people who kidnapped and tortured him. Dr. Davis refers to exposure to people who resemble those whom the applicant fears as a potential

> problem in Mexico. **It [sic] not entirely clear why [sic] is meant by this statement but it presumably refers to people whose physical features appear Mexican, like the people that assaulted the applicant. However, it appears that the applicant associates with such people in Canada. The applicant submitted a letter from a business contact who writes that the people that the applicant employs "are usually Spanish speaking Canadians" and that not only does the applicant "employ Spanish speaking Canadians he also seems to find a variety of new Canadians". His church also appears to be Spanish-speaking. I acknowledge that Spanish-speaking and Mexican are not synonymous but, given the demographics of Spanish speakers in Canada, I find it high [sic] likely that the applicant would be regularly exposed to people who "resemble" individuals of Mexican descent given his activities in Canada.** Despite Dr. Davis' statement that the applicant is "coping very poorly in Calgary", the evidence submitted by the applicant with regard to his establishment in Canada, particularly his letters of support from business contacts and his church indicate that he functions very well in his community. **There is little evidence before me to support Dr. Davis' statement that exposure to people who resemble Mexicans would lead to a decline in the applicant's mental health. I acknowledge that Dr. Davis' statement is broad and he may have been referring specifically to the Mexican police officers who assaulted the applicant. I have also reviewed the information before me with regard to this possibility and I note that in Dr. Davis' report, the applicant states "I know Canada is a more safety country but I am scared because I don't know who they are (Calgary policemen)". It therefore appears that the applicant is affected by seeing individuals in police uniforms generally, even in Canada. I find little indication that the applicant's mental condition would be exacerbated by exposure to Mexican police officers as he has exposure to people who appear Mexican in Canada and he is already affected by seeing police officers in Canada.** Dr. Davis states that the applicant "Is not a candidate for any psychological health in a return [to Mexico]"…
>
> Emphasis added

[20] To summarize the Officer's findings, the Principal Applicant hires Spanish speaking employees who "resemble" Mexicans, his Calgary church had Spanish speaking members, and he was affected by uniformed police in Calgary. The Doctor confirmed that he currently suffers

from PTSD. This led the Officer to conclude that going to Mexico City would not worsen his PTSD because going to Mexico would not be any different than what he is exposed to in Calgary /Surrey.

[21] That is unreasonable. The torture that occurred at the hands of the Mexican Ministerial police was horrific. The medical report is clinical and definitive on the linkage between the torture and the Principal Applicant's PTSD. Under the heading "*Potential disability arising from mental health in a return scenario*", Dr. Davis states:

> There is a high probability that Mr. Reyes would suffer disproportionately in any return scenario. It is imperative that the reader of this report takes special care to appreciate how the convergence of empirical, published data, cited in References 5-8, below, lend support to my conclusions. Mr. Reyes's mental health is poor today and his condition appears to be both chronic and deteriorating. His personal prospects are well-summarized in a recent publication of the prestigious *Journal of Abnormal Psychology*:
>
> > "Torture is one of the most extreme forms of interpersonal violence; an assault on the mind as well as the body. Torture survivors are more likely than individuals exposed to other forms of violence to report symptoms of posttraumatic stress disorder (PTSD), major depression, and elevated anxiety, and these symptoms often have severe consequences for daily functioning long after the events that precipitated them (p. 734)."
>
> Additional to his fitting a category of persons whose daily functioning has been dramatically altered for a prolonged period by torture, one readily concludes that Mr. Reyes very likely sustained frontal region brain trauma during the phase of torture in which the assailants hit him across his mask-covered face with a baseball bat and on the head with what appeared to him as the butt-end of a rifle. His reported bleeding from the ears after this, a report that appears to have been accepted in the IRB hearing even without a related hospital report, but his report was more detailed and, unfortunately, this detail was not incorporated into the Personal Narrative. Persons who sustain such blows are commonly

> found to have suffered concussive brain trauma; I conclude from Mr. Reyes's reported cognitive symptoms and from the retrospective description of his physical state after torture that he likely sustained concussive injury.
>
> Recent fMRI studies of brain imaging among head-injured, torture victims becomes quite relevant here: Dr. Mollica, a long-respected, Harvard-based expert on trauma among refugees reports that major head-blows to the front/top of the head (traumatic, frontal head injuries) sustained in torture commonly result in associated (linked), chronic mental illnesses that do not resolve. And, coupling with this, research into the neurochemical pathways for treatment of PTSD shows an across the board and equally disheartening "treatment resistance" (drug ineffectiveness) among torture victims – an ineffectiveness that is especially likely when the PTSD is severe. Treatment with antidepressants (e.g., Zoloft) is even less effective when there is head injury to the frontal region or when the PTSD arousal states are especially severe; each results in a unique neurochemistry of hyperarousal and memory pattern, as seen in Mr. Reyes. You will very likely well understand from the foregoing that Mr. Reyes is not a candidate for any psychological treatment.

[22] Despite this medical opinion about the linkage between the Principal Applicant's PTSD and Mexico, the Officer's stated concern is the absence of a "clear link" between them. The Officer's analysis on this factor is based on the unreasonable conclusions about the Principal Applicant's life in Canada described above at paragraph 5.

A. *BIOC*

[23] The Respondent relies on this Court's judgment in *Joseph v Canada (Minister of Citizenship and Immigration)*, 2015 FC 661 at paragraphs 32-35, to say that this Officer's BIOC was reasonable because it was commensurate with the evidence submitted in the file. The Respondent points out that the Officer found the children's best interests is to remain in Canada with their parents, and gave this significant weight. In addition, the Officer did conclude that

"seeing their parents in distress would negatively impact the children" and "there is little information indicating that the children's care and development would be negatively impacted."

[24] In response to the Officer's conclusion about the family returning to Mexico, the Applicants argue that this is unreasonable; the Principal Applicant suffers from PTSD and moving back to Mexico, where he was tortured, will negatively impact the children and that should be defined, detailed and examined with a great deal of attention.

[25] In *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paragraph 39, the Supreme Court of Canada explained that a BIOC analysis is unreasonable if the children's interests are not well identified, defined, and examined with a great deal of attention in light of all the evidence:

> 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: *Baker*, at para. 75. This means that decision-makers must do more than simply *state* that the interests of a child have been taken into account: Hawthorne, at para. 32. Those interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence: *Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358 (C.A.), at paras. 12 and 31; *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 323 F.T.R. 181, at paras. 9-12.

[26] In *Cardona v Canada (Citizenship and Immigration)*, 2016 FC 1345, I judicially reviewed whether a BIOC satisfied the *Kanthasamy* standard in a refused H&C application involving a mother suffering from PTSD. That decision was unreasonable because the officer

failed to consider the impact on the child if the mother was returned to a country where it was expected her PTSD would worsen:

> [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.

[27] In the case before me now, the Principal Applicant is expected to be unable to cope with his PTSD regardless of whether he is in Canada or Mexico—but if returned to Mexico the medical opinion is that he will disproportionately suffer. The Court has recognized that some hardship is inherent upon leaving Canada, like leaving friends, family, community, and personal residence (*Irimie v Canada (Minister of Citizenship and Immigration* (2000), 10 Imm LR (3d) 206 at para 12 (FC)).

[28] But this hardship is not necessarily "inherent" when the Principal Applicant suffers so greatly from PTSD. On the facts of this case, loss of access to these resources (friends, family, community, and personal residence) may greatly affect the BIOC hardship analysis. The Officer in this case only says "there was little information" about how the children's care would be negatively impacted.

[29] The "little information" not analyzed includes the information in the medical report under the heading "*Satisfactory fulfilment of familial responsibilities in a return.*" Dr. Davis explained

that it is highly likely the Principal Applicant will retreat into uncommunicative seclusion in Mexico:

> As stated, Mr. Reyes is coping very poorly in Calgary. He is able to work but his overall social and familial functioning is compromised by the effects of PTSD. For instance, he has poor emotional controls and yells at his wife without cause; he has not ever physically assaulted her. In addition, his functioning with the children is compromised. He is suspicious of most persons in his work and social environment (please refer to the interview section, above). These symptoms would combine with depressive features (hopelessness, hyperarousal, and a paranoid quality of fear, for example) to make it highly likely that Mr. Reyes would retreat into uncommunicative, seclusion in Mexico. If he cannot walk without fear of hypervigilance in a Calgary shopping mall it is hard to imagine how he would function in an environment where on a daily basis he would see persons with much closer resemblance to those whom he fears. In PTSD it is the resemblance to and association with traumatic experience that leads to symptom expression. This may not be logical but it is completely explained by the biological accommodations that take place after physical and metal trauma. There is nothing in my review of Mr. Reyes that stands out as indicative of his being an exception to this rule.

[30] Given that there was evidence in the medical report (as seen above), an important BIOC factor was not analysed. Despite the finding the BIOC was a positive factor, the Officer failed to analyse the hardship the children would face if the family was deported to Mexico while the father suffers from PTSD. It is important for the Officer to give each factor the appropriate weight so that they can be reasonably balanced. Since the decision could be affected by giving these factors different weight, I find this decision is unreasonable.

[31] All of the other issues will not be dealt with as it is sufficient to grant this application on the errors as stated above.

[32] The decision will be quashed and re-determined by a different decision maker. The Applicants should be allowed to file updated evidence and submissions given the passage of time and their move to another province.

[33] No question was presented for certification and none arose.

JUDGMENT in IMM-2856-17

THIS COURT'S JUDGMENT is that:

1. The Application is granted and the decision is quashed and sent back to be re-determination;

2. No question is certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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