Federal Court Cour fédérale

Date: 20210817

Docket: IMM-7198-19

Citation: 2021 FC 776

Ottawa, Ontario, August 17, 2021

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

GABRIEL ANTONIO GONZALES MONTERO
GENESIS FERNANDA HERRERA RODRIGUEZ
STEVEN DAVID PORRAS HERRERA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Rodriguez and Mr. Montero claim to be the victims of a violent attack that occurred in August 2016 in Costa Rica, which left Ms. Rodriguez traumatized. Due to the August 2016 attack and alleged subsequent events, the Applicants fled Costa Rica and sought refugee protection in Canada. Both the Refugee Protection Division (the "RPD") and the Refugee

Appeal Division (the "RAD") denied their claims, although the RAD accepted that the August 2016 attack occurred.

[2] The Applicants then applied for permanent resident status based on humanitarian and compassionate ("H&C") grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "*IRPA*"). A senior immigration officer (the "Officer") of Immigration, Refugees and Citizenship Canada refused the Applicants' H&C application.

[3] The Applicants now seek judicial review of the Officer's decision. In particular, the Applicants assert that the Officer erred by not reasonably considering the hardship Ms. Rodriguez would face if she returns to Costa Rica, by not reasonably considering the best interests of the child (the "BIOC"), and by unreasonably relying on the findings of the RPD and the RAD.

[4] In my view, the Officer's decision is unreasonable. The Officer erred by relying on the availability of healthcare and family support in Costa Rica rather than considering how Ms. Rodriguez's mental health may decline if she is removed. Further, the Officer failed to address how Ms. Rodriguez's removal would heighten her risk of suicide, thus displaying a lack of sensitivity to the evidence and the impact of their decision. I therefore grant this application for judicial review.

II. **Facts**

A. *The Applicants*

[5] The Applicants are a family of Costa Rican nationals: Ms. Genesis Fernanda Herrera Rodriguez; her husband, Mr. Gabriel Antonio Gonzalez Montero; and their son, Mr. Steven David Porras Herrera, born in 2011 (the "Minor Applicant"). Ms. Rodriguez and Mr. Montero also have a daughter, Ms. Abby Nalemi Gonzalez Herrera, born in 2017, who is a Canadian citizen and not a party to this application.

[6] Ms. Rodriguez met her previous partner, Mr. Leslie Porras Gonzalez, at about the age of 16. Mr. Gonzalez is the biological father of the Minor Applicant.

[7] Mr. Gonzalez was an abusive partner. He would physically assault Ms. Rodriguez, including while she was pregnant with the Minor Applicant. Their relationship ended when Mr. Gonzalez was incarcerated in July 2011, shortly after the Minor Applicant was born.

[8] Ms. Rodriguez and Mr. Montero began their relationship in June 2016. Ms. Rodriguez became pregnant shortly thereafter.

[9] On August 6, 2016, while visiting Mr. Montero's mother, Ms. Rodriguez and Mr. Montero were violently attacked by a group of men after witnessing the men preparing large quantities of drugs. Both Ms. Rodriguez and Mr. Montero were beaten during the attack, and

each of the men violently sexually assaulted Ms. Rodriguez. Ms. Rodriguez received medical treatment for the injuries caused by the sexual assault, and she subsequently lost her child in a miscarriage.

[10] On January 31, 2017, the Applicants fled Costa Rica and sought refugee protection in Canada.

[11] In a decision dated June 1, 2017, the RPD found that the Applicants were neither Convention refugees nor persons in need of protection under sections 96 and 97 of the *IRPA*. The RPD had several credibility concerns with respect to the Applicants, particularly with respect to Mr. Montero, and determined that the Applicants could avail themselves of state protection in Costa Rica.

[12] In a decision dated March 15, 2018, the RAD upheld the RPD's decision and dismissed the Applicants' appeal. The RAD accepted that the August 2016 attack occurred, but it found that the Applicants had not established a nexus between the attack and a protected ground under section 96 of the *IRPA*.

[13] On or about July 3, 2018, the Applicants submitted their H&C application.

B. *Decision Under Review*

[14] In a decision dated September 30, 2019, the Officer refused the Applicants' H&C application. The Applicants now seek judicial review of that decision.

[15] In support of their H&C application, the Applicants submitted a report by Dr. Christopher Ross Kitamura, dated July 16, 2018. Dr. Kitamura diagnosed Ms. Rodriguez with post-traumatic stress disorder and major depressive disorder, noting that she was abused by her step-father and Mr. Gonzalez, and that she was sexually assaulted in August 2016. Additionally, Dr. Kitamura concluded that Ms. Rodriguez may experience a recurrence of self-harm and suicidal ideation, including potential suicide attempts, if she returns to Costa Rica.

[16] In denying the Applicant's H&C application, the Officer relied upon the following findings:

1. The Applicants failed to address the findings of the RPD and the RAD with respect to the Applicants' fear of persecution in Costa Rica.

2. The Applicants' establishment in Canada did not warrant H&C relief. The Officer noted that the Applicants have upgraded their English skills, attended church, and developed friendships while in Canada, but concluded these factors were not determinative.

3. Ms. Rodriguez's mental health may decline if she returns to Costa Rica, thus impacting her capacity to parent. However, Ms. Rodriguez would likely be able to access psychological assistance and receive family support in Costa Rica.

4. The BIOC did not warrant H&C relief, as the Minor Applicant and Abby could reintegrate to Costa Rica in a manner that would not compromise their interests.

III. Legislative Framework

[17] Under subsection 25(1) of the *IRPA*, the Minister may grant discretionary relief from the requirements of the *IRPA* to certain foreign nationals on H&C grounds, taking into account the BIOC:

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	25 (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

[18] Citing *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 ("*Kanthasamy*"), among other cases, Justice Little described the purpose of H&C applications

and the relevant considerations in *Rainholz v Canada (Citizenship and Immigration)*, 2021 FC 121 ("*Rainholz*"):

> [14] Humanitarian and compassionate considerations refer to "those facts, established by the evidence, which would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the [*IRPA*]". The purpose of the H&C provision is provide equitable relief in those circumstances.
>
> [15] Subsection 25(1) has been interpreted to require that the officer assess the hardship that the applicant(s) will experience on leaving Canada. Although not used in the statute itself, appellate case law has confirmed that the words "unusual", "undeserved" and "disproportionate" describe the hardship contemplated by the provision that will give rise to an exemption. Those words to describe hardship are instructive but not determinative, allowing subs. 25(1) to respond flexibly to the equitable goals of the provision.
>
> [16] An applicant may raise a wide variety of factors to show hardship on an application for H&C relief. Commonly raised factors include establishment in Canada; ties to Canada; health considerations; consequences of separation of relatives; and the BIOC. The H&C determination under sub. 25(1) is a global one, and relevant considerations are to be weighed cumulatively as part of the determination of whether relief is justified in the circumstances.
>
> [17] The discretion in subs. 25(1) must be exercised reasonably. Officers making humanitarian and compassionate determinations must substantively consider and weigh all the relevant facts and factors before them.
>
> [18] The onus of establishing that an H&C exemption is warranted lies with the applicants. Lack of evidence or failure to adduce relevant information in support of an H&C application is at the peril of the applicant.
>
> [citations omitted, emphasis added]

IV. **Issue and Standard of Review**

[19] The sole issue in this application for judicial review is whether the Officer's decision is reasonable.

[20] It is common ground between the parties that the applicable standard of review is reasonableness. I agree (*Rainholz* at para 23, citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*")).

[21] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[22] For a decision to be unreasonable, an applicant must establish that the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). A reviewing court must refrain from reweighing the evidence that was before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125).

V. Analysis

[23] The Officer found that the hardship Ms. Rodriguez would face if she returns to Costa Rica did not warrant H&C relief because she would be able to access healthcare and family support:

> Counsel submits that "a removal to Costa Rica will have a profoundly negative impact on Ms. Herrera Rodriguez" […] I acknowledge that counsel submits that Ms. Rodriguez's mental health will also likely have a negative effect on her capacity to parent, and as such, on her children, Steven and Abby. While I am sympathetic to Ms. Rodriguez's circumstances, I have been provided insufficient objective evidence that Ms. Rodriguez would be unable or would be denied psychological assistance in her country. Furthermore, I note that the evidence before me indicates that the applicants' immediate family consisting of their parents/grandparents and their sisters/aunts and brothers/uncles continue to reside in Costa Rica and insufficient evidence has been adduced to satisfy me that they would be unwilling or unable to assist Ms. Rodriguez and the children if the need arises.

[24] The evidence before the Officer regarding Ms. Rodriguez's mental health concerns is largely contained in Dr. Kitamura's report, which found that Ms. Rodriguez may face a heightened risk of suicide if she returns to Costa Rica:

> The likely impact of removal to Costa Rica, including separation from her daughter, on her mental health is negative and may include recurrence of self-harming and suicidal ideation (potentially including suicide attempts), due to feeling hopeless and helpless. With sustained support in a safe and secure setting, united with her family, her symptoms are likely to continue to improve.

[25] Dr. Kitamura found that Ms. Rodriguez's mental health concerns were primarily caused by the abuse she suffered from her step-father and Mr. Gonzalez, as well as the August 2016 attack. The RAD accepted that the August 2016 attack occurred.

[26] In my view, the Officer committed two reviewable errors in finding that the hardship Ms. Rodriguez would face if she returned to Costa Rica did not warrant H&C relief.

A. *The Officer's Decision is not Justified in Relation to the Relevant Law*

[27] The Supreme Court in *Kanthasamy* affirmed that where mental health diagnoses are accepted, the fact that an individual's mental health would likely worsen if they were removed to their country of origin is a relevant consideration that must be identified and weighed regardless of whether there is treatment available in that country (*Kanthasamy* at para 48). This principle echoes throughout this Court's jurisprudence (see *Esahak-Shammas v Canada (Citizenship and Immigration)*, 2018 FC 461 at para 26, and the cases cited therein).

[28] In this case, the Officer's decision contradicts the Supreme Court's guidance in *Kanthasamy*. The Officer did not dispute Ms. Rodriguez's mental health diagnosis. However, rather than assessing whether Ms. Rodriguez's mental health would deteriorate due to her removal to Costa Rica, the Officer relied solely upon the availability of healthcare and family support in Costa Rica as a justification for why H&C relief was not warranted. As noted by the Applicants, whether Ms. Rodriguez can receive care in Costa Rica does not meaningfully consider the hardship she may face if removed to the site of her trauma.

[29] The distinguishing factor in this case is that the Officer relied on the availability of family support in Costa Rica in addition to the availability of healthcare. However, this finding does not alter the fact that the Officer failed to address how Ms. Rodriguez's mental health would likely worsen if she were to be removed to Costa Rica, which the Officer was required to do (*Kanthasamy* at para 48). In my view, the Officer cannot obviate this requirement by relying on the availability of care in Costa Rica alone, whether it be healthcare or family support.

[30] In arguing to the contrary, the Respondent notes a number of alleged deficiencies in Dr. Kitamura's report. The Officer, however, did not raise these concerns in their decision, nor did they dispute Dr. Kitamura's findings. The Officer's decision must be assessed in relation to the Officer's reasons, not reasons that the Respondent attempts to import after the fact. As the Officer's rationale for discounting the hardship Ms. Rodriguez would face if she were removed is not addressed in the reasons and cannot be inferred from the record, I find that the Officer's decision is unreasonable (*Vavilov* at para 98).

B. *The Officer's Decision is not Justified in Relation to the Relevant Facts*

[31] The Officer did not address that Ms. Rodriguez may face a heightened risk of suicide if returned to Costa Rica. Indeed, the word "suicide" is not contained anywhere in the Officer's decision.

[32] In *Vavilov*, the Supreme Court affirmed the heightened need for justification in decisions that have particularly harsh consequences on those affected by their outcomes:

> [133] […] Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.

[33] In this case, the Officer's reasons do not reflect the stakes of their decision. Dr. Kitamura found that Ms. Rodriguez's removal may result in the loss of her life. The Officer did not dispute this finding, yet they failed to explain why declining H&C relief was justified in light of it. Considering the gravity of Dr. Kitamura's concerns, I find the Officer's reasons display a lack of sensitivity to the relevant facts and the impact of their decision, thus rendering their decision unreasonable.

[34] Having found the Officer's decision unreasonable, I find it unnecessary to address the remaining issues raised by the Applicants.

VI. <u>Conclusion</u>

[35] I find that the Officer's decision is unreasonable because it is not justified in relation to the relevant facts and law. The Officer's decision contradicts the Supreme Court's decision in *Kanthasamy* by relying on the availability of healthcare and family support in Costa Rica rather than considering how Ms. Rodriguez's mental health may decline if she is removed. Further, the Officer failed to address how Ms. Rodriguez's removal would heighten her risk of suicide, thus

displaying a lack of sensitivity to the evidence and the impact of their decision. I therefore grant this application for judicial review.

[36] The parties have not proposed a question for certification, and I agree that none arises.

JUDGMENT in IMM-7198-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted. The decision under review is set aside and the matter returned for redetermination by a different decision-maker.

2. There is no question for certification.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7198-19
STYLE OF CAUSE:	GABRIEL ANTONIO GONZALES MONTERO, GENESIS FERNANDA HERRERA RODRIGUEZ AND STEVEN DAVID PORRAS HERRERA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	JUNE 28, 2021
JUDGMENT AND REASONS:	AHMED J.
DATED:	AUGUST 17, 2021

APPEARANCES:

Nicholas Woodward	FOR THE APPLICANTS
Leanne Briscoe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Battista Smith Migration Law Group Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT