Federal Court  Cour fédérale

Date: 20211006

Docket: IMM-3500-18
IMM-743-20

Citation: 2021 FC 1039

Ottawa, Ontario, October 6, 2021

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

CARMEN PATRICIA GARCIA JIMENEZ
SERGIO LOZA ROSAS

Applicants

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, Ms. Carmen Patricia Garcia Jimenez and Mr. Sergio Loza Rosas, are wife and husband. They are both citizens of Mexico who, upon entering Canada in 2007, unsuccessfully sought refugee protection. The Applicants unlawfully remained in Canada and were detained in 2017. The Applicants had applied for permanent residence from within Canada

on Humanitarian and Compassionate [H&C] grounds. In a decision dated January 16, 2020, their H&C application was refused.

[2] The Applicants now seek judicial review of the Senior Immigration Officer's [Officer] refusal of their H&C request under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The Applicants submit the Officer unreasonably assessed:

A. the best interests of their three Canadian-born children [BIOC];

B. their establishment in Canada; and

C. the hardship that would result if they were to return to Mexico.

[3] For the reasons that follow, I am persuaded that the Officer's decision is unreasonable.

II. Background

[4] The Applicants' H&C request was initially refused on May 31, 2018. In IMM-3500-18, leave was granted to judicially review that decision. After leave was granted, the Respondent undertook a reconsideration of the decision and the judicial review was held in abeyance pending completion of the reconsideration. It is the January 16, 2020 reconsideration decision that is the subject of the judicial review application in docket IMM-743-20.

[5] At the request of the Applicants and with the consent of the Respondent, the applications in dockets IMM-3500-18 and IMM-743-20 were heard together (Order dated July 7, 2021). The H&C reconsideration decision in docket IMM-743-20 is substantially the same as the original decision in docket IMM-3500-18, as are the Certified Tribunal Records [CTR]. I address both

applications in this Judgment and Reasons, relying on the decision and the CTR in docket IMM-743-20. A copy of this Judgment and Reasons is to be placed on both Court files.

III. Decision under Review

[6] In refusing the H&C request, the Officer reviewed the Applicants' immigration history and identified the factors the Applicants relied upon in seeking H&C relief – establishment in Canada, the best interests of their three Canadian-born children, and hardship arising from the general country conditions in Mexico relating to crime, violence and employment.

[7] The Officer gave some favourable consideration to the Applicants' establishment, noting employment history, volunteer activities, and friendships and general ties to Canada and the community. However, the Officer found it not to be uncommon for individuals residing in Canada to be employed and to integrate into the community. The Officer also found that the circumstances surrounding the Applicants' time in Canada was due to their lack of regard for Canadian immigration laws and gave "significant negative weight to the circumstances surrounding the applicants' establishment in Canada" on this basis.

[8] In assessing hardship, the Officer considered friendships and Ms. Jiminez's strong family ties in Canada. The Officer found the evidence was insufficient to establish that separation from family and friends would sever those relationships. In considering family ties, the Officer noted that the majority of Ms. Jiminez's family members in Canada "are without status and are the subjects of outstanding warrants for their arrests, as such there is no guarantee they will be allowed to remain in Canada." The Officer noted that both Applicants also had family in Mexico

and the evidence did not demonstrate that these family members would be unable or unwilling to assist in their re-integration in Mexico. The Officer also concluded that the evidence did not establish the Applicants would be unable to obtain employment in Mexico.

[9] The Officer then addressed the children's best interests.

[10] The Officer considered a psychological assessment of the Applicants' oldest child. The Officer found the Doctor was speculating when she stated that the only treatment for the ten-year-old was to remain in Canada. The Officer noted the report was based on a single visit, that no treatment beyond remaining in Canada was prescribed and that although the child was receiving stress and anxiety counselling in Canada, there was insufficient evidence that similar counselling services were unavailable in Mexico. The Officer noted the child continued to excel in school despite reports that she is suffering from extreme anxiety, stress and sleeplessness.

[11] The Officer found there to be insufficient evidence to conclude the children's best interests would be compromised if the Applicants were to return to Mexico. The Officer noted the children would be transitioning to life in Mexico with the care and support of both parents and extended Mexican family members. Noting their age, the Officer found it reasonable to conclude the children would be able to adapt. The Officer also concluded there was insufficient evidence to demonstrate that there was any language barrier or other obstacle to the children pursuing their education in Mexico. Finally, the Officer found the Applicants and their children could access protection from the state if exposed to violent crime, noting Mexico is a democracy with a functioning judiciary and security apparatus.

IV. Standard of Review

[12] The parties submit and I agree that the Officer's H&C decision is reviewable on the reasonableness standard (*Senay v Canada (Citizenship and Immigration)*, 2021 FC 200 at paras 12-13). 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" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85).

V. Analysis

[13] The Supreme Court of Canada's decision in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], teaches that the purpose of subsection 25(1) of the IRPA is to provide equitable relief where humanitarian and compassionate considerations warrant an exemption from the ordinary requirements of the IRPA. All relevant humanitarian and compassionate considerations that arise in a particular case, particularly the best interests of directly affected children, are to be given full and careful attention by a decision maker when assessing an application for H&C relief. Where raised, a decision maker should take into account a child's emotional, social, cultural and physical welfare. Where a child's best interests are not sufficiently considered, a subsection 25(1) decision will be unreasonable.

A. *The BIOC Analysis is unreasonable*

[14] The Applicants argue the Officer's BIOC analysis was tainted by factual errors and focused on basic needs as opposed to the children's best interests. They also submit that the Officer failed to consider the effect and impact of relocation on the children. The Respondent takes the position that the BIOC analysis was reasonable.

[15] I am of the view that the Officer's consideration of the children's best interests was unreasonable.

[16] In the H&C submissions before the Officer, the Applicants highlighted factors relating to the emotional, social, cultural and physical welfare of the children. In addressing these factors, the Officer (1) adopted an overly restrictive approach in assessing the children's circumstances, resulting in an assessment focusing on basic needs rather than the best interests of the children; and (2) misapprehended and thereby failed to assess evidence relating to the family's connection to extended family members with status in Canada.

[17] In addressing the Applicants' argument that the children's interests would be compromised if the family were to return to Mexico, the Officer finds they would have the support of their parents and extended family members in Mexico in adjusting to a new country. The Officer also finds that the evidence is insufficient to establish that the children would not be able to attend school, adapt to a change of the language of instruction at school, or access health care or state protection in Mexico.

[18] The decision effectively concludes that the evidence failed to establish that the basic needs of the children could not be met in Mexico. However, in conducting a BIOC analysis, a decision maker must undertake more than a basic needs analysis. Instead, the circumstances of the children must be considered as a whole and from the perspective of what is in the children's best interests (*Kanthasamy* at para 45; *Figueroa Jimenez v Canada (Minister of Citizenship and Immigration*), 2015 FC 527 at para 27).

[19] In this instance, the children's circumstances were not considered as a whole. Instead, the children's circumstances were viewed and assessed individually and through the lens of hardship (*Taylor v Canada (Minister of Citizenship and Immigration)*, 2016 FC 21 at para 24). The hardship lens prevented the Officer from considering the children's overall best interests as the jurisprudence requires.

[20] Similarly, the Officer's treatment of the evidence relating to the mental health of the Applicants' oldest daughter, including her psychological assessment, was flawed. The Officer appears to accept the evidence of the child's medical condition and the expert opinion that a move to Mexico would exacerbate her condition, but again addresses the issue through a hardship lens. This narrow approach caused the Officer to focus on whether hardship might be minimized and prevented the Officer from considering the impact of a move to Mexico on the child's mental health and an assessment of what might be in her best interests (*Kanthasamy* at paras 47 and 48; *Sutherland v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1212 at para 20).

[21] The Officer's BIOC analysis is also tainted by a misapprehension of the evidence, which resulted in the Officer failing to consider and address the impact on the children of being separated from members of their extended family in Canada. While the Officer acknowledges evidence of strong family ties, the evidence is discounted on the basis that "the majority of [the] family members are without status … as such there is no guarantee that they will be allowed to remain in Canada." This was simply not in accordance with the evidence.

[22] Instead, the evidence indicates the Applicants have a number of extended family members with status in Canada and that these family members play an important role in the children's support network. The Officer's misapprehension of and resultant failure to grapple with the evidence also undermines the reasonableness of the BIOC analysis.

B. *The Officer's establishment analysis is also unreasonable*

[23] Relying on *Apura v Canada (Citizenship and Immigration)*, 2018 FC 762 [*Apura*], the Applicants argue that the Officer erred by requiring they demonstrate exceptional establishment in Canada to warrant H&C relief. They further submit that the Officer failed to situate their illegal stay in Canada within a global assessment of their favourable establishment factors and explain how their establishment was insufficient to warrant relief. Finally, they submit that the Officer's treatment of family ties in both Mexico and Canada was inconsistent with the evidence.

[24] The Respondent argues that the Officer's consideration of establishment and the conclusions reached were reasonable.

[25] I am convinced that the Officer did adopt a standard of exceptional establishment in assessing the H&C request. In the initial decision, the Officer expressly states that the Applicants' establishment was found not "to be exceptional". This language indicates that the Officer was of the view that the absence of evidence demonstrating exceptional establishment was a basis to deny H&C relief.

[26] The specific words relating to exceptional establishment are omitted in the reconsideration decision before me. However, language that describes the Applicants' level of establishment as not being uncommon remains, signalling that an applicant who demonstrates common establishment will not warrant H&C relief and again indicating that exceptional establishment must be shown. The Officer's failure to re-engage in a meaningful weighing of all factors relevant to establishment in the reconsideration decision also reinforces my view in this regard.

[27] In *Apura*, Justice Shirzad Ahmed finds that a decision maker errs where the absence of exceptional or extraordinary circumstances forms the basis of a denial for H&C relief (para 23). I agree with this view.

[28] Although H&C relief pursuant to subsection 25(1) of the IRPA may well be described as exceptional, extraordinary or special relief, these descriptors do not establish a legal standard that an applicant must meet. Instead, and in accordance with the equitable underlying purpose of subsection 25(1), a decision maker is required to substantively and cumulatively consider and

weigh *all* relevant facts and factors raised (*Kanthasamy* at paras 25, 28 and 31). The Officer's establishment analysis is unreasonable for this reason.

[29] The establishment analysis is also undermined by the Officer's treatment of the evidence relating to family members in Canada and Mexico. As detailed above, the Officer misapprehended the evidence as it related to the status of many of the Applicants' extended family members in Canada. This factual misapprehension prevented the Officer from addressing this factor when assessing establishment.

[30] In finding there to be insufficient evidence to demonstrate that family members in Mexico would be unable or unwilling to assist with the Applicants' re-integration, the Officer again appears to have either misapprehended or ignored evidence. The Applicants' connection to family in Mexico is addressed in Mr. Rosas's evidence where he reports weak ties with his family members in that country. It was certainly open to the Officer conclude this evidence was either not persuasive or somehow incomplete. The Officer does not do so. Instead no reference is made to this evidence even though it appears to refute the insufficiency finding. While the Officer is presumed to be aware of all of the evidence, the failure to specifically address evidence from an applicant that appears to respond to a decision maker's concern can undermine the transparency and intelligibility of the decision in issue.

[31] The Officer's misapprehension of, and failure to fully engage with, the evidence related to family members both in Canada and in Mexico also taints the Officer's hardship analysis.

VI. Conclusion

[32] Having concluded that the Officer unreasonably assessed the request for H&C relief, the application is granted. The parties have not identified a question for certification and none arises.

JUDGMENT IN IMM-3500-18 AND IMM-743-20

THIS COURT'S JUDGMENT is that:

1. The applications for judicial review in IMM-3500-18 and IMM-743-20 are granted and the decisions set aside;

2. The matters are returned for redetermination by a different decision maker;

3. A copy of this Judgment and Reasons will be placed on both Court files (IMM-3500-18 and IMM-743-20); and

4. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-3500-18 AND IMM-743-20
STYLE OF CAUSE:	CARMEN PATRICIA GARCIA JIMENEZ, SERGIO LOZA ROSAS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERFENCE
DATE OF HEARING:	JULY 14, 2021
JUDGMENT AND REASONS:	GLEESON J.
DATED:	OCTOBER 6, 2021

APPEARANCES:

Cheryl Robinson	FOR THE APPLICANTS
Laoura Christodoulides	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Refugee Law Office Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT