Federal Court Cour fédérale

Date: 20100813

Docket: IMM-4853-09

Citation 2010 FC 820

Ottawa, Ontario, August 13, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

CINDI (CINDY) YUMIKO HERNANDEZ CARDENAS
JAIME ALDAIR PALMA HERNANDEZ

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants applied for judicial review, pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), asking the Court to set aside a decision of a Pre-Removal Risk Assessment (PRRA) officer. The officer rejected their PRRA application on August 19, 2009.

[2] For the reasons that follow this application is dismissed.

Preliminary Matter

[3] This application was scheduled and came on for hearing in Toronto on August 11, 2010. On August 6, 2010, Catherine Kerr, counsel for the applicants, wrote to the Court enclosing a copy of a letter she had written to the respondent and a copy of a Notice from Legal Aid, dated July 13, 2010, which her office received while she was on vacation. The Notice from Legal Aid reads as follows:

> You acknowledged the Legal Aid certificate in this case in February of this year. The client has applied for a change of lawyer. Please refer to the reasons attached. Apparently, the client was requesting a Spanish speaking lawyer. Please comment on this client's reasons. Please advise as to the status of the case, or as to what steps have been taken by you if any. Please comment on your relationship with the client.
>
> It is noted that the client applied for this change last March. It is noted on the system that you were notified of the change request on May 25 last, and were invited to respond, but no response has been received to date, as far as we are aware.
>
> Legal Aid has been tardy in processing this change of lawyer request on account of the transformation of Legal Aid, a process that has involved the closure of six area offices within the GTA and the centralization of client files and a staff complement to administer those client files in this District Office.
>
> You may call me at extension 4227 to discuss or leave a detailed message.

[4] The Court advised all counsel that they were expected to attend at the hearing and could speak to the request made by Ms. Kerr to the party opposite for an adjournment. No Notice of Change of Solicitor has been filed as required by the *Federal Courts Rules* and Ms. Kerr remains solicitor of record for the applicants.

[5] At the hearing of this matter, Ms. Kerr informed the Court that the applicants had terminated her retainer and had told her so in May 2010. Ms. Kerr said that she assumed that other counsel would be appointed. She requested an adjournment.

[6] The request for an adjournment was denied. This hearing date was scheduled more than three months ago. Despite Ms. Kerr's retainer being terminated shortly thereafter, neither she nor the applicants took any steps to inform either the respondent or the Court of that fact. There is no evidence that the applicants have taken any steps to retain other counsel and Ms. Kerr acknowledged that she has been unable to contact the applicants since May 2010.

[7] The Court sets fixed dates for its hearings. That is unquestionably a benefit to counsel and their clients. The applicants knew or ought to have known the date scheduled for this hearing and taken steps to obtain representation or appear in person to make oral submissions. The Court has fixed judicial and administrative resources and every adjournment granted means that those resources have been squandered and another equally deserving applicant's matter will not be scheduled as promptly as it would have been had the adjournment been denied. For these reasons, as well as the absence of any prejudice to the applicants, the request for an adjournment was denied.

[8] As a consequence of that ruling and because the applicants had informed Ms. Kerr that they no longer wished her to represent them, Ms. Kerr informed the Court that she would not be making

any oral submissions to the Court on the application but that the applicants would be relying on the written memorandum of argument that had been filed.

[9] Counsel for the respondent made brief oral submissions. The respondent sought leave to rely on an affidavit of the PRRA officer filed in the stay application in this file, but not included in the Respondent's Record in this application. The Court granted leave, subject to determining what weight, if any, to give it in light of the failure to include it in the Record. In the end, it was unnecessary to consider this additional evidence.

[10] Although Ms. Kerr was taking no active role in making submissions, she informed the Court that she would not have proposed any question for certification in this application.

Background

[11] Ms. Cindi Yumiko Hernandez Cardenas is a citizen of Mexico who arrived in Canada with her partner, Jesus Gonzalez Luna, on February 23, 2003. Mr. Gonzalez Luna had been married to a woman whose father was a police officer in Mexico. The relationship between Mr. Gonzalez Luna and his wife broke down, and he began dating Ms. Hernandez Cardenas. Shortly after they began dating, Mr. Gonzalez Luna began receiving threats to his life, and Ms. Hernandez Cardenas did as well. She claimed that she did not know exactly who was threatening Mr. Gonzalez Luna and her, but she suspected that it may have been the father and brothers of Mr. Gonzalez Luna's ex-wife. Both Mr. Gonzalez Luna and Ms. Hernandez Cardenas made refugee claims upon their arrival in

Canada. Ms. Hernandez Cardenas' son Jaime, the other applicant, arrived in Canada approximately five months later with the help of his grandmother.

[12] Ms. Hernandez Cardenas claims that approximately five to six months after she arrived in Canada, Mr. Gonzalez Luna began to abuse her. She reported this abuse to the police and pressed charges. She also received a restraining order. Mr. Gonzalez Luna was then convicted of assault and, as a result, he was deported.

[13] Ms. Hernandez Cardenas and her son Jaime's refugee claims were considered on July 28, 2005. On August 23, 2005, they were rejected primarily because the Refugee Protection Division (RPD) of the Immigration and Refugee Board found that there was adequate state protection available for the applicants and also that there was a viable internal flight alternative (IFA).

[14] It appears that Ms. Hernandez Cardenas was married to a Canadian citizen at some point during her time in Canada. She had a second child, Kevin, with this man. They are now separated because he was also abusive and he had a gambling problem.

[15] In 2006, the Catholic Children's Aid Society (CCAS) removed both Jaime and Kevin from Ms. Hernandez Cardenas' care because she had fallen into a deep depression and was unable to effectively look after her children. Kevin was returned to Ms. Hernandez Cardenas' care in August 2009 with a temporary supervision order. Jaime, however, remained in the care of the CCAS because he suffered from developmental delays, behavioural problems, and tubular sclerosis. On

April 28, 2008, Jaime became a Crown ward. On August 15, 2008, Ms. Hernandez Cardenas was granted weekly access to Jaime.

[16] Ms. Hernandez Cardenas submitted a PRRA application for Jaime and herself in December 2008. She claimed that they were at risk in Mexico because Mr. Gonzalez Luna wanted revenge for having been deported as a result of the criminal charges she pressed. She made her original submissions without the aid of a lawyer. However, in January 2009, she retained counsel, who made further submissions on her behalf. On August 19, 2009, the PRRA application was rejected.

[17] The officer further noted that Jaime is a Crown ward and that his mother did not have custodial or parental rights, and that the Catholic Children's Aid Society (CCAS) confirmed that Jaime would be relying on his mother's risk submissions.

[18] The officer then reviewed the applicants' past in Canada, noting that their refugee claims were denied and that the risks claimed on the PRRA application were essentially the same as those that were before the RPD. No application had been made to review that decision. The RPD rejected the claim of risk from the ex-common law partner because it was speculative and because the applicants had a viable IFA in Tabasco, Campeche, Cancun, Oaxaca and Monterrey. The RPD had also concluded that state protection would be available to the applicants if the ex-partner was able to locate them. The officer found that the applicants had not provided sufficient evidence to overcome the RPD's conclusions regarding the existence of state protection and an IFA.

[19] The officer considered the evidence presented by the applicants in support of their PRRA application. The officer noted the applicants' claim that the ex-partner made threats to Ms. Hernandez Cardenas and that he had attacked her mother's house. Although the applicants provided pictures of the damage to the mother's house, the officer indicated that they were blurry and dark and the original photos were never submitted, despite the applicants asserting that they would be submitted. The officer further noted that the applicants provided few details on when the incident occurred, how recently, and how often. Nevertheless, the officer accepted that the incident occurred sometime prior to December 2008. The officer found that the fact that the principal applicant's mother still lives in Merida, Yucatan, where the applicants used to live, does not speak to the reasonableness or viability of an IFA in the locations listed by the RPD or its determination of the availability of state protection.

[20] The officer also considered the documentary evidence submitted by the applicants, noting that the documents indicate that there are ongoing problems of domestic and gender violence and general crime in Mexico. The officer found that these were not new risk developments, but were simply updates on problems and concerns that existed at the time the RPD made its determination.

[21] The officer further noted that little evidence was provided relating to the reasonableness and viability of the IFA locations. As a result, the officer concluded that the applicants had provided insufficient information to establish that the IFA locations were no longer reasonable or viable.

[22] The officer also looked to recent documentary evidence and found that the country conditions in Mexico were consistent with those that existed at the time the RPD made its decision. The officer further found that the documents did not speak of a change in conditions such that the IFA or the state protection would no longer be available. Thus, the officer concluded that the application failed to meet both ss. 96 and 97 of the Act since an IFA is a determinative factor indicating protection.

Issues

[23] The applicants raise three issues in their memorandum:

1. Did the PRRA officer have the jurisdiction to consider humanitarian and compassionate factors in the adjudication of the applicants' PRRA application?

2. If the PRRA officer had jurisdiction to consider humanitarian and compassionate factors, did the applicants have a legitimate expectation that the PRRA officer would consider such humanitarian and compassionate factors as were before the officer?

3. If there was a legitimate expectation that the PRRA officer would consider humanitarian and compassionate factors, did the PRRA officer fail to properly consider all of the evidence before her including evidence regarding the best interests of the minor applicant?

[24] I believe that the issues raised may be more appropriately described as the following two issues:

1. Did the PRRA officer create a legitimate expectation that humanitarian and compassionate factors would be considered?

2. Did the PRRA officer err by failing to consider all the evidence before her, particularly evidence regarding the best interests of the minor applicant?

Analysis

1. Did the PRRA officer create a legitimate expectation that humanitarian and compassionate factors would be considered?

[25] The applicants submit that the officer created a legitimate expectation that the humanitarian and compassionate (H&C) factors submitted would be considered as part of the PRRA assessment. The applicants submit that the doctrine of legitimate expectations is an aspect of the duty of fairness, and say that it was unfair for the officer to fail to consider the H&C factors submitted to her. The applicants submit that the officer created a legitimate expectation that H&C factors would be considered by requesting information regarding the nature of the relationship between the applicants and Jaime's status as a Crown ward. The applicants further submit that when the officer was discussing the applicants' case with counsel, the officer asked if the applicants had made an H&C application. Counsel indicated that the applicants had not and that the H&C considerations had only been submitted to the officer, to which the officer replied "Okay". The applicants submit that this also created a legitimate expectation that the H&C factors would be considered by leading the applicants to believe that the officer had agreed to consider them. The applicants further submit that

if the officer did not intend to consider such factors, she had a duty as a matter of fairness to advise the applicants that they would not be considered.

[26] I agree with the submission of the respondent that the record fails to disclose any commitment by the officer to consider H&C considerations and, furthermore, if the applicants formed the view that there had been such a commitment, that view was unreasonable.

[27] First, I am not convinced that the officer created a legitimate expectation that humanitarian and compassionate submissions would be considered. The applicants suggest that by requesting information about Ms. Hernandez Cardenas' relationship with Jaime and his status as a Crown ward, the officer invited humanitarian and compassionate submissions and created a legitimate expectation that such submissions would be considered. I believe that misconstrues the words used and the request made by the officer. The letter to which the applicants are referring states:

> When making your updated submissions, please provide an update on Ms. Hernandez Cardenas (*sic*) custody and relationship with respect to Jaime Aldair Palma Hernandez, and an update on his status as a ward of the Crown.

[28] In my view, this does *not* invite humanitarian and compassionate submissions. It was noted in the applicants' first PRRA submissions that Jaime has become a Crown ward, that the judge had recommended that Ms. Hernandez Cardenas apply for a status review application, and that she fully intended on making such an application. She indicates later in her submissions that she intended on making this application at the custody hearing for Kevin on February 13, 2009. The letter from the officer was written on January 30, 2009, prior to further submissions from counsel. In my view, the

officer was *not* requesting humanitarian and compassionate submissions, but was instead seeking information that would help her determine whether Ms. Hernandez Cardenas had made the status review application, whether she had since been granted some type of custody over Jaime, or whether Jaime was still considered a Crown ward, which had implications for his scheduled removal. It is unreasonable to say in these circumstances that the officer was asking for H&C submissions when she requested the information.

[29] Similarly, the applicants submit that the officer created a legitimate expectation that she would consider the H&C submissions because when she was informed by counsel that Ms. Hernandez Cardenas had not made a humanitarian and compassionate application, she said "Okay." That view of a single word response, in the circumstances, in my determination is patently unreasonable. Ms. Hernandez Cardenas said in her original submissions that she was in the process of making an application for landing in Canada on H&C grounds. The reasonable view is that the officer was asking whether such an application had been made for her own information. I do not find that simply responding "Okay" to counsel's indication that no H&C application was made created a positive duty on the officer to either consider these factors or inform counsel and the applicants that she would not be considering these submissions.

[30] Second, I agree with the respondent that the doctrine of legitimate expectations cannot be used to counter Parliament's expressed intent: *dela Fuente v. Canada (M.C.I.)*, 2006 FCA 186. Section 113(c) of the Act sets out the scope of considerations in a PRRA application to those described in sections 96 to 98 of the Act. Parliament's clearly expressed intent was to limit PRRA

applications to those considerations. The doctrine of legitimate expectations cannot be raised to conflict with the officer's statutory duty. To accept the applicants' submission would require such a determination.

2. Did the PRRA officer err by failing to consider all the evidence before her, particularly evidence regarding the best interests of the minor applicant?

[31] The applicants submit that the officer had jurisdiction to hear and consider both H&C factors and risk factors. The applicants rely on the decision of *Kim v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 437, where the Court found that the same officer can decide both PRRA applications and H&C applications. The applicants further rely on *Zolotareva v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1274, where the Court found that while there was no requirement for officers to consider H&C factors, PRRA officers could represent the Minister for the purposes of an H&C application. Thus, the applicants submit, the officer had jurisdiction to consider the applicants' request to remain in Canada on H&C grounds.

[32] The applicants then say that the officer clearly erred by failing to consider the totality of the evidence, including the best interests of the minor applicant, Jaime. They list a number of pieces of information of which the officer was aware and had a duty to consider, including:

i. As a Crown ward, Jaime would not be deported as a matter of policy;

ii. Jaime would be alone in Canada if his mother was deported;

iii. As a pre-adolescent with health and emotional problems, Jaime is not likely to be adopted;

iv. Jaime had already experienced abuse while in foster care;

v. A family court determined that it was in Jaime's best interests to have access to his mother;

vi. Ms. Hernandez Cardenas exercised her access rights for over one and a half years and continues to do so;

vii. As a child with a number of challenges and a likely lifetime of unstable foster care, Jaime would need regular access to his mother more than other Crown wards;

viii. If Ms. Hernandez Cardenas was deported, Kevin would also leave with her and Jaime would also lose the relationship with his brother; and

ix. A CCAS social worker was of the opinion that it was crucial to Jaime's emotional and developmental health that he continues to have time with his mother and brother every week.

[33] The applicants note that despite the existence of all this information, the only comment the officer makes regarding the applicants' H&C submissions is that Jaime is a Crown ward and that Ms. Hernandez Cardenas no longer has custody or parental rights in relationship to him. The applicants submit that not only did the officer fail to consider the totality of the evidence, but her statement is also wrong, as Ms. Hernandez Cardenas still exercises the parental right of access. The applicants cite *Okoloubu v. Canada (Minister of Citizenship and Immigration.)*, 2008 FCA 326, wherein the Federal Court of Appeal stated that officers must have the best interests of the child and the importance of the family unit in mind when determining H&C applications. The applicants

further cite *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, wherein the Supreme Court stated that family-related interests include the best interests of the child and that a decision will be unreasonable if it minimizes the interests of the children involved in a manner inconsistent with Canada's humanitarian and compassionate tradition. The applicants submit that it is clear from the decision that the officer was neither alert nor sensitive to the best interests of Jaime.

[34] Again, I agree with the submissions of the respondent. The fundamental flaw in the applicants' reasoning is that the authorities they cite involve situations where there has been an H&C application made. No such application was made in this case. This Court has held that until the requirements of the *Immigration and Refugee Protection Regulations*, SOR 2002-227 have been complied with, there is no H&C application filed: *Toussaint v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 873. These applicants made no "application in writing accompanied by an application to remain in Canada as a permanent resident" with the required fee and therefore made no request under section 25 of the Act. Had there been an H&C application then it is correct, as the authorities cited by the applicants held, that the same PRRA officer could have made determinations on <u>both</u> applications. Only in that scenario could the officer have considered H&C considerations.

[35] The Federal Court of Appeal in *Varga v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394, has firmly stated that while the same officer may consider both a PRRA application and an H&C application, the two processes should not be confused and an officer has no obligation to consider H&C factors in the context of a PRRA. The case law establishes, without question in

my mind, that in making a PRRA determination an officer does not have a duty to consider H&C submissions either based on the doctrine of legitimate expectation or otherwise. Accordingly, this officer did not err by failing to consider these submissions.

[36] Furthermore, I am of the view that the officer would have erred in law had she considered the alleged H&C factors cited by the applicants. The task of the officer when making a PRRA determination is proscribed by section 113 of the Act to be limited to the risk factors set out in sections 96 to 98 of the Act. The officer is assessing risk, and is not to consider other reasons why an applicant might be better off staying in Canada. There are other appropriate mechanisms in the legislation for that type of assessment.

Conclusion

[37] I find that the officer did not create a legitimate expectation that H&C submissions would be considered. Further, the doctrine of legitimate expectations cannot be used to circumvent the clear statutory authority to consider PRRA applications solely on the basis of ss. 96 to 98 of the Act. As a result, the officer did not err in failing to consider submissions regarding the best interests of the child.

[38] For the foregoing reasons this application is dismissed. There is no question that is properly certifiable on the record before this Court.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application is dismissed; and

2. No question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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