Federal Court  Cour fédérale

Date: 20130124

Docket: IMM-3484-12

Citation: 2013 FC 66

Ottawa, Ontario, January 24, 2013

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

FELIX LEONARDO HERDOIZA MANCHENO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], s 72(1), of a reconsideration decision maintaining a refusal of an exemption from having to apply for permanent residence from outside Canada for humanitarian and compassionate [H&C] reasons.

I. Background

[2] The applicant, Leo Herdoiza, was born in 1963 in Ecuador. He worked as a welder until 1999 and had four daughters, all over the age of 18 at the date of the underlying H&C application by the applicant and at the date of reconsideration. He and his wife Patricia Pinta separated after 14 years of marriage, in about 1997. He opened a restaurant in July 1999, then moved to the U.S. in March 2000 and lived there without status. In 2002 he received notice that his wife had started divorce proceedings. She then married a Canadian citizen and moved with him to Canada in November 2005. After two years, this second marriage ended. Mr. Herdoiza then decided to reunite with his family; and the two ex-spouses decided to cohabit and co-parent their children, and subsequently, a grandchild. In 2008, Mr. Herdoiza submitted an H&C application.

[3] For the last six years, Mr. Herdoiza has worked in construction, gardening, and cleaning jobs for under-the-table cash and has helped to support the family, who are all now Canadian citizens, except him. His evidence is that he contributed $20,000 to buying the current family house in Toronto, however there is no corroborative evidence in support of this fact. He is a primary care-giver for his infant granddaughter. None of the daughters are, or were, at any relevant time in respect of this matter, children under the age of 18, nor were they able to financially support sponsorship for their father for residency in Canada.

[4] The applicant's ex-wife and daughters have all provided letters of support. They all say that Mr. Herdoiza went to the U.S. to earn money to support them, he is important to their emotional support and he acts as a father figure to his granddaughter. The applicant stated in a letter dated November 18, 2008 regarding the H&C application for permanent residence that: "THIS IS

NOT/NOT a case of divorce/re-marriage/sponsorship/divorce and reconciliation of first husband for the purpose of Canadian immigration."

[5] Within days after Mr. Herdoiza received the negative H&C decision of October 27, 2011, CIC stopped accepting sponsorship applications for parents. The pause began on November 5, 2011 and is planned to last up to two years. The applicant's counsel therefore asked for reconsideration of the H&C decision. On March 21, 2012, the Officer notified Mr. Herdoiza that her initial decision to refuse the H&C application remained unchanged.

[6] While the respondent argues the only decision before the Court should concern the reconsideration of the applicant's H&C application dated March 21, 2012 and not the underlying October 27, 2011 decision refusing the applicant's H&C application, it is worthwhile to note the October 2011 reasons for the decision. The Officer noted that the applicant was seeking permanent residence based on establishment, family ties to Canada, and best interests of the child. She acknowledged that he said he had been in Canada for 5 ½ years, had contributed $20,000 to the purchase of a family home, and was co-parenting his children with his ex-wife, as well as caring for his granddaughter.

[7] In refusing the applicant's H&C application, the Officer observed: 1) he provided no documentation to show that he had worked for cash; 2) he provided insufficient evidence to prove that he contributed to buying the family house; 3) he provided little evidence of community involvement or volunteer activity; 4) he provided little evidence of his relationship with his granddaughter; 5) although the other daughters were old enough to submit family class sponsorship

applications, they had not done so; 6) the family's letters of support were very subjective and the Officer gave them little weight. The Officer concluded any hardship from the separation of the applicant and his family members would not be unusual, undeserved, or disproportionate even though the Officer was satisfied that he had close ties to his family.

[8] On reconsideration, the Officer's March 21, 2012 letter indicated that the H&C application was considered on its substantive merits and that the refusal was maintained. The Officer held that while the temporary pause in accepting new sponsorship applications for parents was not in place when she made the initial H&C decision, it is at any rate temporary and does not preclude submitting an application in the future, once the pause is lifted. She also found that the applicant can apply for a two-year "Super Visa" as an option in the interim.

II. Issues

[9] The applicant raises two issues in the present application:

A. Did the Officer err in law in her reconsideration decision by failing to address the issue of hardship raised by the request for reconsideration and by drawing factual conclusions unsupported by the evidence?

B. Did the Officer err by dismissing the interests of the children and undue hardship with respect to the applicant's separation from his four Canadian daughters, giving little weight to the evidence before her, and particularly in failing to consider the best interests of the applicant's infant granddaughter?

III. Standard of review

[10] The standard of review in respect of these issues is reasonableness. In *Fernandez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1131 at paras 40, 42, Justice John A. O'Keefe stated:

> 40 Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 57).
>
> [. . .]
>
> 42 In reviewing the officer's decision on the reasonableness standard, the Court should not intervene unless the officer came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 59). It is not up to a reviewing Court to substitute its own view of a preferable outcome, nor is it the function of the reviewing Court to reweigh the evidence (see *Khosa* above, at paragraphs 59 and 61).

Further, in *Bhattal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 989 at para 3, considering the standard of review in H&C cases, Justice Luc Martineau held that:

> 3 The determination made by the officer as to whether H&C considerations exist is essentially factual. Since Dunsmuir v New Brunswick, 2008 SCC 9 [*Dunsmuir*], the appropriate standard of review for such a decision as a whole has consistently been held to be that of reasonableness, while the standard of correctness applies to issues of procedural fairness. Considerable deference should be accorded (Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817 at para 62) to the officer's findings and the Court should refrain from re-evaluating the weight given to the different factors considered by the officer, including the best interests of any child directly affected (Legault v Canada (Minister of Citizenship and Immigration) 2002 FCA 125 at para 11).

IV. Analysis

A. *Did the Officer err in her reconsideration decision?*

[11] The applicant argues that when the Officer maintained the H&C refusal by dismissing the suspension of parental sponsorships as a factor, she missed the point of the request for reconsideration. The application had been refused on the basis that no hardship would be suffered by the applicant in applying from outside the country. However, the situation was that the applicant would not be able to apply at all for an indefinite time, possibly up to two years or even more.

[12] The Officer also suggested the "Super Visa" application process as an alternative, but the applicant submits that he was ineligible for this, as he had clearly indicated his intention to immigrate, not just visit. While I accept the applicant's long term goal of permanent residency, I also accept this super visa process as a possible interim option.

[13] The applicant also states that the Officer's criticism that none of the daughters had sponsored the father prior to November 4, 2011, was without any valid basis - I agree. None of the daughters qualified on a financial basis to do so.

[14] The applicant argues that the Officer was obliged to consider the daughters' interests even though they are now young adults. He submits that rejecting their letters of support as subjective was unwarranted, and that the point of the letters was to express their attachment to their father and the undue hardship they would feel at being separated from him.

[15] The applicant relies on *Naredo v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1250, 187 FTR 47 at para 20 as authority that the relationship must not be ignored even if the children are no longer minors (see also *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] SCJ No 39, [1999] 2 SCR 817):

> 20 Without going further, I conclude, against the requirements set out in Baker, that the analysis reflected in the reasons for the immigration officer's decision, as they relate to the interests of the applicants' children, is entirely insufficient; and I reach this conclusion bearing in mind the ages of the applicants' children, only one of whom was 18 or under at the date of the decision under review. Indeed, at that time, he was very close to 19 years of age. The two sons of the applicants, whatever their ages, remained "children" of the applicants who could reasonably be expected to be dramatically affected by the removal from Canada of their parents.

[16] Finally, the applicant submits that the Officer failed to consider the evidence concerning the applicant's granddaughter's best interests. She focused on his failure to indicate how many hours per week he spent caring for this child and why he could not maintain a long distance relationship from Ecuador. The applicant argues that the Officer ignored the evidence of a close and caring relationship with his granddaughter towards whom he plays a parental role. Therefore, the Officer was not really "alive, alert, or sensitive" to the child's best interests.

[17] The applicant's counsel acknowledged that the applicant cannot challenge the original decision, only the refusal to reconsider, but that to the extent that the Officer's original reasoning is carried into the refusal to reconsider, it is subject to consideration and review.

[18] The respondent's position is that the Officer's only obligation was to consider whether to exercise her discretion to reconsider (*Kurrukal v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 230 at para 5):

> […] While the judge correctly concluded that the principle of *functus officio* does not bar a reconsideration of the negative section 25 determination, the immigration officer's obligation, at this stage, is to consider, taking into account all relevant circumstances, whether to exercise the discretion to reconsider.

[19] As well, the respondent submits that the applicant should not be permitted to challenge the original refusal (*Medina v Canada (Minister of Citizenship and Immigration)*, 2010 FC 504 at para 32):

> I agree with the Minister that a decision refusing to reopen an H&C application is a distinct decision from the actual decision on the H&C application decision, and may thus be challenged as a distinct decision in a judicial review proceeding. Here the Applicant only sought leave pursuant to subsection 72(1) of the Act with respect to the May 11, 2009 decision, and leave was granted solely in regard to that decision. Consequently, I am not called upon to undertake any judicial review of the subsequent refusal to reopen the matter.

[20] In the respondent's Further Memorandum filed on January 3, 2013, the respondent relies on Justice Marie-Josée Bédard's decision in *Garas v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1247 at para 64, supporting the view that there does not have to be some probability of the alternative route to permanent residence succeeding in order for the Officer to properly consider such a factor:

> The applicant has not offered any authority to suggest that, in order for an immigration officer's decision on an H&C application to be reasonable, that officer must include an analysis of the applicant's ultimate likelihood of not being granted permanent resident status on a subsequent application for residence from abroad.

[21] Further, respondent's counsel relies on *R v Wilson*, [1983] 2 SCR 594 at 599, as the basis to reject any collateral attack on the Officer's reconsideration decision; "an order may not be attacked collaterally and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment".

[22] As well, in *Mpampas v Schwartz Levitsky Feldman Inc*, [2007] OJ No 3105 at para 16 the Court stated "the responding party chose not to appeal or otherwise challenge the decision of Registrar Nettie and it is not now open to him, indirectly, to impugn that decision".

[23] In the alternative, the respondent's position is that, if the Court considers the original refusal to be validly at issue, that decision was also reasonable. An H&C decision-maker has broad discretion (*Gautam v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 686 at paras 13-15, 167 FTR 124):

> 13 The broad discretion conferred by this provision has not been limited by the enactment of a statutory definition of the term "compassionate or humanitarian considerations". However, in order to reduce inconsistencies among decision-makers and to provide assistance for claimants when making their submissions, Immigration Canada has published Guidelines that structure the exercise of discretion under subsection 114(2).
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> 14 As the Guidelines themselves make clear, they are neither legally binding, nor exhaustive of the facts that an officer may take into account when discharging the legal obligation of considering the entirety of a claim by reference to the statutory standard, "the existence of compassionate or humanitarian considerations."
>
> 15 Conversely, the Guidelines do not directly create any legal entitlement in claimants who believe that they have satisfied them, although the rejection of a claim may be set aside as an abuse of discretion if it is based either on a patently unreasonable interpretation or application of an applicable provision in the Guidelines, or on a provision that was clearly not relevant.

[24] Moreover, the respondent submits that the Officer did not have to consider the interests of the applicant's daughters as children's interests, when they are actually young adults (Citizenship and Immigration Canada, *Operational Manual IP5; Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds*) (webpage updated 8 February 2012) online at http://www.cic.gc.ca/english/resources/manuals/ip/ip05-eng.pdf [IP5 Manual] at para 5.12, states that only children under 18 are considered:

> **5.12. Children – Best interests of a child**
> In an examination of the circumstances of a foreign national under A25(1), IRPA introduces a statutory obligation to take into account the best interests of a child who is directly affected by a decision under this section. This codifies departmental practice into legislation, eliminating any doubt that the interests of a child will be taken into account. This applies to children under the age of 18 years as per the Convention on the Rights of the Child.
>
> [. . .]
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> **Children 18 years and over**
> BIOC must be considered when a child is under 18 years of age at the time the application is received. There may, however, be cases in which the situation of older children is relevant and should be taken into consideration in an H&C assessment. If, however, they are not under 18 years of age, it is not a best interests of the child case.

[25] See also *Cha v Canada (Minister of Citizenship and Immigration*), 2006 FCA 126 at para 15:

> 15 It is trite law that these debates, testimony and governmental guidelines are not binding on government institutions and even less so on the courts, but it is accepted that they can offer useful insight on the background, purpose and meaning of the legislation. (*Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration),* [2002] F.C.J. No. 950, 2002 FCA 270, at paragraph 37; *Hernandez* at paragraphs 34 and 35.

[26] Several decisions of this Court have indicated that children aged 18 and over are not entitled to a best interests of the child assessment (*Leobrera v Canada (Minister of Citizenship and Immigration)*, 2010 FC 587 at para 63):

> 63 These reasons support the proposition that the best interests of the child analysis is intimately tied to the Convention on the Rights of the Child and, because of that link, the best interests of the child analysis cannot be performed after a person reaches the age of 18 because that is the limit placed by that instrument.

See also *Massey v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1382 at paras 48:

> 48 In addition, recent jurisprudence of this Court has held that there is no need to consider the best interests of a person over the age of 18 as a "child directly affected" in an application brought under s 25 of IRPA. In Leobrera v Canada (Minister of Citizenship and Immigration), 2010 FC 587, Justice Michel Shore relied on domestic legislation, international instruments and the jurisprudence of the Federal Court of Appeal and Supreme Court to reach the conclusion that "childhood is a temporary state which is delineated by the age of the person, not by personal characteristics" (at para 72).

[27] In my view, *Ramsawak v Canada (Minister of Citizenship and Immigration)*, 2009 FC 636 at paras 17-23 puts this issue in proper context:

> 17 All of these arguments put forward by the respondent were recently canvassed by my colleague Justice Mandamin in the case of Yoo v. Canada (Minister of Citizenship and Immigration), 2009 FC 343. Noting that Mr. Justice Gibson had already decided that adult age children were entitled to receive the benefit of "the best interests of the child" analysis in Naredo v. Canada (Minister of Citizenship and Immigration), [2000] F.C.J. No. 1250, Mr. Justice Mandamin felt compelled to apply the same reasoning on the basis of judicial comity. I would also add, for the sake of completeness, that Justice MacKay followed the Naredo decision in Swartz v. Canada (Minister of Citizenship and Immigration), 2002 FCT 268, [2002] F.C.J. No. 340.
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> 18 While I may have some misgivings about these decisions, I find that it would be most inappropriate to unsettle the state of the law. With the exception of one contrary decision relied upon by the

respondent, which itself was rendered in the context of a motion for a stay of removal (Hunte v. Canada (Minister of Citizenship and Immigration), IMM-3538-03), there appears to be no conflicting case law on this issue. Nor can it be said that relevant statutory authority or binding jurisprudence has been overlooked in coming to that conclusion. As a result, I am prepared to accept that the mere fact a "child" is over 18 should not automatically relieve an officer from considering his or her "best interests" along the lines suggested in Baker.

19 That being said, the assessment of the best interests of the children must take into account the relevant facts of each case. The best interests of a two year-old infant, for example, will most certainly differ from those of a grown up young adult of 21. For example, it is clear from a reading of Mme Justice L'Heureux-Dubé's decision in Baker that what she had in mind were the interests of minor children (see, for example, paras. 71 and 73, where she refers to the UN Convention on the Rights of the Child and to the importance and attention that ought to be given to children and "childhood").

20 Similarly, if one is to look at the hardship that a negative decision would impose upon the children of an H&C claimant, the autonomy of these children or, conversely, their state of dependency upon their parents, must be a relevant factor. In that respect, it is interesting to note that Justice MacKay came to the conclusion that the 19 year-old child of the applicant was still a "child" for the purposes of the Baker analysis because he was still a dependent and was not authorized to work or to continue his studies in Canada. Similarly, Justice Mandamin considered that the adult sons of the applicant were deserving of a best interest of the child analysis because they were financially dependent on their father as they were pursuing their education.

21 In the present case, both younger applicants had, at the time of the application, regular or full-time jobs. According to the applicant's record, they have both attained high school diplomas and are both permanently employed. They were clearly not in the same dependency relationship with their parents as the children considered in previous cases.

22 However, there is more. Far from being dismissive, the officer did consider the submissions regarding the applicant's two youngest children. Despite stating that Deevin Randy and Annalisa Nirmala would "not be considered under the factor Best Interests of the Children" by virtue of their age, the officer nonetheless considered

> their circumstances in the analysis of establishment and hardship. Under the heading "Links to Canadian Society", the PRRA officer writes:
>
> > Deevin Randy and Annalisa Nirmala completed their education in Canada, though they began their studies in their home country. The two young applicants are both young adults and with their educational level, could potentially find work in their home country as they have done in Canada. They have not shown that they have any language barriers, or other significant obstacles, that would prevent them from being employed in their home country. Though they have spent some of their developmental years in Canada, I do not find that the link created for them provides excessive difficulties in returning to their home country.
>
> 23 This analysis, it seems to me, cannot be characterized as being dismissive of their best interests. Of course, it is not cast the same way it would have been if they were still dependent on their parents, irrespective of their age. Because they are now self-sufficient, the impact of a negative H&C decision is not assessed indirectly, in terms of the consequences that might befall them as a result of their parents having to move back to Guyana; more appropriately, the officer looks at their prospects from their own perspective, with a view to determining their likelihood of integrating and finding jobs in their country of origin. This does not strike me as being antithetical or contrary to the best interests of the child analysis developed in Baker; it is rather a more apposite way to be "alert, alive and sensitive" to their needs and interests in light of their particular circumstances. Accordingly, I am of the view that the officer did not fail to appreciate and assess the factors relevant to the two youngest applicants, despite the fact that he did not undertake a separate analysis under the rubric of the "best interests of the children".

See also *Moya v Canada (Minister of Citizenship and Immigration)*, 2012 FC 971 at paras 17-18.

[28] In the present case, the applicant argued that despite the age cut-off, the Officer should have considered the hardship to his children, but the respondent asserts that in fact the Officer did

consider their interests, concluding that she was "not satisfied that any hardship the family would experience" [emphasis added] would be excessive.

[29] The respondent also submits that the applicant provided little detail on the hardship his granddaughter would experience if they were separated, and the Officer's decision will withstand review if the Officer was sensitive to the interests of the child (*Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 12; *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 [*Hawthorne*] at paras 5-6).

[30] Lastly, the respondent argues that the Officer did not ignore other evidence. She considered the sponsorship undertaking provided by the applicant's daughter Tannia, but gave it little weight. She notes that the applicant had only been a source of support for his children since they were reunited in 2006, as no evidence was provided of financial support to them between 2000 and 2006. The Officer also concluded that the applicant had been separated from his children for the majority of their upbringing, and that the factors did not support the H&C request, either individually or cumulatively.

[31] The Federal Court of Appeal decided in *Hawthorne*, above, at para 41, that in considering the best interest of the child in question, the officer should recognize the reality that removal of a parent or grand parent would almost certainly be permanent:

> 41 First, the submissions made to the immigration officer on behalf of Ms. Hawthorne emphasized that her removal would be very detrimental to the best interests of Suzette who might feel that she had no effective [page577] choice but to return to Jamaica with her mother. The officer found that this would not be a major hardship warranting a positive exercise of discretion, because Suzette had

> lived in Jamaica for nearly all her life, having been in Canada for less than a year. However, if the officer had started by identifying the best interests of Suzette, now a permanent resident, as being able to continue to live in Canada, the removal of Ms. Hawthorne could only reasonably have been regarded as highly detrimental to Suzette's best interests if she was thereby effectively compelled to return to Jamaica with her mother. A best interests analysis makes Suzette's present life in Canada the relevant point of comparison, not her previous residence in Jamaica: see Koud v. Canada (Minister of Citizenship and Immigration) (2001), 18 Imm. L.R. (3d) 280 (F.C.T.D.), at paragraph 18.

[32] As in *Hawthorne*, the Officer in this case must have some regard for the likelihood of a proposed outcome, although this need not rise to the level of actually analyzing the probability of success, as long as the suggested alternative is at least somewhat realistic. The Officer failed to do so here.

[33] Further, in *Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166 [*Williams*] at para 64, this Court held that there is no "hardship threshold" that must be "met" but rather that the best interests of the child is truly the starting point of the analysis:

> 64 There is no basic needs minimum which if "met" satisfies the best interest test. Furthermore, there is no hardship threshold, such that if the circumstances of the child reach a certain point on that hardship scale only *then* will a child's best interests be so significantly "negatively impacted" as to warrant positive consideration. The question is *not*: "is the child suffering enough that his "best interests" are not being "met"? The question at the initial stage of the assessment is: "what is in the child's best interests?"

[34] The Court in *Williams*, above, also set out a three-step approach that decision-makers are to follow when assessing the best interest of the child:

> 63 When assessing a child's best interests an Officer must establish first what is in the child's best interest, second the degree to which the child's interests are compromised by one potential decision over

> another, and then finally, in light of the foregoing assessment determine the weight that this factor should play in the ultimate balancing of positive and negative factors assessed in the application.

[35] This Court has more recently cautioned that not all cases will conform to the *Williams* framework, but that it is a "useful guideline" for decision-makers.

[36] Further, while the respondent argues that the applicant's daughters had "chosen" not to sponsor him before the moratorium, the evidence before the Officer in fact shows that they could not afford it. The Officer erred in her finding on this point and was unreasonable.

[37] It appears to me that the applicant is correct that the refusal of his H&C application imposes much greater hardship since November 5, 2011, yet the Officer did not reasonably assess the added undue hardship. I believe that her decision was therefore unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1.) The applicant's application for judicial review is allowed and the matter is referred to a different Board member for redetermination;

2.) No question is certified.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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