Federal Court Cour fédérale

Date: 20140703

Docket: IMM-1099-13

Citation: 2014 FC 649

Ottawa, Ontario, July 3, 2014

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

MARTHA LUCIA MELGOZA AND
MARICELA VAZQUEZ SANTA CRUZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*], of a decision of immigration Officer Susan Neufeld [the Officer], dated January 10, 2013, refusing the applications of the applicants,

Martha Lucia Melgoza [Melgoza] and Maricela Vazquez Santa Cruz [Vazquez], for permanent residence based on humanitarian and compassionate (H&C) considerations.

II. Facts

[2] The applicants are a same-sex couple from Mexico who have been in a common-law relationship since 2002.

[3] Ms. Melgoza alleges that she married her ex-husband, Mr. Jose, in 1989, and they had two children. Mr. Jose subsequently became abusive, physically pushing and hitting Ms. Melgoza, which led to the couple's eventual separation. They started living apart in 1995. Seven years later, in 2002, Ms. Melgoza began a relationship with Ms. Vazquez.

[4] The applicants allege that when Mr. Jose learned that his ex-wife was in a relationship with a woman he became angry, and began calling and verbally abusing both Ms. Melgoza and Ms. Vazquez, whose phone number he had managed to obtain. At one point he told Ms. Vazquez as she was going to work that if the relationship did not end he would harm her and Ms. Melgoza.

[5] It is alleged that eventually Mr. Jose managed to contact Ms. Vazquez's supervisor at her place of employment, Aztra Zeneca Laboratories, in an attempt to have her fired. When this didn't work, Mr. Jose subsequently contacted the company's head office and accused Ms. Vazquez of having an affair with his wife and breaking up their marriage, despite the fact that his marriage to Ms. Melgoza had ended well before she met Ms. Vazquez. As a result, Ms. Vazquez

was approached by her employer and asked to leave her job. Ms. Vazquez did not attempt to go to the police because she did not believe that she would receive protection.

[6] The applicants allege that after this incident, they decided to go to Canada, and arrived in January 2006 on visitor visas which expired after six months. They remained in Canada and each applicant started her own cleaning business.

[7] The applicants returned to Mexico in January 2007, allegedly because Ms. Melgoza missed her children and she and Ms. Vazquez both had open return airline tickets that were expiring, so they wished to use the tickets before they expired. Upon their return to Mexico, the applicants allege that Mr. Jose resumed his campaign of harassment against them. Because of this and the better economic conditions, they returned to Canada in February 2007, six weeks after arriving in Mexico. They have remained illegally in Canada ever since.

[8] They allege that Mr. Jose has continued his harassment of them since they have been in Canada via Facebook.

[9] In January 2012 the applicants filed their H&C application, which was refused by the Officer on January 10, 2013.

III. Contested decision

[10] In her decision, the Officer indicated that H&C applications are assessed on the basis of unusual and undeserved, or disproportionate hardship, noting that foreign nationals who allege

risk related to factors falling under sections 96 and 97 of the *IRPA* can only have such claims assessed in a refugee claim by the Immigration and Refugee Board of Canada [the IRB] or in the form of a Pre-Removal Risk Application, and not through an H&C application.

[11] The Officer reviewed the evidence provided in support of hardship due to discrimination in the affidavit of Ms. Melgoza. The Officer noted that Ms. Vazquez did not provide an affidavit. She concluded that no specific details or documentary support was provided of any discrimination that the applicants had personally experienced as a lesbian couple living in Mexico City, or any recourse taken in reporting or combating discrimination. The Officer listed various factors in support of this conclusion, including:

- the couple's co-habitation in Mexico City as a lesbian couple since 2002;
- the fact that they were not named in any of the articles or country documentation;
- the lack of objective supporting evidence establishing personal discrimination or victimization of incidents of crime or violence;
- the absence of documentation corroborating past or continuing harassment by Ms. Melgoza's ex-husband, including copies of the threats made on Facebook while living in Canada; and
- the absence of documentation related to Ms. Vazquez's resignation from her employment in Mexico.

[12] With respect to the general country conditions, the Officer noted that in addition to having read and considered the materials filed by the applicants, she had also reviewed the IRB's Research Directorate documentation, including the following relevant evidence:

1) The existence of laws to prevent and eliminate discrimination in the Federal District including dissemination based on sexual orientation or preference, but without information on the effectiveness of this legislation.
2) Same-sex marriages were legalized in Mexico City in December 2009 (these laws came into effect in March 2010).
3) The Federal District Human Rights Commission (CDHDF) carries out investigations and provides non-binding recommendations and conciliatory proposals to the appropriate public authorities and parties.
4) Despite progressive legislation and other measures, discriminatory conduct and violence against sexual minorities still exists, including a "culture of homophobia within the Federal District government apparatus", which indicates that sexual minorities still face prejudice and social stigma.
5) Between January 2011 and July 2012, the CDHDF received 57 complaints of human rights violations from sexual minorities, which contain references to 101 human rights violations.
6) Avenues of redress and recourse, including support services, exist in Mexico to assist sexual minorities, but outside of Mexico City only three or four organizations across Mexico offer support services.
7) An organization entitled Agenda LGBT aims to achieve equality in human rights through activities such as: self-esteem workshops, sensitization workshops for the public, campaigns against homophobia, participation forms to promote human rights, and the provision of legal assistance in case of discrimination or human rights violations.

8) In 2009 a Federal District Human Rights Program was created, composed of representatives from public institutions, civil society organizations, international organizations, academic institutions, diplomatic missions, and other interested parties with the mandate of planning and coordinating the addition of a human rights perspective in public institutions in the Federal district.

[13] The Officer analyzed the applicants' evidence regarding establishment in Canada. She discussed the applicants' businesses, their Business Administration degrees, the letters of support from their customers and friends and their record of volunteerism in the local community. However, the Officer also noted that the applicants had remained in Canada without authorization for approximately 5 years before submitting an application for permanent residence on H&C grounds and they did not submit a refugee claim or apply for an extension to their initial status. She concluded that it could not be argued that the resulting hardship was not anticipated by *IRPA*, or that it was beyond the applicants' control. She also pointed out that subsection 25(1) of *IRPA* is an exceptional measure and not simply an alternate means of applying for permanent resident status in Canada. The Officer concluded that the evidence before her did not support a conclusion that the applicants had become established in Canada to the extent that severing their ties would amount to unusual and undeserved or disproportionate hardship.

IV. Issues

[14] The applicants submit that the issues are the following:

A. Did the Officer err in assessing the hardship the applicants had faced as lesbians and a same-sex couple in Mexico?

B. Did the Officer selectively omit important documentation pertaining to country conditions?

C. Did the Officer base her decision on the failure of the applicants to assert that they had been threatened with physical harm?

D. Did the Officer err in assessing the hardship the applicants would face from drug-related violence and crime in Mexico?

V. Standard of review

[15] The standard of review applicable to a decision on an H&C application is one of reasonableness (see, for example, *Lara Martinez v Canada (Citizenship and Immigration)*, 2012 FC 1295 at para 19; *Frank v Canada (Citizenship and Immigration)*, 2010 FC 270 at para 15).

VI. Analysis

A. *Was there Evidence that the Applicants Faced Discrimination or Failed to Take any Recourse in Combating Discrimination?*

[16] The applicants challenge the Officer's finding that there was insufficient evidence demonstrating that they were victims of discrimination. The Officer outlined the numerous factors for her conclusion, pointing out the absence of corroborating or objective supporting evidence where it would be anticipated.

[17] In addition to the factors raised above, I agree that the failure of Ms. Vazquez to file an affidavit is significant, since she was the person directly threatened by Mr. Jose and forced to

resign due to his alleged conduct vis-à-vis her employer. The introduction of an affidavit is normally the choice of counsel, who is not required to produce evidence that does not support his clients' case so long as no fraud on the decision-maker is committed. Where an adjudicative Officer would normally anticipate evidence from the applicant alleged to be the victim of harassment that forms the substantial basis for the claim, its absence cannot be overlooked. As a result, the hearsay evidence of Ms. Melgoza regarding Ms. Vazquez's victimization by her husband suffers a substantial reduction in weight, due to the lack of corroborative evidence.

[18] Moreover, aside from any issue of the weight given to the events surrounding Ms. Vazquez's resignation, the Officer was justified in considering these incidents as pertaining to a vindictive family law dispute involving Mr. Jose and Ms. Melgoza, as opposed to evidence of discrimination against Ms. Melgoza and Ms. Vazquez. This is a reasonable characterization, given that there is no other reliable evidence demonstrating that the applicants personally suffered discrimination in Mexico City.

[19] It is also noted that Mr. Jose has since remarried. Given the applicants' long absence from Mexico City since February 2007, it is inexplicable why highly probative objective evidence in the form of copies of the continuing harassing emails and threats alleged to have been made on Facebook were not included in the applicants' materials. If such material existed, their experienced counsel would be expected to make every effort to obtain copies and introduce them as highly corroborative evidence supporting claims of harassment, which is the gravamen of the applicants' claim.

[20] An Officer may ascribe little probative value or weight to evidence submitted because of its vagueness, such as where there is a lack of detail, sources are unidentified, statements are unsworn, or obvious corroborative evidence is omitted to confirm significant allegations. Deference is owed to Officers in their assessment of the probative value of the evidence before them. So long as their assessments fall within the range of reasonableness, no reviewable error arises; see *Ferguson v Canada (MCI)*, 2008 FC 1067 at paragraph 33.

B. *Did the Officer Selectively Omit Important Documentation Pertaining to Country Conditions?*

[21] The applicants contend that absent a "boilerplate statement" that the Officer had read their documentation, she failed to specifically identify, reference or otherwise even mention any of the documentary evidence that was submitted. Instead she based her conclusion on a documentary source the Officer proffered herself, the IRB's Response to Information Request (RIR) entitled *Situation of sexual minorities in Mexico City, Guadalajara (Jalisco) and Puerto Vallarta (Jalisco); whether there are support or advocacy groups acting on their behalf (2009 – August 2012)*.

[22] The RIR provides a balanced summary of country conditions, including extensive references to the prejudice and social stigma faced by sexual minorities. The major conclusions from the report were referenced by the Officer in her decision. The applicants did not refer the Court to any evidence from other sources that was not to the same effect as that found in the RIR and described by the Officer in her decision.

[23] The primary focus of the applicants' argument was that the Officer selectively omitted contradictory passages from the RIR. In particular, they referred the Court to the absence of any reference to section 1.3 of the report entitled *Societal Attitudes towards Sexual Minorities in Mexico City*, which I cite below:

> 1.3 *Societal Attitudes towards Sexual Minorities in Mexico City*
>
> According to a March 2012 CDHDF report, sexual minorities still face prejudice and social stigma which result in exclusion and discrimination (ibid., 13). A study conducted in 2010 by the National Council for the Prevention of Discrimination (Consejo Nacional para Prevenir la Discriminacion, CONAPRED), which surveyed 52,095 people across Mexico (Mexico 2011a, 15), indicates that in Mexico City, 43.3 percent of people surveyed state that they would not allow a homosexual to live in their homes, while 38.8 percent indicated that they would not allow a lesbian to live in their homes (Mexico 2011b, 109, 110).
>
> Sources report on the death of two individuals in Mexico City that were part of the LGB T community (US 24 May 2012, 30; Pink News 3 July 2012). On 30 June 2012, a member of the National Lesbian and Gay Journalists Association (AP 3 July 2012; Pink News 3 July 2012), who was reportedly "openly gay" (ibid.), was found dead in the elevator of his apartment building in Mexico City's Condesa neighbourhood, and the police are investigating his death (ibid.; AP 3 July 2012). On 23 July 2011, a member of the Revolutionary Democratic Party's Coordinating Group for Sexual Diversity was stabbed to death in his Mexico City home (5 Aug. 2011; US 24 May 2012, 20). The US Department of State's *Country Reports on Human Rights Practices* for 2011 adds that he was also an organizer of Mexico City's annual LGBT pride parade (ibid.).

[24] I do not find that these two paragraphs can be described as examples of selective omissions of highly relevant evidence by the Officer. A study surveying attitudes of persons not wanting a lesbian to <u>live</u> in their homes is not an appropriate indication of attitudes. Moreover, no meaningful conclusion can be drawn from a statistic of 38.8 percent of persons not wanting to live with a lesbian without a benchmark of comparable attitudes of Canadians or Americans.

Besides, there is no legal requirement of shared residency of persons. Frankly, who one lives with is a very personal choice depending upon different circumstances which may reflect a number of factors. The issue is one of tolerance in normal day-to-day relationships at work and in the community.

[25] With respect to the second paragraph, the deaths of the organizers of Mexico City's annual pride parade have little relevance to the applicants' situation as there is no indication that they participated in these events. In any case, this sort of evidence speaks more to the issue of risk rather than hardship.

[26] Moreover, this paragraph was a source of discussion during oral hearing in regards to the source materials in the Certified Tribunal Record. There was a marked distinction between the 2010 and 2011 US Country Reports under the same heading. The 2011 Report omitted many positive objective facts noted in the 2010 Report. For example, it noted that "activists had organized gay pride marches in cities across the country. The largest, in which 400,000 persons participated, was held in June in Mexico City." An event of this size would suggest a degree of acceptance of homosexual relationships which has accompanied the important legislative and institutional progress of acceptance of gays and lesbians in Mexico City since 2007.

[27] It is to be recalled that the Supreme Court in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 62 emphasized that the principles outlined in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] provide significant scope for specialized decision-makers to decide cases within a

range of reasonable outcomes. If the reasons allow the reviewing court to understand why it made its decision and permits it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[28] I am satisfied that the Officer grappled with the substantive live issue of the allegations of harassment and the conclusions to be drawn from the documentary evidence on discrimination in Mexico City, which are appropriately reflected in her reasons, and sufficiently demonstrate why her conclusions fall within the range of acceptable outcomes.

C. *Did the Officer Base her Decision on the Failure of the Applicants to Assert that they had been Threatened with Physical Harm?*

[29] The applicants submit that the Officer made a reviewable error in the test applied by requiring the demonstration of physical harm as a factor in an H&C application. To this end they cite the following paragraph in support of their contention:

> It is noted that the applicants do not assert that they have been threatened with physical harm by Ms. Melgoza's husband, or that he has made threats against them of causing physical harm.

[30] On the basis of the foregoing statement, the applicants submit that the Officer implied that physical harm was necessary as part of the test for an H&C application. They argue that the amendment to *IRPA* adding section 25(1.3) was in order to eliminate any overlap between a claim for refugee protection and an H&C application. Precisely because Mr. Jose did not physically harm the applicants, "[a]ny greater degree of harm would render this harassment to be personalized risk and, thus, [be] barred from consideration by section 25(1.3)." While this submission was modified somewhat in light of the recent Federal Court of Appeal decisions in

Kanthasamy v Canada (Citizenship and Immigration), 2014 FCA 113 [*Kanthasamy*] and *Lemus v Canada (Citizenship and Immigration)*, 2014 FCA 114 [*Lemus*], the substance remains the same: that the referenced statement has no place in an H&C analysis.

[31] I do not characterize the Officer's statement as a <u>requirement</u> that physical harm be an element of an H&C application. I find the comment as merely indicating that physical harm was not a factor in <u>this</u> case. She was careful in her introductory statement to point out that claims of risk related to factors under sections 96 and 97 could only be addressed through the IRB or a PRRA application and not through an H&C application. That observation by the Officer is inconsistent with the applicants' characterization of her impugned comment.

[32] In addition, I understand that threats of or evidence of physical harm may be alleged in an H&C application. In the decision of *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, [2010] 2 FCR 311, 2009 FCA 81, the Federal Court of Appeal endorsed Justice Pelletier's comment in *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, 2001 FCT 148, [2001] 3 FC 682, 204 FTR 5, 13 Imm. LR (3d) 289, that: "With respect to H&C applications, absent special considerations, such applications will not justify deferral <u>unless based upon a threat to personal safety</u>." [Emphasis added] I would understand this comment to mean that issues of personal harm could be considered under an H&C application.

[33] In *Kanthasamy* the Federal Court of Appeal interpreted the amendment to the *IRPA* intended by subsection 25(1.3) as limiting reference to <u>factors</u> under sections 96 and 97. Nonetheless, the evidence adduced in previous proceedings is admissible in H&C proceedings;

however, it must be assessed through the "lens" of subsection 25(1). The question to be asked is whether that evidence can be considered to personally and directly cause the applicant to suffer unusual and undeserved, or disproportionate hardship.

[34] Similarly, in *Lemus*, which was rendered contemporaneously with *Kanthasamy*, the Court of Appeal referred the matter back to the Officer because she was not cognizant of the facts relevant to the matters raised in the unsuccessful application for refugee protection that might have also been relevant to the consequences of requiring the Lemus family to return to El Salvador. The Court indicated at paragraph 26 that the Officer "failed in the remainder of the reasons to assess, through the lens of hardship, the <u>risk</u> that the child would be <u>targeted</u> by the Mara Salvatruchia." [Emphasis added].

[35] While in this matter there was no previous unsuccessful RPD decision by which the Officer could be satisfied that the evidence put forward did not relate to a risk sufficient to meet the requirements of sections 96 and 97, this appears to be an irrelevant consideration. As I interpret *Kanthasamy*, the H&C Officer must consider the evidence regardless of whether it also relates to a risk of personal harm, so long as it is viewed through "the lens of hardship". Accordingly, the Officer cannot be criticized for the observation that the evidence of hardship did not include any risk to the personal safety of the applicants.

[36] Insofar as the applicants allege that Mr. Jose conducted a campaign of harassment relevant to an H&C application, the Officer concluded that information was not provided by them to support the assertion that they would be unable to seek recourse from the police or

judiciary to contend with this complaint. In any event, the applicants' failure to seek recourse from the police or other authorities for the alleged harassment and threats remains a significant fact undermining their allegations.

[37] It is also to be noted that the Officer rejected the applicants' establishment claim. I agree that by remaining in Canada without authorization for approximately 5 years before submitting their application it could not be argued that the resulting hardship was not anticipated or that it was beyond the applicants' control. The integrity of the *IRPA* in maintaining control over admission to permanent residency status is seriously undermined if applications are founded upon persons remaining illegally in the country and then coming forward with establishment arguments created by their own illegality. The Officer was correct in discounting the establishment evidence on this basis, while noting that an H&C application is an exceptional measure and not simply an alternate means of applying for permanent resident status in Canada.

[38] Finally, the recent amendments to the *IRPA* contained at subsection 25(1.21) point to a conclusion that hardship caused by discrimination is not a stand-alone factor in the context of an H&C application, unlike factors such as the best interests of the child, or risk to life caused by inadequate medical facilities in the returning country. Those factors, which are singled out in subsection 25(1.21) as exceptions permitting an applicant to file an H&C application within one year of an unsuccessful RPD application, appear to be sufficient to found a successful application on their own.

[39] Discrimination, on the other hand, is normally insufficient as a stand-alone factor for a successful H&C application. This is demonstrated by Citizenship and Immigration Canada's *IP 5 Manual on Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds*, which states at section 5.17, "Assessment of discrimination":

> Nevertheless, discrimination alone would not necessarily be sufficient to warrant a positive H&C decision, in the absence of other positive considerations in the applicant's favour.

D. *Did the Officer Err in assessing the hardship the applicants would face from drug-related violence and crime in Mexico?*

[40] The applicant Ms. Melgoza made a passing reference at paragraph 22 of her affidavit of September 29, 2011, to concerns about returning to Mexico because of the increasing levels of violence. Despite the apparent insignificance of this issue to the applicants, they criticize the Officer for limiting her comments to the fact that they were not personally victims of crime or violence in Mexico. I find that the Officer's conclusion that there was a functioning judiciary and police protection to which the applicants could turn in cases of harassment from Mr. Jose implies that similar protections were available as regards any complaints of threats of physical harm. There is no reviewable error arising from the Officer's conclusion that general threats from increasing levels of violence in Mexico were not a significant factor in the H&C application.

[41] For all the above reasons I find that the Officer's decision falls within a range of reasonable acceptable outcomes and is sufficiently articulated by its reasons. There is no question of general importance requiring certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is denied; and

2. No question of general importance is certified.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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