Federal Court  Cour fédérale

Date: 20170509

Docket: IMM-5026-16

Citation: 2017 FC 481

Ottawa, Ontario, May 9, 2017

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

JANNES MAURICIO AGUILAR SARMIENTO, ROSA LIVIA CASTILLO ROMAN, ROSA SOFIA AGUILAR CASTILLO AND NOELIA CRISTINA AGUILAR CASTILLO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] The Applicants, Mr. Jannes Mauricio Aguilar Sarmiento, his wife Ms. Rosa Livia Castillo Roman and their two (2) minor girls are all citizens of Spain. The adult Applicants are also citizens of Ecuador.

[2] The Principal Applicant, Mr. Aguilar Sarmiento, applied for permanent residency outside Canada as a member of the skilled worker class. His application was refused in March 2011.

[3] In June 2013, the Applicants travelled to Canada as visitors and three (3) months after their arrival, they submitted an application for permanent residence based on humanitarian and compassionate [H&C] considerations. Their application was refused in February 2014. They continued to have visitor status until August 2015.

[4] Since the Applicants remained in Canada without status, the Canada Border Services Agency arrested the Principal Applicant on February 11, 2016. The Principal Applicant was released on terms and conditions and a removal order was issued against the Applicants the same day.

[5] On May 27, 2016, the Applicants submitted a second application for permanent residence based on H&C considerations. In support of their application, the Applicants relied on two (2) factors: their establishment in Canada and the best interest of their children. Regarding their establishment, the Applicants submitted that they are self-sufficient and will not become reliant on Canadian social programs. They namely refer to the fact that: 1) the Principal Applicant had been working as a self-employed painter from the time he arrived in Canada; 2) his wife had made significant efforts to improve her English ability and obtained her General Education Diploma [GED] by attending classes at the Toronto City Mission, in addition to doing significant volunteer work in the community; and 3) the family had close family ties in Canada. As for the

best interest of their children, the Applicants submitted that undue hardship would be caused to the family if they were removed from Canada, as they would suffer psychological harm.

[6] In a decision dated October 21, 2016, a Senior Immigration Officer [Officer] dismissed their application, finding that there were insufficient H&C considerations to justify an exemption. The Officer found that while the family's self-sufficiency and community involvement were positive factors, their establishment in Canada was obtained partly in violation of Canada's immigration laws since Ms. Castillo Roman obtained her GED without having a valid permit authorizing her to study in Canada and the Principal Applicant did not have a work permit authorizing his employment in Canada until August 2016.

[7] The Officer also considered the best interest of the child factor in relation to the two (2) minor Applicants and their two (2) minor cousins. The Officer acknowledged that it would be in the best interest of the minor Applicants to remain with their parents and that their interest would be better served in Canada as they could continue to enjoy the physical presence of their other family members. However, the Officer noted that the best interest of the children affected was only one of many important factors to be considered in making an H&C decision. The Officer found that in this case, the best interest of the children alone did not justify the granting of an exemption because the Applicants had not demonstrated that leaving Canada would have a negative impact on the four (4) children affected.

[8] The Officer also considered the risk and adverse country conditions and found that the Applicants had adduced little evidence demonstrating that living in either Spain or Ecuador would directly cause them hardship.

[9] The Applicants now seek judicial review of the Officer's decision. They submit that the decision is unreasonable because the Officer: 1) mischaracterized the evidence of the Applicants' establishment efforts; 2) failed to properly assess the personal hardship the Applicants would face in Spain; and 3) erred in the analysis of the best interest of the children.

II. Analysis

A. *Standard of review*

[10] H&C decisions are reviewable on the standard of reasonableness. The same standard of review is applicable to the assessment of the best interests of the child (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44 [*Kanthasamy*]; *Kisana v Canada (Citizenship and Immigration*), 2009 FCA 189 at para 18 [*Kisana*]; *Richard v Canada (Citizenship and Immigration)*, 2016 FC 1420 at para 14). In assessing reasonableness, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59 [*Khosa*]; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

[11] Moreover, an H&C exemption is an exceptional and discretionary remedy (*Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 15). The *onus* of

establishing that an H&C exemption is warranted lies with the Applicants (*Kisana* at para 45; *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at para 16 [*Semana*]). If the Applicants omit pertinent information from their H&C application, they do so at their own peril (*Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 8).

B. *Mischaracterization of the evidence of establishment*

[12] The Applicants submit that the Officer mischaracterized the evidence of their establishment efforts and in particular, the evidence relating to Ms. Castillo Roman's GED studies at the Toronto City Mission and the monies deposited in the Principal Applicant's bank account.

[13] The Applicants argue that Ms. Castillo Roman did not violate the terms of her work permit as she did not attend an educational institution nor did she participate in any "academic, profession or vocational training course". The Toronto City Mission is a charitable organization, not an educational institution, and Ms. Castillo Roman participated in their "Role Model Moms" program. The Applicants contend that the mischaracterization of the evidence on this point leads to an inherently flawed conclusion about Ms. Castillo Roman's level of establishment.

[14] The Respondent concedes that the Officer mischaracterized this evidence but argues that the error is not determinative. I agree with the Respondent. The Officer's finding regarding the Applicants' level of establishment is not based solely on Ms. Castillo Roman's failure to obtain the authorization to study in Canada. The Officer also noted that the family had only been in Canada for a short amount of time and that their establishment efforts were not uncommon. The

Officer also found that the Principal Applicant's unauthorized employment prior to August 2016 "substantially" affected his establishment because it was obtained in violation of Canada's immigration laws. In contrast, the Officer found that Ms. Castillo Roman's failure to obtain a valid authorization to study in Canada only "somewhat" took away from her establishment in Canada. Overall, the Officer gave the Applicants' establishment in Canada some positive weight but reasonably considered that some of the Principal Applicant's establishment was accrued in violation of Canada's immigration laws.

[15] This Court has held on a number of occasions that "applicants cannot and should not be 'rewarded' for accumulating time in Canada, when in fact, they have no legal right to do so" (*Nguyen v Canada (Citizenship and Immigration*), 2017 FC 27 at para 32 [*Nguyen*], citing *Millette v Canada (Citizenship and Immigration)*, 2012 FC 542 at para 41, in turn citing *Tartchinska v Canada (Minister of Citizenship and Immigration)* [2000] FCJ 373 (FC) at paras 21-22; *Semana* at paras 49-51). Moreover, an H&C exemption is not meant to be an "alternative immigration scheme" or an "appeal mechanism" for failed permanent residence claimants (*Kanthasamy* at paras 23, 90, 107; *Nguyen* at para 29). While I can appreciate the argument that the Principal Applicant's failure to be employed could have a negative impact in the determination of his level of establishment, the Principal Applicant has failed to demonstrate why he did not seek and obtain the necessary permits of employment prior to August 2016. The Officer's assessment of the Applicants' establishment is therefore reasonable.

[16] The Applicants also argue that the Officer made an unreasonable negative inference in noting that the Principal Applicant did not provide any explanation why the monies deposited in

his bank account did not coincide with the income reported to the Canada Revenue Agency for the 2013 calendar year. I disagree. While the Officer commented on the existence of unexplained sources of income, the Officer subsequently noted that "[r]egardless of these differences", the Principal Applicant did not have a work permit authorizing his employment until August 2016.

C. *Personal hardship if returned to Spain*

[17] The Applicants submit that the Officer erred in stating that they did not provide enough evidence about how they would be personally affected by the country conditions in Spain and that living in either Spain or Ecuador would directly cause them hardship. The Applicants argue, on the contrary, that the fact that they were chronically unemployed for respectively two (2) and three (3) years, prior to coming to Canada, clearly demonstrates that they were personally affected by the economic crisis in Spain. They also argue that the Officer minimized the family's struggles by noting that the Applicants were able to meet their daily needs.

[18] I have reviewed the record that was before the Officer and find that the Applicants have failed to demonstrate that the Officer's assessment is unreasonable. The Applicants based their H&C application on their level of establishment in Canada and the best interest of the children. They made no submissions and adduced no evidence in the context of their H&C application regarding how the country conditions in Spain or Ecuador would negatively impact them or how the economic conditions in Spain would affect them. The Officer nevertheless reviewed the adverse country condition documentation submitted by the Applicants in the context of their pre-removal risk assessment application as the Officer was also the decision-maker in relation to that application. Ultimately, the Officer found that the Applicants had not provided enough

information about how they themselves would be personally affected by the country conditions in Spain. In the absence of submissions or evidence relating to the Applicants' periods of alleged "chronic unemployment" and how the economic conditions in Spain affected them directly, the Officer cannot be faulted for not considering evidence or arguments that were not on the record.

D. *Best interest of the child*

[19] Finally, the Applicants submit that the Officer erred in assessing the best interest of the children by considering extraneous evidence that was not before the Officer and by applying the wrong legal test.

[20] The Applicants argue that in assessing the best interest of the children, the Officer unreasonably engaged in weighing the benefits of the two (2) children staying in Canada without their parents versus the children returning to Spain with their parents. The Applicants submit that there was no evidence on the record to suggest that the minor Applicants could remain in Canada without their parents. While this part of the Officer's analysis may indeed appear to be somewhat confusing, I am of the view that the Officer's observations must be considered in their proper context. In the spirit of being thorough, the Officer was simply looking at the best interest of the children through different lenses including the children remaining in Canada without their parents.

[21] As for the Officer's statement that the minor Applicants' cousins will continue to have access to education, healthcare and that there is little indication that their parents would be unable to provide them care, I am of the view that the Officer was again being thorough in his

analysis of the best interest of the children. The Officer considered the factors which are generally relevant in determining the best interest of the children and found that they were not at issue in this case.

[22] Overall, I find that the Officer's assessment of the best interest of the children is reasonable. The Officer considered the psychological effect on the children if they left Canada, their ties in Canada, the standard of living both in Spain and in Canada, the relatively short amount of time the children have spent in Canada, the education system in Spain, the period of adjustment that they would undergo in Spain and the consequences of family separation. The Officer acknowledged that the best interest of the children would be to remain with their parents and that their interest would be better served in Canada where they could continue to enjoy the physical presence of their other family members. However, the Officer reasonably noted that while the best interest of the children was important, it was only one of the many important factors to be considered in the context of an H&C application (*Semana* at para 28). The Officer ultimately found that in this case, the best interest of the child factor did not justify granting an exemption as there was insufficient evidence to demonstrate that there would be a negative impact on the four (4) children if the Applicants leave Canada. The Applicants have not persuaded me that the Officer committed a reviewable error in the assessment of the best interest of the children.

III. Conclusion

[23] In conclusion, even if the Officer mischaracterized the evidence regarding Ms. Castillo Roman's GED studies, it was open to the Officer, in the exercise of his or her discretion, to

conclude that the Applicants had not demonstrated sufficient H&C considerations to warrant special relief. When viewed as a whole, I find that the Officer's decision is reasonable as it falls within the range of possible, acceptable outcomes which are defensible in light of the facts and the law (*Khosa* at para 59; *Dunsmuir* at para 47).

[24] Accordingly, the application for judicial review is dismissed. No questions were proposed for certification and I agree that none arise.

JUDGMENT in IMM-5026-16

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed and no question of general importance is certified.

"Sylvie E. Roussel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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