Federal Court  Cour fédérale

Date: 20180719

Docket: IMM-4873-17

Citation: 2018 FC 758

Toronto, Ontario, July 19, 2018

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

DEIBY STEVEN PENAGOS BOTERO
AMY GABRIELA PENAGOS CORREDOR
AND DAYANA ALEXANDRA CORREDOR NOMESQUE

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Deiby Steven Penagos Botero, his common-law wife, Dayana Alexandra Corredor Nomesque, and their minor infant daughter, Amy Gabriela Penagos Corredor, are all

citizens of Colombia. They entered Canada from the United States on February 2, 2017 and claimed refugee status.

[2] On April 25, 2017, the Refugee Protection Division [RPD] rejected their claim on the basis that the pivotal areas of the Applicants' allegations lacked credibility. The RPD found that the Applicants had not established that their fear had a nexus to a Convention ground and also, that the risk faced by the Applicants was a risk generally faced by others and not personalized to them. The RPD also found that the Applicants had not rebutted the presumption of state protection or the reasonableness of living in a different part of Colombia even if they were victims of common criminality.

[3] The Applicants filed a notice of application for leave and judicial review of the RPD's decision. Their application was dismissed on July 19, 2017 for failure to perfect the application record.

[4] In August 2017, the Applicants filed an application for permanent residence on humanitarian and compassionate [H&C] grounds, citing their establishment in Canada, the hardship they would face if forced to return to Colombia and the best interests of the minor Applicant.

[5] Directed to report for removal on November 19, 2017, the Applicants sought a deferral of their removal from Canada pending the determination of their application for permanent residence. On November 10, 2017, an inland enforcement officer [Officer] of the Canada Border

Services Agency rejected the Applicants' request. This Court subsequently granted the Applicants a stay of removal on November 24, 2017.

[6] The Applicants now seek judicial review of the Officer's decision. They argue that the Officer committed a reviewable error by failing to address the country condition evidence, relying instead on the RPD's conclusion that the Applicants were neither Convention refugees nor persons in need of protection as defined by sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

II. Analysis

[7] The standard of review applicable to the decision of an enforcement officer refusing to defer a removal is reasonableness (*Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 43 [*Lewis*]; *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 at para 27; *Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 25 [*Baron*]).

[8] 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 light 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*]).

[9] Moreover, it is well-established that a decision-maker is presumed to have considered all of the evidence in reaching his or her decision (*Florea v Canada (Minister of Employment and Immigration*, [1993] FCJ No 598 (FCA) (QL)) and the adequacy of reasons is not a stand-alone basis to quash a decision (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14, 16).

[10] The scope of an enforcement officer's discretion under subsection 48(2) of the IRPA is very limited as the enforcement officer is required to enforce the removal as soon as possible (*Lewis* at paras 51, 54; *Baron* at paras 48-51). It is generally accepted that an enforcement officer enjoys some discretion to delay the timing of removal when a person is unable to travel for reasons of illness or the need to accommodate other commitments such as school or other family obligations (*Baron* at para 49, citing with approval the decision of this Court in *Simoes v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 936 (TD) at para 12 [*Simoes*]; *Lewis* at para 55). However, the mere existence of an H&C application does not constitute a bar to the execution of a valid removal order (*Baron* at para 50; *Simoes* at para 13; *Lewis* at para 56).

[11] In *Baron*, the Federal Court of Appeal also approved the boundaries of an enforcement officer's discretion which were circumscribed by Mr. Justice Pelletier in *Wang v Canada (Minister of Citizenship and Immigration*), [2001] 3 FC 682 (TD). In particular, the Federal Court of Appeal indicated that deferral should be reserved for those applications where the failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment and, with respect to H&C applications, absent special considerations, such applications will not justify deferral unless the deferral is based upon a threat to personal safety of the

applicant (*Baron* at para 51; *Hernandez Fernandez v Canada (Citizenship and Immigration)*, 2012 FC 1131 at para 45 [*Fernandez*]).

[12] The Applicants submit that the Officer in this case was required to engage with the country condition evidence in order to be satisfied that the Applicants will not face a situation that would expose them to the risk of death, extreme sanction or inhumane treatment. They further submit that the Officer's failure to consider the country condition evidence renders the assessment of the best interests of the minor Applicant unreasonable. They rely on the decision of this Court in *Ramada v Canada (Solicitor General*) 2005 FC 1112 [*Ramada*] wherein it is stated that an enforcement officer's discretion may be second-guessed on judicial review where the enforcement officer has overlooked an important factor or seriously misapprehended the circumstances of a person being removed (*Ramada* at para 7).

[13] I agree with the Respondent that the Officer did not overlook any factors or misapprehend the circumstances of the Applicants.

[14] The Applicants' request for a deferral of removal consists of a two (2) page letter. The Applicants refer the Officer to their submissions and documentary evidence provided in support of their H&C application. In their H&C submissions, the Applicants submit that even if the RPD found that the Applicants' claims did not fall within the purview of sections 96 and 97 of the IRPA, it accepted that the principal Applicant had been targeted by common criminals for extortion and therefore, these facts should be assessed through the lens of hardship to determine

whether returning to Colombia would constitute underserved, undue or disproportionate hardship.

[15] In the decision rejecting the Applicants' request to defer the removal, the Officer not only indicates that the Applicants' submissions on the issue of hardship were considered, the Officer specifically refers to an article relating to forced displacement in Colombia provided by the Applicants in support of their H&C application. It is thus reasonable to conclude that the Officer engaged with the country condition evidence submitted by the Applicants.

[16] It was also reasonable for the Officer to refer to the decision of the RPD. As the Federal Court of Appeal stated in *Lewis*, risk determinations are generally made by the RPD and by pre-removal risk assessment officers (*Lewis* at para 52). The country condition evidence relied upon by the Applicants was available at the time of the RPD's decision and the Applicants did not establish any deterioration in country conditions or that they faced a risk of death, extreme sanction or inhumane treatment (*Fernandez* at para 50; *Jonas v Canada (Citizenship and Immigration)*, 2010 FC 273 at para 19). The onus was on the Applicants to adduce evidence supporting their request for deferral.

[17] The Applicants have also failed to persuade me that the Officer's assessment of the best interests of the minor Applicant was unreasonable given the limited evidence provided by the Applicants regarding the risk they face. It is well-established in jurisprudence that an enforcement officer is not required to undertake a substantive review of a child's best interests before executing a removal order. The Officer is only required to consider the short-term best

interests of the child (*Baron* at para 50; *Lewis* at paras 56-61; *Fernandez* at para 51). Here, the Officer considered the evidence led by the Applicants and concluded that this factor did not justify an H&C exemption.

[18] To conclude, the Applicants have failed to persuade me that the Officer's decision falls outside of the range of possible, acceptable outcomes which are defensible in light of the facts and law (*Khosa* at para 59; *Dunsmuir* at para 47).

[19] Accordingly, the application for judicial review is dismissed.

[20] I have considered the Applicant's proposed question for certification. Since this decision is fact specific and the proposed question is not dispositive of this matter, no question of general importance shall be certified.

[21] Lastly, the parties agree that the proper Respondent in this proceeding is the Minister of Public Safety and Emergency Preparedness and thus, the style of cause shall be amended accordingly.

JUDGMENT in IMM-4873-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. The style of cause is amended to replace the Minister of Citizenship and Immigration with the Minister of Public Safety and Emergency Preparedness as the Respondent;

3. No question of general importance is certified.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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