

Date: 20070710

Docket: IMM-3884-06

Citation: 2007 FC 734

Ottawa, Ontario, July 10, 2007

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

**LUIS FERNANDO RODRIGUEZ ZAMBRANO
CAROLINA GOMEZ
KATHERINE ABIGAIL RODRIGUEZ
JOSHUA ALEXANDER RODRIGUEZ
CAROLINA GOMEZ**

Applicants

and

**THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] The Applicants request judicial review of a Removal Officer's refusal to defer their removal from Canada. A stay of removal was granted by this Court.

II. BACKGROUND

[2] The Applicants (father, mother and one child) were citizens of Ecuador, Venezuela and the United States respectively. Another child was a Canadian born citizen. The parents had lived illegally in the United States for 10 years before coming to Canada.

[3] Their refugee claim was rejected in part because their account of persecution was not believed by the Immigration and Refugee Board. There were no new issues raised in the PRRA which was also negative.

[4] The Applicants filed, in March 2006 while their PRRA was pending, an H&C application which is still outstanding.

[5] In January 2006 the Applicants were informed that if their PRRA was unsuccessful, they would be removed to the United States. They requested deferral of removal on the basis that they would voluntarily comply and would make their own travel arrangements to another country so they could avoid removal to the United States where they might be arrested on an immigration warrant. Deferral was granted to permit the family to make these travel arrangements.

[6] The Applicants filed a second deferral request on July 7, 2006 pending a decision on their H&C application. In addition to raising concerns as to their ability to stay in either Venezuela or Ecuador (the parents' countries of citizenship), they filed a report of a psychologist concerning the

stress the parents were under because of their fear of return to Ecuador where they had claimed to be persecuted.

[7] The deferral request was denied. The Removal Officer noted the psychologist's report, considered the immigration history of the family, noting most particularly the conviction of the male parent on a DUI and driving with a suspended licence offence in Miami in 1992, and considering the best interests of the children from several perspectives.

[8] In the end the Removal Officer could not find a reason for deferral. The Officer made a key finding that the H&C would not be successful because the male parent had been convicted of an offence which made him ineligible for landing in Canada. The critical paragraph reads:

I genuinely believe it would be in the best interests of the children to remain with the family and to settle together in a place they can, which at this time appears to be Ecuador. In light of the fact that the male head of family has by his own admission been convicted of an offence that would make him ineligible to be landed in Canada the H&C application could not be approved and ultimately the family would have to depart Canada even if allowed to remain for processing of that.

III. ANALYSIS

[9] The Applicants have attacked the Removal Officer's decision on several grounds which will be dealt with further. However, read as a whole, the Officer was clearly sympathetic to the family and did a thorough and balanced review of the case, but for the aspect of the Miami driving conviction.

[10] The authority of a removal officer is extremely limited as confirmed in *Simoes v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 936 (QL). The deferral request is not a review of all past decisions nor is it a finding as to the success of any other pending applications.

[11] The standard of review of a deferral decision has been the subject of some debate in this Court as to “reasonableness *simpliciter*” or “patent unreasonableness”. For purposes of this case, the choice between these two standards is immaterial in the result.

[12] The Removal Officer made no error in consideration of the psychological report and it did not merit a detailed analysis. The report, if accepted, would mean that the Applicants could never be removed because they feared and were stressed by the thought that they would be removed to the country in which they were persecuted. Whatever the merits of this subjective basis for the report, the Immigration and Refugee Board and the PRRA Officer had rejected as credible the very factual basis on which the fear and stress were based.

[13] The Applicants challenged the Removal Officer’s efforts, performed on her own time, to ensure that the family could live together in Ecuador. This had been a live issue since 2004, one which the Applicants should have addressed, and there is no allegation that the Officer’s conclusion was wrong.

[14] The Officer was more than “alert, alive and sensitive” to the best interests of the children. It was evident that she was sympathetic to the family’s situation, and that she was concerned that the family remain together.

[15] It was in respect to the pending H&C where this decision becomes problematic. There is no evidence that a DUI and driving while licence suspended offence constitutes “serious criminality”. Further, the Officer does not appear to have considered CIC Operations Manual Bulletin 121 which gives an H&C officer the authority to exempt an exclusion under the Act including a conviction for a non-serious criminality.

[16] Despite the able argument of Respondent’s counsel that the criminality issue was peripheral, that issue was intertwined with the consideration of “best interests of the children”.

[17] The Court cannot be certain that the criminality conclusion was peripheral and therefore must conclude that the Officer failed to properly consider a critical fact and made a legal conclusion which cannot be supported under any of the standards of review.

[18] For this reason, the judicial review is granted. The deferral decision is quashed and the deferral request is remitted for consideration to a new Removal Officer to be determined as expeditiously as possible. Despite the Applicants’ request, the Court will not issue directions to that new Officer.

[19] There is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES THAT the application for judicial review is granted. The deferral decision is quashed and the deferral request is remitted for consideration to a new Removal Officer to be determined as expeditiously as possible.

“Michael L. Phelan”

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-3884-06

STYLE OF CAUSE: LUIS FERNANDO RODRIGUEZ ZAMBRANO et al
and
THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS

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**REASONS FOR JUDGMENT
AND JUDGMENT:** Phelan J.

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