Date: 20091118

Docket: IMM-1390-09

Citation: 2009 FC 1175

Ottawa, Ontario, November 18, 2009

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

CESAR VICENTE BUSTAMANTE RUIZ,
ANGELICA GALVAN GUZMAN, and
CESAR JESUS BUSTAMANTE GULVAN
by his litigation guardian
CESAR VICENTE BUSTAMANTE RUIZ

Applicants

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by an immigration officer dated February 18, 2009, denying the applicants' application for permanent residence on humanitarian and compassionate grounds (H&C) pursuant to section 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA). The Court concludes that the H&C decision in this case was reasonably open to the H&C officer with respect to both the best interests of the children and the applicants' establishment in Canada.

FACTS

Background

[2] The applicants are citizens of Mexico. They are a husband, wife and their minor son. Thirty-two (32) year old Vicente Bustamante Ruiz is the husband applicant, thirty (30) year old Angelica Galvan Guzman is the wife applicant, and eight (8) year old Cesar Jesus Bustamante Gulvan is the minor applicant. Diego Miguel Bustamante Galvan is the applicant parents' second son, born in Canada July 17, 2005, and therefore not a party to these proceedings.

[3] The applicant husband entered Canada on September 5, 2003. He made a claim for refugee protection on October 8, 2003. The rest of the applicant family entered Canada on November 15, 2003 and claimed refugee protection at the port of entry.

[4] On March 29, 2006 a panel of the Refugee Protection Division (RPD) of the Immigration and Refugee Board rejected the applicants' claim for refugee protection on the basis that the claim itself was untrustworthy and without credibility. The written decision and reasons were issued by the RPD on April 11, 2006.

[5] The applicants filed an H&C application on August 2, 2006 and a Pre-Removal Risk Assessment (PRRA) on November 20, 2006. They updated their submissions on October 16, 2008.

[6] The H&C and PRRA applications were heard by the same PRRA officer and were both denied in February 2009.

Decision under review

[7] The applicants sought an exemption from the in-Canada selection criteria based on H&C considerations.

[8] In denying the applicants' application, the officer considered the following factors:

1. the country conditions in Mexico and the risk of harm to the applicants if returned;
2. the applicants' degree of establishment in Canada;
3. the applicants' relationships and familial ties in Canada; and
4. the best interests of the children.

[9] The applicants submitted that none of their family members in Mexico could provide them with support or accommodation.

[10] On the other hand, the applicants significantly established themselves in Canada since they arrived in 2003 by becoming self sufficient, purchasing a vehicle and other personal property, maintaining a savings account in Canada, volunteering in the community, and attending church. The applicants indicated that the applicant wife was in a first trimester pregnancy in October 2008.

[11] In consideration of the best interests of the children, the applicants stated that their children would suffer from being deprived of their father's steady employment income he currently generates in Canada if the family was removed to Mexico. If removed, the children will no longer

be safe from Mexico's high crime rate. The applicants' older son is now more comfortable speaking English than Spanish, does well at school, maintains involvement in extracurricular activities, and is well adjusted to Canada. Removal to Mexico would deprive both minor children of the opportunities Canada has to offer since it was reasonable to assume that the youngest child would accompany his parents to Mexico. Lastly, the Canadian born son has a speech and language delay that is treatable with speech therapy. He has been placed on a waitlist for this treatment in Canada.

[12] The H&C officer assigned considerable weight to RPD's denial of the applicants' refugee claim on the basis of a negative credibility assessment.

[13] The officer noted the pending criminal charges against the husband applicant, but declined to assign any weight to them.

[14] The officer reviewed the applicants' submissions on the nature of the risk that they fear in Mexico and contrasted them with the objective country condition documentation. The officer found that it would not be "unusual and underserved or disproportionate hardship" for the applicants to seek state protection in Mexico.

[15] On the issue of establishment in Canada, the officer concluded that the applicants' degree of establishment was expected of persons who seek refugee protection in Canada:

> I note that upon their arrival to Canada, the applicants' status was temporary. During this time, they have all made efforts to become established in Canada; however, I am not satisfied that the applicants had a reasonable expectation that they would be allowed to remain in

> Canada permanently. There is insufficient evidence before me that they remained in Canada due to circumstances beyond their control. In addition, individuals making refugee claims in Canada are permitted to work and study, therefore a measure of establishment is expected to take place. It is commendable that a certain level of establishment has taken place; however, I do not give significant weight to the applicants' length of time or establishment in Canada. I find that the applicants have not established that severing these ties would have such a significant negative impact that would constitute unusual and undeserved or disproportionate hardship.

[16] On the issue of family ties, the officer found that the applicants had no close relatives living in Canada. The applicants have several relatives living in Mexico.

[17] The officer considered the minor applicant's circumstances.

[18] The officer reviewed the significant language delay that is afflicting the Canadian born child. While the child is wait-listed for speech therapy in Toronto, the officer found that the applicants failed to provide sufficient evidence to show that similar treatments would be unavailable to the child in Mexico. The officer concluded that insufficient evidence was advanced to show that removal to Mexico would cause an unusual and undeserved or a disproportionate hardship for the two minor children.

[19] The H&C officer therefore concluded that the applicants had not established that they would experience unusual, undeserved or disproportionate hardship if returned to Mexico, and that their personal circumstances did not warrant an H&C exception.

LEGISLATION AND OTHER PROVISIONS

[20] Section 25 (1) of IRPA allows the Minister to exempt an applicant from any of the requirements of the Act:

25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

ISSUES

[21] The applicant raises two issues in this application:

a. Whether the officer failed to be alive and attentive to the best interests of the children, by applying the "unusual and undeserved or disproportionate hardship" test, and rendering an unreasonable decision not in accordance with the evidence?

b. Whether the officer rendered an unreasonable assessment of the applicants' establishment, by finding it of a level which is "expected", and dismissing it as illegitimate?

STANDARD OF REVIEW

[22] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of [deference] to be accorded with regard to a particular category of question (see *Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at paragraph 53)."

[23] The Federal Court of Appeal recently held in *Kisana v. Canada (MCI)*, 2009 FCA 189, per Justice Nadon at paragraph 18 that the standard of review of an immigration officer's H&C decision is reasonableness (see also my decisions in *Ramotar v. Canada (MCI)*, 2009 FC 362, at paragraphs 9-11; *Ebonka v. Canada (MCI)*, 2009 FC 80, at paragraphs 16-17).

[24] In reviewing the officer's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within 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." (*Dunsmuir*, *supra* at paragraph 47, *Khosa*, *supra*, at paragraph 59).

ANALYSIS

Issue No. 1: Whether the officer failed to be alive and attentive to the best interests of the children, by applying the "unusual and undeserved or disproportionate hardship" test, and rendering an unreasonable decision not in accordance with the evidence?

Did the officer apply the correct best interests of the children test?

[25] The applicants submit that the H&C officer erred in equating "best interests of the children" with the "unusual and undeserved and disproportionate hardship" standard. In doing so the officer applied a too restrictive analysis.

[26] The applicants rely on this Court's decision in *Arulraj v. Canada (MCI)*, 2006 FC 529 where Justice Barnes held at paragraph 14 that the threshold of unusual, undeserved, or disproportionate hardship has no place in the best interests of the child analysis. The applicants submit that the following excerpt from page 7 of the officer's reasons reveals that the best interests of the children test is improperly equated with the "unusual and undeserved and disproportionate hardship" test:

> I have considered the best interests of the two minor children of the principal applicant and his spouse. I have not been presented with sufficient evidence to establish that a removal of the three applicants to Mexico would cause an unusual and undeserved or disproportionate hardship for the two minor children of the principal applicant and his spouse.

[27] This Court has held in *Segura v. Canada (MCI)*, 2009 FC 894, per Justice Zinn at paragraph 29 that the mere use of words "unusual and undeserved and disproportionate hardship" in the context of a best interests of the child analysis does not automatically render an H&C decision unreasonable as long as on a reading of a decision as a whole it is apparent that the officer applied the correct test and conducted a proper analysis.

[28] I agree with this jurisprudence. The fact that the officer included the "unusual and undeserved and disproportionate hardship" does not necessarily mean that the officer in fact applied that threshold test inappropriately to the best interests of the children analysis.

Unreasonableness of the officer's best interests of the children analysis

[29] The applicants submit that officer failed to consider the benefits that would accrue to the children from living in Canada and the hardships they would suffer from being removed to Mexico.

[30] The Federal Court of Appeal recently held in *Kisana, supra*, that the approach in *Hawthorne v. Canada (MCI)*, 2002 FCA 475, 297 N.R. 187, is the correct approach to analyzing the best interests of the children (*Kisana*, *supra*, at paragraph 37).

[31] In *Hawthorne v. Canada (MCI)*, 2002 FCA 475, 297 N.R. 187, Justice Décary of the Federal Court of Appeal held at paragraph 5 that an immigration officer is presumed to know that living in Canada can afford many opportunities to a child. The task of the officer is therefore to assess the degree of hardship that is likely to result from the removal and then to balance that

hardship against other factors that might mitigate the consequences of removal (*Kisana, supra,* at paragraph 31).

[32] Counsel's submissions at the time of the application indicated that the applicant children were well adjusted to Canada, progressed well in school, had scores of friends, and enjoy extracurricular activities. The H&C officer is presumed to be aware of those factors.

[33] The officer explicitly stated at page 7 of the decision that he "considered the environment and conditions for the youngest child in Canada, and in Mexico". This statement is sufficient to discharge the officer's duty to analyze the benefits to the children in Canada in light of the applicants' failure to provide specific illustrations of disadvantages or hardships that would face the children if removed Mexico.

[34] The applicants submit that the officer erred in not soliciting further evidence regarding the medical concerns of the applicant parent's Canadian son. They state that the officer was under a duty to make inquiries into matters arising from the evidence, where the evidence was insufficient to establish a concern. The applicants rely on this Court's decision in *Del Cid v. Canada (MCI),* 2006 FC 326, per Justice O'Keefe at paragraphs 30-31.

[35] In *Kisana, supra,* at paragraphs 47-49 the Federal Court of Appeal confined the application of *Del Cid* to its own facts. The Court found that in *Del Cid* specific evidence was presented to the officer regarding the effect of separation upon the kids, such as the inability to eat and extended

bouts of crying along with additional factors of establishment in Canada. Failure to balance those factors rendered the decision unreasonable. The Court held that if the applicants are unable to meet their burden to demonstrate sufficient H&C factors, there is no duty upon the officer to make further inquiries (*Kisana*, *supra,* at paragraph 61).

[36] In the case at hand, “the vacuum, if any, was created by the appellants' failure to assume their burden of proof” and explain to the officer if the speech therapy was available to the applicants’ youngest child in Mexico (*Kisana*, *supra,* at paragraph 56). The officer was therefore under no duty to make further inquiries.

[37] The applicants submit that the officer erred in failing to consider the best interests of the children, particularly the Canadian born child, in light of the country condition document which warns of a high rate of kidnappings.

[38] It is trite law that an H&C officer is not required to refer to every piece of evidence as long they state in making their findings, they considered all the evidence (*Cepeda-Gutierrez v. Canada (MCI)* (1998), 157 F.T.R. 35, 83 A.C.W.S. (3d) 264 (F.C.T.D.), per Justice Evans (as he the was) at paragraph 16). In this case the officer made exactly such a statement and the applicants have not been able to point out an important omission that would justify this Court’s intervention.

[39] In my view the officer provided sufficient analysis to base his conclusion that the best interests of the children in this case warranted an H&C exemption from IRPA. This ground of review is therefore dismissed.

Issue No. 2: Whether the officer rendered an unreasonable assessment of the applicants' establishment, by finding it of a level which is "expected", and dismissing it as illegitimate?

[40] The applicants submit that the family's degree of establishment in Canada since 2003 is such that removal would give rise to "unusual and underserved or disproportionate hardship".

[41] The decision of this Court in *Ahmad v. Canada (MCI)*, 2008 FC 646, per Justice Dawson at paragraph 49 held that hardship in the context of an H&C application "should be something other than that which is inherent in being asked to leave after one has been in place for a period of time". The respondent cites this Court's decision in *Ramotar v. Canada (MCI)*, 2009 FC 362, where I held at paragraph 33 that maintaining employment and integrating into the community over a period of 6 years does not constitute an unusually high degree of establishment.

[42] In my view, the officer's characterization of the applicant's stay as illegitimate is irrelevant to the present inquiry and at any rate it does not render the decision unreasonable.

[43] It was reasonably open to the PRRA officer to find that the applicants merely demonstrated a normal level of establishment that did not warrant an H&C exemption. This ground of review therefore fails.

CERTIFIED QUESTION

[44] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

The application for judicial review is dismissed.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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