Federal Court		Cour fédérale

Date: 20100622

Docket: IMM-5266-09

Citation: 2010 FC 677

Toronto, Ontario, June 22, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

FELIX ANTONIO OSEGUEDA GARCIA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of the decision of a Pre-Removal Risk Assessment Officer (the Officer) where Felix Antonio Osegueda Garcia's application for permanent residence from within Canada on humanitarian and compassionate grounds was refused.

[2] The application for judicial review shall be granted for the following reasons.

[3] The Applicant, Felix Antonio Osegueda Garcia, is a citizen of El Salvador who arrived in Canada, as a permanent resident, in 1989 at the age of 16. He attended high school but dropped out after three years.

[4] The Applicant was married in 1995 and divorced a year later. He has one daughter born of that marriage; he has full custody of his daughter and has been her primary caregiver since infancy. In 1999, the Applicant was convicted of assault against his ex-spouse and was convicted of armed robbery in 2001. The Applicant remarried in 2008 and currently lives with his wife, her son and his daughter.

[5] As a result of his criminal convictions, on November 28, 2002, the Applicant was issued a deportation order based on a finding of serious criminality under paragraph 36(1)(a) of the Act. The removal was stayed for three years and a review was to take place in October 2006. The Applicant was sent two notices regarding the reconsideration but he claims that he did not receive them and this is why he did not appear. His application was deemed abandoned in July 2007 and an application to reopen was refused in March 2009.

[6] As part of his recourse under the Act, the Applicant applied for an exemption allowing him to apply for permanent resident status from within Canada on the basis of humanitarian and compassionate (H&C) grounds pursuant to section 25 of the Act. That application was refused on September 10, 2009 and is the subject of this judicial review.

Standard of review

[7] An H&C application, including the assessment of the best interests of the child, is to be held to a standard of reasonableness as many of the findings are questions of mixed fact and law and the determination is highly discretionary (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Markis v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 428, 71 Imm. L.R. (3d) 237 at paragraphs 20 and 21; *Laban v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 661, [2008] F.C.J. No. 819 paragraphs 13 and 14). The question of whether or not the Officer applied the correct legal test has been found to be a question of law and held to a standard of correctness (*Markis* at paragraph 19).

[8] In applying the 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* at paragraph 47).

Conclusion with regard to establishment

[9] The Applicant argues that the Officer misapprehended his level of establishment and that there was an overwhelming amount of evidence that showed his establishment in Canada and that this factor should have weighed in his favour. This Court has held that the findings with regard to establishment will be reasonable if it is in accordance with the evidence before the decision maker (*Jamrich v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 804, 29 Imm. L.R. (3d) 253 at paragraph 28).

[10] In the case at bar, the Officer notes that the Applicant was employed for the better part of this time in Canada but that he has been unemployed since 2007 and in receipt of social assistance. She also notes counsel's submissions that the Applicant has been financially responsible for his daughter. She considers that he took some high school classes but dropped out and did not finish other courses. She also finds that the Applicant does not belong to any organizations but does help a woman with her chores and this woman has stated in a letter that she would miss him greatly. Elsewhere in the decision, the Officer finds that the Applicant does not have strong ties to El Salvador.

[11] Also contained in the record, and not mentioned by the Officer, were other letters from friends of the Applicant testifying to their good relationships with him and their dismay should he have to leave Canada (Certified Tribunal Record at pages 90 to 100). Nor does the Officer mentions the Applicant's family ties in Canada.

[12] At section 11.3 of IP 5 (Citizenship and Immigration Canada, *IP 5 Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds* (6 November 2009, I P 5), the following questions are suggested to assess the level of establishment:

> • does the applicant have a history of stable employment?
> • is there a pattern of sound financial management?
> • has the applicant integrated into the community through involvement in community organizations, voluntary services or other activities?
> • has the applicant undertaken any professional, linguistic or other studies that show integration into Canadian society?
> • does the applicant and their family members have a good civil record in Canada? (e.g. no criminal charges or interventions by law enforcement officers or other authorities for domestic violence or child abuse)

[13] The Applicant arrived in Canada at the age of 16 after having fled El Salvador over 20 years ago. For the most part he has been gainfully employed and has managed to raise his daughter. There was clear evidence that the Applicant has many friends with whom he has strong ties and has a family in Canada. He is married and has been living with the same person for the last five years. In my view, the Officer made an unreasonable finding, in view of the evidence that was before her, when she concluded that there was insufficient evidence that the Applicant has established himself in Canada.

Conclusion with regard to risk

[14] It is well accepted by this Court that it is perfectly legitimate for an officer to rely on the same factual findings in assessing an H&C application and a PRRA application. However, this is only provided that the appropriate test is applied in each context - in the case of an H&C application, the test of unusual and undeserved or disproportionate hardship which is a lower threshold than the test for a PRRA application (*Liyange v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1045, [2005] F.C.J. No. 1293 par. 41). Accordingly, the question here is whether, with respect to the alleged risk, the Officer approached the issue as though it was subject to the same considerations as the PRRA application.

[15] To begin, I note that the Officer explicitly states that she recognizes the two different tests to be applied and correctly stated the test for the H&C application. She also mention that in his H&C application, the Applicant identifies a risk stemming from the government of El Salvador who would suspect him of being a gang member due to his tattoos and from gangs in El Salvador who

would suspect him of being a member of a different gang. This being the same risk identified in his PRRA application. She then goes on to analyse the risks claimed by the Applicant in view of the documentary evidence. This analysis is identical to that in the PRRA decision, with the exception of a few minor changes and additions (PRRA decision, Certified Tribunal Record at pages 119 to 126).

[16] The Officer concludes her analysis by making the following finding with regard to the alleged risk:

> After completing my own research on the country conditions in El Salvador, I find the applicant has not established that there are probable grounds to believe, should he return to El Salvador, he would face a risk to his life that would subject him personally to hardship that is unusual and underserved or disproportionate.

[17] Once again, I recognize that it is acceptable to rely on the same factors in both a PRRA and an H&C application and that this can be the best way to arrive at more consistent and efficient decision making. However, it is still crucial that the appropriate test be applied. As my colleague, Justice de Montigny said in *Ramirez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1404, 304 F.T.R. 136 par. 47:

> Officers who rule on both the PRRA and the H&C applications of the same applicants will obviously be at greater risk of confusing the two separate and distinct analyses required by these procedures. Even if well aware of the different rationales underlying these two kinds of applications, they may be drawn to the same conclusions, perhaps inadvertently, if only because it is often difficult, if not conceptually at least in practice, to disregard a previous determination made on the basis of the same facts. This is not to say that the practice of having the same officer reviewing both applications should be discouraged. Consistency is also a virtue, and there is no better way to achieve coherence than by having the same officer assessing the same person's PRRA and H&C applications.

> But extra care should be taken to ensure the two processes are kept separate.

[18] In the case at bar, a full reading of the analysis on the alleged risk in the H&C decision and a comparison to the PRRA decision shows that the decisions are essentially the same on the risk elements except for a few minor changes and the conclusion reproduced in the paragraph above and I cannot find that they are in fact separate. Other than the statement made at the beginning of the decision and general conclusion, there is no discussion or analysis as to the evaluation of the risk in terms of hardship. Hardship being defined as follows:

> Unusual and undeserved hardship is described as a hardship "not anticipated by the Act or Regulations" or resulting of "circumstances beyond the person's control," while disproportionate hardship is described as a hardship that "would have a disproportionate impact on the applicant due to their personal circumstances." (*Ramirez* at paragraph 46)

[19] There is no indication that the Officer assesses the alleged risk using this framework. I find that the decision is unreasonable as the Officer did not consider the risk factors in the context of the H&C application. Although it was the same risk that was alleged, the fact that the analysis in the H&C decision is essentially an identical copy of the PRRA decision, other than blanket statements, leads me to conclude that the Officer merely adopted the assessment of risk that she made under the PRRA application and failed to apply the different considerations required by the H&C test.

Best interests of the children

[20] I am satisfied that the Officer was alert, alive and sensitive to the best interests of the children. The Officer found this to be a positive factor but the best interest of the child is not a determinative factor in an application (*Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 F.C. 358 par.12). Although this Court may have given this factor more weight, in view of the particular circumstances in this case, it is not the role of the courts to re-examine the weight given to the different factors.

[21] No question for certification was proposed and none arises.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is allowed. The matter is remitted back for redetermination by a different Officer. No question is certified.

"Michel Beaudry"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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