Federal Court  Cour fédérale

Date: 20101110

Docket: IMM-540-10

Citation: 2010 FC 1078

Ottawa, Ontario, November 10, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

ERIK SOLIS JIMINEZ,
PATRICIA RODRIGO NONIGO,
VANIA SOLIS RODRIGO,
ZAIRA SOLIS RODRIGO,
MAYLING MARYORI SOLIS RODRIGO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision by a Pre-Removal Risk Assessment Officer (the officer), dated November 24, 2009 where the applicants' request to be exempted from the requirement to obtain an immigration visa prior to coming to Canada on the basis of humanitarian and compassionate grounds pursuant to section 25 of the Act (H&C application) was refused.

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

[3] The applicants are citizens of Mexico. Erik Solis Jimenez (the principal applicant, or PA) and his wife (Patricia Rodriguez Nonigo) have three children, Vania Solis Rodrigo, Zaira Solis Rodrigo, Mayling Maryori Solis Rodrigo, who are also applicants in this case.

[4] The applicants came to Canada because of problems experienced in Mexico with a drug dealer and fraudster named Fredi Duque Dominguez (Fredi), who allegedly asked the PA to repaint stolen cars that had been the subject of insurance claims. The PA refused, but was warned that his daughters could be harmed, and told by neighbours that Fredi Duque was not only involved in drug trafficking but also protected by police officers and public servants. As a result, the PA decided to leave for Guatemala with his family in August 2003, following a number of threats made against him and his children.

[5] In January 2004, five months after having left, the PA and his family returned to Mexico because of health problems and because it had been impossible for the children to attend school in Guatemala.

[6] A few months after returning to Mexico, the PA's wife learned that Fredi had been arrested and that his accomplices believed her husband to have been behind the arrest. Shortly after hearing of this, the PA fled to the city of Puebla with his family and from there, arranged their departure to Canada.

[7] The applicants arrived to Canada on August 5, 2004 and made a refugee claim later that month. Their refugee claim was rejected on June 16, 2005 and the application for leave and judicial review was refused on September 20, 2005. In its decision, the Refugee Protection Division (RPD) determined that the applicants' account was not entirely credible and that even if there were problems with corruption in Mexico, it was possible for the PA to seek state protection. The panel also emphasized the fact that the applicants had been able to go and live in Puebla for a month without any problems.

[8] The PA and his family then made an H&C application on November 25, 2005 as well as a Pre-Removal Risk Assessment (PRRA) in July 2009.

[9] The applicants submitted that their H&C application should be approved because a) they faced personalized risk upon return to Mexico, b) they were established in Canada and c) it was in the interests of their children to stay in Canada, arguing that it would be difficult for them to reintegrate into the Mexican school system, as well as d) the fact that the eldest child, Vania had been diagnosed with an anxiety disorder, and there was concern about her receiving proper treatment in Mexico.

[10] On January 27, 2010, the PA and his family learned they were to be removed from Canada on February 9, 2010. The PA submitted a request for deferral. It was granted until the end of the current school year to permit his children to complete their studies.

[11] In its negative decision on the H&C application with regards to the applicants' fear of Fredi, the officer decided that the articles submitted as evidence were insufficient to allow her to find that state protection was inadequate. She concluded that the PA had not exhausted all courses of action open to him.

[12] With regards to the applicants' establishment in Canada, she noted that while the applicants have made considerable efforts to find work and to be self-supporting, they had not demonstrated how the termination of their employment in Canada and the PA's spouse's theological studies would cause them hardship that could be described as being "unusual and undeserved or disproportionate". She also found that the applicants' social and family ties with their country of origin were stronger than those they have established in Canada.

[13] In terms of the best interest of the children, the officer recognized the efforts that the PA's three girls would have to make to reintegrate into the Mexican school system. However, she found that speaking with an accent, having to have one's studies abroad recognized or having to seek entrance or assessment exams, do not, in this case, amount to hardship that could be described as unusual, undeserved or disproportionate.

[14] Furthermore, with regards to the PA's daughter Vania, and the arguments made about her psychological state and anxiety disorder, the officer concluded that it is possible in Mexico to obtain help from a mental health professional and that there are various support programs for persons who do not have private insurance. The officer further noted that "the children's best interest is one of

the many important factors that must be taken into consideration when assessing humanitarian and compassionate grounds. However, the concept of the best interest of a child does not mean that it alone outweighs all other factors.

[15] Questions as to natural justice and procedural fairness, as well as whether a PRRA officer applied the right test of hardship in a risk analysis in an H&C application under section 25 of IRPA is a question of law, and the appropriate standard of review is one of correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Zambrano v. Canada (Citizenship and Immigration)*, 2008 FC 481, [2008] F.C.J. No. 601 (QL), *Barrack v. Canada (Citizenship and Immigration)*, 2008 FC 962, [2008] F.C.J. No. 1197 (QL)).

[16] Questions of fact are on the other hand submitted to the standard of reasonableness (*Dunsmuir*, above and *Baker v. Canada (Citizenship and Immigration)*, [1999] 2 S.C.R. 817).

[17] In the case at bar, the applicants argue firstly, that they were denied natural justice and procedural fairness when the officer decided that there were adequate mental health resources available to the applicants in Mexico on the basis of a World Health Organization (WHO) article not presented to the applicants, or made available to them prior to her decision (*Haghighi v. Canada (Citizenship and Immigration)*, [2000] 4 F.C. 407 (C.A.), *Level (litigation guardian) v. Canada (Public Safety and Emergency Preparedness)*, 2008 FC 227, 71 Imm. L.R. (3d) 52, 324 F.T.R. 71, *Zamora v. Canada* (*Citizenship and Immigration*), 2004 FC 1414, [2004] F.C.J. No. 1739 (QL)).

[18] In *Level*, where the extrinsic evidence in question was a medical report, the Court stated at para. 21 that:

> The relevant point as I see it is whether the applicant had knowledge of the information so that he or she had the opportunity to correct prejudicial misunderstandings or misstatements. The source of the information is not of itself a differentiating matter as long as it is not known to the applicant. The question is whether the applicant had the opportunity of dealing with the evidence. This is what the long-established authorities indicate the rules of procedural fairness require. In the well known words of Lord Loreburn L.C. in *Board of Education v. Rice*, [1911] A.C. 179 (H.L.) at page 182:
>
> > They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.

[19] I find that there was no lack of procedural fairness here. The information relied upon is widely available, and even if the applicants had not read that specific article, it is a piece of information that would have been easy to come across. I find it hard to believe that the applicants would not have known that they had the option of using public services in Mexico, and that private services were not the only ones available to them. Also, the article in question was only one of the factors considered by the officer concerning Vania.

[20] Secondly, the applicants submit that the officer applied the incorrect legal test in the evaluation of hardship and that the degree of establishment that they have achieved in Canada and their loss of ties in Mexico will cause unusual and undeserved or disproportionate hardship if they have to return to Mexico (*Pacia v. Canada (Citizenship and Immigration)*, 2008 FC 804, [2008]

F.C.J. No. 1014 (QL), *Pinter v. Canada (Citizenship and Immigration)*, 2005 FC 296, [2005] F.C.J. No. 366 (QL)).

[21] Justice Lagacé provides a good analysis of the state of the law with regards to this question in *Markis v. Canada (Citizenship and Immigration)*, 2008 FC 428, [2008] F.C.J. No 564 (QL), at paras. 23-24:

> The applicants submit that the officer applied the incorrect legal test in the evaluation of hardship. Instructively, this Court asserts in *Sahota v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 651, [2007] F.C.J. No. 882 (QL), at para. 1:
>
> > Although the distinction in fact may not always be apparent, there is a clear distinction in law between a pre-removal risk assessment and an application for permanent residence from within Canada on humanitarian and compassionate grounds.
>
> Indeed, while both applications take risk into account, in the context of a PRRA, the consideration of the ""risk" as per section 97 of IRPA involves assessing whether the applicant would be personally subjected to a danger of torture or to a risk to life or to cruel and unusual treatment or punishment" (*Sahota*, above, at para. 7) while in the context of an H & C application, "risk should be addressed as but one of the factors relevant to determining whether the applicant would face <u>unusual, and undeserved or disproportionate hardship</u>. Thus the focus is on hardship, which has a risk component, not on risk as such." (Emphasis added.) (*Sahota*, above, at para. 8).

[22] In the case at bar, the officer considered that the applicants were able to travel not only to Guatemala, but also within different cities of Mexico without any problems, and noted that they were able to obtain passports without mentioning any difficulties.

[23] The officer applied the proper test in analyzing and considering the risk component in the context of the present H&C application.

[24] Thirdly, the applicants contend that the officer in making its decision on the best interest of the children was not alert, alive and sensitive.

[25] It is worth reiterating the main principles relating to the consideration of the best interest of the child in H&C cases. In *Legault v. Canada (Citizenship and Immigration),* 2002 FCA 125, 212 D.L.R (4^{th}) 139 at paras 11 and 12, Justice Décary stated:

> In *Suresh*, the Supreme Court clearly indicates that *Baker* did not depart from the traditional view that the weighing of relevant factors is the responsibility of the Minister or his delegate. It is certain, with *Baker*, that the interests of the children are one factor that an immigration officer must examine with a great deal of attention. It is equally certain, with *Suresh*, that it is up to the immigration officer to determine the appropriate weight to be accorded to this factor in the circumstances of the case. It is not the role of the courts to re-examine the weight given to the different factors by the officers.
>
> In short, the immigration officer must be "alert, alive and sensitive" (*Baker, supra*, at paragraph 75) to the interests of the children, but once she has well identified and defined this factor, it is up to her to determine what weight, in her view, it must be given in the circumstances. . . . It is not because the interests of the children favour the fact that a parent residing illegally in Canada should remain in Canada (which, as justly stated by Justice Nadon, will generally be the case), that the Minister must exercise his discretion in favour of said parent. Parliament has not decided, as of yet, that the presence of children in Canada constitutes in itself an impediment to any "refoulement" of a parent illegally residing in Canada (see *Langner v. Canada (Minister of Employment and Immigration)* (1995), 29 C.R.R. (2d) 184 (F.C.A.), leave to appeal refused, [1995] 3 S.C.R. vii). [Emphasis added.]

[26] In the present case, the officer considered the personal situation of the three children and gave cogent reasons to conclude that none of the allegations of hardship could be considered as unusual, undeserved or disproportionate. She analyzed documents submitted by the applicants (letter from a school located in Mexico City and a report by a psychologist). In sum, the applicants are asking this Court to reweigh the factors already considered by the officer. I find that there are no reviewable errors that warrant the Court's intervention.

[27] Fourthly, the applicants argue that the officer made several factual errors in her review of evidence placed before her.

[28] Again, after a review of the evidence, the Court is unable to conclude that the officer erred in the exercise of her discretion. The officer’s decision on the whole is transparent, intelligible and falls as a possible and acceptable outcome.

[29] No question of general importance was submitted and none arise.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed. No question is certified.

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-540-10
STYLE OF CAUSE:	ERIK SOLIS JIMINEZ, PATRICIA RODRIGO NONIGO, VANIA SOLIS RODRIGO, ZAIRA SOLIS RODRIGO, MAYLING MARYORI SOLIS RODRIGO AND THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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