Federal Court  Cour fédérale

Date: 20130730

Docket: IMM-10131-12

Citation: 2013 FC 778

Montréal, Quebec, July 30, 2013

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

DAVID LOPEZ ARTEAGA
MARIA DEL PILAR FLORES VALENCIA
DAVID LOPEZ FLORES
AND
JOSEMARIA LOPEZ FLORES

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AMENDED REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants seek judicial review of an immigration officer's decision made pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], whereby the officer refused to exempt the applicants from the requirement to apply for permanent residence status from outside Canada, on humanitarian and compassionate [H&C] grounds.

[2] Essentially, the applicants argue that the Court's intervention is warranted in this case because (i) the officer's assessment of the evidence regarding the central factor of their H&C application, namely the best interests of their nine-year-old son affected with Down syndrome, is flawed and unreasonable, and (ii) the officer breached procedural fairness by relying on extrinsic evidence regarding the availability of medical services for the child in Mexico, without disclosing this evidence to the applicants.

I. Background of the H&C Application

[3] The applicants are from Mexico and have lived in Canada since 2008. They are a family of four: the principal applicant, Mr. Lopez Arteaga, his spouse, Ms. Flores Valencia, and their two sons, Josémaria and David, presently 10 and 13 years old.

[4] Their refugee claim was rejected in August 2011 and leave to apply for judicial review of that decision was denied in November 2011.

[5] In January 2012, the applicants applied for permanent residence on H&C grounds, primarily based on the best interests and special medical and therapeutic needs of Josémaria and on the basis of their establishment in Canada since 2008.

Establishment in Canada

[6] The principal applicant and his spouse have taken several months of French courses since June 2008. The principal applicant and his son, David, also speak English.

[7] At the time of the officer's decision, the applicant's spouse was unemployed and had been attending sewing training since September 2011 to become a seamstress. The principal applicant had worked as a self-employed hand-launderer and presser since May 2011. Their sons went to school and Josémaria attended a private government-subsidized school for children with disabilities in Montréal known as Peter Hall School.

Josémaria's condition

[8] The evidence before the officer established that Josémaria's condition necessitated regular speech therapy, physiotherapy, occupational therapy and child psychologist services, to which he did not have access in Mexico, except for a limited number of therapy sessions provided by the public health sector. Further services were refused to Josémaria in Mexico in light of the high level of demand and services were unavailable in the two schools that Josémaria attended, even though one of the schools was considered to be a special school for children with disabilities. Although at the time the required therapies were available in the private sector, the costs were prohibitive for the applicants. They submitted documentary evidence in support of their account of the limited availability of services for children with disabilities in the public sector in Mexico and the unaffordability of such services in the private sector.

II. Decision under Review

[9] In lengthy and detailed reasons, the H&C officer recognized several positive factors of the family's integration and establishment, namely their stable employment, their participation in linguistic and vocational courses, and their active involvement in their church, in the parents' committee of Josémaria's school and in a community organization for persons with disabilities

named AMEIPH (*Association multiethnique pour l'intégration des personnes handicapées*). Nevertheless, she found that this did not justify the exemption of the family from the statutory obligation to apply for an immigrant visa before coming to Canada.

[10] That said, this application for judicial review more specifically challenges the officer's findings regarding Josémaria's condition and whether his best interests warranted an H&C exemption. I will therefore focus on the relevant part of the reasons.

[11] In her decision, the officer noted that Josémaria had significant development delays when he arrived in Canada as a result of his lack of access to the services he required: though he was nearly five years old, he could not speak, could only communicate with few gestures, could not control his urination and bowel movements, still needed diapers, could not eat on his own, could not walk straight and walked with his head to one side.

[12] The officer also noted that, since arriving in Canada, Josémaria has been attending Peter Hall School, where he benefits from a multi-disciplinary program designed to address his specific therapeutic needs. The evidence submitted before the officer, including the letters from AMEIPH and from Josémaria's teacher, established that as a result of the services he received, Josémaria had made considerable progress in all areas of his development. Josémaria had gained considerable autonomy and made significant physical and intellectual progress.

[13] The officer took issue with the fact that the March 2009 medical evaluation from the Montreal Children's Hospital, which the applicant referred to in his affidavit, was not furnished as

evidence in support of the allegation that Josémaria's medical reports indicated the benefits of the treatments he had started receiving and recommended that they be continued.

[14] The officer recognized, however, that according to AMEIPH's letter, any interruption and sudden change in the therapeutic services Josémaria was receiving in Montreal could have negative consequences on his development and social integration, and risked negatively affecting the progress that he had already made. However, she found that the letter from Josémaria's teacher at Peter Hall School did not indicate that a change of school would be detrimental to his development and well-being. The officer further noted that no evidence from health care professionals treating Josémaria in Quebec was provided to support this allegation.

[15] With respect to the availability of the services Josémaria required in Mexico, the officer found that these services existed both in the public and the private sector, such as the *Centro de Atencion Multiple*, the *Centro psicopedagogico*, the *Centro de rehabilitacion y Educacion Especial* and the *Intervencion Temprana*, the John Langdon Down Foundation (a private institution) and other NGOs (World Health Organization, Mental Health Altas, and *Plaidoyer en faveur de la santé mentale: Guide des politiques et des services de santé mentale*, 2005). She found that any interruption of these services would be temporary and that the applicants would be able to earn enough money in Mexico to pay for private services for their son. In addition, the officer noted that public healthcare in Quebec was limited, like it was in Mexico, as demonstrated by the fact that Peter Hall School was a private school essentially funded by the private *Peter Hall Foundation*, although it was also subsidized by the Quebec Ministry of Education. In reaching these conclusions, the officer relied in part on the website of Peter Hall School, the John Langdon Foundation, CBC

news articles, the website of Teachers Without Borders, a November 2006 Notice from the Advisory Board on English Education to the Quebec Ministry of Education, Recreation and Sports (http://www.mels.gouv.qc.ca/cela/anglais.htm), and a 2011 report from the International Psychiatry journal entitled "*Services for adults with intellectual disability in Mexico: Opinions and Experiences of Service Users*."

[16] As a result, she found that Josémaria's well-being and development would not be compromised by returning to Mexico.

III. Issues and Standard of Review

[17] The applicants submit that the Court's intervention is necessary in this case on any of the following grounds of review:

(i) The officer ignored evidence of the limited availability of public sector services for children with Down syndrome in Mexico;

(ii) The officer's finding that the applicants could afford to pay for services in the private sector was speculative and contrary to the evidence;

(iii) The officer breached procedural fairness by relying on extrinsic evidence without disclosing it to the applicants or providing them with an opportunity to comment on it.

[18] The first two errors alleged by the applicants involve the officer's assessment of the evidence and determination of whether the best interests of the child negatively affected by the decision warranted H&C consideration. These are questions of fact or mixed fact and law and are reviewable on the reasonableness standard (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190, at para 47). It is also well established that the standard of review for a decision based on H&C grounds

under subsection 25(1) of the IRPA is that of reasonableness (*Singh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 11, at para 21).

[19] By contrast, questions of procedural fairness, such as whether the officer breached the applicants' right to procedural fairness by relying on extrinsic evidence obtained through the internet, without disclosing it to the applicants and providing them with an opportunity to respond, are, as both parties agree, subject to the standard of correctness (*Kambo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 872 at para 24).

IV. Analysis

[20] The issue of procedural fairness is dispositive of this case and warrants the intervention of the Court.

[21] The applicants rightfully submit that the H&C officer erred by conducting her own internet search on the availability of services for children with disabilities provided by non-governmental organizations and foundations in Mexico, without disclosing the evidence to the applicants or seeking their input on the subject. In fact, a number of the documents relied upon, as listed above, do not exist in the National Documentation Package on Mexico and although they are filed in the Tribunal Record under the heading "General information submitted by the applicants," it is apparent from the officer's reasons that they were not submitted by the applicants but rather consulted by the officer on her own initiative. Her reliance on extrinsic evidence is also problematic in that her final conclusion was that even if one centre, organization or specialized school did not or could not offer

a given treatment or service, it would be possible to merge the services offered by the different public and private institutions to which the officer referred to in her decision.

[22] Again, some of these sources were unknown to the applicants and they were not provided with an opportunity to comment on their relevance. The applicants are of the view that with the exception of the website of the John Langdon Down Foundation, which is a private foundation that provides costly services to children with Down syndrome, the remainder of the extrinsic evidence to which the officer referred to was of little to no relevance to the issue before her. It is obviously not the role of this Court to determine the probative value and the relevance of this evidence to the applicants' case, hence the officer's duty to disclose them to the applicants in order to provide them with the opportunity to make submissions. It is important to note that the applicants' own experience regarding the disputed services when they were still in Mexico remained non-contradicted and was a relevant consideration that was poorly evaluated by the officer.

[23] As such, the respondent's reliance on *Adetunji v Canada (Minister of Citizenship and Immigration)*, 2012 FC 708, at para 38, is unfounded because not only were the documents at issue in the present case not made available to the applicants, but also nothing suggests that the information contained in those documents regarding the numerous institutions to which the officer referred to was reasonably available to the applicants. Be that as it may, the relevance of those documents in assessing the availability of the special and specific services required by Josémaria is what the applicants challenge here in part.

[24] The problem of documents unilaterally consulted on the internet by the decision-maker has already been raised before this Court. The general rule to be distilled from the jurisprudence is that when the documents relied upon contain "novel and significant" information that the applicant could not reasonably anticipate (which is generally the case when documents are retrieved and chosen from the vast pool of information available on the internet), fairness dictates that the applicant should have the opportunity to challenge their relevance or validity by making additional submissions (see *Zamora v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1414 at paras 17-25; *Radji v Canada (Minister of Citizenship and Immigration)*, 2007 FC 836 at para 25; *Davis v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1223 at paras 24-26 and *Gonzalez v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 153).

[25] The respondent cited no case law in support of its argument that the issue of extrinsic evidence should be viewed differently in the context of an H&C application than in the context of a refugee claim or a pre-removal risk assessment, and in fact, the respondent withdrew this argument at the hearing.

[26] In an application made pursuant to section 25 of the IRPA, the H&C officer's role is to assess if the applicants would face unusual, undeserved or disproportionate hardship if they were to file their application for permanent residence from outside Canada in the usual manner provided at section 11 of the IRPA (*Kharrat v Canada (Minister of Citizenship and Immigration*, 2007 FC 842 at para 25). Aside from the crucial importance of the best interests of the child directly affected by the decision under review, to which the officer is required to be "alert, alive and sensitive" (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75), it is imperative

to ensure that the applicants have had the opportunity to satisfy the officer of the hardship that they may encounter as a result of lack of the services required by Josémaria's condition, and counter the officer's conclusion regarding the availability of such services in Mexico. This was not done in the applicants' case.

[27] Since the present application must be granted on this basis alone, it is unnecessary for the Court to address in further detail the two other issues regarding the officer's analysis of the best interests of the child. Suffice it to add briefly that as a result of her over-reliance on the extrinsic evidence, the officer gave very limited weight to the documentary evidence submitted by the applicants regarding the limited availability of public sector services for children with Down syndrome in Mexico, as well as the principal applicant's allegation that although there are some public sector services for children with special needs in Mexico, such as those that were offered to Josémaria when he was in Mexico, the demand for such services outstrips the supply. As such, the assessment clearly lacks in justification, transparency and intelligibility (*Dunsmuir*, above, at para 47).

[28] Also, it was speculative, rather irrelevant, and therefore unreasonable for the officer to expect the applicants to be able to afford to pay for Josémaria's schooling and treatment in the private sector given the professional skills they have gained in Canada as a hand-launderer and presser and as a seamstress, and given that they have learned English and French. The jurisprudence cautions against such findings that are not based on established facts or reasonably drawn inferences therefrom, but rather on mere conjecture (*Huot v Canada (Minister of Citizenship and Immigration)*, 2011 FC 180 at para 26, citing Justice Dawson's decision in *Zhang v Canada*

(Minister of Citizenship and Immigration), 2008 FC 533 at paras 2-3). A finding that directly contradicts the evidence on file, which was that the cost of private services in Mexico was prohibitive for ordinary working people such as the applicants, should be based on other evidence and not on pure conjecture.

[29] For all these reasons, the present application for judicial review is granted. No questions of general importance were proposed by the parties and none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The present application for judicial review is granted and the matter is remitted back for a *de novo* examination by a different H&C officer.

2. No question is certified.

"Jocelyne Gagné"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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