

Federal Court



Cour fédérale

Date: 20130905

Docket: IMM-10821-12

Citation: 2013 FC 847

Ottawa, Ontario, September 5, 2013

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

**CARLOS ARMANDO MELGAR REYES
MIRIAN ISABLE MELGAR ESPINOZA**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Mr Carlos Armando Melgar Reyes and Ms Mirian Isable Melgar Espinoza, originally from El Salvador, applied for permanent residence in Canada on humanitarian and compassionate grounds (H&C). An immigration officer denied their applications, finding that they would not face unusual, undeserved or disproportionate hardship if they returned to El Salvador.

[2] The applicants argue that the officer's decision was unreasonable because it failed to take proper account of their psychological evaluations. The officer gave little weight to Ms Espinoza's evaluation and did not refer to Mr. Reyes' at all. The applicants ask me to overturn the officer's decision and order another officer to reconsider their applications.

[3] I agree that the officer failed to give adequate consideration to the psychological evidence presented by the applicants and, accordingly, rendered an unreasonable decision. I must, therefore, allow this application for judicial review.

[4] While the applicants presented other issues, I need only consider the question whether the officer's decision was unreasonable in light of the failure to address the psychological evidence.

II. Factual Background

[5] The applicants claimed to fear criminals in El Salvador who had threatened them and killed Mr Reyes' cousin. In 2004, their claim for refugee protection was dismissed for a lack of credible evidence and because state protection was available to them in El Salvador.

[6] In 2005, the applicants submitted their H&C applications and detailed the past trauma they endured in El Salvador and the psychological hardship facing them if they returned there. They each provided the officer with a psychologist's evaluation. The psychologist diagnosed both applicants with Post Traumatic Stress Disorder (PTSD) based on their past experiences and fear of returning to

El Salvador. The psychologist further recommended that they receive psychotherapy, and suggested that Ms Espinoza would benefit from certainty regarding her future safety.

III. The Board's Decision

[7] The officer considered the degree to which the applicants had established themselves in Canada and the best interests of their two children – one in El Salvador and one in Canada. The officer also considered the psychological report indicating that Ms Espinoza suffered from PTSD based on her past war experiences in El Salvador and her fear of being killed on return. However, the officer gave the report little weight because it was based on Ms Espinoza's unsworn and uncross-examined evidence about her experiences in El Salvador. In other words, it was hearsay. Further, the officer noted the lack of evidence that treatment was unavailable for Ms Espinoza's psychological issues in El Salvador.

IV. Was the officer's decision unreasonable?

[8] The applicants argue that the officer's decision was unreasonable because the officer had no grounds on which to discount the significance of Ms Espinoza's psychological report. In addition, the officer apparently did not consider Mr Reyes' psychological report at all.

[9] I agree.

[10] The psychologist's reports only amounted to hearsay in respect of the precise source of the applicants' fear. Specifically, the reports could not be used to establish that the applicants had actually been threatened.

[11] However, the reports did not constitute hearsay in respect of the psychologist's expert opinion regarding the applicants' mental health. The reports provide the psychologist's expert opinion regarding the mental health of the applicants, a critical component of their H&C application. In this respect, the reports do not constitute hearsay. Therefore, the officer's rationale for discounting the evidentiary value of the reports was unsound (*Lainez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 914).

[12] Further, since the officer gave the psychological evidence little or no weight, finding that there was no evidence that treatment was unavailable for Ms Espinoza in El Salvador, the officer did not consider the nature or degree of the psychological hardship that Ms Espinoza or her husband would face if removed from Canada. As their allegations of psychological harm represented the core of their applications, the officer's failure to give the evidence appropriate consideration resulted in an unreasonable decision.

V. Conclusion and Disposition

[13] The officer improperly discounted the psychological evidence put forward by Ms Espinoza and failed to consider the evidence regarding Mr Reyes. Accordingly, the officer's conclusion did not represent a defensible outcome based on the facts and the law. I must allow this application for

judicial review and order another officer to reconsider the applicants' H&C applications. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT

THIS COURT’S JUDGMENT is that:

1. The application for judicial review is allowed and the matter is referred back to another officer for reconsideration.
2. No question of general importance is stated.

“James W. O’Reilly”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-10821-12

STYLE OF CAUSE: CARLOS ARMANDO MELGAR REYES, ET AL
v
MCI

PLACE OF HEARING: CALGARY, ALBERTA

DATE OF HEARING: July 15, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: September 5, 2013

APPEARANCES:

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