Federal Court  Cour fédérale

Date: 20130925

Docket: IMM-2361-13

Citation: 2013 FC 976

Ottawa, Ontario, this 25th day of September 2013

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MARCO TULIO MORENO HERNANDEZ

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is the second trip to the Federal Court concerning Mr. Moreno Hernandez's application for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds, under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "Act").

[2] The first trip to this Court resulted in a judgment, dated September 11, 2012 which set aside a decision of a Senior Immigration Officer. My colleague, Justice Roger T. Hughes, concluded that the officer's decision was "wholly unreasonable having regard to the factual circumstances of this particular case". As a result the Court ordered that the matter be re-determined by a different officer "having regard to the correct law and the particular facts in this case and that the Applicant was, at the material time, a 17-year-old child". Such redetermination was conducted and it resulted in a decision by another Senior Immigration Officer (the "officer") dated March 11, 2013. That negative decision is challenged on judicial review pursuant to section 72 of the Act and leave was granted on June 13 last.

[3] The facts of this case will be important. Fortunately, they are not disputed by the parties.

The facts

[4] The applicant was born on October 22, 1994 in Honduras. He is a citizen of that country. The record shows that the applicant has a mother, a stepfather as well as a sister, a brother, a half-sister and two half-brothers. They all reside in Honduras.

[5] It is not disputed that the applicant, living with his family in Honduras, was living in harsh conditions. Their accommodations were minimal, his stepfather did not have continuous employment and they are still living in those conditions in a small village of about 1,000 inhabitants.

[6] It is not disputed either that the applicant, in October 2008, was sent to the United States illegally. Arrested and detained for a period of two months, he was returned to Honduras.

[7] A year later, he was again sent outside of the country by his family. After having transited through Guatemala, Mexico and the United States, he arrived in Canada on December 14, 2009 and made a refugee claim in this country on January 5, 2010.

[8] His refugee claim was denied on August 26, 2011. The main issue, as found by the Refugee Protection Division, was the credibility of the applicant. The testimony concerning his forced recruitment and threats by the Maras gang in Honduras was not believed. It appears that it is not contested by the applicant that his credibility was deficient because he now acknowledges that he had not been subjected to threats and there were no attempts to recruit him while he was in Honduras. He stated in writing:

> I made up a story for my refugee claim because I thought it would be easier for me to stay in Canada if I did. Just like my mother said in her talk with my lawyer, the gangs were not trying to get me to join them before I left Honduras, and I did not run around committing crimes with them.

In spite of that concession, one of the elements raised in the H&C application is the renewed concern that he would be a suitable candidate for recruitment by the Maras were he to be returned to his country.

[9] On November 23, 2011, he submitted an H&C application. As indicated, the application was denied, but this Court quashed the decision and ordered a redetermination.

The officer's decision

[10] The officer conducting the redetermination had to address three different issues raised by the applicant. First, the interests of the child had to be considered. As pointed out earlier, the application is to be dealt with on the basis that the applicant was 17 years of age. Second, it was argued that the applicant is well established in this country and that militates in favour of granting his H&C application. Finally, evidence was presented and arguments were made about the adverse country conditions the applicant would face if he were to return to Honduras and, thus, whether this would constitute undue hardship.

[11] The officer identifies in the decision the three grounds that had been presented. It is stated that the best interests of the child were carefully considered, as required because the application was made at the time the applicant was 17 years of age. The officer then proceeds to examine carefully the establishment of the applicant in Canada and the adverse country conditions he would face in Honduras.

[12] The establishment of the applicant in this country is acknowledged throughout the reasons. By all accounts, the applicant is doing very well in school and in his community, in spite of the fact that he is here without his family and is a "ward of the Ministry of Children and Family Development in British Columbia". He lives with foster parents and five other children. The officer declares however that

> . . . it is my opinion that the fact that the applicant may enjoy better opportunities in Canada than in Honduras does not mean that the discretion afforded by subsection 25(1) of the Immigration and Refugee Protection Act (IRPA) will be exercised in a positive manner.

Having to return to Honduras will cause the applicant difficulties, but the officer considers that the skills acquired in Canada and his personality traits will assist him in readjusting in his native country. The officer concludes by writing:

> I have carefully considered the evidence before me, mindful of the Federal Court's concern that the previous "Officer's reasons failed to have regard to the overwhelming positive evidence as to the establishment of the Applicant in Canada". I acknowledge that the applicant has attended high school in Canada since March 2010, that he has improved his English, that he has had a job, and that he has formed close relationships with a variety of people, several of whom have written letters in support of the applicant. However, based on my analysis above of the evidence regarding the applicant's establishment which is before me in this H&C application, I am of the opinion that it would not be contrary to the applicant's best interests to have him returned to Honduras.

[13] The officer then proceeds to examine the adverse country conditions if the applicant were to be returned to Honduras. The officer fairly recognizes that adverse conditions may warrant the exercise of humanitarian and compassionate discretion. Indeed, it is recognized that "[t]he H&C assessment is lower in threshold than PRRA and is not limited to the PRRA's specific legislative parameters of persecution: Risk to life, torture and cruel and unusual treatment or punishment". There is no doubt that the situation in Honduras is rather bleak. However, the officer concludes that it is mere speculation to state that gangs would attempt to recruit the applicant if he returned to his country. As for the opportunities available to the applicant in Honduras, the officer considers that he would be better equipped to deal with the situation in Honduras now that he has acquired some skills and education in Canada.

[14] In view of the argument presented by counsel for the applicant about the fettering of the discretion on the part of the officer, it is important to examine carefully the position taken with respect to sections 96 and 97 of the Act.

[15] Subsection 25(1.3) of the Act is the provision that was invoked by the officer to exclude from consideration on this application the claim of risk to life that was already considered in the refugee application that was denied in 2011. Subsection 25(1.3) reads:

25. (1.3) In examining the request of a foreign national in Canada, the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements that are related to the hardships that affect the foreign national.	**25.** (1.3) Le ministre, dans l'étude de la demande faite au titre du paragraphe (1) d'un étranger se trouvant au Canada, ne tient compte d'aucun des facteurs servant à établir la qualité de réfugié – au sens de la Convention – aux termes de l'article 96 ou de personne à protéger au titre du paragraphe 97(1); il tient compte, toutefois, des difficultés auxquelles l'étranger fait face.

[16] The officer does not have the discretion to ignore subsection 25(1.3). The decision makes the point that the fears for the applicant's life at the hands of gangs and the smuggler who had him leave Honduras could not be considered again because they have been addressed in the refugee application. However, the officer refers specifically to "adverse country conditions that have a direct negative impact on the applicant are a relevant factor in the assessment of an H&C application that is submitted on or after June 29, 2010". It is on that basis that the decision goes on to state:

> . . . In fact, the evidence indicates that he had no problems with gangs while he was living in El Pedernal. I am of the opinion that it is speculation to conclude that gangs in Honduras would try to recruit the applicant if he were to return to that country. I do not find that counsel on behalf of the applicant has provided sufficient objective evidence for me to conclude that the applicant's removal to Honduras would subject him to a risk that would warrant the exercise of humanitarian and compassionate discretion.

The standard of review

[17] The applicant and the respondent agree that a standard of reasonableness will apply to the assessment to be made of a decision on an H&C application. However, the applicant argues that a standard of correctness is required with respect to the refusal of the officer to assess certain risks because, in the view of the applicant, this constitutes the fettering of discretion which carries a higher standard of review.

Analysis

[18] I do not believe that the officer has fettered the discretion that is provided by section 25 of the Act. When considered carefully, the reasons for the decision merely exclude from consideration the "risks" that had already been the subject of a decision on the refugee application. It would not be appropriate in this case to consider fully the meaning to be ascribed to subsection 25(1.3) of the Act. The matter was not fully argued and it is not essential for the disposition of the case. Suffice it to say that the officer considered the elements related to the hardship that affect the foreign national, including that he might be the subject of recruitment attempts if he were to return to his country. It is a conclusion that was based on the evidence in front of the officer. More importantly, the evidence with respect to the claims concerning section 97 of the Act was ruled to be not credible and, indeed, it was confirmed that it was not credible through a written statement made by the applicant himself.

[19] In my view, the more difficult issue is that which is at the heart of the applicant's argument. The applicant argues that the decision, as a whole, is unreasonable. In his view, the interests of the child must be carefully defined and there must be an articulation for why they are not sufficient to

warrant the application of the discretion of section 25 of the Act. Here, the applicant argues that the interests of the child were minimized, which makes the decision unreasonable. There is a need to examine carefully these interests before they are to be dismissed.

[20] In essence, the applicant claims that the decision-maker lifted the arguments and sought to minimize them with a view to concluding, without careful analysis, that they were insufficient to warrant the application of section 25.

[21] It is subsection 25(1) that finds application in this case. It reads:

25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible – other than under section 34, 35 or 37 – or does not meet the requirements of this Act, and may, on request from a foreign national outside Canada – other than a foreign national who is inadmissible under sections 34, 35 or 37 – who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	**25.** (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire – sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 – , soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada – sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 – qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

[22] A fair reading of that provision does not allow for the conclusion that the interests of the child are paramount. They must carry weight but they are not the sole consideration to be taken by the Minister in making the decision. The Supreme Court of Canada decision in *Baker v Canada*

(Minister of Citizenship and Immigration), [1999] 2 SCR 817, [*Baker*] describes the appropriate balance to be given. One can read at paragraph 75 of the decision:

> [75] The certified question asks whether the best interests of children must be a primary consideration when assessing an applicant under s. 114(2) and the Regulations. The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H&C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.

[23] I also find illuminating the words of Iacobucci J. in *Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 SCR 748, at paragraph 56:

> [56] . . . An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it.

[24] I would have thought that this conforms with the often quoted paragraph 47 in *Dunsmuir v New Brunswick*, [2008] 1 SCR 190:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court

> conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[25] In the case at hand, I have read and re-read the reasons given by the officer. I am of course aware that it is not for this Court to substitute its discretion for that of the officer. A significant measure of deference is owed to the decision-maker. However, I have not been able to find the reasons that support the conclusion that was reached.

[26] My review of the decision leaves me with the statement of the arguments and the conclusion that they do not warrant the application of section 25. Hence, having found what would appear to be a number of factors that would favour the application of H&C considerations provided for in section 25, the decision-maker simply concludes, at page 8 of his decision, that:

> . . . I am of the opinion that it would not be contrary to the applicant's best interests to have him returned to Honduras.

[27] Similarly, the decision-maker declares that "I do not find that counsel on behalf of the applicant has provided sufficient objective evidence to bring me to conclude that the applicant's removal to Honduras would subject him to a risk that would warrant the exercise of humanitarian and compassionate discretion".

[28] We are left wondering why this evidence would not be sufficient.

[29] This is, in my opinion, especially important in view of the Supreme Court's decision in *Baker, supra,* where the Court puts special emphasis on the need for the decision to be animated by the recognition of compassionate or humanitarian considerations. One can read at paragraph 66:

> [66] The wording of s. 114(2) and of Regulation 2.1 requires that a decision-maker exercise the power based upon "compassionate or humanitarian considerations" (emphasis added). These words and their meaning must be central in determining whether an individual H&C decision was a reasonable exercise of the power conferred by Parliament. The legislation and regulations direct the Minister to determine whether the person's admission should be facilitated owing to the existence of such considerations. They show Parliament's intention that those exercising the discretion conferred by the statute act in a humanitarian and compassionate manner. This Court has found that it is necessary for the Minister to consider an H&C request when an application is made: *Jiminez-Perez, supra*. Similarly, when considering it, the request must be evaluated in a manner that is respectful of humanitarian and compassionate considerations.

Further, one can read comments about the importance of the best interests of the child:

> [74] . . . Therefore, attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for an H&C decision to be made in a reasonable manner. While deference should be given to immigration officers on s. 114(2) judicial review applications, decisions cannot stand when the manner in which the decision was made and the approach taken are in conflict with humanitarian and compassionate values. The Minister's guidelines themselves reflect this approach. However, the decision here was inconsistent with it.

[30] As a matter of first impression, we find in this case a child of 14 years of age being sent to the United States, by his parents, because of the dire circumstances in which they find themselves. Upon being returned to Honduras, the same child is sent, a year later, through Guatemala, Mexico and the United States to Canada. He is by then 15 years old. It is not disputed that the applicant

came to Canada because he wanted to help his family financially. On the record before the Court, there is no suggestion that he came to Canada for ulterior motives and it is understood that the applicant's family is very poor with limited prospects. He has since, by every account, done his best to adapt to his new surroundings and he appears to be in the process of completing his high school education. One would expect that, in such circumstances where the evidence appears to be favourable to the applicant, the decision-maker would articulate the reasons why the interests of the child and humanitarian and compassionate considerations which must animate the decision-making, as per *Baker*, *supra*, were not sufficient. In the case at hand, what we have, instead, is a declaration that it was not sufficient, with the further rationale that the skills acquired in Canada will be assets usable if returned to Honduras.

[31] It would seem to me that, as a matter of first impression, there appears to be a serious case for the possible application of section 25 such that the decision-maker would recognize the need for a strong articulation of the countervailing arguments and rationale in order for the decision to be ruled to be reasonable. I wish to make it clear that it is not for this Court to substitute its discretion for that of the decision-maker. But the reasonableness of the decision is measured by the articulation of its reasons and outcomes. There may be other considerations, of a public-policy nature for instance, that should come into play. However, they were not disclosed in a decision that called for an articulation of reasons justifying the outcome chosen.

[32] In this case, the articulation of the reasons is, in my view, deficient. As such, it cannot be said that the decision is reasonable. My Reasons for Judgment should not be taken to mean that it is a foreclosed conclusion that section 25 of the Act ought to be applied in favour of the applicant.

Conversely, however, if it is not possible to articulate reasons, that may very well indicate that the range of acceptable outcomes in this case is very narrow.

JUDGMENT

THIS COURT ADJUDGES that:

1. The application is allowed.
2. The matter is to be re-determined by a different officer having regard to the correct law and the particular facts in this case and that the applicant was, at the material time, a 17-year-old child.
3. The parties agreed that there is no question for certification. The Court concurs.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2361-13
STYLE OF CAUSE:	MARCO TULIO MORENO HERNANDEZ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	SEPTEMBER 11, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	ROY J.
DATED:	SEPTEMBER 25, 2013

APPEARANCES:

Warren Puddicombe	FOR THE APPLICANT
Helen Park	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Elgin, Cannon & Associates Vancouver, British Columbia	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT