Federal Court Cour fédérale

Date: 20131001

Docket: IMM-6185-12

Citation: 2013 FC 998

Ottawa, Ontario, October 1, 2013

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

JORGE ELIECER MARTINEZ HOYOS, SOR EULANDY HIGUITA DAVID, JORGE ANDRES MARTINEZ HIGUITA AND MARIA PAULA MARTINEZ HIGUITA (BY HER LITIGATION GUARDIAN JORGE ELIECER MARTINEZ HOYOS)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants are a family (parents and two children) from Colombia, whose refugee claims were dismissed. Following the dismissal, they made a humanitarian and compassionate [H&C] application under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA or the Act], seeking to remain in Canada due to the ties they had formed here and to the hardship they claimed they would likely incur if returned to Colombia. At the time the

H&C application was made, only one of the children, Maria Paula, was a minor. The other, Jorge Andres, was 19 but was still attending high school on a full-time basis and presumably was entirely dependent on his parents.

[2] The applicants filed very sparse submissions in support of their H&C application. In terms of the likely impact of return to Colombia on Jorge Andres and Maria Paula, the submissions did little more than comment on their academic records and allege that relocation and interruption in their education would be difficult and that the children feared return.

[3] The Officer who examined the applicants' H&C application dismissed it, finding that the applicants would not suffer undue, disproportionate or undeserved hardship if required to apply for permanent resident status from Colombia. In coming to this decision, the Officer assessed the impact of return to Colombia on the best interests of Maria Paula but stated that no similar analysis was required in Jorge Andres' case as he was not a minor.

[4] In terms of the best interests analysis in Maria Paula's case, the Officer commented on the lack of submissions on the point and then stated as follows:

> In the absence of … information, I am nevertheless alive and sensitive to the fact that the Applicants' [*sic*] have one minor child and that her best interest needs to be considered.
>
> Maria Paula was 8 years old when she came to Canada and today she is 11 years old. She is a student and doing well in school as indicated by the letter of reference.
>
> I accept that it must be difficult for any child to move to a different country where the culture is vastly different and I accept that it must be very difficult to return to a country where the criminal activity is significantly higher than that of Canada. The Applicant

> states that his children are fearful to return to Colombia. Given the fact that the Applicant does not explain why the children are terrified to return to Colombia, I can only speculate that it is due to the criminal violence in Colombia that the children feel unsafe.
>
> I find it would cause Maria Paula anxiety and stress to undergo a major relocation back to Colombia and that she would undergo a period of adjustment while she gets used to the school system and the lifestyle in Colombia. For these reasons I give this factor for consideration positive weight.

[5] In addition to considering this factor, the Officer also considered the claimed risk due to adverse country conditions in Colombia and the degree of the family's establishment in Canada. In light of all the factors examined, the Officer concluded that the H&C application should be rejected. He reasoned in this regard that the positive factor (of Maria Paula's best interests in staying in Canada) was outweighed by the negative factors of there being neither any unusual degree of establishment in Canada nor proof that the applicants would be at risk if returned to Colombia. He concluded:

> I have taken into consideration the best interest of the child, Maria Paula. I have given this factor for consideration positive weight as I accept that it is difficult for a child to have relocated to a country with a vastly different culture and it must be very difficult to move back to Colombia after she has settled in Canada and she is doing well in school.
>
> Overall, I find that the positive factor (best interest of the child) does not outweigh all the other factors which have been considered. I note that, Maria Paula, most likely attended school in Colombia and that she will most likely be able to adjust to the school system again given time and the support of her parents and older brother.

[6] The applicants argue that the Officer made three reviewable errors in reaching this decision, any one of which warrants intervention, claiming that:

1. The Officer's best interests of the child [BIOC] analysis was flawed because the Officer ought to have assessed the impact of relocation on Jorge Andres, who should be considered a "child" within the meaning of section 25 of the IRPA, given his age and dependence on his parents;

2. The BIOC analysis conducted with respect to Maria Paula was flawed because the Officer failed to apply the approach to the assessment of the best interests of children as set out in *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166, 212 ACWS (3d) 207 [*Williams*], which the applicants allege is a necessary pre-condition for an adequate treatment of the interests of impacted children in an H&C application; and

3. The Officer's reasons were inadequate in that he merely recited the evidence but did not offer an explanation for some of his key findings.

[7] In my view, none of these points has merit, and, accordingly, this application will be dismissed for the reasons set out below.

Standard of Review

[8] The parties agree that the reasonableness standard of review applies to the second and third of the errors alleged by the applicant but disagree as to the standard of review applicable to the assessment of the Board's determination that Jorge Andres is not a "child" within the meaning of section 25 of the IRPA.

[9] The applicants argue that the correctness standard should apply to review of the Board's decision on this point because there is conflicting jurisprudence from this Court regarding whether individuals over the age of majority may nonetheless be considered "children" for purposes of a BIOC analysis under section 25 of the IRPA. Some decisions in this Court have said yes (see e.g. *Naredo v Canada (Minister of Citizenship and Immigaration)* (2000), 192 DLR (4th) 373, 187 FTR 47; *Yoo v Canada (Citizenship and Immigration)*, 2009 FC 343 at paras 29-32, 343 FTR 253), while others have said no (see e.g. *Saporsantos Leobrera v Canada (Citizenship and Immigration)*, 2010 FC 587 at paras 30-72, [2011] 4 FCR 290 [*Saporsantos Leobrera*]; *Moya v Canada (Citizenship and Immigration)*, 2012 FC 971 at paras 7-18, 416 FTR 247). The applicants argue that determination of who is entitled to benefit from a BIOC analysis is a matter of general importance to the legal system as a whole, given the divided jurisprudence and the breadth of those potentially impacted by this issue. They therefore assert that the correctness standard is applicable to this issue since they claim that Supreme Court of Canada has indicated that full curial review is appropriate where the point in issue is one of general importance for the legal system as a whole (relying in this regard on *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 55, [2008] 1 SCR 190 [*Dunsmuir*]).

[10] The respondent, on the other hand, argues that the reasonableness standard of review applies to this question because the previous case law has settled this issue and determined that the applicable standard is reasonableness (see e.g. *Ramsawak v Canada (Citizenship and Immigration)*, 2009 FC 636 at para 13, 86 Imm LR (3d) 97; *Saporsantos Leobrera*, at paras 28-29). The respondent further submits that the reasonableness standard should apply since determining who is a "child" for purposes of the BIOC analysis under section 25 of the IRPA

involves the Officer's interpretation of his "home" statute, which normally attracts the reasonableness standard.

[11] I concur with the respondent that the Officer's determination that Jorge Andres was not a "child", within the meaning of section 25 of the IRPA, should be reviewed on the reasonableness standard.

[12] In its decisions in *Dunsmuir* and the numerous administrative law cases applying *Dunsmuir*, the Supreme Court of Canada has made clear that the reasonableness standard is presumptively applicable to the review of decisions made by administrative tribunals. While it is true that there are exceptions to this presumption, contrary to what the applicants claim, the mere presence of a question of general importance to the legal system as a whole is not alone sufficient to engage any of those exceptions. Rather, the Supreme Court has indicated that the exception the applicants seek to invoke arises only where the determination being challenged raises a question of general law that is *both* of central importance to the legal system as a whole *and* also outside the tribunal's area of expertise.

[13] In *Dunsmuir* itself, Justices LeBel and Bastarache, writing for the majority, put it this way at para 55:

> A question of law that is of "central importance to the legal system . . . and outside the . . . specialized area of expertise" of the administrative decision maker will always attract a correctness standard ([*Toronto (City) v CUPE, Local 79*, 2003 SCC 63, [2003] 3 SCR 77] at para. 62).

[14] The Supreme Court has endorsed the foregoing several times (see e.g. *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59 at paras 35-40, 55, [2011] 3 SCR 616 [*Nor-Man*]; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at paras 18, 22-23, [2011] 3 SCR 471; *Smith v Alliance Pipeline Ltd*, 2011 SCC 7 at para 26, [2011] 1 SCR 160; and *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 30, [2011] 3 SCR 654).

[15] Moreover, in *Nor-Man*, the Supreme Court expressly rejected the argument that the applicants make in this case, to the effect that there need only be a question of general importance considered by a tribunal for the correctness standard to apply. There, Justice Fish, writing for the Court stated at para 55:

> The respondent also argues that *Toronto (City)* stands for the proposition that a labour arbitrator's application of common law doctrines must be correct. In my view, it does not. As we have seen, the application of general rules or principles of law will not automatically be reviewed for correctness unless they raise legal issues "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Toronto (City)*, at para. 62, *per* LeBel J.; *Dunsmuir*, at para. 60; *Smith*, at para. 26).

[16] The Federal Court of Appeal has likewise confirmed that before the correctness standard applies to a tribunal's decision on a point, the issue considered by the tribunal must be *both* of general importance to the legal system as a whole *and* outside the tribunal's expertise. In *B010 v Canada (Citizenship and Immigration)*, 2013 FCA 87, 359 DLR (4th) 730, Justice Dawson,

writing for the Court, stated at para 68 that she was: "… no longer satisfied that the importance of a question by itself is sufficient to warrant review on the correctness standard".

[17] Chief Justice Crampton has also recently rejected the notion that divisions in the jurisprudence of an inferior tribunal may attract review on the correctness standard in *Huang v Canada (Minister of Citizenship and Immigration)*, 2013 FC 576, 229 ACWS (3d) 949 [*Huang*]. That case dealt with the thorny problem of residency under the *Citizenship Act*, RSC 1985, c C-29, in respect of which there is more division in the case law than over the question of who qualifies as a child for purposes of a BIOC analysis under section 25 of the IRPA. After summarizing the various tests and referring to the many conflicting decisions, the Chief Justice stated:

> [24] What is clear from the foregoing is that the jurisprudence pertaining to the test(s) for citizenship remains divided and somewhat unsettled.
>
> [25] In this context, it is particularly appropriate that deference be accorded to a citizenship judge's decision to apply any of the three tests that have a long and rich heritage in this Court's jurisprudence.

[18] The Ontario Court of Appeal has likewise held that the reasonableness standard may well give rise to opposite and conflicting decisions from administrative decision-makers on identical points but that this division in the case law does not lead to full curial review on an issue. In *Hydro Ottawa Ltd v International Brotherhood of Electrical Workers, Local 636*, 2007 ONCA 292, 85 OR (3d) 727, 281 DLR (4th) 443, the Court of Appeal recognized that:

> [E]ven if a different approach were suggested by other arbitration decisions, the failure of a subsequent arbitrator to follow previous decisions does not by itself make the subsequent arbitrator's

> decision patently unreasonable. The doctrine of *stare decisis* has no application in such circumstances. […] In each case the issue is whether the arbitrator's interpretation of the collective agreement is supportable on the record and not patently unreasonable in that context. Lack of unanimity is the price to be paid for having independent and specialized decision-makers in the labour relations field protected by the standard of review of patent unreasonableness. [Citations omitted]

[19] The same conclusion was reached in *National Steel Car Ltd v United Steelworkers of America, Local 7135* (2006), 278 DLR (4th) 345, 159 LAC (4th) 281 (ONCA), and in both cases the Ontario Court of Appeal relied on the Supreme Court of Canada's decision in *Domtar Inc v Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 SCR 756, 105 DLR (4th) 385. In that case at pages 800-01 (cited to SCR), Justice L'Heureux-Dubé wrote for the unanimous Supreme Court that:

> If Canadian administrative law has been able to evolve to the point of recognizing that administrative tribunals have the authority to err within their area of expertise, I think that, by the same token, a lack of unanimity is the price to pay for the decision-making freedom and independence given to the members of these tribunals. Recognizing the existence of a conflict in decisions as an independent basis for judicial review would, in my opinion, constitute a serious undermining of those principles. This appears to me to be especially true as the administrative tribunals, like the legislature, have the power to resolve such conflicts themselves. The solution required by conflicting decisions among administrative tribunals thus remains a policy choice which, in the final analysis, should not be made by the courts.

[20] Although these cases were decided with respect to the patent unreasonableness standard (which was collapsed into the reasonableness standard in *Dunsmuir*), the reasoning applies equally to the reasonableness standard. Indeed, the very definition of a reasonable decision contemplates that there may well be diverging interpretations given to an identical provision by

different decision-makers, since the standard, itself, foresees "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47).

[21] Thus, contrary to what the applicants assert, the fact that there is divided authority on whether dependants over the age of majority are "children" in respect of a BIOC analysis under section 25 of the IRPA and the fact that this issue may touch many claimants does not result in there being full curial review of a decision like that made by the Officer in this case.

[22] In addition, as the respondent rightly notes, post-*Dunsmuir* decisions of this Court have held that the reasonableness standard of review is to be applied to an officer's interpretation of who is a "child" within the meaning of section 25 of the IRPA (see e.g. *Ramsawak v Canada (Citizenship and Immigration)*, 2009 FC 636 at para 13, 86 Imm LR (3d) 97 and *Saporsantos Leobrera* at paras 28-29). These cases further support the determination that the reasonableness standard is applicable here as the Supreme Court of Canada has indicated that where the previous jurisprudence has satisfactorily established the applicable standard of review, that standard should be applied (see e.g. *Dunsmuir* at paras 57-58, 62; *Northrop Grumman Overseas Services Corp v Canada (Attorney General)*, 2009 SCC 50 at para 10, [2009] 3 SCR 309; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at paras 16, 19-22, [2011] 3 SCR 471; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 48-49, 360 DLR (4th) 411).

[23] I believe that the previous case law has satisfactorily settled that the reasonableness standard applies to the Officer's determination that Jorge Andres is not a "child" within the

meaning of section 25 of the IRPA. The interpretation arises from the Officer's home statute and is a matter falling within the area of expertise of Citizenship and Immigration Canada officers, who are charged with determining whether to grant H&C consideration to individuals under section 25 of the IPRA and in articulating a BIOC analysis.

[24] Thus, the reasonableness standard applies to the review of the Officer's determination that Jorge Andres was not a "child" within the meaning of section 25 of the IRPA and to his conclusion that it was therefore not necessary to undertake a BIOC analysis in respect of Jorge Andres.

Was the Officer's determination regarding Jorge Andres reasonable?

[25] Turning, next, to consideration of the reasonableness of the Officer's decision with respect to Jorge Andres, I concur with the respondent that the fact that the Officer followed one of the two lines of authority on the point must lead to the conclusion that his determination was reasonable. This case is similar to *Hao v Canada (Citizenship and Immigration)*, 2011 FC 46, 383 FTR 125 (Eng), in which my colleague, Justice Mosley, upheld a citizenship decision as reasonable because the citizenship judge applied one of the three tests recognized in the jurisprudence, holding that the applicant's preference for a more favourable test did not render that decision unreasonable (see also *Huang* at para 25).

[26] The same can be said here; where there are two competing lines of authority it cannot be unreasonable for the Officer to choose one of them and apply it. Otherwise, the mere presence of

a competing line of authority would defeat the Officer's decision no matter which interpretation he chose.

[27] It also must be noted that the debate regarding the error the Officer is alleged to have made in respect of not conducting a BIOC analysis for Jorge Andres is more illusory than real as there is no doubt that the same result would have obtained in Jorge Andres' case as in his sister's if the Officer had conducted an assessment of Jorge Andres' best interests. Given that virtually no information was provided to the Officer about the best interests of either and that what little information that was provided was identical for both of them, the Officer would inevitably have found that the best interests of Jorge Andres did not require H&C consideration.

[28] The Officer's consideration of the interests of Jorge Andres was therefore reasonable and his failure to conduct a separate BIOC analysis for Jorge Andres does not constitute a reviewable error.

Was the Officer's determination regarding Maria Paula reasonable?

[29] The applicants next argue that the BIOC analysis the Officer conducted in respect of Maria Paula was unreasonable because the Officer failed to apply the formulation set out in *Williams*. In that case, my colleague, Justice Russell, stated at para 63 that:

> When assessing a child's best interests an Officer must establish first what is in the child's best interest, second the degree to which the child's interests are compromised by one potential decision over another, and then finally, in light of the foregoing assessment determine the weight that this factor should play in the ultimate balancing of positive and negative factors assessed in the application. [Emphasis in original]

[30] The applicants argue that this sort of analysis was not conducted by the Officer and, accordingly, the decision should be set aside as being unreasonable.

[31] I disagree for two reasons.

[32] First, in my view, the applicants have misinterpreted the holding in *Williams*. As I read that decision, it does not mandate that a particular formula must always be applied by an officer in assessing the child's best interests in every H&C application but, rather, stands for the proposition that the best interests of impacted children must be considered and weighed along with the other factors in an H&C application. In addition, *Williams* turned on the fact that the officer in that case erred in dismissing the application because he held that the impacted children were not shown to have likely been subject to "undue" hardship because it was not clear they would be beaten, malnourished or denied medical care if they were required to leave Canada with their family. Justice Russell found this "basic needs" assessment of the hardship factor to be erroneous in *Williams*.

[33] The formula set out in *Williams* need not be mechanically applied in every case as my colleague Justice Mosley noted in *Webb v Canada (Citizenship and Immigration)*, 2012 FC 1060 at para 13, 417 FTR 306:

> In my view, the *Williams* formula provides a useful guideline for officers to follow where it may be helpful in assessing a child's best interests but it is not mandated by the governing authorities from the Supreme Court and the Federal Court of Appeal. … immigration officers are not bound by any magic formula in the exercise of their discretion.

[34] Second, and perhaps more importantly, the Officer was given virtually no information about the best interests of Maria Paula. Despite this, the Officer assessed the degree that Maria Paula's best interests would be affected when he discussed the advantages she likely enjoyed in Canada and how they might be lost if she returned to Colombia. The Officer ultimately gave the best interests of Maria Paula positive weight, which means that he had found that her best interests favoured remaining in Canada. However, it did not outweigh the factors favouring a return to Colombia. Thus, in substance, the Officer conducted the *Williams* analysis. In the absence of any fuller submissions or evidence on the point, his treatment of the issue was as complete as possible and cannot be said to be unreasonable.

[35] Thus, the second argument advanced by the applicants is without merit.

Were the Officer's reasons inadequate?

[36] The applicants finally assert that the Officer's reasons were inadequate because he did not say how Maria Paula's best interests were overridden by the other factors in the application and that this renders the decision unreasonable.

[37] Once again, with respect, I disagree. Reasons are adequate if they allow the parties and reviewing court to ascertain why a decision was made. In *Newfoundland Nurses* the Supreme Court of Canada said at para 16 that: "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met." As I noted at para 21 of *Martin-Ivie v Canada (Attorney General)*, 2013 FC 772: "the reasons of a tribunal are not to be read

microscopically. Rather, it is enough if the tribunal's reasons reflect an understanding of the issues and evidence; it is not necessary that detailed references to the evidence be contained in the decision".

[38] Here, although brief, the Officer's reasons do provide the basis for his decision, namely, that Maria Paula's best interest in staying in Canada are not so significant that they outweigh the lack of any other reason for H&C consideration. In addition, the reasons given by the Officer must be assessed in light of the submissions made, which, as noted, were virtually nonexistent. It is hard to imagine how the Officer could have said more in light of the limited material that was provided.

[39] Thus, the Officer's reasons were adequate.

Certified Question

[40] Finally, the respondent proposed two questions for certification:

> 1. Is the "child" spoken of in section 25 of *IRPA* restricted to a person under the age of 18 years at the time the H&C application is received?
>
> 2. In an H&C application, is the officer required to follow the test set out in *Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166 (CanLII), 2012 FC 166 at paragraph 63 in order to demonstrate that s/he is being alert, alive and sensitive to the best interests of the child?

[41] The applicant concurs with the certification of the first of these two questions, asserting that it would be helpful if guidance were given by the Federal Court of Appeal on whether

individuals over the age of majority, who are dependent on their parents, are to be considered "children" for purposes of a BIOC analysis under section 25 of the IRPA. The applicant, however, contests certification of the second question, arguing that the *Williams* criteria are fact-dependent and do not transcend the interests of the immediate parties in this case.

[42] The criteria for certifying a question were recently reiterated in *Lin Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168, 446 NR 382. At para 9, the Federal Court of Appeal stated:

> … that to be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance. As a corollary, the question must also have been raised and dealt with by the court below and it must arise from the case, not from the Judge's reasons.

[43] I do not believe it appropriate to certify either of the questions proposed as neither meets the foregoing criteria.

[44] As concerns the first of the proposed questions, it would not be dispositive of an appeal and has not been dealt with by me, given my determination on the applicable standard of review and conclusion that either interpretation of "child" in section 25 is reasonable. Moreover, the issue is largely irrelevant on the facts of this case, given the paucity of the submissions made with respect to the best interests of both Maria Paula and Jorge Andres. Therefore, the first question does not meet the criteria for certification.

[45] As for the question regarding *Williams*, I agree with the applicants that it is fact-specific and could not dispose of the appeal in these circumstances since the Officer conducted as complete a *Williams* analysis as could be done in the absence of more evidence on the best interests of Maria Paula. Thus, the second proposed question is likewise inappropriate for certification.

[46] This application for judicial review will accordingly be dismissed and no question certified under section 74 of the IRPA.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed;

2. No question of general importance is certified under section 74 of the IRPA: and

3. There is no order as to costs.

"Mary J.L. Gleason"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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