

Federal Court



Cour fédérale

Date: 20140611

Docket: IMM-576-13

Citation: 2014 FC 558

Ottawa, Ontario, June 11, 2014

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

**ALEJANDRO ESPINOSA BARRAGAN
SOLEDAD ADRIANA CABALLERO SALINAS
ANGEL ALEJANDRO ESPINOSA
CABALLERO**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Alejandro Espinosa Barragan, his wife Soledad Adriana Caballero Salinas and their adult son Angel Alejandro Espinosa Caballero, seek judicial review of the decision of a Senior Immigration Officer refusing their application for permanent residence from within Canada on humanitarian and compassionate (H&C) grounds.

[2] The applicants submit that the Immigration Officer breached the duty of fairness owed to them by conducting independent research on an issue without giving them an opportunity to respond to the information obtained and that the Officer further erred in assessing the hardship that the applicants would face upon their return to Mexico.

[3] I am satisfied that the Officer breached procedural fairness by relying on extrinsic evidence in refusing the applicants' H&C application.

[4] For this reason, this application will be allowed.

II. Background

[5] The applicants first arrived in Canada on June 6, 2009. They filed refugee claims and applications for Pre-Removal Risk Assessments, all of which were denied.

[6] Meanwhile, the applicants applied for permanent residence from within Canada on humanitarian and compassionate grounds, on the basis of their establishment in Canada and the hardship they would suffer if returned to Mexico. A Senior Immigration Officer found that the applicants had been very successful in establishing themselves in Canada, but nonetheless refused their application, finding that they would not face unusual, undeserved or disproportionate hardship if returned to Mexico. This decision underlies this application for judicial review.

III. Breach of the Duty of Fairness due to Officer's External Research

[7] The applicants provided evidence to the Officer from Ms. Salinas' treating psychiatrist that her Post-Traumatic Stress Disorder (PTSD) and depression, which resulted from previous trauma in Mexico involving the *Los Zetas* gang, may relapse if she is returned to similar

circumstances in Mexico. The applicants submitted that this would create a disproportionate hardship for the family.

[8] In response to this claim, the Officer conducted independent internet research and found that one of the main agents of persecution identified by the applicants had been arrested by the Mexican police. Based on this, the Officer determined that one of the triggers for Ms. Salinas' PTSD had been removed, thereby reducing her hardship. This information was not disclosed to the applicants for a response prior to a decision being made in relation to their H&C application.

[9] At the hearing, the Crown quite properly conceded that, in light of the Court of Appeal's decision in *Mancia v. Canada (Minister of Citizenship and Immigration)*, [1998] 3 F.C. 461, [1998] F.C.J. No. 565 (C.A.), this information, which was not general in nature, but was highly particular to the applicants' case, should have been disclosed.

[10] The real issue in this application, therefore, is to what extent this information was determinative of the Officer's finding that the applicants would not face unusual, undeserved and disproportionate hardship if returned to Mexico.

[11] The respondent argues that this information was not determinative because the Officer found that the potential hardship the applicants would suffer upon returning to Mexico could be mitigated if they relocated to another region.

[12] I do not accept this argument.

[13] As the Officer correctly indicated, H&C Officers may not consider the risk factors that are considered under sections 96 and 97 of the *Immigration and Refugee Protection Act*,

S.C. 2001, c. 27. Rather, they are required to consider circumstances related to the hardships that affect the foreign national, in this case, how the applicants' experience of having been targeted by the *Zetas* related to the hardship the family would experience upon return.

[14] Seen in this light, the Officer's assessment of whether Ms. Salinas' hardship upon return - in particular, the potential for a relapse of her PTSD even after relocation - cannot be separated from the Officer's belief that one of the main triggers for her PTSD had been removed.

[15] Accordingly, I am satisfied that the novel and significant extrinsic evidence relied upon by the Officer in refusing this application was material to the outcome of this application. The Officer breached procedural fairness by not disclosing this information to the applicants for a response.

[16] Given that this breach of procedural fairness is dispositive of this application, I do not need to address the applicants' remaining arguments.

IV. Conclusion

[17] For these reasons, the application for judicial review is allowed. I agree with the parties that the case does not raise a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, and the matter is remitted to a differently constituted panel for re-determination.

"Anne L. Mactavish"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-576-13

STYLE OF CAUSE: ALEJANDRO ESPINOSA BARRAGAN, SOLEDAD
ADRIANA CABALLERO SALINAS, ANGEL
ALEJANDRO ESPINOSA CABALLERO v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MAY 28, 2014

JUDGMENT AND REASONS: MACTAVISH J.

DATED: JUNE 11, 2014

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