Federal Court  Cour fédérale

Date: 20140602

Docket: IMM-496-13

Citation: 2014 FC 530

Ottawa, Ontario, June 2, 2014

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

SANDRA ELIZABETH MOLINA DE VAZQUEZ, LEANDRO MARIANO VAZQUEZ MOLINA, LAUTARO NAHUEL VAZQUEZ MOLINA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of I. Fonkin, Senior Immigration Officer (the Officer), refusing Sandra Elizabeth Molina de Vazquez's (the principal Applicant) application for permanent residence from within Canada based on humanitarian and compassionate (H&C) grounds. The decision was rendered on November 22, 2012 and communicated to the principal Applicant on January 2, 2013. The application also included two

of the principal Applicant's sons, Leandro and Lautaro, both minors at the time of the decision. The principal Applicant has two other children; Hernan, who was recently deported to Argentina, and Geronimo, a 10 year old Canadian citizen.

[2] On February 21, 2013, Justice Zinn dismissed the motion for a stay of execution. The principal Applicant and her sons were removed on February 23, 2013.

[3] On the basis of the analysis set out below, this application for judicial review ought to be dismissed.

I. Facts

[4] The principal Applicant is a citizen of Argentina. She left Argentina on February 14, 2000, after having allegedly been threatened because her husband's father was involved in crime. She arrived in Canada on February 16, 2000 along with her husband Omar Gustavo Vazquez and her three sons Hernan (born in 1994), Leandro (born in 1996) and Lautaro (born in 1997). They made a refugee claim upon their arrival, but it was dismissed on October 17, 2000 for lack of nexus between their alleged persecution and any of the Convention grounds.

[5] In May 2001, the principal Applicant and her family left Canada for the United States, where they lived until their return to Canada on August 18, 2001. They then made a second refugee claim.

[6] In April 2002, the principal Applicant gave birth to her fourth son, Geronimo. In October 2002, the principal Applicant and her husband separated.

[7] The second refugee claim was denied on January 29, 2003 but the principal Applicant claims she had no knowledge of it because she was no longer living with her husband and she had moved to a different address. The Officer mentioned in his reasons, however, that the principal Applicant applied to this Court for leave to appeal the negative refugee determination in 2003, which was eventually denied.

[8] The Applicants failed to appear for their Pre-Removal interview scheduled for May of 2005. It was only in 2008, when the principal Applicant's ex-husband was deported to Argentina, that she claims she learned of what had happened to their second refugee claim.

[9] In April 2012, the principal Applicant's son Leandro was intercepted by the police. It is at that point in time that the principal Applicant and her family came to the attention of the Canadian Border Services Agency (CBSA). When the principal Applicant contacted CBSA, she was served with a Pre-Removal Risk Assessment (PRRA). By then, she had been working without an employment authorization for eight years (her last one having expired in July of 2004).

[10] The principal Applicant's eldest son, Hernan, also got into trouble with the law, and his PRRA was found to be negative. He was therefore deported in May 2012, after he turned 18.

[11] The principal Applicant's PRRA was rejected on November 21, 2012 on the grounds that she had not rebutted the presumption of state protection and the finding with respect to the existence of an internal flight alternative.

[12] On June 19, 2012, the principal Applicant filed an H&C application on two main grounds: her establishment in Canada and the best interests of her children (BIOC).

[13] The H&C application was dismissed on November 22, 2012. The decision was communicated to the principal Applicant on January 2, 2013. The Applicants filed the present application for leave and judicial review of the H&C dismissal on January 17, 2013.

[14] On February 14, 2013, the Applicants requested a stay of removal, which was dismissed on February 21, 2013. The principal Applicant and her minor sons were removed to Argentina on February 23, 2013.

II. Decision under review

[15] After reviewing the principal Applicant's immigration history in Canada, her employment, volunteer work, and letters in support of her application, the Officer also reviewed her four sons' conditions. The Officer noted, among other things, the psychologist report regarding Geronimo's learning disability and anxiety, Hernan's deportation, Leandro's special education teacher's statements regarding his learning disability, and Lautaro's involvement in soccer.

[16] Regarding the principal Applicant's establishment, the Officer noted that, while she has been living in Canada for over 12 years and has had steady employment, first as a cleaner and then as a pastry specialist, the evidence had not shown that returning to Argentina would lead her to lose her experience, skills and training, or that she would be unable to find similar employment. Also, even if she has been involved in volunteer activities in her community and at her son's school, the principal Applicant has not demonstrated that she would be unable to partake in similar activities in Argentina or that doing so would result in undue hardship.

[17] The Officer also considered the BIOC. Although the Officer acknowledged that Leandro and Lautaro would probably face a phase of adjustment in returning to Argentina, the Officer indicated that they would have many options to finish their high school studies and would receive strong family support. The Officer then referred to various websites describing the high quality of the Argentinean educational system.

[18] The Officer mentioned that English schools are also accessible since English is Argentina's second official language. The Officer also indicated that many special education programs were implemented and could address Leandro's learning disability.

[19] The Officer further stated that Leandro and Lautaro were fluent in Spanish, having been exposed to the Spanish language at home and through their involvement in the Latin community in Canada.

[20] The Officer noted that with regards to Geronimo's situation, being a Canadian citizen, moving to the Argentinean schooling system and culture would probably involve a significant adjustment. However, considering the Argentinean government's efforts to provide a strong educational system, good family support, and keeping in mind that Spanish is the primary language at home, the Officer found that Geronimo's transition would be manageable.

[21] In his summary, the Officer notes:

> The Applicant came to Canada in the year 2000. The Applicant had two refugee hearings and two negative determinations. After the refugee decisions were delivered to the Applicant, CBSA requested that the Applicant appear for a Pre-Removal interview, in 2005. The Applicant did not appear. A warrant was issued against the Applicant for failing to appear. The warrant remained active for approximately 7 years when in April of 2012 the Applicant presented herself before the CBSA as her son Leandro came to CBSA's attention. In the following month, in May, the Applicant's eldest son Hernan was deported to Argentina. In June the Applicant submitted this H&C application. I note that the last valid Work Permit the Applicant was issued expired on 17Jul2004.
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> The Applicant evaded the immigration authorities for approximately 7 years. The Applicant states that she is established in Canada; however, the moderate level of establishment the Applicant achieved was based on working without authorization and by not complying with the immigration laws and policies. Not appearing as requested by the Canadian authorities was a choice the Applicant made and that has brought much stress and anxiety to the Applicant and her children.
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> Decision, p 11; Application Record, p 16

[22] The Officer added that, even if positive weight can be given to the BIOC, it does not, by itself, outweigh all the other factors considered. This resulted in his conclusion that the principal Applicant had not demonstrated that her return to Argentina would result in unusual, undeserved or disproportionate hardship.

III. Issues

[23] This application for judicial review turns essentially on the following three questions:

A. Did the Officer err by relying on four independently researched sources regarding education in Argentina without providing the Applicants with the opportunity to respond?

B. Did the Officer err in his analysis of the best interests of the children?

C. Did the Officer err in his assessment of the Applicants' establishment in Canada?

IV. Analysis

[24] It is well established that the reasonableness standard applies on an application for judicial review of an H&C decision: see e.g., *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 18. As for the first question, it must be assessed on the standard of correctness as it refers to an issue of procedural fairness: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Stephenson v Canada (Minister of Citizenship and Immigration)*, 2011 FC 932 at para 29.

A. *Did the Officer err by relying on four independently researched sources regarding education in Argentina without providing the Applicants with the opportunity to respond?*

[25] Counsel for the Applicants argued that the Officer erred in relying on extrinsic evidence that was not full, fair and accurate, and breached procedural fairness by not giving the Applicants an opportunity to respond. The sources relied upon regarding education in Argentina are four websites, including tourism websites. These websites were used to conclude that the principal Applicant's sons would have access in Argentina to education and special education programs for students with learning disabilities.

[26] The Officer did not disclose these sources to the Applicants, and counsel submitted that even if they are found online and are publicly available, the Applicants could not reasonably be expected to know about them. It is also contended that the evidence relied upon was not full, fair and accurate because the sources are not of the nature referred to in the Operational Manual IP5 – Immigrants Applications in Canada made on Humanitarian or Compassionate Grounds (the Manual) and do not constitute a relevant portrayal of the Argentinean educational system.

[27] I agree with the Applicants' assertion that not everything found online can be considered as publicly available. If it were otherwise, as I stated in *Sinnasamy v Canada (Minister of Citizenship and Immigration)*, 2008 FC 67 (at para 39), it "would impose an insurmountable burden on the applicant as virtually everything is nowadays accessible on line". An officer should therefore be prudent when considering and relying upon "materials that could not be described as the kind of standard documents that applicants can reasonably expect officers to consult" (*Mazrekaj v Canada (Minister of Citizenship and Immigration*), 2012 FC 953 at para 12). In fact, as stated by the Federal Court of Appeal in *Mancia v Canada (Minister of Citizenship and Immigration)*, [1998] 3 FC 461 [*Mancia*] at para 22:

> [W]here the immigration officer intends to rely on evidence which is not normally found, or was not available at the time the applicant filed his submissions, in documentation centres, fairness dictates that the applicant be informed of any novel and significant information which evidences a change in the general country conditions that may affect the disposition of the case.
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> See also: *N.O.R. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1240 at para 28; *Arteaga v Canada (Minister of Citizenship and Immigration)*, 2013 FC 778 at para 24; *Begum v Canada (Minister of Citizenship and Immigration)*, 2013 FC 824 at para 36

[28] That being said, it is not the document itself which dictates whether it is "extrinsic" evidence which must be disclosed to an applicant in advance, but whether the information itself contained in that document is information that would be known by an applicant, in light of the nature of the submissions made: *Jiminez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1078 at para 19; *Stephenson v Canada (Minister of Citizenship and Immigration)*, 2011 FC 932 at paras 38-39. In the case at bar, while the particular websites consulted by the Officer might be considered somewhat unorthodox and are clearly not standard sources, they contained general information on the Argentinean school system which would have been reasonably accessible by the Applicants. They provide general information on the Argentinean school system that could have been found elsewhere by the Applicants, and that information can clearly not be characterized as "novel and significant information which evidences a change in the general country conditions that may affect the disposition of the case", as stated by the Federal Court of Appeal in *Mancia*.

[29] I would also venture to add that the principal Applicant did not rely on her children's learning disabilities in her H&C submissions before the Officer. There was no submission that

the children would not be able to register for school in Argentina, or that they would not receive the proper care and support that they may need to cope with their learning challenges. As noted by the Respondent, the stated hardship was that they would "probably readjust losing time in school" [sic] and would be "deprived of considering any of their already chosen career paths if they are sent back to Argentina. The career opportunities in Argentina are very different of [sic] the Canadian society". In that context, the Officer's findings with respect to Argentina's educational system and its capacity to deal with special needs, was superfluous, to the extent that the issue was not even raised by the Applicants.

[30] The principal Applicant filed a supplementary affidavit with the Court on December 16, 2013, outlining the difficulties she encountered in registering her sons in school and substantiating her claim that special education programs for learning disabilities are unavailable in Argentina. She claimed that if she had been presented with the "extrinsic" evidence about Argentina's educational system, she would then have provided that affidavit to the Officer.

[31] It is trite law that evidence that was not before the decision-maker at the moment of its decision, should not be taken into consideration during the judicial review: *Quiroa v Canada (Minister of Citizenship and Immigration)*, 2007 FC 495 at para 26; *Adil v Canada (Minister of Citizenship and Immigration)*, 2010 FC 987 at para 44; *Shahid v Canada (Minister of Citizenship and Immigration)*, [1993] FCJ No 1333 at para 4. It will be accepted only when issues of procedural fairness are at stake and, if so, when the information is necessary. In the case at bar, the information found in the supplementary affidavit relates to a question of fact, and clearly did not exist prior to the Officer's decision being rendered. Moreover, the information is of no

probative value and purely anecdotal; it is self-serving and the affiant could not be cross-examined. This affidavit is therefore of no value in assessing the reasonableness of the Officer's findings with respect to the Argentinean school system.

[32] For all of the foregoing reasons, I am therefore of the view that the evidence relied upon by the Officer was not extrinsic, and that the Officer did not breach procedural fairness in failing to provide the Applicants with the opportunity to respond.

B. *Did the Officer err in his analysis of the best interests of the children?*

[33] The principal Applicant submits that the Officer's conclusions on BIOC were unreasonable since the particular needs of her sons, were not properly taken into consideration. Even if the Officer had noted that English education and special education programs were offered in Argentina, he did not assess whether the principal Applicant was able to afford this kind of education or if it would effectively be available to her sons. Particularly regarding the principal Applicant's youngest son Geronimo, the principal Applicant considers that the Officer did not take into account his anxiety and the fact that his Spanish linguistic abilities are very limited because he had neither learned to speak nor write Spanish. It was therefore unreasonable, according to the principal Applicant, to conclude that her sons would face a moderate adjustment.

[34] Once again, the findings of the Officer must be assessed in the context of the principal Applicant's submissions on her H&C application. There was indeed evidence on the record (primarily school records and, in Geronimo's case, a psychological assessment) showing the

children's (and especially Geronimo's) special educational needs. However, the H&C submissions do not raise any learning disability; to the contrary, it is stated that Leandro and Lautaro "are very smart students, both have average grades in school they are good athletes" (Applicants' Record, p 52). As for Geronimo, the only mention of his educational challenges is to the effect that he suffers "from anxiety and learning disability in the moderate to severe range" as a result of his mother's problems with regards to her immigration status (Applicants' Record, p 54). The unusual, undeserved or disproportionate hardship alleged on behalf of the children is that they would "probably" have to "readjust losing time in school", and "would be deprived of considering any of their already chosen career paths if they are sent back to Argentina" (Applicants' Record, p 56).

[35] It appears that the Officer considered the educational system in Argentina as a result of the contradiction between the consultant's statements referred to in the previous paragraph and the evidence submitted in support of the H&C application. The Officer's findings with respect to the high quality of the Argentinean educational system are supported by the evidence, and there was nothing before him showing that Geronimo would not have access to a school where his special needs would be addressed.

[36] The Officer did not deny that the children would have to go through an adjustment period. However, he did conclude that the adjustment required for the two older boys would be a moderate one in light of their language abilities, family support and the Argentinean educational system. The Officer also accepted that the adjustment for the younger child may be a significant one, in light of the fact that his Spanish language skills are weak. He was of the view, however,

that it would be manageable given his exposure to the Spanish language and culture at home. These findings are entirely reasonable, and fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 at para 47.

[37] Even if it could be argued that the Officer has underestimated the difficulties that the children would face upon returning to Argentina, particularly for Geronimo, it would hardly be sufficient to override his overall analysis. It is to be remembered that the Officer did conclude that the best interests of the children was a positive factor in the overall assessment of an H&C application. He found, however, that this one positive factor does not outweigh all of the other factors, and such a finding is consistent with the decision of the Supreme Court in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, where Justice L'Heureux-Dubé found (at para 75) that the children's best interests will not always outweigh other considerations.

C. *Did the Officer err in his assessment of the Applicants' establishment in Canada?*

[38] The principal Applicant submits that the Officer's conclusions regarding her establishment in Canada were unreasonable. Not only has she completed a pastry workshop, supporting the fact that she has special training for her employment, but she also provided a specialized service to her employer (i.e. South American pastries). More importantly, she argues that the Officer should not have put as much emphasis on the fact that she overstayed in Canada following the expiry of her work permit in 2004. She relied on *Sebbe v Canada (Minister of Citizenship and Immigration)*, 2012 FC 813, for the proposition that it is "irrelevant whether the

persons knew he or she was subject to removal when they took steps to establish themselves and their families in Canada" (at para 23).

[39] I cannot accede to this argument. First of all, the Officer does not assert that the principal Applicant did not provide evidence of special training; what the Officer says is that she has not provided evidence that she has special training and that her skill set would be lost if she returned to her country of origin, which could, if established, amount to undue hardship (Applicants' Record, p 13).

[40] Second, the principal Applicant provided no evidence at all that her employer would experience hardship if she were removed. In fact, the Officer finds that she works in an occupation where her skills are not unique to Canada. There is no evidence that her employer will have any difficulty at all in replacing her upon removal. Moreover, the principal Applicant has not demonstrated she would not be able to find other employment in Argentina.

[41] I agree with the Applicants that being without status does not automatically lead to the non application of section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27: acting otherwise would render the H&C scheme irrelevant (see e.g., *Benyk v Canada (Minister of Citizenship and Immigration)*, 2009 FC 950 at para 14). If merely remaining in Canada pending the outcome of legal procedures, even after a failed refugee claim for example, may not necessarily be a negative factor, the same cannot be said if an applicant has been flouting the law and ignoring lawful orders to leave the country. I agree with the Respondent that obtaining a discretionary exemption from the application of the usual legal requirements, as a result of

disobeying the law, would fly in the face of immigration policy. As stated by the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 [*Legault*] at para 19:

> In short, the Immigration Act and the Canadian immigration policy are founded on the idea that whoever comes to Canada with the intention of settling must be of good faith and comply to the letter with the requirements both in form and substance of the Act. Whoever enters Canada illegally contributes to falsifying the immigration plan and policy and gives himself priority over those who do respect the requirements of the Act. The Minister, who is responsible for the application of the policy and the Act, is definitely authorised to refuse the exception requested by a person who has established the existence of humanitarian and compassionate grounds, if he believes, for example, that the circumstances surrounding his entry and stay in Canada discredit him or create a precedent susceptible of encouraging illegal entry in Canada. In this sense, the Minister is at liberty to take into consideration the fact that the humanitarian and compassionate grounds that a person claims are the result of his own actions. (emphasis added)

[42] Contrary to the Applicants' argument, *Legault* cannot be distinguished from the case at bar because the applicant in that case had illegally entered Canada to evade prosecution in the United States. It is clear that *Legault* stands for the broader proposition that positive factors may not prevail if an applicant has not acted in good faith and in compliance with Canadian laws. Those who ignore lawful orders to leave the country, contribute to eroding the immigration scheme of Canada and creating a precedent susceptible of encouraging disregard for Canada's laws. When establishment is a function of having deliberately chosen to evade removal, it should not provide an applicant with an advantage over those who have complied with the law. Indeed, this finding underlies the reasons of the motion Judge for dismissing the Applicants' motion to stay their removal.

[43] The Manual specifically addresses the situation in which individuals choose to remain in Canada after flouting Canada's immigration laws, and requires officers to treat it as a negative factor. Furthermore, the Manual sets out certain criteria for consideration, which includes whether the applicant has a good civil record. In the case at bar, it is clear that the Applicants do not have a good civil record based on both their flouting of Canada's immigration laws, which resulted in being underground for seven years, and in the son coming to the attention of Toronto police. The principal Applicant claimed she did not know she was supposed to report for a Pre-Removal interview in 2005. It is hard to believe, however, that she lived all those years in Canada without ever inquiring as to her status, especially after learning that her husband had been removed. She was at the very least negligent (bordering on wilful blindness) in not inquiring about regularizing her status in Canada, and it appears that she only submitted her H&C application once having been caught through the actions of the police and then the CBSA.

[44] I find, therefore, that the Officer did not err in taking this factor into consideration and did not give it overriding weight, as argued by the Applicants. The sole factor given positive consideration was the BIOC. Despite characterizing the principal Applicant's establishment as "moderate", the Officer pointed out that her skills were not unique to Canada and that they would not be lost upon removal, that schools and newcomer facilities are not reliant on the principal Applicant for her services, and that she is not established in Canada to a degree that should she return to her country of origin, she would suffer unusual, and undeserved or disproportionate hardship due to severing ties with Canada. In those circumstances, the Officer could give significant weight to the fact that her establishment was accumulated as a result of

having evaded removal and remaining underground until caught by police on an unrelated matter.

V. Conclusion

[45] For all of the foregoing reasons, I come to the conclusion that this application for judicial review must be dismissed. No question for certification was proposed by the parties, and none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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