Federal Court  Cour fédérale

Date: 20141208

Docket: IMM-5187-13

Citation: 2014 FC 1178

Ottawa, Ontario, December 8, 2014

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

NANCY GONZALEZ GONZALEZ
REGYNA MIRANDA VARGAS GONZALEZ
(by her litigation guardian)

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT & REASONS

[1] This is an application to set aside a decision by a Canada Border Services Agency officer (the "Officer"), who under section 48 of the *Immigration and Refugee Protection Act*, 2001, c 27 (the "IRPA"), refused to defer removal of the Applicants to Mexico pending determination by the Minister of Citizenship and Immigration of their application for humanitarian and compassionate ("H&C") relief under section 25 of the IRPA.

[2] This is a story of a mother and her disabled daughter and Canadian born infant being returned to Mexico. Her disabled daughter's ability to access health care is the central factor in this case.

I. Background

[3] The Officer refused to grant a deferral of the Applicants removal order to Mexico until the outcome of a pending H&C application.

[4] The Applicants' efforts to remain in Canada are extensive and have occurred over years with the court's frequent involvement. The minor applicant, Regyna, and her mother, Nancy Gonzalez, are citizens of Mexico who arrived in Canada on January 16, 2009. Her infant sister, 7 month old Hanna, is a citizen of Canada. Nancy Gonzalez made a Convention refugee claim because of domestic violence but the application was denied. Subsequently the Applicants' Pre-Removal Risk Assessment ("PRRA") and H&C were also rejected in June 2010 and November 2011.

[5] The Applicants filed a fresh H&C with new evidence in April 2012, alleging the first H&C was mishandled by the immigration consultant. The second H&C application is still pending.

[6] Concurrent to this, the Applicants requested a deferral of their removal scheduled for July 2012. The deferral was denied but the judicial review application of that decision was allowed by Mr. Justice O'Keefe and the request for deferral was returned for reconsideration. The deferral of

removal was denied again on August 12, 2013, and the present application is a judicial review of that denial. Mr. Justice Manson ordered a stay of the removal order on August 14, 2013, until the outcome of the present judicial review application.

[7] Seven year old Regyna suffers from multiple severely debilitating conditions that require constant care. She has been diagnosed with cerebral palsy, severe global developmental delay, static encephalopathy, and sensorineural hearing loss. Because of these conditions, Regyna has severe motor impairment, cannot sit independently, has poor head control and is non-verbal.

[8] The Applicants submitted numerous medical opinions attesting to Regyna's serious medical conditions and evidence about the specialized type of instruction she received at school. Regyna attends a nutritional clinic, feeding therapy clinic, neurology clinic, and audiology clinic. The CIC Health Management Branch also provided opinions on Regyna's conditions based on the medical evidence provided. The Health Management Branch opinion indicated that the services of neurologists, paediatricians, and occupational therapists are available in Mexico as well as special education and well-equipped pharmacies.

II. Issue

[9] Was the decision of the Officer to refuse the Applicants' deferral of removal application reasonable per *Dunsmuir v New Brunswick*, 2008 SCC 9?

III. Analysis

[10] Two arguments are advanced in support of setting aside the decision of the removal Officer.

[11] The first argument is that the decision was unreasonable in that it took into account that there may be medical treatment available for Regyna if she returned to Mexico, but erred by concentrating on the availability of services and not how accessible they would be given the manner the Mexican healthcare system addresses the needs of physically or mentally handicapped children.

[12] The second argument is that the decision did not fairly account for their pending, second, H&C application filed.

A. *Medical Treatment*

[13] The Applicants argue that the Officer should have assessed the "access v. availability" issue for the Mexican health care system because that is a short term consideration for the Officer whereas the long term question of how Regyna might overcome barriers to accessing care are properly assessed by the H&C officer.

[14] The Applicants' submitted a large volume of documentation impugning the Mexican healthcare system as not being able to properly care for Regyna because of Mexico's lack of resources and the approach to the issue.

[15] The Officer without the expertise to assess the availability of healthcare in Mexico, asked the Senior Medical Officer, Health Management Branch, to review the documentation. In response, the Senior Medical Officer advised that there was medical care available for the needs of Regyna and that she could travel by air.

[16] The Applicants argue that the Officer erred by not assessing the documentary evidence provided by the Applicants themselves regarding the healthcare in Mexico, but instead they sought the opinion of CIC Health Management Branch. The submissions of the applicant is that the Officer "weighing of these repeated opinions that state, without reasoning, that care is available against volumes of evidence indicating that care will not be immediately accessible, and the reliance on the opinion that Regyna is fit to fly" is a reviewable error.

[17] The Applicants disagree with the Senior Medical Officer's assessment of the evidence.

[18] I will not re-weigh the Senior Medical Officer's evidence even though the Applicants do not agree with him. The Officer relying on the CIC Health Management Branch advice is not an error as it was beyond her expertise.

[19] The Officer found that the issues raised mirror what was raised in the RPD and PRRA process and refused to defer removal.

B. *Pending H&C application*

[20] The second ground on which it is said that the Officer's decision should be set aside, namely the pending H&C application, has no merit. The Officer observed that the factors advanced in the pending H&C application were similar to those advanced in the first H & C. The Applicants contend that the first H&C application was inadequately prepared.

[21] The Respondent argued that the Officer determining that the second H&C application was not imminent so it was inappropriate to defer. The second H&C was submitted in April 2012 and the deferral was considered August 12, 2013, but as late as July 22, 2013 the Applicants submitted 140 more pages in material.

[22] In this regard, the observations of Mr. Justice Zinn in *Jonas v Canada (Citizenship and Immigration)*, 2010 FC 273 at para 21 are directly apposite:

> In this case, the officer did consider the existence of the pending H&C application and it was open to the officer to consider the imminence of a decision in the pending H&C application. In many cases, the imminence of a decision may be a reflection of whether the application had been filed in a timely manner. In this case, the officer does not indicate whether, in his view, the H&C application was filed in a timely manner; however, it is of note that the applicant did not file it until almost five years after the rejection of his refugee claim by the RPD. The officer concluded that a decision was not imminent even though the application had been transferred to the local CIC Office. The officer's determination that the pending H&C application did not warrant his exercise of discretion was reasonable.

[23] The case law is clear that the existence of a pending H&C application does not, absent special circumstances, warrant a deferral. The Federal Court of Appeal made it clear, in *Baron v*

Canada (Minister of Public Safety and Emergency Preparedness), 2009 FCA 81 at para 49, that the boundaries of an enforcement officer's discretion are narrow and circumscribed. The Court of Appeal notes that if applicants are successful in their H&C application, they can be made whole by readmission.

[24] The weight to be assigned to a pending H&C application is a matter of discretion when the officer is aware of the H&C application (*Khamis v Canada (Citizenship and Immigration)*, 2010 FC 437 at para 29).

[25] In this case, given the Applicants' lengthy immigration history, and the delay between the refusal of the first H&C and the initiation of the second H&C makes the decision before me of the Officer not to defer by reason of the pending H&C, justifiable and reasonable.

[26] In sum, I cannot conclude that the decision is unreasonable. The Officer applied the correct test, considered all of the evidence and submissions of the Applicants and rendered a decision that falls "within the range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). There is no reviewable error.

[27] The application for judicial review is dismissed.

[28] No question for certification has been proposed and none arises.

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. No question for certification has been proposed and none arises.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5187-13
STYLE OF CAUSE:	GONZALEZ ET AL V MPSEP
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 6, 2014
JUDGMENT AND REASONS:	MCVEIGH J.
DATED:	DECEMBER 8, 2014

APPEARANCES:

Mr. Laura Brittain	FOR THE APPLICANTS
Mr. Michael Butterfield	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Refugee Law Office Toronto, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT