Federal Court Cour fédérale

Date: 20170519

Docket: IMM-4417-16

Citation: 2017 FC 517

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, May 19, 2017

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

RENE MUJANAYI BAKENGE
&
GODELIVE MUKENDI NDEKENYA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] Rene Mujanayi Bakenge and Godelive Mukendi Ndekenya, a Congolese couple who are 77 and 66 years old, respectively, are seeking judicial review of the decision to refuse their

application for an exemption, based on humanitarian and compassionate considerations, from the requirement to file their permanent residence application from outside Canada.

[2] They allege that the officer erred in his analysis of the best interests of the children of their oldest son, a Canadian resident, and in his analysis of the risks and adverse conditions that prevail in the Democratic Republic of the Congo [DRC].

II. Preliminary issue

[3] The respondent argues that the applicants' application had a substantive defect that justified its dismissal, as the applicants did not file an affidavit verifying the facts relied on to support the application, as required under paragraph 10(2)(*d*) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [Rules].

[4] As the application for leave was granted despite that substantive defect, I prefer to address the merit of the application for judicial review, rather than dismiss it on that ground alone.

III. Facts

[5] The applicants arrived in Canada on November 16, 2013, and filed a claim for refugee protection on July 8, 2014. That claim was dismissed by the Refugee Protection Division and by the Refugee Appeal Division, and their application for leave and judicial review was dismissed by this Court.

[6] On July 15, 2016, the applicants filed an application for permanent residence based on humanitarian and compassionate considerations, which was dismissed on September 30, 2016, and is the subject of this application. They cited several grounds, only two of which are relevant for the present purposes. Their oldest son is now a single father and, because he works seven days a week, he counts on them to help him raise and look after his children, aged 16 and 13. Moreover, given the current situation in the DRC that justifies a moratorium on removals to that country by the Government of Canada, their removal would allegedly jeopardize their safety. As well, upon their return, they would be seen as being rich or as witches and would thus be persecuted.

IV. Impugned decision

[7] The immigration officer concluded that the factors cited by the applicants were not sufficient to support their application for an exemption under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [IRPA].

[8] The officer considered the best interests of the applicants' grandchildren, the possibility of the applicants having access to health care in the DRC, their degree of settlement in Canada, and the risks and adverse conditions in their country of origin. As the applicants are only challenging the first and last of these factors, only they will be considered.

[9] The officer attached importance to the letters sent by the applicants' grandchildren, which explain their attachment and the positive impact that the applicants have on their lives. However, he noted that the applicants have been in Canada for less than three years and have not shown

that their grandchildren would suffer any harm, other than the usual impacts of a separation, if the applicants were to return to the DRC. If that were to happen, they would still be able to maintain a long-distance relationship through social networks and information technology. After weighing all the evidence submitted by the applicants, the officer concluded that it did not demonstrate that the best interests of the applicants' grandchildren would be compromised by their return to the DRC.

[10] The officer then considered the applicants' allegations regarding the risks they would face if they were removed. Apart from the disastrous general conditions in the country, the officer noted that the applicants claim that they fear returning to the DRC primarily for two personal reasons: they could be seen as being rich or as witches and they are wanted by the Congolese police. However, the officer noted an absence of any evidence to support those two allegations. Although he recognized the general insecurity that prevails in the DRC, the officer concluded that the applicants had not demonstrated a link between that insecurity and their personal situation.

V. Issue and standard of review

[11] In my view, this application for judicial review only raises one issue:

> *Did the officer err in his assessment of the evidence and the various factors justifying the granting of an application for permanent residence based on humanitarian and compassionate considerations?*

[12] Decisions based on section 25 of the IRPA are intrinsically discretionary and, as such, are subject to the reasonableness standard of review (*Kanthasamy v. Canada (Citizenship and Immigration*), 2015 SCC 61 at paragraph 10).

[13] When the reasonableness standard applies, this Court's role is to determine whether the decision-maker's findings fall within a "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 47). As long as "the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility," this Court cannot substitute its own view of a preferable outcome (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12; [2009] 1 SCR 339 at paragraph 59).

VI. Analysis

> *Did the officer err in his assessment of the evidence and the various factors justifying the granting of an application for permanent residence based on humanitarian and compassionate considerations?*

[14] In my opinion, the officer's decision is reasonable. He assessed the best interests of the children, all the applicants' allegations regarding the risks and adverse conditions in the DRC, the applicants' degree of settlement in Canada, and their argument that they would not have sufficient access to medical or health care in the DRC. He assessed it all in light of the evidence and reasonably determined that the applicants had not discharged the burden of proof to show that their circumstances justified an exemption under subsection 25(1) of the IRPA.

[15] An application based on that provision is an exceptional measure. It places the burden of proof on applicants to show that they would face "unusual and undeserved" or "disproportionate" hardship if their application were not granted and if they had to file their application for permanent residence from outside Canada (*Kanthasamy*, above, at paragraph 26). The Supreme Court stated:

> … "Unusual and undeserved hardship" is defined as hardship that is "not anticipated or addressed" by the *Immigration and Refugee Protection Act* or its regulations, and is "beyond the person's control". "Disproportionate hardship" is defined as "an unreasonable impact on the applicant due to their personal circumstances" …

[16] The Supreme Court added that the expression "unusual and undeserved or disproportionate hardship" does not create three separate thresholds. Rather, these factors "should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision" (*Kanthasamy*, above, at paragraph 33). The elements that justify an exemption thus vary based on the specific facts and context of each application (*Kanthasamy*, above, at paragraph 25).

[17] In my opinion, that is what the officer did in this case.

(1) Best interests of the children

[18] The applicants allege that the officer erred in his examination of the best interests of the children on two grounds: first, they submit that the officer failed to consider that the father of the minor children is a single father and that the children benefit from having their grandparents near them; second, they allege that the officer erred in finding that the applicants had not

demonstrated that they would be unable to maintain a relationship with their grandchildren using information technology. In support of that point, they cite *Somera Duque v. Canada (Citizenship and Immigration)*, 2007 FC 1367, in which this Court found that it was unreasonable for an immigration officer to conclude that a father could remain in contact with his two-year-old daughter by telephone.

[19] With respect, I do not share the applicants' position. In my view, the officer appropriately analyzed the impact of the applicants' return to the DRC on their grandchildren, based on the evidence before him. He was alert, alive and sensitive to the interests of the applicants' grandchildren (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraph 75; *Kanthasamy*, above, at paragraph 38).

[20] Although the applicants' son says he is a single parent, the evidence on record shows instead that he has shared custody of his children with their mother. In my view, that is very different from being a single parent. Despite that fact, the officer noted the following:

> [TRANSLATION]
> I note that the applicants are involved in the family of their oldest son, who is a single parent (Decision, Tribunal Record, at page 5).

[21] The officer, therefore, considered the evidence on record and the fact that the applicants could provide some assistance to their son when his children are with him. He also noted that the children testified that, over the last three years, they have come to know their grandparents and enjoy their presence. He clearly acknowledged the grandparents' role in the lives of their grandchildren and their son.

[22] However, the officer noted that the applicants have been in Canada for less than three years and that no evidence on record shows that their grandchildren would suffer any particular harm if they were to return to the DRC.

[23] The officer also found that there was no indication that the applicants would be unable to maintain a relationship with their grandchildren using information technology.

[24] In that regard, I have difficulty seeing the parallel that the applicants have tried to draw between their situation and that of a father of a two-year-old child in *Somera Duque*. The need of a two-year-old child to be in close and constant contact with the father cannot be compared to the need of teenagers to maintain equally close contact with their grandparents. In the situation before us, the children in question would remain in Canada in the joint and shared custody of both their parents. We, therefore, cannot infer from *Somera Duque* that it was unreasonable to conclude that the relationship that the applicants developed over the last few years with their grandchildren could be continued long distance.

[25] Indeed, the applicants are asking me to reassess the evidence and adopt their preferred solution, which is not the role of this Court (*Khosa*, above, at paragraph 59).

[26] I am, therefore, of the opinion that the officer could reasonably conclude that he was not satisfied that the best interests of the applicants' grandchildren would be compromised by their return to the DRC.

(2) Risks and adverse conditions in the DRC

[27] The applicants also argue that the officer erred in his analysis of the risks and adverse conditions in the DRC, by applying the criteria set out in section 97 of the IRPA or applied as part of a pre-removal risk assessment [PRRA] application. They submit that the officer relied on the absence of a link between the alleged risks and the applicants' personal situation to give little weight to the evidence filed. In their opinion, that amounted to applying a higher standard than appropriate for an application for humanitarian and compassionate considerations (*Diabate v. Canada (Citizenship and Immigration)*, 2013 FC 129 at paragraph 34; *Shah v. Canada (Citizenship and Immigration)*, 2011 FC 1269 at paragraph 73).

[28] I am rather of the opinion that the officer considered the evidence presented and the prevailing conditions in the DRC, and that he did not conduct a risk analysis using the criteria set out in sections 96 and 97 of the IRPA.

[29] It must be recalled that the applicants alleged that they feared for their safety on three specific grounds:

- They could be seen as being rich or as witches;
- They would be wanted by Congolese police; and
- They would be victims of the general insecurity that prevails in the DRC.

[30] The applicants did not challenge the officer's review of the first two grounds.

[31] Regarding the third ground, the officer stated that he was sensitive to the unstable situation in the DRC, but noted that the applicants did not demonstrate how that situation would affect them in particular.

[32] The burden of proof was unquestionably on the applicants to demonstrate that their fear was well-founded. In *Piard v. Canada (Citizenship and Immigration)*, 2013 FC 170, this Court concluded that the analysis under subsection 25(1) of the IRPA must be in light of an applicant's personal situation (*Piard*, above, at paragraph 18). In it, Mr. Justice Boivin cites with approval the words of Mr. Justice Shore in *Lalane v. Canada (Citizenship and Immigration)*, 2009 FC 6, at paragraph 38:

> [38] The allegation of risks made in an H&C application must relate to a particular risk that is personal to the applicant. The applicant has the burden of establishing a link between that evidence and his personal situation. Otherwise, every H&C application made by a national of a country with problems would have to be assessed positively, regardless of the individual's personal situation, and this is not the aim and objective of an H&C application. That conclusion would be an error in the exercise of the discretion provided for in section 25 of the IRPA, which is delegated to, *inter alia*, the PRRA officer by the Minister.
>
> [Citations omitted.]

[33] I am of the opinion that that is exactly what the officer did in the case before us. The officer identified the factors raised by the applicants, he considered the evidence submitted in support of them, and he concluded that, without a link between the adverse conditions in the DRC and the applicants' personal situation, he could not place very much weight on the objective evidence submitted. In other words, the evidence of the general situation in the DRC

did not allow him to determine that the applicants would face “unusual and undeserved” or “disproportionate” hardship if their application was not granted.

[34] There is nothing in the officer’s reasons that lead me to conclude that he drew an incorrect conclusion based on the criteria normally reserved for application of section 97 of the IRPA.

[35] The officer’s decision is, therefore, reasonable in all respects.

VII. Conclusion

[36] For the above-mentioned reasons, the applicants’ application for judicial review will be dismissed. The parties did not submit any questions of general importance for certification, and I am of the opinion that this matter has not raised any.

JUDGMENT in IMM-4417-16

THIS COURT'S JUDGMENT is that:

1. The applicants' application for judicial review is dismissed;

2. No question of general importance is certified.

"Jocelyne Gagné"
Judge

Certified true translation
This 17th day of October 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4417-16
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