Federal Court  Cour fédérale

Date: 20171106

Docket: IMM-1911-17

Citation: 2017 FC 1003

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, November 6, 2017

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

CARLOS EDUARDO BERMUDEZ FRANCO
IRÈNE DOUAIHI DE BERMUDEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants are seeking judicial review of an immigration officer's decision to deny them the opportunity to apply for permanent residence from within Canada, rather than from Venezuela, their country of citizenship. This application for judicial review, made under section 72 of the *Immigration and Refugee Protection Act* (SC 2001, c 27) [IRPA], must be decided on the basis of reasonableness. The parties agree on this point, and the Court shares this

opinion. There is a wealth of jurisprudence on the standard of review, and I will simply refer to *Cadet v. Canada (Citizenship and Immigration)*, 2016 FC 1242.

I. Facts

[2] This case is straightforward. The Applicants are the grandparents of a girl born in Canada one year ago, whose father is a permanent resident and whose mother is Canadian. Over the past few years, the Applicants have travelled considerably, including many times to Canada as visitors, as well as on cruises and to Europe. They came to Canada in August 2016 as visitors and are now seeking permanent residence without having to apply from Venezuela (subsection 11(1) of the IRPA). To do so, they cite humanitarian and compassionate considerations under section 25 of the IRPA.

[3] In addition to their granddaughter's parents, the Applicants have a son who is studying in Canada and who is said to want to obtain permanent residence in this country.

[4] Essentially, the application is based on the fact that the Applicants have two sons in Canada, and they rely primarily on the granddaughter's best interests, along with their establishment in Canada and the social and economic situation in Venezuela, to support their argument that there are sufficient humanitarian and compassionate considerations.

II. The decision for which judicial review is requested

[5] The decision-maker attentively reviewed the situation. He provided reasons for the decision. He reviewed the three factors proposed by the Applicants. First, he rejected the argument that the Applicants have some degree of establishment in Canada. They do not speak either official language, and their ages (both are in their early sixties) suggest that they are unlikely to be able to work. In fact, Ms. De Bermudez has not worked since 1984. Furthermore, in the last four years, they report having taken some thirty trips to Miami, Montréal, Aruba and Europe, as well as several cruises, which demonstrates a certain financial ease that is reflected by the opportunity to take what appear to be extended vacations. Clearly, work is no longer their top priority. Ultimately, establishment in Canada cannot be considered a significant factor.

[6] With respect to the granddaughter's best interests, there is no doubt that it is always best to reunite families rather than to separate them. That is not denied. However, it is the child's best interests that must be considered, and not those of the parents, who testify that they appreciate the grandparents' help. The immigration officer considered that, at such a young age, it could not be demonstrated that the granddaughter's best interests were in themselves sufficient humanitarian and compassionate considerations to allow the grandparents to apply for permanent residence from within Canada.

[7] Finally, even though the social and economic situation in Venezuela has seriously deteriorated in recent years, the Applicants' argument would mean that any person in Canada who is outside their country of citizenship where the social situation has become difficult should

benefit from humanitarian and compassionate considerations to stay in Canada. That is clearly not the state of the law. The officer did express clear sympathy toward the Applicants and reminded them that they could be sponsored, or could even apply for extended visitors' visas to be able to participate in the lives of their family and granddaughter in Canada.

III. Analysis

[8] Some tend to read a remedy for all ills into the text of subsection 25(1) of the IRPA. As soon as a degree of sympathy can be raised, they seek a favourable decision because this sympathy would become a humanitarian and compassionate consideration.

[9] As the Supreme Court of Canada noted in *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61; [2015] 3 SCR 909 [*Kanthasamy*], subsection 25(1) of the IRPA, which the Applicants cited in that case, "[was not] intended to be an alternative immigration scheme" (paragraph 23). Subsection 25(1) provides only a discretionary authority to exempt a foreign national from the obligations of the IRPA if there are sufficient humanitarian and compassionate considerations. These humanitarian and compassionate considerations appear to be the ones recognized by the Court in *Kanthasamy*:

> [13] . . . The first Chair of the Board, Janet Scott, held that humanitarian and compassionate considerations refer to "those facts, established by the evidence, which would excite in a reasonable man [*sic*] in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the Immigration Act": p. 350. This definition was inspired by the dictionary definition of the term "compassion", which covers "sorrow or pity excited by the distress or misfortunes of another, sympathy": *Chirwa*, at p. 350. The Board acknowledged that "this definition implies an element of subjectivity", but said there also

> had to be objective evidence upon which special relief ought to be granted: *Chirwa*, at p. 350.

[10] The Court's decision in *Kanthasamy* sought first and foremost to contextualize a test presented in guidelines that was widely used by officials in these matters and that likely had the effect of being substituted for the wording of the statute itself. The guidelines required that there be "unusual and undeserved" or "disproportionate" hardship; instead of seeking to apply these descriptions to a given situation, as administrative decision-makers regularly did, the Court reiterated that the guidelines should be treated as descriptive. They do not create three new thresholds separate and apart from the humanitarian and compassionate considerations already provided for in subsection 25(1) of the IRPA. However, the fact remains that the threshold under the IRPA itself is high.

[11] In fact, the Court recognizes that "[t]here will inevitably be some hardship associated with being required to leave Canada. This alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under s. 25(1)" (paragraph 23).

[12] According to the immigration officer, this indicates that the child's interests in having her grandparents in the area, while desirable, are not in themselves sufficient humanitarian and compassionate considerations. Likewise, the fact that the Applicants would have to leave when their visitors' visas expire, whether the visas are for a brief or extended stay, involves its share of hardship, but it is no different from the hardship experienced by any person who would prefer to stay in Canada, but has no status here.

[13] In my view, the immigration officer's findings are reasonable. The reviewing court has a limited role. That role is certainly not to substitute the Court's discretion for that which Parliament conferred on the administrative decision-maker. The role of the reviewing court is to examine the lawfulness of the administrative decision. In fact, a decision that is unreasonable is, by definition, unlawful (*Mission Institution v. Khela*, 2014 SCC 24; [2017] 1 SCR 502, at paragraph 74). The administrative decision must be flawed in its justification, transparency or intelligibility before it is appropriate to intervene. Similarly, there would be grounds to intervene if the decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. That is the burden on the Applicant for judicial review.

[14] This has not been demonstrated in this case. I in no way deny that there may be cases where the grandparents' presence would be in the child's best interests and would carry considerable weight. I share the opinion of my colleague Justice Diner, who wrote in *Zlotosz v. Canada (Immigration, Refugees, and Citizenship)*, 2017 FC 724 that "[t]he mere fact that the Officer found that the family has 'forged strong ties' and are very close does not render a positive outcome a foregone conclusion. This is particularly so in the circumstances where the Applicants are neither the child's primary caregivers nor financial providers (*Mack* at paragraphs 18, 20; *Louisy* at paragraph 13)" (paragraph 30). That is certainly the case here. It was in no way alleged, much less demonstrated, that these grandparents play as primary a role as that of the parent caregivers who are raising their granddaughter and providing for her needs.

IV. Conclusion

[15] This case in no way entails considering the situation of a child born in Canada who would have to accompany his or her parents to a country where the economic and social situation is particularly difficult. Rather, it is a matter of wanting the grandparents to be involved in the child's life in Canada. As desirable as that may be, the immigration officer's finding that this did not amount to sufficient humanitarian and compassionate considerations is perfectly reasonable. Consequently, the application for judicial review is dismissed. The parties and the Court agree that there is no serious question of general importance to be certified.

JUDGMENT in IMM-1911-17

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

No question is certified.

"Yvan Roy"
Judge

Certified true translation
This 11th day of September 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

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