Date: 20090424

Docket: IMM-2705-08

Citation: 2009 FC 412

Ottawa, Ontario, April 24, 2009

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

REINALDO ANTONIO PAZ
DELMI CECILIA REYES PAZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

I. Introduction

[1] This is an application under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of an immigration officer's decision on May 6, 2008 refusing to exempt the applicants on humanitarian and compassionate (H&C) grounds from the obligation to obtain an immigrant visa from outside Canada. Such an exemption would have made it possible to process their application for permanent residence in Canada.

II. Facts

[2] The applicants are citizens of El Salvador. They arrived in Canada on December 9, 2001.

[3] December 11, 2001, the applicants applied for refugee protection based on Mr. Paz's fear of persecution from his former employers.

[4] June 11, 2003, the RPD denied the applicants' refugee claim. The applicants applied for leave to appeal.

[5] March 25, 2004, the application for judicial review was allowed, resulting in the decision being returned to the RPD for redetermination.

[6] October 1, 2004 a new RPD board found that the applicants were not convention refugees or persons in need of protection. The applicants applied for leave to judicially review the decision. The application was denied.

[7] September 15, 2005, the applicants sought an exemption from the in Canada selection criteria based on humanitarian and compassionate grounds. The applicants based their application for exemption on the grounds that they are well established in Canada, and that they fear returning to El Salvador.

[8] In a decision of May 6, 2008, the immigration officer found that the applicants had not established sufficient humanitarian and compassionate grounds to justify the processing of their

application from within Canada. The officer also found that obliging the applicants to return to El Salvador in order to make their applications for permanent residence would not result in disproportionate hardship.

[9] January 20, 2009, Justice Hanson granted leave for judicial review of the May 6, 2008 and stayed the applicants' deportation until the matter has been decided.

III. Issue

[10] In their submissions, the applicants contend that the officer erred in the following ways:

i. The officer failed to analyze the risk raised by the applicants that had not previously been raised before the RPD boards, that of the targeting of people returning to El Salvador from abroad by the public who perceive them as being wealthy. The officer erred in not assessing this risk separately from the other risks raised by the applicants.
ii. The obligation to provide adequate reasons was not met, as the officer simply recited excerpts from the submissions of the parties and the evidence, and stated a conclusion. The officer should have set out findings of fact and the evidence these findings were based on.
iii. The officer misapplied the test for humanitarian and compassionate relief.
iv. The officer preferred his own evidence over contradictory evidence without providing reasons.
v. The officer applied the wrong standard when evaluating the applicants' level of establishment in Canada.

(Applicants' further memorandum of argument)

[11] Adversely, the respondent argues that the officer exercised her discretion in good faith, and that the role of the Court, when asked to review a decision of a discretionary nature such as one to grant or refuse to grant an exemption based on humanitarian and compassionate grounds, is limited

to ensuring that the decision maker exercised her discretionary power in good faith and in conformity with nature justice. The Court must also ensure that the decision maker assessed all relevant considerations and did not rely on irrelevant ones, but must not re-weigh the factors considered by her.

IV. Analysis

Legislative Regime

[12] Section 11(1) of IRPA requires that persons who wish to settle in Canada must, prior to their arrival in Canada, submit an application from outside Canada and qualify for and obtain a permanent resident visa. This principle is a cornerstone of Canada's immigration legislation (*Singh v. Canada (Citizenship and Immigration)*, 2009 FC 11).

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**11.** (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

[13] Section 6 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations), reiterates this obligation.

6. A foreign national may not enter Canada to remain on a permanent basis without first obtaining a permanent resident visa.	**6.** L'étranger ne peut entrer au Canada pour s'y établir en permanence que s'il a préalablement obtenu un visa de résident permanent.

[14] Section 25 of IRPA gives the Minister the discretion to approve deserving cases for processing within Canada based on humanitarian and compassionate grounds.

25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	**25.** (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

[15] To obtain this exemption, the applicants must prove that they would face unusual, undeserved or disproportionate hardship if they were required to file their respective applications for permanent residence from outside the country (*Doumbouya*, above, at paragraph 8; *Akinbowale v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1221, at paragraphs 14 and 24; *Djerroud v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 981, 160 A.C.W.S. (3d) 881, at paragraph 32). Recourse to an exemption from the requirement that one applies for

permanent residency from outside of Canada based on humanitarian and compassionate grounds is clearly exceptional, as evidenced by the wording of Section 25 IRPA (*Doumbouya v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1186, 325 F.T.R. 186, at paragraph 6).

[16] An application for permanent residence made from within Canada sets in motion a two-step decision-making process, in which the officer must first determine whether the applicant should be exempted from the statutory obligation set out at 11(1) IRPA that requires foreign nationals to apply for an immigrant visa before coming to Canada, and second verify whether the applicant meets the requirements established by the IRPA (*Mutanda v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1101, 148 A.C.W.S. (3d) 977; *Egbejule v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 851, 140 A.C.W.S. (3d) 363). The validity of this two-step process was recently confirmed by the Federal Court of Appeal in *Espino v. Canada*, 2008 FCA 77, 164 A.C.W.S. (3d) 680.

[17] Moreover, the decision-making process based on humanitarian and compassionate grounds is entirely discretionary and seeks to determine whether the granting of an exemption is warranted (*Doumbouya*, above, at paragraph 7; *Quiroa v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 495, 312 F.T.R. 262, at paragraph 19).

[18] To obtain an exemption, persons applying for an exemption based on humanitarian and compassionate grounds must prove that they would face unusual, undeserved or disproportionate

hardship if they were required to file their respective applications for permanent residence from outside the country (*Doumbouya*, above, at paragraph 8; *Akinbowale*, above; *Djerroud*, above).

[19] Justice de Montigny in *Serda v. Canada (Minister of Citizenship and Immigration)*, (2006 FC 356, 146 A.C.W.S. (3d) 1057, cited with approval in *Doumbouya*, above, at paragraph 9) discussed the meaning of the words "unusual, undeserved or disproportionate" in this context:

> In assessing an application for landing from within Canada on Humanitarian and Compassionate grounds made pursuant to section 25, the Immigration Officer is provided with Ministerial guidelines. Immigration Manual IP5 - Immigration Applications in Canada made on Humanitarian or compassionate Grounds, a manual put out by the Minister of Citizenship and Immigration Canada, provides guidelines on what is meant by Humanitarian and Compassionate grounds . . .

[20] The IP5 Manual goes on to define "unusual and undeserved" hardship and "disproportionate" hardship. It states, at paragraphs 6.7 and 6.8:

6.7 Unusual and underserved hardship	**6.7 Difficulté inhabituelle et injustifiée**
Unusual and undeserved hardship is:	On appelle difficulté inhabituelle et injustifiée:
- the hardship (of having to apply for a permanent resident visa from outside of Canada) that the applicant would have to face should be, in most cases, unusual, in other words, a hardship not anticipated by the Act or Regulations; and	- la difficulté (de devoir demander un visa de résident permanent hors du Canada) à laquelle le demandeur s'exposerait serait, dans la plupart des cas, inhabituelle ou, en d'autres termes, une difficulté non prévue à la Loi ou à son Règlement; et
- the hardship (of having to apply for a permanent resident visa from outside of Canada) that the applicant would face should be, in most cases, the result of circumstances beyond the person's control	- la difficulté (de devoir demander un visa de résident hors du Canada) à laquelle le demandeur s'exposerait serait, dans la plupart des cas, le résultat de circonstances échappant au contrôle de cette personne.
6.8 Disproportionate hardship	

	6.7[sic] Difficultés démesurées
Humanitarian and compassionate grounds may exist in cases that would not meet the "unusual and undeserved" criteria but where the hardship (of having to apply for a permanent resident visa from outside of Canada) would have a disproportionate impact on the applicant due to their personal circumstances.	Des motifs d'ordre humanitaire peuvent exister dans des cas n'étant pas considérés comme "inusités ou injustifiés", mais dont la difficulté (de présenter une demande de visa de résident permanent à l'extérieur de Canada) aurait des répercussions disproportionnées pour le demandeur, compte tenu des circonstances qui lui sont propres.

[21] Hardship that is inherent in having to leave Canada is not enough to constitute disproportionate hardship (*Doumbouya*, above, at paragraph 10).

Standard of Review

[22] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to “ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of [deference] to be accorded with regard to a particular category of question.”

[23] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the Supreme Court of Canada established that reasonableness is the appropriate standard of review for H&C application decisions. The Court stated at paragraph 62:

> **¶ 62** … I conclude that considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language. Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court – Trial Division and the Federal Court of Appeal in certain circumstances, and the individual rather than polycentric nature of the decision, also suggest that the standard should not be as deferential as "patent unreasonableness". I conclude, weighing all these factors, that the appropriate standard of review is reasonableness *simpliciter*.
>
> [Emphasis added]

[24] The standard of review of reasonableness has been recently confirmed by this Court. (*Barzegaran v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 681, at paragraphs 15-20; *Zambrano v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 481, at paragraph 31).

[25] In reviewing the officer's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir* at paragraph 47).

[26] The Court has reviewed the written argument of the applicants and the respondents heard oral submissions from both parties and has reviewed the decision in question. As discussed above, the decision of the Minister's delegate to grant or deny an exemption on humanitarian and compassionate grounds is discretionary. In the written decision of the officer, the Court does not see any issues that constitute reviewable errors. While the officer did not provide an analysis on the

issue of the applicants potentially being perceived as wealthy and targeted by criminals upon their return to El Salvador, she did clearly note the argument in her written decision. The officer had this issue in mind when she made her determination.

[27] The Court does not agree with the applicants when they rely on *Via Rail* (2007 S.C.J. 15) and argue that the duty to provide adequate reasons was not met. The *Via Rail* decision does not deal with discretionary decisions of the Minister's delegate, but rather with decisions rendered by an administrative tribunal. In any event, the Court finds that the duty to provide adequate reasons was met in this case; the written decision rendered by the officer was intelligible and clearly falls within the range of possible and acceptable outcomes of the discretionary decision-making process. The eight-page decision adequately addresses the issues at play in this file, and the Court cannot find any evidence of bad faith on the officer, nor any deficiencies in natural justice.

[28] The applicants allege that the officer misapplied the test for humanitarian and compassionate relief. After a review of the applicable legislative regime and jurisprudence, it is clear that the legislator has chosen not to prescribe a particular test to be applied by the decision-maker when determining whether an applicant should be granted humanitarian and compassionate relief. This was confirmed by the Supreme Court of Canada in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, quoting from *Baker v. Canada (Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 36, where the Court states that applicants seeking relief on humanitarian and compassionate grounds have "no right to a particular outcome or to the application of a particular test" (para. 36). The lack of official test or strict parameters is not

justification for a judicial review of the decision of a Minister's delegate; it is simply the nature of a discretionary decision.

[29] The applicants also allege that the officer preferred her own evidence over contradictory evidence provided by the applicants. The applicants submitted during oral submissions that they believe the officer should be required to give reasons for preferring certain evidence over other, contradictory, evidence. The applicants maintain that the reasons should include a comment on each of the pieces of evidence, and a final decision. The respondent argues that the legislator has chosen not to proscribe a particular format for reasons issued in an application for and exemption based on humanitarian and compassionate grounds. The Court concurs with the respondents, and finds that the reasons issued in this case were adequate, and that there is no obligation on the part of the officer to provide a written analysis of each piece of evidence considered when issuing reasons on an H&C application.

[30] Finally, the applicants allege that the officer applied the wrong standard when evaluating the applicant's level of establishment in Canada. From the decision rendered by the officer, it is clear that she considered all relevant factors when assessing the applicants' level of establishment in Canada. The fact that she referred to the fact that the establishment in Canada as not being exceptional does not create in itself a wrong standard. Her reasons on this issue have to be read as a whole. Furthermore, there is no evidence that the officer acted in bad faith, and the Court finds this determination reasonable.

[31] Neither the applicant nor the respondent has submitted that there are any questions for certification.

[32] For these reasons, this application for judicial review is dismissed.

ORDER

THIS COURT ORDERS THAT:

- The application for judicial review is denied.

- No question will be certified.

“Simon Noël”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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