Federal Court  Cour fédérale

Date: 20120416

Dockets: IMM-5046-11
IMM-5047-11
IMM-5048-11

Citation: 2012 FC 437

Ottawa, Ontario, April 16, 2012

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

LUIS ENRIQUE GARCIA RODRIGUEZ
JOSE MIGUEL GARCIA RODRIGUEZ
JAIME GARCIA RODRIGUEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] These files involve judicial review applications made by Pedro Jose Garcia Obispo [Mr. Obispo] and his three adult children, Luis Enriqué, José Miguel and Jaime Garcia Rodriguez [the Applicants] in which they seek to have the Court review and set aside the decisions of the immigration officer [the Officer] at the Canadian Immigration Section in Santo Domingo,

Dominican Republic dated June 26, 2011, in which the Officer refused to grant the Applicants permanent resident status as members of the family class [the Decisions].

[2] Mr. Obispo sought to sponsor his sons as members of the family class. Mr. Obispo was born in the Dominican Republic and is now a Canadian citizen. He was sponsored by his ex-wife in 1995. At that time, he did not declare that he had dependent children in his application for permanent residence. Consequently, none of the Applicants was examined for application purposes. Pursuant to section 117(9)(d) of the *Immigration and Refugee Protection Regulations,* SOR/2002-227 [the Regulations], this failure precluded the Applicants from later being considered as members of the family class. That provision provides in relevant part:

117.(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if …	117.(9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes …:
(d) … the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.	(d) … dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.

[3] The Applicants applied under section 25(1) of the *Immigration and Refugee Protection Act,* SC 2001, c 27 [the IRPA] for a discretionary exemption from the requirements of section 117(9)(d)

of the Regulations on a humanitarian and compassionate [H&C] basis. The Officer rejected their H&C requests in the Decisions that are the subject of these applications for judicial review.

[4] The Decisions consist of three letters and the Officer's Computer Assisted Immigration Processing System [CAIPS] notes. The Officer sent three separate but identical letters to the Applicants, rejecting their applications. In the letters, the Officer concluded that H&C considerations did not justify granting an exemption because the Applicants' responses to questions concerning their father "did not demonstrate an ongoing relationship with him." The Officer also stated that in coming to his decision, he took into consideration the established relationships the Applicants had with their mother, grandparents and siblings in the Dominican Republic.

[5] In the CAIPS notes, the Officer underlined the inconsistencies in the answers given by the three Applicants in relation to when their father immigrated to Canada, how often he visited them in the Dominican Republic (one brother saying it was every year, another every four years and the third only once in the last nine years) and regarding whether Mr. Obispo lives in a house or an apartment. The Officer also noted that the only photos presented were from a visit by Mr. Obispo to the Dominican Republic in 2010 and then from many years prior. The Officer further pointed to the Applicants' difficulty in providing details about their father's life and the length of time he waited to sponsor them. He referred to the evidence before him regarding monies provided by Mr. Obispo to his sons. He also stated that he considered the Applicants' current living situation in the Dominican Republic, referred to the fact they were employed or in school, noted the strength of their relationships with family members in the Dominican Republic and concluded that there was no evidence to suggest any duress.

[6] The Applicants and Mr. Obispo argue that the Decisions should be set aside, submitting that they are unreasonable. They assert principally two reasons in support of this contention: first, they claim the Officer failed to consider the purpose of section 117(9)(d) of the Regulations and, second, they argue that the Officer failed to appropriately consider the evidence before him. The Respondent, on the other hand, argues that the Decisions are reasonable, that the Officer properly exercised the discretion he possessed under section 25(1) of the IRPA, considered the evidence and came to a conclusion that was open to him. The Respondent also requests that Mr. Obispo be struck from the style of cause, asserting he lacks standing to bring these applications for judicial review.

Standing of Mr. Obispo as an Applicant

[7] Dealing first with the standing issue, subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c 41 [FCA] provides that anyone "directly affected by the matter in respect of which relief is sought" may bring an application for judicial review. The Respondent argues that because Mr. Obispo was not an applicant before the Officer and because the Decisions were not addressed to him, he is not appropriately named as an applicant in this application for judicial review. The Respondent cites *Douze v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1337, [2010] FCJ No 1680 [*Douze*] and *Carson v Canada (Minister of Citizenship and Immigration)*, (1995), 95 FTR 137 [*Carson*] in support of the proposition that individuals who sponsor family members for landing on H&C grounds lack standing to bring judicial review applications in respect of decisions made on the H&C applications. Mr. Obispo and the Applicants argue that Mr. Obispo is a proper applicant as it was his failure to list the Applicants in 1995 that gave rise to their disqualification and to the need for an H&C exemption from the requirements of section 117(9)(d) of the Regulations. They cite no authority in support of their position.

[8] In my view, the decisions in *Douze* and *Carson* are persuasive authority, and should be followed. As Justice Tremblay-Lamer noted in *Douze* at para 15, the test for determining whether parties are directly affected, within the meaning of subsection 18.1(1) of the FCA, is "whether the matter at issue directly affects the party's rights, imposes legal obligations on it or prejudicially affects it directly". None of the foregoing may be said of Mr. Obispo in respect of the Decisions at issue in this judicial review application. His rights and obligations are not directly affected as it is only his sons who sought an exemption from the requirements of the Regulations. Accordingly, the Respondent's request to strike Mr. Obispo's name from the style of cause in these matters will be granted.

Standard of Review

[9] Both parties assert that the standard of review to be applied by this Court in the present applications is that of reasonableness. I concur. The recent decision of the Federal Court of Appeal in *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 18, [2010] 1 FCR 360 [*Kisana*] is dispositive in this regard and confirms that the reasonableness standard applies to the review of decisions of immigration officers on H&C applications made in the context of family sponsorship applications.

[10] The reasonableness standard is a highly deferential one and necessitates that the reviewing court not intervene unless it is satisfied that the reasons of the tribunal are not "justified, transparent or intelligible" *and* that the result does not fall "within the range of possible, acceptable outcomes which are defensible in respect of facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

Did the Officer commit a reviewable error in misinterpreting the requirements of section 117(9)(d) of the Regulations?

[11] Turning to the merits of these applications, the Applicants' first argument is that the Decisions should be set aside as unreasonable because the Officer failed to consider the purpose of section 117(9)(d) of the Regulations. They argue in this regard that Mr. Obispo did not list the Applicants as dependents in his 1995 application for permanent residence through inadvertence. Counsel for the Applicants suggested that this inadvertence was likely attributable to Mr. Obispo's lack of fluency in English in 1995 and to the fact that it was his ex-wife (who perhaps did not want the sons in Canada) who filled out forms for Mr. Obispo's 1995 application. The Applicants further argue that this inadvertence should have been considered as a compelling reason in favour of granting the Applicants' H&C application. They suggest that the policy consideration behind section 117(9)(d) of the Regulations is to ensure that those who are inadmissible cannot later gain permanent residency status and argue that this policy consideration should have militated in favour of granting the Applicants' H&C consideration as they were not ineligible to enter Canada in 1995.

[12] There are several problems with this argument. First, it was not made to the Officer, nor is it borne out by the evidence. The only evidence before the Officer concerning the reasons for the Applicants not having been listed as dependents by their father in 1995 was the explanation that Mr. Obispo was not certain why he had omitted the Applicants and that it was possibly because they were not going to be living with him in Canada. There was simply no evidence to suggest that the Applicants were left out of the 1995 application due to Mr. Obispo's inadvertence. Similarly, there is no such evidence before the Court. Indeed, in his affidavit filed in support of this application, Mr. Obispo deposes merely that he did "not remember exactly why [his] children were not included in

[the 1995] application." The lack of evidentiary foundation for this argument is sufficient to dispose of it.

[13] The argument also fails on a principled basis. While an Officer may provide relief from the effect of section 117(9)(d) of the Regulations where there are "compelling reasons" to do so, the case law recognises that mere inadvertence does not normally constitute a compelling reason. For example, in *Pascual v Canada (Minister of Citizenship and Immigration*, 2008 FC 993, [2008] FCJ No 1233, the immigration officer had held that inadvertence similar to that claimed by Mr. Obispo was not a compelling reason to relieve from compliance with section 117(9)(d) of the Regulations; the officer's conclusion was upheld by this Court on review (see para 19). Indeed, as the Federal Court of Appeal held in *Kisana* at para 27, misrepresentations, like the present, are a relevant public policy consideration in an H&C assessment which may well reasonably lead an officer to reject an H&C application for relief from the requirements of section 117(9)(d) of the Regulations.

[14] Thus, there is nothing unreasonable in the way in which the Officer treated the reasons for the Applicants' omission from Mr. Obispo's 1995 permanent residency application. Nor did the Officer fail to understand the policy behind section 117(9)(d) of the Regulations. Accordingly, the first argument advanced by the Applicants does not provide any basis for granting the relief sought in these judicial review applications.

Did the Officer commit a reviewable error in his consideration of the evidence?

[15] The same is true of their second argument. The Applicants argue in the second place that the Officer erred in finding insufficient H&C grounds to grant the Applicants permanent residence

status. More specifically, they contend that in assessing the factors under section 25(1) of the IRPA, the Officer relied only on the answers given during the interviews, failed to review the totality of the evidence before him, including the desire of the family to be together, and focused too much on the Applicants' ability to remain in the Dominican Republic. Further, they argue that the Officer erred in the conclusion that the inconsistencies in the Applicants' interview answers demonstrated a lack of ongoing relationship with their father, suggesting that it is to be expected that young men in their early 20s or teenage years might not be aware of the details of their father's employment or domestic situation. The Applicants also state that the Officer improperly ignored the reasons for the relatively few visits by Mr. Obispo to the Dominican Republic in recent years and for the delay in seeking to sponsor the Applicants. They note that the evidence before the Officer demonstrated that Mr. Obispo had not been to the Dominican Republic for several years prior to 2010 as he no longer worked for an airline, which had previously allowed him to travel there free of charge. They also claim that Mr. Obispo could not have sponsored the Applicants earlier because he did not then have custody of them.

[16] The Respondent, for its part, argues that Decisions must be viewed and assessed in their totality, that the Officer appropriately assessed all the relevant factors and that his Decision is reasonable. The Respondent also asserts that it was not necessary for the Officer to list all the evidence he considered and that the Applicants seek to have this Court re-weigh the evidence, which ought not be the function of a court on a judicial review application, particularly where the reasonableness standard is applicable.

[17] In my view, the Officer did not commit a reviewable error in his treatment of the evidence. He considered the relevant factors, his conclusions were reasonable, and he was under no obligation to refer specifically in the Decisions to any particular piece of evidence.

[18] In *Kisana* at para 33, the Federal Court of Appeal summarized the various matters which should be considered in connection with geographical separation of family members. These include:

> … the effective links with family members, i.e. in terms of ongoing relationship as opposed to the simple biological fact of relationship; has there been any previous period of separation and, if so, for how long and why; the degree of psychological and emotional support in relation to other family members; options, if any, for the family to be reunited in another country; financial dependence, and; the particular circumstances of the children.

[19] A review of the letters and of the CAIPS notes indicates that each of the relevant factors was considered and weighed by the Officer. In the CAIPS notes, the Officer stated that he had:

> […] carefully reviewed all evidence in [each] case in preparation for the interview[s] … [and] concluded that the focus of the interview[s] would be to review H&C elements, establish parent child relationship between [A]pplicant[s] and [Mr. Obispo] as well as parent child relationships between [A]pplicant[s] and [their] mother / grandparents / siblings in the Dominican Republic. The assessment will then establish whether sufficient H&C elements exist to overcome exclusion resulting from [Mr. Obispo] not declaring [A]pplicant[s] when he immigrated to Canada.

[20] Following the interviews, the Officer concluded that the Applicants had not demonstrated a sufficient degree of ongoing relationship with Mr. Obispo to warrant H&C consideration and that conversely, the strength of the Applicants' relationships with their family members in the

Dominican Republic meant that refusing the applications would not leave the Applicants without support.

[21] The Officer's conclusions are amply supported by the evidence that was before him. While he did not refer to any particular piece of evidence (apart from what was discussed during the interviews), it was not necessary for him to do so. As Justice Abella recently wrote for a unanimous Supreme Court in *Newfoundland and Labrador Nurses Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*S.E.I.U., Local 333 v. Nipawin District Staff Nurses Assn.* (1973), [1975] 1 S.C.R. 382 (S.C.C.), at p. 391).

[22] With respect to the Officer's conclusion regarding the degree of relationship between Mr. Obispo and the Applicants, I tend to agree with the Applicants that teenage boys and young men might not have detailed knowledge of their parents' work and living arrangements if they live in a different city and that this does not necessarily mean that there might not be an ongoing deep relationship between these sorts of young men or teenage boys and their parents. That said, there was sufficient other evidence before the Officer regarding the lack of relationship between Mr. Obispo and the Applicants to support the Officer's conclusion. Such other evidence included the fact that Mr. Obispo had emigrated to Canada and left the Applicants behind, that he had relinquished custody of them, and that, in recent years, he had visited the Applicants only

infrequently, regardless of what the reason for this might have been. Thus, it cannot be said that the Officer’s conclusion regarding the lack of a sufficient relationship was unreasonable.

[23] In terms of the Officer's conclusion regarding the strength of the relationship between the Applicants and their family in the Dominican Republic, all the evidence before the Officer pointed to this conclusion. Each of the Applicants indicated in the interviews that their relationships with their family members, including their mother, in the Dominican Republic were strong. Accordingly, this conclusion is likewise reasonable.

[24] In light of the foregoing, the Decisions were eminently reasonable and, therefore, these applications for judicial review will be dismissed.

[25] No question for certification under section 74 of IRPA was presented and none arises in this case.

[26] In accordance with Prothonotary Aalto’s Order in Court Docket: IMM-5046-11 dated September 8, 2011, Court Dockets: IMM-5046-11, IMM-5047-11 and IMM-5048-11 are consolidated. A copy of these Reasons for Judgment and Judgment will be placed on each file.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Applicant, Pedro Jose Obispo, is struck from the style of cause in files IMM-5046-11, IMM–5047-11 and IMM-5048-11;
2. These applications for judicial review are dismissed;
3. No question of general importance is certified; and
4. There is no order as to costs.

"Mary J.L. Gleason"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-5046-11, IMM-5047-11 and IMM-5048-11
STYLE OF CAUSE:	*Luis Enriqué Garcia Rodriguez, José Miguel Garcia Rodriguez, Jaime Garcia Rodriguez v The Minister of Citizenship and Immigration*
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 28, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	GLEASON J.
DATED:	April 16, 2012

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