Federal Court Cour fédérale

Date: 20150416

Docket: IMM-6075-13

Citation: 2015 FC 483

Montréal, Quebec, April 16, 2015

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

MARIA FELIX CISNADO

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) of the September 3, 2013 decision (the decision) of the Refugee Board, Immigration Appeal Division (IAD) wherein the IAD allowed an appeal by Maria Felix Cisnado (the respondent) against the refusal of a sponsorship

application for her niece, Guadalupe Patricia Cisnado (the niece). The Minister of Citizenship and Immigration seeks judicial review of the IAD's decision.

[1] For the reasons set out below, I have concluded that the present application should be dismissed.

II. Facts

[2] In March 2009, the respondent applied to sponsor her niece's application for landing.

[3] The niece was born in 1992 in El Salvador. Her mother died when she was six months old. Her mother was a prostitute. She never met her father and all indications are that neither she nor her mother ever even knew who the father was. The niece's grandmother took care of her after her mother died, but the grandmother died in 2000. From that time, the niece went through a series of guardianship arrangements and orphanages.

[4] In a letter dated April 13, 2010, a visa officer informed the niece that the respondent's application for sponsorship was refused because the respondent did not meet the low-income cut-off requirement. The visa officer considered that the respondent did not have the level of income required to sponsor three people (being, the respondent's husband, the respondent's niece, and the niece's infant son).

[5] Following the visa officer's decision, the respondent appealed to the IAD.

III. Decision

[6] The IAD determined that the niece was a "member of a family class" under subsection 117(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (*IRPR*) (as she is "a person whose parents are deceased"), which allowed the respondent to seek to sponsor her. Though the niece never knew her father and therefore could not prove that he is deceased, the panel considered that it could not have been Parliament's intention to require proof of the death of a person who likely could never be identified.

[7] The IAD continued with an assessment of humanitarian and compassionate (H&C) factors. The IAD recognized that the respondent's income does not satisfy the low-income cut-off requirement. However, taking into account the circumstances and the best interest of the child (the niece's infant son), it considered that there were sufficient H&C grounds to allow the appeal. The IAD found that the circumstances are exceptional, since the niece is now a mother with a child in a country where violence towards women is common, and the only parent she ever knew (her mother) is now deceased. The IAD considered that the niece and her child would "at least have a much better chance in Canada for survival."

IV. Issues

[8] This matter raises the following issues:

1. Did the IAD err in concluding that the niece is a "family class" member pursuant to subparagraph 117(1)(f)(ii) of the *IRPR*?
2. Did the IAD err in allowing the appeal on the basis of H&C factors?

V. Relevant Provisions

Immigration and Refugee Protection Act (S.C. 2001, c. 27)

Family reunification

12. (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.

Sponsorship of foreign nationals

13. (1) A Canadian citizen or permanent resident, or a group of Canadian citizens or permanent residents, a corporation incorporated under a law of Canada or of a province or an unincorporated organization or association under federal or provincial law - or any combination of them - may sponsor a foreign national, subject to the regulations.

Immigration and Refugee Protection Regulations (SOR/2002-227)

117. (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is:

[…]

(f) a person whose parents are deceased, who is under 18 years of age, who is not a spouse or common-law partner and who is

Loi sur l'immigration et la protection des réfugiés (L.C. 2001, ch. 27)

Regroupement familial

12. (1) La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.

Parrainage de l'étranger

13. (1) Tout citoyen canadien, résident permanent ou groupe de citoyens canadiens ou de résidents permanents ou toute personne morale ou association de régime fédéral ou provincial - ou tout groupe de telles de ces personnes ou associations - peut, sous réserve des règlements, parrainer un étranger.

Règlement sur l'immigration et la protection des réfugiés (DORS/2002-227)

117. (1) Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants

[…]

f) s'ils sont âgés de moins de dix-huit ans, si leurs parents sont décédés et s'ils n'ont pas d'époux ni de conjoint de fait :

[…]	[…]
(ii) a child of a child of the sponsor's mother or father, or	(ii) les enfants des enfants de l'un ou l'autre de ses parents,

VI. Analysis

[9] A key question in this case is whether the legislator intended that an individual seeking to be recognized as a member of the family class pursuant to subparagraph 117(1)(f)(ii) of the *IRPR* should have to show evidence that her father is dead in circumstances in which it is expected that no one knows, or ever knew, the identity of the father.

A. *Standard of review*

[10] The issue of the standard of review is central to this decision. It therefore requires more than a cursory review.

[11] When an administrative tribunal interprets its home statute, it is presumed that the standard of reasonableness applies (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, at para 39 (*Alberta Teachers*); *Medzalabanleth v Abénaki of Wôlinak Council*, 2014 FC 508, at para 28). However, this presumption can be rebutted. In *McLean v British Columbia (Securities Commission)*, 2013 SCC 67, at paras 22, 32 and 33, Justice Moldaver stated:

> [22] The presumption endorsed in *Alberta Teachers*, however, is not carved in stone. First, this Court has long recognized that certain categories of questions — even when they involve the interpretation of a home statute — warrant review on a correctness standard (*Dunsmuir*, at paras. 58-61). Second, we have also said that a contextual analysis may "rebut the presumption of

> reasonableness review for questions involving the interpretation of the home statute" […]
>
> […]
>
> [32] In plain terms, because legislatures do not always speak clearly and because the tools of statutory interpretation do not always guarantee a single clear answer, legislative provisions will on occasion be susceptible to multiple *reasonable* interpretations (*Dunsmuir*, at para. 47; see also *Construction Labour Relations* v. *Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405). Indeed, that is the case here, as I will explain in a moment. The question that arises, then, is *who gets to decide among these competing reasonable interpretations*?
>
> [33] The answer, as this Court has repeatedly indicated since *Dunsmuir*, is that the resolution of unclear language in an administrative decision maker's home statute is usually best left to the decision maker. That is so because the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired *the administrative decision maker* — not the courts — to make. Indeed, the exercise of that interpretative discretion is part of an administrative decision maker's "expertise".
>
> [Emphasis in original.]

[12] In *Canada (Citizenship and Immigration) v Kandola*, 2014 FCA 85 (*Kandola*), the Federal Court of Appeal considered that "whether the Canadian father of a child conceived through assisted human reproduction (AHR) technology, without any genetic link to him or to her foreign birth mother obtains derivative citizenship pursuant to paragraph 3(1)(b) of the [Citizenship Act]" was a question to be reviewed on the standard of correctness. In *Kandola*, Justice Marc Noël, in the majority, stated at paras 43 to 45:

> [43] Specifically, there is no privative clause and the citizenship officer was saddled with a pure question of statutory construction embodying no discretionary element. The question which he was called upon to decide is challenging and the citizenship officer cannot claim to have any expertise over and above that of a Court of Appeal whose sole reason for being is resolving such questions.

> [44] In this respect, I note that construing paragraph 3(1)(b) requires a consideration of the shared meaning rule in the application of bilingual enactments as well as the use that may be made of the French text given that it was enacted in the context of a revision. There is no suggestion that an immigration officer was ever asked to consider either of those questions and nothing in the structure or scheme of the Act suggests that deference should be accorded to the immigration officer on the question which he had to decide.
>
> [45] I am therefore satisfied that the presumption [that the reasonableness standard of review should apply] is rebutted.

[13] In *B010 v Canada (Citizenship and Immigration)*, 2013 FCA 87, the Federal Court of Appeal considered that interpretation of the term "people smuggling" was an issue to be addressed under the standard of reasonableness. In this case, Justice Dawson stated at paras 64 to 66:

> [64] More recently, in *Alberta Teachers'*, cited above at paragraph 45, the Supreme Court restated the general principle that reasonableness will usually be the applicable standard of review when a tribunal is interpreting its own statute or statutes closely connected to its function. At paragraph 30 of the reasons of the majority, this general principle was said to apply:
>
> > […] unless the interpretation of the home statute falls into one of the categories of questions to which the correctness standard continues to apply, i.e., "constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, ... '[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals' [and] true questions of jurisdiction or vires" *(Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 18, per LeBel and Cromwell JJ., citing *Dunsmuir*, at paras. 58, 60-61).

> [65] The application of these principles to the present case leads to my second reason for concluding that the Federal Court selected the appropriate standard of review.
>
> [66] Members of the Board function in a discrete and special administrative regime. They have expertise with respect to the interpretation and application of the Act. The nature of the question of law is the interpretation of the phrase "people smuggling". This question of statutory interpretation of the Board's home statute raises neither a constitutional question, nor a question of law of general importance to the legal system as a whole. Neither does it involve a question regarding jurisdictional lines between competing specialized tribunals nor a true question of jurisdiction (to the extent such questions continue to exist; see, *Alberta Teachers'* at paragraphs 33 to 43).

[14] More recently, in *Ijaz v Canada (Citizenship and Immigration)*, 2015 FC 67, Justice Strickland considered whether an assessment conducted for the purpose of awarding points to a skilled worker's Canadian education credential or equivalency under section 78 of the *IRPR*, in the context of an application for permanent residence, requires a foreign diploma, certificate, or credential to be the equivalent of a completed Canadian educational credential. Justice Strickland considered that the presumption of reasonableness had not been rebutted, and stated at para 32:

> […] In this instance, that expertise comes to bear in making a determination of whether the technical requirements of the IRPA and IRP Regulations have been met. Specifically, whether in the circumstances of the case, the required number of points have been achieved to permit qualification in the FSW class. In assessing the education component, this requires the interpretation of ss. 78 and 73 of the IRP Regulations, as well as the results of the equivalency assessment. In my view, this is a question of mixed fact and law and is entitled to deference. Further, the statutory ambiguity at the heart of this judicial review does not fall within one of the categories of questions to which the standard of correctness continues to apply - constitutional questions, questions of law that have central importance to the legal system as a whole and that are outside the adjudicator's expertise, questions regarding the jurisdictional lines between two or more competing specialized tribunals and true questions of jurisdiction or vires (*Canadian*

> *Human Rights Commission* at para 18, *Dunsmuir* at paras 58, 60-61; *Alberta Teachers'* at para 30).

[15] Justice Heneghan in *Fang v Canada (Citizenship and Immigration*), 2014 FC 733, at para 25 (*Fang*) explained that if it was determined that a person does not meet the regulatory criteria to be recognized as a member of the "family class" pursuant to the *IRPR*, the IAD cannot employ its H&C discretion. Hence, whether a person is a member of the family class establishes whether the IAD lacked jurisdiction to assess H&C factors (*Fang*, at para 25). In that case, the IAD determined that it did not have jurisdiction to consider H&C factors. According to Justice Heneghan, this question of jurisdiction is a question of *vires* reviewable under the standard of correctness (*Fang*, at para 16).

[16] On the other hand, the majority of the Supreme Court of Canada in *Alberta Teachers* observed at para 33 that the category of true questions of jurisdiction is narrow indeed and that no questions of jurisdiction had been identified by the Court since *Dunsmuir v New Brunswick*, 2008 SCC 9. The position of the Supreme Court in *Canadian National Railway Co. v Canada (Attorney General)*, 2014 SCC 40 (*National Railway*) confirmed the limited scope of the exceptions to the presumption of reasonableness that applies when an administrative tribunal is interpreting its home statute. In *National Railway*, the central question at issue was the interpretation of section 120.1 of the *Canada Transportation Act*, SC 1996, c 10 that involved confidential contracts and the availability of a complaint-based mechanism that is limited to shippers that meet the statutory conditions under subsection 120.1(1) (*National Railway*, para 60). The Supreme Court of Canada considered that this issue did not raise a question of central importance to the legal system, and do not have a precedential value outside of issues arising

under this statutory scheme (*National Railway*, para 60). Hence, the Supreme Court considered that the presumption of reasonableness was not rebutted (*National railway*, para 62).

[17] In my opinion, the present case does not raise any (i) constitutional questions, (ii) questions of law that are of central importance to the legal system as a whole and that are outside of the adjudicator's expertise, (iii) questions regarding the jurisdictional lines between two or more competing specialized tribunals, or (iv) the exceptional category of true questions of jurisdiction.

[18] Furthermore, questions of mixed fact and law, including the status of an alleged member of the "family class", are reviewable on the standard of reasonableness (*Fang*, at para 18).

[19] I agree with the respondent that the IAD's conclusion on whether the niece is a member of the "family class" should be reviewed under the standard of reasonableness. I reach the same conclusion concerning the H&C aspect of the present case (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, at paras 57-58).

B. *Did the IAD err in concluding that the niece is a "family class member" pursuant to subparagraph 117(1)(f)(ii) of the IRPR?*

[20] As mentioned, a key question in this case is whether the legislator intended that an individual seeking to be recognized as a member of the family class pursuant to subparagraph 117(1)(f)(ii) of the *IRPR* should have to show evidence that her father is dead in circumstances in which it is expected that no one knows, or ever knew, the identity of the father. More broadly,

the central issue is whether Parliament intended that a person who cannot find or even identify a parent is excluded from the "family class".

[21] Though the IAD's decision devotes much attention to the meaning of the word "parents", it is my view that I need not decide whether that analysis is correct or reasonable. In my view, reading the words of the *IRPA* and the *IRPR* in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *IRPA* and the intention of the Parliament (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, at para 21), this case can be decided from a higher level.

[22] I am mindful that one of the objectives of the *IRPA* is family reunification (paragraph 3(1)(d)). Subsection 12(1) of the *IRPA* ties this objective to the notion of the "family class".

[23] I am also of the view that a person's birth certificate is a reasonable source to identify that person's parents. In the present case, the niece's birth certificate identifies her mother (who died long ago), but does not identify any father. Given the circumstances it is easy to understand this omission. It appears that, officially, the niece only ever had one parent.

[24] In my view, it is also reasonable to conclude that, for the purposes of the respondent's sponsorship application, the niece had only one parent. This is consistent with the available documentation and information. It is also consistent with the objective of family reunification. In my view, it is reasonable to read the requirement in paragraph 117(1)(f) of the *IRPR* that the

sponsored foreign national be "a person whose parents are deceased", as requiring that any identified or identifiable parent be deceased.

[25] In support of its challenge to the IAD's decision, the applicant cites jurisprudence to the effect that there is a presumption that Parliament did not intend a statute to have an absurd result. I agree with the principle, but I believe it applies in the respondent's favour in the present case. It would be absurd to expect someone to prove the death of a person who cannot be identified. It would seem to be equally absurd to deprive family class sponsorship to all persons who are unable to identify one of their parents. I have heard no convincing argument as to why Parliament would have intended such a result.

[26] Accordingly, I conclude that the IAD did not err in concluding that the niece is a member of the "family class".

C. *Did the IAD err in allowing the appeal on Humanitarian and Compassionate (H&C) factors?*

[27] The applicant also argues that it was unreasonable for the IAD to determine that there were sufficient H&C grounds to allow the respondent to succeed in her sponsorship application. In support of this argument, the applicant cites a number of factors that should have been considered. However, I am not convinced that the IAD erred in failing to discuss these factors, or in concluding that there were sufficient H&C grounds despite these factors. In reaching this conclusion, I am mindful that the IAD, as an expert tribunal, is owed significant deference in the context of this highly discretionary decision: *Bielecki v Canada (Citizenship and Immigration),*

2008 FC 442, at para 23; *Canada (Citizenship and Immigration) v Abdo*, 2007 FCA 64, at para 13.

VII. Conclusion

[28] In my opinion, the application for judicial review should be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The present application is dismissed.

2. No serious question of general importance is certified.

"George R. Locke"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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