Federal Court  Cour fédérale

Date: 20170920

Docket: IMM-1096-17

Citation: 2017 FC 842

Ottawa, Ontario, September 20, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

SHARON HERMAN
DEAN ROBERT
KAYSHA HERMAN
AVERY ROBERT

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*] of the decision of the Minister of Citizenship and Immigration Canada's representative [Minister's representative], dated January 27, 2017, which rejected the Applicants' application for permanent residence based on humanitarian and compassionate [H&C] grounds [the Decision].

[2] For the reasons that follow, the application is dismissed; the Decision is reasonable as assessed under the tests for judicial review determined by the Supreme Court of Canada.

[3] The applicants are Ms. Sharon Herman (age 34) [the Principal Applicant], her common law partner, Dean Robert (age 40), a daughter from a previous relationship (age 18), and her son with Mr. Robert, (age 9) [collectively, the Applicants]. All Applicants are citizens of St. Lucia.

[4] The Principal Applicant entered Canada on April 14, 2010 with a visitor record valid for six months. An application to extend her temporary resident status was refused on December 23, 2010. Instead of leaving when her visitor's record expired, she has remained living, and working, in Canada since then, with neither status nor work permit. Mr. Robert and the two children entered on August 2, 2012, also with visitor records valid for six months. Mr. Robert has also been both living without status and working without permit in Canada since then. Their filings do not indicate whether either was paying income tax; they filed little if any financial information.

[5] In May 2016, the CBSA issued a warrant for the Principal Applicant's arrest and shortly thereafter she was detained briefly before being released on terms and conditions.

[6] On June 28, 2016, the Applicants submitted their application for permanent residence based on humanitarian and compassionate grounds [the H&C application].

[7] The H&C application was based on the following:

- The Applicants are settled in Canada. Mr. Robert is a trained and employed air conditioning and refrigeration technician and the Principal Applicant works as a caregiver. The Principal Applicant does volunteer work. They are members of the Precious Blood Catholic Church, and have no criminal records;
- Both children have attended school in Toronto since September 2012;
- The family is self-supporting and does not rely on any outside source for financial support;
- Mr. Robert suffers from Chronic Myeloid Leukemia [Leukemia], for which he received treatment with Gleevec or its equivalent in St. Lucia and continues to receive treatment with the same drug in Toronto:
    - Mr. Robert's physician in Toronto, Dr. E. Cheng secured compassionate funding for access in Canada to the Leukemia drug Gleevec/equivalent from a pharmaceutical company, via its compassionate-use fund.
    - In applying for the compassionate use, Dr. E. Cheng noted that Mr. Robert had maintained his Leukemia in St Lucia with a different, more affordable drug, called hydroxyurea which only helped suppress symptoms, but not the Leukemia itself.
    - Dr. E. Cheng notes that there were multiple times when Mr. Robert has gone 2-3 weeks without hydroxyurea because of the cost, resulting in crises where he landed in the hospital.
    - Dr. E. Cheng states, "he really needs to be on Gleevec/equivalent and he had several years of excellent results on Gleevec in the Caribbean in the past so this is why this medication has been chosen as a top priority."

- In a letter dated June 14, 2016, Dr. Ramsaroop, who also treated Mr. Robert, wrote the following:

  > The patient was diagnosed with CML prior to his arrival in Canada. […] At the time the patient was receiving a medication called Gleevec (Imatinib) sponsored/donated. When this medication was unaffordable, he used hydroxyurea but this was ineffective and caused him frequent symptoms.

- The same letter from Dr. Ramsaroop states that Mr. Robert should continue his medical care for Leukemia in Canada because he is unlikely to have compassionate access to this critical life-saving medication in St. Lucia.
- A letter from Dr. M. Cheung who treated Mr. Robert at Toronto's Sunnybrook Health Sciences Centre confirms that Mr. Robert should remain on Gleevec indefinitely, which is routinely funded through the Provincial Drug Benefits Program.
- Dr. M. Cheung states that if Mr. Robert were to discontinue Gleevec, his Leukemia would likely progress, over years, to an acute myeloid leukemia which would ultimately be fatal.
- A letter from Dr. O. Gabriel, an expert consultant oncologist practising in St. Lucia who treated Mr. Robert in St. Lucia, noted that while in St. Lucia, Mr. Robert obtained his treatment and the Gleevec medication through a donation program and the national central supplies unit under the St. Lucia Ministry of Health. Dr. Gabriel also noted that:

  > Dean Robert runs the risk of not obtaining this medication if he returns to St. Lucia. It would take 3 to 6 months to obtain this medication if Dean Robert returns to St. Lucia. I recommend that his care be continued in Canada, as these medications are more accessible there. Cancer care in St. Lucia is extremely costly to patient and family.

[8] Mr. Robert also has twelve-year old twin daughters who reside in St. Lucia.

[9] The Minister's representative refused the H&C application for permanent residence. The Applicants also submitted a pre-removal risk assessment application [PRRA]. The Minister's representative dismissed the PRRA application; the Applicants do not seek judicial review of the PRRA decision.

[10] On this judicial review, the Court is obliged to apply the tests set by the Supreme Court of Canada and other relevant jurisprudence. In *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at paras 57 and 62, the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." The appropriate standard of review of an H&C decision is reasonableness: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*]. *Kanthasamy* also concluded that H&C is not a parallel or "alternative immigration scheme". Noël J. held that considerable deference should be given to Minister's representative exercising H&C powers in *Ogunyinka v Canada (Citizenship and Immigration)*, 2015 FC 595, at para 19, citing to *Baker* at para 62:

> Considerable deference should be given to immigration officers exercising the powers conferred by legislation, given the fact specific nature of the inquiry, its role [subsection 25(1) of the IRPA] 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.

[11] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[12] The Supreme Court of Canada further instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

[13] In *Nguyen v Canada (Citizenship and Immigration)*, 2017 FC 27 [*Nguyen*] at paras 28-29 I found the following in relation to judicial review of decisions by Ministers representative's in H&C matters:

> [2] The Court is not asked to, nor may it, reweigh the evidence. Judicial review is not an opportunity to re-litigate the case below, nor is it in any way a *trial de novo*. The over-arching consideration is not whether the decision below is right or wrong, but whether it is reasonable or unreasonable. The key question is whether the Decision falls with the range of outcomes that is defensible on the facts and the law.
>
> [3] In enacting section 25 of the *IRPA*, Parliament gave the Minister of Citizenship and Immigration the authority and responsibility to apply the correct legal standard and to reach a decision in H&C matters that is reasonable, as defined by the Supreme Court of Canada in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9. The Minister has

> delegated this authority to H&C Officers so that they may make such decisions on his behalf. According to the jurisprudence, both the Minister and his delegated Officer(s) have an exceptional and highly discretionary authority in this regard. Their authority deserves considerable deference by the Court.

[14] With these points in mind, I will consider the H&C issues as found by the Minister's representative, namely establishment, risk and adverse country conditions, and the best interests of the children [BIOC].

Establishment

[15] The Minister's representative assigned some positive weight to the Applicants' church and community involvement, the fact that they have never applied for social assistance, the friendships they made in Canada and the Principal Applicant's volunteer work. The Minister's representative placed little weight on Mr. Robert's community involvement, because he did not provide supporting documentation. The Minister's representative also acknowledged the success and involvement of the children in school to which he also assigned some positive weight. These findings in my view were open on the record.

[16] The Minister's representative placed "substantial negative weight" on the adult Applicants' employment in Canada because of the fact that neither adult applicant had ever held valid permits authorizing them to work in Canada - one had been working for 6 years and the other for 4 years - and neither had filed bank or tax records. While this finding was heavily criticized by the Applicants, in my view it involved weighing and assessing the evidence which is for the Minister's representative to do, and in respect of which considerable deference is owed

as outlined above. It is well-known that it is for these tribunals to assess and weigh evidence. In my view, it was open for the Minister's representative to assess and conclude in this manner on this record.

[17] The Minister's representative also placed some negative weight on the failure of both Applicants to attempt to regularize their immigration statuses. On the record, it is apparent that it took the arrest of the Principal Applicant 6 years after her arrival in Canada (and 4 years after the arrival of Mr. Robert) for the Applicants to attempt to regularize their immigration status. The Minister's representative reasonably noted that little explanation was given for why they waited so long.

[18] As can be seen, there were positives and negatives in the establishment assessment. I do not see one being predominant over the other, and I am not persuaded by the Applicants' arguments to the contrary. He properly considered "all" the factors, as required by *Kanthasamy*; the Applicants disagree with the assessment of one of many factors, but in my view that was not determinative of the establishment assessment nor the Decision as a whole.

Risk and Adverse Country Conditions

[19] The Minister's representative considered letters from various physicians regarding Mr. Robert's Leukemia, but was not persuaded that Mr. Robert should remain in Canada where he has access to the Gleevec/equivalent. The Minister's representative notes Dr. E. Cheng stated, "he had excellent results of Gleevec in the Caribbean in the past." The Minister's representative in my view reasonably found this statement suggests Mr. Robert received adequate medical

treatment in St. Lucia; the fact is that he was doing well and was on Gleevec in St. Lucia when he chose to leave for Canada.

[20] The Minister's representative placed little weight on Dr. Ramsaroop's argument that Mr. Robert is, "unlikely to have 'life-saving medication' in his home country", because there are other statements about Mr. Robert being on Gleevec for many years with "excellent results" (as just noted) prior to his entry to Canada. This conclusion was also open to the Minister's representative because Dr. Ramsaroop was not an expert on medical care in St. Lucia.

[21] A letter from consultant oncologist, Dr. Gabriel of St. Lucia, stated that "it would take 3 to 6 months to obtain this medication if Dean Robert returns to St. Lucia". The Minister's representative accepted Dr. Gabriel as an expert, but inconsistently discounted his evidence on the timeline because "he does not indicate that he consulted any secondary documentation concerning country conditions in St. Lucia" such that there was "insufficient evidence to establish, on a balance of probabilities, that he is an authoritative source on medical coverage timelines." In my respectful view, this finding was unreasonable; no evidence or explanation was offered that oncological consultants in St. Lucia are required to buttress their professional opinions as physicians by such additional sources; Dr. Gabriel was accepted as an expert in his field by the Minister's representative, and must be taken to be able to speak within that expertise as I find he did.

[22] The Minister's representative had previously noted the failure of both adult Applicants to file banking or tax information. This became relevant when the Minister's representative

concluded that with this evidence absent, there was insufficient evidence that Mr. Robert could not make alternate health arrangements for those initial 3 to 6 months in St. Lucia. Again, this finding was open on the record.

[23] The Minister's representative places little weight on the Principal Applicant's statements about supporting her mother in St. Lucia because he received very little evidence, such as receipts, to establish how much the Principal Applicant assists her mother or that they would be unable to continue their support upon return to St. Lucia. This was not challenged.

[24] The Decision acknowledges that there would be challenges reacclimatizing the Applicants to St. Lucia, but notes that the Principal Applicant and Mr. Robert maintained long-term stable employment there prior to their departure and, further that they have acquired new transferable skills since being in Canada. The Minister's representative finds that there is no evidence that they would not be able to at least temporarily stay with family upon their return. Further, they would be able to stay in touch with contacts in Canada via social media tools. These findings are supported on the record and were open to the Minister's representative.

Best Interests of the Children

[25] In discussing the BIOC, the Minister's representative acknowledges that Canada offers a lifestyle and future opportunities that are generally considered more desirable that those in St. Lucia, and that both children have established themselves in Canada to some degree. Nonetheless, he was satisfied that they are neither so integrated into Canadian society nor that the country conditions in St. Lucia are so bad that accompanying their parents to St. Lucia would

significantly compromise their wellbeing. Further, the St. Lucian and Canadian school year both run roughly from September through June, so a move back to St. Lucia would not necessarily disrupt their education. The Minister's representative notes that youth unemployment is higher in St. Lucia than in Canada, however the teenage daughter appears to be extremely intelligent and resourceful and should she require assistance while she seeks employment, she has very supportive parents that are likely to assist her.

[26] The Minister's representative noted that he had little information to suggest that the Applicants financially support Mr. Robert's twin daughters who reside in St. Lucia. He acknowledges that the twins have resided in St. Lucia for their whole lives and that he does not have any evidence that the twins would be interested in moving to Canada. Ultimately, the Minister's representative finds that it is within the best interests of the twins that they remain in St. Lucia. Each of these findings was open to the decision maker.

[27] The Applicants say that the assessment of the impact of departure on the teenaged daughter was inadequate having regard to *Kanthasamy*; however, this is not a ground to fault the Minister's representative because in reality, no such evidence was filed by the Applicants who had the duty and burden to make that case. Here they failed to do so.

[28] In my respectful view, the assessment of the BIOC was attentive to the facts of this case. The Minister's representative was clearly alert and sensitive to the children and their situations whether in Canada or St. Lucia. He considered it in their best interests to remain with their parents. While perhaps awkwardly worded, the following conclusion on BIOC was open to the

Officer: “[A]s it seems against the minor applicants’ best interests to be separated from their loving parents, I find that it is somewhat in the children’s best interests to stay in Canada and that their best interests are better served by remaining with the adult applicants.” As he was obligated and entitled to do, the Minister's representative found that the weight accorded to the BIOC was not enough to justify an exemption because of insufficient evidence demonstrating a negative impact on the aforementioned children if the Applicants leave Canada.

[29] Regarding country conditions, he finds that the Applicants failed to present any exceptional difficulty given their employment history in St. Lucia. The Minister’s representative concluded there was little reason why the Principal Applicant and Mr. Robert could not establish themselves to a degree where they could provide for themselves and their children. This finding in my view is not objectionable.

[30] Standing back and reviewing the matter as an organic whole, and keeping in mind that judicial review is not a treasure hunt for errors, I conclude that the Decision of the Minister's representative is justified, transparent and intelligible notwithstanding the representative’s unreasonable treatment of Dr. Gabriel. There is, with respect, no merit to the argument that the ruling respecting their lengthy work status without required permits was determinative of this multi-faceted H&C determination.

[31] I have concluded that the Decision falls within the range of possible, acceptable outcomes that are defensible in respect of the facts of this case and the law as required by *Dunsmuir*. Therefore, judicial review must be dismissed.

The Applicants proposed to certify a question on the finding that their work experience, an element of establishment, was given ‘substantial negative weight’. The Minister opposed certification after receiving instructions. In my view, this is not a proper question for certification because I do not see it as dispositive but rather one of many factors considered. As such and in any event, that issue is fact-specific to this case and lacks general importance, see generally *Liyanagamage v Canada (Secretary of State)* (1994), 176 NR 4 at paras 4-6; *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 paras 7 to 10, and *Zazai v Canada (Citizenship and Immigration)*, 2004 FCA 89 at paras 11-12.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, no question is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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