Federal Court  Cour fédérale

Date: 20171108

Docket: IMM-2025-17

Citation: 2017 FC 1010

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, November 8, 2017

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

JIMMY NKONGOLO MUBIAYI
RUTH KAPINGA KABASELE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants are seeking judicial review of a decision made by a senior immigration officer on March 31, 2017. That decision pertains to an application for permanent residence in Canada, despite the fact that the application was not submitted from the applicants' country of origin. The application for judicial review is made under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

I. Standard of review

[2] It is well established that the role of Federal Court judges is not to substitute their own opinion for that of the administrative decision-maker, but rather, to review the lawfulness of the decision made. Thus, for certain rather limited issues, the standard of review applied by the Court is that of correctness. However, in the vast majority of immigration law cases, it is the reasonableness standard that applies. That is the case here. The Court must therefore determine whether the decision made by the senior immigration officer is lawful, because it is reasonable (*Mission Institution v. Khela*, 2014 SCC 24; [2014] 1 SCR 502, at paragraph 74). Moreover, the parties agree that the reasonableness standard applies in this case.

II. Facts

[3] The applicants are citizens of the Democratic Republic of the Congo and arrived in Canada in 2006 and 2008. They each filed separate refugee claims, which were denied. However, the denial of their refugee claims did not result in removals because of the temporary suspension of removals to the Democratic Republic of the Congo. In fact, this “moratorium” is still in place.

[4] Despite the moratorium, the applicants filed applications based on humanitarian and compassionate grounds on two other occasions. The first application was denied on January 14, 2013. The second application was also denied on August 25, 2015. A third application, which is the subject of this judicial review, was filed on September 30, 2016, and was denied on March 31, 2017.

[5] This time, the applicants are citing better establishment in Canada through the employment they allege to hold here and their community involvement. They also cite the best interests of the three (3) children, aged 3, 5, and 7, who were all born in Canada. Lastly, the applicants cite the adverse conditions in the Democratic Republic of the Congo and the consequences of the temporary suspension of removals for them. The applicants, who would like to be permitted to apply for permanent residence from within Canada, despite the obligation set out in section 11 of the IRPA requiring visa applications to be submitted from outside the country, refer to the saving provision of subsection 25(1) of the IRPA. That provision requires the immigration officer to consider "humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected."

III. The decision for which judicial review is requested

[6] The administrative decision-maker examined the humanitarian and compassionate considerations raised and rejected all of them. In my opinion, the decision-maker correctly assessed the applicants' establishment, the effects of the moratorium and the situation in the Democratic Republic of the Congo. I am less persuaded with regard to the assessment of the best interests of the children.

IV. Analysis

[7] Ultimately, there is very little evidence on record. The applicants chose not to submit a testimony attesting to the facts by means of an affidavit. They simply decided to rely on the submissions of their counsel, an immigration consultant. The administrative decision-maker

therefore decided to give little weight to those submissions, which are not supported by the applicants' evidence, considering them to be uncorroborated or even contradicted by the evidence submitted. Three aspects were highlighted in the administrative decision.

A. *Establishment*

[8] The administrative decision-maker did not find the applicants' establishment to be convincing. I found no indication of how that finding might be unreasonable since, given the submissions made, it is a finding that would inevitably fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v. New Brunswick*, 2008 SCC 9; [2008] 1 SCR 190, at paragraph 47). For example, the male applicant submitted notices of assessment only for 2009, 2010, 2011 and 2012. For the subsequent years, the alleged employment income is ambiguous at best. In fact, on his IMM5669 form, the applicant reports that he is self-employed, meaning that, by definition, his income is not employment income. As the administrative decision-maker notes, one is either a salaried employee or self-employed. The company with which the applicants are reportedly associated also seems to be shrouded in mystery. In fact, it is designated as "12345678 Québec", which is in itself rather remarkable.

[9] The applicants do appear to have some social involvement. However, it can certainly not be described as broad, considering their seemingly close-knit network. This led the senior immigration officer to conclude that [TRANSLATION] "the applicants do not demonstrate substantial establishment, considering that they have been in Canada for 10 years." The applicants have not demonstrated how this finding is inappropriate, much less unreasonable.

B. *The situation in the Democratic Republic of the Congo*

[10] In their submissions filed in support of their permanent residence application, the applicants allege that, if they are removed, they will be faced with unusual and undeserved or disproportionate hardship, given that the living conditions in the Democratic Republic of the Congo are among the most difficult in the world. I assumed that the applicants made this reference for descriptive purposes (*Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61; [2015] 3 SCR 909 [*Kanthasamy*], at paragraph 33). First, it is important to note that there is currently a moratorium on removing nationals of the Democratic Republic of the Congo. As the immigration officer noted, [TRANSLATION] "it is up to the applicants to demonstrate that, as a result of their personal circumstances, they risk being affected by the situation." Thus, the administrative decision-maker found that the lack of testimony by the applicants and the inadequacy of the evidence are highly problematic for the applicants' case. Added to this is the moratorium, which will mean that the applicants, if they must return to their country of origin in the future, will face situations different from those that are currently ongoing and that justify said moratorium. That is why the immigration officer states that [TRANSLATION] "given the inadequacy of the evidence regarding the personal situation in the event of a return to the DRC and the TSR [temporary suspension of removals], I give this factor no weight in the overall assessment of this application." I have nothing to add to that statement.

[11] In addition, the applicants were seeking humanitarian and compassionate considerations based on the fact that they are remaining in Canada without status as a result of the moratorium. I

find that the decision made in this regard is clearly justified, intelligible and transparent. That decision reads as follows at page 6 of 8:

> [TRANSLATION]
> Certainly, remaining in Canada without status is less appealing than having permanent residence. However, I think that the applicants must instead compare their situation with the one that would exist were it not for the TSR, rather than with the situation of permanent residents. The purpose of a TSR is not to allow people who choose to benefit from it to receive similar treatment to that of permanent residents. Counsel alleges that remaining in Canada without status, for nationals of the countries covered by a TSR, is in itself a situation that raises sufficient humanitarian and compassionate considerations to justify granting an exemption under subsection 25(1). I do not agree with this assertion by counsel, as that would mean that any person who benefits from a TSR should be granted permanent residence.

[12] My colleague, Justice Alan Diner, had to address a similar argument in *Ndikumana v. Canada (Citizenship and Immigration)*, 2017 FC 328:

> [23] The Officer did in fact review this argument with respect to Ms. Ndikumana. He found that, while remaining in Canada without status may cause inconvenience, it is a normal consequence of the decision to remain in Canada without status (at least for the years between the lifting of the TSR in 2009 and the introduction of the ADR in 2015). The Officer's finding therefore fully meets the test of reasonableness.

I have come to the same conclusion in the case at hand.

[13] It is acceptable for a permanent residence application to be submitted even though the applicants are not at immediate risk of being deported from Canada. However, it is entirely different to allege that humanitarian and compassionate considerations should carry significant

weight because the applicants cannot be deported from Canada given the moratorium that was imposed. While I am not suggesting that these considerations are irrelevant, I do not see how giving them minimal weight could constitute an unreasonable decision in this case. The applicants failed to discharge their burden.

C. *Best interests of the children*

[14] I consider the issue of the best interests of the children to warrant special attention. That special attention owed to children has been recognized in our law for nearly twenty (20) years. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*], the Court wrote:

> 73 The above factors indicate that emphasis on the rights, interests, and needs of children and special attention to childhood are important values that should be considered in reasonably interpreting the "humanitarian" and "compassionate" considerations that guide the exercise of the discretion. I conclude that because the reasons for this decision do not indicate that it was made in a manner which was alive, attentive, or sensitive to the interests of Ms. Baker's children, and did not consider them as an important factor in making the decision, it was an unreasonable exercise of the power conferred by the legislation, and must, therefore, be overturned....

At paragraphs 74 and 75, the Court goes on to describe the attention that is owed to the situation of children. Those paragraphs read as follows:

> 74 ... Therefore, attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for an H & C decision to be made in a reasonable manner. While deference should be given to immigration officers on s. 114(2) judicial review applications, decisions cannot stand when the

> manner in which the decision was made and the approach taken are in conflict with humanitarian and compassionate values. The Minister's guidelines themselves reflect this approach. However, the decision here was inconsistent with it.
>
> 75 The certified question asks whether the best interests of children must be a primary consideration when assessing an applicant under s. 114(2) and the Regulations. The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.

[15] I am very concerned that the reasons given by the immigration officer do not show that he was alive, attentive and sensitive to those interests. My reading of his reasons leads me to find that he did in fact minimize those interests to then compare them with other considerations to find that those other considerations take precedence. This is not the analytical framework that ought to exist and be applied.

[16] When he noted that the children are 3, 5, and 7 years old, the administrative decision-maker made the critique that the applicants did not testify about them and that [TRANSLATION] "no evidence was submitted to indicate that the children are still living with the applicants, such as letters from the daycare centre, professionals, or even friends." This seems to have been the crux of the decision-maker's concerns, since later in the decision, he notes that [TRANSLATION] "the applicants did not submit evidence indicating that they do have custody of their three children and that they take care of them." Despite these observations, the

decision-maker states that he is satisfied that it would be in the children's best interests that their parents be able to remain in Canada with them. However, no attentive review of the interests of these children can be found. In fact, the decision-maker goes back to the fact that, in the current circumstances, the children are benefitting from the moratorium and will not be separated from their parents. This leads to the conclusion that, [TRANSLATION] "as a result, I find that denying this application is not likely to compromise the interests of the children, since it will be the status quo, meaning that the entire family will remain in Canada. I will, therefore, give some positive weight to this factor, but I do not consider it to be a determining factor in this case." Thus, the decision-maker minimizes the best interests of the children to remain here with their parents on the sole basis that their parents will not be deported in the short term. I would add that I have difficulty understanding the administrative decision-maker's finding when he writes:

> [TRANSLATION]
> I also took the best interests of the children into account, and I found, despite the minimal evidence submitted on the topic, that the interests of the children, which are to remain with their parents in Canada, are more of a positive factor than a negative one in this application.

I cannot see how the best interests of the children to remain with their parents in Canada is more positive than negative. It seems appropriate to refer to the following paragraph of the Supreme Court of Canada's majority decision in *Kanthasamy*:

> [59] Moreover, by evaluating Jeyakannan Kanthasamy's best interests through the same literal approach she applied to each of his other circumstances — whether the hardship was "unusual and undeserved or disproportionate" — she misconstrued the best interests of the child analysis, most crucially disregarding the guiding admonition that "[c]hildren will rarely, if ever, be deserving of any hardship": *Hawthorne,* at para. 9. See also

> *Williams v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 166, at paras. 64-67 (CanLII).

[17] It seems to me that the administrative decision-maker chose to minimize the best interests of the children in finding that deportation from Canada would not be imminent, given that the moratorium is still in place. In my view, that consideration is irrelevant. The best interests of the children are not to be weighed against the removal of their parents, but rather, in terms of the stability of the family situation and other benefits that come with the opportunity to submit a permanent residence application now, from within Canada. In my opinion, the decision-maker took too narrow of a view. The administrative decision-maker should have considered all aspects of the best interests of the children.

[18] As stated in *Baker*, while they merit significant weight, the best interests of the children will not always prevail over other considerations. Nevertheless, these interests must first be given the weight they are given in the case law. Nowhere in the immigration officer's decision did I find an evaluation that is alive, attentive and sensitive to these interests. And yet, such an examination depends heavily on the context and the many factors involved. In *Kanthasamy*, the Supreme Court majority summarized what is required as follows:

> [39] A decision under s. 25(1) will therefore be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered: *Baker*, at para. 75. This means that decision-makers must do more than simply *state* that the interests of a child have been taken into account: *Hawthorne*, at para. 32. Those interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence: *Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358 (C.A.), at paras. 12 and 31; *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 323 F.T.R. 181, at paras. 9-12.

> [40] Where, as here, the legislation specifically directs that the best interests of a child who is "directly affected" be considered, those interests are a singularly significant focus and perspective: *A.C.*, at paras. 80-81.
>
> [My emphasis.]

[19] In my opinion, it would be unwise to dispose of this application based on humanitarian and compassionate considerations without having conducted a much more sensitive analysis of the children's interests. The other humanitarian and compassionate considerations raised by the applicants are of no help to them. However, the deficient examination of the best interests of the children renders the decision unreasonable (*Baker*, at paragraph 73), and it must therefore be referred back for reconsideration of these best interests.

[20] Once the best interests of the children have been examined in accordance with the current state of the law, the administrative decision-maker will have to weigh the best interests, which constitute an important factor with substantial weight, against other considerations. There may be other reasons to deny a humanitarian and compassionate application, despite an attentive review of the children's interests. Thus, I am not suggesting in these reasons that the application under review must be allowed. It is rather that this Court's role is limited to reviewing the lawfulness of the decision and, given how the best interests of the children were handled, this decision is flawed to the extent that it must be overturned solely with respect to the best interests of the children.

[21] Consequently, the sole issue of the best interests of the children must be reconsidered, as the other humanitarian and compassionate considerations submitted by the applicants have been

addressed reasonably. A different administrative decision-maker will therefore need to examine the children's situation and decide, on the basis of that attentive review, whether or not the application made under IRPA section 25 should be allowed.

[22] The parties have agreed that there were no serious questions of general importance. As a result, no questions are certified.

JUDGMENT in IMM-2025-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed only with respect to the best interests of the children. This factor must be reconsidered by a different administrative decision-maker. The decision-maker will then need to consider all the evidence to weigh the best interests of the children, which is the sole humanitarian and compassionate consideration.

2. There is no question to be certified.

"Yvan Roy"
Judge

Certified true translation
This 7th day of November 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

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