Federal Court  Cour fédérale

Date: 20190320

Docket: IMM-3537-18

Citation: 2019 FC 349

[CERTIFIED ENGLISH TRANSLATION, REVISED BY THE AUTHOR]

Montréal, Quebec, March 20, 2019

PRESENT: Mr. Justice Grammond

BETWEEN:

HEBERT MARLON LOPEZ COBO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. López is seeking judicial review of a visa officer's decision to refuse his application for an exemption on humanitarian and compassionate grounds [H&C]. I allow his application, since the visa officer did not reasonably weigh the relevant factors, in particular the best interests of Mr. López's daughter.

[2] Mr. López is a Colombian citizen. He arrived in Canada in 2010 and claimed refugee protection. His claim was rejected in 2011. In 2012, he married a Colombian citizen who was granted refugee status in Canada. In 2013, his wife applied for permanent residence and included Mr. López as a family member. In 2014, the couple had a daughter who was born in Canada. In 2015, Mr. López was removed from Canada.

[3] Shortly thereafter, Mr. López submitted an application for permanent residence, sponsored by his wife, to the Canadian Embassy in Bogotá. It was then that Mr. López disclosed that he had been convicted of a criminal offence for possessing a false passport. The alleged offence dates back to 2005. He claims to be innocent and that, despite his arrest at the time, he believed that the case had been closed without further action. However, he was convicted *in absentia* in 2011. Upon his return to Colombia in 2015, he took steps to have the conviction overturned, but was unsuccessful. Such a conviction renders Mr. López inadmissible, according to section 36 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[4] In order to overcome this obstacle, Mr. López asked the visa officer to grant him an H&C exemption under section 25 of the Act. This request was rejected, mainly on the following grounds:

> While I am cognizant that the refusal of this application may result in the continued separation of [Mr. López, his wife] and their child, and that the best interests of the child may be served by living together with both parents, I am not satisfied that there are sufficient H&C grounds to overcome [Mr. López's] criminal inadmissibility in this case.

[5] Mr. López seeks judicial review of this decision. According to *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909, at paragraph 44 [*Kanthasamy*], this Court can only set aside such a decision if it considers it unreasonable.

[6] First, I will deal with a preliminary argument raised by the Minister. Since Mr. López did not submit an affidavit in support of his application for leave and judicial review, the Minister submits that the application does not comply with rule 10 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22. Rule 10 provides that the applicant's record includes, among other things, "one or more supporting affidavits verifying the facts relied on by the applicant in support of the application." However, the Federal Court of Appeal has frequently reiterated the principle that, with certain exceptions that do not apply in this case, judicial review is based exclusively on the record before the administrative decision maker (see, for example, *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at paragraph 86). Moreover, rule 17 provides for the filing of the certified tribunal record, which is supposed to contain all the evidence presented to the administrative decision maker. So what is the role of rule 10? In my opinion, it is to allow the applicant to bring evidence at the leave stage, when the certified tribunal record is not yet available. Indeed, the grounds for judicial review may not be apparent from the decision challenged. However, once leave has been granted, it is often not necessary to submit affidavit evidence. The absence of Mr. López's affidavit is therefore not a defect that warrants the dismissal of his application.

[7] I will now turn to the analysis of the decision challenged. This decision contains the same type of errors that were found to be unreasonable by my colleague Justice Denis Gascon in

Nagamany v Canada (Citizenship and Immigration), 2019 FC 187 [*Nagamany*], as well as in my decision in *Sivalingam v Canada (Citizenship and Immigration)*, 2017 FC 1185 [*Sivalingam*].

[8] First, the best interests of the child have not been examined in a reasonable manner. The officer shows no empathy for the child's situation (*Nagamany* at paragraph 39). He refers to "the common-sense presumption that it is in the best interests of a child to be raised by both parents" (*Sivalingam* at paragraph 17; *Nagamany* at paragraph 41), but he effectively does not give any weight to it. However, we must look at what the officer does and not what he says. Although the officer is not required to write lengthy reasons, reading the decision does not convince me that he has taken into account the "equitable underlying purpose of the . . . relief" (*Kanthasamy* at paragraph 31) and that he "sufficiently considered" the best interests of the child (*Kanthasamy* at paragraph 39).

[9] Second, the officer failed to contextualize the offence that gives rise to Mr. López's inadmissibility. Although Mr. López claims to be innocent, his conviction by a Colombian court is sufficient to provide reasonable grounds to believe that the offence was committed, according to section 33 of the Act. However, the officer failed to note that the offence was committed almost 15 years ago and does not involve violence. Failure to take these mitigating factors into account has the effect of creating an insurmountable wall, which is contrary to the purpose of section 25 of the Act (*Sivalingam* at paragraphs 9–10).

[10] The Minister also argued that the fact Mr. López married and started a family when his status in Canada was uncertain constituted reprehensible conduct that was inconsistent with

being granted an H&C exemption. In other words, there should be no reward for Mr. López's illegal course of conduct. However, the officer did not rely on this ground. The excerpt I quoted above, which summarizes the officer's reasoning, clearly shows that the only negative factor that has outweighed the best interests of the child is Mr. López's criminal record. It is not for me to justify the officer's decision based on reasons that the officer chose not to consider, as the Supreme Court stated in *Delta Air Lines Inc. v Lukács*, 2018 SCC 2, [2018] 1 SCR 6 at paragraph 27.

[11] In any event, I have serious doubts regarding the Minister's argument. Applications for H&C relief are often made when the applicant is already under a removal order. In fact, as the Supreme Court pointed out in *Kanthasamy* at paragraph 14, the power to grant an H&C exemption is intended to "mitigate the rigidity of the law." Exercising this power necessarily implies, from the outset, that the situation does not comply with the Act. Therefore, without falling into circular reasoning, illegality or non-compliance with the Act cannot be invoked as an obstacle to the granting of H&C relief. Additional caution must be exercised when the best interests of a child are at stake. As far as possible, the child should not suffer the consequences of the illegal conduct of his or her parents. Ruling out H&C relief on the grounds of any form of illegality would have the practical effect of excluding consideration of the best interests of the child in broad categories of situations. Ultimately, as the Quebec Court of Appeal wrote in *Adoption – 1445*, 2014 QCCA 1162 at paragraph 69, [TRANSLATION] "it is the interests of the child that must prevail, not the circumstances of the child's birth".

[12] The application for judicial review is therefore allowed, and the matter is referred back to another officer for redetermination.

[13] In closing, I would like to express the wish that this new decision be made quickly. Indeed, as I pointed out in *Iheonye v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 375, at paragraph 20, “the course of one’s childhood cannot be changed retroactively”.

JUDGMENT in IMM-3537-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;

2. The matter is referred to another officer for redetermination;

3. No question is certified.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Cristian Roa Riveros	FOR THE APPLICANT
Isabelle Brochu	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Cristian Roa Riveros Attorney Montréal, Quebec	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT