Federal Court  Cour fédérale

Date: 20190613

Docket: IMM-4980-18

Citation: 2019 FC 811

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Montréal, Quebec, June 13, 2019

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

EULALIA ALEGRIA MONROY

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the case

[1] This is an application for judicial review of the decision rendered on September 12, 2018, by a visa officer of the Immigration Section of the Canadian Embassy [officer], in Mexico City, Mexico, in which he refused to grant an authorization to return to Canada [ARC].

II. Facts

[2] The applicant is a 61-year-old Mexican citizen who wishes to come to Canada to visit her daughter, who is a permanent resident of Canada.

[3] In 2005, the applicant arrived in Canada and made a refugee claim that was denied on July 5, 2006. She said her counselor failed to inform her of the consequences of not leaving Canada after her refugee claim was denied. Her failure to leave when required by law resulted in a deportation order that now affects her right to visit her daughter in Canada.

[4] The applicant filed an application for leave and judicial review of this decision and her application was denied on November 2, 2006. She remained in Canada and took advantage of a Pre-Removal Risk Assessment [PRRA], which was also denied. This refusal resulted in a deportation order effective on July 11, 2007. The applicant left Canada on July 11 as scheduled.

[5] In May 2017, the applicant applied for an electronic travel authorization to visit her daughter in Canada. It was upon receiving the refusal of this application that the applicant learned of the consequences of her failure to leave Canada after having been informed that her refugee claim had been refused, more specifically, that she could return to Canada only if she obtained an ARC.

[6] In May 2018, the applicant filed an ARC application, which was denied on September 12, 2018, and which is the subject of this judicial review.

III. Visa officer's decision

[7] The visa officer concluded that the applicant's offence under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] prevailed over her desire to visit her daughter. More specifically, the officer expressed himself as follows: [TRANSLATION] "I am not satisfied that your reasons for returning to Canada outweigh the circumstances that led to the issuance of the removal orders." The officer agreed that it would not be possible for the applicant's daughter to travel to Mexico to meet her mother, but added that there are other countries where such a meeting could take place.

IV. Issue

[8] The sole issue raised in this application for judicial review is whether the officer's decision was reasonable.

[9] The standard of review for a highly discretionary decision by a visa officer is that of reasonableness. The Court will only be allowed to intervene if the decision-making process lacks justification, transparency and intelligibility, and if the officer's decision does not fall within the range of possible acceptable outcomes that may be justified on the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 and *Lilla v Canada (Citizenship and Immigration)*, 2015 FC 568 at para 27).

V. Relevant law

[10] The following provisions of the IRPA and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] are relevant:

In force — claimants	**Cas du demandeur d'asile**
49 (2) Despite subsection (1), a removal order made with respect to a refugee protection claimant is conditional and comes into force on the latest of the following dates:	**49** (2) Toutefois, celle visant le demandeur d'asile est conditionnelle et prend effet:
(a) the day the claim is determined to be ineligible only under paragraph 101(1)(e);	a) sur constat d'irrecevabilité au seul titre de l'alinéa 101(1)e);
(b) in a case other than that set out in paragraph (a), seven days after the claim is determined to be ineligible;	b) sept jours après le constat, dans les autres cas d'irrecevabilité prévus au paragraphe 101(1);
(c) if the claim is rejected by the Refugee Protection Division, on the expiry of the time limit referred to in subsection 110(2.1) or, if an appeal is made, 15 days after notification by the Refugee Appeal Division that the claim is rejected;	c) en cas de rejet de sa demande par la Section de la protection des réfugiés, à l'expiration du délai visé au paragraphe 110(2.1) ou, en cas d'appel, quinze jours après la notification du rejet de sa demande par la Section d'appel des réfugiés;
(d) 15 days after notification that the claim is declared withdrawn or abandoned; and	d) quinze jours après la notification de la décision prononçant le désistement ou le retrait de sa demande;
(e) 15 days after proceedings are terminated as a result of notice under paragraph 104(1)(c) or (d).	e) quinze jours après le classement de l'affaire au titre de l'avis visé aux alinéas 104(1)c) ou d).
No return without prescribed authorization	**Interdiction de retour**
52 (1) If a removal order has	**52** (1) L'exécution de la

been enforced, the foreign national shall not return to Canada, unless authorized by an officer or in other prescribed circumstances.

mesure de renvoi emporte interdiction de revenir au Canada, sauf autorisation de l'officer ou dans les autres cas prévus par règlement.

Departure order

224 (1) For the purposes of subsection 52(1) of the Act, an enforced departure order is a circumstance in which the foreign national is exempt from the requirement to obtain an authorization in order to return to Canada.

Mesure d'interdiction de séjour

224 (1) Pour l'application du paragraphe 52(1) de la Loi, l'exécution d'une mesure d'interdiction de séjour à l'égard d'un étranger constitue un cas dans lequel l'étranger est dispensé de l'obligation d'obtenir l'autorisation pour revenir au Canada.

Requirement

(2) A foreign national who is issued a departure order must meet the requirements set out in paragraphs 240(1)(a) to (c) within 30 days after the order becomes enforceable, failing which the departure order becomes a deportation order.

Exigence

(2) L'étranger visé par une mesure d'interdiction de séjour doit satisfaire aux exigences prévues aux alinéas 240(1)a) à c) au plus tard trente jours après que la mesure devient exécutoire, à défaut de quoi la mesure devient une mesure d'expulsion.

Exception — stay of removal and detention

(3) If the foreign national is detained within the 30-day period or the removal order against them is stayed, the 30-day period is suspended until the foreign national's release or the removal order becomes enforceable.

Exception: sursis ou détention

(3) Si l'étranger est détenu au cours de la période de trente jours ou s'il est sursis à la mesure de renvoi prise à son égard, la période de trente jours est suspendue jusqu'à sa mise en liberté ou jusqu'au moment où la mesure redevient exécutoire.

Application of par. 42(1)(b) of the Act

226 (2) For the purposes of subsection 52(1) of the Act, the making of a deportation

Application de l'alinéa 42(1)b) de la Loi

226 (2) Pour l'application du paragraphe 52(1) de la Loi, le fait que l'étranger soit visé par

order against a foreign national on the basis of inadmissibility under paragraph 42(1)(b) of the Act is a circumstance in which the foreign national is exempt from the requirement to obtain an authorization in order to return to Canada.	une mesure d'expulsion en raison de son interdiction de territoire au titre de l'alinéa 42(1)b) de la Loi constitue un cas dans lequel l'étranger est dispensé de l'obligation d'obtenir une autorisation pour revenir au Canada.

VI. Position of the parties

A. *The applicant*

[11] The applicant raises seven problematic points concerning the officer's decision, which she considers arbitrary.

[12] The first point refers to the contradiction found in the Global Case Management System [GCMS], which reads "There is indication of criminal inadmissibility", whereas on page 5 of those same notes it is written: "Finally, PA does not pose a risk to Canada's security; she has no criminal background".

[13] Next, the applicant disagrees with the officer when he concludes that there are no compelling and exceptional circumstances to motivate the applicant's return to Canada. On the contrary, she considers that the need to visit her daughter after more than 10 years of separation constitutes such a circumstance.

[14] In connection with this same point, the applicant submits that the officer was required to apply the criteria found in the operational manual of Immigration, Refugees and Citizenship

Canada OP1, Procedures (OP Manual) and which provides a list of reasons to take into account when considering the request to return to Canada. One of those reasons is formulated as follows: “Are there factors that make the applicant’s presence in Canada compelling (e.g., family ties, job qualifications, economic contribution, temporary attendance at an event)?” (Emphasis in the applicant’s brief). Thus, according to the applicant, the officer should have taken into account the family ties that bind her to her daughter who lives in Canada.

[15] As the notes in the GCMS are favorable to the applicant, apart from the fact that the Government of Canada had to expel her from Canada in 2007, the applicant submits that the officer had to justify why he gave more weight to the fact that she acted in contravention of the IRPA than to the other criteria.

[16] The applicant considers that the officer erred when he wrote “I note over 10 years have passed since the execution of removal. However, eligibility to apply is not the only consideration”, since there is no time limit for filing an ARC application.

[17] Finally, the applicant points out that the officer did not analyze the tangible or intangible benefits to the applicant if the request was granted. This is, according to the applicant, another error.

B. *The respondent*

[18] The respondent first recalls the discretionary nature of an ARC and that the legislator has chosen to treat persons subject to a departure order differently from those facing a deportation order as the latter are only allowed to return to Canada with the authorization of an officer.

[19] The respondent, citing paragraphs 51 to 53 of *Quintero Pacheco v Canada (Citizenship and Immigration)*, 2010 FC 347, states that the officer is not required to give formal or comprehensive reasons. That said, the respondent submits that the officer considered all the evidence on file and took into consideration all factors relevant to making a decision.

[20] Regarding the applicant's claim that she did not know the consequences of not leaving Canada after her refugee claim was rejected, the respondent relies on the case law to say that "ignorance of this requirement [departure order] is no excuse for failing to comply with it" (*Chazaro v Canada (Minister of Citizenship and Immigration)*, 2006 FC 966 at para 22 and 24; *Parra Andujo v Canada (Citizenship and Immigration)*, 2011 FC 731 at para 27 [*Parra Andujo*]).

[21] The respondent relies on the case law to assert that the applicant mistakenly believes that the officer should follow the guidelines of the OP Manual to the letter (see *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 32 [*Kanthasamy*]). It emphasizes that the instructions in question do not have the force of law and are not binding. This would not result in any right and the OP Manual cannot serve as an impediment to the exercise of the officer's discretion.

VII. Analysis

[22] The applicant indicates that the notes in the GCMS state “There is indication of criminal inadmissibility”. Like the applicant, the Court is of the opinion that this is an error (probably the omission of the word “no”) since the evaluation seems to indicate otherwise. Indeed, we can also read in the GCMS: “Finally, PA does not pose a risk to Canada’s security; she has no criminal background”. However, in light of the officer’s conclusion, it does not appear that he relied on this error in weighing the factors that led to his negative decision.

[23] Contrary to the applicant’s claims, the officer does not have to follow the OP Manual, since it is not legally binding (*Kanthasamy*, above, para 32). On the contrary, the case law recognizes that the officer has wide discretion when deciding on an ARC application (*Parra Andujo*, above, at para 22).

[24] With respect to what is expected of an officer in terms of reasons for an ARC decision, the case law states that very little is required. That said, “such decisions cannot be arbitrary and, where reasons are given, those reasons need to make some sense and must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law” (*Umlani v Canada (Citizenship and Immigration))* 2008 FC 1373 at para 61).

[25] In this case, the officer stated that visiting a family member was not a compelling reason that could justify granting an ARC. In conclusion, the officer wrote that the applicant and her

daughter could meet in a country other than Canada and Mexico. However, for the reasons that follow, the Court considers this decision unreasonable.

[26] First, Canada is known for its reasonable decisions, and reasonability requires that we always keep in mind a humanitarian dimension—which should not be confused with an analysis for humanitarian reasons—especially here, the importance of family ties. In this case, it was a question of considering the family situation of the applicant who, let us remember, is 61 years old and has not seen her daughter in 10 years. Circumstances associated with other cases could quickly put an end to such an analysis. However, according to the officer, the applicant is not a risk to Canada; she left Canada at her own expense as soon as she received the rejection of her PRRA application and her daughter demonstrated her ability to support her mother for the duration of a short stay. Moreover, even if nothing in the evidence proves there is an urgent situation, this is still a person in her sixties. Finally, the applicant never attempted to come to Canada illegally.

[27] Canada should be prevented from becoming a closed fortress where there is a permanent impediment to bringing together families who pose no threat to the security of Canada and whose reunion would have no financial impact on Canada, especially when other options are not realistic. Any visit—in the hope that the applicant and her daughter will have many opportunities to see each other in the future—should be accompanied by proof that the applicant has a return ticket whose date is within the period during which her daughter is able to provide for her basic needs.

[28] In conclusion, while it is true that the officer has broad discretion in awarding an ARC, the fact remains that when the officer provides reasons, they must be reasonable in light of the facts presented. This Court considers that the decision and its reasons were not reasonable.

VIII. Conclusion

[29] For the above reasons, this application for judicial review is allowed.

JUDGMENT in Docket IMM-4980-18

THE COURT ORDERS THAT the application for judicial review is allowed, that the decision is set aside, and that the file is referred to another officer for reconsideration. There is no question of general importance to certify.

"Michel M.J. Shore"
Judge

Certified true translation
This 5th day of July, 2019.

Daniela Guglietta, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4980-18
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