Federal Court  Cour fédérale

Date: 20240404

Docket: IMM-5270-23

Citation: 2024 FC 512

[ENGLISH TRANSLATION]

Ottawa, Ontario, April 4, 2024

Present: Associate Chief Justice Gagné

BETWEEN:

SABRI BEN HARIZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Sabri Ben Hariz, a Tunisian citizen, is inadmissible on grounds of serious criminality. He was deported from Canada in 2019 and since then, has been living in France with his spouse (at least at the time of the underlying application), whom he married in 2021 and who has dual

French and Canadian citizenship. Their daughter was born in France in March 2021 and also has dual citizenship.

[2] He had asked the Minister to waive his inadmissibility and to exempt him from the provisions of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], relating to the sponsorship of foreign nationals for humanitarian and compassionate considerations.

[3] The Minister's delegate considered the applicant's argument that his wife is finding it difficult to live outside Canada and that his daughter would be separated from one of her parents if the request were refused. However, she granted greater weight to the fact that the applicant's daughter was born in France and has lived there with both her parents since she was born. The applicant did not explain why separation would be inevitable other than as the result of a choice made by the parents. The Minister's delegate also noted that the applicant has a French residence permit and has taken all the steps required to integrate there. She therefore saw nothing to prevent the family from remaining in France until the applicant received a suspension of his criminal record, if applicable. The Minister's delegate therefore rejected the application for an exemption.

II. Issues and standard of review

A. *What are the Minister's obligations with regard to an application for exemption for humanitarian and compassionate considerations submitted by a foreign national outside Canada?*

B. Did the Minister's delegate err in her analysis of the best interests of the child?

[4] The standard of review applicable to a discretionary decision made under subsection 25(1) of the IRPA is reasonableness *(Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65).

III. Analysis

A. *What are the Minister's obligations with regard to an application for exemption for humanitarian and compassionate considerations submitted by a foreign national outside Canada?*

[5] Following the hearing before the Court, I contacted counsel for the parties to provide them with an opportunity to submit arguments on the distinction made by Parliament between an application for an exemption for humanitarian and compassionate considerations by an applicant in Canada and one by an applicant outside Canada. Pursuant to subsection 25(1) of the IRPA, the Minister must examine the application of a foreign national in Canada and may, on request, examine that of a foreign national outside Canada.

[6] Counsel for the applicant referred the Court to a work of doctrine (Guilbault, Louis, "Des considérations d'ordre humanitaire : les limites de la décision raisonnable dans le contexte d'application de l'article 25 (1) de la *Loi sur l'immigration et la protection des réfugiés*" (2018) 48:1-2 RDUS 123), and the Federal Court of Appeal decision *Lemus v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 114, which do not address the issue. Counsel for the respondent unfortunately did not respond to the question and instead addressed the distinction between subsection 25(1) and subsection 25(1.3).

[7] In any event, and considering my finding on the reasonableness of the decision by the Minister's delegate, the issue of whether the Minister is required to consider an exemption application by a foreign national outside Canada will be a matter left for another occasion.

B. *Did the Minister's delegate err in her analysis of the best interests of the child?*

[8] First, the respondent is asking the Court not to consider the letter from the applicant's wife dated April 6, 2021, submitted in support of her sponsorship application, in which she confirms that she lives in France with the applicant but states that she plans to return to Canada in December 2021, at the end of her maternity leave. The respondent argues that this information was not before the Minister's delegate and cannot be considered by the Court.

[9] In his application for an exemption, the applicant stated the following with regard to his wife:

> [TRANSLATION]
> - My wife is living outside Canada during the proceeding, which involves significant financial resources. (Her job is in Canada, and she is currently teleworking, which makes her projections difficult.)
>
> - My wife, living outside Canada, finds the situation difficult.

[10] Although the respondent is correct on this issue, I do not think it has an impact on the actual issue raised in this application for judicial review, which involves the best interests of the child.

[11] The applicant arrived in Canada in 2008 as a visitor. In 2012, an exclusion order was issued against him for remaining in Canada beyond the period of his authorized stay.

[12] He was found guilty of several criminal offences in 2015, 2017 and 2018, and an exclusion order was issued against him on February 8, 2018. He was removed from Canada in 2019.

[13] It was in this context that he married his wife in February 2021 and that his daughter was born in France in March 2021.

[14] In my opinion, the Minister's delegate properly identified the best interests of the applicant's daughter, which are to stay in France, where she was born, with both her parents.

[15] Whether one considers the evidence submitted in support of the sponsorship application or that in support of the exemption application, both involve the interests of the child's mother—not those of the child—and a list of choices the child's parents have made. While it is true that when examining an application for exemption, the Minister is required to consider the best interests of any child affected by the decision, this does not exonerate the child's parents from making life choices that take the best interests of their child into consideration.

[16] In my opinion, considering all the circumstances of this case, it was open to the Minister's delegate to grant considerable weight to the fact that the child was born in France and lived there with both her parents at the time of the application.

[17] The applicant's inadmissibility was known to the parents at the time they decided to get married and have their daughter in France. Their current situation is more the result of informed choices they made than any unfortunate events they suffered.

[18] In my opinion, the circumstances of this case would not "excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes" of the applicant (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 21, citing *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338, [1970] IABD No 1).

[19] The Minister's delegate considered all the factors that were submitted to her, in particular, the best interests of the child, and it was open to her to conclude that the applicant's situation did not justify waiving his inadmissibility.

IV. Conclusion

[20] I am of the opinion that the decision by the Minister's delegate was reasonable and intelligible, and was justified in relation to the factual and legal constraints in this case. The applicant's application for judicial review is therefore dismissed. The parties have not proposed any questions of general importance for certification, and I am of the view that this matter does not give rise to any.

JUDGMENT in IMM-5270-23

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Jocelyne Gagné"
Associate Chief Justice

Certified true translation
Elizabeth Tan

FEDERAL COURT

SOLICITORS OF RECORD

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