Federal Court  Cour fédérale

**Date: 20140523**

**Docket: IMM-5154-13**

**Citation: 2014 FC 492**

**[UNREVISED ENGLISH CERTIFIED TRANSLATION]**
**Ottawa, Ontario, May 23, 2014**

**PRESENT: The Honourable Mr. Justice Roy**

**BETWEEN:**

**MEHDI REZKI**
**FATIHA MELLOUK**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] The applicant is challenging a decision of an immigration officer, dated May 30, 2013, according to which the humanitarian considerations raised in his case did not justify an exemption, in whole or in part, from the relevant requirements of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], and the *Immigration and Refugee Protection Regulations*,

SOR/2002-227 [the Regulations]. This is an application for judicial review pursuant to section 72 of the IRPA.

## I. Facts

[2] Mehdi Rezki arrived in Canada on November 1, 2009, when he was six years old. His parents, a dentist and a pharmacist, and their other three children, born in 1993, 1995, and 1998, were granted permanent residence in Canada. However, for reasons difficult to explain, to this day, young Mehdi has not been included in the application made for the rest of the family. The family is originally from Morocco, but the applicant was born in the United States. He is an American citizen and entered Canada on an American passport that his parents had apparently obtained for him. He was not declared when the application for permanent residence was submitted in 2007. However, his parents state that they showed his American passport at the Canadian border when they arrived in Canada.

[3] The circumstances surrounding Mehdi Rezki's arrival in Canada were unclear when his case was examined by Citizenship and Immigration Canada authorities, and they remain so to this day. Fatiha Mellouk is his mother, as DNA tests have confirmed, and it was she who decided to represent her son, who is the youngest of the family's four children. All the members of the family have at least Moroccan citizenship.

[4] On October 18, 2010, that applicant's mother tried to sponsor him as a member of the family class. She initially explained that she and her husband thought that because of his American nationality, their son did not need a visa. She then stated that they were afraid of

delaying the processing of the immigration application. It was never explained how adding a fourth child when filling out the forms would have delayed the processing of the application, nor why they thought that an American passport could grant status in Canada. While the members of the family were trying to become permanent residents, American citizenship alone would have done just as well. On June 2, 2011, the sponsorship application was rejected.

[5] The applicant continued living in Canada despite being without status; he is currently attending school at Collège international Marie de France in Montréal. The documentary evidence suggests that he did not register there until September 2011, having spent the previous school year in Casablanca, at École Ernest Renan.

[6] Essentially, it is paragraph 117(9)(*d*) of the Regulations that is preventing the sponsorship in the circumstances. That provision reads as follows:

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| **Excluded relationships** | **Restrictions** |
| (9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if | (9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes : |
| . . . | […] |
| (*d*) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined. | d) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle. |

[7] The applicants do not appear to have challenged this rejection. Instead, Ms. Mellouk tried to obtain permanent residence for her son by seeking an exemption from paragraph 117(9)(*d*) of the Regulations, relying on the saving provisions of subsection 25(1) of the IRPA, which reads as follows:

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| **Humanitarian and compassionate considerations - request of foreign national** | **Séjour pour motif d'ordre humanitaire à la demande de l'étranger** |
| 25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible - other than under section 34, 35 or 37 - or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada - other than a foreign national who is inadmissible under section 34, 35 or 37 - who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected. | 25. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire - sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 -, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada - sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 - qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché. |

[8] Thus, on February 1, 2012, the applicants filed a second application for permanent residence, this time invoking humanitarian and compassionate considerations under

subsection 25(1) of the IRPA to justify an exemption from the regulatory requirements. It is the child's mother, of course, who is overseeing the case.

[9] It is clear upon examining the documentary evidence that the immigration officer had doubts about this application and, more generally, about the case. Some additional information was therefore required.

[10] On December 11, 2012, the officer contacted Ms. Mellouk by email to tell her that further explanations were needed: a written statement explaining who was Zanine Fatiha, the person originally listed as the child's mother on his birth certificate; official proof of the mother's legal change of name; proof of residence in Canada; an explanation of the family's sources of income in Canada; a medical certificate confirming the child's premature birth; and a Quebec Selection Certificate in the child's name. The officer also informed the applicant's mother that the information on the DNA analysis laboratory was out of date and that maternity could not be evaluated on the basis of the results already provided.

## II. Decision and parties' arguments

[11] On May 30, 2013, the officer rejected the application. The decision letter explains that she concluded that under subsection 117(9) of the Regulations, Mehdi was not a member of the family class, having not been declared at the outset, and that in this case, the humanitarian and compassionate considerations and the best interests of the child did not warrant an exemption from subsection 117(9).

[12] Essentially, the application under subsection 25(1) of the IRPA is based on the best interests of the child. The applicants submit that it is in the child's best interests to remain in Canada and live here with the other members of the family, who all have permanent resident status. A separation would be very harmful.

[13] The immigration officer exercised discretion in rejecting the application. Earlier, when the case was being examined, doubts about the child's parentage had been raised. DNA tests dispelled these doubts. However, all the circumstances surrounding the child's birth and the difficulties in obtaining the requested information relevant to processing the application continued to cast a shadow over this case.

[14] The circumstances of the child's birth therefore remain nebulous. It appears that there is no documentation available, but Ms. Mellouk claims that she went to the United States to attend a conference and gave birth to the child there prematurely. At the hearing of the application for judicial review, Ms. Mellouk, who chose to dispense with the services of counsel after having been assisted throughout the process to that point, stated that there were additional reasons. However, for some unknown reason, no such evidence was supplied to the immigration officer and therefore cannot be used upon judicial review. At any rate, this lack of evidence on the circumstances of the child's birth aroused suspicions.

[15] However, first and foremost, the immigration officer believes that the noted failure to comply with subsection 117(9) of the Regulations was not inadvertent. The applicants deliberately chose to conceal the existence of a fourth child. In addition, the immigration officer

was not satisfied that the family is so established in Canada that they cannot return to Morocco to resettle there. They are all Moroccan citizens, and it appears that the father never completely established himself in Canada. This is another grey area in the family's story, since they did not give a satisfactory explanation for the very long periods spent in Morocco.

[16] The immigration officer therefore concluded that in this case, the best interests of the child do not constitute sufficient humanitarian and compassionate considerations. The best interests of the child would not be at risk if Ms. Mellouk and her child had to return to Morocco. The notes in the Global Case Management System (GCMS) provide us with some details about the reasons for rejecting the application. The immigration officer appears to start from the premise that there does not have to be a separation, since all the individuals involved are Moroccan citizens. The family's bonds are strong. The ties to Canada are more tenuous, and the immigration officer notes that their sources of income are outside the country.

## III. Analysis

[17] The challenge to the decision was presented to this Court as if the Court could substitute its discretion for that of the immigration officer. Despite the Court's efforts to make Ms. Mellouk understand that the onus was on her to show that the decision is unreasonable, she instead went about trying to generate sympathy. While there is no denying that sympathy has its place, the Court has a different role to play, which is to review the legality of the decision at issue here. Since decisions under section 25 of the IRPA are reviewed on the reasonableness standard (*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189; [2010] 1 FCR 360 [*Kisana*]), the Court must show deference to the decision of administrative tribunal. It is helpful

to once again quote paragraph 47 of *Dunsmuir v New Brunswick*, 2008 SCC 9; [2008] 1 SCR 190 [*Dunsmuir*]:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. 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.

[18] In the case under review, the immigration officer concluded that multiple factors taken together led her to exercise her discretion under subsection 25(1) of the IRPA so as to reject the application. Those factors may be summarized as follows:

(a) the decision not to declare Mehdi Rezki was deliberate, and paragraph 117(9)(*d*) applies with full force and effect;

(b) the reasons given for this decision varied: Ms. Mellouk initially pleaded ignorance, claiming that Mehdi's American passport was sufficient, but later argued that she did not want to draw out the immigration process. These variations constitute contradictions;

(c) more generally, the answers given were allegedly vague or even contradictory. The questions, however, were simple and factual, and the interviewees are well-

> educated individuals. Indeed, the delays in responding and in following instructions as simple as those given in February 2011 to regularize the child's status were noted. The latter incongruity was described as "another blatant disregard for immigration laws and non-compliance with instructions given by a CIC employee . . ." (GCMS);
>
> (d) the degree of establishment in Canada was insufficient. Although the mother's residency was not called into question, the father's residency was, as he spends much of his time in Morocco. These prolonged absences are unexplained. Establishment in Morocco has been maintained and could easily be increased. The family could therefore be reunited in Morocco if they wished, with neither the child nor the family suffering any "disproportionate hardship".

[19] Essentially, if Mehdi cannot be included in the "family class", it is because of the deliberate actions of those who now want to sponsor him, and the best interests of the child in remaining with his family in Canada are not enough to counterbalance this, because his parents could establish themselves in Morocco with relative ease, or at least without "disproportionate hardship", given the enduring ties of the father and the parents' level of education.

[20] As was previously noted, the female applicant seemed to think that the Court could substitute its own view for that of the immigration officer. Her oral argument shed absolutely no light on how the impugned decision was not reasonable, within the meaning of *Dunsmuir*.

[21] The Court relied on the memorandum of fact and law, which by the way was not repudiated, to consider the arguments made in it regarding the reasonableness of the decision. It seems to me that the memorandum raises two arguments which the author barely develops:

(1) the immigration officer should have considered the best interests of the child in being granted permanent residence. Instead, she considered the best interests of the child if he had to leave Canada. In the applicants' view, it was in the best interests of the child for him to continue living with his family in Canada, as a separation would be harmful;

(2) the immigration officer failed to give reasons for the decision, as she is required to do. It is alleged that this is violates the rules of natural justice.

[22] The second issue, which is considered in accordance with the correctness standard (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12; [2009] 1 SCR 339), can be disposed of quickly. In my view, *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62; [2011] 3 SCR 708, provides a complete answer. The quality of the reasons alone is not enough. At paragraph 14, the Supreme Court wrote as follows:

> [14] Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §§12:5330 and 12:5510). It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was

> saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).

The applicable test is set out at the end of paragraph 16:

> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[23] What the applicants are actually complaining about has more to do with the conclusion that the officer reached. The reasons for a decision are never adequate in the eyes of someone who disagrees with them. This, in my view, explained why the best interests of the child were not in danger, since the family could easily return to their country of origin, to which they still have strong ties, if the time spent there by the father and the lack of sources of income in Canada are any indication. The Court has no difficulty understanding the reasons for the decision.

[24] Whether the decision is reasonable in terms of the child's best interests perhaps requires further elaboration. An application made under subsection 25(1) of the IRPA, as in the present case, is not limited to the best interests of the child. This factor must be taken into account, but the provision provides that humanitarian and compassionate considerations warrant overriding

the criteria and obligations of the legislation. Such are the factors that were weighed and examined by the immigration officer.

[25] The test that the applicants proposed would emphasize the best interests of the child, which would be to remain in Canada. They complain that the decision dealt with the best interests of the child should he have to leave the country. In my opinion, such is not the test, and such is not the exercise that the immigration officer was required to perform. What the immigration officer did was to examine the humanitarian and compassionate considerations and conclude that the child's hardship, should he have to return to Morocco, would not be unusual and undeserved or disproportionate because the parents could re-establish themselves there with relative ease. There was no error, since adequate consideration was given to the child's interests.

[26] What is unusual here is that the child's parents, as well as the older children in the family, all have permanent resident status in Canada. Usually, it is the parents who are seeking permanent resident status and therefore invoke the best interest of the child in order to remain in Canada. The only argument presented by the applicants is that the best-interests-of-the-child test was applied incorrectly. However, the review of the decision is inconclusive on this point. Everyone understood that the family would prefer it if all its members could remain in Canada. However, the immigration officer concluded that the hardship in returning to Morocco would not be unusual and undeserved or disproportionate. In the particular circumstances of this case, there are insufficient grounds to override the public policy reasons for subsection 117(9) of the Regulations.

[27] On closer inspection, the situation in the present case could be clarified somewhat through a review of the case law. This Court has dealt with numerous cases under section 25 of the IRPA in which one or both parents were to be deported while the child was a Canadian citizen with a constitutional right to remain in the country. Time and time again, the Court held the best interests of the child, which is clearly to remain with his or her parents, was but one of the factors to be considered. In *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 FC 358 [*Legault*], the Court wrote:

> [11] In *Suresh*, the Supreme Court clearly indicates that *Baker* did not depart from the traditional view that the weighing of relevant factors is the responsibility of the Minister or his delegate. It is certain, with *Baker*, that the interests of the children are one factor that an immigration officer must examine with a great deal of attention. It is equally certain, with *Suresh*, that it is up to the immigration officer to determine the appropriate weight to be accorded to this factor in the circumstances of the case. It is not the role of the courts to re-examine the weight given to the different factors by the officers.
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> [12] In short, the immigration officer must be "alert, alive and sensitive" (*Baker*, *supra*, at paragraph 75) to the interests of the children, but once she has well identified and defined this factor, it is up to her to determine what weight, in her view, it must be given in the circumstances. The presence of children, contrary to the conclusion of Justice Nadon, does not call for a certain result. It is not because the interests of the children favour the fact that a parent residing illegally in Canada should remain in Canada (which, as justly stated by Justice Nadon, will generally be the case), that the Minister must exercise his discretion in favour of said parent. Parliament has not decided, as of yet, that the presence of children in Canada constitutes in itself an impediment to any "*refoulement*" of a parent illegally residing in Canada (see *Langner v. Canada (Minister of Employment and Immigration)*, (1995), 29 C.R.R. (2d) 184 (F.C.A.), leave to appeal refused, [1995] 3 S.C.R. vii).

[28] The factors that favour keeping a family together do not always outweigh upholding the integrity of the immigration system. In fact, if the interests of the child automatically prevailed,

this would become an automatic exemption from paragraph 117(9)(*d*) of the Regulations, rendering that provision ineffective for a specific class of individuals.

[29] As the Federal Court of Appeal noted in *Kisana*, it is therefore clear that false or misleading statements may outweigh the interests of the child (para 27).

[30] In my view, it is clear that the immigration officer knew perfectly well that it would be in the best interests of the child to remain with his parents in Canada, if that is what they should decide to do. This is no way means that the assessment of the inherent hardship stemming from the rejection of an application based on humanitarian and compassionate considerations ignored the interests of the child. As the Federal Court wrote in *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2003] 2 FC 555:

> [5] The officer does not assess the best interests of the child in a vacuum. The officer may be presumed to know that living in Canada can offer a child many opportunities and that, as a general rule, a child living in Canada with her parent is better off than a child living in Canada without her parent. The inquiry of the officer, it seems to me, is predicated on the premise, which need not be stated in the reasons, that the officer will end up finding, absent exceptional circumstances, that the "child's best interests" factor will play in favour of the non-removal of the parent. In addition to what I would describe as this implicit premise, the officer has before her a file wherein specific reasons are alleged by a parent, by a child or, as in this case, by both, as to why non-removal of the parent is in the best interests of the child. These specific reasons must, of course, be carefully examined by the officer.
>
> [6] To simply require that the officer determine whether the child's best interests favour non-removal is somewhat artificial—such a finding will be a given in all but a very few, unusual cases. For all practical purposes, the officer's task is to determine, in the circumstances of each case, the likely degree of hardship to the child caused by the removal of the parent and to weigh this degree of hardship together with other factors, including public policy

> considerations, that militate in favour of or against the removal of the parent.

[31] I fail to see how the decision under review incorrectly applied the test under section 25 of the IRPA. As for the weight to be given to the factors to be considered, *Legault* establishes that this is up to the decision maker. I do think it is possible that the weight assessed could be inherently unreasonable: discretion cannot be exercised arbitrarily and with no grounding in reality (*Roncarelli v Duplessis*, [1959] SCR 121).

[32] However, the immigration officer had serious grounds to question various aspects of this case.

[33] I cannot bring myself to conclude that this finding by the immigration officer does not fall within the range of possible outcomes, within the meaning of *Dunsmuir*. If the Court were to conclude otherwise, this would amount to recognition that subsection 117(9) of the Regulations is not in the public interest whenever the family member sponsored in the family class is a child. Here, although the applicants were expected to be as transparent as possible, such was not the case. In fact, the background information form that the mother filled out, at pages 15 to 18 of the certified record, states that Mehdi attended school at École Ernest Renan, in Casablanca, during the 2010–2011 school year. He did not become a student in Canada until September 2011, well after his parents were granted permanent residence, and clearly after he began school in Morocco. For every answer, the mother tersely replied that the form, which she herself signed on December 29, 2011, had to be wrong.

[34] In my view, someone who invokes humanitarian and compassionate considerations to seek an exemption from a legislative provision must do so in a perfectly transparent manner. The same is true for the obligation imposed in paragraph 117(9)(*d*) of the Regulations. The penalty is severe for those who do not act transparently. Section 25 exists to remedy certain situations, but it cannot be used to perpetuate grey areas. The applicants were not as transparent as they were required to be.

[35] The result was an application shrouded by doubts that the applicants did nothing to dispel, even though they were given many opportunities to do so. The immigration officer exercised her discretion, on behalf of the Minister, by giving full consideration, on the one hand, to the best interests of the child, concluding that he would not face unusual and undeserved or disproportionate hardship if he returned to the country of citizenship; and, on the other hand, to the provisions of the IRPA, which are clearly in the public interest and would have to be set aside to grant the application.

[36] It may well be that others could have come to a different conclusion. However, this is not what the reasonableness standard is about. As the Supreme Court wrote in *Dunsmuir*, this does not mean that reviewing courts "may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view" (para 48). The decision under review is reasonable in every respect and must be treated with deference.

[37] The application for judicial review is therefore dismissed. There is no question to be certified.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed.

There is no question to be certified.

"Yvan Roy"

Judge

Certified true translation
Michael Palles

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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