Federal Court  Cour fédérale

Date: 20140828

Docket: IMM-2988-13

Citation: 2014 FC 827

Ottawa, Ontario, August 28, 2014

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

MARIA SUELI MACHADO DE LIMA
IVANIR MENDES DE LIMA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] Mrs. Maria Sueli Machado de Lima and her husband, Mr. Ivanir Mendes de Lima are citizens of Brazil. They have been continuously residing in Canada since 2004 and 1999, respectively.

[2] Mr. and Mrs. de Lima seek judicial review of the Immigration Officer's decision to refuse their application for permanent residence based on humanitarian and compassionate (H&C) grounds. They submit that the Officer ignored evidence, and that she applied the wrong test in assessing the hardship they would face should they have to apply from Brazil.

[3] On August 21, 2012, the de Limas presented a permanent residence application based on H&C grounds, their second such application, requesting an exemption from the requirement to apply from outside Canada. This application was presented under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[4] On April 4, 2013, the Officer refused their application, concluding that the de Limas had failed to demonstrate that they would face unusual and undeserved or disproportionate hardship if they were not granted the exemption.

[5] For the reasons set out below, I find that the Officer's decision is within the range of reasonable outcomes in respect of the facts and the law, and that the Officer applied the proper test in relation to the assessment of hardship.

II. H&C APPLICATION

[6] Mr. and Mrs. de Lima are seeking an exemption from the usual requirement to apply for permanent residence outside Canada. This requirement is set out in subsection 11(1) of IRPA, while the possibility to be granted an exemption is found at subsection 25(1), both reproduced in the annex.

[7] For the application under subsection 25(1) to succeed, the applicant must prove that the refusal to grant the exemption and the resulting obligation to apply from outside Canada will result in unusual, underserved or disproportionate hardship (*Singh v Canada* (*Minister of Citizenship and Immigration*), 2009 FC 11).

[8] Subsection 25(1.3) provides that the Officer may not consider the factors that are taken into account for the determination made under sections 96 and 97 of IRPA, but must consider the elements related to the hardships.

III. QUESTIONS

[9] The two questions raised in this case are:

(a) Did the Officer err in assessing the H&C grounds?

(b) Did the Officer err in applying the legal test for hardship?

IV. STANDARD OF REVIEW

[10] I agree with the parties that the applicable standard of review in answering the first question is that of reasonableness since deference should be granted to an Officer exercising his or her discretionary power (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 62; *Kanthasamy v Canada* (*Minister of Citizenship and Immigration*), 2013 FC 802 at para 10, 2014 FCA 113 at para 32). The Officer is given a wide margin of discretion in reaching a conclusion that "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008, SCC 9 at para 47).

[11] Regarding the second question, I agree with the Applicants that the proper standard will be correctness if the issue is the determination of the appropriate legal test for hardship (*Hinzman v Canada* (*Minister of Citizenship and Immigration*), 2009 FC 415 at para 40, reversed in 2010 FCA 177 on other grounds).

[12] However, determining if the test was adequately applied to the facts and circumstances of this particular case will be a question of mixed law and fact, and will thus require the application of the reasonableness standard.

V. POSITION OF THE PARTIES

(1) Mr. and Mrs. de Lima's position

[13] First, the de Limas submit that the Officer ignored evidence. While the Officer noted that there was no evidence that their son Wagner was unable to work without his father's help, a note from Wagner's doctor was provided indicating he was unable to work. Further, they argue it was unreasonable for the Officer to set aside all letters of support from family and friends on the basis that they were written by people who might be biased regarding the outcome of the present application. The de Limas argue that this type of exclusion cannot stand since family and friends are the individuals most likely to be aware of their establishment in Canada. This type of exclusion was set aside by the Court in the refugee context, and it should, they contend, be set aside as well in the H&C context.

[14] Second, the de Limas claim that the Officer applied the wrong test in assessing the hardship. They submit that the Officer unreasonably discounted the fact that Mrs. de Lima suffers from anxiety. Even though the risk factors in sections 96 and 97 may not be considered in an H&C application, the Applicants argue that the Officer must consider the hardship related to her psychological condition. Since the Officer failed to assess the hardship stemming from Mrs. de Lima's mental health issues, she thus applied the wrong legal test.

[15] Finally, the de Limas submit that the Officer failed to be "alert, alive and sensitive" to the best interests of the children as established in the case law and immigration operations manuals.

(2) Respondent's position

[16] The Respondent notes that an H&C exemption is an exceptional and discretionary remedy that must be granted only when the Applicant is facing undue and undeserved or disproportionate hardship (*Legault v Canada* (*Minister of Citizenship and Immigration*), 2002 FCA 125 [*Legault*] at para 15; *Baker, supra*). The refusal to grant an H&C exemption does not take away the right of Applicants to apply for permanent residence; Applicants may still apply and they will have to comply with the usual requirements under the IRPA.

[17] The Respondent further submits that subsection 25(1.3) requires an Officer to assess the facts through a lens of hardship: *Kanthasamy v Canada* (*Minister of Citizenship and Immigration*), 2014 FCA 113 at para 74. In order to avoid duplication in the immigration system, risk factors taken into consideration under sections 96 and 97's analysis may not be considered under H&C applications under section 25, although elements related to hardship must be. The

applications presented under section 25 are normally broader and more flexible, but they are not intended to be used as an appeal for failed refugee claimants.

[18] The Respondent stresses that factors are not facts. He submits that the Officer was correct in stating that she had no jurisdiction to assess the risk related to the violence in Brazil alleged by Mrs. de Lima. Furthermore, the de Limas provided very little information.

[19] According to the Respondent, the Officer did consider Mrs. de Lima's mental health, but found no resultant hardship. Indeed, the letter provided by Mrs. de Lima's doctor provides no detail with respect to her condition or to the care she requires. Insufficient evidence prevents the H&C exemption from being granted (see *Owusu v Canada* (*Minister of Citizenship and Immigration*), 2004 FCA 38 at paras 5 and 8).

[20] The Respondent argues that the Officer's assessment was reasonable and that the weight to be given to H&C factors falls within an officer's discretion (*Legault, supra* at para 11; *Suresh v Canada* (*Minister of Citizenship and Immigration*), [2002] 1 SCR 3 at paras 34-37). The medical note and letter from Wagner's doctors contained no indication that he cannot work without the assistance of his father. Moreover, the Officer did consider the information in the support letters and reasonably set them aside. Finally, the best interests of the de Limas' grandchildren were reasonably assessed.

VI. ANALYSIS

(a) Did the Officer err in assessing the H&C grounds?

[21] I find no reviewable errors in the Officer's assessment of the evidence.

[22] The documents submitted by the de Limas did not support their allegations that Wagner was working, that his father was working with him, or that the father's assistance was absolutely necessary.

[23] The Officer did consider the documents supporting the de Limas' claim of establishment in Canada, but decided not to give it a lot of weight. This is not a determining element in the decision process.

[24] The Officer did consider the best interests of the children, but had very little in terms of evidence. Mayalle lives with her parents; the issue of foster care has been resolved for some time. No documents were submitted confirming the involvement of the de Limas in Caleb's education.

[25] The Officer's conclusions were reasonable based on the record before her, and the intervention of the Court is not required.

(b) Did the Officer err in applying the legal test for hardship?

[26] The Respondent notes the recent confirmation from the Federal Court of Appeal in *Kanthasamy, supra*, that while sections 96 and 97 factors are not to be considered in subsection 25(1) applications, the facts underlying those factors may be relevant insofar as they relate to whether the Applicant is directly and personally experiencing unusual and undeserved or disproportionate hardship.

[27] In the present case, the Officer applied that test, concluded that there was little evidence on the matter, and noted that the risk elements would be addressed in the PRRA application. The Officer did consider the evidence under the hardship analysis, evidence limited to the letter from Mrs. de Lima's doctor, but concluded that this evidence did not reach the threshold of unusual and undeserved or disproportionate hardship.

[28] The Officer assessed the facts "through the lens of hardship", but decided that these facts did not reach the level of hardship justifying an exemption under subsection 25(1) of the IRPA. Since it was within the Officer's discretionary power to come to this conclusion, and since it falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law, the Court's intervention is not required.

VII. CONCLUSION

[29] This application for judicial review must be denied. Neither party proposed a question of general importance for certification, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that:

- This application for judicial review is dismissed;
- No question is certified.

"Martine St-Louis"

Judge

Immigration and Refugee Protection Act SC 2001, c 27	**Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27**
Application before entering Canada	Visa et documents
11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
Electronic travel authorization	Autorisation de voyage électronique
(1.01) Despite subsection (1), a foreign national must, before entering Canada, apply for an electronic travel authorization required by the regulations by means of an electronic system, unless the regulations provide that the application may be made by other means. The application may be examined by the system or by an officer and, if the system or officer determines that the foreign national is not inadmissible and meets the requirements of this Act, the authorization may be issued by the system or officer.	(1.01) Malgré le paragraphe (1), l'étranger doit, préalablement à son entrée au Canada, demander une autorisation de voyage électronique requise par règlement au moyen d'un système électronique, sauf si les règlements prévoient que la demande peut être faite par tout autre moyen. S'il détermine, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi, le système ou l'agent peut délivrer l'autorisation.
Restriction	Réserve
(1.1) A designated foreign national may not make an	(1.1) L'étranger désigné ne peut présenter une demande de

application for permanent residence under subsection (1)

(a) if they have made a claim for refugee protection but have not made an application for protection, until five years after the day on which a final determination in respect of the claim is made;

(b) if they have made an application for protection, until five years after the day on which a final determination in respect of the application is made; or

(c) in any other case, until five years after the day on which they become a designated foreign national.

Suspension of application

(1.2) The processing of an application for permanent residence under subsection (1) of a foreign national who, after the application is made, becomes a designated foreign national is suspended

(a) if the foreign national has made a claim for refugee protection but has not made an application for protection,

résidence permanente au titre du paragraphe (1) que si cinq années se sont écoulées depuis l'un ou l'autre des jours suivants :

a) s'il a fait une demande d'asile sans avoir fait de demande de protection, le jour où il a été statué en dernier ressort sur sa demande d'asile;

b) s'il a fait une demande de protection, le jour où il a été statué en dernier ressort sur cette demande;

c) dans les autres cas, le jour où il devient un étranger désigné.

Suspension de la demande

(1.2) La procédure d'examen de la demande de résidence permanente présentée au titre du paragraphe (1) par un étranger qui devient, à la suite de cette demande, un étranger désigné est suspendue jusqu'à ce que cinq années se soient écoulées depuis l'un ou l'autre des jours suivants :

a) si l'étranger a fait une demande d'asile sans avoir fait de demande de protection, le jour où il a été statué en

until five years after the day on which a final determination in respect of the claim is made;

dernier ressort sur la demande d'asile;

(b) if the foreign national has made an application for protection, until five years after the day on which a final determination in respect of the application is made; or

b) s'il a fait une demande de protection, le jour où il a été statué en dernier ressort sur cette demande;

(c) in any other case, until five years after the day on which the foreign national becomes a designated foreign national.

c) dans les autres cas, le jour où il devient un étranger désigné.

Refusal to consider application

Refus d'examiner la demande

(1.3) The officer may refuse to consider an application for permanent residence made under subsection (1) if

(1.3) L'agent peut refuser d'examiner la demande de résidence permanente présentée au titre du paragraphe (1) par l'étranger désigné si :

(a) the designated foreign national fails, without reasonable excuse, to comply with any condition imposed on them under subsection 58(4) or section 58.1 or any requirement imposed on them under section 98.1; and

a) d'une part, celui-ci a omis de se conformer, sans excuse valable, à toute condition qui lui a été imposée en vertu du paragraphe 58(4) ou de l'article 58.1 ou à toute obligation qui lui a été imposée en vertu de l'article 98.1;

(b) less than 12 months have passed since the end of the applicable period referred to in subsection (1.1) or (1.2).

b) d'autre part, moins d'une année s'est écoulée depuis la fin de la période applicable visée aux paragraphes (1.1) ou (1.2).

If sponsor does not meet requirements

(2) The officer may not issue a visa or other document to a foreign national whose sponsor does not meet the sponsorship requirements of this Act.

Cas de la demande parrainée

(2) Ils ne peuvent être délivrés à l'étranger dont le répondant ne se conforme pas aux exigences applicables au parrainage.

Humanitarian and compassionate considerations — request of foreign national

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.

Séjour pour motif d'ordre humanitaire à la demande de l'étranger

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.

Restriction — designated foreign national

(1.01) A designated foreign national may not make a request under subsection (1)

Réserve — étranger désigné

(1.01) L'étranger désigné ne peut demander l'étude de son cas en vertu du paragraphe (1) que si cinq années se sont écoulées depuis l'un ou l'autre des jours suivants :

(a) if they have made a claim for refugee protection but have not made an application for protection, until five years after the day on which a final determination in respect of the claim is made;

a) s'il a fait une demande d'asile sans avoir fait de demande de protection, le jour où il a été statué en dernier ressort sur la demande d'asile;

(b) if they have made an application for protection, until five years after the day on which a final determination in respect of the application is made; or

b) s'il a fait une demande de protection, le jour où il a été statué en dernier ressort sur cette demande;

(c) in any other case, until five years after the day on which they become a designated foreign national.

c) dans les autres cas, le jour où il devient un étranger désigné.

Suspension of request

Suspension de la demande

(1.02) The processing of a request under subsection (1) of a foreign national who, after the request is made, becomes a designated foreign national is suspended

(1.02) La procédure d'examen de la demande visée au paragraphe (1) présentée par l'étranger qui devient, à la suite de cette demande, un étranger désigné est suspendue jusqu'à ce que cinq années se soient écoulées depuis l'un ou l'autre des jours suivants :

(a) if the foreign national has

a) si l'étranger désigné a fait

made a claim for refugee protection but has not made an application for protection, until five years after the day on which a final determination in respect of the claim is made;

une demande d'asile sans avoir fait de demande de protection, le jour où il a été statué en dernier ressort sur la demande d'asile;

(b) if the foreign national has made an application for protection, until five years after the day on which a final determination in respect of the application is made; or

b) s'il a fait une demande de protection, le jour où il a été statué en dernier ressort sur cette demande;

(c) in any other case, until five years after the day on which they become a designated foreign national.

c) dans les autres cas, le jour où il devient un étranger désigné.

Refusal to consider request

Refus d'examiner la demande

(1.03) The Minister may refuse to consider a request under subsection (1) if

(1.03) Le ministre peut refuser d'examiner la demande visée au paragraphe (1) présentée par l'étranger désigné si :

(a) the designated foreign national fails, without reasonable excuse, to comply with any condition imposed on them under subsection 58(4) or section 58.1 or any requirement imposed on them under section 98.1; and

a) d'une part, celui-ci a omis de se conformer, sans excuse valable, à toute condition qui lui a été imposée en vertu du paragraphe 58(4) ou de l'article 58.1 ou à toute obligation qui lui a été imposée en vertu de l'article 98.1;

(b) less than 12 months have passed since the end of the applicable period referred to in subsection (1.01) or (1.02).

b) d'autre part, moins d'une année s'est écoulée depuis la fin de la période applicable visée aux paragraphes (1.01) ou (1.02).

Payment of fees	Paiement des frais
(1.1) The Minister is seized of a request referred to in subsection (1) only if the applicable fees in respect of that request have been paid.	(1.1) Le ministre n'est saisi de la demande faite au titre du paragraphe (1) que si les frais afférents ont été payés au préalable.
Exceptions	Exceptions
(1.2) The Minister may not examine the request if	(1.2) Le ministre ne peut étudier la demande de l'étranger faite au titre du paragraphe (1) dans les cas suivants :
(a) the foreign national has already made such a request and the request is pending;	a) l'étranger a déjà présenté une telle demande et celle-ci est toujours pendante;
(b) the foreign national has made a claim for refugee protection that is pending before the Refugee Protection Division or the Refugee Appeal Division; or	b) il a présenté une demande d'asile qui est pendante devant la Section de la protection des réfugiés ou de la Section d'appel des réfugiés;
(c) subject to subsection (1.21), less than 12 months have passed since the foreign national's claim for refugee protection was last rejected, determined to be withdrawn after substantive evidence was heard or determined to be abandoned by the Refugee Protection Division or the Refugee Appeal Division.	c) sous réserve du paragraphe (1.21), moins de douze mois se sont écoulés depuis le dernier rejet de la demande d'asile, le dernier prononcé de son retrait après que des éléments de preuve testimoniale de fond aient été entendus ou le dernier prononcé de son désistement par la Section de la protection des réfugiés ou la Section d'appel des réfugiés.

Exception to paragraph (1.2)(c)

(1.21) Paragraph (1.2)(c) does not apply in respect of a foreign national

(a) who, in the case of removal, would be subjected to a risk to their life, caused by the inability of each of their countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, to provide adequate health or medical care; or

(b) whose removal would have an adverse effect on the best interests of a child directly affected.

Non-application of certain factors

(1.3) In examining the request of a foreign national in Canada, the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national.

Exception à l'alinéa (1.2)c)

(1.21) L'alinéa (1.2)c) ne s'applique pas à l'étranger si l'une ou l'autre des conditions suivantes est remplie :

a) pour chaque pays dont l'étranger a la nationalité — ou, s'il n'a pas de nationalité, pour le pays dans lequel il avait sa résidence habituelle — , il y serait, en cas de renvoi, exposé à des menaces à sa vie résultant de l'incapacité du pays en cause de fournir des soins médicaux ou de santé adéquats;

b) le renvoi de l'étranger porterait atteinte à l'intérêt supérieur d'un enfant directement touché.

Non-application de certains facteurs

(1.3) Le ministre, dans l'étude de la demande faite au titre du paragraphe (1) d'un étranger se trouvant au Canada, ne tient compte d'aucun des facteurs servant à établir la qualité de réfugié — au sens de la Convention — aux termes de l'article 96 ou de personne à protéger au titre du paragraphe 97(1); il tient compte, toutefois, des difficultés auxquelles l'étranger fait face.

Provincial criteria	Critères provinciaux
(2) The Minister may not grant permanent resident status to a foreign national referred to in subsection 9(1) if the foreign national does not meet the province's selection criteria applicable to that foreign national.	(2) Le statut de résident permanent ne peut toutefois être octroyé à l'étranger visé au paragraphe 9(1) qui ne répond pas aux critères de sélection de la province en cause qui lui sont applicables.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2988-13
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