Federal Court of Appeal  Cour d'appel fédérale

Date: 20140502

Dockets: A-510-12

Citation: 2014 FCA 114

CORAM: **BLAIS C.J.**
SHARLOW J.A.
STRATAS J.A.

BETWEEN:

JOSE MARIA SERRANO LEMUS, ENMA ALVARADO DE SERRANO, and JOSE MARIA SERRANO ALVARADO

Appellants

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on November 4, 2013.

Judgment delivered at Ottawa, Ontario, on May 2, 2014.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: BLAIS J.A.
SHARLOW J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] The appellants (collectively the "Lemus family") appeal from the judgment of the Federal Court (*per* Justice Near): 2012 FC 1274. The Federal Court dismissed the Lemus family's

application for judicial review from the Minister's refusal to grant humanitarian and compassionate relief under subsection 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

[2] This Court heard this appeal together with the appeal in *Kanthasamy v. Canada (Minister of Citizenship and Immigration)*, file no. A-272-13: 2014 FCA 113. Accordingly, I direct that a copy of these reasons be sent to counsel in this case and to counsel in the *Kanthasamy* appeal. These reasons should also be placed in the *Kanthasamy* appeal file.

[3] Central to both appeals is a common issue: the interpretation of subsection 25(1) of the Act, as amended by the *Balanced Refugee Reform Act*, S.C. 2010, c. 8, section 4. That amendment added new subsection 25(1.3).

[4] The certified questions in this appeal raise this issue of interpretation. In *Kanthasamy*, I concluded that the Minister's interpretation of subsections 25(1) and 25(1.3) – an interpretation adopted by the Federal Court in this case – is substantially correct. Therefore, I would answer the certified questions in this case in a manner consistent with my reasons in *Kanthasamy*.

[5] The remaining issues in this appeal concern the Lemus family's Charter challenge to subsection 25(1.3) of the Act and the reasonableness of the Minister's denial of its application for humanitarian and compassionate relief under subsection 25(1) of the Act.

[6] I reject the Lemus family's Charter challenge. However, I find the Minister's decision to be unreasonable. Therefore, I would allow the appeal, set aside the decision of the Federal Court, grant

the application for judicial review, and remit the matter to the Minister for redetermination in accordance with these reasons.

A. The basic facts

[7] The Lemus family arrived in Canada from El Salvador and applied for refugee status in Canada. The Refugee Protection Division dismissed the application.

[8] The Refugee Protection Division found that the applicants were not Convention refugees or persons in need of protection. They did not establish a link to any of the grounds in section 96 of the Act. As business owners, they feared crime from the Mara Salvatruchia or crime and violence generally. But these were risks faced generally by others in El Salvador. There was no evidence suggesting that they would be targeted upon their return to El Salvador.

[9] The Lemus family applied to the Minister for humanitarian and compassionate relief under subsection 25(1) of the Act, relying upon the family's establishment in Canada, the best interests of the child, and the severe hardship and risk that the family would encounter upon returning to El Salvador. Mr. Lemus' spouse suffers from post-traumatic stress disorder and depression due to a sexual assault in El Salvador. Mr. Lemus' child, a teenage male, was said to be a potential target of the Mara Salvatruchia.

[10] The Minister's Officer rejected the subsection 25(1) application. I set out the reasons for the rejection below, in the context of reasonableness review.

B. Analysis

[11] In *Kanthasamy*, on the issue regarding how subsections 25(1) and 25(1.3) should be interpreted, I concluded as follows (at paragraph 81):

> Matters such as well-founded fear of persecution, risk to life, and risk of cruel and unusual treatment or punishment – factors under sections 96 and 97 – may not be considered under subsection 25(1) by virtue of subsection 25(1.3) but the facts underlying those factors may nevertheless be relevant insofar as they related to whether the applicant is directly and personally experiencing unusual and undeserved, or disproportionate hardship.

[12] I also emphasized that in applying this standard, Officers may have regard to the Minister's processing manual for guidance. However, Officers must have regard to all of the facts and circumstances before them and apply this standard in an open-minded way, unfettered by the statements in the manual.

[13] The Lemus family attacks the validity of subsection 25(1.3) on the basis of sections 7 and 15 of the Charter and the constitutional principle of the rule of law.

[14] To some extent, I have dealt with these issues in my rejection of Mr. Kanthasamy's Charter values analysis: see *Kanthasamy*, *supra* at paragraphs 77 and 78.

[15] Subsection 25(1.3) in no way offends the constitutional principle of the rule of law, as that principle has been interpreted by the Supreme Court of Canada in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 at paragraph 58:

> This Court has described the rule of law as embracing three principles. The first recognizes that "the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power": *Reference re Manitoba Language Rights*, at p. 748. The second "requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order": *Reference re Manitoba Language Rights*, at p. 749. The third requires that "the relationship between the state and the individual…be regulated by law": *Reference re Secession of Quebec*, at para. 71.

In my view, the Lemus family is using the phrase "rule of law" as a catch-all ground of constitutional attack. That is not legally sound. When the validity of legislation is challenged on the basis that it offends the rule of law, the validity of the challenge must be assessed on the basis of the principles set out in *Imperial Tobacco*. See also *Yeager v. Day*, 2013 FCA 258 at paragraph 13.

[16] As for section 7 of the Charter, subsection 25(1.3), by requiring an assessment of the hardships facing the Lemus family, accommodates whatever rights to liberty and security of the person they have. Officers deciding applications for humanitarian and compassionate relief under subsection 25(1) must consider all of the facts bearing upon whether there is unusual or undeserved, or disproportionate hardship.

[17] The Lemus family's section 15 submissions are predicated on the assumption that subsection 25(1.3) treats applicants for humanitarian and compassionate relief differently from applicants who are not refugee claimants. This is not so: all applicants receive the same hardship assessment. Therefore, I reject the section 15 submissions.

[18] Turning to the Officer's decision in this case, for the reasons set out in *Kanthasamy, supra,* the standard of review of the Officer's decision is reasonableness. The Federal Court correctly so found.

[19] The Federal Court went on to find that the Officer's decision was reasonable.

[20] The Federal Court noted that the Officer properly attached significance to the presence of family members in El Salvador. The Officer found that these family members "should be able to provide some support and assistance to the applicants in re-establishing themselves upon return."

[21] The Federal Court also noted, with approval, that the Officer found that the hardship and general country conditions were "generally faced by the population." As for the spouse and her condition, the Officer found that she could "obtain any necessary medical or psychological assistance she may require upon return to El Salvador, as she had done previously." Considering the degree of establishment in Canada, the Officer concluded that it "is as expected" given their length of stay in Canada and is "not exceptional."

[22] To this point, I agree with the Federal Court that the outcome reached by the Officer was acceptable and defensible on the facts and the law.

[23] Where I part company with the Federal Court is in its view that the Officer reached an acceptable and defensible decision given the interpretation of subsection 25(1.3) set out in *Kanthasamy* and described above.

[24] While the Officer noted the existence of subsection 25(1.3), she did not look at the facts relevant to the matters raised in the application for refugee protection that might have also been relevant to whether requiring the Lemus family to return to El Salvador would cause unusual and undeserved, or disproportionate hardship.

[25] This is evident from the following passage from the Officer's reasons:

> The applicant's Humanitarian and Compassionate application is based in part upon risks that the applicants would face if returned to El Salvador, specifically risk related to a fear of the Mara Salvatruchia and the fear of recruitment of the minor applicant by this gang. These risks are described in Section 96 and 97 of IRPA and as such, they can only be addressed by the Immigration and Refugee Board (IRB). The evidence before me indicates that these fears have been addressed by the IRB and the applicant's refugee claim has been refused. As I do not have the jurisdiction to reassess claims due to a fear of risk, as outlined in Section A96 and A97 [*sic*] of IRPA, I did not consider the evidence that pertains to the applicant's fear of return to El Salvador, however, I did consider the non-risk factors that the applicant has cited.

[26] The Officer failed in the remainder of the reasons to assess, through the lens of hardship, the risk that the child would be targeted by the Mara Salvatruchia. The Officer did assess the best interests of the child, but in different respects, noting that "there is insufficient evidence before me to indicate that his basic amenities would not be met in El Salvador," where the child has "extended family members who continue to reside in El Salvador." On that basis, I conclude that the decision is unreasonable and cannot stand.

[27] The Minister submitted that there was enough evidence in the record to sustain the Officer's decision to reject the Lemus family's application for humanitarian and compassionate relief. The

Minister invited us to find material in the record before the Officer to sustain the outcome she reached.

[28] The Minister's submission is supported by a literal reading of the following statement in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 48:

> We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, at para. 49).

[29] However, *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 suggests that this does not allow a reviewing court free rein to dive into the record before the administrative decision-maker to save the decision.

[30] In *Alberta Teachers' Association*, at paragraph 54, Justice Rothstein, writing for the majority of the Supreme Court, found that giving respectful attention to the reasons which could be offered in support of a decision is not a "*carte blanche* to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result."

[31] At paragraph 55 of *Alberta Teachers' Association*, Justice Rothstein envisaged that:

> [i]n some cases, it may be that a reviewing court cannot adequately show deference to the administrative decision maker without first providing the decision maker the opportunity to give its own reasons for the decision. In such a case, even though

> there is an implied decision, the court may see fit to remit the issue to the tribunal to allow the tribunal to provide reasons.

[32] On the day after the Supreme Court decided *Alberta Teachers' Association*, it released *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62. In it, the Supreme Court reiterated paragraph 48 of *Dunsmuir*. It did not cite *Alberta Teachers' Association*.

[33] At paragraphs 11 and 12 of *Newfoundland Nurses*, the Court reiterated the need for reviewing courts to pay "respectful attention to the reasons…*which could be offered* in support of a decision" [my emphasis]. In the same case, the Supreme Court adopted the following additional excerpt from Professor Dyzenhaus' article, in an unqualified manner without any rationale:

> For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc., then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective.

One might well query the idea that reviewing courts are to presume the correctness of administrators' decisions, even in the face of a defect. One might also query whether, in trying to sustain an outcome reached by flawed reasoning, the reviewing court might be coopering up an outcome that the administrator, knowing of its error, might not have itself reached. Finally, whether an outcome should be left in place because of the strength of the record or other considerations has traditionally been something for the remedial stage of the analysis, not an earlier stage: *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6.

[34] But these are queries for another day. We now have a practical question to resolve. *Alberta Teachers' Association* was released on one day and *Newfoundland Nurses* released on the very next day, with the latter not commenting on the former. Which of the two cases states the principle that ought to be applied in this case? In my view, it is *Alberta Teachers' Association*. I make the following observations.

[35] First, the statements made in *Newfoundland Nurses* about paragraph 48 of *Dunsmuir* arose in the context of a discussion about how to analyze sparse reasons given by an administrative tribunal. That is not the issue before us.

[36] Second, in *Alberta Teachers' Association* the Supreme Court had to deal directly with paragraph 48 of *Dunsmuir* on the facts of the case before it. Its discussion was central to its disposition of the case. The same cannot be said of the discussion about paragraph 48 of *Dunsmuir* in *Newfoundland Nurses*.

[37] Therefore, I conclude that in this case, the controlling authority is *Alberta Teachers' Association*. It follows that it would not be appropriate, in this case, to accept the Minister's invitation and supplement or recast the Officer's reasons to save her decision.

[38] This is a situation where the Officer, informed by these reasons of her error and of the proper standard to be applied, might well reach a different result. There is evidence in the record that could support a decision either way. I cannot say that the record leans so heavily against relief that sending the matter back to the Officer would serve no useful purpose, as *per MiningWatch*

Canada, *supra*. Nor can I say that the record is unequivocally in favour of relief allowing us to award *mandamus* and grant the subsection 25(1) application.

[39] It follows that the Officer's decision is unreasonable and the matter should be sent back for redetermination.

C. Disposition

[40] In light of my reasons in *Kanthasamy*, *supra*, I would answer the certified questions as follows:

> 1. What is the nature of the risk, if any, to be assessed with respect to humanitarian and compassionate considerations under section 25 of *IRPA*, as amended by the *Balanced Refugee Reform Act*?
>
> Answer: Matters such as well-founded fear of persecution, risk to life, and risk of cruel and unusual treatment or punishment – factors under sections 96 and 97 – may not be considered under subsection 25(1) by virtue of subsection 25(1.3). However, the facts underlying those factors may nevertheless be relevant insofar as they related to whether the applicant is directly and personally experiencing unusual and undeserved, or disproportionate hardship.
>
> 2. Does the exclusion from consideration on humanitarian and compassionate grounds of the "factors" taken into account in the determination of whether a person needs protection under sections 96 or 97 of *IRPA* mean that the facts presented to the decision-maker in the application for protection may not be used in a determination of the "elements related to the hardships" faced by a foreign national under subsection 25(1.3) of *IRPA*?
>
> Answer: No. All facts related to the hardships may be provided and considered.

[41] For the foregoing reasons, I would allow the appeal, set aside the decision of the Federal Court, grant the application for judicial review, and remit the matter to the Minister for redetermination in accordance with these reasons.

[42] Counsel for the Lemus family seeks solicitor and client costs. In my view, there are no special reasons for an award of costs under section 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22.

"David Stratas"

J.A.

"I agree.
Pierre Blais C.J."

"I agree.
K. Sharlow J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS: A-510-12

APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE NEAR DATED OCTOBER 31, 2012, NO. IMM-2593-12

STYLE OF CAUSE:	JOSE MARIA SERRANO LEMUS, ENMA ALVARADO DE SERRANO AND JOSE MARIA SERRANO ALVARADO v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 4, 2013
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	BLAIS C.J. SHARLOW J.A.
DATED:	MAY 2, 2014

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