Federal Court  Cour fédérale

Date: 20150908

Docket: IMM-8477-14

Citation: 2015 FC 1054

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, September 8, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

JULIO CÉSAR VICTORIA GOMEZ

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. Introduction

[1] The applicant (or Mr. Gomez) contests the rejection of his application for permanent residence on humanitarian and compassionate grounds, presented to the respondent from within

Canada, pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [the Act].

[2] This case has one unusual aspect to it: since the rejection of his permanent residence application, dated October 31, 2014, the applicant had a removal order issued against him and consequently left Canada on January 14, 2015. His counsel nonetheless argues that the matter has not become moot because, he insists, as Mr. Gomez is under an inadmissibility order, the present application, were it to be allowed, could result in the waiver, in whole or in part, in the interest of his minor child, who was born and still resides in Canada, of the period during which he cannot re-apply for permanent residence due to his inadmissibility. The respondent made no specific submissions on this point.

[3] I am satisfied that the outcome of this judicial review application may have consequences on the parties' rights, even though the applicant is no longer in Canada, and that it is therefore appropriate for the Court to rule on this application (*Borowski v. Canada (Attorney General*) [1989] 1 SCR 342).

II. Background

[4] Mr. Gomez is a Mexican citizen. He arrived in Canada in July 2008 and claimed refugee protection, which was refused to him in May 2012. On October 23, 2013, the Court dismissed, on the merits, the application for judicial review made by the applicant against that decision (*Gomez v Canada (Citizenship and Immigration)*, 2013 FC 1070). In the meantime, Mr. Gomez made the acquaintance of Ms. Yoidel Florian, who has permanent resident status in Canada. A

common-law relationship ensued and from that union a daughter, Samara (Samara Minerva Victoria Florian), was born on November 25, 2013.

[5] On May 13, 2014, the applicant filed his application for permanent residence on humanitarian and compassionate grounds with the respondent. In it, he alleged that his personal circumstances were such that he would suffer unusual and undeserved or disproportionate hardship if he were required to make an application for permanent residence from outside Canada, primarily by reason of his level of establishment in Canada and because it would not be in the best interests of his daughter to be separated from him. In addition, a few days earlier he had pleaded guilty to the offence set out in paragraph 253(1)(*b*) of the *Criminal Code*, of operating a motor vehicle while impaired. In light of his guilty plea and what is provided for in paragraph 36(2)(*a*) of the Act, he also sought, in his permanent residence application, an exemption to overcome inadmissibility, which became effective a few days after the filing of that application.

[6] Pointing out the exceptional nature of an application made under section 25 of the Act, the respondent, through an immigration officer, found that the reasons put forward by the applicant in support of his application for permanent residence were not sufficient to warrant an exemption from the usual requirement under the Act that such applications be made from outside Canada. More specifically, with regard to the best interests of the child test, the respondent noted:

a. That the spouse of Mr. Gomez was a permanent resident in Canada and, as such, had been granted legal status;

b. That it was therefore reasonable to believe that she would be able to travel with the child, who is Canadian;

c. that Mr. Gomez had not demonstrated that his spouse and the child's mother would be unable to take care of the child or ensure her emotional, social, physical and financial well-being;

d. he was unable to demonstrate that he was providing any financial contribution to the child's needs or the nature and specific extent of his involvement in the care and life of the child;

e. nor had he demonstrated whether, and to what extent, the child's well-being would be compromised in the event he were to return to Mexico;

f. that in this regard, the letter from the social worker, indicating that the forced separation of the couple would be devastating for both the couple and the child, was vague and general, and did not explain whether any other assessments had been conducted and was therefore insufficient evidence that the applicant's return to his country of origin would have a negative impact on the child; and

g. that Mr. Gomez was also the father of a 16-year old boy who had remained in Mexico at the time the applicant left that country for Canada and that he failed to explain why his presence in Canada with his Canadian child would be more important that his presence with his Mexican child.

[7] The respondent concluded that although the best interests of the child was a significant factor in the analysis of an application under section 25 of the Act, that factor, in the circumstances of this case, could not justify an exemption from the usual requirements for applications for permanent residence.

[8] Mr. Gomez essentially criticizes the respondent on two fronts, both of which relate to the analysis of the best interests of the child test. First, he argues that the respondent did not assign sufficient weight to the social worker's letter. Second, he contends that the respondent failed to consider his application in relation to his inadmissibility, which means that if his inadmissibility is maintained, he would be prevented from re-applying for permanent residence for several years.

III. Analysis

[9] The issue to be determined is whether the respondent, in deciding as she did on these two points, erred in a manner that, under section 18.1 of the *Federal Courts Act*, would warrant the intervention of the Court.

[10] As the Federal Court of Appeal recently reiterated in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113, subsection 25(1) of the Act is an exceptional provision in the sense that an application made under this provision is essentially, in the words of *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 SCR 84, "a plea to the executive branch for special consideration which is not even explicitly envisioned by the Act" (*Kanthasamy*, at para 40; *Chieu*, at para 64).

[11] The Federal Court of Appeal also noted that this Court has repeatedly interpreted subsection 25(1) as requiring proof that the applicant will personally suffer unusual and undeserved, or disproportionate hardship if he or she is required to apply for permanent residence from abroad, as per the normal requirement under the Act, that is to say that the

hardship must be something more than the usual consequences of leaving Canada and applying to immigrate through normal channels (*Kanthasamy*, at para 41).

[12] On this point, it noted that in adopting "unusual and undeserved, or disproportionate hardship" as the standard, the Court has generally adopted the interpretation set out by Citizenship and Immigration Canada in tis processing manual, which in Chapter IP 5, deals with applications made under the regime of subsection 25(1) of the Act (*Kanthasamy*, at para 43). The relevant portions of this chapter, which is entitled "*Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds*" are as follows:

> *5.10. The assessment of hardship*
>
> The assessment of hardship in an H&C application is a means by which CIC decision-makers determine whether there are sufficient H&C grounds to justify granting the requested exemption(s).
>
> The criterion of "unusual, undeserved or disproportionate hardship" has been adopted by the Federal Court in its decisions on Subsection 25(1), which means that these terms are more than mere guidelines. [citation omitted]
>
> In many cases the hardship test will revolve around the requirement in A11 to apply for a permanent residence visa before entering Canada. In other words, would it be a hardship for the applicant to leave Canada in order to apply abroad.
>
> Applicants may, however, request exemptions from other requirements of the *Act and Regulations*. In such cases, the test is whether it would be a hardship for the applicant if the requested exemption is not granted.
>
> Individual H&C factors put forward by the applicant should not be considered in isolation in a determination of the hardship that an applicant would face; rather, hardship is determined as a result of a global assessment of H&C considerations put forth by the applicant. In other words, hardship is assessed by weighing together all of the H&C considerations submitted by the applicant. Hardship must be unusual and undeserved or disproportionate as described below:

Unusual and undeserved Hardship	*Disproportionate hardship*
• The hardship faced by the applicant (if they were not granted the requested exemption) must be, in most cases, unusual. In other words, a hardship not anticipated or addressed by the *Act or Regulations*; and • The hardship faced by the applicant (if they were not granted the requested exemption) must be undeserved so in most cases, the result of circumstances beyond the person's control.	• Sufficient humanitarian and compassionate grounds may also exist in cases that do not meet the "unusual and undeserved" criteria but where the hardship of not being granted the requested exemption(s) would have an unreasonable impact on the applicant due to their personal circumstances.

5.11. Factors to consider in assessment of hardship

Subsection A25(1) provides the flexibility to grant exemptions to overcome the requirement of obtaining a permanent residence visa from abroad, to overcome class eligibility requirements and/or inadmissibilities, on humanitarian and compassionate grounds.

Officers must assess the hardship that would befall the applicant should the requested exemption not be granted.

Applicants may base their requests for H&C consideration on any number of factors including, but not limited to:

- establishment in Canada;

- ties to Canada;

- the best interests of any children affected by their application;

- factors in their country of origin (this includes but is not limited to: Medical inadequacies, discrimination that does not amount to persecution, harassment or other hardships that are not described in A96 and A97);

- health considerations;

- family violence considerations;

- consequences of the separation of relatives;

- inability to leave Canada has led to establishment; and/or

- any other relevant factor they wish to have considered not related to A96 and A97.

[13] The Federal Court of Appeal endorsed this Court's approach while at the same time taking care to point out that if the factors referred to in section 5.11 of the Processing Manual, which lack the force of law, are a reasonable enumeration of the types of matters that the respondent must consider when assessing an application for humanitarian and compassionate relief under subsection 25(1) of the Act, they should not be interpreted as being an exhaustive list (*Kanthasamy*, at paras 50-51).

[14] It should be noted in this regard that the best interests of any child affected by an application on humanitarian and compassionate grounds is a factor whose consideration is expressly required by Parliament. It is settles law that the best interests of the child, although not determinative in itself, is an important factor in the assessment of an application under subsection 25(1) of the Act (*Legault v Canada (Minister of Citizenship and Immigration)* 2002 FCA 125; *Kisana v Canada (Minister of Citizenship and Immigration)* 2009 FCA 189). An immigration officer making a decision on an application based on this provision must therefore be "alert, alive and sensitive" to the interests of the child affected by the application (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 75). It is also well-settled that the concept of "unusual and undeserved, or disproportionate" hardship is ill-suited when assessing the best interests of the child (*Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475; *Shchegolevich v Canada (Minister of Citizenship and Immigration)*, 2008 FC 527; (*Shchegolevich*); *Mangru v Canada (Minister of Citizenship and*

Immigration), 2011 FC 779; *Sinniah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1285; *Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166; *Sun v Canada (Minister of Citizenship and Immigration)*, 2012 FC 206; *E.B. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 110; *Monje v Canada (Citizenship and Immigration)*, 2013 FC 116).

[15] In this case, I am of the view that the respondent did indeed fail to consider the request for an exemption to overcome an inadmissibility, at least as a factor for the purposes of assessing the best interests of the child test, and that this, in and of itself, is enough to set aside the decision and refer the matter back for redetermination by a different immigration officer.

[16] According to the Processing Manual, an immigration officer, acting on behalf of the respondent, must assess the hardship that would befall the applicant should the requested exemption not be granted. Subsection 25(1) of the Act specifically identifies the fact that a foreign national is inadmissible as being one of the circumstances on which the exercise of discretion can be based. In turn, the Processing Manual provides the flexibility to grant exemptions to overcome "the class eligibility requirements and/or inadmissibilities, on humanitarian and compassionate grounds".

[17] In this case, as the only element of the analysis of the inadmissibility of Mr. Gomez, the respondent merely opined that he had not shown respect for the laws of Canada. Nowhere in the decision do we find any discussion on whether it would be appropriate to grant the request for an exemption due to this measure, particularly in the context of the bests interests of the applicant's young daughter, given that the impact of this measure would be to considerably delay when he

could reapply for permanent residence and thus prolong the period of separation between father and child. In this regard we find no analysis, even superficial, of the circumstances of the guilty plea at the root of the inadmissibility, including the nature of the offence in question, the sentence handed down or the isolated character of the incident, from the standpoint of granting an exemption to overcome the inadmissibility of Mr. Gomez, in light of all of the circumstances in support of the application on humanitarian and compassionate grounds. The decision is also bereft of any discussion as to the effects of this measure in the interests of the child.

[18] Yet this request for an exemption was clearly identified in the application for humanitarian and compassionate relief submitted by Mr. Gomez. There is no doubt in my mind that the inadmissibility had to be analyzed by the respondent when the matter of the best interests of the child was being considered. This is precisely what the Court found in *Malekzai v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1099, 256 FTR 199*:*

> [60] I am satisfied that the H & C Officer did not take into consideration the potential inadmissibility of the applicant when assessing the best interests of the applicant's Canadian-born child. I wish to make it clear that I am not saying that the H & C Officer should have made a ruling on the applicant's inadmissibility or admissibility to Canada as that is not for the H & C Officer to decide. The H & C Officer should have taken into consideration as a factor, however, the applicant's possible inadmissibility to Canada, when assessing the best interests of the child, especially since section 15 of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 deems the Board's findings of fact regarding war crimes conclusive on subsequent decisions regarding inadmissibility.

[19] In *Rogers v Canada (Minister of Citizenship and Immigration)*, 2009 FC 26, 339 FTR 191, Justice de Montigny, now of the Federal Court of Appeal, found that the immigration officer seized with the application under subsection 25(1) of the Act in that case, had fettered his

discretion by failing to consider, on his own initiative no less, whether to grant an exemption to overcome inadmissibility (*Rogers*, at para 42). Moreover, Justice de Montigny pointed out that even if one were to presume that the officer had considered the question, there was nothing in his decision that would allow one to determine the basis on which it was deemed that no exemption should be granted (*Rogers*, at paras 48-49).

[20] In this case, such consideration, from the perspective of the best interests of the child, is non-existent and there is nothing in the decision to suggest that the respondent actually gave the matter any thought.

[21] I am aware that the standard of review to be applied in such matters is reasonableness (*Rogers*, at paras 16-17). This standard invites the Court to show considerable deference to the decisions of immigration officers, given the factual nature of the analysis they are called upon to carry out, subsection 25(1) of the Act's role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language (*Baker*, above, at para 62; *Kanthasamy*, above, at para 33). Thus, the Court should intervene only if the decision challenged does not have the attributes of justification, transparency or intelligibility and does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 47).

[22] In this case, given the respondent's silence on a crucial element of the application for permanent residence on humanitarian and compassionate grounds, I am of the opinion that the respondent's decision does not possess the attributes of justification, transparency or

intelligibility. It is therefore necessary for me to intervene on that basis and set aside the respondent's decision. In light of the decisive nature of my finding with regard to the manner in which the respondent handled the question of inadmissibility, it will not be necessary to determine whether the respondent assigned sufficient weight to the social worker's letter submitted by Mr. Gomez in support of his application for permanent residence.

[23] This application for judicial review is therefore allowed.

[24] At the hearing, counsel for the applicant sought the certification of a question for the Federal Court of Appeal, in the event I was to dismiss his application for judicial review. He was of the view that the best interests of the child test, prescribed by subsection 25(1) of the Act, merited clarification in light of recent judgments of this Court in *Etienne v Canada (Citizenship and Immigration)*, 2014 FC 937, and *Akyol v Canada (Citizenship and Immigration)*, 2014 FC 1252, both of which were delivered by Justice Donald J. Rennie, now of the Federal Court of Appeal. However, given that the application has been allowed, there is no need to make any determination as to whether to certify a question in this case. In any event, I find that these two judgments are consistent with the state of the law on this issue, as it has been shaped by the Supreme Court of Canada in *Baker*, above, and by subsequent judgments of the Federal Court of Appeal in *Legault* and *Hawthorne*, above, and more recently in *Kinasa v (Citizenship and Immigration)*, 2009 FCA 189.

ORDER

THE COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed;

2. The matter is referred back to a different immigration officer for redetermination;

3. No question id certified.

"René LeBlanc"
Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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