Federal Court  Cour fédérale

Date: 20160708

Dockets: IMM-5478-15
IMM-5479-15

Citation: 2016 FC 786

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 8, 2016

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

JUNIO ALLISON LOVERA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Judicial review is sought in the two matters cited above. In both cases, the parties are the same and the applicant claims relief in respect of two separate administrative decisions. Two applications for judicial review were made in order to comply with rule 302 of the *Federal Courts Rules*, SOR/98-106. Regardless, the applications arose from the same facts, and the same

arguments are made in both cases. Thus, judgment will be rendered in both applications for judicial review, and a copy of this judgment and its reasons will be placed in each file.

[2] The applications for judicial review are made under section 72 of the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27) (the Act). One concerns an application for a pre-removal risk assessment (PRRA application) (IMM-5479-15), and the other an application for permanent residence on humanitarian and compassionate grounds (H&C application) (IMM-5478-15).

I. Facts

[3] The applicant was born on January 31, 1982. He is originally from the Dominican Republic and is a citizen of that country. His mother tongue is Spanish. He arrived in Canada on November 11, 1995, at age 13. His mother was sponsored by her then-spouse, who is the biological father of the applicant's sister. The applicant's mother and stepfather separated in 1997. The applicant did not finish high school. He worked construction jobs.

[4] On March 2, 2004, the applicant was convicted of breaking and entering with intent under section 348 of the *Criminal Code* and sentenced to two years' probation and a $600.00 fine.

[5] On November 18, 2013, he was arrested and charged again, this time for offences under the *Controlled Drugs and Substances Act* (S.C. 1996, c. 19). According to the evidence in the record, he quit his job in 2008 to look after a cannabis grow-op. He was not caught by police

until three years later. In addition to the drug and other substance charges, he was also charged with theft over $5,000.00 for using an electrical bypass to power the grow-op. On January 7, 2014, he was found guilty and sentenced to nine months in prison, with two years of probation to serve upon his release. The probation order was set to expire on October 6, 2016.

[6] When released on parole after serving a portion of his sentence, the applicant supposedly lived with a woman he referred to as his spouse and with whom he had been involved since August 2014. This woman has four children and shares custody of them with their father.

[7] As for the applicant's brother and sister, they live in Canada. Nothing is known about the relationship between the applicant and his brother, but the evidence in the record suggests that he is closer to his sister and her daughter.

[8] On January 15, 2016, the applicant left Canada as a result of a second inadmissibility report; it was issued on February 17, 2014, a few weeks after the January 7, 2014 conviction. The first report, issued on January 11, 2006, was related to the breaking and entering offences for which he was convicted.

II. PRRA application

[9] The PRRA application was rejected on October 26, 2015. In fact, it was the same senior immigration officer who processed the applications mentioned at paragraph 2. A number of allegations were made and were dismissed in the PRRA application. The application for judicial

review challenges only the senior officer's decision to reject the applicant's claim as to the treatment he would receive if he were to return to the Dominican Republic.

[10] Indeed, the applicant's argument that criminals deported to the Dominican Republic face increased danger was rejected. Making note of the documentation provided in the H&C application for permanent residence indicating that the United States carries out mass deportations that often make headlines and are often on the same flight, the immigration officer pointed out that Canada had a different approach to deportation.

[11] Specifically, the applicant claimed, based on this documentation, that deportations by the United States often resulted in photos being taken by the media and in names being added to lists that could be accessed by potential employers. Supposedly, this results in significant job discrimination, and the general public is warned of the arrival of these fellow citizens, whom they may perceive as somewhat undesirable.

[12] To counter this claim, the senior officer wrote:

> [TRANSLATION]
>
> Deportations from Canada are different. Canada does not engage in mass deportations of Dominicans. They are deported on regular flights, and in most cases they are not even escorted. Moreover, Canada has a policy not to disclose the reasons for someone's deportation. There are many reasons why a person may be deported; they may be seeking asylum or refugee status, or maybe they have simply been in the country illegally. Consequently, I cannot conclude that the situation of Dominicans deported from Canada is akin to that of Dominicans deported from the United States.

III. Parties' positions on the application for judicial review of the PRRA decision

[13] The applicant argues that the respondent's evidence is not in the record. It is extrinsic evidence. It was not disclosed to the applicant, which has affected his involvement in the case. Since he does not know the evidence and is therefore unable to comment on, challenge or even object to it, he argues he was denied procedural fairness.

[14] The applicant relies on a single decision. In *Dasent v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 FC 720, Mr. Justice Rothstein, then of this Court, held, at paragraph 23:

> The relevant point as I see it is whether the applicant had knowledge of the information so that he or she had the opportunity to correct prejudicial misunderstandings or misstatements. The source of the information is not of itself a differentiating matter as long as it is not known to the applicant. The question is whether the applicant had the opportunity of dealing with the evidence. This is what the long-established authorities indicate the rules of procedural fairness require. In the well-known words of Lord Loreburn L.C. in *Board of Education v. Rice*, [1911] A.C. 179 (H.L.), at page 182:
>
> > They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.

Clearly, the applicant is claiming that he did not have the opportunity to contradict the evidence on which the senior immigration officer relied to reject his claim regarding people deported to the Dominican Republic from the United States.

[15] In this matter, rather than defend the applicant's claim on the merits, the respondent simply argues that the application for judicial review is moot, since the applicant has already left the country, six months ago. Here again, reliance is placed on the unequivocal jurisprudence of the Federal Court of Appeal, which, in *Solis Perez v. Canada (Citizenship and Immigration)*, 2009 FCA 171, was in agreement with the trial judge, who had said:

> … Parliament intended that the PRRA should be determined before the PRRA applicant is removed from Canada, to avoid putting her or him at risk in her or his country of origin. To this extent, if a PRRA applicant is removed from Canada before a determination is made on the risks to which that person would be subject to in her or his country of origin, the intended objective of the PRRA system can no longer be met. Indeed, this explains why section 112 of the Act specifies that a person applying for protection is a "person in Canada".

[16] Moreover, the Minister responded to the merits of the case, including the argument made in respect of the PRRA application, as will be seen when I discuss the H&C application for permanent residence made from within Canada.

IV. Decision concerning the H&C application for permanent residence

[17] The decision in question was rendered on October 28, 2015. The senior immigration officer was satisfied with the quality of the applicant's ties to Canada. However, the commission of serious offences considered as endangering the safety of Canadians was seen as a negative factor in terms of establishment in Canada.

[18] The applicant's relationships with his sister and niece were considered. It was noted that the applicant no longer appeared to be living with them. In fact, his sister no longer depended on him to meet her needs. The officer agreed that it would be in his niece's interests to have him in her life, but this bond is not in itself sufficient to warrant an exemption.

[19] The decision was the same regarding the children of the applicant's then-girlfriend of a few months, who said in an affidavit that although the applicant claimed to be living with her, their relationship was not official. The decision mentions that she met him online in August 2014. Apparently she shares custody of her children with their father; they were in the process of divorcing at the time of the decision. Given the recentness of the relationship, which, according to the girlfriend, had not evolved into cohabitation, the senior immigration officer could not conclude that the children's best interests required that the applicant apply for permanent residence from within Canada. The officer also noted that the applicant was in a new relationship despite being subject to a removal order for being inadmissible.

[20] The issue of risk should the applicant have to return to the Dominican Republic was addressed in virtually the same way as it had been addressed in the PRRA decision. The officer added that the applicant spoke French, which would help him find work in tourism in the Dominican Republic. Moreover, his mother tongue is Spanish, which will help him readjust to his home country.

[21] Consequently, the H&C application was denied.

V. Parties' positions on the H&C application

[22] The applicant challenges the immigration officer's decision on several grounds. He argues that the officer:

(a) did not make a reasonable assessment of his rehabilitation;

(b) did not apply the correct test in deciding his H&C application;

(c) used extrinsic evidence without disclosing it to him; and

(d) did not give sufficient weight to the best interests of the children directly affected.

[23] The applicant claims that his rehabilitation should have been considered more favourably. According to him, it started in 2011, when he was arrested for his illicit activities, which had been going on for three years in terms of the commercial production of cannabis. He says he is sorry and wants to take responsibility for what he did. This comment is in response to a remark by the immigration officer to the effect that the applicant was trying to downplay his responsibility by claiming that he had been only an accessory to the break-ins and that he had chosen to look after the grow-op because he needed the money.

[24] Regarding the application of section 25 of the Act, essentially the applicant argues that the immigration officer did not follow the Supreme Court of Canada's decision in *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 (*Kanthasamy*). In the applicant's view, the immigration officer applied only the "unusual and undeserved or disproportionate hardship" test, which, according to the Supreme Court decision, is only descriptive and does not create any new thresholds separate and apart from the humanitarian and compassionate considerations set out in section 25.

[25] Concerning the best interests of the children directly affected, again, the applicant argues that the immigration officer minimized the consequences of his removal for the children. He says he is already a father figure to them, though he does not comment on the fact that he has only just become a part of their lives. Moreover, the examples given as to the need for him to be there are rather weak.

[26] Lastly, as for the use of extrinsic evidence, the argument is the same as for the PRRA application.

[27] The respondent, in turn, argues that the applicant has lax values that cause him to downplay the severity of his actions and their social impact. As a result, he is a danger to the safety of Canadians, and his criminal history shows disregard for Canadian law.

[28] Regarding the best interests of the children directly affected, the respondent points out that the officer did not simply say that she was taking them into account, but also noted that the applicant had come into the lives of his spouse's children barely a year earlier at the time of the decision. In the applicant's opinion, the officer's taking a different view of the evidence before her does not constitute an unreasonable assessment. As for the niece, the applicant's role in her life is secondary at best. They do not live together, and the applicant does not financially support his sister, meaning that the child's best interests are served by her parents.

[29] The respondent spent several paragraphs commenting on the applicant's argument that the senior immigration officer applied the wrong test in deciding the H&C application. According to the respondent, the senior immigration officer did follow the Supreme Court decision in *Kanthasamy*. Though the words "unusual and undeserved or disproportionate hardship" were used in the course of the decision, it was only for descriptive and instructive purposes. They were not thresholds to be satisfied; rather, the immigration officer examined and weighed all relevant H&C considerations. In the respondent's opinion, the officer's analysis shows that her focus was on section 25 of the Act and not on the three descriptors, which, in any event, were certainly not proscribed in the Supreme Court decision.

[30] As for the use of extrinsic evidence, the respondent argues that it is unclear what point the applicant was trying to make regarding the difference between the American approach and the Canadian one. The respondent does not suggest that the evidence used was already known to the decision-maker, but rather that counsel for the applicant should have known how deportations are carried out, because this is basic information known to all immigration lawyers. This information can also supposedly be found in immigration manuals that are available online to the public. In any event, the respondent says that this information was intended to reassure the applicant, as his situation was distinguished from that of other Dominicans deported from the United States.

VI. Analysis

[31] The first issue is the standard of review applicable to these matters. The applicant has made no submissions in this regard. The respondent argues that, except for the issue of extrinsic evidence, the standard of review applicable to H&C decisions is that of reasonableness. I agree (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 SCR 339 (*Khosa*); *Kanthasamy*, above, at paragraph 44). As for the use of extrinsic evidence, this is an issue of procedural fairness, which is reviewable on a standard of correctness (*Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 SCR 502, at paragraph 79).

[32] I would point out that it is for the administrative tribunal to determine what are the H&C considerations that warrant granting permanent resident status or an exemption from any applicable criteria or obligations of the Act. Such is the decision of Parliament. A reviewing court may intervene only if the administrative tribunal's decision is unreasonable. The applicant had the onus of proving that (*Khosa*, above, at paragraph 57).

[33] What the Supreme Court decision in *Kanthasamy* does proscribe is that the administrative decision-maker confine him- or herself to a test such as the "unusual and undeserved or disproportionate hardship" test, thus substituting a test that can be restrictive compared to what the Act provides for: H&C considerations relating to the foreign national, taking into account the best interests of a child directly affected. Subsection 25(1) of the Act reads as follows:

25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies	25 (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada

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.	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.

At paragraph 33 of its decision, the Supreme Court gave the following explanation of what constitutes the relationship between the language of the Act and that in guidelines issued by the Minister:

> 33 The words "unusual and undeserved or disproportionate hardship" should therefore be treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). As a result, what officers should not do, is look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds, and use the language of "unusual and undeserved or disproportionate hardship" in a way that limits their ability to consider and give weight to *all* relevant humanitarian and compassionate considerations in a particular case. The three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision.

[34] Nothing in the decision under review tells me that the administrative tribunal fell into that trap. Granted, reference was made to unusual and undeserved or disproportionate hardship, but this was not done to the exclusion of a full review of H&C considerations, by creating high thresholds.

[35] The decision-maker did not accept the applicant's claims regarding his rehabilitation. In my view, the applicant's arguments form no basis for him to validly complain about the decision in this regard. First, possible rehabilitation is only one factor among others of limited relative weight. The applicant appears to argue that he has not committed any other offences since 2011. But it is difficult to understand how the applicant's possible rehabilitation would be of considerable weight when reviewing H&C considerations, given that the decision-maker also had to take into account the severity of the offences and the fact that the applicant had quit his job to look after a grow-op for three years; these are far from one-time, minor offences. Second, the record shows an impatient inmate complaining of his conditions of detention. Once released, he paid off his creditors only partially, as he chose to declare bankruptcy. Perhaps he was on the road to rehabilitation in the sense that he was not convicted of further offences, but this was not established, nor was it established that he had had a road-to-Damascus experience and made every effort to redeem himself for past mistakes. It was open to the senior immigration officer to take account of the applicant's trying to downplay his responsibility by saying that he had not entered the homes broken into but had participated in the commission of the offences and that money problems had resulted in an illicit operation that ended three years later, when he was caught by police. The offences were objectively very severe. Third, the applicant's probation

officer assessed the risk of recidivism as moderate at best. In my view, the immigration officer's assessment has not been shown to be unreasonable.

[36] As is often the case, the decision regarding a child's best interests is not an easy one. *Kanthasamy*, above, provides the following guiding principles:

> 39 A decision under s. 25(1) will therefore be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered: *Baker*, at para. 75. This means that decision-makers must do more than simply *state* that the interests of a child have been taken into account: *Hawthorne*, at para. 32. Those interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence: *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 (CanLII), [2002] 4 F.C. 358 (C.A.), at paras. 12 and 31; *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 165 (CanLII), 323 F.T.R. 181, at paras. 9-12.

[37] Essentially, the senior immigration officer's analysis consisted of noting the children's age—15 and 9—and their health problems. It was noted that the applicant provided transportation to treatment appointments; although the children's father's assistance with this was apparently not to the mother's satisfaction, given the presence of a father figure and the applicant's brief relationship with the children's mother, the immigration officer found that the children's best interests did not require that he remain in Canada.

[38] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, the Supreme Court stated:

> 75 The certified question asks whether the best interests of children must be a primary consideration when assessing an applicant under s. 114(2) and the Regulations. The principles discussed above indicate that, for the exercise of the discretion to

> fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.

In this case, the evidence presented in support of the children's best interests is itself fairly thin. The senior immigration officer did not merely mention the children's best interests, and she could do no better than to examine what had been identified and defined by the applicant. In this regard, the applicant has an onus. Based on what was before the senior immigration officer, the decision-maker was alert, alive and sensitive to the children's best interests. What the decision-maker must not do is minimize them; in this case, the evidence was far from dominant, and the senior immigration officer's attitude cannot be criticized. Minimization always depends on the evidence presented. In this case, there was no minimization given the thinness of the evidence.

[39] Finally, there remains the issue of extrinsic evidence. In my opinion, the standard of correctness is such that it leads to the conclusion that the application for judicial review must be allowed on this issue alone. To counter what might be a fallacious argument, the administrative tribunal chose to use information that was not before it. In this case, it was extrinsic evidence that directly called into question the evidence presented by the applicant.

[40] The decision found that the situation in the United States was less than highly relevant. The senior officer could have considered its relative importance, and such decision would then

have been subject to judicial review. Presumably, the quality of the American evidence could have been challenged. Instead, the officer chose to compare the situation in the United States as described to that in Canada, though it would appear that no evidence on the latter had been presented, and these considerations were not even disclosed to the applicant.

[41] In *Judicial Review of Administrative Action in Canada* (Carswell, loose-leaf) at number 10:8320, entitled "Specialized Knowledge and Disclosure," Brown and Evans wrote:

> …of course, the courts have often stated that official notice cannot be a basis for fact-finding without disclosure to the parties, although the fact that the decision-maker is merely aware of extraneous evidence will not, without more, be a breach of procedural fairness. While specialized knowledge may be used to assist the decision-maker to assess the evidence that has been given on a certain fact, it cannot be a substitute for evidence when none has been introduced.
>
> Accordingly, where a tribunal can identify facts or information on which it intends to rely in making its decision and where there is doubt as to whether that information is known to the parties, a tribunal should disclose it to the parties as a matter both of prudence and fairness, in order to ensure that the parties are provided with an opportunity to respond.

[42] In this case, the only response given by the government was that an immigration lawyer would know how deportations of Dominicans to their home country were carried out in Canada. In my opinion, this response is unsatisfactory.

[43] Indeed, it is not disputed that the source of the information used by the immigration officer to counter the applicant's argument is unknown. The fact that this information is known to experts in the field—which has not been established—does not resolve the situation. In fact, one cannot respond to evidence if it has not been disclosed. What matters is that the evidence

used be made available to give the parties the opportunity to comment on, counter or object to it. It is not even possible to draw inspiration from this Court's recent jurisprudence on access to online documentation (we simply do not know where the information came from). Brown and Evans speak of caution and fairness. In my view, these are particularly important where the information used comes from an unknown source.

[44] What was described as the Canadian approach is nothing more than extrinsic evidence. It is not proven, nor had it even been mentioned before the decision-maker relied on it to counter a document—whose value has not been established either—from the *Northern Manhattan Coalition for Immigrant Rights*. The dilemma is this: To counter a document of uncertain value, the immigration officer chose to rely on what she considered to be the Canadian approach, which is not in evidence. Should then a breach of procedural fairness be overlooked because the breach was committed in an attempt to counter evidence that is itself questionable? As such decision is subject to the standard of correctness, which does not require any form of deference, the Court must make a finding of error resulting in a breach of procedural fairness.

[45] Professor Patrice Garant explained things in a concise and decisive way in *Droit Administratif*, 6th ed. (Éditions Yvon Blais Inc.):

> [TRANSLATION]
>
> Subject to judicial notice, the jurisprudence does not allow a tribunal to gather its own evidence without notifying the parties in the record and giving them the opportunity to respond to it before rendering its decision.
>
> (Page 642)

[46] At the hearing, the respondent claimed that the Canadian approach as described was not extrinsic evidence. No argument supported this claim. In my opinion, this type of evidence is not extrinsic if the facts are common knowledge. As the source of the information used by the senior officer is unknown, it is difficult to establish common knowledge. I do admit that a specialized tribunal may take judicial notice of a wide variety of information. But this information must be common knowledge, which the immigration officer did not establish.

[47] Consequently, the application for judicial review will be allowed. However, since the other reasons put forward in support of the application for judicial review were rejected, and since there is no reason to conclude that a serious question of general importance is involved, the only determination to be made is in respect of the treatment of people sent back to the Dominican Republic.

[48] The application for judicial review concerning the PRRA application is opposed by the government because it became moot when the applicant left Canada for the Dominican Republic six months ago.

[49] In my opinion, concerning the PRRA application, discretion should be exercised in favour of hearing the matter despite its mootness (*Solis Perez v. Canada (Citizenship and Immigration* (above)). It seems to me that the three criteria identified in the leading case on mootness (*Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342, at pages 358 to 363) all point to the same conclusion. First, it is clear that there is an adversarial context to this matter, because the same arguments were made in relation to the H&C application, which is certainly

not moot (*Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at paragraph 52, [2010] 2 FCR 311). Therefore, the second criteria is met, as there is no concern for judicial economy. Lastly, the Court's law-making function is the same in both matters. Indeed, it would be reasonable to wonder in this case why a given argument can be decided in one case and not the other. Therefore, the Court finds that the two applications for judicial review must be dealt with in the same manner.

[50] The applicant claims, based on some documents, that people sent back to the Dominican Republic experience discrimination. This documentation, on its face, concerns people sent back to the Dominican Republic from the United States. In this case, the senior immigration officer countered this claim by pointing out that Canada had a different approach. When the matters are returned to another immigration officer, only this question should be reconsidered. The applicant will be able to submit this documentation or other documents, and the respondent will be able to present evidence to the contrary.

JUDGMENT

THIS COURT'S JUDGMENT is that the applications for judicial review in dockets IMM-5478-15 and IMM-5479-15 are allowed on the ground that, in both cases, the senior immigration officer used extrinsic evidence concerning the manner in which people deported to the Dominican Republic may be treated. Only this question is to be reconsidered by a different decision-maker.

A copy of this decision will be placed in each file.

There are no serious questions of general importance.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5478-15 IMM-5479-15
STYLE OF CAUSE:	JUNIO ALLISON LOVERA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	JUNE 20, 2016
JUDGMENT AND REASONS:	ROY J.
DATED:	JULY 8, 2016

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