Federal Court  Cour fédérale

Date: 20170713

Docket: IMM-2731-16

Citation: 2017 FC 679

Ottawa, Ontario, July 13, 2017

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

BARBORA GAZIOVA, BARBORA LUKACOVA, AND MICHAELA LUKACOVA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Barbora Gaziova (the "Principal Applicant"), Barbora Lukacova and Michaela Lukacova (collectively the "Applicants") seek judicial review of the decision, dated June 13, 2016, of an Officer (the "Officer") dismissing their application for permanent residence in Canada on humanitarian and compassionate ("H&C") grounds, pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act").

[2] The Applicants are citizens of the Czech Republic. They came to Canada in April, 2009 and sought protection pursuant to section 96 and subsection 97(1) of the Act on the grounds of ethnic discrimination faced by Roma in the Czech Republic. The Immigration and Refugee Board, Refugee Protection Division (the "RPD") rejected their claim on August 8, 2012.

[3] The Applicants sought leave and judicial review of the RPD decision. Leave was denied by the Federal Court on December 23, 2014.

[4] In the H&C decision, the Officer noted that the Applicants' bear the burden of submitting evidence to show hardship. The Officer observed, relative to the country condition reports, that "no explanation has been provided as to how this documentation relates to the applicant." With respect to the letters of support, the Officer found that the letters did not demonstrate that separation would cause hardship. The Officer considered the best interests of the children and was not satisfied that there was sufficient evidence to show a negative impact upon them arising from removal to the Czech Republic.

[5] The Applicants filed the affidavits of Mr. Rocco Galati and Ms. Barbora Lukacova in support of this application for judicial review.

[6] The affidavit of Mr. Galati provides the history of the Applicants' attempts to gain status in Canada, including reference to a settlement agreement between the Minister of Citizenship and Immigration (the "Respondent"), and a group of 56 families, including the Applicants, relating to their refugee claims.

[7] The settlement was made in respect of an action on behalf of claimants from the Czech Republic in cause number T-1700-11. The Applicants in the current cause were parties in cause T-1700-11 and subject to the settlement in that proceeding.

[8] Barbora Lukacova, a daughter of the Principal Applicant, deposed that she and her sister are extremely distressed by the decision of the Officer, both because of the context described in Mr. Galati's affidavit and the language of the decision itself.

[9] The Applicants now argue that the Officer breached the duty of procedural fairness on the basis that there is a reasonable apprehension of bias on the part of the Officer arising from a conflict between the Officer and the Applicants' former lawyer, that is Mr. Galati. The alleged conflict is described in the affidavit of Mr. Galati.

[10] The Applicants further submit that the Officer erred in the analysis of the H&C factors and of hardship, specifically in discussing each factor in isolation rather than cumulatively and in treating the words "unusual and undeserved hardship" in too rigid a manner.

[11] The Applicants also argue that the Officer ignored the evidence about their employment, integration and the impact on their education. They submit that the Officer improperly failed to assess evidence of discrimination faced by others who shared their identity as Roma.

[12] The Applicants submit that the decision is unreasonable, on the grounds that the Officer only reviewed the facts and gave a conclusion without analyzing the "cumulative evidence and factors presented". They argue that the Officer failed to provide adequate reasons.

[13] Finally, the Applicants submit that the decision violates the Minutes of Settlement that were filed in cause number T-1700-11. Those Minutes of Settlement provided that all allegations of bias and conspiracy against the Government would be withdrawn, the Applicants would be provided with Temporary Resident Permits ("TRPs"), Citizenship and Immigration Canada would process the H&C applications of the Applicants prior to the expiration of the TRPs, and certain fees would be waived.

[14] The Applicants seek solicitor and client costs in their Notice of Application for Leave and Judicial Review.

[15] The Respondent, as a preliminary matter, objects to the inclusion of the Minutes of Settlement in the Applicants' record. He submits that these Minutes do not assist the Applicants since the Minutes are unambiguous "and no express terms have been breached." He argues that the Minutes do not provide any "undertaking" about a particular result following the H&C application of the Applicants.

[16] The Respondent also submits that the Applicants have failed to meet the high burden of demonstrating bias on the part of the Officer. He contends that the fact that former counsel

challenged a decision of the Officer made some 5 years earlier than the one in issue here does not give rise to a reasonable apprehension of bias.

[17] Further, the Respondent argues that the Officer considered all the relevant factors and concluded that H&C relief was not warranted. The Applicants were required to show that the general country conditions would personally give rise to hardship and in the opinion of the Officer they had failed to do so.

[18] The Respondent submits that the Officer did not err by addressing the different factors in separate paragraphs. There is no evidence that the Officer did not follow the approach discussed by the Supreme Court in its decision in *Kanthasamy v. Canada (Minister of Citizenship and Immigration)*, [2015] 3 S.C.R. 909. The Officer said that a "global assessment" was conducted.

[19] The Respondent argues that the reasons meet the standard of "reasonableness". They provide the Court with sufficient detail to show why the decision was made and adequately address the H&C factors.

[20] The Respondent submits there is no justification for an award of costs and the Applicants have shown no "special reasons" for such an award, as required by Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 (the "Federal Courts Citizenship, Immigration and Refugee Protection Rules").

[21] The first matter to be addressed is the applicable standard of review.

[22] The issue of procedural fairness is to be reviewed on the standard of correctness; see the decision in *Mission Institute v. Khela*, [2014] 1 S.C.R. 502 at paragraph 79. An H&C decision, upon its merits, is reviewable on the standard of reasonableness; see the decision in *Kanthasamy v. Canada (Minister of Citizenship and Immigration),* [2015] 3 S.C.R. 909 at paragraph 44.

[23] According to the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 47, the standard of reasonableness requires that the decision be justifiable, intelligible and transparent, and fall within a range of acceptable outcomes.

[24] The Applicants raise the issue of bias as giving rise to a breach of procedural fairness. I agree that bias, if established, can indeed breach procedural fairness because it can deprive a party of a fair hearing; see the decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 45, which reads as follows:

> Procedural fairness also requires that decisions be made free from a reasonable apprehension of bias, by an impartial decision-maker.

[25] The Applicants claim that the Officer was biased against Mr. Galati and by extension, against his clients, the Applicants.

[26] The leading authority on the issue of bias is *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369. In *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484. The Supreme Court of Canada confirmed that the statement of the test found in the dissent of *Committee, supra* at paragraph 40, is the appropriate test for bias, as follows:

> [W]hat would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

[27] I am not persuaded by the evidence of Mr. Galati that the Officer was biased against the Applicants, as a result of interactions between him and the Officer in a previous proceeding.

[28] The fact that the Officer made a negative ruling relative to an H&C application submitted by other clients of Mr. Galati is not enough to support a finding of bias. If the Applicants are arguing that the Officer is biased against Mr. Galati and any of his clients, they must submit evidence of that bias; see the decision in *Hughes v. Canada (Attorney General),* 2010 FC 837 at paragraph 21, which reads as follows:

> The burden of demonstrating either the existence of actual bias, or of a reasonable apprehension of bias, rests on the person alleging bias. An allegation of bias is a serious allegation, which challenges the very integrity of the decision-maker whose decision is in issue. As a consequence, a mere suspicion of bias is not sufficient: *R. v. S. (R.D.),* [1997] 3 S.C.R. 484 (S.C.C.) at para. 112; *Arthur c. Canada (Procureur général)* (2001), 283 N.R. 346 (Fed. C.A.) at para. 8 (F.C.A.). Rather, the threshold for establishing bias is high: *R. v. S. (R.D.),* at para. 113.

[29] The Applicants have failed to meet their evidentiary burden to show bias on the part of the Officer in the assessment of their H&C application. They have not shown any breach of procedural fairness.

[30] The Applicants' argument about the inadequacy of reasons may be considered an argument about procedural fairness. However, the decision in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, has determined that this argument is no longer an independent basis for attaching a decision made by a statutory decision maker.

[31] The adequacy of reasons is to be assessed on the standard of reasonableness; see the decision in *Cycles Lambert Inc. v. Canada Border Services Agency* (2015), 469 N.R. 313 (F.C.A.) at paragraph 19.

[32] The next issue is the reasonableness of the decision as a whole.

[33] I am not persuaded by the Applicants' submissions that the Officer failed to consider all relevant H&C factors. The fact that the Officer addressed these issues in separate paragraphs does not show a failure to cumulatively weigh the evidence. This argument seems to more about form than substance.

[34] The Officer considered the relevant factors upon an H&C application, that is the Applicants' establishment, including employment and family ties, risk, hardship and the best interests of the children.

[35] The children of the Principal Applicant are now adults. They were minors when they entered Canada. The Officer addressed their best interests. The Officer considered the education and relationships of the Applicants, and the impact that removal would have upon them.

[36] The Officer considered the relevant H&C factors. The reasons meet the test for "reasonableness" as discussed in *Dunsmuir, supra*.

[37] Next, there is the issue of the Minutes of Settlement.

[38] These Minutes do not give any promise or undertaking about the ultimate decision upon any H&C application submitted by the Applicants. In my opinion, the Minutes are irrelevant in the disposition of this application for judicial review.

[39] The Applicants seek solicitor and client costs upon this application for judicial review. According to the Federal Courts Citizenship, Immigration and Refugee Protection Rules, costs can be awarded for special reasons.

[40] The Applicant did not succeed in this application. It is not necessary for me to discuss costs. In any event, I agree with the arguments of the Respondent that no case has been established for the award of costs.

[41] In the result, the Applicants have shown no reviewable error by the Officer. There is no breach of procedural fairness. The reasons are adequate and the decision meets the standard of reasonableness as referred to above. The application for judicial review will be dismissed.

[42] The Applicants proposed the following questions for certification:

> 1. Can an order made by the Court (a Prothonotary), in the course of a Judicial Review, be reconsidered by the applications Judge, notwithstanding that no appeal was taken from the order of the Prothonotary pursuant to **Rule 51** of the **Federal Courts Rule**?
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> 2. Is any appeal, notwithstanding **Rule 51** of the **Federal Court Rules**, from any interlocutory order, from the Court, in a judicial review, pursuant to the leave provisions under the **IRPA**, permissible under s. 72(e) of the **IRPA**?
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> 3. If an application Judge, in an application for judicial review can "reconsider" or hear an "appeal", from an interlocutory order made by the Court, in the course of that judicial review under the leave provisions of the **IRPA**, what is the statutory authority for the applications judge to do so?
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> [Emphasis in original]

[43] The Respondent opposes certification of these questions.

[44] The test for certifying a question is set out in *Zazai v. Canada (Minister of Citizenship and Immigration)* (2004), 318 N.R. 365 (F.C.A.) at paragraph 11, that is a serious question of general importance which would be dispositive of an appeal.

[45] The Federal Court of Appeal recently confirmed the criteria for certifying a question pursuant to subsection 74(d) in *Lewis v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 FCA 130, at paragraphs 36 and 37, as follows:

> The case law of this Court establishes that in order for a question to be properly certified under section 74 of the IRPA, and therefore for this Court to have jurisdiction to hear an appeal, the question certified by the Federal Court must be dispositive of the appeal, must transcend the interests of the parties and must raise an issue of broad significance or general importance. In consequence, the question must have been dealt with by the Federal Court and must necessarily arise from the case itself (as opposed to arising out of the way in which the Federal Court may have disposed of the case): *Zhang v. Canada (Minister of Citizenship and Immigration)*, 2013 FCA 168 (F.C.A.) at para. 9, (2013), 446 N.R. 382 (F.C.A.); *Varela v. Canada (Minister of Citizenship & Immigration)*, 2009 FCA 145 (F.C.A.) at paras. 28-29, (2009), [2010] 1 F.C.R. 129 (F.C.A.); *Zazai v. Canada (Minister of Citizenship & Immigration)*, 2004 FCA 89 (F.C.A.) at paras. 11-12, (2004), 318 N.R. 365 (F.C.A.) [*Zazai*]; and *Liyanagamage v. Canada (Secretary of State)* (1994), 176 N.R. 4 (Fed. C.A.) at para. 4, [1994] F.C.J. No. 1637 (Fed. C.A.).
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> The case law further recognizes that once a question has been properly certified, this Court may consider any issue in the appeal and is not limited to considering only the question(s) certified: *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) at para. 12, 174 D.L.R. (4th) 193 [*Baker*]; *Mudrak v. Canada (Minister of Citizenship and Immigration)*, 2016 FCA 178 (F.C.A.) at para. 19, (2016), 485 N.R. 186 (F.C.A.) [*Mudrak*]; and *Zazai* at para. 10.

[46] The questions for certification proposed by the Applicants do not meet the test for certifying a question and no question will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, no question will be certified.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2731-16
STYLE OF CAUSE:	BARBORA GAZIOVA ET AL v. MCI
PLACE OF HEARING:	TORONTO
DATE OF HEARING:	JANUARY 25, 2017
JUDGMENT AND REASONS:	HENEGHAN J.
DATED:	JULY 13, 2017

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