Federal Court  Cour fédérale

Date: 20181116

Docket: IMM-1195-18

Citation: 2018 FC 1137

Toronto, Ontario, November 16, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

LUCIANO BRAMBILLA
VALDILENE BRAMBILLA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants challenge a negative decision of a Senior Immigration Officer [Officer] dated February 15, 2018 [Decision], refusing their request for the processing of their application for permanent residence from within Canada, based on humanitarian and compassionate [H&C] grounds under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. For the reasons that follow, this application will be dismissed.

I. Background

[2] Mr. Brambilla and his wife are both citizens of Brazil and Italy. Mr. Brambilla first attempted to become a permanent resident in 1998 by allegedly entering into a marriage of convenience with a Canadian citizen, resulting in a refusal. He made a refugee claim in 2002 but withdrew this request a year later. His third attempt, made in 2010, was also refused.

[3] In 2012, the Brambillas came to Canada as visitors and returned to Brazil six months later. They came back to Canada in 2013, again as visitors. They overstayed their visas, purchased a home and started a business. Their son, Lucas, was born in Canada in 2014, after which they moved back to Brazil to help Ms. Brambilla's mother who was unwell. The Applicants returned to Canada in 2015, and in July 2016, submitted an inland H&C application, the refusal of which is the subject of these reasons.

II. Decision under Review

[4] The key findings of the Decision are fivefold:

1. When the Applicants came to Canada in 2013 as visitors, their intention was to find employment, and despite not being authorized to do so, opened a business and bought a house. In October 2014, the Applicants learned that Ms. Brambilla's mother was ill, sold their home in Canada and returned to Brazil to care for her;

2. The Applicants advise, through their immigration consultant, that they do not want to return there because "Brazil continues to struggle economically and as a result, they can only expect violence and unemployment". The Officer, however, observed that "the applicants have not shown that there exists a link between their personal circumstances and the hardship cited in relation to the country conditions", and that they did not demonstrate circumstances "unusual in comparison to the

situation of others similarly situated to them in Brazil such that an exemption is justified";

3. Their Canadian aunt, who says that she resides with the Applicants and is close with them, did not provide evidence to support the contention that she is unable or unwilling to care for herself or that she requires the Applicants' assistance; and

4. Although it is in the best interests of their Canadian-born child to remain in Canada, this is only one of many factors to consider; he has already resided in Brazil, where he has both sets of grandparents, aunts, uncles, and extended family;

5. Regarding security in Brazil, no country, including Canada, can provide a guarantee that violence or financial misfortune will not occur in a child's lifetime. On this point, the Officer concluded that "their evidence does not support that adverse country conditions will have a direct, negative impact on them or that they are members of a group that will be affected by discrimination in Brazil".

III. Issues

[5] The Applicants raise the following issues:

A. Did the Officer use the appropriate legal test?

B. Did the Officer err in the assessment of the Applicants' establishment?

C. Did the Officer err in the assessment of the country conditions?

D. Did the Officer err in the assessment of their child's best interests?

[6] Whether the decision-maker applied the appropriate legal test is subject to the standard of correctness (*Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at para 27). The remaining three issues attract a reasonableness review, meaning that the Decision must be

justified, transparent, and intelligible, and fall within the range of possible, acceptable outcomes (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

IV. Analysis

[7] The Applicants based their H&C application on establishment, the best interests of their child, and adverse country conditions in Brazil. Before looking at each of these disputed elements, it is worth mentioning that an H&C exemption is an equitable remedy. As noted by the Supreme Court of Canada [SCC] in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] quoting from *Chirwa v Canada (Minister of Manpower and Immigration)* (1970), 4 IAC 338, H&C relief is warranted when:

> [13] … those facts, established by evidence, which would excite in a reasonable man [*sic*] in a civilized community a desire to relieve the misfortunes of another – so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the Immigration Act.

[8] The H&C exemption is a highly discretionary tool, and thus decisions considering it merit significant deference from this Court.

A. Did the Officer err in the application of the legal test?

[9] The Applicants interpret the Decision as applying the test regarding hardship that has since been rejected by the SCC in *Kanthasamy* at paragraph 33. Relying on *XY v Canada (Citizenship and Immigration)*, 2018 FC 213 [*XY*] and *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 [*Lauture*], the Applicants also argue that the Officer fell into the

same trap that occurred in those two decisions by conflating the establishment analysis with hardship.

[10] I disagree with the Applicants that the Officer applied the wrong test. As the Respondent conceded, the Decision could have been better worded. However, viewed as a whole, the Officer evaluated, as separate components, the Applicants' establishment in Canada and the hardship of applying abroad, and arrived at reasonable conclusions for both considerations. Indeed, both are factors that must be considered (*Nguyen v Canada (Citizenship and Immigration)*, 2017 FC 27 at para 28; *Chokr v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 1022 [*Chokr*] at para 9). Furthermore, the post-*Kanthasamy* jurisprudence has been clear that hardship remains an important factor in H&C requests (see, for instance, *Miyir v Canada (Citizenship and Immigration)*, 2018 FC 73 at paras 15-22 and 33).

[11] While the word "hardship" indeed found its way into several paragraphs that discussed establishment, the Officer clearly evaluated both concepts on their own terms.

[12] Furthermore, I do not agree with the Applicants that either *XY* or *Lauture* stand for the proposition that an officer cannot address both hardship and establishment within the same part of the H&C analysis. While I agree with the Applicants that it would be best to keep the concepts separate, to read either *Lauture* or *XY* as imposing a blanket prohibition on such commingling is to elevate form over substance. Rather, both of those cases faulted the officers for their failure to evaluate establishment evidence and weigh it along with other factors relevant to whether the H&C exemption applied. In both cases, the officer made the mistake of simply

using the positive establishment attributes of the respective applicants in Canada, to find that they could therefore successfully establish abroad. In *XY*, Justice Pentney reproduced the following section of Justice Rennie's judgment in *Lauture*:

> [21] In the present case, the Officer concluded that the applicants' "engagement in society is remarkable" and that the relations they had formed with their community were significant. However, despite this conclusion the Officer did not weigh the establishment factor in the applicants' favour, and instead dismissed the factor on the basis that community involvement also may occur in Haiti. This is not a proper application of the establishment factor.
>
> …
>
> [23] Instead of assessing whether the applicants would be able to volunteer and attend church in Haiti, the Officer should have assessed the applicants' evidence of employment, volunteer work, and integration in their community in Canada. The Officer then should have considered whether this factor favours the application, is neutral, or weighs against the application.
>
> [24] The analytical error here was also considered in *Sosi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1300 (CanLII). There, the officer had stated:
>
> > The applicants have demonstrated a very high level of establishment in Canada in a short period of time; however, while establishment is an important factor in assessing hardship it is not the only factor to be considered. <u>The industriousness of this family also tends to demonstrate a high level of ability to re-integrate back into Kenyan society, especially when considering the prospect of them being reunited with their remaining children on their return</u>. [emphasis added]
>
> [25] The Court held this to be an unreasonableness analysis and at para 18 wrote:
>
> > In my opinion, the use of the conclusion that the applicants are well established in Canada is perverse because it takes the existence of a factor set out in IP 5 as a consideration militating towards granting humanitarian and compassionate relief and

> uses it to do just the opposite. Obviously, the proven establishment of the applicants in Canada should work in their favour because there is absolutely no way of knowing whether the personal abilities they used to create this establishment can be used in Kenya to accomplish the same thing.
>
> [26] In other words, an analysis of the applicants' degree of establishment should not be based on whether or not they can carry on similar activities in Haiti. Under the analysis adopted, the more successful, enterprising and civic minded an applicant is while in Canada, the less likely it is that an application under section 25 will succeed. My colleague Justice Russel Zinn made the point well in *Sebbe v The Minister of Citizenship and Immigration*, 2012 FC 813 (CanLII) at para 21:
>
> > …However, what is required is an analysis and assessment of the degree of establishment of these applicants and how it weighs in favour of granting an exemption. The Officer must not merely discount what they have done by crediting the Canadian immigration and refugee system for having given them the time to do these things without giving credit for the initiatives they undertook. The Officer must also examine whether the disruption of that establishment weighs in favour of granting the exemption.
>
> [*XY* at para 29. Emphasis at para 24, above, added by Justice Rennie in *Lauture*]

[13] In *XY*, Justice Pentney went on to note that there too, the officer had inappropriately used evidence of positive establishment in Canada against the applicant. However, I do not find that the Officer has replicated the *XY* / *Lauture* error in the instant case. I find the analysis quite distinct from and lacking in the fundamental error made in both the *XY* and *Lauture* cases on which the Applicants rely.

B. Did the Officer err in the assessment of establishment?

[14] The establishment evidence provided by the Applicants included letters from family and friends, a blood donor card, information from the son's day care, and receipts of furniture purchased. While the Officer acknowledged that the Applicants reached a certain level of establishment, including social integration and certain work and volunteer activities, the Officer also noted that the evidence supporting establishment was limited, finding:

> The applicants' establishment efforts have been duly noted in this assessment; however, I do not find their degree of establishment to be exceptional in relation to similarly situated individuals who have been in Canada for a similar amount of time. The applicants have been in Canada for less than three years and have disregarded Canada's immigration laws by overstaying the authorized period of their stay and working without the proper authorization.

[15] Having reviewed the evidence presented, and the Officer's assessment of the Applicants' establishment in the Decision, I find that the conclusions reached were justifiable and open for the Officer to make. I note that individuals with much longer and uninterrupted stays in Canada have also failed to garner a positive establishment assessment (*Zlotosz v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 724 at para 35). The Officer's negative inference from the Applicants' situation was also reasonable, given that this was not the first time the Applicants had entered Canada, overstayed, and engaged in unauthorized employment.

[16] The Applicants also criticized the Officer's assessment of the aunt's letter regarding her relationship with them. In the Decision, the Officer notes that the aunt provided no evidence to support her contention that she will be unable to care for herself, and that she will need the

Applicants to be her caregivers. The Officer reasonably found insufficient evidence to support these assertions.

C. Did the Officer err in the assessment of the country conditions?

[17] According to the Applicants, the Officer did not take into consideration evidence, including certain newspaper articles portraying difficult economic conditions and violence in Brazil, as well as the Applicants' testimony, and the H&C submissions provided by their immigration consultant. The Applicants also contend that the Officer erred in finding that they did not demonstrate circumstances "unusual in comparison to the situation of others similarly situated to them in Brazil".

[18] Beginning with the last point, despite making this comment, the Officer nonetheless made its Decision on a lack of evidence provided regarding the Applicants' situation in Brazil. Although the Applicants attempt to demonstrate a link between the hardship related to the country conditions in Brazil and their personal circumstances, I do not feel that the Officer overlooked this evidence, unlike in *Chokr v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 1022.

[19] As evidence of their personal circumstances, the Applicants believe that the Officer should have accepted their failed business in Brazil and their following assertion: "[i]n Brazil, I tried to have a normal life, however due to the economic crisis, violence and robbery, we lost everything". However, H&C applicants are expected to put their best foot forward (*Nhengu v Canada (Citizenship and Immigration)*, 2018 FC 913, at para 6). It is not the role of the Officer

to fill in blanks left by the Applicants. Given the insufficiency of evidence, the Officer's conclusions were reasonable.

D. Did the Officer err in the assessment of the child's best interests?

[20] The Applicants also impugn the Officer's assessment of the best interests of the child, particularly in light of the ongoing violence and economic problems in Brazil. However, once again, I find that the Officer arrived at a reasonable finding, having acknowledged the hardship associated with a move back to Brazil, and concluding that although it would be in the best interests of the child to remain in Canada, this factor alone did not warrant H&C relief. The Officer noted that their child, who had already lived in Brazil for a year, would re-integrate with the assistance of a broad family network. This was reasonable as the family network in Brazil is far broader than it is in Canada.

[21] The Officer, after considering the evidence and submissions, determined that while the best interests of the child must be taken into account, it is not necessarily a determinative factor. I agree (see *Canada (Citizenship and Immigration) v Hawthorne*, 2002 FCA 475 at paras 5–6; more recently, *Adam v Canada (Citizenship and Immigration)*, 2017 FC 316 at para 7).

V. Conclusion

[22] I find that the Officer's refusal to exercise H&C discretion, as well as the reasoning that led to that conclusion, to be justified, intelligible and transparent. The Decision is reasonable and does not warrant the intervention of this Court. The application for judicial review is dismissed. No questions for certification were argued, and none indeed arises.

JUDGMENT in IMM-1195-18

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. No questions for certification were argued, and none arose.

3. There is no award as to costs.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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