Federal Court  Cour fédérale

Date: 20110705

Docket: IMM-5518-10

Citation: 2011 FC 803

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, July 5, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

EMMANUEL CASTOR RUIZ
and
FRANC CASTOR LINARES

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Judicial procedure

[1] This is an application for judicial review, submitted by Emmanuel Castor Ruiz and Franc Castor Linares in accordance with subsection 72(1) of the IRPA, of the decision by the Second Secretary, Immigration Section of the Canadian Embassy in Port-au-Prince (Second Secretary),

dated November 30, 2010, refusing the application for permanent residence in Canada based on humanitarian and compassionate grounds made by Emmanuel Castor Ruiz, the child of Franc Castor Linares, on the ground that the humanitarian and compassionate considerations raised in his case do not justify the application for an exemption sought under section 25 of the IRPA.

Facts

[2] On April 7, 1993, the sponsor, Mr. Linares, who was born on January 13, 1965, submitted an application for permanent residence in Canada as a dependant of his mother, who was herself sponsored by one of her other sons.

[3] The principal applicant, Mr. Ruiz, who was born in the Dominican Republic on June 12, 1994, is Mr. Linares's son; Mr. Linares admitted his paternity.

[4] On December 12, 1995, Mr. Linares arrived in Montréal and his sister-in-law, that is, his brother's spouse, completed a record of landing, which indicated that the applicant had no dependants (Respondent's Record and affidavit, page 9). In that regard, Mr. Linares alleges that he tried to declare the existence of his son, Emmanuel, to the immigration officer at the point of entry, but that the officer did not speak Spanish. Mr. Linares was granted landing; he stated that he tried to seek the assistance of an interpreter, but in vain.

[5] On July 17, 1998, Mr. Linares submitted a sponsorship application by a parent in favour of his son, Mr. Ruiz (Respondent's Record and affidavit, page 11).

[6] On May 26, 2003, the applicant's application for permanent residence, supported by the sponsor's sponsorship, was refused by the Immigration Section of the Canadian Embassy in Port-au-Prince on grounds that he was not a member of the family class under paragraph 117(9)(*d*) of the IRPR. Mr. Linares was then informed of the decision and of his right to appeal the decision to the Immigration Appeal Division (IAD) (Decision dated May 26, 2003, Applicants' Record, pages 141-142).

[7] On January 23, 2007, Mr. Linares appealed the decision dated May 26, 2003, before the IAD. The appeal was dismissed and Mr. Linares filed an application for judicial review of the IAD's decision with the Federal Court.

[8] On November 26, 2007, Justice Pierre Blais dismissed the application for judicial review, specifying that an application for an exemption on humanitarian and compassionate grounds would be a more appropriate remedy (Decision of the Federal Court in docket IMM-1896-07, Applicants' Record, pages 144 *et seq.*, at page 154).

[9] On November 11, 2008, Mr. Ruiz submitted an application for permanent residence in Canada in the family class based on humanitarian and compassionate grounds and appealed the decision dated May 26, 2003. This application was sponsored by Mr. Linares.

[10] On May 2009, the two applicants were allegedly informed that the Second Secretary wished to interview Mr. Ruiz and his mother.

[11] On August 6, 2009, Mr. Ruiz met with the Second Secretary in Santo Domingo in the presence of his paternal aunt (Applicants' Record, pages 20 to 23).

[12] On November 18, 2009, the Second Secretary refused the application after examining Mr. Ruiz's file and finding that his case did not justify the exemption sought (Applicants' Record, page 23).

[13] On November 30, 2009, the Second Secretary sent a decision to Mr. Ruiz, refusing his application for permanent residence based on humanitarian and compassionate grounds (Letter of refusal to the applicant, Applicants' Record, page 8).

[14] On December 2, 2009, the Second Secretary sent a letter to Mr. Linares concerning the undertaking of assistance presented in support of the application for a permanent residence visa submitted by his son (Letter of refusal to the sponsor, Applicants' Record, pages 10-11).

[15] On January 21, 2010, the sponsor signed a waiver of his right to appeal in order to obtain a refund of fees (Applicants' Record, page 10).

[16] On January 29, 2010, the sponsor filed a notice of appeal against the Second Secretary's decision (Respondent's Record, pages 28-29).

[17] On April 9, 2010, the Border Services Agency hearing advisor filed a motion to have the appeal dismissed for want of jurisdiction.

[18] On April 28, 2010, the sponsor responded to the motion to dismiss the appeal by filing arguments and exhibits in support of his arguments and by asking the IAD to allow the sponsor's appeal.

[19] On June 15, 2010, the IAD dismissed the applicant's appeal dated January 29, 2010.

[20] On September 22, 2010, the principal applicant and the sponsor filed an application for leave and judicial review of the Second Secretary's decision dated November 30, 2009, before the Federal Court, accompanied by a motion for an extension of time.

Decision under review

[21] The Second Secretary rendered a decision on the principal applicant's humanitarian and compassionate application. According to her, the humanitarian and compassionate grounds raised by the applicant did not justify an exemption from some or all of the applicable criteria and obligations of the Act:

> [TRANSLATION]
>
> I arrived at this conclusion because, in light of the documents submitted and also further to an interview with you and your aunt in Santo Domingo on August 6, 2009, I am not convinced that you and your sponsor have been in constant contact since he immigrated to Canada in 1995.

> In fact, your sponsor returned only five times to the Dominican Republic since he left for Canada and the few photos taken with him date back to your childhood. Only one was taken in 2006. The evidence of the contact between you is weak. Your sponsor deliberately left the Dominican Republic leaving you there. In total, you lived with your sponsor for only one year.

Issue

[22] Was the Second Secretary's decision that the humanitarian and compassionate grounds raised in Mr. Ruiz's case do not justify an exemption from some or all of the applicable criteria and obligations of the Act reasonable?

Relevant legislative provisions

[23] Section 25 of the IRPA provides for the following:

Humanitarian and compassionate considerations — request of foreign national	Séjour pour motif d'ordre humanitaire à la demande de l'étranger
25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, 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,	**25.** (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada, 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.

taking into account the best interests of a child directly affected.

Payment of fees

(1.1) The Minister is seized of a request referred to in subsection (1) only if the applicable fees in respect of that request have been paid.

Exceptions

(1.2) The Minister may not examine the request if the foreign national has already made such a request and the request is pending.

Non-application of certain factors

(1.3) In examining the request of a foreign national in Canada, the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national.

Provincial criteria

(2) The Minister may not grant permanent resident status to a foreign national referred to in subsection 9(1) if the foreign national does not meet the province's selection criteria applicable to that foreign

Paiement des frais

(1.1) Le ministre n'est saisi de la demande que si les frais afférents ont été payés au préalable.

Exceptions

(1.2) Le ministre ne peut étudier la demande de l'étranger si celui-ci a déjà présenté une telle demande et celle-ci est toujours pendante.

Non-application de certains facteurs

(1.3) Le ministre, dans l'étude de la demande d'un étranger se trouvant au Canada, ne tient compte d'aucun des facteurs servant à établir la qualité de réfugié — au sens de la Convention — aux termes de l'article 96 ou de personne à protéger au titre du paragraphe 97(1); il tient compte, toutefois, des difficultés auxquelles l'étranger fait face.

Critères provinciaux

(2) Le statut de résident permanent ne peut toutefois être octroyé à l'étranger visé au paragraphe 9(1) qui ne répond pas aux critères de sélection de la province en cause qui lui sont applicables.

national.

[24] Paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations,* SOR/2002-227 (IRPR) is also relevant to this matter:

117. (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is	**117.** (1) Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants :
…	[…]
Excluded relationships	Restrictions
(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if	(9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes :
. . .	[…]
(*d*) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.	*d*) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.

Position of the parties

[25] The applicant states that the Second Secretary misled the applicants by writing in her letter of refusal that the IRPA permitted them to appeal the IAD's decision, especially since the Second Secretary's letter included a "Notice of Appeal" and a document entitled [TRANSLATION] "Important instructions". The applicants followed this suggestion and appealed the Embassy's decision to the IAD, which dismissed the applicants' appeal because it did not have jurisdiction to hear it.

[26] The applicants argue that the Second Secretary erred in assessing the sponsor's conduct that led to the exclusion under paragraph 117(9)(*d*). The applicants also claim that the Second Secretary erred in law by failing to consider the best interests of the child and by failing to support her decision with sufficient reasons. Furthermore, the applicants also claim that the Second Secretary erred in law by failing to consider the best interests of the child and by failing to support her decision with sufficient reasons.

[27] In reply, the applicants added to their principal arguments that the case law and the Operational Manual acknowledge the need to proceed with a second assessment of "all of the evidence and submissions put forth by the client and all other factors relevant to the assessment of H&C, including BIOC."

[28] The respondent contends that the sponsor has no standing and that his name should therefore be struck from the style of cause. The respondent also claims that the applicants did not adequately justify their delay in filing their application for leave and judicial review. Furthermore, the

respondent argues that the Second Secretary was not required to examine the decision by the Adjudication Division dated July 11, 2000, or that of Justice Blais dated July 28, 2007, to decide on the application for an exemption on humanitarian and compassionate grounds submitted by the principal applicant. The respondent also mentioned that if the sponsor had declared his child, he would not have been able to obtain permanent residence as a dependant of his mother. According to the respondent, the Second Secretary examined the humanitarian and compassionate considerations argued by the applicants and it is not up to this Court to weigh the relevant factors. The respondent also maintains that the officer fulfilled her duty of examining the interests of the child pursuant to the principles of case law, according to which this factor is not, in immigration law, determinative.

Standard of review

[29] In *Kisana v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, 179 A.C.W.S. (3d) 181, Justice Marc Nadon of the Federal Court of Appeal confirmed that the jurisprudence has already determined in a satisfactory manner that the standard that applies to humanitarian and compassionate decisions is reasonableness (at paragraph 18, see also *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9). It is up to the Second Secretary to weigh the factors and not the Court responsible for the judicial review of the humanitarian and compassionate decision.

Analysis

[30] First, the Court must examine the two preliminary issues submitted by the respondent, that is, the issue of direct standing and that of the extension of time by the Federal Court.

Style of cause

[31] The respondent is asking the Court to strike the name Franc Castor Linares, father of the principal applicant and sponsor, from the style of cause because he does not have standing in this case pursuant to subsection 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. The applicants object to this request (Reply Memorandum, at paragraphs 3 to 5). The respondent cites the following decision, among others: *Apotex Inc. v. Canada (Governor in Council)*, 2007 FC 232, 155 A.C.W.S. (3d) 1080:

> [19] No person may seek judicial review in this Court unless that person is "directly affected by the matter in respect of which relief is sought". (s.18.(1), *Federal Courts Act*, above. The only exception occurs where an Applicant has public interest standing, discussed below). Plainly, the rationale for this requirement has at least two elements: to ensure that appropriate parties are brought before the Court, and to ensure that no matter is brought before the Court until it actually has an effect to be examined.
>
> [20] For an Applicant to be considered "directly affected", the matter at issue must be one which adversely affects its legal rights, impose legal obligations on it, or prejudicially affect it directly. (Reference is made to: *Rothmans of Pall Mall Canada Ltd. v. Canada (Ministry of National Revenue – M.N.R.)*, [1976] 2 F.C. 500 (C.A.); *Kwicksutaineuk/Ah-kwa-mish Tribes v. Canada (Minister of Fisheries and Oceans)*, 2003 FCT 30 (T.D.), [2003] F.C.J. No. 98 (QL), at para. 8, aff'd on other grounds 2003 FCA 484, [2003] F.C.J. No. 1893 (C.A.) (QL), leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 55).

[32] The sponsor is the applicant's father. As the sponsor, he received a letter from the Second Secretary, further to the decision. He is directly affected by the matter in the application.

Application for an extension of time

[33] The applicants asked the Court to grant an extension of time. The applicants state that the Second Secretary misguided them by writing in the letter of refusal that the IRPA permitted them to appeal the decision to the IAD. The applicant cites *Huot v. Canada (Citizenship and Immigration)*, 2010 FC 973, in which the criteria for an extension of time are stated:

> [14] The applicant must satisfy the Court (a) that she had a continuing intention to pursue her application for judicial review; (b) that the application for judicial review deserves consideration; (c) that there is a reasonable explanation for the delay; and (d) that an extension of time will not prejudice the respondent.

[34] As in *Huot*, above, the Court fails to see how granting the applicants an extension of time to hear this matter could prejudice the respondent. There are particular circumstances in this case and the interests of justice will be better served if the extension of time is granted.

Analysis

[35] First, the burden of proof rests on the person who submits an application based on humanitarian and compassionate considerations (*Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, 128 A.C.W.S. (3d) 1175) at paragraph 5; *Akinbowale v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1221, at paragraph 14). The jurisprudence has also established that the best interests of the child are certainly an important factor, but are not

determinative (*Hawthorne v. Canada (Minister of Citizenship and Immigration) (CA)*, 2002 FCA 475, at paragraph 2; *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125; *Kisana*, above, at paragraph 37). In this case, the Second Secretary was not alert, alive and sensitive enough to the interests of the child. Moreover, in her notes, she failed to expressly refer to the best interests of the child. She considered the child's situation as follows:

> [TRANSLATION]
>
> With respect to the applicant's mother, she deliberately left the DR for Spain leaving her son behind. The reasons stated by the applicant and the aunt for him to join his father in CDA are more for economic and educational reasons. The child has not been abandoned because his aunt looks after him as well as his grandmother and other family members. Application refused.

(CAIPS notes, Applicants' Record, page 23)

[36] Given the paternity in question, the arguments on the interests of the child were not assessed in a reasonably adequate manner.

[37] The Court agrees with the written and oral arguments from the memorandum of fact and law by both of the applicants' counsel.

[38] Finally, the Court accepts the applicant's position that it was up to the Second Secretary to judge the evidence according to the interests of the child given the exceptional situation; this was stated by the Court further to the evidence demonstrating that the father had wanted to emphasize the existence of his son for several years; this is understood by his initial and continuous statements, which were not considered false or fraudulent further to the evidence in that regard. Furthermore,

the evidence does not seem to have been reasonably considered or assessed in the decision concerning the child.

Conclusion

[39] The Second Secretary should have attached more weight to certain elements essential to the child's interests for the decision to be considered reasonable. Consequently, the application for judicial review is allowed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that:

1. The application for judicial review be allowed and the matter be returned to another decision-maker for redetermination.

2. No question for certification was raised.

"Michel M.J. Shore"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5518-10
STYLE OF CAUSE:	EMMANUEL CASTOR RUIZ ET AL. v. MCI
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