Federal Court  Cour fédérale

Date: 20171027

Docket: IMM-1153-17

Citation: 2017 FC 959

Ottawa, Ontario, October 27, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

NANCY BIBIANA SEPULVEDA CARDONA
ERICK NORBERTO ROMERO CORTES

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the Matters

[1] This is an application for judicial review under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*] of the decision of a representative of the Minister of Citizenship and Immigration at the Embassy of Canada in Bogota, Columbia [the Minister's representative] dated January 12, 2017, which rejected Nancy Bibiana Sepulveda Cardona's [the Applicant] application for a permanent resident visa as a member of the family

class [the Decision] which was sponsored by Erick Norberto Romero Cortes [the Sponsor]. In the same application, the Applicant also requested permanent resident status based on humanitarian and compassionate [H&C] grounds per section 25(1) of *IRPA* [the H&C Application], which was also denied.

[2] For the reasons that follow, the application is granted.

II. **Facts**

[3] The Applicant, a citizen of Colombia, met the Sponsor in February 2008 in Bogota, Columbia. In August 2008, the Applicant and Sponsor began dating. In November 2009, the Sponsor made an application for a permanent resident visa for Canada as a skilled worker. In March 2011, the Applicant and Sponsor moved in together. In November 2011, the Sponsor was granted permanent residence in Canada. The Sponsor was landed in July 2012. The Sponsor has become a successful and contributing member of Canadian society.

[4] An application for permanent residence under the skilled worker class requires that an applicant declare all of his or her dependents, which includes a common-law spouse. The Sponsor did not declare the Applicant as a dependent because he and the Applicant were not married when he left Columbia, and because the parties agreed that their relationship ended when he left Columbia. The Sponsor also believed a common-law relationship required two years of cohabitation, which is in fact the law in Colombia but not in Canada, where it is only one year.

[5] After the Sponsor moved to Canada, he and the Applicant communicated. In December 2012, the Sponsor returned to Colombia for Christmas and he and the Applicant discussed the possibility of the Applicant moving to Canada with him. It was not until May 2013, when he and the Applicant started travelling to other countries to meet, that they started seriously evaluating the possibility of sponsorship.

[6] In April 2014, the Sponsor filed an application to sponsor the Applicant for permanent residence as his common-law spouse.

[7] In August 2014, the application was refused because the Sponsor did not declare the Applicant as a dependent family member in his application for permanent residence [the First Refusal]. The Sponsor states that he did not understand the refusal; he believed he could overturn the First Refusal if he and the Applicant were married.

[8] The Applicant and Sponsor were married in Colombia on October 27, 2014.

[9] In November 2014, the Sponsor reapplied to sponsor the Applicant for permanent residence, and the Applicant applied for a temporary resident visa [TRV] in January 2015. In February 2015, the second application by the Sponsor was refused for the same reasons as the First Refusal [the Second Refusal], i.e., because the Sponsor did not declare the Applicant as a dependent family member. The Applicant's TRV application was also refused in February 2015.

[10] In December 2015, the Sponsor submitted a third application to sponsor the Applicant, in which he advised that his failure to include the Applicant in his initial application was due to his unfamiliarity with the legal definition of common-law spouse under Canadian law.

[11] On November 30, 2016, the Applicant was interviewed by the Minister's representative, who informed the Applicant that there were concerns that she was excluded because she had not been declared by the Sponsor. The Applicant explained that she and the Sponsor believed she was not his common-law spouse because they had not lived together for two years. The Applicant also explained that she had no intention to move to Canada because she did not want to leave her family. It was not until after the Sponsor was landed that she realized she wanted to be with him in Canada.

[12] On January 12, 2017, the Applicant received the third refusal on the same grounds as the First Refusal and the Second Refusal, which refusal is the subject of this judicial review.

[13] The Applicant filed this Application on March 13, 2017. The Respondent filed his Memorandum on May 11, 2017. The Applicants' Reply Memorandum was filed May 23, 2017. The Respondent filed a Further Memorandum on September 8, 2017.

[14] The Court heard the application on September 25, 2017, when, without notice, and at the opening of the hearing, the Respondent moved to dismiss, alleging for the first time that the Court lacked jurisdiction to hear the application.

III. **Issues**

[15] At issue is whether the refusal of the Applicant's application for a permanent resident visa as a member of the family class is reasonable, and whether this Court has jurisdiction to hear this application.

IV. **Standard of Review**

[16] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is not necessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." This Court has already determined that the standard of review under paragraph 117(9)(d) of *Immigration and Refugee Protection Regulations* [*IRPR*] is reasonableness: *Ling Du v Canada (Citizenship and Immigration),* 2012 FC 1094 at 47 per O'Keefe J, and *Sekinatu v Canada (Citizenship and Immigration),* 2015 FC 729 at paras 10-11 per Shore J. Therefore, reasonableness is the standard of review.

[17] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[18] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

[19] The appropriate standard of review of the H&C aspect of the decision at issue is reasonableness: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*].

[20] H&C reviews under section 25 of *IRPA* offer special and additional considerations for an exemption from Canadian immigration laws that are otherwise universally applied. The purpose of the high degree of discretion conferred by the legislation is to allow flexibility to approve deserving cases not anticipated by *IRPA*, see the decision of O'Keefe J in *Mikhno v Canada (Citizenship and Immigration)*, 2010 FC 386.

V. **Analysis**

Decision respecting paragraph 117(9)(d) of the *IRPR*

[21] In my respectful view, this case must be decided in favour of the Applicants for several reasons.

[22] First, in my view, this application should be granted for substantially the same reasons as those provided by Heneghan J in *Odicho v Canada (Citizenship and Immigration)*, 2008 FC 1039, where the facts and conclusion were:

> [11] There is no dispute that the husband failed to declare his wife as a non-accompanying dependent when he landed in Canada in January 2005. There is no evidence to challenge the bona fide of the marriage of the Applicants. There is no evidence to challenge the status of the infant as their child. Indeed, the Respondent did not file an affidavit from the Visa Officer.
>
> [12] There is one critical fact and that is the husband's failure to declare the change in his marital status when he landed in Canada. This failure gave rise to the exclusion of his wife pursuant to the terms of paragraph 117(9)(d) of the Regulations which provides as follows:
>
> | | |
> |---|---|
> | 117(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if | 117(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. |
>
> [13] Subsection 25(1) of the Act provides a means for persons to overcome the consequences of non-compliance with the requirements of the Act and the Regulations. Subsection 25(1) provides as follows:

Humanitarian and compassionate considerations	**Séjour pour motif d'ordre humanitaire**
25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or 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 obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	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, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

[14] This provision of the Act addresses the examination of the "circumstances" of a foreign national who is inadmissible or who does not meet the statutory requirements, including the requirements of the Regulations. It is an ameliorative provision.

[15] In the present case, the Visa Officer apparently ignored the material that was submitted concerning the "circumstances" of the husband's failure to declare the change in his marital status at the time he landed in Canada. In my view, the Applicants tendered the essential evidence, which is the existence of a marriage, of a family and of a desire to be together. The husband provided an explanation for his initial failure to disclose the change in his marital status and, in my view, there is nothing more to be said. The Applicants have submitted the necessary facts. They carry the

> burden of establishing the evidence to justify an exercise of discretion, but in my opinion the discharge of this burden does not require superfluity.
>
> [16] The Visa Officer's decision does not demonstrate an understanding of the purpose of subsection 25(1), which is to overcome the consequences of being in breach of the statutory requirements. The initial decision of February 6, 2007, which excluded the child, as well as the wife, illustrates an excess of zeal on the part of the original decision-maker, if not a misunderstanding of section 117 of the Regulations.
>
> [17] As a result, the application for judicial review is allowed. The decision of May 3, 2007, is quashed and the matter is remitted for reconsideration by a different member of the Canadian Embassy in Syria.

[23] In my view, the decision with respect to paragraph 117(9)(d) of the *IRPR* is also unreasonable as not being within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. The record was as follows:

- when the Sponsor made his application for permanent residence for Canada at the end of 2009, he was not living with the Applicant;
- during the time that they lived together, neither of them considered the other his or her common-law spouse; they treated each other as boy / girlfriend living together, knowing well that there was a real prospect that their relationship would end if the Sponsor left Colombia;
- the Sponsor and the Applicant finished their relationship when the Sponsor left Colombia because at the time, the Applicant was not interested in leaving Colombia;
- At the relevant time, the Sponsor was under the impression that a common law relationship could exist only after two years of cohabitation, as is the case under Colombia's law, and he had not lived with the Applicant that long.

[24] In my view, this evidence was effectively ignored; on this record, it was not open to the Minister's representative to find that the Sponsor had been in a common-law relationship with

the Applicant at the time he applied for permanent residence and, at the time, he was granted permanent residence in Canada. This aspect of the decision is not defensible in respect of the facts.

H&C Decision

[25] The record in the terms of the H&C Application was that:

- The Applicant and Sponsor have a strong relationship, and have been together for over 8 years;
- The Sponsor had been in Canada for almost 5 years, the same time that they have been separated;
- The Sponsor is a permanent resident of Canada where he is well established;
- The Applicant and Sponsor wish to form a family in Canada;
- It would be hard for Applicant to continue separated from her husband;
- They had made several attempts at being together in Canada, including three sponsorship applications and one TRV application;
- During the years the Applicant and Sponsor were separated, they made approximately 13 trips to different places to spend time together as a couple; and,
- They never had an intention to provide incorrect information to the Canadian authorities.

[26] The decision of the Visa Officer as stated in his GCMS notes [the H&C decision] is contained in a single sentence at the end of the visa decision which reads:

> Decision: Sponsor became a PR in Canada on 19 July 2012. At the time of landing the Sponsor did not declare a common law relationship with the applicant. As a result of the sponsor not declaring that he was in a common law relationship to the applicant prior to becoming a permanent resident, the applicant is now excluded. The sponsor was free to disclose relationship details as instructed on the applicant's forms at the time of his application in and subsequent landing in 2012. I find the applicant excluded R 117(9)(d). Eligibility: failed with regards to the H&C elements. I

> am not satisfied sufficient humanitarian compassionate grounds exist to support and exception to the exclusion of the application.
>
> [Emphasis added]

[27] I am not persuaded and am unable to agree that the H&C decision was reasonable in the circumstances. It is cursory to say the least, curt and dismissive. Moreover, the reason given for refusing the H&C relief are the same as the reason why H&C relief was denied in the first place: this lacks reasonableness because of circularity. In addition, these reasons are doubtless inadequate; however, it must be acknowledged that inadequacy of reasons is not a standalone ground for judicial review. However, these reasons do not explain how the Minister's representative balanced the evidence of a long-lasting, strong relationship where the Applicant and Sponsor made numerous attempts to be together in order to start a family in Canada, with the humanitarian and compassionate grounds that must be assessed per *Kanthasamy*. I am compelled to agree that the reasons of the Minister's representative lack the justification, transparency and intelligibility demanded by *Dunsmuir*. Therefore, judicial review must be granted.

Late motion to dismiss for want of jurisdiction

[28] At the very opening of hearing and without notice, the Respondent moved to dismiss the application on the ground that the Court allegedly lacked jurisdiction to entertain it.

[29] The Respondent argues that this Court cannot entertain a challenge to the H&C analysis by the Minister's representative because the Applicant is statutorily-barred from applying for judicial review. The Respondent also alleges that a sponsored person can only seek judicial

review of an H&C decision after accepting the conclusion that he or she is not a member of the family class pursuant to paragraph 117(9)(d) of the *IRPR.*

[30] The Respondent relies on *Somodi v Canada (Citizenship and Immigration),* 2009 FCA 288 [*Somodi*] (and other cases). In *Somodi*, the Federal Court of Appeal answered in the affirmative the following certified question of law: does section 72 of *IRPA* bar application for judicial review by applicant of spousal application while sponsor exercises right of appeal pursuant to section 63 of *IRPA*.

[31] *Somodi* was distinguished by Mosley J in *Phung v Canada (Citizenship and Immigration),* 2012 FC 585 [*Phung*]. In *Phung,* a Vietnamese woman married a Canadian man in Vietnam. The couple had a child in Vietnam and the family moved to Canada. Upon arriving in Canada, the wife did not disclose a previous son, born from a different father. An immigration officer later refused to allow the oldest son's application because he was said to be excluded from the family class. In setting aside the visa officer's decision, Mosley J found that at first impression, it would seem that paragraph 72(2)(a) of *IRPA* would bar an application for judicial review of the decision until the right of appeal to the IAD has been dismissed. However, Mosley J also found that the only procedural route open to the minor was to bring a separate application under section 25 of *IRPA*, which, in seeking an exemption from inadmissibility under section 25, the minor applicant had already done.

[32] Mosley J relied on Martineau J's decision in *Huot v Canada (Citizenship and Immigration),* 2011 FC 180, at paras 26 and 28:

> [26] A right of appeal from a visa officer's decision is only meaningful if the concerns with the decision can be addressed through the appellate procedure.
>
> [28] Here, as in *Huot*, the applicant had made extensive H&C submissions to the office. I agree with Justice Martineau that in such situations, the limitation in paragraph 72(2)(a) of the IRPA does not override the Court's jurisdiction to review whether the officer erred in considering H&C factors. To conclude otherwise would deny foreign national who are excluded from the family class an effective remedy and would be inconsistent with the broad discretion to grant an exemption, particularly where the best interests of a child are concerned.

[33] Mosley J concluded at para 37:

> 37 […]The officer did not ignore the H&C considerations but her review of them was cursory in contrast to her discussion of the occasions on which the principal could have disclosed her son but did not. The officer's review of the factors was coloured, in my view, by her awareness of the principal applicant's misrepresentations during their earlier interactions and perceived failure to look after the interests of her son when she had the opportunity to do so earlier.

[34] I also agree with Martineau J in *Huot* at paras 14-15:

> [14] Normally, when leave is granted, procedure must defer to the law. It is understandable that in cases where there is no jurisdiction or order extending the time to file an application for judicial review, these issues must be determined at the outset. However, the hearing before the judge on the application for review must not become an arena where a party can present yet again each and every possible preliminary motion and objection that has not previously been decided or heard.
>
> [15] The Court must be able to control the proceedings that are before it so as to prevent abuse. <u>In this regard, a party's lack of status should normally have been decided prior to the hearing on the merits by means of a motion to strike, if necessary.</u> […]
>
> [Emphasis added]

[35] I also agree with Near J (as he was then) in *Mahmood v Canada (Citizenship and Immigration)*, 2011 FC 433, at paras 13-16:

> A. *Does the Applicant Have Standing*?
>
> [13] The Respondent submits that the Applicant, as the sponsor of Ms. Bashir, has no standing to challenge the refusal of the application since he is not "directly affected" by the decision as required by subsection 18.1(1) of the *Federal Courts Act* (RS, 1985, c F-7*)*. The jurisprudence of this Court supports this position. The Respondent cites *Carson v Canada (Minister of Citizenship and Immigration)* (1995), 95 FTR 137 at para 4:
>
> > [4] While Mrs. Carson has an interest in this proceeding, in that she is Mr. Carson's sponsor for landing in Canada and she was interviewed as part of the marriage interview involving the H&C determination, these facts are insufficient to give her standing in this judicial review. Mrs. Carson is a Canadian citizen and does not require any exemption whatsoever from the Immigration Act or regulations. Moreover, whether she has standing or not has no impact whatsoever on the ultimate issue in this matter. Accordingly, with respect to this proceeding, the applicant, Tonya Carson, is struck as a party.
>
> (see also *Wu v Canada (Minister of Citizenship and Immigration)* (2000), 183 FTR 309, 4 Imm LR (3d) 145 at para 15).
>
> [14] The Respondent submits that this application for judicial review should be dismissed on this basis alone.
>
> [15] I have had the benefit of reading my colleague, Justice Luc Martineau's recent decision, *Huot v Canada (Minister of Citizenship and Immigration)*, 2011 FC 180. He determined that the statements made in *Carson* and *Wu*, "made at another time…under the former *Immigration Act*" were not binding and determinative, and that the facts of the case before the Court would need to be considered in exercising the Court's discretion to grant standing to a party (at para 20). In the present matter, I would like to echo the sentiment expressed by Justice Martineau at paras 14 and 15:
>
> > [14] […] the hearing before the judge on the application for review must not become an arena

> where a party can present yet again each and every possible preliminary motion and objection that has not previously been decided or heard.
>
> [15] The Court must be able to control the proceedings that are before it so as to prevent abuse. In this regard, a party's lack of status should normally have been decided prior to the hearing on the merits by means of a motion to strike, if necessary. […]
>
> [16] In the interests of justice, I am of the view that this preliminary objection on the part of the Respondent at this late stage should be dismissed. However, if I am wrong, given my conclusion with respect to whether the Officer's decision was reasonable there is no need to make a finding with respect to the standing of the Applicant.
>
> [Emphasis added]

[36] The great delay in bringing this motion also counts against the Respondent. The Minister could and if he was so inclined, should have resisted the application for leave to appeal on jurisdictional grounds; he did not. Leave was then granted by this Court. The grant of leave gave rise to a second opportunity for the Respondent to raise the issue of jurisdiction, i.e., in the supplementary memorandum permitted by the Order granting leave. Once again, the Respondent was silent.

[37] As noted, the matter was raised only on the morning of the hearing. While the Respondent's counsel attempted to reach the Applicant's counsel by telephone on the Friday before the hearing, nothing in writing was sent at that time to either the Court or the Applicant; failure to alert the Court and opposing counsel in writing cannot be encouraged. The normal rule is that motions such as this require notice; this rule is salutary and benefits not only the parties

but also the Court. I heard oral arguments on the point and also gave the parties time to file supplementary material after the hearing.

[38] The Respondent's motion to dismiss is dismissed.

Certified Question

[39] Neither counsel proposed a question for certification, and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the decisions below are set aside, the matters are to be re-determined by a differently constituted decision-maker, no question is certified and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1153-17
STYLE OF CAUSE:	NANCY BIBIANA SEPULVEDA CARDONA, ERICK NORBERTO ROMERO CORTES v THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA
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APPEARANCES:

Luis Antonio Monroy	FOR THE APPLICANTS
Asha Gafar	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Luis Antonio Monroy Barrister and Solicitor Toronto, ON	FOR THE APPLICANTS
Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, ON	FOR THE RESPONDENT