Federal Court Cour fédérale

Date: 20220421

Docket: IMM-4580-21

Citation: 2022 FC 572

[ENGLISH TRANSLATION]

Ottawa, Ontario, April 21, 2022

PRESENT: The Honourable Madam Justice Roy

BETWEEN:

LIONEL NZAMBE LETEYI
MADDIE MIDIBI NZAMBISA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants, Lionel Nzambe Leteyi and Maddie Midibi Nzambisa, are seeking judicial review of a decision by a Senior Immigration Officer (the "decision-maker") rejecting their application under section 25 of the *Immigration and Refugee Protection Act* (SC 2001, c 27) [IRPA]. The applicants sought an exemption from having to file their application for permanent

residence from outside Canada, as required by section 11 of the IRPA. The exemption was refused.

[2] The application for judicial review is brought pursuant to section 72 of the IRPA.

I. Background

[3] The applicants are citizens of the Democratic Republic of the Congo (DRC) who arrived in Canada in September 2014 on study visas issued in Tunis in August 2014; they landed in Montreal on September 7 of the same year. They filed refugee protection claims in early October 2014 and these were denied on December 5, 2014, in the case of Mr. Nzambe Leteyi and on January 5, 2015, for Ms. Midibi Nzambisa. Work permits were issued for both in May 2015 and have been repeatedly renewed since. They cited humanitarian and compassionate considerations to allow them to apply for permanent residence without leaving Canada on July 30, 2020.

[4] Two children were born to the applicants; two girls, born on August 30, 2019, and December 22, 2016.

[5] The factors invoked under humanitarian and compassionate considerations are: the establishment of the family, the best interests of the children and the adverse and difficult conditions in the DRC. It should be noted that a temporary suspension of removal (TSR) to the DRC has been in place for several years. The applicants are not currently at risk of being returned to their country of nationality.

II. Impugned decision

[6] The applicants are relying on their establishment in Canada. Since the applicants had been in Canada for six years at the time they submitted their application, some level of establishment was expected. Both applicants provided notices of assessment for the years 2014 to 2018, but Mr. Leteyi's notices for the years 2015 to 2018 reported no income for those years while the other three years reported modest income, including one year with an income of $2,500. Ms. Nzambisa reported incomes all below $20,000 per year. This elicited a comment from the decision-maker that little information had been provided about the financial stability of a family of four whose reported incomes were modest. While the applicants' employment is a positive factor, it can only be given relative weight. I understood that the relativity came from the modest incomes.

[7] The decision-maker also noted that it appeared that the applicants had been able to develop social and support networks, judging from the letters of support they had received.

[8] The decision-maker noted in his decision that the applicants had provided little by way of explanations or evidence to support their argument with respect to the best interests of the two children. This finding on the part of the decision-maker was not disputed, as the applicants' counsel conceded that there was little to be said given the children's young age.

[9] The decision-maker was therefore left to consider only the conditions in the DRC as they related to the children, noting that they were far from ideal, especially when compared to

conditions in Canada. Indeed, given the children's young age, it was in their best interest to remain with their parents. However, the decision-maker noted that a refusal of the application in this case would not result in the parents' departure since the TSR would remain in place. Thus, at the time, he stated that [TRANSLATION] "it is more likely than not that the children will continue to have access to their parents, housing, health care and public education by remaining in Canada" (Senior Immigration Officer's Decision, p. 5 of 6).

[10] The decision-maker also considered as a factor, apart from the best interests of the children, the adverse conditions in the DRC with respect to the applicants themselves. It appears from the decision under review that the applicants had relied to a large extent on the same elements that had been raised in their refugee protection claims: those claims were rejected. Missing from the review was the experience of the two applicants of growing up in the DRC where they seem to have been able to develop and study without apparent incident.

[11] Nevertheless, the immigration officer acknowledged [TRANSLATION] "that conditions in the country are extremely poor to such an extent that the applicants would likely face hardship as a result, and that the idea of returning to the country may present additional stress and hardship. I have given positive consideration to these applications" (Senior Immigration Officer's Decision at 5 of 6). However, the decision-maker noted that the TSR for the DRC was in place and that there was no indication that the applicants were inadmissible to Canada, which would have made them subject to removal despite the TSR. Accordingly, the refusal of the application did not result in removal, which obviously mitigated the hardship the applicants may have faced.

[12] Looking at all the factors relied on by the applicants to benefit from section 25 of the IRPA, the decision-maker noted the limited evidence offered with respect to the best interests of the children; their interests would be to remain with their parents who would, in any event, remain in Canada. The applicants’ establishment was positive but modest, especially since the evidence provided gave an incomplete picture of their financial situation. Adverse conditions in the DRC were also positively considered, but this was mitigated by the fact that the applicants did not have to deal with them as a result of the TSR. Assessing the situation as a whole, the decision-maker found that the personal circumstances of the applicants did not warrant the exceptional response represented by section 25 of the IRPA.

III. Arguments and analysis

[13] Everyone agrees that such decisions are subject to judicial review on the standard of reasonableness. In essence, the applicants claim that the decision under review was unreasonable because the decision-maker accepted as positive each of the factors identified and presented by them in support of their application without reaching an overall decision in favour of the applicants.

[14] For the applicants, the fact that the decision-maker found that the factors were all positive is sufficient to make the ultimate finding that subsection 25(1) of the IRPA should apply to them. I reproduce the following paragraph:

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d’ordre humanitaire à la demande de l’étranger**

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

The failure of the decision-maker to act on the various factors submitted would, according to the applicants, render the decision inconsistent, and therefore unreasonable.

[15] The applicants also relied on what they considered to be a lack of attention to the best interests of the children; in their view, those interests were not sufficiently taken into account.

[16] The Minister, on the other hand, defended the reasonableness of the decision. He insisted that the measure claimed in this case was exceptional and discretionary; the burden was on the party invoking section 25 to provide sufficient evidence to convince the decision-maker. The respondent urged the Court to show deference.

[17] With respect to the factor of the applicants' establishment, the respondent recalled that the decision-maker concluded that this factor should be given only marginal weight. The information on the couple's financial situation pointed to modest incomes—where there were incomes—and the record was silent on the ability to make ends meet with the presence of two children. The mere fact that after six years in Canada the applicants had developed social and professional ties did not justify an exemption from applying to become an immigrant other than from abroad.

[18] The conditions that prevail in the DRC have not been adopted by decision-makers in the context of refugee protection applications. The same narrative would not be more credible when presented in the context of a humanitarian and compassionate application (*Zingoula v Canada (Citizenship and Immigration)*, 2019 FC 201; *Nwafidelie v Canada (Citizenship and Immigration)*, 2017 FC 144). Moreover, the applicants would have had to establish the link between their particular circumstances and the adverse conditions: this was not done (*Laguerre v Canada (Citizenship and Immigration)*, 2020 FC 603; *Nyabuzana v Canada*, 2021 FC 1484). Finally, there was nothing unreasonable about taking into account the fact that the presence of the TSR prevented the applicants from being removed. This made it entirely reasonable to have given little weight to the conditions in the DRC.

[19] With respect to the best interests of the children, the Minister noted that the issue was not necessarily determinative in that the legal test was that the decision-maker must be responsive, attentive and sensitive to the best interests of the child, not that the best interests of the child were determinative. Here, the evidence about the children was minimal given their young age (which was the applicants conceded). Moreover, the fact that the children would not be removed with their parents given the TSR rendered the factor alone insufficient.

[20] In my view, the applicants failed to establish that the decision under consideration was unreasonable because it was inconsistent. The inconsistency in the decision was said by the applicants to have arisen from the fact that the factors put forward were recognized as positive. Ergo, this should have resulted a positive response. At the hearing of the judicial review application, the Court recalled that applicants must meet the standard now established in *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*]:

> [13] The meaning of the phrase "humanitarian and compassionate considerations" was first discussed by the Immigration Appeal Board in the case of *Chirwa v. Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338. The first Chair of the Board, Janet Scott, held that humanitarian and compassionate considerations refer to "those facts, established by the 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": p. 350. This definition was inspired by the dictionary definition of the term "compassion", which covers "sorrow or pity excited by the distress or misfortunes of another, sympathy": *Chirwa*, at p. 350. The Board acknowledged that "this definition implies an element of subjectivity", but said there also had to be objective evidence upon which special relief ought to be granted: *Chirwa*, at p. 350).
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> [Emphasis added.]

[21] It is also worth noting that the regime set out in section 25 of the IRPA is not an alternative immigration scheme (*Kanthasamy*, para 23). It is an exceptional measure involving a discretionary power conferred on the Minister by the Act to mitigate the rigidity of the law in appropriate cases (*Kanthasamy*, para 19). The standard is not only intended to provide access to humanitarian and compassionate relief, "but also to prevent its undue overbreadth" (*Kanthasamy*, para 14). The nature of the IRPA continues to be essentially exclusionary.

[22] It is worth recalling the breadth of discretion that the IRPA confers on the Minister in these matters. In *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, the Court of Appeal noted:

> [19] In short, the *Immigration Act* and the Canadian immigration policy are founded on the idea that whoever comes to Canada with the intention of settling must be of good faith and comply to the letter with the requirements both in form and substance of the Act. Whoever enters Canada illegally contributes to falsifying the immigration plan and policy and gives himself priority over those who do respect the requirements of the Act. The Minister, who is responsible for the application of the policy and the Act, is definitely authorised to refuse the exception requested by a person who has established the existence of humanitarian and compassionate grounds, if he believes, for example, that the circumstances surrounding his entry and stay in Canada discredit him or create a precedent susceptible of encouraging illegal entry in Canada. In this sense, the Minister is at liberty to take into consideration the fact that the humanitarian and compassionate grounds that a person claims are the result of his own actions.

[23] There was nothing inconsistent about the decision in this case. To satisfy the *Kanthasamy* test, it is clear that the hardship faced by those seeking access to the remedy must be of some intensity to lead a reasonable person in a civilized society to relieve the misfortune of another. The test specifically recognizes that it is a special remedy. The factors presented by the

applicants will not suffice if there is only an addition of more or less positive factors. Thus, in terms of establishment, this factor was given only [TRANSLATION] "some positive consideration". It has not been established how this would be unreasonable. In this regard, I agree with my colleague Justice Catherine Kane, who recently wrote as follows in *Evans v. Canada (Citizenship and Immigration)*, 2021 FC 733:

> [53] Although the Officer did not suggest an expected level of establishment for Mr. Evans, I do not agree that it would necessarily be an error for an officer to find that an applicant had not achieved or exceeded the level of establishment that would be customary for a similarly situated person. An H&C exemption is not simply another avenue to gain status in Canada or to overcome the need to apply from abroad (as noted in *Kanthasamy*). In this context, it would be reasonable for an officer to consider whether the establishment is simply what is minimally reasonable in the circumstances or is greater, without attaching some artificial level or expectation, based on the time spent in Canada. Working, paying rent, paying bills and making friends are basic aspects of life and are reasonably "expected", unless there is some impediment. This would not be remarkable or exceptional establishment, warranting some greater relative weight on an H&C application.

[24] The other two factors relied upon by the applicants (best interests of the children and conditions in the DRC) both suffered from the same flaw identified by the decision-maker: the TSR made it so that the potential hardships the applicants might face in the country to which they could be returned were not present since they benefitted from the suspension of removal.

[25] The existence of the TSR was relevant. On the one hand, its existence did not establish that the section 25 application should be granted (*Likale v Canada (Citizenship and Immigration)*, 2015 FC 43; *Nkitabungi v Canada (Citizenship and Immigration)*, 2007 FC 331). But more importantly, I agree that the very presence of the TSR was a factor that the decision-

maker was open to consider and was relevant. In *Emhemed v. Canada (Citizenship and Immigration)*, 2018 FC 167, it is stated:

> [11] I do not consider the Officer to have unduly restricted his hardship analysis or fettered his discretion by deferring to the ADR. The Officer considered all the relevant factors that were put forward by the Applicant in his submissions. I also note that the Applicant did not make any submissions on how the conditions in Libya affected him personally. When viewed as a whole, I find that the Officer's hardship assessment is reasonable. I also find that it was not unreasonable for the Officer to rely on the fact that the Applicant would not be removed from Canada in his assessment of hardship. This Court reached a similar conclusion in *Ndikumana* at paragraph 18 and in *Likale* at paragraph 38.
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> [Emphasis added.]

Similarly, in *Ndikumana v. Canada (Citizenship and Immigration)*, 2017 FC 328 [*Ndikumana*], this Court noted that difficult conditions in the country of citizenship may be given little weight when a temporary suspension of removal prevails:

> [17] First of all, the Officer gave little weight to the fact that there are difficult conditions in Burundi because Ms. Ndikumana would not return to Burundi if her application were denied, given the ADR. This finding is reasonable. The facts are very similar in *Nicolas v. Canada (Citizenship and Immigration)*, 2014 FC 903 [*Nicolas*], in which Noël J. found that the decision to deny the HC application on the grounds that the woman could not prove that there were adverse conditions in Haiti, although there was a TSR in effect, was reasonable (*Nicolas* at para. 32).
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> . . .
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> [19] In this case, it would not be unreasonable to find that Ms. Ndikumana will continue to benefit from the ADR, and that she will not have to deal with current conditions in Burundi.
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> . . .

> [21] The finding that Ms. Ndikumana will not have to suffer from current conditions in Burundi, given that a TSR is currently in effect, is therefore reasonable.

[26] It appears to me that reasonableness must include the simple fact that an applicant cannot rely on a factual situation they will not face as a result of the TSR (or of an administrative deferral of removal [ADR]). If the situation in the country of citizenship were to change in such a way that the temporary suspension of removal was lifted, then it would be necessary to consider how, and to what extent, the domestic situation had worsened. At this point, the exercise is artificial and fundamentally moot.

[27] Faced with the possibility that it might have been reasonable for the decision-maker in this case to have given little weight to the current adverse conditions in the DRC, which of course would directly undermine the unreasonableness of the decision under consideration, counsel for the applicants suggested that one possible argument could be that the precariousness of the applicants' status in Canada might justify the section 25 remedy. This argument cannot be made at the judicial review stage as it was not made before the administrative decision-maker who was given the task of considering the arguments on the merits. Nothing of the sort was done. It is for the administrative tribunal to consider arguments on the merits, not the reviewing court (*Canada (Public Safety and Emergency Preparedness) v Bakafik*, 2022 FCA 18, 466 DLR (4th) 333 at paras 51–53). I note, however, that a similar argument does appear to have been made in *Ndikumana*. This Court found that the decision-maker's rejection of the argument fully met the test of reasonableness (*Ndikumana*, para 23). In our case, the issue does not arise.

[28] During the hearing, the Court asked the Minister's counsel whether it would be possible for the applicants to submit a new application under section 25 of the IRPA if the TSR were to be lifted in respect of the DRC. Without hesitation, and formally, counsel stated that it would be possible. In fact, it often arises that more than one section 25 application is made when conditions change. The factors can then be re-submitted, with the necessary adjustments due to the passage of time. I feel it would be fair for the Minister to consider a new, timely and diligent application before removal action is taken in that case. When a Senior Immigration Officer rejects an application under section 25 of the IRPA in large part because the applicants would not be required to leave Canada under a TSR, the applicants' intention to seek special relief has been clearly manifested. When conditions change, an appropriate review of the actual conditions at the time should be permitted. Although it is true that a review while the TSR is in place is artificial, when conditions are sufficient to lift the TSR, it would be fair to repeat the exercise if the applicants diligently apply for such a review.

[29] The Court finds that the application for judicial review as presented is dismissed. After considering the suggestion of a question under section 74, which would have been difficult to justify under the applicable law (*Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130; *Lunyamila v. Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22), the applicants did not make such a suggestion. Nor did the Minister suggest one. As a result, no question will be certified.

JUDGMENT in IMM-4580-21

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. No question under section 74 of the IRPA is certified.

"Yvan Roy"
Judge

Certified true translation
Elizabeth Tan

FEDERAL COURT

SOLICITORS OF RECORD

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