Federal Court  Cour fédérale

Date: 20101101

Docket: IMM-52-10

Citation: 2010 FC 1067

[UNREVISED CERTIFIED TRANSLATION]

Montréal, Quebec, November 1, 2010

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

SEIF EDDINE KOROGHLI

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), for judicial review of a decision by a visa officer (officer) at the Embassy in Paris dated November 2, 2009, rejecting the application for a permanent resident visa by Seif Eddine Koroghli, a child under tutorship, on the ground that he was not a member of the family class category. The officer also refused to exercise his humanitarian discretion to grant permanent residence to this child because subsection 25(2) of the IRPA prohibited him from doing so.

FACTS

[2] Ms. Baya Amiri, a Canadian citizen, and her husband Mohamed Koroghli, a permanent resident, are both of Algerian origin.

[3] Ms. Baya Amiri travelled to Algeria in early 2007 to initiate steps with the state organizations responsible for finding new families for these abandoned children.

[4] After she returned to Montréal, an Algerian *Foyer pour enfants assistés* told the couple that there was a possibility of taking an Algerian child under tutorship, named Seif Eddine, born October 23, 2007, of an unknown biological father and a biological mother who abandoned the infant at birth.

[5] The sponsors obtained final tutorship of the child in January 2008. On January 23, 2008, the child was physically given to them. On February 12, 2008, a certificate of tutorship was issued by an Algerian court. The sponsors were also allowed to change the child's surname.

[6] In June, a birth certificate and an Algerian passport bearing the surname Koroghli were issued to the child.

[7] On August 23, 2008, the sponsors obtained permission from an Algerian court for the child to permanently reside in Canada with them. At that time, they began immigration procedures in Quebec in the family class category.

[8] A sponsorship application was filed in the name of the child together with an application for a permanent resident visa in the family class category.

[9] A visa officer at the Embassy in Paris rejected the application in a letter dated November 2, 2009.

[10] On January 5, 2010, an application for leave and judicial review of that decision was filed.

ISSUES

i. Did the officer err by refusing to exercise his humanitarian discretion to grant permanent residence?

ii. Did the officer err by not offering the sponsors the possibility of residing in another province where adopting the applicant would be theoretically possible?

POSITIONS OF PARTIES

[11] The applicant primarily submits that the best interests of the child required that, once the parents were informed of Quebec's refusal to grant the child a selection certificate (CSQ), the visa officer should have offered them the opportunity to reside elsewhere in Canada, in a province in which the legislation does not prevent a child under tutorship from being the subject of a full adoption.

[12] According to the applicant, the officer's obligation to offer an alternative is explicitly recognized by Citizenship and Immigration Canada in its operational manual IP-5 *Immigrant applications in Canada made on Humanitarian or Compassionate Grounds*, section 13.2 "Requesting a *Certificat de Sélection du Québec*".

[13] Although he recognizes that this manual applies only to applications made in Canada, he maintains that by analogy this obligation should also apply to applications made outside Canada, as is the case here.

[14] If the officer had complied with his obligation, the parents would have been able to obtain a letter of "no objection" to the adoption in Canada from another province and relied on paragraph 117(1)(*g*) of the *Immigration and Refugee Protection Regulations* (IRPR), which provides that the family class includes a minor whom the sponsor intends to adopt in Canada and

who satisfies certain specific conditions, notably that the competent authority of a province has stated in writing that it does not object to the adoption.

[15] For his part, the respondent maintains that the visa officer lacked jurisdiction to examine humanitarian and compassionate considerations because subsection 25(2) of the IRPA prohibits the exercise of the discretion set out in subsection 25(1).

[16] Moreover, the officer did not have an obligation to offer Mr. Koroghli, the family's sponsor, the opportunity to reside elsewhere in Canada. The IP-5 operational manual does not apply to the sponsors in this case. Nor can it be applied by analogy because applications made from within Canada differ from those filed outside the country. Parliament clearly provided separate processes for these two categories of applicants.

[17] Rather, it is the OP-2 (overseas processing) operational manual *Processing Members of the Family Class* that was applicable to determine whether the applicant satisfied the criteria in this immigration category. The manual does not impose an obligation on the respondent to suggest residence alternatives if the person does not meet Quebec's selection criteria.

[18] The OP-4 manual *Processing of applications under section 25 of the IRPA*, which the officer used to decide whether humanitarian and compassionate considerations had to be assessed once it was determined that the applicant was not a member of the family class, also does not impose such an obligation.

[19] The respondent adds that the onus was on the applicant's parents to do their own research on the possibility of adoption in Quebec and the other provinces. Under subsection 11(1) of the IRPA, the onus was also on them to take the necessary steps to demonstrate to the officer that he was admissible to Canada.

ANALYSIS

[20] The question of law regarding the officer's jurisdiction is reviewed on a standard of correctness (*Chen v. Canada (Minister of Citizenship and Immigration*), 2007 FC 41 at paragraph 10).

[21] The issue of procedural fairness also commands a correctness standard (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12).

[22] Subsection 25(1) of the IRPA states clearly that when a foreign national who is the subject of the application is outside Canada, the Minister or his or her delegate may take into account humanitarian and compassionate considerations and may grant permanent residence. This discretion is broad since the Minister may grant an exemption from any applicable obligations:

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	25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui

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

(Emphasis added)

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.

[23] However, under subsection 25(2) of the IRPA, this discretion is removed if the foreign national does not meet the province's selection criteria:

Provincial criteria

25(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 national.

Critères provinciaux

25 (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.

[24] Subsection 9(1) of the IRPA, which is referred to in subsection 25(2), provides:

Sole provincial responsibility — Permanent residents

9. (1) Where a province has, under a federal-provincial agreement, sole responsibility for the selection of a foreign national who intends to reside in that province as a permanent resident, the following provisions apply to that foreign national, unless the agreement provides otherwise:

Responsabilité provinciale exclusive: résidents permanents

9. (1) Lorsqu'une province a, sous le régime d'un accord, la responsabilité exclusive de sélection de l'étranger qui cherche à s'y établir coMs. résident permanent, les règles suivantes s'appliquent à celui-ci sauf stipulation contraire de l'accord:

(*a*) the foreign national, unless inadmissible under this Act, shall be granted permanent resident status if the foreign national meets the province's selection criteria;	*a*) le statut de résident permanent est octroyé à l'étranger qui répond aux critères de sélection de la province et n'est pas interdit de territoire;
(*b*) the foreign national shall not be granted permanent resident status if the foreign national does not meet the province's selection criteria;	*b*) le statut de résident permanent ne peut être octroyé à l'étranger qui ne répond pas aux critères de sélection de la province;
. . .	(…)

(Emphasis added)

[25] In paragraphs 67(*a*) and 70(1)(*d*) and subsection 70(3), the IRPR follow the IRPA terminology and provide that an applicant outside Canada who intends to reside in Quebec cannot be granted permanent residence if the applicant does not meet the province's criteria.

[26] Accordingly, the officer could not be required to consider humanitarian and compassionate considerations because the Quebec provincial authorities had already refused to grant the applicant a selection certificate and, as a result, the applicant fell within the exception in subsection 25(2) of the IRPA.

[27] The applicant submits that the officer should have applied the instructions in the IP-5 manual *mutatis mutandis*, i.e. when the Quebec selection criteria were not met, he should have informed the child's sponsors that it was possible to be admitted in another province. For the applicant, the failure to do so is an error of law that goes to the officer's jurisdiction.

[28] I reject this argument. The officer had no obligation under the applicable immigration manuals OP-2 and OP-4 to suggest that the applicant move to another province. Therefore, there cannot be a breach of procedural fairness.

[29] Parliament provided for two separate processes to deal with applications: when the persons are in Canada and when they are abroad. The applicant is in Algeria, and the application for a permanent resident visa with sponsorship that the sponsor filed was made abroad.

[30] It follows that, in practice, different operational manuals were developed based on whether the applicant is in Canada or abroad at the time his or her application is filed and processed.

[31] Moreover, regardless of the considerations that warranted developing the instructions in the aforementioned manuals, their application could not, in any event, override a statutory requirement.

[32] All that the OP-5 manual states is that applicants must be informed that they can move to another province where the adoption could theoretically be possible, in which case the local office in the new province of residence would be responsible for the application.

[33] Even if the manual could apply or if this scenario took place, the applicant would still have to satisfy the section 25 requirements and the exception in subsection 25(2) of the IRPA.

[34] Finally, I would add that when the sponsors were taking steps to obtain tutorship of the child, it was their responsibility to find out whether this child could immigrate to Quebec. If they had done so in a timely manner, they would have known that the adoption was not possible. They could have then taken steps to reside in another province. It is too easy today to blame the officer for their own inaction.

[35] The officer did not err in law and did not breach any procedural fairness requirement. Consequently, the application for judicial review is dismissed.

JUDGMENT

The application for judicial review is dismissed.

"Danièle Tremblay-Lamer"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-52-10**
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