Federal Court Cour fédérale

Date: 20140318

Docket: IMM-904-13

Citation: 2014 FC 261

Ottawa, Ontario, March 18, 2014

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

VICTOR CUTBERTO AYALA LOPEZ
EVELYN RUIZ PANTOJA
ESTEBAN AYALA RUIZ
GENESIS THALIA AYALA RUIZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is the judicial review of a decision denying permanent residence status on H&C grounds. The Applicants are Victor Cutberto Ayala Lopez, his wife and two children aged 7 and 4.

II. BACKGROUND

[2] The relevant statutory provision in respect of the Immigration Officer's [Officer] decision is section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]:

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.
…	…
(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	(1.3) Le ministre, dans l'étude de la demande faite au titre du paragraphe (1) 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

of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national.	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.

[3] The Applicants are citizens of Mexico and they have been in Canada for four years. Their refugee claim was rejected and leave for judicial review was denied. The Applicants then applied for permanent residence on humanitarian and compassionate grounds, the current matter at issue.

[4] The Officer understood the Applicants' claim to consist of three elements: (a) the father had been threatened by a criminal organization in Mexico and therefore they could not return to their hometown; (b) that the family was now established in Canada and would face hardship if forced to leave and (c) that the best interests of the children were to remain in Canada.

[5] The Officer referred to the law which bound him particularly s 25(1) and (1.3) of IRPA as amended by the *Balanced Refugee Reform Act*, SC 2010, c 8. He concluded that the Applicants had to demonstrate that applying for permanent residency from outside Canada would constitute unusual and undeserved or disproportionate hardship.

[6] In considering the Applicants' degree of establishment, the Officer began by noting that the Applicants had been in Canada only four years and that the oldest child was in school but the youngest was not of school age. The mother has worked as a cashier since 2011. The Officer considered evidence of the father's volunteer work but could not find that it had lasted longer than a month. The father was now employed as a concrete machine operator and had received positive performance evaluations which the Officer found weighed in his favour; however, the Officer did

not accept that his employer would have difficulty replacing him. The Officer accepted there was an auto sales business registered in the father's name, but noted that there was no evidence demonstrating that the company was actively doing business, that it had any assets or has provided employment to Canadians.

Based on these factors, the Officer concluded that the Applicants' establishment was a positive consideration but it was not exceptional. Rather, it was what would be expected of people living in Canada hoping to acquire permanent residence.

[7] On the matter of the best interests of the child, the Officer held that this was but one, although important, factor in the analysis of hardship. The Officer concluded that the children had not developed a significant degree of attachment to Canada and would be able to adapt upon a return to Mexico. There was no evidence of psychological harm flowing from a return to Mexico or of growing up in unfavourable economic or social conditions.

[8] Finally, the Officer canvassed other factors including the resourcefulness and adaptability of the parents. Given their ability to settle and find employment in Canada, the Officer found they would likely be able to do so in a Mexican town other than their home town upon return. While the Applicants may have a lower standard of living in Mexico than what they currently enjoy in Canada, this was consistent with that of other similarly situated Mexican citizens.

[9] From all of this, the Officer concluded that there were insufficient H&C grounds to justify approving the permanent residence applications.

III. ANALYSIS

[10] The standard of review for these decisions on "Establishment" is well settled as "reasonableness" (*Tindale v Canada (Minister of Citizenship and Immigration)*, 2012 FC 236, 407 FTR 9 [*Tindale*]; *Diabate v Canada (Minister of Citizenship and Immigration)*, 2013 FC 129, 427 FTR 87).

[11] The Applicants argue that the decision is unreasonable because the Officer did not justify his conclusions. In effect, the Applicants argue that the Officer did not explain why the Applicants' circumstances were not exceptional.

[12] With respect, that argument reverses the burden. The Applicants are required to show why their circumstance was exceptional. Further, they must show that their exceptional circumstances will result in unusual, undeserved or disproportionate hardship if they are made to apply for permanent residence from outside of Canada.

[13] The Officer laid out a clear line of reasoning explaining the factors considered and the weight given to the key pieces of evidence. It is inaccurate to assert that the Officer did not consider the temporal component of the case. The Officer made direct reference to the four years in Canada and what occurred in those four years (see Certified Tribunal Record, page 6). Where she did not give much weight to the evidence, she provided an explanation. For example, she did not give much weight to the father's volunteering as the documentary evidence established he had only volunteered for a month. Similarly, she did not assign much weight to the auto sale business as there was no evidence beyond a business registration certificate that the company was actively doing business.

The Officer also explained why the Applicants' case did not meet the "exceptional" threshold (see Certified Tribunal Record, page 7).

[14] The Applicants' real complaint is with the weight the Officer assigned to the evidence and they seek to have this Court re-weigh that evidence. That is something this Court cannot and should not do. Section 25 is a highly discretionary provision (an exception to the general rule) and deference is owed to the Respondent where the Respondent's official has laid out a clear and reasonable line of reasoning to justify a conclusion which itself is reasonable.

[15] The decisions in *Adu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 565, 139 ACWS (3d) 164, *Cobham v Canada (Minister of Citizenship and Immigration)*, 2009 FC 585, 178 ACWS (3d) 421 and *Tindale* are all cases where the applicant could not tell the real basis for the decision and where the applicant had spent considerably more time in Canada leading to a greater presumption of establishment. That is not the case here. In those cases, the decision under review lacked the qualities referred to in paragraph 14. I am not convinced that, as the Respondent argues, *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, has necessarily rendered the above decisions of less precedential value but I need not decide that point.

[16] Therefore, I can find nothing unreasonable about the decision under review.

IV. CONCLUSION

[17] This judicial review will be dismissed. There are no questions for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-904-13
STYLE OF CAUSE:	VICTOR CUTBERTO AYALA LOPEZ, EVELYN RUIZ PANTOJA, ESTEBAN AYALA RUIZ, GENESIS THALIA AYALA RUIZ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	DECEMBER 10, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	PHELAN J.
DATED:	MARCH 18, 2014

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