Langner v. Canada (Minister of Employment and Immigration)

Federal Court Judgments

Federal Court of Canada - Trial Division

Montreal, Quebec

Denault J.

Heard: January 11, 1994

Judgment: July 12, 1994

Action No. T-3027-91

[1994] F.C.J. No. 1287 | [1994] A.C.F. no 1287 | 98 F.T.R. 188 | 49 A.C.W.S. (3d) 1138

Between Ewa Pawlak J. Langner, Stanislaw Langner, Robert Langner and Damian Langner, Plaintiffs, and Minister of Employment and Immigration and Deputy Attorney General of Canada, Respondents

(16 pp.)

Case Summary

Aliens — Admission — Immigrants — Sponsorship — Persons entitled to be sponsors, constitutional challenge of the mandatory age requirement, when available — Practice — Judicial review — Application for relief based on Canadian Charter of Rights and Freedoms, when available — Review of denial of exemption under section 114(2) of Immigration Act, scope of — Civil Rights — Practice — Who may raise Charter issues — Standing.

Action for an order setting aside a decision of the Canada Immigration and Employment Commission concluding that the applicant husband and wife had no compassionate and humanitarian reasons for the grant of an exemption under subsection 114(2) of the Immigration Act and for other reliefs pursuant to subsection 24(1) of the Canadian Charter of Rights and Freedoms. The two infant children of the applicants, born in Canada and therefore Canadian citizens, sought a declaration that they were entitled to remain in Canada and that no removal order be made against their parents. The applicants were polish citizens. They were admitted to Canada for three months based on the valid visitor's visas they were then carrying. They claimed Convention refugee status one day after the expiry of the three-month period for which they were allowed into the country. A panel of the Refugee Division found that their claim had no credible basis. On the basis of requests and representations made by the applicants' counsel, the decision denying the said exemption was reviewed at three different times with each review producing a confirmation of the decision. The applicants' children were born while the applicants' were fighting to remain in Canada. In this action which began as an application for judicial review, the children sought to have the definition of "sponsor" in section 2(1) of the Immigration Regulations, requiring that a sponsor be at least 19 years of age in order to sponsor parents' application for landing, declared inoperative because it infringed their constitutional rights. Also, the children, ages five and three, challenged the removal order against their parents again on the basis that its execution would infringe upon their constitutional rights.

HELD: Action dismissed.

Given that the adult plaintiffs made no assertion in their action that they had personally been denied their rights under the Canadian Charter of Rights and Freedoms, they could not base any of their claims for relief on subsection 24(1) of the Charter. Similarly, given that the infant plaintiffs were not affected by the decision refusing to recognize the humanitarian and compassionate reasons asserted by their parents, they had no standing in respect of the remedy of quashing the impugned decision denying exemption under subsection 114(2) of the Immigration Act. The inability of the children to act as sponsors was not the result of the fact that they were not 19 years of age

but was due to the fact that no proper application for landing that could be sponsored had been made by their parents. Accordingly, they had no personal or direct standing to seek a declaration that subsection 2(1) of the Immigration Regulations was inoperative in relation to them. Also, the children did not have public interest standing to challenge the subsection and given that they were not named in the removal order, they could not claim that its execution would infringe any of their constitutional rights. With respect to the refusal to grant the exemption, the plaintiffs had failed to establish that it was affected by a violation of some rule of administrative law.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 6, 7, 15, 24(1), 32(1)(a), 32(1)(b).
Immigration Act, R.S.C. 1985, c. I-2, ss. 9, 27(2)(e), 32(7), 82(1), 114(2).
Immigration Regulations, 1978, SOR/78-172, s. 2(1).

Julius H. Grey and Elizabeth Ann Lenghan, for the Applicants. Joanne Granger and Yves Leboeuf, for the Respondents.

DENAULT J.

1 This is essentially an application for Judicial review brought by Ewa Pawlak J. LANGNER and Stanislaw LANGNER ("the parents") seeking to set aside a decision of the Canada Employment and Immigration Commission dated October 16, 1991 concluding that they had no humanitarian or compassionate reasons which would justify granting an exemption under subsection 114(2) of the Immigration Act, R.S.C. 1985, c. I-2. Also in this application Robert and Damian LANGNER ("the children") are seeking a declaration that they are entitled to remain in Canada and that no removal order should be made against their parents. Joined to this application, which was transformed into an action after leave was granted, there is a claim by the children to have the definition of "sponsor" in section 2(1) of the Immigration Regulations, 1978, SOR/78-172, as amended by SOR/93-44, which requires that a sponsor be at least 19 years of age in order to sponsor his or her parents' application for landing, declared to be inoperative.

2 There were no witnesses called at the hearing of this case, since the parties had filed a joint statement of facts. For fear of omitting some of these facts, and since the facts set out in the joint statement greatly exceed the initial framework of the application, I consider it necessary to reproduce the agreement between the parties, which reads as follows, in full.

[TRANSLATION]

1. The plaintiffs Ewa Pawlak J. Langner and Stanislaw Langner, who are of Polish nationality, arrived in Canada on January 19, 1988.

2. At that time they were carrying visitor visas and were admitted to Canada as visitors for a maximum period of 3 months.
3. The plaintiffs were also carrying America visas.
4. When they arrived in Canada, the plaintiffs were intending to go to the United States in order to make a application for landing in Canada from there.
5. They did not follow through on this plan, after being informed about 2 weeks before the expiry of their visitor visas that Mrs. Langner was pregnant.

6. They then decided to remain in Canada, since they could not cover the medical expenses associated with the birth of a child that they would have had to pay during their time in the United States.
7. Accordingly, on April 20, 1988, one day after their visitor visas expired, the plaintiffs Ewa Pawlak J. Langner ad Stanislaw Langner claimed refugee status in Canada.
8. On April 20, 1988, Mr. and Mrs. Langner were reported under section 27 of the Immigration Act on the ground that they were persons described in paragraph 27(2)(e) of the Immigration Act since they had remained in Canada after the expiry of the time for which they had been allowed to remain in Canada.
9. On October 24, 1990, Mr. and Mrs. Langner were interviewed by a Immigration officer under the refugee claimant backlog clearance program, so that they could provide information to show that there were sufficient humanitarian or compassionate reasons or that it was in the public interest to recommend a exemption to the Governor in Council under subsection 114(2) of the Immigration Act, so that their application for permanent residence could be processed within Canada.
10. During that interview, Mr. and Mrs. Langner were informed that there were no such humanitarian or compassionate reasons and that they would be given notice of a hearing to determine whether there was a credible basis for their refugee claim.
11. On November 15, 1990, Mr. an Mrs. Langner were given notice to appear at a hearing to be held under subsection 27(4) of the Immigration Act further to the report made against them under paragraph 27(2)(e) of the Immigration Act. The inquiry was to be held on November 27, 1990.
12. On November 27, 1990, the inquiry was postponed to January 24, 1991, and then to April 8, 1991.
13. The inquiry, during the course of which Mr. and Mrs. Langner claimed refugee status, commenced on April 8, 1991 and continued on June 19, 1991.
14. On August 1, 1991, the adjudicator and the member of the Refugee Division of the Immigration and Refugee Board rendered their decision, concluding that Mr. and Mrs. Langner's claims to refugee status did not have a credible basis.
15. At that time the adjudicator also issued a departure notice, under subsection 32(7) of the Immigration Act, ordering Mr. and Mrs. Langner to leave Canada on or before October 13, 1991. Mr. and Mrs. Langner were then informed that they were entitled to a final humanitarian and compassionate review before the removal order was executed.
16. On August 2, 1991, the defendant's representatives received written submissions from Mr. and Mrs. Langner relating to the existence of humanitarian and compassionate reasons in their case.
17. On August 6, 1991, a immigration officer reviewed the humanitarian and compassionate reasons and made a negative recommendation as to whether Mr. and Mrs. Langner's application for permanent residence should be processed within Canada.
18. On September 26, 1991, the Backlog Review Unit confirmed the decision made on August 6, 1991.
19. On October 15, 1991, counsel for Mr. and Mrs. Langner made a written request to the defendant for a review of the decision that there were no humanitarian or compassionate reasons. The date on which Mr. and Mrs. Langner were to leave Canada was then postponed to November 5, 1991.
20. On October 16, 1991, the negative recommendation as to whether Mr. and Mrs. Langner's application for permanent residence should be processed within Canada was upheld.
21. On November 8, 1991, Mr. and Mrs. Langner were served with a notice to appear at an inquiry to be held on December 3, 1991 pursuant to a report made under section 27 of the Immigration Act, alleging that they were persons described in paragraph 27(2)(e) of the Immigration Act in that they had remained in Canada after November 5, 1991.

22. At the request of counsel for Mr. and Mrs. Langner, that inquiry was adjourned to January 21, 1992 and again adjourned to June 15, 1992.
23. On December 4, 1991, the office of the Minister of Employment and Immigration Canada confirmed the negative recommendation concerning processing Mr. and Mrs. Langner's application for permanent residence within Canada.
24. On April 3, 1992, Mr. and Mrs. Langner had another interview to review their humanitarian and compassionate reasons.
25. On May 8, 1992, counsel for the plaintiffs was informed by letter from a representative of the defendant that at the last humanitarian and compassionate review no reason had been presented to justify processing Mr. and Mrs. Langner's application for permanent residence within Canada and that the decision that had already been made in that respect was being upheld.
26. The plaintiffs Ewa Pawlak J. Langner ad Stanislaw Langner have had two children born in Canada: Robert, born in Montreal on October 8, 1988 and Damian, born on March 6, 1990.
27. The children Robert and Damian have both Canadian citizenship and Polish citizenship. They carry Polish passports.
28. At present, the plaintiffs have 21 family members living in Canada a permanent residents or Canadian citizens; these are: [a list of family members follows, comprising one brother and his wife and three children, for the male plaintiff, and one sister, four uncles, three aunts, four cousins, three nieces and one brother-in-law, for the female plaintiff].
29. The mother of the plaintiff Stanislaw Langner and his brother and three sisters are living in Poland at present.
30. The plaintiff Ewa Pawlak J. Langner still has her parents and a brother and sister living in Poland.
31. The children Robert ad Damian Langner, who are 4 and 2 years old, respectively[1], do not have legal capacity to contract and, given their young age, are not able to decide whether they wish to sponsor their parents' application for landing, and further are not able to choose their country of residence.
32. The children Robert ad Damian Langner have no income or assets of any nature whatever, and are dependent on their parents Ewa Pawlak J. Langner ad Stanislaw Langner.
33. On October 27, 1992, removal orders were made against the plaintiffs Ewa Pawlak J. Langner and Stanislaw Langner. No proceedings have been brought to challenge the merits of the said removal orders.
34. The children Robert ad Damian Langner are not included in the removal orders and are not subject to any departure notice.

The parties have also agreed to the following statement of facts:

[TRANSLATION]

1. The children speak French ad Polish;
2. The older child attends kindergarten in French; the younger attends a French daycare centre in the same school;
3. The language used between the parents and the children is Polish; the children communicate between themselves in French.

PROCEEDINGS

3 It is important to note that the Langner parents and children initially filed an application for leave under subsection

82(1) of the Immigration Act seeking to bring an application for judicial review of the decision made on October 16, 1991 concluding that the parents had no humanitarian or compassionate reasons which would have enabled them to make their application for landing within Canada rather than making application before arriving in Canada. The application was made in file no. 91-T-183 of this Court, in which Mr. and Mrs. Langner sought to challenge that decision, which had been made under subsection 114(2) of the Immigration Act. Leave was granted on November 22, 1991, and on December 5, 1991 the plaintiffs brought this action.[2] The plaintiff Ewa Pawlak J. Langner was appointed guardian of her children. The Langner children submit, specifically, that their constitutional rights would be infringed if the removal order made against their parents were to be executed. It is important to note that the removal order has not been challenged by the parents. The Langner children are also asking that the definition of a "sponsor" (subsection 2(1) of the Immigration Regulations, 1978) be declared to be inoperative as regards them, because it infringes their constitutional rights by requiring that they be at least 19 years of age in order to sponsor an application for landing.

STANDING OF THE PARENTS AND CHILDREN

4 The action raises both questions of administrative law and questions under subsection 24(1) of the Canadian Charter of Rights and Freedoms.[3] Given that the defendants are contending that the parents, on some points, and the children, on other points, lack standing in respect of each of the arguments raised and remedies sought, it is important first to analyze the question of the standing of each of these two distinct groups of plaintiffs, the Langner parents and children.

5 We shall first examine the primary remedies sought by all of the plaintiffs in their action. I have numbered each of the items of relief sought to assist in understanding the text. The plaintiffs are primarily seeking:

1. TO QUASH under rules of administrative law and under the Charter the decision denying humanitarian and compassionate relief to Plaintiffs or TO DECLARE that it has simply not been made;
2. TO ORDER by mandamus that Respondents make a positive decision or reconsider the matter;
3. TO DECLARE that Plaintiffs are entitled to a positive decision;
4. TO DECLARE that the minor Plaintiffs are entitled to stay in Canada with their parents and to prohibit under section 24(1) of the Charter the taking of any steps by Defendants to remove the parents;
5. TO DECLARE inoperative the age requirement of the definition of "sponsor" in Reg. 291) under the Immigration Act 1976 and TO DECLARE that minor Plaintiffs have a right to sponsor their parents.

6 We would note that during the hearing counsel for the plaintiffs withdrew items no. 2, respecting the issuance of a mandamus for the purpose of obtaining a positive decision, and no. 3, respecting a declaration that the plaintiffs were entitled to a positive decision.

7 In item no. 1, the plaintiffs are seeking first to have the decision concluding that they have no humanitarian or compassionate reasons that would justify granting an exemption under subsection 114(2) of the Immigration Act quashed. The grounds relied on for this claim relate both to administrative law and to the Canadian Charter of Rights and Freedoms. Given that this relief is sought both by the Langner parents and by the Langner children, the defendant contends that one or the other of these groups of plaintiffs does not have standing.

8 Let us examine the parents' situation in this respect first. There is no doubt that since Mr. and Mrs. Langner have been granted leave to bring an application for judicial review they have the necessary standing to challenge this decision. However, given that they make no assertion in their action that they have personally been denied their Charter rights, they cannot base their action on subsection 24(1) of the Charter. In Borowski v. Attorney General of Canada[4], the Supreme Court held that a person who is seeking a remedy under subsection 24(1) of the Charter must personally have been a victim of an infringement of his or her Charter rights and that such a person may not

base his or her application on an infringement of the rights of third parties. The Langner parents do not have the necessary standing to claim this Charter remedy, and so this decision will be analyzed later in relation to the principles governing administrative law. The Langner parents' lack of standing applies to each of the remedies sought to the extent that they are based on the Canadian Charter of Rights and Freedoms.

9 Given that the Langner children are not affected by the decision refusing to recognize the humanitarian and compassionate reasons asserted by their parents, they have no standing as plaintiffs in respect of the remedy of quashing the decision concluding that there are no humanitarian or compassionate reasons that could justify granting an exemption under subsection 114(2) of the Immigration Act.

10 As item no. 4 of the relief sought indicated earlier, the children are claiming the right to remain in Canada with their parents and are asking that no proceedings be undertaken to remove the parents. The parents are not alleging that they have personally been victims of the infringement of Charter rights, except indirectly and in that the removal order against them compels them, in practice, if they must return to Poland, to take their minor children with them, although the children are Canadian citizens and enjoy the rights guaranteed by the Charter. Given that the children's standing and the Charter rights claimed by the children are closely related, this claim will be analyzed later, and in the exercise of its discretion the Court recognizes that they have such standing.

11 Finally, in item no. 5 of the relief sought in the action, the plaintiffs jointly seek a declaration that the definition of a "sponsor" is inoperative in that it requires that they be at least nineteen years old. On the one hand, the Langner parents have not established any personal standing, in that they are not and cannot be sponsors; rather, they are the persons for whose benefit the Langner children would like to be able to exercise their rights and act as sponsors.

12 On the other hand, I believe that the facts in this case establish that the Langner children do not have direct and personal standing in relation to this head of relief, and they further cannot act in the public interest. I shall explain. The Immigration Act and the Regulations provide that a "sponsor"[5] may sponsor an application for landing and not a person. As a general rule, an immigrant who wishes to be landed in Canada must apply for and obtain an immigrant visa before arriving in Canada (section 9 of the Act). The application for landing must therefore be made outside Canada. In this case, the Langner parents did not make an application for landing before arriving in Canada, and they did not follow through on their plan to go to the United States for that purpose. As an exception, in cases where an exemption is granted under subsection 114(2) of the Immigration Act, a person may make an application for landing, which may be sponsored by a sponsor, within Canada. In this case, no exemption has been granted to permit the Langner parents to make an application for landing within Canada. On the contrary, it is the refusal of such an exemption that forms the main subject-matter of the action. There is therefore no application for landing which could be sponsored by a person who meets the requirements of the Immigration Regulations, 1978, specifically by a person who satisfies the definition of a sponsor. The inability of the Langner children to act as sponsors is therefore a result not of the fact that they are not nineteen years of age, but rather of the fact that no application for landing that could be sponsored has been made by their parents. Accordingly, the Langner children have no personal and direct standing to apply for the remedy of a declaration that the requirement that they be nineteen years of age imposed in the definition of a sponsor is inoperative as regards them. The inapplicability of a law to the person who challenges its validity makes the case moot.[6]

13 In this case, the Langner children also do not have public interest standing. While traditionally only the Attorney General had standing to represent the law or the public interest by bringing an action for a declaratory judgment, there are decisions[7] of the Supreme Court that have modified and brought flexibility to the rules relating to standing in constitutional law. Despite the expansion of the body of constitutional authorities relating to standing to bring an action, general opinion is still that the role of the courts is not to give pure opinions every time an individual happens to disagree with a law. On this point, in Canadian Council of Churches v. Canada (Minister of Employment and Immigration)[8], after describing the evolution and raison d'être of public interest standing, Cory J. dealt with the danger of such standing being abused and access to it being extended, as follows:

> The Increasing recognition of the importance of public rights in our society confirms the need to extend the right to standing from the private law tradition which limited party status to those who possessed a private interest. In addition some extension of standing beyond the traditional parties accords with the provisions of the Constitution Act, 1982. However, I would stress that the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. It is essential that a balance be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by a well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.
>
> The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The grating of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this Court need not and should not be expanded. The decision whether to grant status is a discretionary one with all that that designation implies. Thus undeserving applications may be refused. Nonetheless, when exercising the discretion the applicable principles should be interpreted in a liberal and generous manner.

14 In Hy and Zel's Inc. v. Ontario (Attorney General)[9], after quoting the above-mentioned passage from the reasons of Cory J., Major J. of the Supreme Court set out the tests established in the case law to justify standing to bring proceedings in a matter of public law. He stated:

> Following this Court's earlier decisions, in order that the Court may exercise its discretion to grant standing in a civil case, where, as in the present case, the party does not claim a breach of its own rights under the Charter but those of others, (1) there must be a serious issue as to the Act's validity, (2) the appellants must be directly affected by this Act or have a genuine interest in its validity, and (3) there must be no other reasonable and effective way to bring the Act's validity before the court.

15 In this case, even if we assume, solely for the purposes of discussing this question, that the Langner children meet the first two tests set out by the Supreme Court, the circumstances of the case do not justify the Court in exercising its discretion to permit the Langner children to argue that the definition of a sponsor cannot be set up against them, because of their age, since there may undoubtedly be another reasonable and effective way of bringing the issue that they are raising before the courts. It appears from the facts admitted in evidence that the age of the children (5 and 3 years), the fact that they do not have any income or any assets whatever, since they are dependent on their parents, and the fact that they are not able to decide whether they wish to sponsor their parents' application for landing or able to choose their country of residence, mean that they are not appropriate candidates for examining the question of a sponsor within the meaning of the Act. The situation would have been different if they were minors of about seventeen or eighteen years of age, who were capable of sponsoring their parents but were deprived of the right to do so solely because of their age.

16 To summarize, neither the parents nor the children have standing in respect of examining the constitutionality of the definition of "sponsor" set out in subsection 2(1) of the Immigration Regulations, 1978.

HUMANITARIAN AND COMPASSIONATE REASONS

17 We shall now examine whether the negative decision in respect of humanitarian and compassionate reasons satisfies the principles of administrative law.

18 Counsel for the plaintiffs argues, generally speaking, that according to the applicable tests in administrative law the decision concluding that the Langner parents did not have sufficient humanitarian or compassionate reasons to recommend an exemption to the Governor in Council under subsection 114(2) of the Immigration Act, so that their

application for permanent residence could be processed within Canada, is unreasonable and must be quashed. He contends that the immigration officer who examined this case did a particularly poor assessment of the applicants' family dependency in her decision of August 6, 1991, in that she found that they in fact had "no strong dependency", while the evidence established that they had strong family ties in Canada, not to mention that their two children, Robert and Damian, were born here.

19 I find that this argument is without basis. As I indicated earlier, the decision that the Langner parents are seeking to challenge was made under subsection 114(2) of the Immigration Act. Under the scheme of the legislation, exempting a person from the Regulations or facilitating a person's admission under subsection 114(2) of the Act is an exception to normal procedure, and the courts have recognized on many occasions that the power exercised under this subsection is discretionary.[10] A decision made in this sort of case is purely administrative, but it is well known that government administrative officials must act fairly. Judicial review by this Court must be limited to reviewing the legality of the decision, and not its merits.

20 In this case, the evidence filed by the parties on consent greatly exceeds the framework of what the parties had sought in the application for leave covered by file no. 91-T-183. First, while counsel for the applicants was challenging a negative decision communicated on October 16, 1991, he took pains to establish the illegality of the original decision made on August 6, 1991, which I discussed earlier. Second, the joint statement of facts establishes that numerous other hearings have taken place, at the request of counsel for the plaintiffs, to determine whether there are humanitarian or compassionate reasons in favour of the Langner parents. On this point, it is therefore difficult, if not impossible, to ascertain which decision is being challenged. With respect to the decision of August 6, 1991, which counsel for the plaintiffs addressed with particular zeal, we must observe that even though the immigration officer made the comment to the effect that there was "no strong dependency" in terms of family ties, she did, however, recognize (Exhibit D-6) that there were minor children and that the plaintiff Mr. Langner had a brother. It is particularly important, however, to note that this negative decision was based on other criteria which the immigration officer also had to take into account, that is, the fact that the plaintiffs would have no problems if they were to return to Poland and the possibility that members of their family could act as their sponsors.[11] Moreover, given that the decision that is being challenged, the one dated October 16, 1991, was the fourth time that humanitarian and compassionate reasons had been considered or reviewed, and that the evidence establishes that these reasons were considered and reviewed in accordance with the recognized principles of administrative law and immigration guidelines, there is nothing unreasonable about the conclusions on this point. Suffice it to mention, as is set out in the joint statement of facts, that since the plaintiffs brought this action there have been two other assessments of humanitarian and compassionate reasons, the first on December 4, 1991 and the second on April 3, 1992. On each occasion the Langner parents had an opportunity to put forward all the reasons in support of their request for an exemption, which received final refusal on May 8, 1992. The plaintiffs have not brought an application for leave under subsection 82.1 of the Immigration Act to have that decision reviewed.

21 I therefore conclude that no violation of any rule of administrative law has been established that would allow me to quash either of the negative decisions as to whether there are humanitarian or compassionate reasons in favour of the Langner parents.

THE CHILDREN'S CHARTER RIGHTS

22 And now what of the children's right to remain in Canada with their parents, or more precisely, to object to their parents being removed, based on their Charter rights? In the alternative, can it be said that their rights will defacto be infringed by the removal of their parents?

23 A person who claims that a Charter right has been infringed has the burden of persuading the Court both that the Charter applies and that there has been a denial or infringement of a right conferred on him or her by the Charter. The burden of establishing that there has been a government action in this case to which the Charter applies and which denies or infringes a right guaranteed to them by the Charter therefore rests on the Langner children.

24 It is clear, on reading section 32 of the Charter[12] and the case law, that the Charter is intended to control government action and that activities of a private nature are excluded from the application of the Charter. Accordingly, in order for the Charter to apply, there must be a connection between the alleged infringements of the Charter and the actions of the government. If the causal connection between the actions of the government and the alleged infringement of the Charter rights is "too uncertain, speculative and hypothetical to sustain a cause of action"[13], the infringement will not be recognized.

25 In this case, the children contend that they will have to leave Canada with their parents and that this is the only possible hypothesis. They therefore argue that their departure from Canada will infringe the rights guaranteed to them by sections 6, 7 and 15 of the Charter. The defendant argues that the effects on the children of their parents' departure from Canada can in no way be laid at the government's doorstep and do not result from the government's action in relation to them.

26 A quick analysis of the evidence shows that there is nothing to compel the children to leave Canada. The parents' decision to take their children to Poland when the removal order is executed cannot be blamed on government action. If the children were ultimately to leave Canada with their parents, it would be because the parents are inadmissible to Canada and because of the removal order made against them, and not by reason of the refusal to conclude that they had humanitarian or compassionate reasons to justify granting them an exemption under subsection 114(2) of the Act. First, the removal order does not cover the children[14], and second, it has not even been challenged. It therefore cannot be a decision resulting from a government action that would open the way to a claim to Charter rights by the children, because there is nothing connecting them to that removal order. In the event of the children's departure with their parents, it will result only from the parents' decision[15], a personal decision made without government intervention and with which the government has nothing to do. On this point, given that if the children depart they will do so not as a direct consequence of the negative decision made with respect to their parents' humanitarian and compassionate reasons or of the removal order made against their parents, they cannot claim that their Charter rights have been infringed.

27 Furthermore, the parents' decision to take their children to Poland is not inevitable. Given that there is no removal order against the children and there is nothing to compel them to leave, we must assume that the parents' decision as to whether or not to take their children to Poland will be made solely on the basis of the best interests of the children. This choice will be made by the parents themselves, taking all of the circumstances into account and, given the evidence that there are numerous close family members in Canada, it cannot be said that in this case the choice to take the children to Poland is inevitable. Nor can it be argued, as counsel for the plaintiffs contended, however, that the parents of children born in Canada cannot be removed if, in practice, that decision would compel the children to leave the country or to be raised here without their parents.[16] The parents may very well decide, taking into account the rights that Canadian citizens have and the values that prevail in this country, to leave the children in Canada, or take them to Poland, in which case they may always return to Canada by virtue of their citizenship. The Court need not speculate as to the choices that the parents will have to make.

28 In the circumstances, I need not analyze the children's allegation that their rights under sections 6, 7 and 15 of the Charter have been infringed.

29 For these reasons, the action is dismissed. Because this action originally consisted of an application for judicial review, which generally does not result in an order for costs, no costs will be awarded.

Certified true translation: Katryn E. Barnard

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1 They were 5 and 3 years old, respectively, at the time of the hearing.

2 There is nothing in the file to indicate that the Court has given authorization for this application for judicial review to be transformed into an action.

3 Part I of the Constitution Act, 1982, comprising Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11:

> 24.(1) Anyone whose rights or freedoms, a guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

4 [1989] 1 S.C.R. 341 at 367.

5 Subsection 2(1) of the Regulations: "sponsor" means a Canadian citizen or permanent resident who is at least 19 years of age, who resides in Canada and who sponsors an application for landing. (Emphasis mine.)

6 Law Society of Upper Canada v. Skapinker, *[1984] 1 S.C.R. 357* at 383.

7 Thorson v. Attorney General of Canada, *[1975] 1 S.C.R. 138* at 161-62; Nova Scotia Board of Censors v. McNeil, *[1976] 2 S.C.R. 265* at 271; Minister of Justice (Canada) v. Borowski, *[1981] 2 S.C.R. 575* at 584-85.

8 *[1992] 1 S.C.R. 236* at 252-53.

9 *[1993] 3 S.C.R. 675* at 690.

10 Kretowicz et al. v. M.E.I., *77 N.R. 38* at 48 (C.A.); Koutsouveli v. M.E.I., *21 F.T.R. 271* at 275 (T.D.); Vidal v. Canada (Minister of Employment and Immigration) *(1991), 13 Imm. L.R. (2d) 123* at 128-29.

11 "Decision and justification: negative, [I] see no problems for subj. to return to Poland & have his family sponsor them from Poland." (cf. D-6).

12 Application of Charter

32.(1) This Charter applies

> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

13 Operation Dismantle v. The Queen, *[1985] 1 S.C.R. 441* at 447.

14 In addition, they cannot be subject to such an order, under subsection 33(1) of the Act: "Where a removal order or conditional removal order is made by an adjudicator against a member of a family on whom other members of the family in Canada are dependent for support, any member of the family dependent on that member may be included in that order and be removed from or required to leave Canada unless the dependant is a Canadian citizen..." (Emphasis mine.)

15 Kretowicz et al. v. M.E.I., op. cit., at pp. 57-58.

16 The United States courts have rejected this argument on numerous occasions, inter alia in Lopez v. Franklin, 427 F. Supp. 345 (D. Mich. S.D. 1977); Aalund v. Marshall, 461 F. 2d 710 (5th Cir. 1972).

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