Federal Court  Cour fédérale

Date: 20160330

Docket: IMM-2446-15

Citation: 2016 FC 356

Ottawa, Ontario, March 30, 2016

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

ANTOINE BECHAALANI AND RABAB SRAJ

Applicants

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Mr. Antoine Bechaalani and Mrs. Rabab Sraj seek judicial review of the decision of a Citizenship and Immigration [CIC] officer refusing their application for permanent residence from within Canada on humanitarian and compassionate grounds [H&C] application.

II. Facts

[2] The Applicants, husband and wife, are Lebanese citizens. At the time of the decision on their H&C application, they were respectively 76 and 70 years old. They have four adult children and a number of grandchildren living in the province of Québec. They state that they have a fifth adult child living in the United States, although they both indicate in their separate IMM 5406 forms that she resides in Beirut, Lebanon.

[3] The Applicants entered Canada in September 2011 with temporary resident visas for a period of three months. They applied for refugee protection in October 2011, and those claims were rejected by the Refugee Protection Division. They subsequently made a Pre-Removal Risk Assessment application and their H&C application, which were both rejected.

[4] Since their arrival in Canada, the Applicants have lived with their children and grandchildren. They received monthly social assistance from the Québec government until March 1, 2014; they state they asked for social assistance to cease because their daughter in the United States began to financially support them.

[5] The Applicants base their H&C application on the following factors:

- they have no remaining family in Lebanon;
- the best interest of the children would be negatively affected, because their grandchildren have close bonds and dependence with the Applicants;
- their adult children rely on them for child care and other family support;

- the Applicants have medical conditions: Mr. Bechaalani is diabetic and suffers from hypertension, and Mrs. Sraj has hygienic requirements that her daughters assist her with;
- there is general insecurity in Lebanon, and the Applicants would face discrimination and harassment upon their return.

III. Impugned Decision

[6] The immigration officer refused the H&C application. He began by examining the factors of adverse country conditions and hardship in Lebanon. He accepted that general instability and security issues in Lebanon would likely lead to some psychological hardship for the Applicants. With respect to the Applicants' stated health conditions, the officer acknowledged it was possible that they suffered from those conditions, but that there was minimal expert evidence to demonstrate it. As for the lack of family support in Lebanon, while the officer accepted that four of the five adult children lived in Québec, he found that the evidence was inconclusive as to whether the fifth adult child, Aline, lives in the United States or rather in Lebanon, given that the Applicants' applications stated that her present address was located in Beirut, Lebanon. He also noted that there was minimal objective evidence to show that no other family member of either Applicant remained in Lebanon.

[7] The officer then moved on to the establishment factor. He gave positive consideration to the Applicants' emotional bond with their children and grandchildren, and to the child care and assistance the Applicants provided to them. However, the officer found that the Applicants had provided minimal submissions suggesting that if they returned to Lebanon, they would not be able to apply for "super visas" to visit Canada. The Applicants also did not demonstrate that their financial situation was consistent with an exceptional level of establishment in Canada.

[8] Finally, the officer found that the fact that the Applicants had exhausted avenues to regularize their status, yet decided to remain in Canada, weighed against their case.

IV. Issue and standard of review

[9] This application for judicial review raises a single determinative issue:

- *Did the officer make a reviewable error?*

[10] The Applicants submit that while the standard of review normally applicable to H&C applications is reasonableness, the standard of review applicable in the case at bar is correctness, because an officer applying the wrong test or ignoring a relevant factor in his exercise of discretion are questions of law (*Canada (Citizenship and Immigration) v Mathew*, 2007 FC 685 at para 22). However, their arguments on the merits allege both "reviewable errors" and "unreasonable" conclusions on the part of the officer (rather than "incorrect" conclusions).

[11] I cannot agree with the Applicants that the officer's decision should be reviewed against the standard of correctness. The applicable standard of review for an immigration officer's decision on an H&C application is reasonableness (*Lopez v Canada (Citizenship and Immigration)*, 2013 FC 1172 at para 28). This has been established in the jurisprudence, both pre- and post-*Dunsmuir v New Brunswick*, 2008 SCC 9 (*Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 18). And as will be discussed below, I do not agree that the officer failed to consider relevant factors.

V. Analysis

[12] With respect to the Applicants' argument that the officer failed to address sections 12.5 and 12.8 of the IP-5 Manual, the Respondent rightly points out that the IP-5 Manual is no longer in use by CIC in H&C applications. Rather, the CIC website now has "Program Delivery Instructions", and there is a section specifically on H&C assessments, which was applicable when the Applicants filed their H&C application. The following excerpts are informative [emphasis added]:

> The onus is entirely upon the applicant to be clear in the submission as to exactly what hardship they would face if they were not granted the requested exemption(s). You do not have to elicit information on H&C factors and are not required to satisfy applicants that such grounds do not exist.
>
> Applicants must put forth any H&C factors that they believe are relevant to their case.
>
> ...
>
> Fact finding should be done using the usual standard of proof in administrative law: Balance of probabilities --- is it more likely than not that the evidence or information presented is true?
>
> …
>
> Applicants may base their requests for H&C consideration on any relevant facts that they want to have considered including, but not limited to:
>
> - establishment in Canada for In-Canada applications and ability to establish in Canada for overseas applications
> - ties to Canada
> - the best interests of any children affected by their application
> - factors in their country of origin, including adverse country conditions
> - health considerations including inability of a country to provide medical treatment
> - family violence considerations

- consequences of the separation of relatives
- inability to leave Canada has led to establishment (in the case of applicants in Canada).

[13] These excerpts clearly demonstrate that the onus is on the Applicants to specify which hardships they would allegedly face, and demonstrate these on a balance of probabilities. The officer does not need to elicit information from the Applicants, but must consider all the elements presented by them. I agree with the Respondent that these guidelines are neither mandatory nor exhaustive; they are not enforceable by the public (*Mohammad v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 363 (FCA), [1988] FCJ No 1141 (QL) at para 14); they are not binding on the officer (*Canada (Minister of Public Safety and Emergency Preparedness) v Cha*, 2006 FCA 126 at para 15); and they cannot fetter the officer's discretion (*Tshidind v Canada (Minister of Citizenship and Immigration)*, 2006 FC 561 at para 9).

[14] This was recently confirmed by the Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 32:

> "There is no doubt, as this Court has recognized, that the Guidelines are useful in indicating what constitutes a reasonable interpretation of a given provision of the *Immigration and Refugee Protection Act*: *Agraira*, at para. 85. But as the Guidelines themselves acknowledge, they are "not legally binding" and are "not intended to be either exhaustive or restrictive": *Inland Processing*, s. 5. Officers can, in other words, consider the Guidelines in the exercise of their s. 25(1) discretion, but should turn "[their] mind[s] to the specific circumstances of the case": Donald J. M. Brown and The Honourable John M. Evans, *Judicial Review of Administrative Action in Canada* (2014), at p. 12-45. They should not fetter their discretion by treating these informal Guidelines as if they were mandatory requirements that limit the equitable humanitarian and compassionate discretion granted by s. 25(1): see *Maple Lodge Farms Ltd. v. Canada*, 1982 CanLII 24

> (SCC), [1982] 2 S.C.R. 2, at p. 5; *Ha v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49 (CanLII), [2004] 3 F.C.R. 195 (C.A.), at para. 71."

[15] Nevertheless, I find that the officer did not ignore the H&C factors in the guidelines related to the family. He gave positive consideration to the Applicants' bonds and interdependence with their children and grandchildren, the child care and assistance they provided, and acknowledged that separation would cause emotional hardship. However, the officer balanced those considerations with his findings that the Applicants had not demonstrated they would have difficulty in obtaining visitor visas to Canada in the future, such as "super visas", nor that their financial situation was consistent with exceptional establishment. It was open to the officer to weigh these different factors.

[16] Thus, it cannot be said, as the Applicants contend, that "all factors in the said guidelines were established in favour of the applicants, except for the support available in their home country". The officer had other preoccupations, such as the lack of evidence that applying for visitor visas would entail particular difficulty.

[17] With respect to the officer's finding that the evidence was "inconclusive" regarding their daughter Aline's country of residence, I agree with the Respondent that it was open to him to reach that conclusion. As this Court held in *Obeta v Canada* (*Citizenship and Immigration),* 2012 FC 1542 at para 25:

> As explained earlier, the burden of providing sufficient information rests on the applicant, and where the Officer's concerns arise directly from the requirements of the Act or its Regulations, there is no duty on the Officer to raise doubts or concerns with the applicant… In terms of sufficient information,

> the onus will not shift on the Officer simply on the basis that the application is "complete". The applicant has the burden to put together an application that is not only "complete" but relevant, convincing and unambiguous.

[18] In my view, the Applicants' application was ambiguous as to Aline's country of residence and the officer was under no duty to raise that doubt with the Applicants (*Singh v Canada (Citizenship and Immigration)*, 2012 FC 855 at para 32).

[19] Moreover, I agree with the Respondent that this finding was not determinative of the officer's decision. The officer's conclusion that there was minimal objective evidence to suggest that no other family members, or close non-relatives, remained in Lebanon, was not confined to the finding of inconclusive evidence on Aline's country of residence, but was rather a general conclusion that the Applicants must have some family or friends in Lebanon, given that they lived there for the majority of their lives.

[20] Beyond the officer's concerns as to Aline's country of residence and family support in Lebanon, he noted a lack of expert evidence with respect to the Applicants' health conditions. These conditions were only mentioned briefly in one of their daughters' letters, and were not confirmed by medical professionals. Again, this finding goes to the sufficiency of the evidence.

[21] Given the lack of evidence on their health conditions, I cannot agree with the Applicants that the officer erred in his best interests of the child analysis because he did not consider that the Applicants would be unable to return to Canada due to their diminished health. In fact, the officer acknowledged that separation would lead to some emotional hardship. He was "alert,

alive and sensitive" to the best interests of the Applicants' grandchildren. However, the officer concluded that the Applicants had not demonstrated that they would have difficulty in applying for "super visas" in the future. This finding was reasonable given the evidence before him.

[22] Overall, I find that the officer's decision is reasonable.

VI. Conclusion

[23] For these reasons, this application for judicial review will be dismissed. The parties have not proposed any question of general importance for certification and none arises from this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed;

2. No question of general importance is certified.

"Jocelyne Gagné"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mark J. Gruszczynski	FOR THE APPLICANTS
Evan Liosis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gruszczynski, Romoff Barristers and Solicitors Montréal, Québec	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Montréal, Québec	FOR THE RESPONDENT