Federal Court  Cour fédérale

Date: 20161209

Docket: IMM-2605-16

Citation: 2016 FC 1364

[ENGLISH TRANSLATION]

Ottawa, Ontario, December 9, 2016

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

PARVEEN BUSHRA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of decision by an immigration officer [the officer] dated June 1, 2016, rejecting the applicant's request for an exemption on humanitarian and compassionate grounds [H&C request], pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] The applicant is a citizen of Pakistan. She is infected with the Hepatitis C virus [HSV] and suffers from post-traumatic stress disorder and major depression. She claimed refugee protection a few weeks after arriving in Canada in December 2012. In June 2013, the Refugee Protection Division of the Immigration and Refugee Board of Canada rejected her refugee protection claim, and the Refugee Appeal Division confirmed that decision in November 2013. In July 2014, after a very difficult pregnancy, the applicant gave birth to a baby girl. The baby has several health issues, the causes of which remain unclear; apart from this, her condition is stable, and she continues to receive medical follow-up care. The child's father is unknown, and the applicant has sole custody.

[3] In January 2015, the applicant submitted an H&C request to be exempted from the obligation to apply for a permanent resident visa from outside Canada. In rejecting the H&C request, the officer concluded that the applicant's degree of establishment and integration was no greater than what would have been expected of any person arriving in Canada. The officer also concluded that treatment is available in Pakistan for people living with HSV, as well as for the various psychological issues from which the applicant also suffers. Moreover, there was no evidence in the record to suggest that the applicant's daughter could not receive appropriate care in Pakistan or would be discriminated against because she was born out of wedlock and is being raised by a single mother. The officer was also of the opinion that the applicant's profile was not consistent with that of women who are victims of discrimination in Pakistan.

[4] The refusal to grant the exemption sought by the applicant on humanitarian and compassionate grounds is not an acceptable outcome which is defensible in respect of the

applicable legal principles and the evidence in the record. Even if we assume that the applicant's daughter could receive medical follow-up and that the applicant herself could have access to psychologists and medication in Pakistan to treat her psychological issues and depression, the fact remains that the officer's cursory analysis of the evidence in the record concerning Hepatitis C is incomplete, selective and seriously deficient.

[5] The uncontradicted evidence in the record shows that the applicant is infected with a genotype of HCV (the 3a genotype) that is among the most difficult to treat, while according to the documentation on record, there is no treatment in Pakistan equivalent to the one that the applicant started in Canada in March 2016 and has not yet finished. The documents referenced by the officer clearly support the applicant's allegations to the effect that the treatments for Hepatitis C available in Pakistan are not only very expensive but also very limited, despite the county having one of the highest rates of people living with HCV in the world. In fact, the situation reported in the documentation illustrates that, despite the action taken by the government since 2005, the situation is highly alarming. In Pakistan, approximately 150,000 deaths each year are attributable to the Hepatitis B and C viruses. This situation therefore creates a real and personal risk to the applicant.

[6] Furthermore, the medical specialist who has been treating the applicant since July 2015, Dr. Louis-Patrick Harroui, whose credibility was never called into question, provided the following details in his letter dated January 7, 2016:

> [TRANSLATION]
>
> HCV infection is a chronic illness with potentially very serious health consequences for people, particularly cirrhosis of the liver and its related complications and even liver cancer, which can

> result in premature death. The risk of a person infected with HCV developing one of these complications depends on several factors, including the viral genotype, that is, the subtype of HCV. Ms. Parveen has HCV genotype 3a, which is one of the most difficult to treat and most likely to cause cirrhosis of the liver. Moreover, according to preliminary tests done since the construction, it appears that Ms. Parveen might already have cirrhosis, which would reduce her chances of recovery and increase the risk of severe complications.
>
> It is imperative to continue the investigations related to her HCV infection in order to offer her timely treatment. According to the preliminary information, she would be a candidate for an antiviral treatment as soon as possible to prevent her health from deteriorating. Beginning treatment within the next few weeks would bring her chances of making a full recovery to at least 85% and would stop the progression the damage to her liver. A cure would give her a life expectancy equal to that of a person not infected with HCV. The treatment for Ms. Parveen's infection has been available in Canada for only two years. Access to this treatment is still very limited, even non-existent, in many regions of the world, such as Pakistan, not to mention the obstacles in buying this treatment in countries where there is no health care coverage.

[7] In addition, in his letter dated March 23, 2016, Dr. Harroui explains that the applicant has begun a 15-month experimental treatment and that interrupting it could have deadly consequences for her:

> [TRANSLATION]
>
> Ms. Parveen will begin a treatment for Hepatitis C today as part of a clinical trial of a medication sponsored by a pharmaceutical company. This trial should last 15 months, most likely more. <u>It is crucial that Ms. Parveen remain in Canada for the full duration of the clinical study</u> to ensure the best possible care and treat her infection. I am persuaded that her chances of being cured of Hepatitis C through this clinical trial are over 95 per cent. <u>If Ms. Parveen is sent back to Pakistan before the end of her treatment, the infection will continue to progress and could even be fatal. There is no equivalent treatment for Hepatitis C in Pakistan</u>.
>
> [Emphasis added]

[8] It was therefore entirely unreasonable for the officer to disregard this conclusive medical evidence, which dates from 2016 and directly concerns the applicant, and rely instead on general, inconclusive documentary evidence dating from 2010. In response, the respondent argues that even though the documentary evidence appears to suggest that Hepatitis C treatments are limited and very expensive in Pakistan, the officer did not have to consider what treatments were in fact available and whether the applicant could take advantage of free care. The respondent also submits that if there is still an imminent danger in stopping the experimental treatment which she began in March 2016 and does not appear to be currently available in Pakistan, the applicant can still raise any risk to her life or her health and present new medical evidence to the enforcement officer once she is about to be removed to her country.

[9] I do not agree with the respondent. The applicant is currently suffering from an HCV infection and is already showing signs of advanced infection, even including the early stages of cirrhosis of the liver. It is imperative that the applicant be treated and that she be able to complete the experimental treatment that she has begun in Canada. I find it highly capricious and arbitrary, in the course of analyzing this H&C request, to speculate on the possibility of seeking treatment of some sort in Pakistan, the nature and effectiveness of which is unknown, in order to play down the importance of the risk to the applicant's life or health. Similarly, it is just as unreasonable to ask the applicant, in the days leading up to her deportation, to try to satisfy an enforcement officer—whose discretion is very limited—to stay the removal order once it is already too late.

[10] What is more, at the hearing before this Court, counsel for the applicant also stressed the uncontradicted fact that the fragile health of the applicant's daughter, aged 21 months when the H&C request was filed, is a crucially important factor. In this case, it is in the best interests of the young girl not only to remain with her mother, but also to continue to receive follow-up medical care in Canada rather than in Pakistan. He also criticizes the officer for giving little weight to the risks of discrimination that her daughter will face in such a traditional and religious country. He notes that Pakistan is a Muslim country where women are already discriminated against. *A fortiori*, it may well be asked whether the fact that the young girl—a Canadian, no less—would be brought up in Pakistan by a single mother is likely to cause her harm. Limiting the analysis to the mere evidence of the availability of health care in Pakistan and the fact that the applicant was able to take care of her little girl in Canada shows a profound lack of sensitivity on the part of the officer (*Baker v Department of Citizenship and Immigration*, [1999] 2 SCR 817 [*Baker*]).

[11] Although the Court need not base its intervention on the lack of sensitivity alleged by the applicant, this is an additional reason to quash the decision under review and refer the case back to another immigration officer.

[12] First, it should be noted that there is no pre-set formula or rigid test for analyzing the best interests of the child (*Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2003] 2 FC 555 at paragraph 7 [*Hawthorne*]), other than that the officer must be "alert, alive and sensitive" to the child's best interests (*Baker*). Nonetheless, in December 2015, in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909

[*Kanthasamy*], the Supreme Court placed in their proper perspective the general principles that should guide immigration officers in exercising their discretion under section 25 of the Act.

[13] First, in light of the statute and the legislative summary, it is clear that Parliament intended to grant the Minister and immigration officers broad discretion allowing them "to mitigate the rigidity of the law in an appropriate case" (*Kanthasamy* at paragraph 19). On the one hand, there will inevitably be some hardship associated with being required to leave Canada, but this alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under subsection 25(1) of the Act (*Kanthasamy* at paragraph 23). That said, the systematic application of the "unusual and undeserved" or "disproportionate" hardship test, as defined in the Guidelines of the Act, goes against the goals of this provision. On this point, the Supreme Court held that the "three adjectives" in question do not limit the officer's power to consider factors other than those set out in the Guidelines. In short, these factors should "be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision" (*Kanthasamy* at paragraph 33).

[14] Moreover, turning to the "best interests of a child directly affected" test, the Supreme Court noted in *Kanthasamy* that this test is "highly contextual" because of "the multitude of factors that may impinge on the child's best interest" (*Kanthasamy* at paragraph 35). Needless to say, an officer cannot simply state in his or her decision that the child's interests have been taken into account (*Kanthasamy* at paragraph 39 citing, *inter alia*, *Hawthorne* at paragraph 32). Given the importance of protecting children in the Canadian justice system (*Kanthasamy* at paragraph 36 citing *AB v Bragg Communications Inc*, 2012 SCC 46 (CanLII), [2012] 2 SCR 567

at paragraph 17), the officer must first ensure that the best interests of the child are "well identified and defined" and then examine those interests "with a great deal of attention" in light of all the evidence (*Kanthasamy* at paragraph 39).

[15] In their contextual analysis of the best interests of the child, officers must consider, among other things, "each child's particular age, capacity, needs and maturity", while as the Supreme Court reminds us, "[t]he child's level of development will guide its precise application in the context of a particular case" (*Kanthasamy* at paragraph 35). On this point, the Supreme Court also noted that "[t]he Minister's Guidelines set out relevant considerations for this inquiry" (*Kanthasamy* at paragraph 40), and it cited the following factors found in section 5.12 of those Guidelines:

- the age of the child;
- the level of dependency between the child and the [humanitarian and compassionate] applicant or the child and their sponsor;
- the degree of the child's establishment in Canada;
- the child's links to the country in relation to which the [humanitarian and compassionate] assessment is being considered;
- the conditions of that country and the potential impact on the child;
- medical issues or special needs the child may have;
- the impact to the child's education; and
- matters related to the child's gender.

[16] Finally, after reiterating that "'[c]hildren will rarely, if ever, be deserving of any hardship', the concept of 'unusual and undeserved hardship' is presumptively inapplicable to the

assessment of the hardship invoked by a child to support his or her application for humanitarian and compassionate relief" (*Hawthorne* at paragraph 9), the Supreme Court clarified that "[b]ecause children may experience greater hardship than adults faced with a comparable situation, circumstances which may not warrant humanitarian and compassionate relief when applied to an adult, may nonetheless entitle a child to relief" (*Kanthasamy* at paragraph 41). In *Kanthasamy*, after analyzing the reasonableness of the decision under review, the Supreme Court criticized the officer for having required additional evidence regarding the treatment available to the child in the country of origin, when even the officer had accepted the child's diagnosed post-traumatic stress disorder (Kanthasamy at paragraphs 47-48).

[17] There is most likely a connection to be made with the present case. Indeed, the officer did not consider the best interests of the applicant's child to be a determining factor, despite the admission of her specific medical condition, essentially because of the availability of health services in Pakistan. In my view, the reasoning that simply remaining in Canada will be in the best interests of a child only if the other country is unable to meet the child's "basic needs" runs contrary to the general purpose of section 25 of the Act (*Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166 at paragraph 64; *Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813, [2012] FCJ No. 842 at paragraphs 15-16; *Akyol v Canada (Citizenship and Immigration)*, 2014 FC 1252, [2015] FCJ No. 175 at paragraphs 20-21; *Felix v Canada (Citizenship and Immigration)*, 2014 FC 582, [2014] FCJ No. 623 at paragraph 31).

[18] Moreover, before *Kanthasamy*, this Court had criticized this approach by which officers limited themselves to determining the magnitude of the hardship or harm, rather than actually

considering what was in the child's best interests (*Conka v Canada (Citizenship and Immigration)*, 2014 FC 985, [2014] FCJ No. 1032 [*Conka*]). *Conka* concerned the best interests of a Slovak teenager of Roma ethnicity who, in addition to having autism and developmental disabilities, was struggling with chronic kidney failure. In addition to the state protection issue, the officer had acknowledged the teenager's diagnosis and the existence of discrimination against the Roma people with regard to access to health care. His H&C application was nonetheless rejected. There was insufficient evidence to demonstrate that the services offered in the teenager's country of origin were inadequate in this regard, compared with those he was receiving in Canada. Referring to *Sebbe*, the Court noted that the officer was not tasked with evaluating whether the child's basic needs would be met in his country of origin, but rather with evaluating what would be in the child's best interests (*Conka* at paragraph 21). The Court noted that even if the best interest of children is not necessarily determinative, the very purpose of the H&C application is to ensure that those interests are met, and that children do not suffer hardship (*Conka* at paragraph 23).

[19] In the case under review, apart from the usual formulaic statements—where the best interests of the child are at issue—and the general finding that there was nothing to suggest that the young girl could not receive treatment in Pakistan, the officer does not seem to have considered what would in fact be in the best interests of the applicant's daughter. Aside from the comment that the girl would be able to accompany the applicant to Pakistan and that the applicant had taken good care of her while in Canada, the officer did not conduct a contextual analysis of the child's situation or examine the consequences that being brought up by a single mother in Pakistan could have on her.

[20] This application for judicial review is allowed. The officer's decision is set aside, and the case is referred back to another officer for redetermination. No question of general importance is raised in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed. The officer's decision is set aside, and the case is referred back to another officer for redetermination. No question is certified.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Claude Whalen	FOR THE APPLICANT
Thi My Dung Tran	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Claude Whalen Lawyer Montréal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT