Federal Court  Cour fédérale

Date: 20190103

Docket: IMM-1395-18

Citation: 2019 FC 4

Ottawa, Ontario, January 3, 2019

PRESENT: Mr. Justice Grammond

BETWEEN:

RABIA BOUKHANFRA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Ms. Rabia Boukhanfra, a citizen of Morocco, applied for relief on humanitarian and compassionate [H&C] grounds to be allowed to file an application for permanent residence from Canada. Her application was denied. She now seeks judicial review of that decision. She argues that the officer who rendered the decision unduly required her to demonstrate hardship and failed to properly assess the best interests of the children affected and her establishment in Canada. I am dismissing her application, because, on a fair reading of the officer's reasons, none of those

errors were committed. The decision was reasonable and the intervention of this Court is not warranted.

[2] Ms. Boukhanfra came to Canada in April 2015 on a visitor visa. She was hired by Ms. Ichraq Ayad to provide care to her two children, aged 7 and 14. Ms. Ayad is employed as a senior financial analyst, which she describes as a demanding job. Ms. Ayad was divorced from her husband in 2013 and is now a single mother. Moreover, Ms. Ayad is attending frequent counselling sessions, for reasons that it is not necessary to describe here.

[3] In an attempt to regularize her situation in Canada, Ms. Boukhanfra applied for H&C relief. On February 17, 2018, a senior immigration officer denied her application. Ms. Boukhanfra now seeks judicial review of that decision.

I. Basic Principles

[4] H&C applications are based on section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], which says that the Minister may grant the requested relief if he "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." A decision made under section 25 is discretionary. The decision-maker must weigh several relevant factors, but there is no rigid algorithm that determines the outcome. In a leading case on this topic, Justice Rosalie Abella of the Supreme Court of Canada noted that H&C relief was meant "to mitigate the rigidity of the law in an appropriate case" (*Kanthasamy v Canada (Citizenship and*

Immigration), 2015 SCC 51 at para 19, [2015] 3 SCR 909 [*Kanthasamy*]). The H&C process, however, was not "intended to be an alternative immigration scheme" (*Kanthasamy* at para 23).

[5] This Court reviews H&C decisions on a standard of reasonableness (*Kanthasamy* at para 44). This means that I must not ask myself what decision I would have rendered. I must simply ensure that the decision under review is based on a defensible interpretation of the applicable legal principles and a reasonable assessment of the evidence before the decision-maker. In that context, this Court's role is not to assess the relevant factors or to exercise the discretion anew, but simply to verify that the decision-maker turned his or her mind to the relevant factors and gave them due consideration.

[6] Since the decision of the Supreme Court in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dusnmuir*], judicial review of administrative decisions has increasingly focused on the reasons given by decision-makers. Those reasons must demonstrate "justification, transparency and intelligibility within the decision-making process" (*Dunsmuir* at para 47). Nevertheless, reasons need not be exhaustive or perfect. As Justice Abella mentioned in a subsequent case:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion […] In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

> (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708)

[7] In addition to facilitating judicial review, providing reasons may achieve other objectives (John M Evans, "Writing Effective Tribunal Decisions and Reasons" (2002) 16 CJALP 95). The duty to give reasons may be a form of quality assurance: the process of writing reasons ensures that "issues and reasoning are well articulated and, therefore, more carefully thought out" (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 39 [*Baker*]). Giving reasons promotes consistency in decision-making. Requiring decision-makers to provide reasons is also a manner of holding them accountable to the public and to assure litigants that their arguments have been considered, thereby enhancing the legitimacy of the decision-making process. Lastly, the publication of reasons assists litigants in understanding how the law is actually applied.

[8] I venture to add this. In a context of mass adjudication, there is an inherent tension between the need for efficiency and the requirement of an individualized decision. As is well-known, decision-makers cannot "fetter their discretion" through the adoption of rigid guidelines (*Maple Lodge Farms v Government of Canada*, [1982] 2 SCR 2 at 5-6; *Kanthasamy* at para 32; *Delta Air Lines Inc. v Lukács*, 2018 SCC 2 at para 18 [*Delta Air Lines*]). They must consider the merits of each individual case. Reasons, in this regard, play a critical role. By forcing decision-makers to write reasons, we ensure that they pay attention to the specific features of each case. Reasons that merely state a conclusion without explaining its justification do not provide that assurance (see, for example, *R v Sheppard*, 2002 SCC 26, [2002] 1 SCR 869).

[9] Under the pressure of mass adjudication, decisions-makers may be tempted to resort to standard or "boilerplate" language that has survived judicial review or that courts have used to describe the test that they have to apply. Nothing forbids such a practice. Decision-makers are required to be transparent, not to be original (*Cojocaru v British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at paras 31–33, [2013] 2 SCR 357). The use of standard language, however, is not a vaccine against judicial review. If the conclusion does not flow from the premises, or if the use of boilerplate gives cause to doubt that the decision-maker duly considered the specific facts of the case, the decision may well be unreasonable. Conversely, the lack of standard language or the decision-maker's failure to state the test he or she is applying does not automatically pave the way to the intervention of the Court. What is important is that the reasons be intelligible and that they describe a reasonable path to the decision that was made.

[10] With these principles in mind, I now turn to an analysis of Ms. Boukhanfra's arguments.

II. Hardship

[11] Ms. Boukhanfra first impugns the decision on the basis that the officer impermissibly measured her case against the yardstick of "hardship." To understand this argument, it is necessary to return for a moment to the Supreme Court's *Kanthasamy* decision. The departmental guidelines regarding H&C applications then directed officers to consider whether applicants would suffer "undue and undeserved or disproportionate hardship" if the application were refused. Before *Kanthasamy*, a number of decisions had treated this statement as a rigid test, as a hurdle that applicants had to overcome in order for their case to be considered. In *Kanthasamy*, Justice Abella held that this approach was incorrect. Decision-makers should not

use the concept of "hardship" as the test. Rather, they must consider all the relevant circumstances and have regard to the "equitable underlying purpose of the humanitarian and compassionate relief application process" (*Kanthasamy* at para 31), a process sometimes known as the "*Chirwa* approach." But Justice Abella did not proscribe the use of the concept of "hardship," provided that it is seen as "instructive but not determinative" (*Kanthasamy* at para 33).

[12] The officer in this case used the concept of hardship in the discussion of the consequences that Ms. Boukhanfra's departure would have on Ms. Ayad and her children. The officer wrote:

> […] the evidence before me does not support that severing these ties would constitute a hardship such that it warrants an exemption.
>
> […] the evidence before me does not support that this inconvenience amounts to a hardship.

[13] When the decision is read in its entirety, however, it is obvious that the officer considered all the circumstances alleged by Ms. Boukhanfra. Nevertheless, the officer found that these circumstances were insufficient to warrant relief.

[14] This accords with *Kanthasamy*, in which Justice Abella noted that

> There will inevitably be some hardship associated with being required to leave Canada. This alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under s. 25(1) […].
>
> (*Kanthasamy* at para 23)

[15] Officers must find ways of expressing findings to the effect that what has been shown to them is insufficient to warrant relief. Opposing the concepts of “inconvenience” and “hardship” is an effective manner of conveying this idea. The use of the term “hardship” may be unfortunate, as it gives the impression that the officer did what *Kanthasamy* forbids. In this regard, as I mentioned above, what is significant is not the use of specific words, but the fact that the reasons provide a justification that accords with the directions given by the Supreme Court in *Kanthasamy*. In this regard, my colleague Justice Henry Brown recently stated:

> H&C Officers should not only consider the traditional hardship factors, but in addition, they must consider the *Chirwa* approach. I do not say that they must recite *Chirwa* chapter and verse, nor that there are any magic formulae or special words these Officers must use. But the reviewing courts should have some reason to believe that the Officers have done their job, that is, that H&C Officers have considered not just hardship but humanitarian and compassionate factors in the broader sense.
>
> (*Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at para 33)

[16] In that case, the decision of the H&C officer was quashed. However, the facts of the decision were such that denying H&C relief would be substantively unreasonable on any conceivable test. My colleague’s remarks with respect to the use of the concept of hardship must, I believe, be read in this light.

[17] In the end, I am satisfied that the officer in this case took a broad approach and considered all the relevant factors put forward by Ms. Boukhanfra.

III. Best Interests of the Children

[18] Ms. Boukhanfra also argues that the officer failed to give due consideration to the best interests of Ms. Ayad's children, who would be affected by her departure from Canada. She says that the officer should have stated what the best interests of the children are, instead of merely finding that Ms. Boukhanfra's return to Morocco would not be against their best interests. She also says that insufficient weight was given to this factor.

[19] Once again, Ms. Boukhanfra's arguments are mainly directed at the sufficiency of reasons. In this regard, a passage in *Kanthasamy* may be read as requiring officers to use a specific formulation in their reasons:

> A decision under s. 25(1) will therefore be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered: *Baker*, at para. 75. This means that decision-makers must do more than simply *state* that the interests of a child have been taken into account: *Hawthorne*, at para. 32. Those interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence: *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 F.C. 358 (C.A.), at paras. 12 and 31; *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 165, 323 F.T.R. 181, at paras. 9-12.
>
> (*Kanthasamy* at para 39)

[20] In this regard, certain decisions of this Court held that an H&C decision is unreasonable if the officer fails to describe, as a first step of the reasoning, what is in the best interests of the child (*Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 at paras 63–64; *Jimenez v Canada (Citizenship and Immigration)*, 2015 FC 527 at para 29). Other decisions, however, denied that such an approach is mandatory (*Jaramillo v Canada (Citizenship and Immigration)*,

2014 FC 744 at paras 69–74; *Onowu v Canada (Citizenship and Immigration)*, 2015 FC 64 at para 44). My colleague Justice Richard Southcott recently explained how the first line of cases mentioned above should be interpreted:

> I read these authorities as examples of cases in which an officer conducted a unreasonable BIOC analysis by failing to consider all possibilities as to whether an applicant would be removed from Canada or permitted to stay in Canada, whether children affected by the decision would leave Canada or remain in Canada as a result, and the resulting effect upon the children and their best interests. I do not read these authorities as prescribing a particular legal test to be applied or avoided in conducting a BIOC analysis.
>
> (*Khokhar v Canada (Citizenship and Immigration)*, 2018 FC 555 at para 12)

[21] Indeed, Justice Abella, who had written the reasons of the Court in *Newfoundland Nurses*, cannot be taken to have required, in *Kanthasamy*, officers to use a specific formula or to provide extensive reasons where the issues are well-defined.

[22] One reason for requiring H&C officers to provide more fulsome reasons with respect to the best interests of the child may be the need to enforce the change in the law that was initiated by *Baker*, then affirmed by an amendment to section 25 of the Act and more recently reaffirmed in *Kanthasamy*. Judges of this Court may have felt the need to impose a duty to give more detailed reasons in order to make sure that officers did not dismiss the best interests of the child out of hand.

[23] I doubt, however, that mandating the use of one formula instead of another will accomplish that purpose. After all, what we are looking for is the officer's ability to apply the

test, not merely an ability to recite it. The requirement of intelligibility laid out in *Dunsmuir* is, in my view, the best way of assessing the officers' fidelity to the law.

[24] In this case, I am satisfied that the officer properly assessed the best interests of Ms. Ayad's children. The decision refers to the circumstances of the Ayad family and the help provided by Ms. Boukhanfra. The officer implicitly recognized the bonds that Ms. Boukhanfra has established with Ms. Ayad's children when noting that there may be a "period of adjustment." The officer also noted the paucity of evidence describing those bonds. After reviewing the record, I find that this is a reasonable assessment. One must not forget that an H&C applicant has the burden of providing the relevant information, including information regarding the best interests of children (*Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 5, [2004] 2 FC 635; *Kisana v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 35, [2010] 1 FCR 360). The fact that the officer did not preface the analysis with an assessment of the best interests of the children in the abstract does not render the decision unreasonable.

IV. Establishment in Canada

[25] Lastly, Ms. Boukhanfra argues that the H&C officer conducted a distorted assessment of her establishment in Canada. This argument challenges the following conclusion reached by the officer:

> During her time in Canada, a measure of establishment is expected to occur; however, this in and of itself may not justify the granting of an exemption based on humanitarian and compassionate grounds. I recognize that leaving Canada must be difficult;

> however, the applicant's time in Canada is not exceptional in relation to others in a similar situation.

[26] Ms. Boukhanfra argues that the allusion to a requirement of "exceptionality" is an error that led this Court, on other occasions, to quash an H&C decision (*Ndlovu v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 878 at paras 12–15; *Sivalingam v Canada (Citizenship and Immigration)*, 2017 FC 1185 at paras 13–15 [*Sivalingam*]).

[27] The concept of establishment refers to a form of prescriptive claim to remain in Canada. In other words, the fact that an applicant has established strong ties to Canada is a factor that favours the granting of H&C relief. Yet, this idea is in tension with the exceptional nature of H&C relief and the fact that this process must not become an alternative immigration stream (*Kanthasamy* at para 23).

[28] Thus, strong ties will be required to justify H&C relief. The strength of those ties, however, cannot be measured with mathematical precision. Time is a factor, but it is not the only one.

[29] In this context, statements to the effect that an applicant's establishment is not exceptional may mean that, all things considered, the applicant has not shown ties that are strong enough to justify an exemption from the requirements of the law. They may also constitute boilerplate language intended to cover the officer's disregard of the facts establishing the strength of the ties. Only an analysis of the officer's reasons, taken as a whole, can discriminate

between the former and the latter. The mere use of the language of exceptionality, while unfortunate, does not direct the verdict.

[30] In *Sivalingam*, for example, the officer's finding that establishment was not "above and beyond or extraordinary to what is expected of a person coming to Canada" could simply not be reconciled with the fact that Mr. Sivalingam, now aged 27, came to Canada with his family when he was 12 years old, married a Canadian citizen, had a Canadian child and clearly had much stronger ties to Canada than to his country of origin.

[31] In this case, in contrast, Ms. Boukhanfra has been present in Canada for about three years. She grew up, was educated and worked in Morocco, where her family remains. She spent most of her life in Morocco. While she has established bonds with the Ayad family in Canada, the H&C officer was of opinion that this was not enough to warrant relief. This is how I understand the statement that "the applicant's time in Canada is not exceptional." Again, the language of exceptionality is unfortunate, but it is not, in this case, the badge of an unreasonable decision-making process. We are far from the circumstances of *Sivalingam* or similar cases.

[32] To summarize, Ms. Boukhanfra has not persuaded me that the H&C officer made an unreasonable decision. The application for judicial review will be dismissed.

JUDGMENT in IMM-1395-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No question is certified.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1395-18
STYLE OF CAUSE:	RABIA BOUKHANFRA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 6, 2018
JUDGMENT AND REASONS:	GRAMMOND J.
DATED:	JANUARY 3, 2019

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