Federal Court Cour fédérale

Date: 20190405

Docket: IMM-4915-18

Citation: 2019 FC 417

Ottawa, Ontario, April 5, 2019

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

KAISAR BAKAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

<u>JUDGMENT AND REASONS</u>

[1] The Applicant seeks judicial review of an immigration officer's [Officer] decision [Decision] dated September 18, 2019 to refuse the Applicant's application for permanent residence on humanitarian and compassionate [H&C] grounds.

[2] The Applicant submits that the Officer applied the incorrect test in assessing the H&C application, that the Decision is unreasonable with respect to the best interest of his children [BIOC] and that the Officer's H&C analysis of the Applicant's circumstances is unreasonable.

I. Overview

[3] The Applicant is a 50 year old Bangladeshi man. He is married and has two children, a daughter aged 17 and a son aged 12. The Applicant's wife and two children remained in Bangladesh throughout his entire stay in Canada.

[4] The Applicant entered Canada on September 18, 2008 on a valid temporary resident visa and a foreign work permit which expired in December 2011 following an extension. Just prior to the expiration of the extended work permit, the Applicant suffered a heart attack. A short-term (10 month) work permit was issued to the Applicant in May 2012.

[5] One year after the expiration of the Applicant's term work permit, the Applicant claimed refugee status. His claim was ultimately denied as "manifestly unfounded" by the Refugee Protection Division [RPD] on January 20, 2016. Leave to bring an application for judicial review of the RPD decision was dismissed by Mr. Justice Keith Boswell on May 3, 2016 in Court File No. IMM-689-16.

[6] The Applicant then applied for a pre-removal risk assessment and for permanent residence based on H&C grounds. The Applicant also sought an exemption from the in-Canada eligibility criteria so that he may apply for permanent residence from within Canada. In his

statement in support of his H&C application, the Applicant states that he is well-established in Canada. Since his arrival in Canada, he has held numerous employments, volunteered in his community and formed many meaningful relationships with his friends, coworkers and associates. He writes that the hardship due to the country conditions in Bangladesh, along with his level of education, his political affiliation with the country's ruling party, and his financial support of his family in Bangladesh all warrant the grant of permanent residence on an H&C basis. Moreover, the Applicant adds that the BIOC militates in favour of his permanent residence in Canada because without the Applicant's financial support, his children will be forced to leave their current school and home, leaving them without an education and a future.

[7] After reviewing the evidence submitted by the Applicant and his submissions, the Officer concluded that there was insufficient evidence or grounds upon which to grant the H&C application.

II. Issues

[8] The Applicant has raised three issues on judicial review:

A. Whether the Officer applied the incorrect test in assessing the H&C application?

B. Whether the Decision with respect to the best interests of the Applicant's children is reasonable?

C. Whether the Officer erred in the analysis of the Applicant's H&C application?

III. Standard of Review

[9] The parties agree that the standard of review applicable to an officer's H&C decision under section 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] is that of reasonableness (*Kanthasamy v Canada (Minister of Citizenship and Immigration)*, *2015 SCC 61* [*Kanthasamy*] at para 44; *Taylor v Canada (Minister of Citizenship and Immigration)*, 2016 FC 21 at para 16).

[10] A reasonableness review asks whether the impugned decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*New Brunswick (Board of Management) v Dunsmuir*, 2008 SCC 9 at para 47). Exemptions for H&C reasons are discretionary and an applicant is not entitled to a particular outcome. On judicial review under the reasonableness standard, the Court is not to reweigh the evidence that was before the decision-maker and substitute its own view (*Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 24).

[11] The question of whether the Officer applied the wrong legal test in the H&C analysis, however, attracts the correctness standard (*Marshall v Canada (Minister of Citizenship and Immigration)*, 2017 FC 72 at para 27). Therefore, no deference is owed to the Officer on this issue.

IV. Analysis

A. *Whether the Officer applied the incorrect test in assessing the H&C application?*

[12] The Applicant submits that the Officer failed to have sufficient regard to the equitable purpose behind section 25 of the IRPA and applied the incorrect legal test in assessing the H&C application. In support of his argument, the Applicant points to certain statements made by the Officer, such as "a positive decision…is an exceptional response to a particular set of circumstance" or "discretion is only to be used in exceptional circumstances" as evidence that the Officer fettered the equitable humanitarian and compassionate discretion granted by subsection 25(1). I disagree.

[13] This Court has consistently held that H&C relief is an exceptional and extraordinary remedy: *Li v Canada (Citizenship and Immigration),* 2018 FC 187 at paras 25-26; *LE v Canada (Immigration, Refugees and Citizenship),* 2018 FC 930 at paras 37-38; *Huang v Canada (Citizenship and Immigration)*, 2019 FC 265 [*Huang*] at paras 20 and 21. It is not an alternative immigration stream or appeal mechanism for failed permanent residence applications.

[14] The one decision cited by the Applicant, *Apura v Canada (Citizenship and Immigration)*, 2018 FC 762, which suggests that the absence of exceptional or extraordinary circumstances cannot form the basis of a decision to deny H&C relief, appears to be an outlier. Not only does it fly in the face of well-established jurisprudence, it has been squarely rejected by this Court in *Nguyen v Canada (Citizenship and Immigration),* 2017 FC 27 at para 29, and more recently in a decision of the Chief Justice of this Court in *Huang* at paras 20 and 21:

> 20 Put differently, applicants for H&C relief must "establish exceptional reasons as to why they should be allowed to remain in Canada" or allowed to obtain H&C relief from abroad: *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, at para 90. This is simply another way of saying that applicants for such relief must demonstrate the existence of misfortunes or other circumstances that are exceptional, relative to other applicants who apply for permanent residence from within Canada or abroad: *Jesuthasan, v Canada (Citizenship and Immigration)*, 2018 FC 142, at paras 49 and 57; *Kanguatjivi v Canada (Citizenship and Immigration)*, 2018 FC 327, at para 67.
>
> 21 I recognize that in *Apura v Canada (Citizenship and Immigration)*, 2018 FC 762, at para 23, this Court suggested that it would be an error to deny an H&C application based on the absence of "exceptional" or "extraordinary" circumstances. To the extent that this statement is inconsistent or in tension with the principles quoted in paragraphs 19 and 20 above, and with other jurisprudence that can be fairly read as having adopted a similar approach, I consider that it does not accurately reflect the existing state of the law: see, e.g., *Li v Canada (Citizenship and Immigration)*, 2018 FC 187 at paras 25-26; *L. E. v Canada (Citizenship and Immigration)*, 2018 FC 930, at paras 37-38; *Yu v Canada (Citizenship and Immigration)*, 2018 FC 1281, at para 31; *Brambilla v Canada (Citizenship and Immigration)*, 2018 FC 1137, at paras 14-15; *Sibanda v Canada (Citizenship and Immigration*, 2018 FC 806, at paras 19-20; *Jani v Canada (Citizenship and Immigration)*, 2018 FC 1229, at para 25; *Ngyuen v Canada (Citizenship and Immigration)*, 2017 FC 27 at para 29.

[15] The Applicant has failed to establish that the Officer imposed a higher burden of proof on the Applicant that does not find expression in the text of section 25 when assessing his H&C application. Moreover, the Officer did not conduct the H&C analysis through the lens of hardship as suggested by the Applicant. Rather, the Officer considered the entirety of the Applicant's evidence and submissions in a holistic manner. The material submitted was found to be wanting, and the Officer determined that the Applicant's circumstances and that of his children were not out of the ordinary – in other words, not "exceptional" or "extraordinary". The

use of such adjectives does not necessarily invoke a sinister connotation as long as the Decision as a whole demonstrates that the Officer fairly considered and balanced the relevant facts.

[16] Upon a careful review of the detailed Decision, I am not persuaded that the Officer applied an incorrect test in analyzing either the BIOC or the H&C application as a whole. On this ground, therefore, judicial review cannot succeed and the standard of review of correctness does not apply.

B. *Whether the Decision with respect to the best interests of the Applicant's children is reasonable?*

[17] The Applicant submits that the Officer failed to undertake the highly contextual analysis of the BIOC as established by the Supreme Court of Canada in *Kanthasamy*, which requires that the decision-maker do more than simply state that the interests of a child have been taken into account. Once again, I disagree.

[18] At pages 9 and 10 of the Decision, the interests of the Applicant's two children are well identified, defined and examined by the Officer with due attention to the material submitted.

[19] At the hearing, counsel for the Applicant clarified that the Applicant was not taking issue with the Officer's BIOC analysis of a scenario where his children would be reunited with their father in Canada. The thrust of the Applicant's submissions was that it was in the best interest of his two children that he be allowed to remain in Canada to work and to provide for his family

financially. An emphasis was placed on ensuring that his children could pursue their education in a private college.

[20] The integrity of the immigration process is premised on the onus of an applicant to ensure the completeness and accuracy of his or her application. The Applicant was given notice in the application form that he had to include all factors he wished to have considered and also provide evidence to support any statements he made in the form. The Officer found, however, that there was a lack of evidence of the Applicant's personal finances and that no details were provided regarding the cost of his children's schooling and accommodations.

[21] The Officer was satisfied that the Applicant could re-establish himself in Bangladesh to a level where he could support himself as well as his family. This finding was based on the Applicant's education and employment history, his ability to successfully adapt to new environments, and the low unemployment rate in Bangladesh.

[22] In the circumstances, it was reasonable for the Officer to conclude that the country conditions in Bangladesh did not present an exceptional difficulty for the Applicant to support his family if he is required to leave Canada. I am satisfied that the Officer properly considered the BIOC in its entirety and reasonably came to the conclusion that "the weight accorded to the BIOC is not enough to justify an exemption because of the insufficient evidence demonstrating a negative impact on the children's wellbeing or development if the applicant leaves Canada".

[23] Moreover, the Officer correctly observed that the BIOC analysis need not be determinative of the outcome of the application: *Huang* at para 24. For the above reasons, I am satisfied that the Officer was alert, alive and sensitive to the children's interest and that it was reasonable for the Officer to find that the overall BIOC did not outweigh other considerations.

C. *Whether the Officer erred in the analysis of the Applicant's H&C Application?*

[24] The Applicant submits that the Officer took a segmented approach in the H&C analysis, essentially analyzing each factor in isolation. He argues that the Officer did not globally assess and balance these factors and that the Officer lacked empathy in the analysis of his circumstances.

[25] In my view, the Officer cannot be criticized for the manner in which the relevant factors, such as establishment, health considerations, risk and adverse country conditions and the BIOC, were analyzed. The Officer considered in detail the Applicant's situation and establishment in Canada. The Officer also combed through the Applicant's employment history. The Officer found that the Applicant deserved credit for putting down roots by obtaining housing and finding employment and for making a positive contribution to Canadian society, but considered these factors unremarkable for a person residing in Canada for almost eight years.

[26] As for the health considerations of the Applicant, the Officer determined that his medical examination results indicated that he is not medically inadmissible. Aside from the Applicant's bald assertions, the Officer did not have any evidence to give weight to his health concerns and the accessibility and costs of medication in Bangladesh.

[27] The Officer also considered the Applicant's statement that he was unable to find employment and settle down in Bangladesh during his brief visit in 2012 because of "political crisis/illegal political influence on my family" and the "deteriorating economy in Bangladesh". The bald assertion was given little weight given that it was uncorroborated by any evidence. While accepting that returning to a country one has been absent from for several years naturally causes some dislocation and hardship, the Officer found that there is no evidence to suggest that the Applicant would be unable to find housing and support from his immediate and extended family.

[28] The Applicant does not identify any reviewable error on the Officer's behalf. He is essentially asking the Court re-weigh the evidence adduced before the Officer, which is not the Court's role on judicial review *(Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, para 61). I find the Decision reasonable, given that the Officer evaluated the Applicant's circumstances as a whole and was persuaded that it did not warrant the remedy.

[29] Finally, counsel for the Respondent submitted in her memorandum of argument that the application should be dismissed because the Applicant does not come to Court with clean hands. As this allegation was not raised before the Officer and no finding was made with regard to the authenticity of the Applicant's evidence, this Court will not entertain this argument.

V. Conclusion

[30] For the reasons above, the application for judicial review is dismissed. As the parties did not propose any questions for certification, none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question is certified.

"Roger R. Lafrenière"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4915-18
STYLE OF CAUSE:	KAISAR BAKAL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	APRIL 3, 2019
JUDGMENT AND REASONS:	LAFRENIÈRE J.
DATED:	APRIL 5, 2019

APPEARANCES:

Rekha McNutt Peter W. Wong, Q.C.	FOR THE APPLICANT
Galina Bining	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Caron & Partners LLP Barristers and Solicitors Calgary, Alberta	FOR THE APPLICANT
Attorney General of Canada Calgary, Alberta	FOR THE RESPONDENT