Federal Court  Cour fédérale

Date: 20220527

Docket: IMM-4107-21

Citation: 2022 FC 773

Ottawa, Ontario, May 27, 2022

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

MANDEEP KAUR TOOR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is the judicial review of a decision of a senior immigration officer [Officer] refusing the Applicants' application for permanent residence. The application was based on humanitarian and compassionate [H&C] grounds pursuant to s 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

Background

[2] The Applicant is a 58-year-old citizen of India. She was issued a temporary resident visa in August 2016, which is valid until March 3, 2024. The Applicant entered Canada on September 27, 2019, and has been residing since then with her son, his wife and their two children, ages three and five. On November 12, 2020, the Applicant made an application for permanent residence from within Canada based on H&C grounds, pursuant to s 25(1) of the IRPA. The application was denied by the Officer by letter dated June 5, 2021.

Decision under review

[3] The Officer noted that the Applicant had identified her family ties in Canada, the best interests of the children and a lack of support in India as the basis for her H&C claim.

[4] The Officer noted the desire of the Applicant to live with her son and his family in Canada and found that these important and meaningful ties weigh in her favour. However, there was insufficient evidence that the personal situation of the Applicant is substantively distinguishable from similarly situated other persons who also wish to permanently join family in Canada. The Officer also noted that there was little evidence of other factors or circumstances (such as a pronounced establishment or prolonged residency in Canada) that might provide additional weight in support of the exemption request. In view of the absence of such factors, as well as the apparent lack of exceptional circumstances characterizing the Applicant's family relationships, the Officer found that the Applicant's preference to live with her family in Canada was alone insufficient to grant the exemption request.

[5] As to the best interests of the Applicant's grandchildren, the Officer stated that they were mindful of the fact that the Applicant's family in Canada had become accustomed to her physical presence and may certainly miss her. The Officer was satisfied that the Applicant helps take care of her grandchildren but found that there was insufficient evidence to demonstrate that alternative child care arrangements could not be made or that the Applicant's grandchildren would be unable to learn the culture and language of India through their parents or community programs. The Officer found that the Applicant has created a deep emotional bond with her grandchildren but was not satisfied that the relationship could not be maintained, or that separation from the children would sever those bonds, if the Applicant returned to India. The Officer found that insufficient evidence had been put forth to support that the relationships are characterized by a degree of interdependency and reliance to such an extent that would justify granting an exemption on H&C grounds.

[6] The Officer acknowledged the Applicant's submission that she had no family in India to care for her and that it would be expensive for her Canadian family to visit her. The Officer also acknowledged the Applicant's statement that she relies on the support of her son in Canada but noted that the Applicant has resided in India most of her life, that the information before the Officer suggested that she is active and able-bodied, and that she had previously returned to India and lived on her own. The Officer acknowledged the Applicant's submission that her family was supporting her financially, but noted that there was no evidence that they could not continue to do so if she returned to India. In addition, the Applicant's adult daughter and siblings live in India and there was insufficient evidence that they would be unwilling or unable to assist her with resettlement and reintegration into her community.

[7] The Officer also pointed out that the Applicant holds a valid visa through March 3, 2024 and there was no evidence that she cannot continue to meet the requirements of her temporary status prior to becoming eligible to be sponsored for permanent residence. Thus, the Applicant already has the ability to live with her family in Canada. There was no evidence that the refusal of the H&C application would require her to leave Canada at this time or to otherwise be away for any considerable duration in the foreseeable future. Accordingly, it was difficult to conclude that a rejection of her H&C application would likely result in any in permanent or significant severing of family ties.

[8] The Officer stated that based on a global assessment of the H&C factors presented by the Applicant and her submissions as well as the available information relating to her personal circumstances, they were not satisfied that the Applicant had provided sufficient evidence to establish that a positive exemption was warranted on H&C grounds.

Issue and standard of review

[9] The sole issue in this matter is whether the Officer's decision was reasonable.

[10] The parties submit and I agree that the standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23 and 25). On judicial review, the Court "asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

Reasonableness of the Officer's decision

Applicant's position

[11] The Applicant submits that the Officer erred in law as their reasons demonstrate a lack of understanding and consideration of the objectives of family unification as found in s 3(1)(d) of the IRPA and failed to consider the totality of the evidence. Further, that the Officer unreasonably assessed the best interests of her grandchildren. The Applicant submits that the Officer erred in failing to assess the unfair lottery system for sponsorship for parents and grandparents and the Applicant's eligibility for the lottery. And, in failing to conduct a realistic assessment of the Applicant's hardship upon return to India.

Respondent's position

[12] The Respondent submits that the Applicant failed to demonstrate that the dislocation and hardship is so exceptional, or that there are such compelling circumstances, that H&C relief is warranted. Nor did the Applicant establish that there was anything preventing her from seeking permanent residence in the normal manner outside of Canada. A desire or preference not to be inconvenienced by having to return to a home country to pursue permanent residence in the normal course is not sufficient to meet the exceptional and extraordinary threshold required for H&C relief.

[13] The Respondent further submits that the Applicant has not demonstrated that the Officer misapprehended or ignored any relevant evidence. The Officer's reasons show that they based

their refusal on the totality of the information before them, and carefully considered the various grounds raised by the Applicant. Further, the Officer's best interests of the child analysis was reflective of the evidence submitted, and was reasonable.

Analysis

[14] Section 25(1) of the IRPA gives the Minister discretion to exempt foreign nationals from the ordinary requirements of the IRPA if the Minister is of the opinion that such relief is justified by H&C considerations relating to the foreign national, taking into account the best interest of a child directly affected. In this case, if warranted, an H&C exemption would permit the Applicant to obtain permanent resident status without having to leave Canada to apply for that status, which is the normal route (*Titova v Canada (Citizenship and Immigration)*, 2021 FC 654 at paras 20-21).

[15] In this regard, jurisprudence establishes that an H&C exemption is an exceptional and discretionary remedy, which is intended to provide a flexible and responsive exception to the ordinary operation of the IRPA, or, a discretion to mitigate the rigidity of the law in an appropriate case. 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 H&C grounds under s 25(1). Nor is s 25 an alternative immigration scheme. Rather, s 25 is intended to offer equitable relief in circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another" (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at paras 13, 19, 21, 23; *Shackleford v Canada (Citizenship and Immigration)*, 2019 FC 1313 at paras 12, 15, 16; *Marshall v Canada*

(Citizenship and Immigration), 2017 FC 72 at para 31; *Del Pilar Capetillo Mendez v. Canada (Citizenship and Immigration)*, 2022 FC 559 at para 49).

[16] The onus of establishing that an H&C exemption is warranted lies with the applicant (*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 45). H&C applicants must put their best foot forward and it is not the role of an officer to fill in the blanks left by an applicant (*Lin v Canada (Citizenship and Immigration)*, 2022 FC 341 at para 22; *Brambilla v. Canada (Citizenship and Immigration)*, 2018 FC 1137 at para 19; *Singh v. Canada (Citizenship and Immigration)*, 2022 FC 339 at paras 24-37). This means that an applicant must provide sufficient evidence to convince the officer to grant this exceptional remedy. What warrants relief will vary depending on the facts and context of each case, but officers making H&C determinations must substantively consider and weigh all relevant facts and factors before them (*Kanthasamy* at para 25).

[17] As to the best interests of a child directly affected, this is highly contextual and must be applied in a manner responsive to each child's particular age, capacity, needs and maturity (*Kanthasamy* at para 35). Officers should consider the children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them (*Kanthasamy* at para 38). To demonstrate that a decision maker is alert, alive, and sensitive to the best interests of the child, it is necessary for the analysis in issue to address the unique and personal consequences that removal from Canada would have for the children affected by the decision (*Semana v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1082 [*Semana*] at paras 25–26; also see *Nguyen v Canada (Citizenship and Immigration)*, 2017 FC 27 at para 25). That

said, the burden is on an applicant to advance meaningful evidence in support of an analysis of a child's best interests (*Osorio Diaz v Canada (Citizenship and Immigration)*, 2015 FC 373 at para 29; *Celise v Canada (Citizenship and Immigration)*, 2015 FC 642 at para 35; *Louisy* at para 11; *Huong v Canada (Citizenship and Immigration)*, 2021 FC 1210 at para 26; *Semana* at para 37).

[18] At the outset, it must be noted that the Applicant's submissions in support of her H&C application were sparse, at best. She submitted that:

> I am a widow as my husband passed away on May 1, 2015. In Canada, I am living with my son and his family, and they are supporting me because I do not have work permit. I am looking after their children. In India, it will be hard for me to live alone and if I have to go back to India then my son and his family always have to make trips to India to visit me causing more financial burden on them. Moreover, if I am not In Canada, then one of them have to stay home to look after their children causing more financial and emotional stress. It is true that my daughter is in India but in our culture it is not acceptable to live with your married daughter, it is the responsibility of the son to look after parents. If I have to go back to India, it will cause separation between our family. Moreover, I won't have any support in India.
>
> …
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> I have two young grandchildren and spending time with them. I look after them when their parents are at work. I am spending my quality time with them and happy to be with them. The children are learning our culture and language. As they are very young this is the quality time, we can spend together. If I have to go back to process it will cause separation and also emotional stress on us and children. The process times from overseas are longer which will put more stress on the family. The new lottery system. It is not sure if my son will get an invitation to sponsor. It will be in the best interest of children, if I am allowed to process my application form within Canada.

i. Family reunification

[19] I do not agree with the Applicant that the Officer erred by failing to consider or to understand the objective of family reunification as set out in s 3(1)(d) of the IRPA – which is a recurring theme throughout her submissions. The Officer was not required to make explicit reference to this section nor is it determinative of an H&C application as the Applicant appears to suggest. And, in any event, the Officer's reasons recognize the Applicant has meaningful and important relationships with her family in Canada and wishes to remain here. However, subjective desire will not ground H&C relief. As the Officer noted, there are many parents and grandparents, like the Applicant, who desire to reside permanently in Canada with their families. The Officer found that this ground did not suffice to grant the exemption request because the Applicant failed to submit evidence to establish that her circumstances were exceptional, thereby warranting H&C relief.

[20] When appearing before me the Applicant raised a new argument and submitted that the Officer had applied the wrong test when assessing this factor. This is apparently based on the one use of the word "exceptional" in the reasons when the Officer found that the absence of factors such as a pronounced establishment, "as well as an apparent lack of exceptional circumstances that characterize the family relationships of the applicant", were insufficient to warrant H&C relief. The Applicant relies on *Peter v Canada (Immigration and Citizenship)*, 2022 FC 208 at para 49 in which Justice Zinn referred to his decision in *Zhang v Canada (Citizenship and Immigration)*, 2021 FC 1482. While I might agree that the Officer's wording was not ideal, in my view, the mere use of the word "exceptional" by the Officer does not give rise to a

reviewable error in this case. H&C relief is not an alternative immigration route. It is exceptional relief. The Officer's statement that the Applicants' circumstances were not "exceptional" did not set a higher threshold (see *Al-Abayechi v Canada (Citizenship and Immigration)*, 2021 FC 1280 at para 14; *Damian v Canada (Citizenship and Immigration)*, 2019 FC 1158 at paras 19-21). In any event, it is not necessary to comment further on this submission as, read in whole, I am satisfied that the Officer's reasons demonstrate that they considered the Applicant's personal circumstances but that there was insufficient evidence to establish that those circumstances warranted the granting of the exceptional relief afforded by s 25(1).

[21] Under this same topic the Applicant asserts that the Officer failed to consider that the Applicant's adult daughter who lives in India is married and living with her husband and family. However, it is presumed that administrative decision makers have considered all evidence before them, even if they do not refer to each piece of evidence individually (*Florea v. Canada* (*Minister of Employment and Immigration*), [1993] F.C.J. No. 598 (FCA); *Sing v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125 at para 90; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). Moreover, the Officer found that there was no indication that the Applicant would not be able to return to India and reside on her own, as she had done when she returned on prior occasions. Thus, the Officer implicitly acknowledged the Applicant's position that she could not reside with her married daughter. Further, when making this finding the Officer's concern was that the Applicant had provided insufficient evidence that her family in India would be unable or unable to assist her in resettling and re-establishing herself in her community.

[22] The Applicant also asserts that the Officer failed to consider that her siblings in India live in different places. However, I note that in her application the Applicant states that she lives in Moga, Punjab as does her daughter as well as both of her sisters.

[23] Finally, the Applicant appears to assert that the Officer failed to appreciate that her visa, valid until March 24, 2024, does not allow her to stay in Canada permanently and that travel back and forth puts a financial strain on the family. There is no merit to this submission. The Officer's reasons make it clear that they were well aware of the temporary resident status afforded to the Applicant by the visa. Further, the Officer explicitly acknowledged the Applicant's submission that there would be financial difficulties if she returned to India but found that insufficient evidence had been presented to establish that her family in Canada would be unable to continue to financially support her. The Applicant points to no evidence to support her submission of financial strain that was overlooked by the Officer.

ii. Financial support in Canada

[24] The Applicant submits that the Officer failed to consider the totality of the evidence. Specifically, that "both children permanently reside in Canada" (which I understand from her submissions to mean both of her grandchildren, or perhaps as meaning her son and her daughter-in-law, as she submits that her daughter lives in India); that her son submitted an undertaking to support her and provided proof of his employment and income in support of this; and, that she is a 58-year-old widow who lives with her children who are supporting her.

[25] Again, there is no merit to this submission. The Officer stated the Applicant's age. The Officer was also aware from the Applicant's H&C application that she is a widow. The Officer acknowledged that the Applicant is supported financially in Canada by her son and daughter-in-law and explicitly noted the employment letter and tax assessments from the Applicant's son and daughter-in-law that were submitted by the Applicant. The Officer considered that living alone was the likely outcome of the Applicant returning to India, but found that the Applicant's personal circumstances would not amount to significant hardship, even in living alone which she had done in the past.

[26] The Officer did not fail to consider or misapprehend this aspect of the Applicant's circumstances.

iii. Best interests of the children

[27] The Applicant submits that the Officer failed to assess her application based on the objective of family reunification as the concept of remote interaction is not part of, and undermines, that objective. Further, that the Officer's reasons lack analysis.

[28] In my view, the Applicant fails to appreciate that the Officer's reasons were centered on the lack of evidence submitted to support this ground of her application. The Officer accepted that the Applicant has a deep emotional bond with her grandchildren but was not satisfied that the Applicant could not return to India – as she has before – and still maintain her relationship with them. The Officer acknowledged the hardship to the Applicant of being physically

separated from her grandchildren and that this would cause some dislocation, but found that this did not mean that they could not contact one another. I see no error in this finding. Nor do I agree with the Applicant's submission, when appearing before me, that the Officer erred in failing to appreciate that there is a distinction between the care afforded to the children by the Applicant, as their grandmother, and childcare by a third party. The Officer's point was simply that there was insufficient evidence that alternate childcare arrangements could not be made.

[29] More significantly, but not addressed by the Applicant, the Officer found that the Applicant had not provided sufficient evidence to establish that the relationship between her and her family members in Canada is characterized by a degree of interdependency and reliance that, should separation occur, would justify granting an H&C exemption. I note that the jurisprudence establishes that while a best interests of the child analysis can apply to grandparents, to succeed there must be evidence of a highly interdependent relationship such as a circumstance where a child is ill or has special needs and/or their parent is unable to care for them, necessitating the additional care provided by a grandparent (see *Le v Canada (Citizenship and Immigration)*, 2022 FC 427 at paras 18, 22). The Applicant provided no evidence of this nature.

[30] Further, this Court has held that, without more, the separation between a child and an extended family member such as a grandparent is not sufficient to warrant H&C relief. This hardship is inherent in circumstances where families reside in two different countries (*Khaira v Canada (Citizenship and Immigration)*, 2018 FC 950 at paras 24-25*; Tran v Canada (Citizenship and Immigration)*, 2018 FC 210 at para 11; *Gao v Canada (Citizenship and Immigration)*, 2019 FC 1238 at paras 30-31).

[31] In my view, based on the limited best interests of the child submissions by the Applicant, the Officer's analysis was adequate (*Semana v Canada (Citizenship and Immigration),* 2016 FC 1082 at para 37; *Huong v Canada (Citizenship and Immigration)*, 2021 FC 1210 at para 26; *Fouda v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1176 at para 42; *Esahak-Shammas v Canada (Citizenship and Immigration)*, 2018 FC 461 at para 43). The Officer's reasons demonstrate that they considered each of the Applicant's submissions. The Applicant has not established that the Officer erred in their assessment.

iv. Family class

[32] The Applicant asserts that she raised concerns about the lottery system for sponsorship for parents and grandparents, which is not a fair system and does not guarantee that her son will be able to sponsor her, but that the Officer failed to consider this in the context of the objectives of the IRPA. However, the Officer was not required to consider whether the lottery system for family sponsorship is "fair" or to consider the prospects of success of an application made under that system. They were only required to consider whether the Applicant's personal circumstances warranted an exemption from the requirements of the IRPA on H&C grounds.

[33] The Applicant also asserts that the Officer failed to conduct a realistic assessment of her hardship upon return to India to apply for permanent residence. Specifically, the Officer failed to assess "how long that process may take, especially living in India in COVID-19 and the lottery system" referencing *Kaur*. Again, the role of the Officer was not to assess if the Applicant may

be eligible for family sponsorship and how long that process might take. Nor does her application make any reference to COVID-19.

[34] The Applicant does not otherwise take issue with the Officer's assessment of hardship.

[35] Finally, I note that the Officer did not suggest that the Applicant's temporary residence visa was a suitable replacement for permanent residence granted on H&C grounds. Rather, that any hardship due to family separation was mitigated, in part, by the fact that the Applicant currently holds a visa that would allow prolonged visits with her family in Canada. The Officer merely pointed this out to indicate that there was no evidence that the refusal of the Applicant's H&C application would require her to leave Canada at this time or to otherwise be away for any considerable period of time in the foreseeable future. Thus, the rejection of her application would not likely result in any permanent or significant severing of family ties. In my view, no error arises from the Officer's reference to her temporary residence visa (see *Tosunovska v Canada (Citizenship and Immigration)*, 2017 FC 1072 at paras 33-34). This is not a circumstance where there was an unreasonable emphasis on the possibility of other temporary relief rather than weighing the reasons to potentially grant H&C relief, as was the case in *Ramirez v Canada (Citizenship and Immigration)*, 2022 FC 84 at para 31, relied upon by the Applicant. Nor is it similar to the other case law cited by the Applicant in support of this submission.

Conclusion

[36] The H&C application made by the Applicant demonstrates the existence of a loving and caring relationship between a grandparent and their grandchildren and that the Applicant would

prefer to live in Canada with her family here. However, as the Officer found, this alone is not sufficient to warrant H&C relief. This is because hardship resulting from separation is inherent in circumstances where families reside in two different countries. Based on the record before them, the Officer reasonably concluded that the Applicant did not meet her onus of demonstrating that the exceptional relief afforded under s 25(1) of the IRPA was warranted in her circumstances.

[37] In my view, the Applicant has not demonstrated that the Officer ignored or misapprehended her evidence or failed to properly consider a relevant factor in the H&C assessment. The Officer's reasons were justified, intelligible and transparent, the decision was reasonable.

Certified Question

[38] The Applicant proposed the following question for certification:

> When assessing an application pursuant to s 25(1) of the IRPA, whether the officer has the authority to consider alternative paths available such as temporary residence and the possibility of family class sponsorship.

[39] The Respondent opposes the certification of the proposed question.

[40] In order for this Court to certify a question of general importance, it must be a serious question that is dispositive of the matter, that transcends the interests of the parties, and raises an issue of broad significance or general importance (*Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46 [*Lunyamila*]; *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36).

[41] I agree with the Respondent that this proposed question does not meet the criteria for certification. The Applicant does not make any substantive submissions on how the proposed question meets the criteria, other than asserting that the Officer considered the availability of alternatives such as temporary status and the existence of family class sponsorship in the future and “circled around the availability of alternatives to the Applicant”. Further, the question is not dispositive. The Officer refused the application because the Applicant had not submitted sufficient evidence to demonstrate that the exceptional relief afforded under s 25(1) of the IRPA was warranted in her circumstances. As discussed above, the Officer’s comments regarding her current temporary resident visa were not to suggest that this would be an alternative way for her to immigrate. As to family class sponsorship, the Applicant raised this, arguing that the possibility of immigration under that class was not a certainty given the “unfair” lottery system. The Officer was not required to and did not address this in their reasons.

JUDGMENT IN IMM-4107-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;
2. There shall be no order as to costs; and
3. The question proposed by the Applicant does not meet the requirements for certification and will therefore not be certified.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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