Federal Court  Cour fédérale

Date: 20090615

Docket: IMM-4963-08

Citation: 2009 FC 636

OTTAWA, ONTARIO, JUNE 15, 2009

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

ARJUNE RAMSAWAK
RAMRATTIE RAMSAWAK
DEEVIN RANDY RAMSAWAK
ANNALISA NIRMALA RAMSAWAK

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The applicants are citizens of Guyana. The principal applicant claims to have suffered threats, violence and destruction to his personal property as a result of his Indo-Guyanese ancestry and of his political views. They claim that their second Humanitarian and Compassionate ("H&C") application was erroneously rejected and challenge that decision on four different grounds.

[2] After having carefully reviewed the record and considered the parties' oral and written submissions, I have come to the conclusion that this application ought to be granted. Here are my reasons for so concluding.

BACKGROUND

[3] The principal applicant, Mr. Arjune Ramsawak, arrived in Canada on March 29, 2001 under the authority of a valid visitor's visa. He was joined a few days later, on April 6, by his wife and three children.

[4] The principal applicant belongs to the Indo-Guyanese minority. He has also been affiliated with the People's Progressive Party ("PPP"), in a country he claims is "racially divided" and whose political parties reflect the polarization of the two principal ethnic groups, namely the Indo- and Afro-Guyanese.

[5] On June 19, 2001, the applicants filed a claim for refugee status, on the basis that they fear for their safety in their country. A hearing was held before the Refugee Protection Division on March 20, 2003, and a negative decision was issued on April 11, 2003.

[6] An application for H&C consideration was made to the Minister, under s. 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27(the *"IRPA")*, in June 2003; it was rejected on January 18, 2005. In February 2006, the principal applicant's eldest child married a

Canadian citizen. He became a permanent resident on July 30, 2007, and has since submitted a sponsorship application on behalf of his siblings and parents.

[7] A second H&C application was received by Citizenship and Immigration Canada on October 1, 2007. This one included only the parents and two younger children, who were 18 and 21 years old at the time, respectively. The applicants submitted a Pre-Removal Risk Assessment ("PRRA") application on April 8, 2008.

[8] The current application for judicial review is with respect to the second H&C application, which was considered by the officer concurrently with the PRRA application.

THE IMPUGNED DECISION

[9] After setting out the requirements for a successful H&C application, the officer first determined that there was no need to consider the best interests of the principal applicant's children, given that they were both over 18 years of age at the time of the application.

[10] The officer then considered the allegations of personalized risk, noting that the dependent applicants based their risk of return on that of the principal applicant. This risk included a risk to his daughter of targeted sexual assault, based on her ethnicity. The officer thereafter examined the evidence submitted by the applicants, including a doctor's note describing injuries sustained by the principal applicant in Guyana and a letter indicating his membership in the PPP. Despite that evidence, the officer concluded that objective sources did not support a finding that membership in the PPP posed a significant risk of persecution or violence.

[11] The officer acknowledged that racial tension existed in Guyana, though it was not endorsed by state authorities. Moreover, efforts were being made to curb discrimination and social discord. It was also recognized that violence against women continued to be a problem in Guyana. Nonetheless, the officer concluded:

> …I find that the applicants have not satisfied me that they are personally targeted or at risk of violence or persecution. I find that the problems they cite are general in nature and the applicants have not satisfied me that the problems are specifically related to them. Moreover, they have not satisfied me that there is no protection available to them in their home country. Though human rights conditions in Guyana are not ideal, I am not satisfied that the applicants are personally at risk of persecution.

ISSUES

[12] The applicants have raised three issues in their oral and written submissions:

a. Did the officer err in law in refusing to consider "the best interests of the child" because the main applicant's children were over 18 years at the time of the decision?
b. Did the officer err in law by applying the wrong criteria for assessing the H&C application, referring to personalized risk rather than hardship?
c. Are the reasons deficient in that they fail to disclose the basis for the decision?

ANALYSIS

[13] The first two issues raised by the applicants are clearly of a legal nature. The first one relates to the proper interpretation to be given to the concept of a "child" in the analysis required by the Supreme Court of Canada in assessing the "best interests of the child". The second one bears upon the proper test to apply in an application under s. 25(1) of *IRPA*. These legal issues, however, are clearly intertwined with the factual matrix in which they arise; moreover, they pertain to the

interpretation of the very statute empowering the officers to make their determinations, and it is to be assumed that the officers will have acquired a particular familiarity with the *IRPA* as a result of applying it in the normal course of their duties. For those reasons, I am of the view that the applicable standard of review in examining the first two questions ought to be the "reasonableness" standard.

- The best interests of the child

[14] The applicants claim that, even though the principal applicant's children were over 18 years of age at the time of the decision, the officer had a duty to consider their best interests. They note that the younger applicants, despite being over 18, remained dependents of their parents, according to the definition of a "dependent child" found at s. 2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("*Regulations"*).

[15] The respondents vigorously oppose that argument, stressing that Deevin Randy and Annalisa Nirmala were adults, and not minors, at the time the second H&C decision was rendered. As a result, they were not "children" within the meaning of the concept of "the best interests of the child" analysis as set out in *Baker* v. *Canada (M.C.I.)*, [1999] 2 S.C.R. 817, and in international law. According to the respondent, the applicants erroneously equate the definition of "dependent" as set out in the *Regulations* with the definition of a "child". The respondent submits that individuals are considered children if they are minors, under the age of 18. Indeed, the United Nations *Convention on the Rights of the Child*, whose values should "help inform the contextual approach to statutory interpretation and judicial review" (*Baker*, at par. 70), states in its Article 1:

> For the purposes of the present Convention, a child means every human being below the age of eighteen

> years unless under the law applicable to the child, majority is attained earlier.

[16] Even if Deevin Randy and Annalisa Nirmala could not be considered children under either national or international law, according to the respondent, this would not affect their status as "dependents" for the purposes of their inclusion on their father's application. The definition of "dependent child" set out in the *Regulations* provides that a child can be considered a dependent if he or she is less that 22 years of age and not a spouse or common-law partner. The *Regulations* further provide that someone over the age of 22 can satisfy the definition of "dependent child" if he or she continues to be enrolled in full-time studies until the application for permanent residence is decided. While parents may include their adult children who meet the requirements for "dependency" on their H&C application, this does not render an "adult" a "child" such that a "best interest of the child" assessment is required.

[17] All of these arguments put forward by the respondent were recently canvassed by my colleague Justice Mandamin in the case of *Yoo* v. *Canada (Minister of Citizenship and Immigration)*, 2009 FC 343. Noting that Mr. Justice Gibson had already decided that adult age children were entitled to receive the benefit of "the best interests of the child" analysis in *Naredo* v. *Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1250, Mr. Justice Mandamin felt compelled to apply the same reasoning on the basis of judicial comity. I would also add, for the sake of completeness, that Justice MacKay followed the *Naredo* decision in *Swartz* v. *Canada (Minister of Citizenship and Immigration)*, 2002 FCT 268, [2002] F.C.J. No. 340.

[18] While I may have some misgivings about these decisions, I find that it would be most inappropriate to unsettle the state of the law. With the exception of one contrary decision relied upon by the respondent, which itself was rendered in the context of a motion for a stay of removal (*Hunte* v. *Canada (Minister of Citizenship and Immigration)*, IMM-3538-03), there appears to be no conflicting case law on this issue. Nor can it be said that relevant statutory authority or binding jurisprudence has been overlooked in coming to that conclusion. As a result, I am prepared to accept that the mere fact a "child" is over 18 should not automatically relieve an officer from considering his or her "best interests" along the lines suggested in *Baker*.

[19] That being said, the assessment of the best interests of the children must take into account the relevant facts of each case. The best interests of a two year-old infant, for example, will most certainly differ from those of a grown up young adult of 21. For example, it is clear from a reading of Mme Justice L'Heureux-Dubé's decision in *Baker* that what she had in mind were the interests of minor children (see, for example, paras. 71 and 73, where she refers to the UN *Convention on the Rights of the Child* and to the importance and attention that ought to be given to children and "childhood").

[20] Similarly, if one is to look at the hardship that a negative decision would impose upon the children of an H&C claimant, the autonomy of these children or, conversely, their state of dependency upon their parents, must be a relevant factor. In that respect, it is interesting to note that Justice MacKay came to the conclusion that the 19 year-old child of the applicant was still a "child" for the purposes of the *Baker* analysis because he was still a dependent and was not authorized to work or to continue his studies in Canada. Similarly, Justice Mandamin considered that the adult

sons of the applicant were deserving of a best interest of the child analysis because they were financially dependent on their father as they were pursuing their education.

[21] In the present case, both younger applicants had, at the time of the application, regular or full-time jobs. According to the applicant's record, they have both attained high school diplomas and are both permanently employed. They were clearly not in the same dependency relationship with their parents as the children considered in previous cases.

[22] However, there is more. Far from being dismissive, the officer did consider the submissions regarding the applicant's two youngest children. Despite stating that Deevin Randy and Annalisa Nirmala would "not be considered under the factor Best Interests of the Children" by virtue of their age, the officer nonetheless considered their circumstances in the analysis of establishment and hardship. Under the heading "Links to Canadian Society", the PRRA officer writes:

> Deevin Randy and Annalisa Nirmala completed their education in Canada, though they began their studies in their home country. The two young applicants are both young adults and with their educational level, could potentially find work in their home country as they have done in Canada. They have not shown that they have any language barriers, or other significant obstacles, that would prevent them from being employed in their home country. Though they have spent some of their developmental years in Canada, I do not find that the link created for them provides excessive difficulties in returning to their home country.

[23] This analysis, it seems to me, cannot be characterized as being dismissive of their best interests. Of course, it is not cast the same way it would have been if they were still dependent on

their parents, irrespective of their age. Because they are now self-sufficient, the impact of a negative H&C decision is not assessed indirectly, in terms of the consequences that might befall them as a result of their parents having to move back to Guyana; more appropriately, the officer looks at their prospects from their own perspective, with a view to determining their likelihood of integrating and finding jobs in their country of origin. This does not strike me as being antithetical or contrary to the best interests of the child analysis developed in *Baker*; it is rather a more apposite way to be "alert, alive and sensitive" to their needs and interests in light of their particular circumstances. Accordingly, I am of the view that the officer did not fail to appreciate and assess the factors relevant to the two youngest applicants, despite the fact that he did not undertake a separate analysis under the rubric of the "best interests of the children".

- The risk assessment

[24] The applicants contend that the officer conflated the risk assessment that he made in his H&C decision with the risk assessment that he made in his PRRA decision, and did not use the appropriate threshold of "unusual, undeserved or disproportionate" in the H&C decision. According to the applicants, the generalized risk identified by the officer would certainly cause hardship.

[25] The respondent, in turn, submits that the Officer prefaces his analysis by stating explicitly that in "… an application for exemption on humanitarian and compassionate grounds, the risks presented by the applicants must be assessed in the context of the applicant's degree of hardship". The mere use of the terms "personalized risk" by the officer is not fatal to the decision, argues the respondent, and his decision should not be subject to microscopic examination.

[26] This Court has emphasized, in a number of cases, the importance of assessing an H&C claim through the lens of "hardship", as distinct from that of "risk" applied in relation to a PRRA: see, for example, *Uddin* v. *Canada (Minister of Citizenship and Immigration)*, [2003] .C.J. No. 460; *Serda* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 356; *Sha'er* v. *Canada (Minister of Citizenship and Immigration)*, 2007 FC 231; *Pinter* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FC 296; *Ramirez* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 1404.

[27] The mere fact that the officer stated the proper test at the outset of his reasons does not indicate, of course, that the officer properly assessed the evidence. To come to the contrary conclusion would be to privilege form over substance. Of course, there is nothing wrong with an officer relying on the same set of factual findings in assessing an H&C and a PRRA application, provided these facts are analysed through the proper prism relevant to each application. This is precisely where the officer went wrong: he appears to have parroted the findings made in his PRRA decision, which was released the same day.

[28] Again, personalized risk is not an irrelevant consideration in an H&C application; but an officer has an obligation, in this context, to look beyond risk to other indicators of hardship, where they are present. In this case, the officer makes no reference whatsoever to hardship. Indeed, the section itself is titled "Allegations of Personalized Risk". The officer accepted that there was evidence in the record of racial tensions as well as "problems" with crime and violence against women in Guyana. Nonetheless, the officer was not satisfied that the applicants were "personally targeted or at risk of violence or persecution", given the problems cited "are general in nature". Yet,

nowhere does the officer assess why the applicants would not face hardship as a result of this situation, even if generalized.

[29] After having found that the applicants are not personally targeted or at risk of violence or persecution, the officer concludes:

> Therefore, I do not find that the evidence submitted by the applicant supports the allegations that the applicants face a personalized risk which, if they return to their home country, would cause the applicants to face unusual, undeserved, or disproportionate hardship to apply for permanent residency outside of Canada. I therefore attribute very little weight to this element.

[30] It is not entirely clear to me what this is supposed to mean. It can be interpreted, however, as if personalized risk is a precondition for a finding of unusual, undeserved, or disproportionate hardship. At the very least, this excerpt reveals some confusion between the concepts of risk and hardship, and falls far short of the analysis that is required in the context of an H&C application. For that reason, I have come to the conclusion that the decision does not come within the range of "possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* v. *New Brunswick*, [2008] 1 S.C.R. 190, at para. 47).

- Sufficiency of reasons

[31] Having found in favour of the applicants with respect to the second argument, there is no need to address the other arguments. However, to the extent that these reasons could provide

guidance to the officer who will be tasked with assessing this H&C application afresh, I shall add the following remarks.

[32] The applicants contended that the officer made "crucial errors" in considering their degree of establishment in Canada by allegedly overlooking the fact that they had purchased a house and erroneously finding that they still have family in Guyana (when, in fact, those relatives have since left the country). I agree with the respondent that these findings were of no consequence. First, the officer acknowledged that the applicants had "acquired" their own apartment. Second, even if the officer erred in stating they had family in Guyana, this was not a determinative factor in the decision.

[33] As for the adequacy of the reasons, it is clear from the officer's reasons why the H&C application was rejected: there was insufficient evidence of personalized risk, and there was not enough evidence of a degree of establishment warranting the exercise of the Minister's discretion under s. 25(1) of *IRPA*. Although the argument is directed towards the lack of explanation as to why the applicants would not suffer undue hardship if forced to return to Guyana, it has already been dealt with under the heading of "risk assessment" and is therefore redundant. Otherwise, I agree with the respondent's assertion that the officer's notes are sufficiently clear, precise and intelligible for the applicants to know why their request has failed.

[34] For all the above reasons, this application for judicial review is granted, and the matter is sent back for reconsideration by a different officer. No questions for certification have been proposed by counsel, and I agree that none arises on this record.

ORDER

THIS COURT ORDERS that this application for judicial review be granted, and the officer's decision of September 26, 2008 be set aside. The matter is remitted for redetermination by a different officer.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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