Federal Court  Cour fédérale

Date: 20141217

Docket: IMM-5053-13

Citation: 2014 FC 1226

Toronto, Ontario, December 17, 2014

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

RAJWINDER SINGH JHABAR AND PARMINDER KAUR JHABAR

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], of the decision of a Senior Immigration Officer [Officer] of Citizenship and Immigration Canada [CIC] refusing the Applicants' application for humanitarian and compassion [H&C] consideration.

II. Facts

[2] Rajwinder Singh Jhabar and Parminder Jhabar [the Applicants] are citizens of India who came to Canada in 2000 and made a refugee claim, which was denied in 2001. In 2004, the Applicants made an H&C application. Their application was denied in 2012. The Respondent consented to sending the decision back for re-determination, which re-determination resulted in a negative H&C decision on July 4, 2013 [the Decision]. That is the Decision now under review.

III. Decision

[3] The Officer found that the Applicants had not established that they would face unusual and undeserved or disproportionate hardship if they returned to India. She considered: the hardship due to risk upon return to India; family or personal relationships in Canada that would create hardship if severed; degree of establishment in Canada; medical issues; and establishment, ties or residency in India.

IV. Issue

[4] The sole issue in this matter is whether the Decision was reasonable.

V. Relevant Provisions

[5] Section 25 of *IRPA* is attached below as Appendix A.

VI. Standard of Review

[6] The parties agree, as do I, that the standard of review for an H&C decision is reasonableness: *Qiu v MCI*, 2012 FC 859 at para 8.

[7] When reviewing a decision on the standard of reasonableness, the Court is concerned with "the existence of justification, transparency and intelligibility within the decision-making process" and with "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

VII. Parties' Submissions

[8] The Applicants argue that the decision was unreasonable given their establishment in Canada and the resultant hardship of leaving, after the many years of working and forming strong roots in Canada, which was a natural byproduct of the long delays of CIC processing their H&C application, as well as other applications through which they have sought permanent residency in this country.

[9] The Respondent counters that the Decision was reasonable. H&Cs are exceptional and discretionary permanent residency applications. The Applicants did not meet the high threshold to establish that the hardship they would face in returning to India was unusual and undeserved, or disproportionate (*Irimie v MCI* (2000), 10 Imm LR (3d) 206 at paras 12, 17, 26; *Mayburov v MCI* (2000), 183 FTR 280 at para 7; *Lee v MCI*, 2001 FCT 7 at para 14; *Owusu v Canada*, 2004

FCA 38 at paras 5, 10). For example, they did not provide evidence to support that either they would or their three adult children do currently face hardship in India as a result of lack of employment opportunities or limited access to basic services, nor evidence that the female Applicant's health would suffer or that she would be unable to afford the required medication in India.

A. *Submissions on Establishment*

[10] The Applicants submit that it was unreasonable for the Officer to dismiss their extensive evidence of establishment on the basis that (i) it was no more than would be expected of any refugee claimant (*Raudales v MCI*, 2003 FCT 385; *Jamrich v MCI*, 2003 FCT 804; *Amer v MCI*, 2009 FC 713 at paras 13-14) and (ii) the Applicants knew ever since their refugee claims were denied that removal was a possibility. The Minister controls the speed with which H&C applications are determined, and it is unrealistic to expect claimants to put their lives on hold while awaiting final decisions: *Paterson v MCI*, [2000] FCJ No 139; *Sebbe v MCI*, 2012 FC 813 at para 23.

[11] The Respondent submits the converse, namely that the Officer did not dismiss the positive evidence of establishment solely on the grounds that the Applicants knew that removal was a possibility. Rather, the Officer's conclusion on establishment was on the basis of both this factor *and* the evidence available to her. This is the proper test to be applied in assessing degree of establishment (*Qiu*, above).

B. *Submissions on Hardship*

[12] The Applicants submit that the Officer erred in her assessment of hardship. First, since their 13 years of establishment was unreasonably dismissed, it follows that the Officer failed to reasonably assess their hardship if removed. Second, it was an error to discount evidence of hardship in India on the grounds that the conditions of poverty, lack of jobs, etc. are conditions faced by the general population (*Diabate v MCI*, 2013 FC 129 at paras 32-33; *Shah v MCI*, 2011 FC 1269 at para 73). Third, the Officer failed to take into account the Applicants' age when considering their employability in India.

[13] The Respondent rejects these arguments, stating that the Officer reasonably considered the Applicants' evidence and appropriately concluded that they had not demonstrated unusual and undeserved or disproportionate hardship. While the Officer may not have noted the Applicants' age, she did reasonably consider their employability, as she noted that the principal Applicant had been a partner in a shipping company and transport business, that the skills acquired by the Applicants in Canada could serve to broaden their employment prospects, and that they would have the support and assistance of family in India.

VIII. Analysis

A. *Establishment*

[14] A proper assessment of establishment in Canada is essential to a proper H&C determination: See *Hamam v MCI*, 2011 FC 1296 at para 52; *Raudales*, above, at para 19. While the H&C process is not designed to eliminate hardship, but to provide relief from unusual and

undeserved or disproportionate hardship, evidence of establishment is still a significant factor that must be properly considered and weighed in an H&C analysis: *Hamam* at para 54.

[15] In *Raudales*, as in this case, the officer found that since the refugee process takes several years to run its course, a certain level of establishment would be expected. The officer in that case went on to say that the applicant had established himself as any student would, but that he had not remained in Canada for so long or established such strong ties that it would be unreasonable for him to return to Honduras. The court held that the finding was contrary to the overwhelming weight of evidence put forward, and that absent a proper assessment of establishment, a proper determination could not be made: *Raudales* at paras 18-19.

[16] In reviewing the Officer's assessment of establishment, the question I must answer is whether the Officer properly considered whether the evidence before her was sufficient to warrant an exemption, or whether she simply listed the positive evidence of establishment and then, without any analysis, concluded that the Applicants would not face unusual and undeserved, or disproportionate hardship solely on the basis that such a level of establishment would be expected of anyone who had been in Canada for a period of years: See *Hamam*, above, at paras 55-56; *Ramaischrand v MCI*, 2011 FC 441 at para 10; *Singh v MCI*, 2009 FC 1062 at para 11; *Jamrich*, above, at para 28; *Rincon v MCI*, 2014 FC 194 at para 42; *Singh v MCI*, 2012 FC 612 at paras 9-10; *Amer v MCI*, 2009 FC 713 at paras 11-13.

[17] It is clear that the Officer in this case considered the evidence of establishment submitted by the Applicants. The Officer acknowledged that: the Applicants had lived in the same

community for 13 years; they had relatives in Canada and friendships in their local community; several of their neighbours and friends from India had resettled in Canada; they had been members, volunteers, and financial contributors at their Sikh temple; the principal Applicant had worked full time for the same employer for over 10 years; the female Applicant was steadily employed; the Applicants had a good civic record; and they had filed their taxes every year.

[18] Where the Officer has considered the relevant factors, it will be rare for this Court to intervene, as the range of acceptable outcomes is quite large and it is not this Court's role to re-weigh the factors: *Diabate*, above, at para 29.

[19] The Officer balanced the above factors against the fact that the Applicants had family in India and had acquired skills in Canada that could improve their employability in India. Therefore, even though the Officer noted that "a certain degree of establishment is expected of refugee claimants as they receive due process in the Canadian immigration system" and that "the applicants knew, or ought to have known, that removal from Canada was a possibility following their negative IRB decision in 2001" (Decision, p 4), she clearly considered the evidence submitted by the Applicants against the test of unusual and undeserved or disproportionate hardship. For this reason, this case is distinguishable from *Raudales*, *Jamrich*, and *Amer*, in which the officers did not analyze the Applicants' personal circumstances in reaching their conclusions on establishment.

[20] While I acknowledge that it will not be easy for the Applicants to leave their community and employment in Canada, I conclude that the Officer took into account all the relevant

circumstances and exercised her discretion reasonably. As this Court has found in the past, leaving behind friends, family, employment, or a home is not necessarily enough to justify the exercise of H&C discretion: *Irimie v MCI*, [2000] FCJ No 1906 at para 12; *Lopez v MCI*, 2012 FC 696 at para 15.

(1) Hardship

[21] The Applicants have made three separate submissions to support their argument that the Officer's hardship analysis was unreasonable. I will deal with each in turn.

[22] First, the Applicant's argument that since the 13 years of establishment was unreasonably dismissed, it follows that the Officer's assessment of their hardship was unreasonable, fails as I found above that the assessment of establishment was reasonable. In any case, establishment is not determinative of an H&C application.

[23] Second, I cannot agree with the Applicants that the Officer in this case discounted the evidence of hardship in India on the ground that the conditions of poverty, lack of jobs, etc. are conditions faced by the general population. The Applicant is quite right that it is improper to import a requirement of "personalization" from the section 97 analysis into an H&C, as this would frustrate the purpose of section 25: See *Diabate*, above, at paras 32-36; *Hamam*, above, at paras 43-45. H&C applicants are not required to show that the risks or conditions in their home country are not faced by the general population. As Justice Gleason wrote at paragraph 36 of *Diabate*:

> [T]he frame of analysis for H&C consideration has to be that of the individual him or herself, which involves consideration of whether the hardship of leaving Canada and returning to the country of origin would be undue, undeserved or disproportionate.

[24] However, H&C applicants are required to show that the adverse country conditions would have a direct negative impact on them, such that that the conditions in their country of origin would affect them or that living in conditions where such hardships could happen to them is itself an unusual and undeserved or disproportionate hardship: *Kanthasamy v MCI*, 2014 FCA 113 at para 76; *Vuktilaj v MCI*, 2014 FC 188 at para 36.

[25] Thus, the Officer in this case did not err in her assessment of the Applicants' hardship in returning to India. She referred to the correct test where she wrote: "In the context of the H&C application, the issue is whether the hardships associated with the risks cited are unusual and undeserved or disproportionate, should the applicants return to India" (Decision, p 3). She also properly noted that the Applicants had not provided evidence to support that they or their three adult children in India faced a lack of employment opportunities or limited access to basic services in India (Decision, p 3). As the Applicants failed to provide sufficient evidence that they would be affected by the conditions in India, including lack of work and health care, the Officer reasonably found that the Applicants had not established that they would face these hardships: *Owusu v MCI*, 2004 FCA 38 at para 5.

[26] Third, I disagree with the Applicants' contention that the Officer's failure to consider the Applicants' ages made the Decision unreasonable. As the Respondent points out, the Officer considered several other factors with respect to the Applicants' potential for finding employment

in India. Interfering on this basis would amount to a re-weighing of the evidence considered by the Officer.

IX. Conclusion

[27] For the reasons above, this application for judicial review is dismissed. This case does not raise a serious question of general importance warranting certification.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed. There are no certified questions.

"Alan Diner"

Judge

ANNEX A

Immigration and Refugee Protection Act (SC 2001, c 27) Section 25	*Loi sur l'immigration et la protection des réfugiés* (LC 2001, ch 27) Article 25
25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister 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.	25. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de resident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de resident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considerations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

FEDERAL COURT

SOLICITORS OF RECORD

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