Federal Court  Cour fédérale

Date: 20171214

Docket: IMM-1637-17

Citation: 2017 FC 1150

Ottawa, Ontario, December 14, 2017

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

JASKARAN SINGH
JASKIRAN KAUR BAINS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of an immigration officer in Immigration, Refugees and Citizenship Canada's Case Processing Centre Mississauga [Officer], dated

March 28, 2017 [Decision], which refused the Male Applicant's application for permanent residence on humanitarian and compassionate [H&C] grounds.

II. BACKGROUND

[2] The Applicants are a husband and wife who reside in Canada. They married in July 2015. The Female Applicant, Jaskiran Kaur Bains, is a Canadian citizen and the Male Applicant, Jaskaran Singh, arrived in Canada from India as a student in 2011. After their marriage, the Female Applicant sponsored the Male Applicant for permanent residence in Canada in the Spouse or Common-Law Partner in Canada Class.

[3] In 2014, the Male Applicant was convicted of impaired driving under s 253(1)(a) of the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*]. The Applicants became aware that the Male Applicant could be inadmissible to Canada on grounds of criminality when his application for a work permit was refused in June 2016. The Applicants therefore applied to the Minister for consideration on H&C grounds.

III. DECISION UNDER REVIEW

[4] The Decision begins by laying out the provisions of the Act applicable to the Applicants' application and determining that the Male Applicant is inadmissible to Canada on the grounds of criminality. The Male Applicant's conviction under s 253(1)(a) of the *Criminal Code* is an indictable offence. Therefore, he is inadmissible under s 36(2)(a) of the Act.

[5] The Decision also refuses the Applicants' request for review of their application on H&C grounds under s 25(1) of the Act because the Officer was not satisfied that there are exceptional circumstances that would justify granting permanent residence.

[6] While the Male Applicant's completion of two rehabilitation programs is considered favourable, and the Officer accepts that this carries "great weight" in a rehabilitation application, the Officer did not consider completion of the programs sufficient to warrant an exemption from the Act on their own. The Officer was satisfied that the Male Applicant does not pose a risk and is unlikely to reoffend, but finds that the Applicants have not explained why this is an exceptional situation requiring an exemption.

[7] The Officer finds that it would be feasible for the Applicants to reintegrate into Indian society. The Officer has no concerns over the genuineness of the Applicants' relationship but notes that both Applicants were born in India and that the Male Applicant's parents still live there. The Officer is satisfied that the Male Applicant's knowledge of Indian language and culture means that he "would not be returning to an unfamiliar place, culture or language."

[8] From the information submitted as part of the Applicants' application, the Officer suspects that the Male Applicant was working in Canada without proper authorization and concludes that he has "little regard for immigration laws and regulations." The Officer bases this conclusion on the Applicants' submission of a T4 for the 2015 tax year. The Male Applicant lacked a valid work permit after June 6, 2016 when a permit was refused because of his inadmissibility to Canada. The Officer finds that the Male Applicant's alleged ability to find

employment in Canada despite lacking proper employment status, is evidence of his adaptability in foreign countries.

[9] The Officer notes that the Male Applicant was issued a temporary resident permit on March 4, 2017. Since the permit is valid until February 28, 2020, the Officer states that the Male Applicant will not be required to leave Canada immediately and can apply for rehabilitation or a records suspension of his criminal conviction.

[10] Since the Male Applicant is inadmissible under s 36(2)(a) of the Act, and the Officer finds insufficient H&C grounds to overcome that inadmissibility, the Officer refused the application for permanent residence.

IV. ISSUES

[11] The Applicants raise the following issues in this application:

1. Does the Decision unreasonably disregard evidence or engage in speculation?
2. Did the Officer's failure to allow the Applicants an opportunity to respond to his concerns breach the duty of fairness?
3. Does the Decision fail to consider the objectives of the Act when finding that the Applicants could live in India?

V. STANDARD OF REVIEW

[12] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a

satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[13] The standard of review applied to the consideration of H&C grounds is reasonableness. See *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 18; *Morales v Canada (Citizenship and Immigration)*, 2012 FC 164 at para 17.

[14] The second issue raised by the Applicants, however, is a question of procedural fairness. Questions of procedural fairness are reviewed under the correctness standard. See *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*].

[15] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Khosa*, above, at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[16] The following provisions of the Act are applicable in this application:

Objectives — immigration	**Objet en matière d'immigration**
3 (1) The objectives of this Act with respect to immigration are	3 (1) En matière d'immigration, la présente loi a pour objet :
…	…
(d) to see that families are reunited in Canada;	d) de veiller à la réunification des familles au Canada;
…	…
Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
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	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 résident 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 résident 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

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.	estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.
…	…
Criminality	**Criminalité**
36 (2) A foreign national is inadmissible on grounds of criminality for	(2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;	a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions à toute loi fédérale qui ne découlent pas des mêmes faits;
…	…

VII. ARGUMENT

A. *Applicants*

[17] The Applicants submit that the Decision ignores evidence and engages in baseless speculation. The Applicants take issue with four findings made by the Officer that they say ignore their submissions and are based upon mistaken assumptions. The finding that the Applicants could return to India together because they were born there and speak the language ignores that the Female Applicant has lived in Canada since infancy, has no knowledge of Indian life, and does not speak the language. The finding that the Applicants would not suffer hardship if separated ignores the fact that they have recently purchased a house together, are financially

interdependent, and are trying to have a child. The Officer's finding that the Male Applicant had worked illegally in Canada was incorrect as he had a study permit that allowed him to work. And the finding that the Male Applicant could find work in India ignores that his caste position and minority religion make obtaining good employment difficult.

[18] In *Dhudwal v Canada (Citizenship and Immigration)*, 2016 FC 1124, Justice Harrington held that a decision based on "innuendo and speculation" was unreasonable because nothing in the record justified the decision-maker's inferences. The Applicants say that the Decision engages in similar conjecture when the Officer speculates erroneously rather than assessing the Applicants' evidence at face value. See also *Guzman v Canada (Public Safety and Emergency Preparedness)*, 2009 FC 899 at para 31; *Paulino v Canada (Citizenship and Immigration)*, 2010 FC 542.

[19] The Applicants submit that the Officer denied them procedural fairness by refusing their application because of concerns over the veracity of the Applicants' evidence without providing them a chance to respond to those concerns. They say that the Officer calls into question the Male Applicant's evidence that it would be a significant hardship for the Applicants to separate if the Male Applicant returns to India. Permanent resident applicants are owed a meaningful opportunity to respond "where the credibility, accuracy or genuine nature of information submitted by the applicant in support of their application is the basis of the visa officer's concern": *Hassani v Canada (Citizenship and Immigration)*, 2006 FC 1283 at para 24. See also *Salman v Canada (Citizenship and Immigration)*, 2007 FC 877 at para 12; *Olorunshola v*

Canada (Citizenship and Immigration), 2007 FC 1056 at paras 33-34; *John v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 257.

[20] The Applicants also say that the Decision ignores a primary objective of the Act when the Officer finds that the Applicants could return to India and live together there. Subsection 3(d) of the Act states that one of its objectives is "to see that families are reunited in Canada." The Applicants submit that *Sun v Canada (Citizenship and Immigration)*, 2012 FC 206 at para 25, establishes that failure to consider this objective may render a decision unreasonable. The Applicants point out that they live in Canada, that the Female Applicant is a Canadian citizen, and that it is the Officer's role to assess immigration to Canada, not India.

[21] In reply to the Respondent's submission that the Male Applicant does not require exceptional relief under s 25(1) of the Act, the Applicants say that the Male Applicant is not eligible for a record suspension or pardon, or rehabilitation, because five years have not passed since his conviction in May of 2014. It is the Male Applicant's inability to seek these alternative reliefs that led to the Applicants' request for consideration of H&C grounds.

[22] The Applicants therefore request an order remitting the Decision back for redetermination by a different immigration officer.

B. *Respondent*

[23] The Respondent submits that the Officer's determinative finding is that the Male Applicant has other options for pursuing permanent residence under the Act and the

Immigration and Refugee Protection Regulations, SOR/2002-227, and does not need to rely on exceptional H&C relief. Invoking s 25(1) of the Act is an exceptional measure, and is not meant to be an alternate means of applying for permanent residence status in Canada. See *Marteli Medina v Canada (Citizenship and Immigration)*, 2010 FC 504 at para 54; *Mikhno v Canada (Citizenship and Immigration)*, 2010 FC 386 at para 25; *Barrak v Canada (Citizenship and Immigration)*, 2008 FC 962 at para 27. The Respondent says that the Applicants have not explained why the Male Applicant is unable to apply for rehabilitation or a records suspension while in Canada on his temporary resident permit. Therefore, the Applicants' case does not require an exemption under s 25(1) of the Act.

[24] The Respondent therefore requests that the application for judicial review be dismissed.

VIII. ANALYSIS

[25] The Applicants are right to point out that the Officer makes an error of fact when he says that the Male Applicant was "working without authorization." The evidence is clear that the Male Applicant had been working legally in Canada because his study permit allowed him to work.

[26] In their H&C application, the Applicants emphasized their situation in Canada and presented little to establish that, apart from leaving Canada, they would face additional hardship in India. For example, the Male Applicant now explains in his affidavit before me that his wife has been living in Canada since she was six years old, has no knowledge of life in India, and does not speak the language. This information, however, was not provided in the H&C

submissions where the Applicants merely said that “Ms. Bains also works and has family in Canada that she would be denied from seeing if she had to live abroad with Mr. Singh.” It was never alleged that she did not know the language and the culture in India, and would face any hardship there other than the hardship of having to leave Canada, where she has grown up, and where her family continues to reside. However, if the Decision is read with care, it is apparent that the Officer is not saying that the Female Applicant knows the language and the culture in India. He is saying that the Male Applicant does: “I also note you have knowledge of the culture and language which would assist you in your return to your country of nationality.” The word “your” here refers to the Male Applicant as it does when the Officer says “your parents are currently residing there.” This is clear because the Decision is addressed to Jaskaran Singh who is the Male Applicant and not both Applicants.

[27] A great deal of what the Officer says about the hardships the Applicants might face in India is a function of the lack of evidence and submissions of the Applicants themselves. Their submissions are focused upon their establishment in Canada and the hardships of leaving Canada behind, but an H&C assessment also requires an officer to consider what applicants will face in the country to which they will return.

[28] I do accept, however, that the Officer’s finding, based upon the false assumption that the Applicant had no right to work in Canada appears to be of some significance for the Decision because the Officer says that “[t]his leads me to believe that you were working without authorization. Given this information it appears you have little regard for immigration laws and regulations” [emphasis added]. The record before me suggests that the Male Applicant has been

meticulous when it comes to "immigration laws and regulations." But is this mistake and the Applicants' allegations of speculation sufficient to render this Decision unreasonable?

[29] I think not because, although the Officer provides some assessment of the usual H&C factors such as establishment and hardship, the real basis of the Decision is that the Male Applicant does not require, and is not entitled to, H&C relief at this point in his advance towards permanent residence.

[30] When addressing the hardship factors, the Officer says that "[b]ased on these factors I am not in [*sic*] the opinion that it would be difficult for you or your spouse to establish yourselves in India if you chose [*sic*] to leave" [emphasis added].

[31] The clear implication here is that neither the Male Applicant or the Female Applicant need to leave Canada, and this factor is picked up later in the Decision when the Officer makes the following points:

> You have recently been issued a Temporary resident permit on 2017/03/04 which is valid until 2020/02/28. Given this information, if you were to be refused, you would not be required to leave Canada immediately. You have sufficient Temporary resident status in Canada to allow you to apply for rehabilitation in accordance with immigration regulations, or an applicable records suspension.
>
> I note the purpose of the H&C process is not to bypass the selection process to enter Canada as a permanent resident but instead it arises in exceptional cases which cannot be managed by the current Immigration and Refugee Protection Act and Regulations. I do not find there are exceptional circumstances in this case, and therefore I am denying your H&C request submitted to overcome your criminal inadmissibility to Canada.

[32] In other words, the hardship factors associated with leaving Canada and the impact upon the Female Applicant and their family plans do not arise in this case because the Male Applicant has not been asked to leave Canada, and may never have to do so. In fact, notwithstanding his criminal conviction and his temporary inability to apply for permanent residence, the Male Applicant has been granted a three-year permit to remain in Canada. So, notwithstanding his criminal conviction which prevented his sponsorship for permanent residence, the system has already provided the means for the Male Applicant to overcome this problem in the form of a temporary resident permit of maximum duration that will allow him to continue his life in Canada and allow him "to apply for rehabilitation in accordance with immigration regulations, or an applicable records suspension." In other words, there is nothing to suggest that the Male Applicant will not, if he follows the available process, be able to achieve his permanent residence objectives at some time in the future. The Male Applicant obviously has concerns about the uncertainty that is inherent in this process and would like to allay his anxiety now by obtaining an H&C exemption. However, it was the Male Applicant's own criminal conduct that has led to a period of uncertainty while the system takes its course.

[33] The Officer also provides considerable assurance: "I am satisfied you are not a risk and are unlikely to re-offend." And there is also the reassurance that the Male Applicant has been granted a three-year temporary resident permit that will carry him forward to February 28, 2020. He cannot seek rehabilitation until May 2020, but there will be options available to him in February 2020 to remain in Canada to pursue rehabilitation and permanent residence. At the worst, he can re-apply for H&C relief again if need be and, provided he continues in the ways he

says he will in this application, his case will be considerably stronger and, if he is not satisfied, he can come to this Court for relief.

[34] I don't think it can be said that the Officer has been unreasonable in denying the request for H&C relief at this juncture in the Male Applicant's progress on the basis that such relief is exceptional and should not be used "to bypass the selection process to enter Canada as a permanent resident," even though that process, because of the Male Applicant's criminal activity, has been rendered more complex than it would otherwise have been. There is, as yet, nothing to suggest that the Male Applicant's goal of permanent residence "cannot be managed by the current Immigration and Refugee Protection Act and Regulations."

[35] The Applicants also argue that the Officer should have convoked an interview to deal with credibility concerns. I see nothing in the Decision to suggest that the Officer had any credibility concerns. Even if I were to accept that the Officer relied upon speculation, this does not raise credibility concerns. And, in any event, credibility concerns had nothing to do with the basis of the Decision described above.

[36] Finally, the Applicants argue that "in finding the Applicants could return to India together and live there… the Officer disregarded one of the primary objectives of the Act, which is to reunite families in Canada."

[37] I think it is clear from the Decision that the Officer found that a refusal of the H&C application did not mean that the Applicants would have to return to India. Any concerns in this regard can be raised in the future, if and when the Male Applicant is required to return to India.

[38] Counsel concur that there is no question for certification and the Court agrees.

JUDGMENT IN IMM-1637-17

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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