Federal Court  Cour fédérale

Date: 20180205

Docket: IMM-2246-17

Citation: 2018 FC 128

Ottawa, Ontario, February 5, 2018

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

AMINA CHAUDHARY

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

[1] On this application, Ms. Chaudhary [the Applicant] seeks review of the April 27, 2017 decision of a Senior Immigration Officer [the Officer] denying her humanitarian and compassionate [H&C] claim for relief under s.25 of the *Immigration and Refugee Protection Act* [IRPA] and also denying her a temporary resident permit [TRP] under s.24(1) of the IRPA. The Officer determined that the Applicant's serious criminality outweighed any H&C considerations.

[2] For the reasons that follow, this judicial review is dismissed.

I. Background

[3] The Applicant became a permanent resident in 1977. It is unclear if her country of citizenship is India or the United Kingdom. In 1984, the Applicant was convicted of first degree murder of an eight year old child, and sentenced to life in prison. An appeal of the decision was dismissed in 1986.

[4] As a result of this conviction, the Applicant was reported for serious criminality and was issued a deportation order.

[5] In 1989 the Applicant married her husband while they were both serving time in prison. She and her husband had three children while she was in prison. All three children have special needs.

[6] In June 2016, the Applicant was granted day parole by the Parole Board of Canada, and has been living at an Elizabeth Fry halfway house. The Applicant alleges that she spends the remainder of her time at her husband's home, whose health has deteriorated since a stroke in August 2016.

[7] In August 2015, the Applicant submitted the H&C application which is the subject of the present judicial review.

II. Decision Under Review

[8] The decision under review is the April 27, 2017 decision of the Officer refusing the Applicant's H&C application and refusing the TRP request.

[9] The Officer addressed the following H&C factors: establishment, family, the best interests of the children [BIOC], the Applicant's rehabilitation, the country conditions of India and the United Kingdom, and the hardship on removal. The Officer weighed these factors against the seriousness of the Applicant's offence.

[10] On establishment the Officer noted that the Applicant was employed while incarcerated, earned a graduate degree while incarcerated and purchased a home in 2006. The Officer also noted the Applicant's participation in various programs as detailed in a letter of support from the Elizabeth Fry Society.

[11] The Officer focused heavily on the Applicant's family and particularly the Applicant's ill husband. The Officer noted a letter from a doctor which indicates that the husband requires 24/7 supervision and that the presence of the Applicant is necessary for life preservation. According to the doctor, without the Applicant's care, her husband would experience "premature death."

[12] The Officer noted that the Applicant and her husband had an unconventional relationship based on distance. As such, the Officer noted that the husband had managed to care and provide for himself while the Applicant was incarcerated. The Officer acknowledged that the husband's

condition deteriorated after 2016, but found that he would have access to medical care and support from other sources.

[13] With respect to the BIOC, the Officer noted that two of the Applicant's three children are non-verbal and require 24/7 care. The Officer noted that there was little evidence to demonstrate the nature of the relationship between the Applicant and her children, and there were no submissions about the Applicant's role in the developmental years of the children. The Officer cited the comments of the institutional parole officer who noted that there had been a distinct lack of effort on the part of the Applicant in establishing or maintaining contact with the children. The Officer concluded that while the situation was unfortunate, it was caused by the Applicant's own decisions. The Officer noted that the Applicant's immigration status and proceedings were "well under way" at the time she decided to "enlarge her family."

[14] On rehabilitation, the Officer noted that the Applicant does not accept responsibility for her crimes, as she maintains her innocence. The Officer did note that the Applicant successfully participated in all required institutional programs. The Officer also cited letters from the John Howard and Elizabeth Fry Societies in support of the Applicant's application.

[15] The Officer addressed the issue of hardship and risks alleged by the Applicant if removed to the United Kingdom or India. India was the primary country of analysis. The Applicant alleged that, if returned to India, her brother would likely kill her as an "honour killing" because she married a Muslim man. The Applicant also alleged that she would be jailed. The Officer concluded that these risks are best assessed in a pre-removal risk assessment [PRRA]

application, which the Applicant had an opportunity to file but did not do so. The Officer acknowledged the hardship of reintegration in India, but noted that the same problems would exist in Canada upon the Applicant's full release into the community, and that the Applicant had the skills to reintegrate.

[16] The Officer noted the relevant test for H&C considerations from *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], and noted that all relevant factors had to be assessed holistically. The Officer noted that the passage of time since the commission of the offence, the low probability of recidivism, and the Applicant's husband and children weighed in her favour. However, the Officer noted that the seriousness of the offence coupled with the fact that the Applicant had not taken responsibility for her crimes weighed against her application. The Officer noted that while the Applicant's children had special needs, her absence would not be detrimental to their well-being, given that extended family members, friends, and other groups could help the children.

[17] The Officer, based on this reasoning, also declined the Applicant's request for a TRP.

III. Standard of Review

[18] The standard of review for an H&C application is reasonableness (*Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 18 [*Kisana*]).

[19] The decision to grant a TRP is a "highly discretionary decision" and is also subject to the reasonableness standard of review (*Lorenzo v Canada (Citizenship and Immigration)*, 2016 FC 37 at para 23; *Evans v Canada (Citizenship and Immigration)*, 2015 FC 259 at para 26).

IV. Issues

[20] The Applicant argues that the Officer's decision is unreasonable in relation to the following issues:

A. Husband's Medical Care

B. BIOC

C. Hardship

D. TRP Refusal

V. Analysis

A. Husband's Medical Care

[21] The Applicant argues that the Officer failed to properly consider the medical evidence which confirms that her husband is very ill and is dependent upon her for his healthcare needs. She points to the medical reports from Dr. Gutman stating that since his stroke in 2016, his care needs are significant and she has been his primary caregiver. She also points to the evidence from her husband himself as well as a niece.

[22] An H&C exemption is exceptional and discretionary (*Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 15 [*Legault*]), and the onus to adduce

relevant evidence in aid of establishing eligibility for an H&C exemption lies with the Applicant (*Kisana*, at para 45; *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 5 [*Owusu*]).

[23] Here the Officer considered and weighed the evidence pertaining to the Applicant's husband. His decision is thorough and thoughtful. Specifically, he pointed to the fact that the husband's condition has worsened since 2016, the very evidence which the Applicant says was not adequately addressed. The Officer specifically weighed this evidence as a positive factor in the overall balance. However, this evidence was not sufficient to overcome the seriousness of the Applicant's convictions.

[24] The Applicant cannot point to evidence which was ignored by the Officer. In essence then, the Applicant is asking to reweigh the evidence, which is not the role of this Court (*Kaur v Canada (Citizenship and Immigration)*, 2017 FC 757 at para 58). While H&C factors could be reweighed in this case to support a different result, it is not the job of this Court to do so where "…the decision fell within the acceptable range of reasonableness" (*Betoukoumesou v Canada (Citizenship and Immigration)*, 2014 FC 591 at paras 35-43).

[25] Here, the Applicant simply wishes that the Officer put more positive weight on the medical evidence and less weight on the criminal convictions. However, the Officer is entitled to focus on the Applicant's criminal history and to find that the history outweighs any H&C considerations, especially where the exemption sought on H&C grounds pertains to criminal

inadmissibility (*Horvath v Canada (Citizenship and Immigration)*, 2016 FC 1261 at para 49; *Lupsa v Canada (Citizenship and Immigration)*, 2009 FC 1054 at para 51).

[26] On an H&C application, the Officer is presumed to have reviewed all the evidence. In a similar case, the Court in *Guiseppe Ferraro v Canada (Citizenship and Immigration)*, 2011 FC 801 at para 17 states [*Ferraro*]:

> There is a presumption that the decision-maker has considered all the evidence before her. The presumption will only be rebutted where the evidence not discussed has high probative value and is relevant to an issue at the core of the claim…

[27] Here, the Officer directly addressed contrary evidence and explained why the seriousness of the offence overcame the situation of the Applicant's husband. The Applicant seeks to reargue the merits of the H&C application before this Court. Parliament delegated power to the Minister of Citizenship and Immigration to make H&C determinations on the merits. The Court cannot intervene to put more weight on the medical evidence or reweigh the evidence (*Leung v Canada (Citizenship and Immigration)*, 2017 FC 636 at para 34 [*Leung*]) absent a "badge of unreasonableness" which takes the H&C decision out of the realm of reasonable, possible outcomes (*Re: Sound v Canadian Association of Broadcasters*, 2017 FCA 138 at para 59).

[28] Since the Officer assessed the evidence, especially the contradictory evidence, no such indications of unreasonableness arise on these facts. For that reason, the Applicant has failed to show that the decision is unreasonable.

B. BIOC

[29] The Applicant argues that the Officer erred in the BIOC analysis, and that her children, 18 years and older, should be considered "children" because of their special needs. The Applicant argues that the Officer's statement regarding the Applicant's having kids in the first place is unreasonable. According to the Applicant, the Officer did not assess what the Applicant's presence in Canada would add to the children's lives.

[30] The Applicant argued that her children will be affected by her removal from Canada. While the Applicant has three children, only two children were listed on her permanent residence application: her daughter, Toni (18 years of age at the time of the H&C application) and her son Omar (22 years of age at the time of the application).

[31] An H&C decision will be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered (*Kanthasamy*, at para 39). The BIOC must be "well identified and defined" and examined "with a great deal of attention" (*Kanthasamy*, at para 39; *Legault*, at paras 12-31), and decision-makers must be "alert, alive, and sensitive" to the BIOC (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75). The BIOC does not mandate a certain result (*Legault*, at para 12) because, generally, the BIOC will favour non-removal (*Zlotosz v Canada (Immigration, Refugees and Citizenship*), 2017 FC 724 at para 22).

[32] As a preliminary matter, though not addressed in the Officer's reasons this Court has held that those 18 years of age and over are not eligible for BIOC consideration: *Leung*, at para 28; *Saporsantos Leobrera v Canada (Citizenship and Immigration)*, 2010 FC 587; *Norbert v Canada (Citizenship and Immigration)*, 2014 FC 409 at para 37. However, cases at this Court also indicate that the BIOC analysis may be available for those over the age of 18 (*Naredo v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15973 (FC); *Yoo v Canada (Citizenship and Immigration)*, 2009 FC 343 at para 32; *Noh v Canada (Citizenship and Immigration)*, 2012 FC 529 at para 63).

[33] Notwithstanding this, the Officer nonetheless conducted a BIOC analysis for the two relevant children, and ultimately weighed the BIOC factor positively in the application.

[34] While there is case law from this Court on both sides of the question, I agree that the age of 18 is not necessarily a hard cut off for BIOC considerations, as there may well be circumstances where it is appropriate to consider the BIOC over the age of 18. In fact, the situation of children with special needs as here might well merit BIOC consideration beyond the age of 18.

[35] However, this analysis has to take into account the facts of the case. The reality here is that Applicant has not been a part of her children's lives on account of her incarceration. Other than attempts to see her children during escorted leaves, there is no evidence that the Applicant played a role in their upbringing or their emotional or financial support. There is no evidence of a dependency relationship between the Applicant and her three adult children. The onus is on the

Applicant to provide enough evidence to support her BIOC arguments in an H&C application: *Owusu*, at para 5.

[36] Further, the Applicant's children all live in different cities and provinces from the Applicant. There was no evidence that the Applicant has attempted to spend time with her children since her release and in reality her parole conditions may not make that feasible. The Officer noted that he had no evidence of the Applicant's role in the developmental years of the children, and further noted evidence from the Applicant's institutional parole officer who concluded that there had been a distinct lack of effort in establishing or maintaining contact with the children.

[37] Nonetheless, the Officer assessed the limited evidence before him to determine the Applicant's relationship with the children. The record of this interaction is limited as given the circumstances the Applicant has not had a great deal of interaction with her children. It was therefore reasonable for the Officer to conclude that her future interaction with her children could be accomplished by other means.

[38] In this case, the Officer considered the needs of the children and ultimately concluded that the Applicant's presence in Canada would not be sufficiently beneficial to warrant an exercise of the exceptional H&C discretion. He did so on the basis of the little evidence offered by the Applicant. The Officer reasonably concluded that the BIOC could be maintained through other means, and that the children—as they have for most of their lives—could be cared for by others.

[39] Since the BIOC does not mandate a certain result (*Legault*, at para 12) and the Applicant failed to show sufficient evidence that the BIOC was a strong factor in favour of non-removal (*Owusu*, at para 5), the Officer's decision is reasonable.

C. Hardship

[40] The Applicant argues that the Officer erred by concluding that the risks alleged by the Applicant on return to India are best assessed in a PRRA application.

[41] Section 25 (1.3) of the IRPA expressly notes that risk factors which inform an analysis under ss. 96 and 97 of the IRPA are not to be imported into H&C consideration under s.25 of the IRPA: *Kanthasamy*, at para 24. However, *Kanthasamy*, at para 51 notes that an H&C application can "take the underlying facts into account in determining whether the applicant's circumstances warrant humanitarian and compassionate relief."

[42] Here, the Officer did take these facts into account. He noted that relocation in India would be difficult, and that the greatest hardship the Applicant would face is reintegration into a country which is foreign to her, especially as a woman. However, the Officer noted that the Applicant had skills to reintegrate. On balance, the Officer concluded that the hardship and other H&C factors were not enough to outweigh the "horrific nature of Mrs. Chaudhary's crime, her refusal to accept responsibility for its commission and consequent lack of remorse."

[43] The Court cannot reweigh this balance of factors on judicial review, and the Officer made no error on this factor.

D. TRP Refusal

[44] The Applicant argues that the refusal of the Officer to analyze her TRP request is unreasonable. She takes issue with the Officer's statement that the Applicant's prolonged stay in Canada would be "…more disruptive to her family…" She argues that this contradicts the evidence on the care she provides to her husband.

[45] However the Officer's comment must be placed in the context of the overall request. A decision to grant a TRP is a highly discretionary decision and therefore is accorded a high degree of deference (*Voluntad v Canada (Citizenship and Immigration)*, 2008 FC 1361 at para 25).

[46] The court in *Ferraro*, at para 25 held that if there are insufficient grounds to support a H&C claim, as here, then there is no obligation on the Officer to conduct a separate analysis for the TRP request.

[47] Here, the Officer concluded:

> I have also taken into consideration whether a TRP is warranted in the circumstances…and conclude that issuing a TRP is similarly not warranted in the circumstances….having carefully weighed the considerations in this case, I find that there is no particular reason to prolong her presence in Canada (emphasis added).

[48] Clearly, the Officer decided the TRP refusal on the same basis as he rejected the Applicant's H&C application. There was no error by the Officer in doing so.

VI. Conclusion

[49] Overall the legal impediment faced by the Applicant was not sufficient to meet the test to obtain H&C relief or a TPR.

[50] The Officer reasonably considered the evidence. Therefore the decision is entitled to deference.

JUDGMENT in IMM-2246-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review of the Officer's decision is dismissed.

2. No question is certified.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Jean Marie Vecina	FOR THE APPLICANT
James Todd	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Vecina & Sekhar Professional Corporation Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT