

Federal Court



Cour fédérale

Date: 20180725

Docket: IMM-5227-17

Citation: 2018 FC 777

Ottawa, Ontario, July 25, 2018

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

MANDEEP KAUR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mandeep Kaur has brought an application for judicial review of a decision by an officer with Immigration, Refugees and Citizenship Canada to deny her request for an exemption on humanitarian and compassionate [H&C] grounds from the requirement of applying for permanent residence from outside Canada.

[2] For the reasons that follow, I find that the immigration officer's decision to ascribe only little weight to the circumstances surrounding the loss of Ms. Kaur's employment in Canada was not consistent with the approach mandated by the Supreme Court in *Kanthisamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthisamy*]. The application is therefore allowed.

II. Background

[3] Ms. Kaur is 46 years old and a citizen of India. She entered Canada on September 19, 2012 with a work permit that was valid for two years. Her work permit was subsequently extended to June 30, 2016. For most of this period, Ms. Kaur worked as a cashier at a liquor store in Calgary.

[4] Ms. Kaur's employer fraudulently withheld her wages and threatened her with dismissal and deportation if she complained. On October 10, 2015, he made good his threat and terminated Ms. Kaur's employment. Her employer was subsequently arrested for assaulting Ms. Kaur's sister.

[5] Ms. Kaur sought to renew her status with the Alberta Immigrant Nominee Program [AINP], and was given an opportunity to find another employer or obtain a Labour Market Impact Assessment [LMIA] before her work permit expired. She was unsuccessful in doing so. Her request for another extension of her work permit was refused on October 12, 2016.

[6] On November 24, 2016, Ms. Kaur requested an exemption on H&C grounds from the requirement of applying for permanent residence from outside Canada. Ms. Kaur stated that she is the primary caregiver for her septuagenarian parents. Her sister is the only member of the household who earns an income. Under the terms of their sponsorship, the parents are prohibited from receiving social assistance for ten years following their arrival in Canada in 2010. Ms. Kaur's father has late-stage Parkinson's disease, and requires constant care and supervision. Ms. Kaur has a brother and husband in India, but no children.

III. Decision under Review

[7] In denying Ms. Kaur's request for an exemption on H&C grounds, the immigration officer ascribed negative weight to the fact that she had been living in Canada without valid status since October 12, 2016. Positive weight was given to Ms. Kaur's volunteer activities, and slight positive consideration was given to letters of support submitted by Ms. Kaur. The officer noted that Ms. Kaur is currently supported by her sister, who works full-time. Based on her language skills and prior work experience, the officer concluded that Ms. Kaur would be able to find employment in India or seek other opportunities to work abroad. The officer therefore gave neutral weight to employment considerations.

[8] The immigration officer acknowledged that Ms. Kaur had lived in Canada for five years but had otherwise spent most of her life in India, where she was born and educated and where she understands the language and customs. The officer found that she had stayed in Canada by choice and assigned little weight to her time in this country. The officer gave some positive

weight to Ms. Kaur's parents' age and their desire to be near their daughter, but found this to be outweighed by her family ties in India, where her husband currently resides.

[9] The immigration officer accepted that Ms. Kaur had been the victim of fraud, and applauded her willingness to assist in the investigation of her employer. The officer acknowledged that her employer's actions had adversely affected her AINP application, but noted that it was ultimately refused due to her inability to obtain a new LMIA. The officer therefore gave little weight to the rejection of Ms. Kaur's AINP application, and observed that she could apply for another work permit from abroad.

[10] The immigration officer acknowledged that Mr. Kaur's father suffers from multiple medical issues, as confirmed by letters from several doctors. However, the officer found little evidence to suggest that Ms. Kaur was the only suitable person to assist him. The officer accepted that Ms. Kaur's mother is also elderly and faces a language barrier in Canada, and ultimately gave considerable positive weight to Ms. Kaur's father's medical condition. The officer nevertheless concluded that this was not a determinative factor, because he would still be supported by Ms. Kaur's mother and sister, and by the medical system and social services.

[11] Considering the application globally, the immigration officer was not satisfied that Ms. Kaur's particular circumstances warranted an exemption on H&C grounds. Her request was therefore refused.

IV. Issue

[12] The sole issue raised by this application for judicial review is whether the immigration officer's decision was reasonable.

V. Analysis

[13] A decision by an immigration officer to grant or refuse an exemption under s 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 is discretionary. The provision is intended to serve as “a mechanism to deal with exceptional circumstances”, and the officer “must be accorded a considerable degree of deference” (*Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4). The officer's decision is subject to review by this Court against the standard of reasonableness. The Court will intervene only if the decision falls outside 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).

[14] Ms. Kaur challenges the immigration officer's analysis on numerous grounds. Given the level of deference owed by this Court to the officer's exercise of discretion, only one of these is persuasive. Ms. Kaur says that the officer “paid lip service” to the circumstances leading to her application; namely, that she was the victim of an exploitive employer who terminated her employment precisely in order to frustrate her prospects for permanent residence.

[15] In *Kanthasamy* at paragraph 13, the Supreme Court of Canada said the following about the meaning of the phrase “humanitarian and compassionate considerations”:

The meaning of the phrase “humanitarian and compassionate considerations” was first discussed by the Immigration Appeal Board in the case of *Chirwa v. Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338. The first Chair of the Board, Janet Scott, held that humanitarian and compassionate considerations refer to “those facts, established by the evidence, which would excite in a reasonable man [*sic*] in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes ‘warrant the granting of special relief from the effect of the provisions of the Immigration Act’”: p. 350.

[16] Ms. Kaur lost her immigration status primarily because of the abusive and exploitive actions of her employer, who defrauded her, assaulted her sister, threatened to terminate her and cause her to be deported, and ultimately carried out this threat. Ms. Kaur, through no fault of her own, now faces separation from her elderly parents, one of whom is severely ill and depends on her as his principal caregiver. She is also losing a path to permanent residence which, although not certain, would likely have been achieved had she not been victimized by her employer.

[17] The immigration officer did not dispute that Ms. Kaur had been the victim of fraud, and even praised her willingness to assist in the investigation of her employer. While acknowledging that her employer’s actions had undermined her AINP application, the officer appears to have concluded that the situation was effectively resolved by affording Ms. Kaur an opportunity to seek new employment or obtain a new LMIA. The officer ultimately gave little weight to the rejection of Ms. Kaur’s AINP application, yet the circumstances that led to this result were at the heart of her request for an exception on H&C grounds.

[18] A troubling implication of the officer's decision is that foreign workers who endure fraud or abuse in the course of their employment, and who are threatened with termination and deportation, can expect little sympathy from those who administer Canada's immigration laws. I do not mean to suggest this was the officer's intention. But the officer's decision to ascribe only little weight to the appalling circumstances surrounding the loss of Ms. Kaur's employment in Canada was not, in my view, consistent with the approach mandated by the Supreme Court in *Kanthisamy*. I am also left in some doubt whether the officer performed "the requisite analysis of whether, in light of the humanitarian purpose of s 25(1), the evidence *as a whole* justified relief" (*Kanthisamy* at para 45).

VI. Conclusion

[19] The application for judicial review is allowed, and the matter is remitted to a different immigration officer for reconsideration in accordance with these reasons. Neither party proposed that a question be certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, and the matter is remitted to a different immigration officer for reconsideration in accordance with these reasons.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5227-17

STYLE OF CAUSE: MANDEEP KAUR v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

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