Federal Court  Cour fédérale

Date: 20190116

Docket: IMM-889-18

Citation: 2019 FC 56

Ottawa, Ontario, January 16, 2019

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

ZULFIKAR AMIRAL PRASLA
(aka ZULFIKAR AMIRALI PRASLA),
JASMINE ZULFIKA PRASLA
(aka JASMINE ZULFIKAR PRASLA),
ZAEEMBHAI ZULFI PRASLA
(aka ZAEEMBHAI ZULFIKAR PRASLA)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants, Zulfikar Amiral Prasla, and his wife, Jasmine, entered Canada with their son, Zaeembhai, on September 19, 2012 and made a refugee claim. After their refugee claim was rejected in July 2014, they applied for a permanent residence visa from within Canada on

humanitarian and compassionate [H&C] grounds. This H&C application was refused in September 2015.

[2] The Applicants submitted a second H&C application in February 2017 based on their establishment, ties to Canada, best interests of the child, and their risk of return to India. In a decision dated February 19, 2018, a Senior Immigration Officer refused the second H&C application. The Applicants have now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*], for judicial review of the Officer's decision. They ask the Court to set aside the decision and have their H&C application redetermined by a different officer.

I. Background

[3] The Applicants are Ismailis. They say they will be discriminated against because they are Muslims and fear returning to India because criminal elements have extorted money from them, and Mr. Prasla will face criminal charges based on false allegations made against him by a former business partner.

[4] Mr. Prasla and his wife are employed, and their son attends high school. The Applicants participate and volunteer in the community. Mr. Prasla and his wife volunteer at their Jamatkhana. Mrs. Prasla helped an elderly woman with food, medicine, and providing company until the woman passed away. Their son has volunteered at the Ismaili Community Center in Toronto.

[5] The Refugee Protection Division [RPD] of the Immigration and Refugee Board determined in a decision dated July 16, 2014, that the Applicants were neither Convention refugees nor persons in need of protection. This Court denied the Applicants' application for leave to apply for judicial review of the RPD decision on November 6, 2014. The Applicants' first H&C application was rejected on September 19, 2015.

II. The Officer's Decision

[6] After summarizing the Applicants' immigration history, the Officer considered their activities and establishment in Canada since arrival and assigned some weight to their establishment. The Officer acknowledged that, while the Applicants had developed friendships in Canada and the hardship of being physically separated from their family and friends here would cause some dislocation, it did not mean that they would be unable to contact one another via other means such as telephone, letters, and social media outlets.

[7] The Officer then considered the best interests of the child, Zaeembhai, who then was sixteen-years-old. The Officer accepted that, while Zaeembhai had benefited from attending school in Canada, at his young age he was more resilient and adaptable to changing situations and successful integration into the Indian school system was feasible despite there being some adjustment. The Officer also accepted that, while it might be difficult for Zaeembhai to leave Canada, whatever adjustments he would have to make he would be doing so with the support of his parents. Thus, the Officer was "satisfied that the best interests of the child would be met if he continued to benefit from the personal care and support of his parents."

[8] The Officer acknowledged that, while Zaeembhai had become accustomed to life in Canada and likely enjoyed better social and economic opportunities than he would in India, there was "insufficient evidence to suggest that the best interest of the minor applicant would be compromised in India, especially given the fact that he would be returning with his parents, the people who have been a constant source of support in his life." The Officer concluded the analysis of Zaeembhai's best interests by stating that:

> …I am not satisfied that returning India would have a significant negative impact on the best interests of the child. Furthermore, I am not persuaded that the child would be unable to adapt or reintegrate or that his best interests would be compromised upon his return to India. …I am satisfied that the best interests of the child would be met if he continued to benefit from the personal care and support of his parents, uncle and aunt in India.

[9] The Officer next addressed the Applicants' fear of returning to India, noting that the RPD had found Mr. Prasla lacked credibility with respect to whether the police were pursuing him in connection with theft allegations or that they were interested in arresting him, and that the Applicants could live safety in Delhi without fear of persecution. The Officer indicated that all the documentary evidence had been considered as well as the Officer's own independent research of country conditions as they related to the Applicants. There was, in the Officer's view, "…insufficient objective evidence that the Applicants would be subjected to state sanctioned discrimination based on their religion."

[10] The Officer found, in view of the documentary evidence, that the Applicants had many avenues of support should they feel their rights were violated or threatened by anyone including

criminals. According to the Officer, the Applicants also had the option of relocating internally in India. The Officer stated:

> The documents indicate that there are large Muslim populations in the states of Uttar Pradesh, Bihar, Maharashtra, West Bengal, Andhra Pradesh, Karnataka, and Kerala; Muslims are the majority in Jammu and Kashmir. The RPD panel concluded in its Written Reasons and Decision, that the applicants could safely seek refuge in Delhi. The RPD panel stated "…that it would not be unduly harsh for the claimants to reside in Delhi".

[11] The Officer concluded the reasons for the decision by noting that the Applicants had spent the majority of their lives in India, and that while they might face some difficulties in readjusting to life in India, it was reasonable to believe that during their years in India they would have developed and continued to have family, friends, acquaintances and social networks there; and they would not be returning to an unfamiliar place, language, culture or a place devoid of a network that would render re-integration unfeasible.

III. Analysis

[12] An immigration officer's decision to deny relief under subsection 25(1) of the *IRPA* is reviewed on the reasonableness standard (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44, [2015] 3 SCR 909).

[13] The reasonableness standard tasks the Court with reviewing an administrative decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determining "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, [2008] 1 SCR 190. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708.

[14] The Officer's decision in this case suffers from two defects which render it unreasonable.

[15] First, the certified tribunal record [CTR] contains an incomplete copy of the RPD's decision and is not in the record. This decision was clearly before the Officer in rendering the H&C decision. The Officer specifically quoted two paragraphs from the RPD's decision about Mr. Prasla's credibility and an internal flight alternative [IFA] in Delhi; these paragraphs are not in the portion of the RPD's decision contained in the CTR.

[16] The case law in this Court has dealt with at least three distinct types of scenarios raised by a deficient CTR, including the following:

> 1. A document does not appear in the CTR and it is unknown whether it was submitted by an applicant. In cases such as these, the Court will presume that the materials in the CTR were the materials before the immigration officer, barring some evidence to the contrary [citations omitted].
>
> 2. A document is known to have been properly submitted by an applicant but is not in the CTR, and it is not clear whether that document, for reasons beyond an applicant's control, was before the decision-maker. In this situation, the case law suggests that the decision should be overturned [citations omitted].
>
> 3. A document is known to have been before the tribunal but is not before the Court and cannot be reviewed. In such a

> case, unless the document is otherwise available to the Court, such as in an applicant's record [citations omitted], the Court will be unable to determine the legality of the decision and the decision will be set aside if the missing document was central to the finding under review [citations omitted].
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> *Togtokh v Canada (Citizenship and Immigration)* 2018 FC 581 at para 16, 293 ACWS (3d) 593

[17] The absence of a complete copy of the RPD decision makes it impossible for the Court to ascertain whether the Officer's references to places other than Delhi as possible IFAs for the Applicants emanated only from the RPD's reasons concerning an IFA or from the Officer's own assessment and analysis of the documentary evidence about areas with large Muslim populations. While it is not unreasonable for an H&C officer to reference an IFA finding by the RPD, it is unreasonable if an H&C officer assesses risk, including the viability of an IFA, contrary to subsection 25(1.3) of the *IRPA*. This subsection stipulates that the factors considered in determining whether a person is a Convention refugee under section 96, or needs protection under subsection 97(1), are not to be considered in assessing the H&C considerations relating to a foreign national under subsection 25(1).

[18] The second defect concerns the Officer's assessment of Zaeembhai's best interests. The Applicants' submitted information to the Backlog Reduction Office of Citizenship and Immigration Canada in four tranches, the last of which was a letter with enclosures dated February 16, 2017, only four days before the Officer made the decision. One of the enclosures with the Applicants' last submissions was a further affidavit of Mr. Prasla dated January 4, 2017, where he stated, "at this time, his [Zaeembhai's] proficiency in English has actually surpassed his ability to speak Hindi."

[19] The Officer made no statement about Zaeembhai's language skills in assessing his best interests. On the contrary, the Officer found that he, as one of the Applicants, would not be returning to "an unfamiliar…language." In my view, this blanket statement cannot be justified in the face of Mr. Prasla's affidavit noted above and is, therefore, unreasonable. It cannot be justified because it does not address the extent of Zaeembhai's language skills in the context of what was in his best interests. In short, the Officer's decision in this case is unreasonable. The decision must be set aside, and the matter returned to another officer for redetermination.

IV. Conclusion

[20] The Applicants' application for judicial review is allowed.

[21] Neither party proposed a serious question of general importance to be certified under paragraph 74(d) of the *IRPA*; so, no such question is certified.

JUDGMENT in IMM-889-18

THIS COURT'S JUDGMENT is that: the application for judicial review is granted; the decision of the Senior Immigration Officer dated February 19, 2018, is set aside; the matter is returned for redetermination by a different immigration officer in accordance with the reasons for this judgment; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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