Federal Court  Cour fédérale

Date: 20190905

Docket: IMM-4905-18

Citation: 2019 FC 1142

Ottawa, Ontario, September 5, 2019

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

BAHADUR SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Bahadur Singh ("Applicant") has lived in Canada for over fifteen years and worked as a cook for thirteen years, under a series of work permits, to support his wife, his two daughters, and his son who have all lived in India throughout that time.

[2] After the Applicant could no longer renew his work permit due to the now repealed "four in four out rule", an immigration consultant he retained to regularize his status falsely stated that she had filed an application for permanent residence from within Canada on humanitarian and compassionate ("H&C") grounds on his behalf under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA"). Shortly after discovering that no such application had been filed, the Applicant formally applied for an exemption from the requirement to apply for permanent residence from outside of Canada on H&C grounds.

[3] On September 20, 2018, an Immigration Officer ("Officer") dismissed the Applicant's H&C application. In the Officer's view, the H&C grounds the Applicant raised in his application: his establishment in Canada, hardship and challenges that he and his family would face upon his return to India, and the incident in which his immigration consultant misled him, raised insufficient evidence to grant relief under subsection 25(1) of the *IRPA*. On October 4, 2018, the Applicant applied to this Court for judicial review.

[4] For the following reasons, I find the Officer's decision is unreasonable. I am setting aside the Officer's decision and shall remit it to another officer for redetermination in accordance with these reasons.

II. **Background**

[5] The Applicant was born in 1967 and is a citizen of India. His spouse and three adult children (born in 1992, 1994, and 1997), two daughters and one son, currently reside in India.

[6] On February 6, 2004, the Applicant arrived in Canada and was issued a work permit which was valid until February 26, 2005. Thereafter, the Applicant extended his work permit multiple times, the last of which was valid until January 17, 2015. Throughout the period he was authorized to work, the Applicant worked for three different employers in Calgary as a cook and one in Medicine Hat, Alberta.

[7] Since January 2015, the Applicant has lived in Calgary with his nephew and has been unemployed as he is not authorized to work.

[8] On April 15, 2015, the Vegreville Case Processing Centre dismissed the Applicant's application to extend his work permit because of the "four in four out rule" which was in force at that time but was repealed in December 2016. That rule set a maximum cumulative period over which a foreign national could remain in Canada under a work permit and the Applicant had apparently reached that maximum period.

[9] Shortly thereafter, he retained an immigration consultant in Calgary to file an application for an exemption on H&C grounds. However, after paying the consultant's fees, the Applicant discovered that he was misled and that the consultant never actually filed the application, despite providing him with a false letter suggesting that the application had been made and that an interview was scheduled.

[10] On January 26, 2017, after the Applicant retained counsel, he officially applied for an exemption from the requirement to apply for permanent residence from outside Canada on H&C

grounds. In his application, the Applicant stated that he would not qualify for permanent residence under an economic class because he is not sufficiently proficient in English.

[11] The Applicant's counsel transmitted a letter in support of his H&C application, dated January 24, 2017, setting forth the grounds for claiming an exemption under subsection 25(1) of the *IRPA*. Of particular interest in this matter, is the following passage under the heading "Efforts to Regularize His Status":

> [The Applicant] went to a "[person named XXX] from [ABC] Inc." He was told that he could apply to remain; he paid her fees and waited and waited and was even provided a letter from his consultant regarding an interview scheduled at Harry Hays. Later he was told that his interview was cancelled. He became suspicious; he went to Mr. Darshan S. Kang, a Member of Parliament. After inquiry, he discovered that there was no record of any such application that was filed. The false documents, and [the Applicant's] efforts to unravel his consultant's mendacity are attached. It would appear that [the Applicant] was presented with a false letter ostensibly written by a [Case Processing Agent].
>
> His efforts to regularize his status, the fact that he was taken advantage of, gives rise to sympathy, empathy.

[12] The documents that this passage refers to include a receipt from ABC Inc. indicating payment in the amount of $550 for "Work permit & submission" dated March 5, 2015 and the email from a CIC Case Processing Agent with the subject line "Appointment for interview – H&C – 5350 5807 [the Applicant]", dated July 4, 2016. The email states that an interview has been scheduled on August 18, 2016 to clarify a few points.

[13] The record also contains an email from the MP Darshan Kang to CIC, dated September 29, 2016, inquiring about the status of the Applicant's application, referencing the application number in the above email subject line. Finally, a letter dated October 5, 2016 addressed to the

Applicant from Darshan Kang states that according to CIC, "there is no record of any application currently in process. The most recent application was for a work permit, that was received on January 20, 2015 and a decision letter was sent on April 15, 2015". Correspondence directly from CIC dated November 15, 2016, states "there is currently no application in process".

[14] The letter submitted by the Applicant's counsel also contained submissions regarding his establishment in Canada and the adverse challenges and hardship he and his family would face if he is removed to India:

> **A. Establishment in Canada:** [the Applicant] has been living in Calgary for almost 13 years (since 2004). He worked hard as a cook during that time to support himself and his family in India and provided notices of assessment since 2004 to prove his employment history. [The Applicant] is an active member of the Calgary Sikh community. A support letter from the Dashmesh Culture Center states that he is a major contributor and volunteer and that he is a great asset to the kitchen given his professional culinary training and experience and that he volunteers his time in the kitchen, cleaning and serving food on a daily basis. He currently lives with his nephew, who provided a letter stating that he supports [the Applicant] and has covered his living expenses since [the Applicant's] work permit expired and that he will continue to do so in the future;
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> **B. Adverse Challenges and Hardship:** [The Applicant] and his family would suffer hardship if he is returned to India. They relied on him for financial support through the income earned from his Canadian employment, as he was their sole financial supporter. He would struggle to find employment in India because his education is limited and India has a high unemployment rate among the less educated. [The Applicant] provided a support letter signed by his wife and three children, drafted by his eldest daughter. She stated that the family is facing "very tough circumstances" in the two year period that [the Applicant] had to stop working due to the expiration of his work permit and that it would be "a huge setback for all of us" if he is removed to India. [The Applicant] also provided his own letter in which he discusses his sacrifice in coming to Canada, namely that he sought to provide a better life and education for his children, and further noted that

> many expenses are forthcoming, including the weddings of his two daughters.

III. **Decision Under Review**

[15] In a decision dated September 20, 2018, the Officer dismissed the Applicant's application. The Officer ultimately held that while it is sympathetic to some aspects of the application, they are not sufficient to warrant relief on H&C grounds under subsection 25(1) of the *IRPA*.

[16] The Officer first stated that after the Applicant's application to extend his work permit was dismissed, and the Regulations were subsequently amended in December 2016, he did not make any further work permit applications and has remained in Canada without status. The Officer then remarked that the Applicant has demonstrated establishment and integration in the community, that he has lived in Canada for almost 15 years, that he was employed and involved in the community, and gave "some favourable consideration" to his establishment.

[17] However, the Officer stated that the Applicant did not demonstrate that his prolonged stay in Canada was motivated by circumstances outside of his control. He must have anticipated that leaving Canada was a possibility. The Officer further found that the Applicant willfully remained in Canada without proper authorization and that this demonstrates a disregard for Canadian immigration laws, which "does not weigh in his favour."

[18] The Officer then considered the Dashmesh Culture Center support letter and letters from the Applicant's employers, which speak positively of him. The Officer gave positive

consideration to the relationships that the Applicant has formed in Canada. The Officer held that the Applicant grew up in India and spent many years there before migrating to Canada and it was not convinced that requiring the Applicant to leave Canada and apply for permanent residence from India would cause him significant difficulties.

[19] The Officer then remarked that the Applicant's documentation establishes modest earnings in Canada and accepted his submission that he financially supports his family in India. However, the Officer stated that the Applicant has been unemployed since his work permit expired in January 2015 and his submissions do not demonstrate how he has been supporting himself during that time or his family in India.

[20] The Officer further held that the Applicant did not demonstrate that he would be unable to secure similar employment to support his family in India or that his spouse and adult children would be unable to support themselves. The Officer remarked that the Applicant is resourceful and enterprising and has obtained transferrable skills that can assist him in supporting his family in India. The Officer was further satisfied that the Applicant has a network of family and support in India.

[21] With respect to the Applicant's submission that he was misled by a dishonest immigration consultant, the Officer acknowledged that "this situation must have been frustrating and disappointing" but the evidence nevertheless did not adequately demonstrate that he made attempts to regularize his status in Canada.

[22] The Officer then acknowledged the Applicant's submission that due to his lack of English proficiency he would not qualify to immigrate within any existing permanent residence category or program. The Officer stated that this might be the case; however, subsection 25(1) of the *IRPA* is not designed to be an alternate means of immigrating to Canada for those who do not meet the requirements of established immigration programs.

IV. **Issue and Standard of Review**

[23] This matter raises a single issue: was the Officer's assessment of the H&C factors raised in the Applicant's application reasonable? (*Kanthasamy v Canada (Citizenship and Immigration*), 2015 SCC 61 at paras 8, 44 [*Kanthasamy*]).

V. **Analysis**

[24] The Applicant argues that the Officer's assessment of his establishment in Canada and the hardship and challenges that he would face upon removal to India was unreasonable. He submits that the Officer simply listed the positive factors relating to his establishment and concluded, without further reasoning, that an exemption is not warranted. As such, it is impossible to determine on what basis the Officer dismissed the application as there is a disconnect between the factors cited by the Officer in favour of the application and the conclusion reached (*Adu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 565 at para 14; *Cobham v Canada (Citizenship and Immigration)*, 2009 FC 585 at para 26; *Tindale v Canada (Citizenship and Immigration)*, 2012 FC 236 at para 11). The Applicant submits that the Officer's finding that he did not "demonstrate that his prolonged stay in Canada was motivated by circumstances outside of his control" is unreasonable. He submits that an H&C applicant

cannot be required to demonstrate that his/her establishment was outside of his/her control and that this is not a reasonable basis to undermine his fifteen years of establishment in Canada.

[25] With respect to hardship, the Applicant challenges the Officer's conclusion that he could likely find employment if returned to India. In his view, the Officer ignored objective evidence that uneducated individuals face high rates of unemployment in India. He submits that it was also not reasonable to find him resourceful and that his family would assist him in finding employment upon his return to India.

[26] Finally, the Applicant submits that the Officer's assessment of his allegation regarding the incident in which he was defrauded by an immigration consultant was unreasonable. Namely, the Officer did not consider whether the hardship he would face upon return is "undeserved" (ie. it is the result of circumstances beyond his control). The Applicant submits that the hardship is caused by undeserved factors: the now repealed cumulative duration rule and the act of fraud committed by the immigration consultant which he had relied on to regularize his immigration status. Moreover, it was unreasonable for the Officer to draw a negative inference from his "failure to regularize his immigration status" given that the Applicant's evidence is that he honestly believed he had applied for an H&C considerations shortly after his application to renew his work permit was refused.

[27] In the Respondent's view, reading the decision as a whole, the Officer's reasons are clear, transparent, and intelligible and the Officer did not misconstrue or ignore any evidence before it: the Officer gave positive consideration to some factors, it simply did not find these were sufficient to overcome the negative factor at issue (the Applicant's overstay). The Respondent

submits that the Applicant's arguments essentially ask this Court to ascribe greater weight to the evidence before the Officer, which is not the purpose of judicial review

[28] The Respondent submits that an H&C officer is not required to specifically articulate what level of establishment would be expected. The Officer did not set a benchmark for establishment and finds that it had not been met, rather, the Officer considered the evidence relating to the Applicant's establishment and gave it some positive weight. The Respondent argues that the Applicant did not establish that he would be unable to reintegrate and find employment in India simply based on his level of education and one outdated internet article relying on Indian census data from 2011.

[29] Finally, the Respondent submits that the Applicant cannot rely on his immigration consultant's misconduct in this application. According to the Federal Court Protocol of March 7, 2014, when such misfeasance by counsel or an authorized representative is alleged, the applicant must notify their former representative with sufficiently detailed allegations (*Brown v Canada (Citizenship and Immigration)*, 2012 FC 1305 at para 57). The Respondent states that the Applicant did not give notice to the representative.

[30] I would first remark that H&C applications brought under subsection 25(1) of the *IRPA* provide officers with broad discretion. The purpose of this provision is to afford the Minister the flexibility to mitigate the *IRPA*'s rigid requirements. In applying this flexible discretion, the officer acting on behalf of the Minister must determine if the application would "excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another" (*Kanthasamy* at para 21, citing *Chirwa v Canada (Minister of Manpower &*

Immigration) (1970), 4 IAC 338 (Imm App Bd) at 350)). This means that the officer must "substantively consider and weigh all the relevant facts and factors before them" (*Kanthasamy* at para 25, citing *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras 74-75). Officers therefore should not confine their analysis to a check-list or to boiler-plate statements, as compassionate factors simply do not fit into templates (*Salde v Canada (Citizenship and Immigration)*, 2019 FC 386 at paras 22-23).

[31] In this case, the Officer held that the Applicant's stay in Canada was not motivated by circumstances outside of his control and that he must have anticipated that leaving Canada was a possibility, to diminish the significance of his fifteen years of establishment in Canada. However, as Justice Zinn held in *Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813 [*Sebbe*], it is inappropriate for an H&C officer to state that the applicant knowingly established himself or herself in Canada, when there was a possibility that they could be removed, and hold that against the applicant (at paras. 23-24). Of course, it is very convenient for an H&C officer to hold an applicant's knowledge of possible future removal against them, as most applicants do not have status before they file an application under subsection 25(1) of the *IRPA* and would be aware of the risk of future removal while establishing themselves in Canada.

[32] Therefore, the question is not whether the Applicant took steps *knowing* that he might not be in Canada permanently; rather, the question the Officer had to ask is "what were the steps [he] took, were they done legally, and what will the impact be if [he] must leave them behind" (*Sebbe* at para 24).

[33] Apart from stating that it considered the evidence and that it gave "some favourable consideration" to the Applicant's establishment, the Officer failed to consider the question asked by Justice Zinn in *Sebbe*. In this case, the Officer may have listed the Applicant's steps, but it failed to consider the impact of leaving Canada behind and whether or not these steps were taken legally.

[34] Essentially, the Officer stated that it considered the Dashmesh Cultural Center letter and support letters, and provided a cursory summary of the evidence before concluding that it was not enough to warrant an exemption under subsection 25(1) of the *IRPA* in a boiler-plate fashion.

[35] What the Officer did not consider was the entire purpose of the Applicant's application. In his letter to the Officer, the Applicant submitted that he left his family in India when his children were young (12, 10, and 6 years old) to provide them a better life. In his words, this was a "sacrifice" and "they missed me and I missed them". The Applicant and his family also submitted that he is their sole financial provider: his children need him to fund their studies, the family needs him to support their expenses in India, his daughters will not be able to pay for their upcoming weddings. From this, the Officer "accepted that [the Applicant] assisted his family financially" and that he "left India to provide a better life for his family".

[36] The difficulty is that the Officer essentially discounted these grounds by concluding that the Applicant did not demonstrate that he would "be unable to secure similar employment" in India to support his family and that he is "a resourceful and enterprising individual and was able to relocate to a new country, able to obtain employment and gain job skills", which the Officer

was satisfied the Applicant could use to secure employment in India. This reasoning completely undermines what the Applicant attempted to achieve by coming to Canada in the first place. One must ask a serious question: why would the Applicant have left his young children and his wife in India, whom he missed, if he would have been able to support them in India all along?

[37] In any case, this Court has consistently admonished officers who have held the fact that an individual is "resourceful" and "enterprising" against them. Following the Officer's reasoning, "the more successful, enterprising and civic minded an applicant is while in Canada, the less likely it is that an application under section 25 [of the *IRPA*] will succeed" (*Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 at para 26; *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at para 35; *Jeong v Canada (Citizenship and Immigration)*, 2019 FC 582 at para 53; *Aguirre Renteria v Canada (Citizenship and Immigration)*, 2019 FC 134 at para 8). One would expect that the message has been received at this point.

[38] These errors are more than enough to demonstrate that the Officer failed to "substantively consider and weigh all the relevant facts and factors before them", namely what the Applicant would be forced to leave behind if he is removed to India (*Kanthasamy* at para 25).

[39] However, the Officer also wrongfully drew a negative inference in concluding that "…the Applicant's willful actions of remaining in Canada without proper authorization shows a disregard for the Canadian immigration laws and this does not weigh in his favor" (emphasis added). It was not reasonable for the Officer to draw this negative inference against the Applicant.

[40] The evidence in the record established that the Applicant stopped working as soon as his work permit expired in January 2015, he applied to renew his work permit that month, and in April 2015 that application was refused. Shortly thereafter the Applicant believed an immigration consultant had applied for an exemption on H&C grounds on his behalf so that he could remain in Canada with status. Evidence in the record, that the Officer did not appear to dispute, demonstrated that the Applicant had reason to believe that an interview with CIC was scheduled in August 2016 and that he verified the status of his application in September 2016, after no interview took place. The Applicant was informed in October 2016 that "there is no record of any application currently in process" and that his application to renew the work permit on January 20, 2015 was the most recent application. The Applicant's counsel received confirmation that this was the case in November 2016. Thereafter, he formally filed an H&C application in January 2017. At worst, it appears that the Applicant remained in Canada without status for two or three months during which time he was in the process of preparing his application.

[41] In light of this evidence, it stretches credulity that the Applicant would simply remain in Canada without making any effort to regularize his status after having remained here for thirteen years under work permits, which he continually renewed as required. Accordingly, given the evidence before the Officer, it could not reasonably draw a negative inference as a result of the Applicant's "willful actions" and "disregard" for immigration laws. Rather, the Applicant showed full regard for immigration laws for over a decade and was the victim of another individual's actions. The Officer had no good reason to doubt the Applicant's good faith.

[42] I also cannot agree with the Respondent that the Applicant had to follow the procedure set forth in the Federal Court Procedural Protocol of March 7, 2014 ("Protocol") regarding allegations made against former counsel (including immigration consultants). It appears that these provisions only apply if the former counsel or immigration representative alleged to have acted incompetently did so in the context of the proceedings under review. In this case, the Applicant is not alleging that the counsel who represented him in the context of *this* underlying H&C application was incompetent and that this amounts to a breach of natural justice. Rather, he alleges that an immigration consultant misled him before he even filed the H&C application at issue. This is the Applicant's explanation for the two years spent in Canada without status.

[43] According to the Protocol, its purpose is to ensure that notice is given where incompetence of counsel is alleged "as a grounds for relief in an application for leave and for judicial review under the [Act]" (ie. the applicant raises that incompetence of counsel gives rise to a breach of natural justice). Moreover, the second of three criteria that comprise the tripartite test for finding that former counsel's incompetence results in a breach of natural justice requires that: "[t]here was a miscarriage of justice in the sense that, but for the alleged conduct, there is a reasonable probability that the result of the original hearing [or application] would have been different" (*Abiobun v Canada (Citizenship and Immigration)*, 2019 FC 299 at para 13). Here the original application was the Applicant's H&C application filed in January 2017 which was separate and distinct from the alleged incident of fraud. That incident, which occurred in the context of a previous (false) H&C application (which was never filed) amounted to an explanation given to the Officer in this case as to why the Applicant remained in Canada without status for nearly two years.

[44] In short, given that the Officer failed to consider and weigh relevant factors in addressing the Applicant's establishment and wrongfully drew a negative inference against him without regard for the evidence, the decision is unreasonable and I am setting it aside.

VI. **Certified Question**

[45] Counsel for each party was asked if there were any questions requiring certification. They each stated that there were no questions for certification and I concur.

VII. **Conclusion**

[46] For the foregoing reasons, this application for judicial review is granted.

JUDGMENT in IMM-4905-18

THIS COURT'S JUDGMENT is that:

1. The decision is set aside and the matter is to be returned for redetermination by a different officer.
2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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