Federal Court Cour fédérale

Date: 20200311

Docket: IMM-1777-19

Citation: 2020 FC 361

Ottawa, Ontario, March 11, 2020

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

HARDEV SINGH SAHOTA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case concerns the decision of an immigration officer (the "Officer") of Immigration, Refugees and Citizenship Canada ("IRCC") refusing a humanitarian and compassionate ("H&C") application made pursuant to section 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] The Applicant is a 41-year-old Indian citizen who was found inadmissible to Canada under section 36(1)(a) of the *IRPA* as a result of a criminal conviction. After a deportation order was issued against the Applicant, he submitted an application for permanent residence based on H&C grounds. The H&C application was refused on the basis that the Applicant had provided insufficient evidence in support of the H&C factors.

[3] On August 29, 2017, the Applicant submitted an application for judicial review. The Applicant disputes the Officer's findings and submits that the Officer failed to be "sufficiently alive, alert and sensitive" to the best interests of the children.

[4] For the reasons that follow, the Officer's decision is unreasonable. This application for judicial review is granted.

II. **Facts**

A. *The Applicant*

[5] Mr. Hardev Singh Sahota (the "Applicant") is a 41-year-old citizen of India. The Applicant came to Canada on December 5, 2001 as a permanent resident, as he was sponsored by his wife, Ms. Rupinder Sahota, who is a Canadian citizen. The Applicant and his wife have three Canadian-born children: twin sons, Harman and Harjot (aged 16), and a daughter, Kiran (aged 15). The Applicant and his family currently live in a basement suite, in the home of the Applicant's brother-in-law in Surrey, British Columbia.

[6] On April 22, 2010, the Applicant was intercepted by Canada Border Services Agency ("CBSA") officers upon his arrival at the Vancouver International Airport on a flight from India

via Frankfurt, Germany. The CBSA officers discovered a false bottom in the Applicant's suitcase that contained approximately two kilograms of heroin. The Applicant claimed that he was carrying the drugs at the request of Kuldip Takher, a Punjabi singer with the stage name "K.S. Makhan".

[7] On July 3, 2015, the Applicant was convicted of one count of unlawfully importing a substance into Canada, contrary to section 6(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 ("*CDSA*") and one count of unlawfully possessing a substance for the purposes of trafficking, contrary to section 5(2) of the *CDSA*.

[8] On September 23, 2015, the Applicant was sentenced to 6 years imprisonment for the importation count under section 6(1) of the *CDSA*, and 5 years for the possession for the purpose of trafficking under section 5(2) of the *CDSA*, to be served concurrently. While at Mission Institution—a minimum security federal penitentiary—the Applicant was a model inmate, involved in community service and pursuing ESL classes. The Applicant served approximately one year in custody, after which he was released pursuant to an Accelerated Parole Review on or about September 22, 2016. The Accelerated Parole Review, under section 125 (repealed) of the *Corrections and Conditional Release Act*, SC 1992, c 20, allows the Parole Board to release an offender on full parole, before the scheduled full parole date, based on the social and criminal history of the offender; information relating to the performance and behaviour of the offender while under sentence; and any information that discloses a potential for violent behaviour by the offender. As the Applicant notes, Accelerated Parole Reviews are rare. Since his release, the Applicant has worked as a fulltime electrician.

B. *Immigration History*

[9] On March 2, 2016, a CBSA Enforcement Officer reported the Applicant under section 44(1) of the *IRPA* for serious criminality pursuant to section 36(1)(a) of *IRPA*, and on March 10, 2016, for organized criminality under section 37(1)(b) of *IRPA*. The Minister's Delegate ("MD") determined that the nature of the offences grounding the section 44(1) reports were serious in nature and not outweighed by the humanitarian and compassionate considerations. The Applicant's case was referred to the Immigration Division ("ID") for an admissibility hearing.

[10] On July 17, 2017, the ID found that the Applicant was inadmissible on grounds of serious criminality pursuant to section 36(1)(a) of the *IRPA*. A Deportation Order was issued against the Applicant.

[11] On August 2, 2017, the Applicant submitted a Pre-Removal Risk Assessment ("PRRA") application, which was ultimately refused on January 8, 2018. On February 6, 2018, the Applicant filed an application for judicial review to challenge this decision, but the application was dismissed on May 15, 2018.

[12] On August 29, 2017, the Applicant filed an H&C application. However, by decision dated January 5, 2018, the H&C application was denied.

C. *H&C Decision*

[13] The Officer refused the H&C application on the basis that there were insufficient H&C grounds to justify granting the application, especially with respect to the hardship that the Applicant would face upon removal to India.

(1) **Establishment and Integration**

[14] With respect to establishment, the Officer found insufficient evidence to indicate that the Applicant is well established from an economic perspective. The Officer found that the Applicant did not provide any evidence reflecting a history of stable employment or income, that the Applicant and his family currently reside in a basement apartment, and that there was insufficient evidence to indicate the acquisition of any assets.

[15] The Officer noted that there was little information elaborating on efforts of community integration outside of the Applicant's period of incarceration, and concluded that this was reflective of a minimal level of community participation and integration into Canadian society.

[16] The Officer acknowledged the numerous letters received in support of the Applicant's good character from friends and the president of a Sikh Temple, but found that there was insufficient evidence to indicate any level of interdependency between the Applicant and these individuals.

(2) **Best Interests of the Children**

[17] On the best interests of the children ("BIOC"), the Officer noted that the Applicant has played an active role in raising his children who met with him regularly at Mission Institution, and that the children have expressed their financial and emotional dependency on the Applicant. The Officer also acknowledged that it would be extremely difficult for the children to visit the Applicant in India on a regular basis and for lengthy periods of time due to the family's economic situation. Although the Officer accepted that the children would face some emotional challenges if the Applicant returned to India, the Officer noted that "the children have already experienced the daily physical absence of their father".

[18] The Officer observed that little information had been provided to indicate adverse effects of the removal on the children's psychological well-being, i.e. a change in the children's academic performance, or to indicate any counselling services to address the psychological challenges. After noting that there was little evidence to indicate challenges for Ms. Sahota's ability to fulfill her parental role—other than the children's letter indicating that their mother was stressed due to financial difficulties—the Officer concluded that any detrimental effects on the children could be moderated by the mother's support.

[19] The Officer also concluded that there was insufficient information to indicate long-term adverse effects on the children's emotional, academic, or social development with the Applicant's removal. Furthermore, the Officer found that the children would be able to keep in touch with their father through e-mails, letters, telephone calls, and social media. The Officer found that the family would be able to benefit from the strong supportive mechanisms in Canada if the Applicant returned to India.

(3) **Financial Challenges**

[20] The Officer noted there was insufficient information elaborating on the financial challenges experienced by the family during the Applicant's period of incarceration, and on the adverse effects of financial difficulties on the children. The Officer concluded that there was insufficient evidence to indicate why Ms. Sahota could not seek social assistance, and implied this could be an option for the family.

(4) **Hardship**

[21] Regarding the Applicant's fear of returning to India and the associated hardships concerning threats from Kuldip Takher, the Officer found that there was insufficient evidence to corroborate the Applicant's fear. The Officer also found insufficient information to indicate that the Applicant would be devoid of familial support upon his return, or that he would be unable to use his newly acquired skills in Canada to assist with reintegration in India.

[22] Overall, although the Officer acknowledged that the Applicant was a model inmate, released early on parole, and remorseful, the Officer ultimately concluded that the seriousness of the convictions and the effect on Canadian society weighed heavily against the Applicant.

III. **Issues and Standard of Review**

[23] The sole issue on this application for judicial review is whether the Officer's decision is reasonable, and in particular whether the Officer erred in analyzing the best interests of the children, by failing to properly assess the evidence and ignoring contradictory evidence.

[24] Prior to the Supreme Court's recent decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) [*Vavilov*], the reasonableness standard applied to the review of an immigration officer's decision on an H&C application: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 (CanLII) [*Kanthasamy*] at para 44. There is no need to depart from the standard of review followed in previous jurisprudence, as the application of the *Vavilov* framework results in the same standard of review: reasonableness.

[25] As noted by the majority in *Vavilov*, "a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker," (*Vavilov* at para 85). Furthermore, "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency," (*Vavilov* at para 100).

IV. **Analysis**

[26] The Applicant submits that the Officer failed to properly assess the BIOC and failed to meaningfully engage with the evidence. Although the Applicant had filed a number of support letters from his children detailing their emotional and financial dependence on him, the Applicant submits that the Officer focused on what was missing from the evidence, instead of engaging with what was contained in the evidence. The Applicant argues that the Officer was "required to identify and define the child's best interests and examine those interests 'with a great deal of attention' in light of all the evidence," as stated by this Court in *Ondras v Canada (Citizenship and Immigration)*, 2017 FC 303 (CanLII) [*Ondras*] at para 11, citing *Kanthasamy* at para 39. In light of this, the Applicant relies on *Cerezo v Canada (Minister of Citizenship and*

Immigration), 2016 FC 1224 (CanLII) at para 10 and submits that the Officer demonstrated a fundamental lack of sensitivity in the manner in which the Officer analyzed the children's letters and assessed the potential hardship if the Applicant were to be removed to India.

[27] The Applicant submits that the Officer's reasoning is inherently contradictory because although the Officer acknowledged the Applicant's active role in his children's lives, the Officer concluded that there was insufficient evidence to indicate the adverse impacts of the Applicant's removal on the children's lives. Additionally, the Applicant submits that by dismissing the evidence of financial hardship and concluding that Ms. Sahota can go on social assistance, the Officer erred by ignoring the possibility that the children's best interests might be best served by maintaining the status-quo (*Alagaratnam v Canada (Citizenship and Immigration)*, 2017 FC 381 (CanLII) at para 32; *Jimenez v Canada (Citizenship and Immigration)*, 2015 FC 527 (CanLII) at paras 27-28). The Applicant asserts that the Officer did not analyze the BIOC, but simply restated the considered factors, and failed to clearly articulate the children's best interests in light of their age, education, and level of interdependency (*Bajraktarevic v Canada (Minister of Citizenship and Immigration)*, 2006 FC 123 (CanLII) at paras 18-20).

[28] Furthermore, the Applicant submits that the Officer failed to properly consider two Correctional Service of Canada ("CSC") reports, which contained extensive evidence about the children's relationship with their father. The Applicant relies on *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC) [*Cepeda-Gutierrez*] at para 17 for the proposition that the more important the evidence that is not mentioned specifically and analyzed in the reasons, the more willing a court may be to infer that the decision-maker has made an erroneous finding of fact without regard to the evidence. The Applicant submits that

the Officer failed to explain why the CSC reports—clearly pointing to an opposite conclusion and squarely contradicting the Officer's findings of fact—were not given significant weight.

[29] The Respondent submits that the Applicant bears the onus to establish the circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another," and to establish exceptional reasons why he should be allowed to remain in Canada (*Kanthasamy* at paras 21-23; *Bakal v Canada (Citizenship and Immigration)*, 2019 FC 417 (CanLII) at paras 13-14; *Huang v Canada (Citizenship and Immigration)*, 2019 FC 265 at paras 17-25). The Respondent argues that the burden falls on the Applicant to provide evidence that establishes the impact of his removal on his wife and children (*Perez Fernandez v Canada (Citizenship and Immigration)*, 2019 FC 628 (CanLII) at paras 22-26). The Respondent submits that the Applicant failed to submit psychological reports or other evidence to establish a psychological impact on his children, and submits that the Officer reasonably concluded that there was insufficient information to indicate long-term adverse effects on the Applicant's children's development. The Respondent argues that the Officer conducted a detailed and thorough consideration of the BIOC.

[30] In addition, the Respondent submits that the BIOC is not determinative of whether a parent may be required to leave Canada (*Kanthasamy* at para 23; *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para 75; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 (CanLII) [*Legault*] at para 12). The Respondent submits that although there are inherent hardships to removal, that is insufficient to justify an exemption under subsection 25(1) of the *IRPA* (*Legault* at paras 15, 19, 21, 23). The Respondent submits that the Applicant simply disagrees with the weighing of the factors and the inferences drawn by the Officer.

[31] In my view, the Officer erred in analyzing the best interests of the children, by failing to properly assess the evidence and by ignoring contradictory evidence (*Cepeda-Gutierrez* at para 17). As a result, the Officer made erroneous findings of fact without regard to the evidence. Contrary to the Officer's finding that the children have already experienced the daily physical absence of their father, the CSC reports note that the Applicant had been taking weekend passes to his family's home ever since he had been eligible, and maintained the weekend passes. The Officer minimized the level of emotional distress for the Applicant's children, and failed to provide reasons for why the children's weekends spent with the Applicant—contradictory evidence to the Officer's findings—was not considered or assigned no weight.

[32] Despite having acknowledged that the Applicant has played an active role in raising his children who met with him regularly while the Applicant was imprisoned; that the children are financially and emotionally dependent on the Applicant; and that it would be extremely difficult for the children to visit the Applicant in India, the Officer unreasonably concluded that there was insufficient information to indicate long-term adverse effects on the children's emotional and social development from the Applicant's removal, while failing to engage in other evidence that indicated emotional and psychological distress upon the children. Similarly to *Ondras*, where the officer failed to fully consider the limited evidence and the decision was rendered unreasonable (*Ondras* at para 10), I find that the Officer's reasons in the case at bar fell short of a full consideration of the evidence.

[33] In observing that the Applicant had not provided evidence to indicate adverse effects of the removal on the children's psychological well-being, or to indicate any use of counselling services, the Officer failed to analyze the CSC reports, which described the Applicant as "a very attentive and supportive father," who helped to contribute towards household expenses and

furniture for their home. The CSC reports had also stated that the Applicant "is mindful of buying his three children whatever they need for school and/or clothing. He presents as an attentive father and his children appear attached to him," indicating the children's financial and emotional dependency on their father.

[34] In view of the above reasons, I find that the Officer's decision is unreasonable.

V. **Certified Question**

[35] 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.

VI. **Conclusion**

[36] The Officer failed to properly consider the evidence before him, and erred in ignoring contradictory evidence. The Officer's decision is unreasonable.

[37] This application for judicial review is granted.

JUDGMENT in IMM-1777-19

THIS COURT'S JUDGMENT is that:

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

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Erica Olmstead Molly Joeck	FOR THE APPLICANT
Keith Reimer	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Edelmann & Co. Law Offices Vancouver, British Columbia	FOR THE APPLICANT
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT