Federal Court  Cour fédérale

Date: 20091029

Docket: IMM-5309-08

Citation: 2009 FC 1108

Ottawa, Ontario, October 29, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ROSHAN LAL SHALI
NANCY SHALI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the negative decision of an officer (Officer), dated November 9, 2008 (Decision), which refused the Applicants' application for permanent residence within Canada on humanitarian or compassionate grounds pursuant to section 25(1) of the Act.

BACKGROUND

[2] The Applicants, Roshan and Nancy Shali, are citizens of India who applied for permanent residence status from within Canada based on humanitarian and compassionate (H&C) grounds. The Applicants' claim is based on hardships they would suffer upon their return to India while waiting for the processing of their application.

DECISION UNDER REVIEW

[3] The reasons given by the Officer to support a negative finding include: the sponsorship by the Applicants' son can be made while the Applicants are outside the country; the Applicants are not well-established in Canada; and the Applicants have both a daughter and a brother residing in India. Also, the Applicants can hire help to assist them in India. On the positive side was the sponsorship by the Applicants' son.

[4] While the Officer considered family reunification as a factor, she found that the travel history of the Applicants and their ability to obtain visitor's visas for travel to Canada showed that it was reasonable to expect that such travel would continue to occur if the Applicants were required to return to India. The Officer noted that the Applicants have previously resided with either their brother or their daughter in India, even though affidavits on file show that neither alternative is now

available to them. The Officer also noted that in the past the Applicants have hired help, and that they could continue to hire help when they return to India.

[5] While the Officer recognized that some challenges would exist for the couple upon their return to India, she found that the hardships were not unusual and undeserved or disproportionate. Moreover, the Officer was not satisfied that the lengthy processing times overseas warranted an exemption from the legislative requirements.

ISSUES

[6] The issues raised by the Applicants are as follows:

1) Did the Officer err by overlooking the emotional needs of the Applicants and the emotional support that their son would be providing to them?
2) Did the Officer err by finding that the Applicants' daughter and sibling who resided in India were factors that do not support a positive decision?
3) Did the Officer err by not providing any analysis of why the evidence by the Applicants' daughter and brother was rejected or did not weigh more heavily in her assessment?
4) Did the Officer err by inferring that reliable help would be available to the Applicants in the future?
5) Did the Officer err by placing too much weight in the past travel history of the Applicants while overlooking their current circumstances?

6) Did the Officer err by stating that the lengthy processing times overseas are not sufficient to warrant an exemption?

7) Were the Officer's reasons adequate to satisfy the duty of procedural fairness?

STATUTORY PROVISIONS

[7] The following provision of the Act is applicable in these proceedings:

Humanitarian and compassionate considerations	Séjour pour motif d'ordre humanitaire
25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	**25.** (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

STANDARD OF REVIEW

[8] Questions of procedural fairness and natural justice such as the provision of adequate reasons are reviewed on a standard of correctness. See *Salman v. Minister of Citizenship and Immigration*, 2007 FC 877 at paragraph 9.

[9] The standard of review to be applied when determining whether adequate grounds existed to allow the Applicants to apply for permanent residence within Canada is reasonableness: *Barzegaran v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 681, at paragraphs 15-20.

[10] In paragraph 44 of *Dunsmuir* the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review". Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[11] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENTS

The Applicants

Overlooked emotional needs

[12] The Applicants submit that the Officer overlooked their emotional needs because she did not note any of the emotional factors in her assessment. The Applicants had provided the Officer with evidence of the emotional turmoil that a return to India would cause, including feelings of helplessness, worry and depression. The Applicants submit that since the Officer included the factors that she considered relevant to the assessment in her notes and other concerns were not noted, the concerns not mentioned must have either been overlooked or considered irrelevant. The Applicants submit that the Officer erred either by overlooking these considerations, or by determining that they were not relevant to her assessment.

No help available

[13] The Applicants submit that the Officer erred in determining that the presence of the Applicants' brother and daughter in India supported a negative decision. The affidavits supplied by the Applicants' daughter and brother demonstrate that the Applicants would not be able to rely on these relatives for help upon their return to India.

[14] The Applicants submit that the Officer should have explained why she did not accept the evidence that supported a positive decision, especially since the Applicants relied on the affidavits to show that they needed to stay in Canada to make their application. The Applicants suggest that such evidence required analysis by the Officer, but that such an analysis did not occur. The Officer should have provided an adequate analysis that demonstrated how she reached her conclusion.

[15] The Applicants say that the reasons given by the Officer in this instance were inadequate. The Applicants cite and rely on *Via Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25 at paragraphs 21 and 22, for the position that the obligation to provide reasons is not satisfied by simply repeating the evidence and submissions of a party and then stating a conclusion. A decision maker must set out findings of fact and the principle evidence upon which findings are based before stating a conclusion. It is necessary for reasons to address the major points at issue in any case. Moreover, the decision maker's reasoning process must be set out, and must demonstrate consideration of the relevant factors.

Officer erred in finding help is available

[16] The Applicants submit that the Officer erred in inferring from the evidence provided that it was reasonable to believe that the Applicants could find reliable help and assistance upon their return to India. The Applicants say there is no evidence to support this inference. Rather, the evidence suggests that the help that the Applicants found was unreliable, and was "more of a

liability than a help." The Applicants suggest that the Officer could have drawn the opposite conclusion based on the same evidence.

Officer erred in focusing on travel history

[17] Although the Applicants concede that they would likely be issued visitor visas, the Applicants contend that the Officer's reliance upon this factor overlooks the entire purpose of their application. Simply put, the Applicants' needs are no longer being met by yearly visits to Canada. The Officer erred in giving great weight and consideration to this factor. In so doing the Officer misconstrued the relevancy of this evidence.

Officer erred in finding that long processing times do not warrant an exemption

[18] The Applicants submit that, taken alone, long waiting times would not warrant a statutory exemption. However, where hardship is alleged, the Applicants say that the length of time to process the application ought to be considered. The Applicants contend this is so because the longer they spend in India, the longer they will have to endure the hardship they fear. Moreover, the Applicants suggest that since they are both suffering from poor health, longer processing times could make their hardship more severe if their conditions deteriorate.

[19] The Applicants submit that since the processing time in this application will cause suffering to them, it should be a relevant factor for consideration. In support of this proposition, the Applicants cite cases where this principle has been considered in stay applications: *Harry v. Canada (Minister of Citizenship and Immigration)*, 2000 CANLII 16418 at paragraph 17, and *Boniowski v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1161.

[20] The Applicants suggest that while the contexts of these cases are different, the principle is the same: that excessive hardship, or irreparable harm, ought to be a relevant factor for consideration. Accordingly, the Applicants submit that the Officer erred in finding that a lengthy processing time was not a relevant consideration.

The Respondent

[21] The Respondent submits that, pursuant to subsection 25(1), the Officer has full authority to determine what constitutes humanitarian and compassionate grounds and that the Decision requires considerable deference from the Court.

[22] Moreover, the Respondent submits that the H&C process is not designed to eliminate all hardship, but rather to grant relief from "unusual and undeserved or disproportionate hardship." The Respondent contends that this is a high threshold to meet: *Irmie v. Canada (Minister of Citizenship and Immigration)*, 10 Imm. L.R. (3d) 206, *Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38. Moreover, a granting of relief under subsection 25(1) is an exceptional remedy based on the discretion given to the Minister.

[23] The Respondent submits that even though the Applicants' plight may evoke sympathy, this alone is not enough for H&C relief. Rather, the onus lies upon the Applicants to demonstrate to the Officer that the statutory requirement to obtain a visa from outside of Canada would result in unusual and underserved or disproportionate hardship.

[24] Even if the Court would have decided the case differently, the Respondent contends that as long as the Officer examined the evidence and came to an acceptable and defensible conclusion, her Decision should be insulated from judicial review.

Evidence was considered

[25] The Respondent contends that the discretionary authority of an immigration officer includes the right to determine the weight given to particular factors and to the documentary evidence provided. There is no evidence in this case to suggest that the Officer failed to consider the "emotional factors," as submitted by the Applicants. The Officer was not required to specifically reference that she considered the emotional hardship of the Applicants. Rather, the question of emotional needs is to be considered as part of the overall assessment of the hardship faced on return. If the reasons as a whole indicate that the Officer was alive to the issue then the Decision cannot be unreasonable: *Quiroa v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 495.

[26] In the case at hand, the Officer clearly noted that she had considered all the information regarding this application as a whole, and reviewed the possible grounds for exemption. Moreover,

the Officer also read and considered the affidavits provided by the Applicants' daughter and brother, and understood that they would no longer be able to care for the Applicants. The Officer was alive to the issue that the Applicants would require assistance in their daily lives.

[27] The Respondent suggests that the emotional component is inherent in the assessment undertaken by the Officer in her consideration of the Applicants' "hardship of having to live alone in India," which the Officer noted was the ground advanced by the Applicants in their application. The Officer clearly had this issue in mind when making her Decision.

[28] Regarding the issue of domestic help, the Officer acknowledged that while some of the Applicants' past hired help had been unreliable, it was "reasonable to believe that they would be able to find reliable help to assist them with their chores should they be required to return to India." The Respondent submits that this conclusion was not unreasonable. It cannot be said that a presumption that such help is available is an unrealistic expectation.

[29] Moreover, the Officer recognized that while the Applicants may face challenges due to Ms. Shali's partial loss of mobility, such challenges were not hardship that rose to the level of being unusual and undeserved or disproportionate. The relief under subsection 25(1) is an exceptional remedy that is dependent on the Minister's discretion.

Detailed reasons are not required

[30] The Respondent disputes the allegation that the Officer erred by not providing detailed reasons as to why the affidavit evidence of the Applicants' daughter and brother did not weigh more heavily in the Officer's assessment and Decision.

[31] While the Applicants cite and rely on *Via Rail* to show that detailed reasons are necessary, the Respondent submits that the Court has rejected the application of *Via Rail* in the context of an H&C decision: *Paz v. Canada (Minister of Citizenship and Immigration*), 2009 FC 412. *Via Rail* did not consider the discretionary decisions of a delegate of the Minister; it dealt with decisions made by an administrative tribunal. As such, it is not reasonable to require administrative officers to give as detailed reasons for their decisions as would be required by an administrative tribunal: *Paz*. When notes are the method used to provide reasons, the threshold for adequacy of reasons is fairly low (see for example, *Paz* at paragraph 27, in general *Ozdemir v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331 and *Jeffrey v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 605 at paragraph 15.

[32] The Officer's reasons acknowledge the affidavit evidence provided and explain how this evidence factored into her Decision. Although the existence of their daughter and brother in India is listed as being a factor not supporting a positive decision, the reasons demonstrate that the Officer considered and weighed the affidavit evidence regarding the Applicants' return to India. Accordingly, the Officer weighed the existence of family members who would no longer be able to give support and accommodation to the Applicants against the Applicants' ability to hire domestic

help. The Officer then determined that the challenges that would be faced by the Applicants in this instance would not amount to unusual or undeserved and disproportionate.

[33] Even if the Applicants' daughter and brother are no longer able to provide accommodation to the Applicants, it does not mean that their existence should not be considered when determining "factors related to country of origin." The Applicants have spent most of their time in India living with either their daughter or their brother. This is a factor related to the country of origin. The Officer did not err in considering this evidence in both contexts in which it arose.

Processing Times

[34] The Respondent submits that the Applicants are taking issue with the weight the Officer gave to processing times in India. There was no evidence before the Officer as to processing times for India. While the Officer considered the existence of "lengthy processing times overseas," the Officer came to the conclusion that, in this case, it did not constitute a factor which was sufficient to warrant a statutory exemption.

[35] While the Applicants attempt to compare hardship in an H&C application to irreparable harm on a stay motion, the Respondent submits that such a parallel cannot be drawn. The determination of irreparable harm on a stay motion depends on the application of a test in which a "serious likelihood [or] jeopardy to the applicants' life or safety" must be demonstrated: (*Golubyev*

v. Canada (Minister of Citizenship and Immigration), 2007 FC 395 at paragraph 12. Clearly, this is not the case with the Applicants.

[36] In sum, the Respondent submits that the Officer considered all relevant factors in reaching her Decision and did not ignore any evidence. Moreover, the Officer exercised her discretion in a reasonable manner and came to a reasonable conclusion.

ANALYSIS

[37] The facts of the present case invite considerable sympathy. It is entirely reasonable that the Applicants, who are well into their 60s, should wish to remain with their son in Canada and should wish to resist the inconvenience, hardship and emotional turmoil that will arise if they are forced to return to India pending a determination of their permanent residence application. However, sympathy and reasonableness are not sufficient to justify interference by this Court. This is because the H&C process is fact-driven and Parliament has decreed that H&C officers should have a broad discretion to determine whether applicants will suffer unusual and underserved or disproportionate hardship.

[38] As the Respondent points out, the H&C process is not designed to eliminate any kind of hardship; relief is only available for "unusual and undeserved or disproportionate hardship." See *Owusu* at paragraph 8; *Ahmad v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 646 (CanLII), at paragraph 49. The onus is on the Applicants to satisfy this test and the discretion belongs to the Minister and his delegates and not the Court. The Court cannot intervene merely

because it has sympathy for the plight of the Applicants or even because it would have reached a different conclusion on the facts.

[39] The Applicants have raised several grounds to justify interference by the Court but, in the end, they are asking the Court to re-weigh the evidence and reach a conclusion that favours them. The Court simply cannot do this.

Overlooking the Emotional Needs of the Applicants and the Emotional Support Available from their son in Canada

[40] The emotional needs referred to by the Applicants are fears of living alone in India, feelings of helplessness and worries about the future, and feelings of hopelessness because there is no one to go back to in India, while their son is available to take care of them in Canada.

[41] These are subjective feelings of the Applicants. They do not refer to medical issues although, of course, the fact of Nancy's ill-health does exacerbate them. In the end, they are fairly typical fears about separation and they are adequately addressed in the Decision. The Officer demonstrates that she is totally alive to the emotional issue because she notes that the H&C grounds put forward by the Applicants are based upon "the hardship of having to live alone in India."

[42] The Decision also examines the objective basis for these feelings and finds there is no unusual and undeserved or disproportionate hardship because:

a. The Applicants can hire help in India;

b. They may not have family accommodation waiting for them but they are not without family connections in India;

c. Their son in Canada can continue to support them in India while they wait; and

d. They can obtain visitor's visas and visit their son in Canada as they have done in the past.

[43] The Officer also says that she has considered the grounds put forward by the Applicants, and it is obvious from the Decision as a whole that she has not overlooked the emotional grounds because they are not really detachable from the various factors that are discussed. For example, the Applicants' feelings of helplessness and worries about the future are part of the consideration that the Officer gives to the availability of help in India, the continuing support of their son, and the availability of visitor's visas.

[44] As Justice Shore pointed out in *Quiroa v. Canada (Minister of Citizenship and Immigration)* 2007 FC 495 (CanLII), at paragraph 38:

> … It is not a requirement that the Officer specifically reference that the emotional hardship of the Applicants were considered. If the reasons, when taken as a whole, indicate that the Officer was alive to the issue, they will survive a somewhat probing examination and will not be found to be unreasonable.

In the present case, the Decision as a whole reveals that the Officer was fully alive to the emotional issues and took them into account as part of the weighing process.

Affidavits of Daughter and Brother in India

[45] The Officer does not overlook the affidavits of the brother and daughter in India or come to any conclusions that reject the evidence in those affidavits.

[46] The Officer acknowledges that these family members cannot provide accommodation as in the past, but points out that the Applicants can hire assistance and have other forms of help available to them. The Applicants have hired help in the past. The fact that it was not reliable is not evidence that reliable help is not available in India. In the past, the Applicants managed with unreliable help. It stands to reason, then, they will also be able to manage with reliable help.

[47] The reasons in the Decision on this issue are entirely adequate. The Officer concludes that the Applicants may not have accommodation with the daughter and brother, but there are other ways to manage their lives while they are waiting in India for the results of their permanent residence application. The Applicants are really arguing that the emotional difficulties of waiting in India should have outweighed the other factors in this case. But weight is a matter for the Officer to decide, and there is nothing unreasonable in the Officer's reasoning or conclusions that the difficulties associated with waiting in India can be managed and do not amount to unusual and undeserved or disproportionate hardship. The reasons and the conclusions fall well within the range of acceptable outcomes justifiable on the facts and the law.

Inferring that Reliable Third Party Help Available

[48] There is nothing unreasonable about this inference. There was evidence that the Applicants had hired help in the past. They found it unreliable but managed nevertheless. There was no evidence to suggest that reliable or adequate help is not available to the Applicants in India or that the Applicants could not afford it.

[49] The Applicants say at paragraph 24 of their written memorandum that "It is submitted that the Officer might easily have drawn an opposite conclusion from the same evidence." This, of course, is not the point. The discretion belongs to the Officer and, provided the Decision falls within the range of possible acceptable outcomes which are defensible in respect of the facts and law, the Court cannot interfere. See *Dunsmuir* at paragraph 47.

[50] The facts of this case are that the Applicants have found help in the past and have provided no evidence that reliable help is not available to them in India, or that they cannot afford reliable help. The conclusions of the Officer fall within the range of acceptable outcomes.

Placing Too Much Weight on Past Travel History and Overlooking Current Circumstances

[51] The arguments advanced by the Applicants on this issue are all about "weight." Weight is a matter for the Officer's discretion. There is nothing to suggest that any factor was overlooked or that the Decision on this issue does not fall within the range of acceptable outcomes.

Lengthy Processing Times From Overseas

[52] As the Decision makes clear, this was a factor that the Officer took into account. Once again, it is a matter of weight and the Court simply cannot interfere because the Applicants disagree with the Decision and feel that this factor should have been given more weight.

[53] The Applicants' assertion that the Officer examined this factor on the assumption that the waiting period would be two years is not born out by the record of what was before the Officer. The fact that a government analyst might have got the period wrong in an affidavit rendered after the Decision does not show that the Officer was under some misconception about the waiting times for the Applicants. There is no reason to suspect that the Officer did not accept the Applicants' position on the relevant waiting and processing times which the Applicants faced if sent back to India and did not take the times into account when deciding whether there was unusual and underserved or disproportionate hardship.

Conclusions

[54] The Court may well have come to a different conclusion from that of the Officer, but I cannot say that anything material was overlooked, that the reasons are inadequate, or that the Decision does not fall within a range of possible acceptable outcomes which are defensible in respect of the facts and the law.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is dismissed;

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.:	IMM-5309-08
STYLE OF CAUSE:	ROSHAN LAL SHALI NANCY SHALI v. THE MINISTER OF CITIZENSHIP AND MMIGRATION
PLACE OF HEARING:	Ottawa, ON
DATE OF HEARING:	September 16, 2009
REASONS FOR JUDGMENT:	RUSSELL J.
DATED:	October 29, 2009

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