Federal Court Cour fédérale

Date: 20100805

Docket: IMM-6146-09

Citation: 2010 FC 805

Ottawa, Ontario August 5, 2010

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

GYAN KAUR

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under section 72(1) of the *Immigration and Refugee protection Act*, S.C. 2001, c. 27 (the "*Act*"), of a decision of an immigration officer, dated November 5, 2009, denying the application for permanent residence from within Canada based on Humanitarian and Compassionate (the H&C application) grounds submitted by the Applicant.

BACKGROUND

[2] The Applicant is a 74-year-old citizen of India. She has been a housewife all her life. She came to Canada in 2001, after the death of her husband. She has four children, who are all, at the

present time, in Canada. Two of her children were granted refugee status and have become Canadian citizens. The two others remain illegally in Canada as their refugee claims have been denied.

[3] In February 2002, the Applicant claimed asylum on the ground that she feared persecution because of her Sikh nationality. Her application was denied in January 2004. On September 1st 2004, the Applicant submitted a first H&C application, which was updated in October 2007, and which was based on the risks and the hardship that she would be exposed to should she return to India: she alleged a fear of persecution because of her Sikh nationality and invoked the hardship that she would suffer if she were separated from her family should she have to leave Canada.

[4] On January 9, 2008, the pre-removal risk assessment (PRRA) officer concluded that the humanitarian considerations put forward by the Applicant did not warrant the granting of the H&C exemption from the requirement to obtain a permanent resident visa prior to coming to Canada. An application for leave and for judicial review of that decision was dismissed by the Federal Court on May 21, 2008 (IMM-689-08).

[5] On September 18, 2009, the Applicant filed a second application for permanent residence from within Canada for H&C considerations, which led to the decision now under review.

THE DECISION UNDER REVIEW

[6] The Applicant's H&C application was denied on November 5, 2009. In his decision, the immigration officer concluded that the Applicant did not demonstrate a sufficient degree of establishment in the community and that she would not suffer unusual, undue or unjustified hardship if she had to apply for a permanent residency visa from India.

THE ISSUES

[7] The Applicant alleges that the officer made three reviewable errors:

a) His conclusions and inferences are not supported by the evidence and are based on speculation;

b) He failed to consider the personal circumstances of the Applicant, and thus rendered a decision without regard to this evidence.

c) He failed to provide adequate reasons for his decision.

[8] The Respondent argues that the officer's assessment of the evidence was reasonable and that he did consider the personal circumstances that were raised by the Applicant despite the fact that he did not mention every piece of evidence in his decision.

THE STANDARD OF REVIEW

[9] The case law has made it clear that the applicable standard of review regarding a decision on an H&C application is that of reasonableness (*Suresh v. Canada (Minister of Citizenship and*

Immigration), 2002 SCC 1; *Dunsmuir v. New Brunswick*, 2008 SCC 9; *Kisana (Minister of Citizenship and Immigration) v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189.

[10] The same standard applies to the decision-maker's assessment of the evidence (*Dunsmuir*; *Ndam v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 513; *Martinez v. Canada* (Minister of Citizenship and Immigration), 2009 FC 798). The court must not re-assess the evidence, re-weigh the factors examined by the decision-maker or substitute its own appreciation of the evidence unless there are gross errors or perverse findings of fact (*The Royal Bank of Canada v. Wu*, 2010 FCA 144). The Court's role when reviewing a decision under the standard of reasonableness is enunciated in *Dunsmuir*, above, at paragraph 47:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[11] While a failure of a decision-maker to consider relevant evidence may suggest an erroneous finding of fact, a failure to mention and address relevant evidence or major points in issue in the reasons may also reveal an inadequacy of the reasons provided (*Malveda v. Canada (Citizenship and Immigration)*, 2008 FC 447). The question of the adequacy of reasons raises an issue of procedural fairness and the decision, in that regard, must be held to the standard of correctness (*Adu v. Canada (Minister of Citizenship and Immigration*), 2005 FC 565; *Thomas v. Canada*, 2007 FC 838; *Canada (Attorney General) v. Fetherston*, [2005] F.C.J. No. 544).

ANALYSIS

[12] After having reviewed the immigration officer's decision and the material that was in his possession, I consider that the officer failed to address the Applicant's personal circumstances and, thus rendered a decision without regard to the evidence. The officer also failed to provide adequate reasons in his decision.

[13] Under section 25 of the *Act*, the Minister has discretion to grant a foreign national an exemption in exceptional situations.

25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, 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 obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

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, sur demande d'un étranger se
trouvant hors du Canada, étudier le cas de cet étranger; il peut lui octroyer le statut de résident
permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives
à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

[14] In examining an application for landing from within Canada on humanitarian and compassionate grounds made pursuant to section 25, an Immigration Officer is to follow the relevant Ministerial guidelines: Immigration Manual IP5 - Immigration Applications in Canada made on humanitarian or compassionate Grounds, a manual put out by the Minister of

Citizenship and Immigration Canada, provides guidelines on what is meant by Humanitarian and Compassionate grounds. It states, at paragraph 5.1:

5.1 Humanitarian and Compassionate Grounds	5.1 Motifs d'ordre humanitaire
Applicants bear the onus of satisfying the decision-maker that their personal circumstances are such that the hardship of having to obtain a permanent resident visa from outside of Canada would be:	Il incombe au demandeur de prouver au décideur que son cas particulier est tel que la difficulté de devoir obtenir un visa de résident permanent de l'extérieur du Canada serait
(i) unusual and undeserved or	(i) soit inhabituelle et injustifiée;
(ii) disproportionate.	(ii) soit excessive.
Applicants may present whatever facts they believe are relevant.	Le demandeur peut exposer les faits qu'il juge pertinents, quels qu'ils soient.

[15] The IP5 Manual goes on to define "unusual and undeserved" hardship and "disproportionate" hardship. It states, at paragraphs 6.7 and 6.8:

6.7 Unusual and undeserved hardship	6.7 Difficulté inhabituelle et injustifiée
Unusual and undeserved hardship is:	On appelle difficulté inhabituelle et injustifée :
• the hardship (of having to apply for a permanent resident visa from outside of Canada) that the applicant would have to face should be, in most cases, unusual, in other words, a hardship not anticipated by the Act or Regulations; and	• la difficulté (de devoir demander un visa de résident permanent hors du Canada) à laquelle le demandeur s'exposerait serait, dans la plupart des cas, inhabituelle ou, en d'autres termes, une difficulté non prévue à la Loi ou à son Règlement; et
• the hardship (of having to apply for a permanent resident visa from outside of Canada) that	• la difficulté (de devoir demander un visa de résident

the applicant would face should be, in most cases, the result of circumstances beyond the person's control	hors du Canada) à laquelle le demandeur s'exposerait serait, dans la pluparts des cas, le résultat de circonstances échappant au contrôle de cette personne.
6.8 Disproportionate hardship	6.8 Difficultés démesurées
Humanitarian and compassionate grounds may exist in cases that would not meet the "unusual and undeserved" criteria but where the hardship (of having to apply for a permanent resident visa from outside of Canada) would have a disproportionate impact on the applicant due to their personal circumstances	Des motifs d'ordre humanitaire peuvent exister dans des cas n'étant pas considérés comme « inusités ou injustifiés » , mais dont la difficulté (de présenter une demande de visa de résident permanent à l'extérieur de Canada) aurait des répercussions disproportionnées pour le demandeur, compte tenu des circonstances qui lui sont propres.

[16] The Applicant based her application on her family ties in Canada, the absence of family ties in India and the hardship she would suffer if she were to return to India in view of her personal circumstances. The personal circumstances stated by the Applicant are as follows:

i. She is a 73 year-old lady (now 74);

ii. She has no means to sustain herself in India: her husband died in 2001; she has no work experience and very limited education; her financial situation is precarious; she has no home in India and no family left in India;

iii. The system of care for the elderly is underdeveloped in India and she would not receive the necessary care and financial support;

iv. Her four children live in Canada where the five of them share an apartment and take care of each other;

v. Her daughter filed a sponsorship application for her in 2007, which is still being processed;

[17] The officer addressed the question of hardship in a very succinct manner:

> [TRANSLATION]
> I do not believe that this person would suffer an unusual, undue or unwarranted inconvenience if she had to file her application for permanent residence from abroad as is provided for by the Canadian Immigration Act. The difficulties she will face will flow directly from her wish to remain illegally without the proper documentation in Canada; it is as simple as that. ..

[18] The officer reached his conclusion on hardship on the basis of one consideration only: the hardship that she might suffer is the result of her own action. He did not address the question of whether the hardship would "have a disproportionate impact on the Applicant due to her personal circumstances". I am of the view that the officer failed to address the Applicant's personal circumstances which were central to her H&C application. The immigration officer has discretion as to the weight to be given to the personal circumstances raised by an applicant, but he cannot fail to have regard to the applicant's personal circumstances.

[19] While the officer is presumed to have considered all of the evidence before him and he does not need to mention every piece of evidence in his reasons (*Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No 598 (F.C.A), his decision cannot stand if he ignores relevant evidence (*Litke v. Canada (Human Resources and Social Development)*, 2008 FCA 366. In *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No.

1425, at paragraph 17, Justice Evans stressed 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 from the silence that the agency made an erroneous finding of fact "without regard to the evidence"".

[20] In the analysis portion of his decision, the officer cited some of the personal circumstances put forward by the Applicant in support of her H&C application but he never addressed them when discussing the issue of hardship. In a very recent decision, the Federal Court of Appeal reaffirmed the obligation of the officer to address the personal circumstances raised in an H&C application:

> [28] At the outset of her reasons, the Officer declares that "the appellants' H&C application has been assessed on the basis of unusual and undeserved, or disproportionate hardship" (H&C decision, *ibidem*). It is common ground that this is the appropriate test.
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> . . .
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> [30] However, she never turns her mind to the thrust of the H&C application: will Mr. Hinzman be subjected to disproportionate hardship if returned to the United States, regardless of the existence of a law of general application or state protection and notwithstanding other findings on differential treatment and due process? [the key issue] (see counsel's submissions in the H&C application, appeal book, volume 1, at pages 125 and following).
>
> [37] The Minister's policy and judicial guidelines for processing applications to remain in Canada based on H&C grounds clearly provide that when assessing a request, officers "must … indicate that all factors have been analysed and explain the weight given to each of these factors and why" before conducting "a balancing exercise between the positive H&C factors identified and the facts that weight against granting an exemption" (Inland Processing Policy Manual, Chapter 5, Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds, Appendix B.)
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> . . .
>
> [40] . . . , the H&C Officer had the duty to look at all of the appellants' personal circumstances, including Mr. Hinzman's beliefs and motivations, before determining if there were sufficient reasons to make a positive H&C decision

> (*ibidem*, Chapter 5, section 11.3). She did not. . . . (*Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2010 FCA 177)

[21] In this case, the officer made the same error that the PRRA officer made in *Hinzman*, above, and by failing to have regard to the Applicant's personal circumstances, he rendered a decision without regard to evidence that was central to the application.

[22] This brings me to the issue of the adequacy of the reasons. I am of the view that the officer did not provide adequate reasons.

[23] By failing to address the personal circumstances put forward by the Applicant, the officer has left her in a position where she does not know why the officer did not accept her personal circumstances or why he did not give them any weight. The officer's reasons do not meet the standard set out by the Supreme Court in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 and in *R. v. Sheppard*, [2002] 1 S.C.R. 869.

[24] In *Via Rail Canada Inc. v. National Transportation Agency (C.A.)*, [2000] F.C.J. No. 1685, the Federal Court of appeal provided useful guidance as to the notion of adequate reasons and stressed that reasons must address the major points in issue and must set out the reasoning followed by the decision maker:

> **21** The duty to give reasons is only fulfilled if the reasons provided are adequate. What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case. However, as a general rule, adequate reasons are those that serve the functions for which the duty to provide them was imposed. In the words of my learned colleague Evans J.A., "[a]ny attempt to formulate a standard of adequacy that must be met before a tribunal can be said to

> have discharged its duty to give reasons must ultimately reflect the purposes served by a duty to give reasons."[7]
>
> **22** The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion.[8] Rather, the decision-maker must set out its findings of fact and the principal evidence upon which those findings were based.[9] The reasons must address the major points in issue. The reasoning process followed by the decision-maker must be set out[10] and must reflect consideration of the main relevant factors.[11]

[25] In this case, the immigration officer failed to address the major points in issue and, therefore, his decision cannot stand.

[26] A final comment**.** The main personal circumstances put forward in support of the H&C application had already been raised by the Applicant in her first H&C application, which was denied by a PRRA officer on January 9, 2008. That decision was well articulated and the PRRA officer dealt with each of the factors presented by the Applicant and he explained the weight that he gave to them. The decision under review did not refer to that first H&C decision other than to mention that this was the Applicant's second application and that the first application had been denied. I do not have to decide whether the second application should have been denied on the basis that the Applicant was invoking elements that had already been addressed, but it is very clear that the decision under review contains errors that were not made by the PRRA officer who processed the first H&C application.

[27] No question was proposed for certification under paragraph 74(d) of the *Act*, and no such question will be certified.

JUDGMENT

THIS COURT ORDERS AS FOLLOWS:

1. The immigration officer’s decision is set aside;
2. The matter is referred back to Citizenship and Immigration Canada to be determined by a different immigration officer;
3. No question of general importance is certified.

“Marie-Josée Bédard”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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