Federal Court Cour fédérale

Date: 20120813

Docket: IMM-6840-11

Citation: 2012 FC 989

Vancouver, British Columbia, August 13, 2012

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

BALRAJ KAUR BHATTAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] allows the respondent to grant an exemption from any regulatory requirement if it is justified by humanitarian and compassionate [H&C] considerations, taking into account the best interests of any child directly affected. The applicant challenges the legality of the decision of an immigration officer, dated September 26, 2011, dismissing her inland application for permanent residence based on H&C grounds.

[2] This application for judicial review must fail. The officer's conclusion that, individually and globally, the factors raised by the applicant do not warrant an exemption on H&C grounds falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law (*Dunsmuir* at para 47). It is apparent that the officer considered the personal situation of the applicant in light of the totality of the evidence and representations submitted by the applicant or on her behalf by the immigration consultant. Moreover, there has been no breach of procedural fairness.

[3] The determination made by the officer as to whether H&C considerations exist is essentially factual. Since *Dunsmuir v New Brunswick,* 2008 SCC 9 [*Dunsmuir*], the appropriate standard of review for such a decision as a whole has consistently been held to be that of reasonableness, while the standard of correctness applies to issues of procedural fairness. Considerable deference should be accorded (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 62) to the officer's findings and the Court should refrain from re-evaluating the weight given to the different factors considered by the officer, including the best interests of any child directly affected (*Legault v Canada (Minister of Citizenship and Immigration)* 2002 FCA 125 at para 11).

[4] As appears from the record and reasons, at the time of her application, the applicant was a 58-year-old citizen of India who had lost her husband in 1991. She is the mother of two adult children: a daughter who is married and lives in the Punjab, India, and a son who is a permanent resident of British Columbia, Canada, since 2004. She is also the grandmother of the two Canadian-

born children of her son and daughter-in-law: a grandson aged five and a granddaughter aged four at the time of the application.

[5] The applicant herself has lived in New Delhi for most of her life. Prior to her son's move to Canada, she lived with her son and was financially supported by him although she had a limited source of income. The applicant first entered Canada on August 24, 2006 to visit her son and his family (daughter-in-law and grandson) and stayed with them until January 27, 2007 when she returned to India. The applicant travelled to Canada a second time on July 21, 2010 to visit her son and two grandchildren. In October 2010, a little more than two months after the applicant's arrival, her son retained an immigration consultant while he sponsored the applicant in support of her application for permanent residence made in Canada based on H&C grounds.

[6] I note that the applicant's affidavit, and that of her son in support of the present application for judicial review, contains evidence that was never before the decision-maker. By the time the applicant came to Canada in 2010, her son had apparently separated from his wife, who had moved out of the house along with their children. However, this important fact is not mentioned in the H&C application; meanwhile, her son became involved in family law proceedings before the Supreme Court of British Columbia for access and visit-related issues. Indeed, on October 11, 2011 – just a few weeks after the refusal of the H&C application – the applicant's son was granted access to his children twice a week. The applicant now alleges that because her son is employed on a full-time basis as an automotive technician and often needs to work overtime, the applicant is currently providing care and support to him and to the children, with whom the applicant has already developed a very close relationship. Furthermore, although this was not initially raised in the

applicant's H&C application, the applicant now states that she has been attempting to establish herself in the country by regularly going to the local Sikh temple and attending events organized by her community, and studying the English language through self-taught courses.

[7] The applicant justifies the failure to bring this new evidence to the attention of Citizenship and Immigration Canada [CIC] by the fact that the immigration consultant who was in charge of her H&C application did not advise her to include written submissions and evidence with regards to her connection and her establishment in Canada. She also blames him for not updating her application so as to render an account of the development of the separation/custody dispute between the applicant's son and his spouse. It is unfortunate for the applicant today that key information may be missing in CIC's file, but it is trite law that a reviewing court is bound by the record filed before the administrative tribunal, the decision of which is under review. I see no particular or special reason in this case to depart from this general rule. None of the exceptions recognized by the jurisprudence apply to the applicant's case. At the hearing before the Court, the applicant's present counsel notably confirmed that no complaint had been lodged against the applicant's former representative. Furthermore, the applicant's reliance on section 5.23 of the *Guidelines IP-5 Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds* [*Guidelines*] and on the Federal Court of Appeal's decision in *Canada (Minister of Citizenship and Immigration) v Kurukkal*, 2010 FCA 230 [*Kurukkal*], is wholly misplaced since, in the present case, there is no evidence that a request for reconsideration has ever been made to the officer.

[8] In the assessment of the application, the officer successively considered the applicant's establishment in Canada, her family ties in Canada, the best interests of her Canadian-born

grandchildren, and the hardship of living alone in India. Several arguments made today by the applicant are related to the fact that the officer considered her level of establishment in Canada. The applicant strongly insists on the fact that her H&C application is not based on her level of establishment in Canada, but essentially on the close family ties she has in Canada and her profound desire to be reunited with her son and grandchildren. However, it is apparent that the dismissal of the H&C application is not solely based on the applicant's lack of establishment in Canada. That said, there was nothing wrong in noting that there is no evidence in the file indicating that the applicant has worked or otherwise integrated into a community here in Canada, or has engaged in any courses of study in Canada, which would lead to her establishment outside of her relationship with her family. In my opinion, the officer is not obliged to solely examine the H&C grounds raised in the application, but can consider all other relevant factors mentioned in the *Guidelines*.

[9] As regards the applicant's family ties with her son and grandchildren, the officer specifically acknowledged that the applicant has considerable emotional ties to her grandchildren in Canada, but stated that these ties do not have to end if the applicant returns to India. This finding is not unreasonable. The evidence on record shows that the applicant is a frequent traveller, willing and able to travel and visit her family in Canada and her sister in the United Kingdom. Moreover, the officer was allowed to conclude that in absence of further information or documentation, there was insufficient evidence that the applicant's family in Canada would depend on the applicant's care and assistance. The fact that the family had resided in Canada without the applicant from January 27, 2007 to July 21, 2010 certainly supports this factual conclusion. Moreover, the officer stated that temporary or permanent separation of family members is a common and even expected result of

international migration and that the IRPA provides other avenues through which family members can be reunited through family class immigration.

[10] The applicant also takes issue with the officer's assessment of the best interests of the applicant's Canadian-born grandchildren. According to the jurisprudence, the best interests of the children is not a determinative factor although it should be given substantial weight in H&C applications: *Legault*, above, at para 12. The applicant submits that the officer failed to specifically consider the adverse effect of her absence on her grandchildren, who especially need her at this time in order to assist them with the separation of their parents; but according to the evidence on record, the grandchildren were living in Canada with the applicant's son and daughter-in-law. As aforementioned, it was up to the applicant to update her H&C application and bring any new relevant evidence to the attention of the officer. In the case at bar, the grandchildren's interests were sufficiently taken into account, considering the evidence that was before the officer and assuming, without deciding, that grandchildren are included.

[11] I note that in the impugned decision, the officer specifically acknowledged that the applicant has a close relationship with her grandchildren and that they would benefit from her presence in Canada. However, the officer concluded that this factor alone did not warrant an exemption from the in-Canada selection criteria for permanent residence, given: (1) the young age of the children; and (2) the relatively short time that the applicant has been physically present in their lives (approximately 14 months from her most recent entry to Canada to the date of the decision); as well as (3) the applicant's ability to travel and visit her family in Canada. Again, the officer noted that nothing in the H&C application established that the applicant's son and daughter-in-law were

unable to provide adequate care for their children in the applicant's absence. Therefore, the officer was not satisfied that the children's care and development would suffer if she were to return and live in India. This conclusion is based on the evidence on record and is not unreasonable in my opinion.

[12] With regard to the hardship the applicant may face upon her return to India, the officer noted that the applicant has lived independently in India since her son's departure in 2004; that she is in good health; and that she has a sister in New Delhi and a brother, father, and daughter in Punjab so that she has the option of relocating to be closer to her family members if she is concerned about being isolated or not having anyone nearby in case of emergency. The officer also noted that the applicant benefits from a certain financial independence given that she owns a home and a small piece of agricultural land in India, and has savings in a bank account. The officer concluded that the applicant would not face unusual and undeserved or disproportionate hardship upon her return to India based upon a lack of family support or care; be it emotional or financial. Again, this conclusion is based on the evidence and is not unreasonable in my opinion.

[13] The applicant submits that it was unreasonable for the officer not to consider the high cost of travelling regularly between India and Canada for a woman of her age, which is, according to the applicant, by no means a feasible or long-term solution to foster her relationship with her grandchildren. The applicant also submits that the officer should have given more weight to the fact that her daughter lives more than 300 kilometres from New Delhi and that in Indian culture, young married women live in their in-laws house and become a member of their husband's family. The applicant's reproaches are misplaced in my opinion. The applicant simply invites the Court to find that, contrary to the officer's finding, it will take an inordinate time for her to carry through

an application for permanent residence from outside Canada, which itself constitutes an unusual and undeserved hardship for an almost 60-year-old woman with poor education. The fact is that the applicant has made several trips to Canada and the United Kingdom and has proven her capacity to live independently in India after the death of her husband in 1991 and the departure of her son to Canada in 2004.

[14] Overall, the general reasoning of the officer is based on common sense and the scheme of the IRPA, and is not irrational or capricious. Indeed, as noted by the officer, "positive assessments for (applications for permanent residence [APRs]) with H&C considerations are exceptional responses to a particular set of circumstances. APRs with H&C considerations are not intended to be applications made in lieu of family class sponsorships from abroad because of convenience or expediency." No serious attack has been made by the applicant against this general statement by the officer. Accordingly, the Court should be particularly respectful of the officer's conclusion that, in this particular case, the applicant has not provided sufficient information or documentation to satisfy the officer that her personal circumstances warrant an exemption from the in-Canada selection criteria for permanent residence.

[15] In conclusion, I am unable to find that the officer has failed to consider the totality of the applicant's evidence and to assess her H&C application in light of her age and cultural background, the *Guidelines*, and the objectives of the IRPA. I also find that the officer did not breach his duty to act fairly as alleged by the applicant. The officer had no obligation to seek to obtain further submissions or information from the applicant. H&C applicants have the onus of establishing the facts on which their claim rests: *Owusu v Canada (Minister of Citizenship and Immigration)*,

2004 FCA 38 at para 8. Moreover, the reasons provided by the officer are clear and cogent, and overall, the findings made by the officer are supported by the evidence and reasonable in the circumstances.

[16] For these reasons, the application for judicial review is dismissed. Neither party proposed a serious question of general importance for certification and none arises in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that the present application for judicial review is dismissed. There is no question for certification.

"Luc Martineau"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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