Federal Court  Cour fédérale

Date: 20150504

Docket: IMM-671-14

Citation: 2015 FC 576

Ottawa, Ontario, May 4, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

SURESH SAVJI CHITRODA

Applicant

and

THE MINISTER OF IMMIGRATION AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Suresh Savji Chitroda [the Applicant] has brought an application for judicial review of a decision of an immigration officer [the Immigration Officer] to refuse his request to apply for

permanent residence from within Canada based on humanitarian and compassionate [H&C] grounds.

[2] For the reasons that follow, the application for judicial review is dismissed.

II. Background

[3] The Applicant is a citizen of Kenya. He arrived in Canada together with his family on November 30, 2009 and made a refugee claim on January 7, 2010. The Applicant and his family fled Kenya following a criminal attack, which they said was due to their Indian ethnicity. The Refugee Protection Division [RPD] of the Immigration and Refugee Board concluded that they had been the victims of random criminality and not a targeted attack. The refugee claim was rejected on March 1, 2012.

[4] The Applicant obtained leave to seek judicial review of the RPD's decision in this Court, but the application was dismissed on December 4, 2012. An application for permanent residence on H&C grounds was made on June 11, 2013, but was rejected on December 17, 2013. It is this decision that is the subject of the present application for judicial review.

[5] The Applicant and his family have made serious efforts to establish themselves in Canada. They both work and they participate in volunteer activities. The Applicant's children are in school and they are doing well. The Applicant has purchased a car, he rents a home and he pays utility bills.

[6] The Applicant's mother in law resides in Canada and suffers from Alzheimer's disease and dementia. The Applicant's wife looks after her mother because the Applicant's brother in law, who also resides in Canada, suffers from several medical problems.

[7] The Immigration Officer refused the Applicant's H&C application for the following reasons:

- The separation from the Applicant's mother in law would not result in disproportionate hardship. The mother in law could be placed in a nursing home and the Applicant did not explain how being separated from his mother in law would result in hardship to their family.

- The Applicant had established himself in Canada to some extent, but this was not sufficient to justify his request to apply for permanent residence from within Canada.

- The Applicant's family had been in Canada for approximately four years and the children were doing well in school. Displacement from Canada would be difficult for the children, but they would ultimately be able to re-adapt to life in Kenya. The children could remain in contact with their friends using technology such as e-mail and Skype.

III. Issues

[8] This application for judicial review raises the following issues:

- Whether the Immigration Officer applied the correct test in determining the best interests of the children and, if so, whether his determination was reasonable;

- Whether the Immigration Officer's assessment of the Applicant's establishment in Canada was reasonable; and

- Whether the Immigration Officer's assessment of the hardship faced by the Applicant's mother in law and brother in law was reasonable.

IV. Analysis

A. *Whether the Immigration Officer applied the correct test in determining the best interests of the children and, if so, whether his determination was reasonable*

[9] The Applicant maintains that the correct approach to conducting an analysis of the best interests of the child is found in *Williams v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 166:

> **63** When assessing a child's best interests an Officer must establish first what is in the child's best interest, second the degree to which the child's interests are compromised by one potential decision over another, and then finally, in light of the foregoing

> assessment determine the weight that this factor should play in the ultimate balancing of positive and negative factors assessed in the application.
>
> [Emphasis original]

[10] In *Webb v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1060 at para 13, Justice Mosley observed that "the *Williams* formula provides a useful guideline for officers to follow where it may be helpful in assessing a child's best interests but it is not mandated by the governing authorities from the Supreme Court and the Federal Court of Appeal." Ultimately, the correct legal test is whether the Immigration officer was "alert, alive and sensitive" to the best interests of the child: *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 10.

[11] I am satisfied that in this case the Immigration Officer was alert, alive and sensitive to the best interests of the children. He acknowledged the disruption of the children's education; he considered their ability to re-adapt to life in Kenya; and he noted that they had grown up primarily in Kenya and had been away from that country for just over four years. The Immigration Officer applied the correct legal test, and his assessment of the best interests of the children fell within the range of reasonable outcomes.

B. *Whether the Immigration Officer's assessment of the Applicant's establishment in Canada was reasonable.*

[12] The Applicant says that the Immigration Officer failed to turn his mind to many of the documents that were submitted to demonstrate his establishment in Canada. The Applicant relies

on this Court's decision in *Begum v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 824:

> 52 I acknowledge that decision-makers are presumed to have considered all of the evidence before them. Therefore, they are not required to make specific reference to every piece of evidence in the record. Failure to analyse evidence that contradicts a tribunal's decision will be found to be unreasonable only when the evidence that is overlooked is critical, contradicts the tribunal's conclusion and ultimately the reviewing Court finds that the omission indicates the tribunal's unwillingness to consider the materials before it (*Herrera Andrade v Canada (Minister of Citizenship and Immigration*), 2012 FC 1490 at para 9). However, "the more important the evidence that is not mentioned specifically and analyzed in the agency's 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" (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, [1998] F.C.J. No. 1425 (QL) (TD) at para 17).

[13] I am unable to conclude that the Immigration Officer failed to consider the documents that were submitted by the Applicant in support of his H&C application, or that the documents contradicted any of his findings. The Immigration Officer accepted that the Applicant and his family have been living in Canada for over four years; the Applicant and his wife are valued employees in their workplace and volunteer; the Applicant's children are doing well in school; the Applicant purchased a car, rents a home and pays utility bills; and the Applicant has relatives in Canada.

[14] This Court has held that a strong degree of establishment is not in itself sufficient for an H&C application to succeed. In *Zambrano v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 481, Justice Dawson wrote as follows:

74 In closing on this issue, I adopt the comments of my late colleague Justice Rouleau in *Chau v. Canada (Minister of Citizenship and Immigration*, [2002] F.C.J. No. 119 (QL). There, he wrote at paragraphs 27 through 28:

> The applicant in the present case raised a number of arguments which, when considered together, amount to several inconveniences by leaving Canada and submit an application abroad which is the normal rule laid down by Parliament. As Lemieux J. rightly stated in *Mayburov v. Canada (Minister of Citizenship and Immigration*), [2000] F.C.J. No. 953 (QL) at para. 39, inconvenience is not the criteria of undue hardship as laid out in the guidelines. The material filed in support of her application leads one to believe that the Applicant could well be a model immigrant and a welcome addition to the Canadian community; she has shown herself to be law-abiding, hard-working, enterprising and thrifty since her illegal entry into Canada. However, that is not the test as to whether or not there are sufficient humanitarian and compassionate grounds to warrant exceptional relief. As Pelletier J. stated in *Irimie*, [2000] F.C.J. No. 1906, supra at para. 26:
>
> > [...] To make it the test is to make the H & C process an ex post facto screening device which supplants the screening process contained in the Immigration Act and Regulations. This would encourage gambling on refugee claims in the belief that if someone can stay in Canada long enough to demonstrate that they are the kind of persons Canada wants, they will be allowed to stay. The H & C process is not designated to eliminate hardship; it is designated to provide relief from unusual, undeserved or disproportionate hardship.
>
> The burden which the applicant had to discharge was whether the Immigration Officer's decision not to grant her an exemption for the inland processing of her permanent residence application was unreasonable. When deciding this issue, the reviewing court cannot overstep its role. In the

> absence of an error in the legal sense, the Court could not and should not substitute its opinion for that of the Immigration Officer. The perspective of the reviewing judge is to examine the evidence before the Immigration Officer and determine whether there was absence of evidence supporting her conclusion or whether her decision was made contrary to the overwhelming weight of the evidence. I cannot reach that conclusion.
>
> **75** Similarly, the applicants in this case appear to be hard-working, law-abiding, self-sufficient, enterprising, thrifty, and charitable to others. They will face hardship if forced to leave Canada. However, they have not established that the officer erred in finding that such hardship would not be unusual and undeserved or disproportionate.

[15] The Applicant in this case, like those in *Chau* and *Irimie*, appears to be hard-working, law-abiding, self-sufficient and charitable to others. He may well be a model immigrant and a welcome addition to the Canadian community. However, for the reasons expressed in *Zambrano* and the cases cited therein, that is not in itself sufficient for an H&C application to succeed.

C. *Whether the Immigration Officer's assessment of the hardship faced by the Applicant's mother in law and brother in law was reasonable.*

[16] The Applicant refers to the Citizenship and Immigration Canada Processing Manual (IP5) – Immigrant Applications in Canada Made on Humanitarian or Compassionate Grounds, which provides as follows:

> 12.8. Consequences of the separation of relatives
>
> The removal of an individual from Canada may have an impact on family members who do have the legal right to remain (i.e. permanent residents or Canadian citizens). Other than a spouse or common-law partner, family members with legal status may include, among others, children, parents and siblings. The lengthy

> separation of family members could create a hardship that may warrant a positive Stage 1 assessment.
>
> To evaluate such cases, officers should balance the various interests at stake:
>
> - Canada's interest (in light of the legislative objective to maintain and protect the health, safety and good order of Canadian society);
> - the circumstances of all family members, with particular attention given to the interests and situation of any dependent children with legal status in Canada;
> - the particular circumstances of the applicant's child (age, needs, health, emotional development);
> - financial dependence involved in the family ties; and
> - the degree of hardship in relation to the applicant's personal circumstances.

[17] The Immigration Officer made the following observations with respect to the Applicant's mother in law and brother in law:

- It was unclear whether the mother in law has legal status (which is required).
- The Applicant did not explain how the mother in law's condition creates hardship for the Applicant and his family – it may create hardship for the brother in law.
- Other care options such as a nursing home were available.
- A letter from the mother's doctor stated only that "It would be helpful if somebody stays with her full time."

[18] Based on these observations the Immigration Officer concluded that issues surrounding the mother in law's health did not amount to disproportionate hardship. I agree. As Justice Zinn wrote in *Pan v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1303:

> **17** In my view, absent a finding of dependency by her mother and sister, the hardship occasioned by the applicant's removal, as difficult for the family as it will no doubt be, cannot be said to go beyond the natural hardship of family separation occasioned by the removal of a family member. The officer did consider the evidence presented and concluded that "the applicant has not provided sufficient evidence to show how her mother and sister are dependent on her".

V. Conclusion

[19] For the foregoing reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Adrienne Smith	FOR THE APPLICANT
Leanne Briscoe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Adrienne Smith Jordan Battista LLP Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT