Federal Court  Cour fédérale

Date: 20150420

Docket: IMM-1717-14

Citation: 2015 FC 501

Ottawa, Ontario, April 20, 2015

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

ABDUL SAMED ISMAIL JOGIAT
ZULEKHA ABDUL SAMED JOGYAT
MUHAMMAD ABDUL SAMED JOGIAT

Applicants

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants are a father, mother, and their son, Muhammad. They seek judicial review of a decision refusing their application for permanent residence in Canada on humanitarian and compassionate grounds. For the reasons that follow, I have concluded that the application for judicial review should be granted.

I. Background

[2] Abdul Samad Ismail Jogiat and his wife, Zulekha Abdul Jogyat, were both born in India and are citizens of that country. Mr. Jogiat is now 68 years old, and his wife is 54 years old. Muhammad was born in Malawi on April 5, 1995, and lived there until he came to Canada in 2004. Muhammad is also a citizen of India because of his parents' citizenship. Muhammad had just turned 18 when the family's H&C application was submitted, and was almost 19 when their application was refused.

[3] The family based their H&C application on their establishment in Canada, the hardship of family separation, and the hardship that they say that they would face as Muslims in India. The applicants also said that their inability to visit the grave of their son and brother in Canada, and the impact that India's poor air quality would have on Ms. Jogyat's asthma were further hardship factors hardship. Finally, the applicants relied on the best interests of both Muhammad and their grandson.

[4] As I have concluded that the immigration officer erred in assessing the application as it related to Muhammad, it is unnecessary to address the other issues raised by the applicants.

II. Analysis

[5] Because Muhammad was over 18 when the family submitted their H&C application, a question arises as to whether the immigration officer was in fact required to carry out a "best interests of the child" (BIOC) analysis. The jurisprudence goes both ways on this point.

[6] Cases such as *Noh v. Canada (Citizenship and Immigration)*, 2012 FC 529, 409 F.T.R. 117 and *Ramsawak v. Canada (Citizenship and Immigration)*, 2009 FC 636, 86 Imm. L.R. (3d)

97, have concluded that a BIOC analysis does not become redundant simply because a child has turned 18 years old, particularly if the child is still dependent on his or her parents. In contrast, cases such as *Ovcak v. Canada (Citizenship and Immigration)*, 2012 FC 1178, [2012] F.C.J. No. 1261 and *Moya v. Canada (Citizenship and Immigration)*, 2012 FC 971, 416 F.T.R. 247, have held that a young person ceases to be a "child" at 18, with the result that no BIOC analysis is required.

[7] I do not, however, have to resolve this question in this case in light of the respondent's concession that, having elected to carry out a BIOC analysis with respect to Muhammad, the officer's assessment had to be reasonable.

[8] The officer commences his analysis of the applicants' H&C application with the observation that the applicants (which presumably includes Muhammad) "bear the onus of satisfying the decision-maker that their personal circumstances are such that the hardship of having to obtain a permanent visa from outside Canada in the normal manner would be i) unusual and undeserved or ii) disproportionate".

[9] The officer concludes his analysis by stating that the applicants (again presumably including Muhammad) "have not established that their personal circumstances are such that the hardships associated with having to apply for permanent residence in the normal manner are in isolation to the hardships faced by others who are required to apply for permanent residence from abroad". The officer went on to quote this Court's decision in *Irimie v. Canada (Minister of Citizenship and Immigration)*, 10 Imm. L.R. (3d) 206 at para. 26, [2000] F.C.J. No. 1906, where Justice Pelletier stated that "[t]he H & C process is not designed to eliminate hardship; it is designed to provide relief from unusual, undeserved or disproportionate hardship".

[10] It is, however, well-established that the "unusual, undeserved, or disproportionate hardship" test has no place in the BIOC analysis: *Hawthorne v. Canada (Minister of Citizenship & Immigration)*, 2002 FCA 475 at para. 9, [2003] 2 F.C. 555; *E.B. v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 110 at para. 11, 383 F.T.R. 157; *Sinniah v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 1285 at paras. 63-64, 5 Imm. L.R. (4th) 313.

[11] That said, the use of the words "unusual, undeserved or disproportionate hardship" in a BIOC analysis will not automatically render an H&C decision unreasonable. It is sufficient if it is clear from a reading of the decision as a whole that the officer used the correct approach and conducted a proper analysis: *Segura v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 894 at para. 29, [2009] F.C.J. No. 111.

[12] That does not appear to have happened in this case. While the officer found that Muhammad's interests would be best served by his being with his parents, nowhere in the reasons does the officer consider the benefit that would accrue to Muhammad if the family were able to stay in Canada - the country where Muhammad has lived for more than half his life.

[13] The officer's finding that Muhammad would be "returning to a culture and society that he is quite familiar with" is also unreasonable. While Muhammad might be expected to have some familiarity with Indian culture, by virtue of being raised by parents who were originally from India, there is no evidence that he has any familiarity with Indian society. Muhammad spent his first few years in Malawi, and has been in Canada since he was nine years old. He has never been to India.

[14] The officer's finding that "it is always viewed as an enrichment for children when a parent has the opportunity for employment or residence in another country and culture" is both facile and insensitive. If moving to another country is "always viewed as an enrichment", then it would arguably always be in the best interests of a child to leave Canada. That is clearly not the case.

[15] The officer never considers the fact that Muhammad would be leaving the environment in which he was raised, one where he has extended family and friends. The finding that Muhammad could go to school in India fails to take into account the fact that he has completed the majority of his schooling in the Canadian educational system.

[16] I recognize that the best interests of a child are not determinative of the outcome of an H&C application. Rather, officers must decide whether the child's best interests, "when weighed against the other relevant factors, justif[y] an exemption on H&C grounds so as to allow them to enter Canada": *Kisana v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, at para. 38, [2010] 1 F.C.R. 360; *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at paras. 12-13, 212 D.L.R. (4th) 139.

[17] In this case, however, the officer never really comes to grips with Muhammad's best interests, beyond the blanket observation that his interests would be best served by being with his parents. Instead, the officer concludes that the applicants had "not demonstrated that severing their ties to Canada would have a significant negative financial, emotional and social impact on Muhammad […] that justifies an exemption under humanitarian and compassionate considerations". With respect, that is not the test.

[18] Having failed to properly identify Muhammad's best interests, the officer could not weigh these interests against the other relevant factors in deciding whether to grant an exemption on H&C grounds so as to allow the family to apply for permanent residence from within Canada. The decision is thus unreasonable.

[19] Given that Muhammad is now 20 years old, I have considered whether anything is to be gained by remitting this matter for re-determination. I have, however, concluded that it is appropriate to do so. Even if a new immigration officer were to conclude that Muhammad is no longer a "child" requiring an analysis of his best interests, the officer would still have to examine factors such as his unfamiliarity with Indian society, his separation from family and friends, and his loss of post-secondary educational opportunities in Canada through the lens of hardship.

III. Conclusion

[20] For these reasons, the application for judicial review is allowed. I agree with the parties that the case does not raise a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, and the matter is remitted to a different immigration officer for re-determination in accordance with these reasons.

"Anne L. Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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