

Federal Court



Cour fédérale

Date: 20171218

Docket: IMM-1937-17

Citation: 2017 FC 1164

Ottawa, Ontario, December 18, 2017

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

KULJEET BISLA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Mr. Bisla [the Applicant] came to Canada from India in 2001 at the age of 14. In 2015 he was convicted of sexual interference with a person under the age of 16, and was sentenced to a term of imprisonment and probation. Following this, he was found inadmissible to Canada for serious criminality and was issued a removal order. Judicial review of that removal order was dismissed (*Bisla v Canada (Citizenship and Immigration)*, 2016 FC 1059 [*Bisla*]). Subsequently,

the Applicant unsuccessfully sought to avoid being removed from Canada on humanitarian and compassionate [H&C] grounds. On April 7, 2017 his H&C application was denied.

[2] In this review of the H&C decision, the Applicant argues that the H&C Officer [the Officer] failed to properly assess the hardship he will face in India because of his intellectual disability and his concomitant economic and psychological dependence on his family in Canada.

[3] For the reasons that follow this judicial review is dismissed. The Officer reasonably considered the evidence and the issues raised by the Applicant.

I. Decision Under Review

[4] In the H&C decision, the Officer takes note of the Applicant's establishment in Canada including his employment and involvement in cultural events. The Officer assigned positive weight to these factors. However, the Officer assigned significant negative weight to the Applicant's offence of sexual touching of a minor, which began when the minor was five. The victimization took place over a period of five years.

[5] With respect to his intellectual disability, the Officer noted that the sentencing judge commented on a psychological report used at his criminal trial. However, that report was not provided to the Officer in support of his H&C application, and at any rate, the judge found that the Applicant realized what he did was wrong.

[6] On his H&C Application, the Applicant did provide a letter from a medical doctor which states “Kuljeet [the Applicant] has an intellectual disability and is unable to comprehend his situation. He is not capable of understanding what he is charged with.” The Officer put little weight on this letter.

[7] With respect to the country conditions in India, the Applicant argued that he would not be able to survive in India because he relies on his family support as a result of his intellectual disability. The Officer noted that despite the claim of an intellectual disability, the Applicant had not made use of the Person With Disabilities services offered in British Columbia. The Officer reasoned that if the Applicant’s disability was as severe as alleged, he would have sought out these services.

[8] The Officer noted that while the Applicant did not finish high school, there was no evidence provided as to why, and no evidence was provided that high school officials were aware of his disability. The Officer concluded that insufficient evidence had been provided to demonstrate that the claimed disability was so severe as to cause significant limitations in the Applicant’s ability to function in daily life or that it would impair his ability to reintegrate in India. The Officer noted that the Applicant currently lives independently from his parents in a separate area of his parents’ home. Further, the Officer noted that the Applicant’s sister, who resides in India, could provide support.

[9] Finally, on the factor of adverse conditions, the Officer concluded that there was no evidence that the Applicant's "mild cognitive defects" would be noticeable such that he would be subject to discrimination in India.

II. Standard of Review

[10] The standard of review for an H&C application is reasonableness (*Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 18).

III. Issue

[11] The only issue on this judicial review is if the decision of the Officer is reasonable.

IV. Analysis

A. *Is the Officer's decision reasonable?*

[12] The Applicant argues that the Officer failed to properly consider his intellectual disability and the fact that because he is entirely dependent upon his family for emotional and financial support, he will not be able to survive in India.

[13] The Applicant also argues that the Officer failed to consider the objectives of s.3 (1)(d) of the *Immigration and Refugee Protection Act* [IRPA] which is to reunite families in Canada. He argues that separation of the family in this case is grounds for a positive decision in keeping with the Guidelines IP-5 [Guidelines].

[14] Overall, H&C relief is exceptional and the Applicant has the evidentiary burden (*Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 5).

[15] H&C considerations are not based upon sympathetic factors but rather require the Officer to balance all relevant positive and negative factors (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 33). Here, the Officer considered each of the grounds raised by the Applicant. His establishment was given some positive weight but the criminal offence was given serious consideration and weighed heavily against the Applicant.

[16] The Officer considered the evidence with respect to the Applicant's mental health. The Officer notes the comments of the sentencing judge but also notes that the full psychological report which was considered in the criminal trial was not provided as part of the H&C application. Moreover, the psychological report offered at the Applicant's trial appears not to have made a formal diagnosis, and at any rate, the Applicant was fit to stand trial and knew what he did was wrong.

[17] On the H&C application the Applicant relied upon a one paragraph letter from his family doctor. The Officer determined that this letter did not demonstrate that the Applicant suffered from a diagnosed disability which would impact his ability to integrate in India. The Officer was entitled to assign little weight to the mental health arguments.

[18] With respect to s.3 (1)(d) of the IRPA, which sets a guiding principle of reunification of family members in Canada, the Officer clearly considered the benefits to the Applicant of

remaining in Canada. He notes the Applicant's long time residence in Canada and that a return to India will cause him "disruption and anxiety." However, this hardship was balanced against all other elements of the application. The Applicant cannot ask the Court to reweigh this factor (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

[19] Further, the Applicant argues that the Officer did not apply the discretion outlined in Guidelines IP-5 which note that "separations of persons in such a genuine dependent relationship may be grounds for a positive assessment." The Applicant argues that the Officer failed to consider this principle in the Guidelines in relation to his separation from his parents.

[20] However, the Guidelines do not bind the decision-maker (*Canada (Citizenship and Immigration) v Thamothearem*, 2007 FCA 198 at para 66; *Whitely v Canada (Citizenship and Immigration)*, 2015 FC 476 at para 12). They simply guide the discretion which the Officer exercises under s.25 of the IRPA. Accordingly, the Guidelines contain permissive language: "Separation of persons in such a genuine dependent relationship may be grounds for a positive assessment" (emphasis added).

[21] Most importantly, the Officer in substance considered the factors listed in the Guidelines respecting familial ties and the consequences of separation. This formed a large part of the analysis. The Applicant, again, simply asks that these factors be reweighed on judicial review.

[22] Finally, the Applicant argues that the Officer ignored a stay of removal order issued by Justice Phelan, after the Applicant was found inadmissible for serious criminality. The stay order

noted the Applicant's reduced cognitive capabilities. However, the Officer specifically noted the Applicant's "mild cognitive defects." Moreover, the stay decision is interim, and is not a full consideration of the Applicant's circumstances, especially when the Applicant's judicial review of the removal order was finally decided by this Court in *Bisla*.

[23] Overall, on judicial review, an applicant must point to specific errors. Those errors must go beyond a simple reweighing of the evidence, or a re-arguing of the merits of the H&C application (*Leung v Canada (Citizenship and Immigration)*, 2017 FC 636 at para 34). Here, the Applicant seeks a rehearing on the arguments made in his H&C application. That is not the role of this Court on judicial review.

[24] The Officer noted the positive factor of the Applicant's establishment and appropriately weighed that positive finding against the Applicant's negative factors and the Officer considered the evidence provided. The Officer's decision is reasonable.

[25] Therefore this judicial review is dismissed.

JUDGMENT in IMM-1937-17

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.
2. No question is certified.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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