Federal Court Cour fédérale

Date: 20180205

Docket: IMM-3476-17

Citation: 2018 FC 132

[ENGLISH TRANSLATION]

Ottawa, Ontario, February 5, 2018

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

GEETIKA PURI
GAGAN PURI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants, Gagan and Geetika Puri, are challenging the reasonableness of a decision by an immigration officer, dated May 17, 2017, that rejected their request to allow them to submit an application for permanent residence in Canada rather than overseas for humanitarian and compassionate considerations, as is allowed by subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The style of cause has been modified to correctly reflect the respondent as The Minister of Citizenship and Immigration.

Background

[3] The applicants are a married couple and citizens of India. They come from different castes. They have two children who were born in Canada and are Canadian citizens. One child is 3 years old and the other is 10 months old. They arrived in Canada on July 12, 2013. On July 27, 2013, the applicants submitted a refugee claim.

[4] They said that they started seeing each other in 2009 and the applicants informed their parents of their desire to get married two years later. The female applicant's family was allegedly opposed to the marriage. The male applicant claims that he was attacked on the orders of the female applicant's father and he received no subsequent help from the police. That did not stop them, and the applicants were married in 2011. The police allegedly arrested the male applicant, accusing him of having kidnapped the applicant. He was then allegedly detained and mistreated. The applicants allegedly experienced further difficulties once the female applicant became pregnant. She alleges in particular that her physician asked her to terminate her pregnancy and kill her.

[5] The refugee claim was dismissed by both the Refugee Protection Division (RPD) and the Refugee Appeal Division (RAD) due to the applicants' lack of credibility. Leave for an application for judicial review before the Federal Court was also not granted.

[6] The applicants' subsequent application for a pre-removal risk assessment was dismissed, as was their application for leave to the Federal Court.

[7] What remained was the application for humanitarian and compassionate considerations [H&C application]. In this case, the officer assessed the risks in India in the context of an H&C application, the applicants' psychological state, their establishment in Canada, and the best interests of the two minor-age children. The H&C application was dismissed, hence this application for judicial review.

This application for judicial review

[8] The only issue consists of determining whether the RAD's decision as a whole is reasonable and whether the H&C application is an acceptable outcome, given the applicable principles and the evidence on record (for example, see Kisana v. Canada (Minister of Citizenship and Immigration), 2009 FCA 189 at paragraph 18). This application for judicial review must therefore be dismissed. During the hearing, when the applicants reiterated the arguments in their written submissions, it was specifically the factor regarding the best interests of the children that was debated.

[9] In their written submissions (factum and reply), the applicants submitted that in his analysis of relevant factors, the officer unreasonably set aside certain evidence regarding the risk and difficulties related to their family situation; that he required an expert psychological opinion when it was not necessary; and lastly, that he failed to consider their children's status as "foreign nationals" in India as part of his assessment of their general interest. The respondent replies that

the officer carried out a detailed, attentive and thorough analysis of the evidence on record and studied the humanitarian and compassionate factors that were raised, and under the circumstances, it was reasonable for him to find that the applicants' personal circumstances were insufficient to grant them the requested exemption.

General principles

[10] As a general rule, a foreign national who wishes to obtain permanent residence in Canada must apply for a visa overseas (see subsection 11(1) of the IRPA). However, subsection 25(1) of the IRPA states that the Minister may grant an exception to that requirement "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".

[11] In this case, it is not disputed that applicants must typically demonstrate the existence of "unusual and undeserved" or "disproportionate" hardship, which is defined as hardship that is "not anticipated or addressed" by the *Immigration and Refugee Protection Act* or its regulations and is "beyond the person's control" or hardship that would have "an unreasonable impact on the applicant due to their personal circumstances" (see *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61 at paragraph 26 [*Kanthasamy*]). According to Guide 5291, the officer may in particular consider establishment in Canada; an inability to leave Canada that has led to establishment; ties to Canada; best interests of any children affected by the application; health considerations; family violence considerations; consequences of separation from relatives; factors in your country of origin (not related to seeking protection) or any other relevant factor (see Immigration, Refugees and Citizenship Canada, Guide 5291 – Humanitarian and

Compassionate Considerations, Ottawa, Immigration, Refugees and Citizenship Canada, September 20, 2017 [Guide 5291]).

Risks and hardship related to family situation

[12] The officer immediately recalled that he could not consider the factors that were taken into account to assess the claim for refugee protection, as indicated in subsection 25(1.3) of the IRPA. However, he must consider the factors that are related to the hardship that the applicants would suffer in their country, in this case, in the family context cited earlier. In this case, the officer reviewed and then rejected various evidence related to risks alleged by the applicants:

- He first reviewed the affidavits and letters from various family members, who explained why the applicants had to leave the country. He found that the authors were not identified and that their claims were not corroborated by other evidence. He found that those documents did not come from independent and objectives sources. The officer adds that those documents were based on facts that had been determined as being not credible by the RPD. He gave them no probative value;

- He then reviewed the letters from social workers who summarized why the applicants had left their country and their feelings of stress and anxiety. The officer found that those letters were based on the applicants' statements and not on the facts experienced by the authors. Those statements had also already been reviewed by the RPD. He added that the mental health problems were not supported by an expert medical opinion.

He found that those documents were insufficient to establish their fear of returning to India;

- He rejected a letter from an Indian physician attesting to the problems suffered by the female applicant in India on the ground that the letter is not identified and the original was not submitted; and

- He reviewed various reports on honour crimes in India, which are particularly common in cases of inter-caste marriages, marriages between social classes, marriages against the parents' wishes, etc. However, he found that the applicants did not prove that they were in any of those categories. He also added that the evidence revealed that the government is taking the problem seriously and is protecting the victims. The situation also affects the Indian public in general and not the applicants in particular.

[13] In this case, it was reasonable for the officer to find that the applicants had not demonstrated that they faced a personal and objectively identifiable risk that could result in undue hardship, or that the conditions in India would cause them undue hardship in relation to their family situation. That finding rests on the evidence and results from an intelligible reasoning that is neither capricious nor arbitrary in this case.

The applicants' psychological conditions

[14] The officer reviewed the letters from social workers stating that the female applicant suffered various psychological hardships upon her arrival in Canada. However, the officer noted that there was little evidence on record indicating that those hardships were persisting today. In addition, those documents were not supported by any expert medical opinions. The record does not contain any evidence that identifies the applicant. The officer found that the applicants did not show that their psychological conditions would complicate their return to India.

[15] In their written factum, the applicants submit that there is no need to require an expert psychological opinion: an experienced social worker is able to understand the female applicant's troubles. The respondent replied that the officer considered the reports from social workers, but nevertheless, noted that the female applicant's condition was not supported by expert evidence. She also did not submit any evidence showing that the situation is persisting. Instead, what stood out from the evidence is that she has adapted to her life in Canada. It was reasonable for the officer to find that the evidence is insufficient to show that upon their return to India, the applicants would suffer from their fragile psychological condition.

[16] In this case, it was reasonable to find that the applicants would not suffer from excessive hardship related to their health condition in the event of their return to India. The applicants did not in fact submit evidence regarding the male applicant's psychological condition. As for the female applicant, the only documents that were submitted came from social workers, and in particular attest to the difficulties experienced upon their arrival in Canada and not at the present time. It was reasonable to require an expert medical opinion.

Establishment in Canada

[17] With respect to the factor concerning establishment in Canada, the officer found that the applicants were well-established in Canada, but no more than what would be expected from any person in a similar situation. Their establishment is recent and is not due to factors beyond their control. He adds that they were well-established in India before their departure and that the experience gained in Canada will help them to become re-established in India. The officer found that their establishment in Canada is not a determinative factor.

[18] In their written factum, the applicants write that the finding in which the knowledge gained in Canada will help the applicants to re-establish themselves in India is a prejudice and is without merit. The respondent replied that the officer's finding is reasonable: the applicants did not show that their establishment is such that there would be sufficient humanitarian and compassionate considerations that may justify them filing an application for permanent residence in Canada.

[19] In this case, it was reasonable to find that the applicants' degree of establishment in Canada was insufficient to justify granting them relief. As stated by the Supreme Court at paragraph 26 of *Kanthasamy*, unusual and undeserved hardship must be beyond the person's control. In this case, the officer correctly highlighted that the applicants' ties to Canada did not depend on circumstances beyond their control and were in no way exceptional or atypical as compared with other people in their situation. Those findings resulted from the evidence on record and are reasonable in this case.

Best interests of the children

[20] What remains is the issue of the best interests of the children, which was the key issue taken up by the new counsel for the applicants. During the oral hearing, counsel submitted before the Court that the refusal of the H&C application is unreasonable, which was strongly challenged by counsel for the respondent.

[21] First, it is clear that the officer in fact reviewed the best interests of the children. The applicants claimed that it would be in the best interests of the children to stay in Canada in a healthy environment. Their arguments more specifically identified Daksh, who is currently receiving speech therapy for language problems. The applicants submit that a return to India would harm his development due to the lack of resources and family support. The officer noted that the language problems were due to ear infections, and that he has made good progress thanks to the strategies used at home and at daycare. A follow-up is suggested in a year. That said, the officer nevertheless noted that the applicant did not submit evidence such that speech therapy treatments and other assistance resources were not available in India. He added that the lack of family resources is based on allegations that the RPD found to not be credible. Given their age, the establishment of the children depends on that of their parents. Maintaining a family unit is in their best interest. However, they can still return to Canada in the future and there is no evidence such that the children will not be able to retain their Canadian citizenship. The officer found that all the evidence did not allow for him to find that a return to India would be against the best interest of the children.

[22] The applicants now submit that the decision is unreasonable because the officer allegedly did not consider the hardship caused by the fact that the children are not Indian citizens and will enter India with tourist visas. In addition, the officer's reasoning is incomplete because no one knows whether a tourist can receive the appropriate health and education services. The applicants recognize the importance of the family unit, as highlighted by the officer, but instead maintain that that should warrant the whole family staying in Canada, since the officer must play a *parens patriae* role, requiring him to ensure the well-being of the children and not deport them into the unknown.

[23] Since the role of the officer is akin to that of *parens patriae* (see *Sebbe v. Canada (Citizenship and Immigration)*, 2012 FC 813 at paragraph 13 [*Sebbe]*), counsel for the applicants submits that the officer had the obligation to ensure that sufficient measures exist in India to protect the rights of these non-Indian children. Thus, he should have questioned the parents in order to obtain additional information. The officer cannot, in respect of an issue of critical importance to the best interests of the children, such as their education and health, shelter behind the failure of the applicants to make representations (see *Lauture v. Canada (Citizenship and Immigration)*, 2015 FC 336 at paragraph 40 [*Lauture*]).

[24] The respondent replies that the officer was aware of the best interests of the children, particularly Daksh, for whom all the circumstances were considered. The best interests of the children is only one test to consider from among others and is not in itself sufficient to warrant relief. In addition, there is no evidence on record such that the officer asked the parents to obtain

tourist visas or that the applicants' children would not be able to obtain citizenship in India once their tourist visas expired.

[25] However, the applicants had five opportunities to provide submissions and evidence. With respect to the best interests of the children, it was always simply a question of Daksh's language problem. In a case where the officer was reproached for not considering the general problems that the children might encounter because the country of origin does not recognize dual citizenship, the Court refused to review the question, given that no evidence had been provided to support such allegations or to detail the hardship that this might cause the children (see *Goule Tapique v. Canada (Citizenship and Immigration)*, 2015 FC 914 at paragraph 22).

[26] The main argument that is now raised by the new counsel for the applicants consists essentially of saying that it would be more advantageous for the children to remain in Canada due to the availability of greater resources and in the event of a return to India, they risk not benefiting from all available services because they are not Indian citizens. That last affirmation was gratuitous and does not rest on any tangible evidence. As this Court highlighted in *Jaramillo v. Canada (Citizenship and Immigration)*, 2014 FC 744 at paragraph 71, "the fact that the children might be better off in Canada in terms of general comfort and future opportunities cannot […] be conclusive in an H&C Decision that is intended to assess undue hardship' because the outcome would almost always favour Canada". Indeed, the children would certainly have access to greater resources in Canada, but nothing in the evidence indicates that they would not have access to the necessary resources in India.

[27] I agree with the respondent's argument for dismissal.

[28] To summarize: By citing the existence of a *parens patriae* obligation that falls to the officer, the applicants are essentially reproaching the officer for not considering the fact that the children may not have access to education and health services due to the fact that they are not Indian citizens. However, although it was a question of the availability of speech therapy services, the general concern of access to education and health services in India for non-citizens, which is now raised by the new counsel for the applicants, was never raised in the numerous written submissions provided by the former counsel for the applicants as part of their H&C application. Furthermore, no documents or other evidence explaining access to care in India for tourists or non-citizen residents were ever submitted to the officer. Therefore, we do not know whether access to those resources depends on the children's citizenship and/or the permanent residence of the children and their Indian parents.

[29] It is also true that the courts are occasionally called on to exercise the parental authority of the Crown or the state regarding children whose lives are endangered or adults who are afflicted with a serious incapacity (see *E (Mrs.) v. Eve*, [1986] 2 SCR 388 at pp 407-425, 31 DLR (4*th*) 1, and cited case law). We must also think of cases where the *parens patriae* authority was exercised by the courts to authorize a blood transfusion to save the life of a child despite the religious objections of the child's parents or even when they are called upon to determine whether a person with a mental disability should be sterilized. Although the particular situation of the two children is not part of any known category in case law, the new counsel for the applicants nevertheless claims that the officer was, on his own initiative, required to carry out

additional research to be satisfied that the children's health and education needs would be met in India. I am not of the view that such an extension of the courts' *parens patriae* authority to the immigration officer can justify the failure of the applicants—who, in practice, have authority of guardianship over Daksh and Anika—to demonstrate through convincing evidence the hardship that may be caused to the children because they are not Indian citizens. There is need to distinguish the facts in this record of the matter, in which the officer's analysis was clearly deficient or based on a lack of analysis of the evidence or on an erroneous apprehension of the criterion of the best interests of a child (see *Sebbe* at paragraphs 14-19; *Lauture* at paragraphs 32-41; *Conka v. Canada (Citizenship and Immigration)*, 2014 FC 985 at paragraphs 20-24).

[30] Ultimately, I am satisfied that the officer considered the best interests of the two children, Daksh and Anika. This is a fundamental consideration in an H&C application. The decision must identify and define, and then examine the interest of the children with a great deal of attention in light of all the evidence (see *Kanthasamy* at paragraph 39). Guide 5291 states various relevant factors: the age of the children; their establishment in Canada; the conditions in the country of return; their medical needs; their education; their sex, etc. However, the decision clearly shows that the officer weighed those factors. The officer considered the young age of the children and thus noted that their establishment in Canada is minimal, since they are entirely dependent on their parents. The officer also considered that it is in the best interests of the children to be with their parents, given that the applicants have always given their children the best care. The officer also considered Daksh's speech therapy in Canada, but noted that the applicant did not submit any evidence such that this service would not be accessible in India. The applicants did not try to show the officer that the children would need to renounce their Canadian citizenship in order to

receive education and health services in India. The officer's finding regarding the best interests of the children is therefore an acceptable outcome.

Conclusion

[31] For these reasons, the application for judicial review is dismissed.

[32] The applicants propose that the following question be certified:

> Does an officer reviewing the best interests of children affected by an H&C application have to ensure that the rights resulting from their status will be respected in their parents' country of origin, particularly the children's right to education and health care when they do not have that country's nationality, due to his/her *parens patriae* obligations?

[33] The applicants submit that numerous children who only have Canadian nationality accompany their parents to their parents' country of origin as part of deportation proceedings, which gives a general scope to the question of the existence of a *parens patriae* obligation that falls to the officer. That question is determinative because if the Federal Court of Appeal finds that the obligation in question was not suitably executed, the officer's decision would be unreasonable, ensuring that the appeal would have to be allowed.

[34] For his part, the respondent opposed the question proposed by the applicants from being certified because it is a hypothetical question that does not consider the facts in the case under review. In summary, the applicants are calling upon the Federal Court of Appeal to render a declaratory judgment, while no evidence or arguments dealing specifically with the educational

institutions attended and the accessibility of health care in India was submitted to the officer in this case.

[35] I concur with the respondent that this is not a case in which the Court must exercise its authority, under paragraph 74(d) of the IRPA, in order to certify a serious question of general importance. To be certified, a question must transcend the interests of the immediate parties to the litigation, contemplate issues of broad significance or general importance and be dispositive of the appeal (see *Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, 51 ACWS (3*rd*) 910 at paragraph 4, [1994] FCJ No. 1637 (QL) (FCA) [*Liyanagamage*]; *Zhang v. Canada (Citizenship and Immigration)*, 2013 FCA 168, at paragraph 9 [*Zhang*]). It must be a question which has been raised and dealt with before the Federal Court and it must arise from the evidence on record and the facts in the litigation (see *Canada (Minister of Citizenship and Immigration) v. Zazai*, 2004 FCA 89 at paragraph 12; *Zhang* at paragraphs 9 and 13). As stated by Décary J.A. in *Liyanagamage* at paragraph 4, the certified question must not be used "as a tool to obtain from the Federal Court of Appeal declaratory judgments on fine questions which need not be decided in order to dispose of a particular case".

[36] In this case, the question that the applicants wish to certify is in fact not determinative with respect to the outcome of the appeal. I concur with the respondent that the applicants essentially want to obtain from the Court of Appeal a declaratory judgment on a hypothetical question that does not arise from either the evidence or the facts on record. In fact, they did not raise any arguments before the officer who was assessing the H&C application regarding hardship that would be caused by their children's lack of citizenship in the event that they return

to India. No evidence dealing with accessibility to medical care or the education system in India was submitted either. Therefore, that argument was not determinative for ruling on this request. As a result, it is not appropriate to certify the question submitted by the applicants.

JUDGMENT in IMM-3476-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No question is certified;

"Luc Martineau"

Judge

Certified true translation
This 29th day of November 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3476-17
STYLE OF CAUSE:	GEETIKA PURI, GAGAN PURI v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	JANUARY 10, 2018
REASONS FOR JUDGMENT AND JUDGMENT:	MARTINEAU J.
DATED:	FEBRUARY 5, 2018

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