

Federal Court



Cour fédérale

Date: 20180328

Docket: IMM-3358-17

Citation: 2018 FC 341

Ottawa, Ontario, March 28, 2018

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

SWARN KAUR GORAYA

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Swarn Kaur Goraya seeks judicial review of a decision of an officer with Citizenship and Immigration Canada to refuse her request to apply for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds.

[2] For the reasons that follow, the immigration officer's assessment of Ms. Goraya's application was justifiable, transparent and intelligible, and the refusal was reasonable. Ms. Goraya has not established that the immigration officer acted in bad faith, or that she was otherwise denied procedural fairness. The application for judicial review is dismissed.

II. Background

[3] Ms. Goraya is a citizen of the United Kingdom. She was born in India in 1943 and is now 74 years old.

[4] Ms. Goraya has two children. One of her sons lives in the United States of America, but Ms. Goraya says that their relationship is not close. Her second son is a permanent resident of Canada. He is the father of four children. The family resides in Edmonton, Alberta.

[5] Ms. Goraya's husband died in January 2015 during a trip to Canada. She has no family left in England.

[6] Ms. Goraya has often visited her son in Canada. She most recently entered Canada on December 4, 2015 as a visitor. She subsequently obtained an extension of her visitor status until June 30, 2017.

[7] In September 2016, Ms. Goraya sought an exemption from the usual requirement of applying for permanent residence from outside Canada. The request was made in accordance with ss 25(1) and 25.1 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

Ms. Goraya cited her advanced age, the absence of family ties in the United Kingdom, the strength of her family ties in Canada, her level of establishment in Canada, and the best interests of her four grandchildren.

III. Decision under Review

[8] The immigration officer found Ms. Goraya's situation to be similar to that of many parents whose children have immigrated to another country. Although she was 74 years old, she was mobile, able to travel, and had travelled back and forth between England and Canada many times. Despite the strength of her family ties, she had been separated from her family before. Ms. Goraya had not demonstrated that she would be unable to qualify for a "super visa", which permits multiple visits of up to two years over a 10 year period. Nor did she explain why regular visitor visas or eventual sponsorship by her son were not reasonable alternatives to the exceptional remedy of an exemption on H&C grounds. The immigration officer also concluded that Ms. Goraya's stays in Canada were too short to demonstrate she was well established, despite her volunteering, computer training courses and assets.

[9] The immigration officer noted that Ms. Goraya had responded "N/A" (not applicable) to the question on the application form regarding any children who would be affected by the H&C decision. The immigration officer held that Ms. Goraya had not demonstrated a significant interdependency between herself and her grandchildren, or that her role was greater than or equal to that of the parents, particularly given her history of absences. The immigration officer concluded that there was insufficient evidence to establish that separation would compromise the grandchildren's emotional, social, cultural and physical well-being.

IV. Issues

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

- A. Was the immigration officer's decision reasonable?

- B. Was the immigration officer's decision procedurally fair?

V. Analysis

[11] A decision of an immigration officer to grant or refuse a request to apply for permanent residence from within Canada on H&C grounds is subject to review by this Court against the standard of reasonableness (*Kanhasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44 [*Kanhasamy*]). The Court will intervene only if the decision falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[12] Whether an immigration officer applied the correct legal test in assessing an H&C application is reviewable against the standard of correctness (*Guxholli v Canada (Citizenship and Immigration)*, 2013 FC 1267 at para 17). Questions of procedural fairness are similarly reviewable by this Court against the standard of correctness (*Canada (Citizenship & Immigration) v Khosa*, 2009 SCC 12 at para 43).

A. *Was the immigration officer's decision reasonable?*

[13] Ms. Goraya says that the immigration officer wrongly concluded she would be eligible for a “super visa”, because her son was not yet a permanent resident of Canada. He acquired this status in April 2017, which was after the application was submitted but before the immigration officer rendered her decision. Furthermore, Ms. Goraya says that her son would have needed to demonstrate a minimum income, and Ms. Goraya’s lack of significant ties to the United Kingdom might have caused the visa to be refused. She notes that a “super visa” is discretionary, and “the very uncertainty that comes with the temporary residence permit cannot replace the remedy of section 25” (citing *Greene v Canada (Citizenship and Immigration)*, 2014 FC 18 at para 9).

[14] With respect to the prospect of eventual sponsorship by her son, Ms. Goraya says the immigration officer failed to consider that her son would need to demonstrate three years of qualifying income, and would then be at the mercy of a lottery. She says the immigration officer failed to acknowledge the impact of her husband’s death on her personal circumstances, and improperly fettered her discretion by unduly focusing on alternatives to the relief sought rather than the H&C grounds themselves.

[15] It is well established that an immigration officer’s exercise of discretion under ss 25(1) and 25.1 of the IRPA is exceptional (*Kanhasamy* at para 19). It is not intended to serve as an alternative path to immigration, and should be applied sparingly (*Kanhasamy* at paras 14, 23).

[16] Contrary to Ms. Goraya's assertion that the immigration officer wrongly found her to be eligible for a "super visa", the immigration officer concluded only that she had not submitted sufficient information to demonstrate that she would be ineligible. This is an important distinction. The onus was on Ms. Goraya to establish grounds upon which the immigration officer might grant the exceptional relief sought. The onus was not on the immigration officer to demonstrate why it should be refused.

[17] Moreover, I am not persuaded that the immigration officer's decision was based exclusively, or even predominantly, on the potential availability to Ms. Goraya of alternatives under the IRPA. The decision was based on a consideration of numerous factors, including Ms. Goraya's family ties in Canada, the absence of family ties in the United Kingdom, her relationship with her grandchildren, her travel history, and her ability to travel freely between the United Kingdom and Canada without having to apply for a visa in advance.

[18] Ms. Goraya offered the immigration officer little in the way of evidence regarding the best interests of her grandchildren. Indeed, she indicated on the application form that no children would be affected by the decision. In my view, the immigration officer reasonably found that Ms. Goraya had not demonstrated interdependence between herself and her grandchildren, particularly given that the cumulative time Ms. Goraya had spent in Canada amounted to approximately a year and a half.

[19] Ms. Goraya also takes issue with the immigration officer's assessment of her ties to Canada. She says the immigration officer improperly treated establishment as a condition, rather

than a significant factor (citing *Kanthasamy* at para 47). In my view, Ms. Goraya is asking the Court to re-weigh the evidence. That is not the role of a court on judicial review (*Khosa* at para 61).

[20] I therefore conclude that the immigration officer's reasons were justifiable, transparent and intelligible. The decision was reasonable.

B. *Was the immigration officer's decision procedurally fair?*

[21] Before she issued the decision, the immigration officer telephoned the home of Ms. Goraya's son in Edmonton. The son answered. The ensuing conversation was awkward and occasionally heated. The immigration officer said she was calling to obtain further information to support the application, including the son's birth certificate. The son said she should contact Ms. Goraya's immigration consultant, and accused the immigration officer of not following proper procedure. The son asked for more time to provide the information. The immigration officer says she found the son's attitude to be aggressive and hostile. The son says the immigration officer declared that she would refuse the application and abruptly ended the call. Neither the immigration officer nor the son were cross-examined on their respective affidavits.

[22] The immigration officer refused the application the same day. There is no reference to the telephone call in the immigration officer's decision.

[23] Ms. Goraya says the telephone call must have played a role in the immigration officer's decision, and the failure of the immigration officer to acknowledge it in the reasons is highly irregular. The immigration officer proceeded to make the decision without giving Ms. Goraya an opportunity to provide the additional information requested. Ms. Goraya says this demonstrates bad faith.

[24] In her affidavit, the immigration officer deposes that her preliminary assessment of Ms. Goraya's application was that she had provided insufficient information to establish the parentage of either of her two sons, and had shown insufficient H&C grounds on which the application might be granted. Following the difficult telephone conversation with the son, the immigration officer decided to give Ms. Goraya the benefit of the doubt regarding the question of parentage, and processed the application based on the information provided. She did not mention the telephone call in her reasons because she did not consider it to be relevant. She says it had no impact or influence on her decision.

[25] An allegation of bad faith on the part of a decision-maker requires a high level of proof (*Qin v Canada (Citizenship and Immigration)*, 2014 FC 846 at paras 30-32). The immigration officer's uncontroverted evidence is that the primary purpose of the telephone call was to obtain further information regarding Ms. Goraya's parentage of her sons. When this information was not forthcoming, the immigration officer gave Ms. Goraya the benefit of the doubt respecting the question of parentage, and proceeded to decide the application based on the information provided.

[26] An immigration officer is under no obligation to point out weaknesses in an application, or to ask an applicant to update evidence (*Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 45 [*Kisana*]). Moreover, Ms. Goraya has not identified any further evidence or information that might have strengthened her case. I am therefore satisfied that Ms. Goraya was given a meaningful opportunity to present relevant evidence and have it fully and fairly considered (*Kisana* at para 45). The immigration officer has provided a reasonable account of her actions, and the evidence does not support a finding of bad faith.

VI. Conclusion

[27] The application for judicial review is dismissed. Neither party proposed that a question be certified for appeal, and none arises in this case.

JUDGMENT

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

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3358-17

STYLE OF CAUSE: SWARN KAUR GORAYA v MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

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JUDGMENT AND REASONS: FOTHERGILL J.

DATED: MARCH 28, 2018

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