

Federal Court



Cour fédérale

Date: 20190910

Docket: IMM-6078-18

Citation: 2019 FC 1153

Ottawa, Ontario, September 10, 2019

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

PRITAM SINGH SHAH

Applicant

and

**THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP CANADA**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Pritam Singh Shah, seeks judicial review of the decision of an Immigration Officer [the Officer], dated November 15, 2018, which refused his Application for Permanent Residence from within Canada on Humanitarian and Compassionate [H&C] grounds, pursuant to section 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [the Act].

[2] For the reasons that follow, the Application is dismissed. While the Court sympathizes with the Applicant's circumstances and his desire to remain in Canada with his family, the Court's role is not to make the decision, rather to determine if the Officer's decision is reasonable. The Court finds that the decision is reasonable; it is justified, transparent and intelligible and is defensible in accordance with the law and the facts on the record.

I. Overview

[3] Mr. Shah is a 78-year-old citizen of India. His only family – his son, daughter-in-law and two grandsons – arrived in Canada in 2010 and are now permanent residents. Prior to 2010 Mr. Shah lived with his family in India. He attests that his family is very close and that he helped raise his grandchildren, imparting his traditional culture and language.

[4] Mr. Shah recounts that his daughter-in-law and youngest grandson returned to India shortly after their arrival in Canada in 2010 to care for him. Before returning to Canada in 2012, Mr. Shah's daughter-in-law arranged for a caretaker for Mr. Shah. He attests that the caretaker neglected him, leaving him in isolation and poor mental and physical health.

[5] Mr. Shah has visited Canada several times. On March 26, 2015, he obtained a multiple entry Temporary Residence Visa [TRV], which expires on January 13, 2025. This multiple entry TRV permits Mr. Shah to remain in Canada for periods of up to six months with possible extensions.

[6] In April 2017, Mr. Shah entered Canada as a visitor. On June 15, 2017, Mr. Shah applied for Permanent Residence from within Canada on H&C grounds, noting in particular: his establishment in Canada, family ties, the impact of separation from his family, his frail health and the best interest of his grandsons.

[7] Mr. Shah arrived in Canada again in February 2018 and has remained since due to the extension of his TRV.

[8] Mr. Shah's family in Canada also submitted online "an interest to sponsor a family member or grandparent" in 2017 but their application was not selected. In January 2019, Mr. Shah's son attempted to file another online interest, but the program closed due to high volume before he could do so.

II. The Decision under Review

[9] The Officer considered the relevant evidence and factors. The Officer noted that there were several positive factors but, based on his global assessment, found that an H&C exemption was not justified.

[10] With respect to Mr. Shah's establishment in Canada, the Officer noted that Mr. Shah had visited Canada several times and gave positive weight to the fact that Mr. Shah had always complied with Canadian immigration regulations and had returned to India when required.

[11] The Officer noted that Mr. Shah had some investments and a monthly pension that would enable him to live independently in India. The Officer also noted that Mr. Shah's son would support him if needed whether he returned to India or remained in Canada.

[12] The Officer noted that Mr. Shah has resided with his family in Canada continuously since February 2018, but gave little weight to his time spent in Canada as a factor supporting his establishment.

[13] The Officer gave significant positive weight to Mr. Shah's relationship with his family. The Officer acknowledged that Mr. Shah had no relatives in India and that his only family is his son, daughter-in-law and grandsons in Canada.

[14] The Officer gave little weight to the impact of family separation. The Officer found that there was little corroborative evidence to explain why Mr. Shah was not capable of living on his own and required day-to-day support or assistance. The Officer noted that Mr. Shah had recently passed the medical examination to permit his TRV to be extended. The Officer added that Mr. Shah's multiple entry visa, valid until 2025, would permit him to continue to visit his family in Canada and noted that there was little evidence to suggest that he is not fit to travel or would experience difficulty doing so. The Officer also noted that there was little evidence that he would not be able to return to India based on his age.

[15] With respect to the best interests of the children affected [BIOC] – i.e., Mr. Shah’s grandsons – the Officer noted that the oldest grandson was 19 years of age and did not meet the definition of “child” for the purposes of the BIOC analysis.

[16] With respect to Mr. Shah’s 17-year-old grandson, the Officer found that there was little evidence of Mr. Shah’s role in his younger grandson’s life. The Officer concluded that the grandson’s basic medical, educational, and social needs would continue to be met in Mr. Shah’s absence.

[17] In conclusion, the Officer found that the H&C factors, assessed globally, did not warrant an exemption under subsection 25(1) of the Act.

III. The Issues

[18] Mr. Shah submits that the decision is not reasonable: the Officer erred by failing to consider the evidence of his circumstances as a whole in relation to the hardships he would face if required to return to India; and, the Officer erred in his assessment of the best interests of his younger grandson, by ignoring relevant evidence.

IV. The Standard of Review

[19] The jurisprudence has clearly established that the standard of review of an Officer’s decision with respect to an H&C application is reasonableness (*Kanhasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 [*Kanhasamy*] at para 44).

[20] To determine whether a decision is reasonable, the Court looks for “the existence of justification, transparency and intelligibility within the decision-making process” and considers “whether the decision falls within a 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, [2008] 1 SCR 190).

[21] The role of the Court is not to remake the decision or to reweigh the evidence. The Court owes deference to the decision-maker and should only intervene where the decision does not reflect the *Dunsmuir* standard.

V. The Applicant’s Submissions

[22] Mr. Shah submits that the H&C Officer failed to consider relevant evidence of the hardship he would face resulting from his unique circumstances, including his emotional and physical dependency on his family in Canada, his lack of a social network in India, and his inability to create new networks due to his advanced age.

[23] Mr. Shah submits that his age and family dependency are important factors that should be considered in assessing hardship (*Makarenko v Canada (Minister of Citizenship and Immigration)*, 2014 FC 600 at para 24 [*Makarenko*]; *Epstein v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1201 at paras 11, 14-15 [*Epstein*]).

[24] Mr. Shah further submits that the Officer did not consider the evidence holistically, contrary to the principle in *Kanthisamy* at para 113. [He argues that the Officer considered the factors in segments which led to contradictory findings.

[25] With respect to the Officer's BIOC analysis, Mr. Shah submits that the Officer did not follow the guidance of the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 75 [*Baker*], requiring decision-makers to "consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them."

[26] Mr. Shah submits that the Officer ignored relevant evidence of his relationship with his younger grandson, given that they lived together for most of the grandson's life. Mr. Shah argues that the Officer failed to consider the photographs of Mr. Shah together with his grandson over the years and the letter written by his older grandson describing their relationship. He argues that the Officer failed to draw reasonable inferences from his older grandson's description of their relationship, which is the same relationship he had with his younger grandson.

[27] Mr. Shah also submits that the Officer failed to take into account other relevant BIOC factors, focussing instead on irrelevant factors, including his grandson's access to the Canadian medical system, education system and social services.

VI. The Respondent's Submissions

[28] The Respondent notes that H&C considerations are no longer assessed through the lens of underserved and disproportionate hardships. The Officer did not err by failing to specifically address hardship, rather the Officer applied the principles of *Kanthisamy* and assessed all the relevant H&C factors. The Respondent submits that no single factor prevailed over any other in the Officer's reasons, that each factor was considered, attributed weight, and that all factors were then assessed globally.

[29] The Respondent submits that the Officer noted several positive factors, including Mr. Shah's strong family ties, but found a lack of evidence to support Mr. Shah's other submissions, such as his inability to live alone, his inability to travel and any medical condition. The Respondent notes that the Officer observed that the multiple entry visa, valid until 2025, permits Mr. Shah to travel to Canada. The Respondent notes that this informed the Officer's attribution of little weight to the impact of family separation.

[30] With respect to the BIOC, the Respondent submits that the Officer correctly stated the law, including finding that the older grandson was not a child for the purposes of the analysis, and reasonably assessed the BIOC of the younger grandson. The Officer reasonably concluded that there was insufficient evidence that the grandson's best interests would not be met if Mr. Shah returned to India.

VII. The Decision is Reasonable

[31] The Officer did not err in his analysis of the H&C application. As noted above, a decision is reasonable where it is transparent, intelligible and justified. In the present case, the Officer addressed all of the factors relevant to the H&C application and all of the evidence submitted, noting that there was little evidence to support many of the factors raised. The Officer did not err by failing to consider relevant evidence or by failing to conduct a global assessment of all the relevant evidence. The weight attached to the considerations is within the Officer's discretion and the Court's role is not to reweigh the evidence.

[32] Section 25 of the Act, which Mr. Shah seeks to rely on, provides that an exemption from the criteria or obligations of the Act –which, in this case, would otherwise require Mr. Shah's permanent residence application to be made from abroad – may be granted on the basis of humanitarian and compassionate considerations, "taking into account the best interests of a child directly affected".

[33] This exemption is discretionary and exceptional relief. The Supreme Court of Canada has confirmed that an H&C application is not an alternative immigration stream (*Kanhasamy* at paras 23). The onus is at all times on an applicant to establish with sufficient evidence that this exemption or exception should be granted (*Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 45; *Liang v Canada (Minister of Citizenship and Immigration)* 2017 FC 287 at para 23, [2017] FCJ No 286 (QL)). Officers who conduct H&C assessments must

consider all of the evidence presented and be satisfied that relief is justified in the particular circumstances.

[34] In *Kanthasamy*, the Supreme Court explained that what will warrant relief under section 25 will vary depending on the facts and context of each case (at para 25).

[35] The Supreme Court also emphasized, at para 33, the need to consider and weigh all relevant facts and factors and called for a more liberal interpretation of H&C considerations, not limited to undue, undeserved or disproportionate hardship. However, the Court also acknowledged, at para 23, that some hardship is inevitable:

[23] There will inevitably be some hardship associated with being required to leave Canada. This alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under s. 25(1): see *Rizvi v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 463, at para. 13 (CanLII); *Irimie v. Canada (Minister of Citizenship and Immigration)* (2000), 10 Imm. L.R. 206 (F.C.T.D), at para. 12. Nor was s. 25(1) intended to be an alternative immigration scheme: House of Commons, Standing Committee on Citizenship and Immigration, Evidence, No. 19, 3rd Sess., 40th Parl., May 27, 2010, at 15:40 (Peter MacDougall); see also Evidence, No. 3, 1st Sess., 37th Parl., March 13, 2001, at 9:55 to 10:00 (Joan Atkinson).

A. *The Officer did not fail to consider relevant evidence or to conduct a global assessment of the H&C factors*

[36] The decision conveys that the Officer considered and weighed all the relevant H&C factors. The Officer noted Mr. Shah's dependency on his family and gave "significant positive weight" to his family ties, acknowledging that Mr. Shah had no other family in India. The Officer also acknowledged Mr. Shah's submissions but reasonably concluded that there was little

evidence to explain why he is unable to live on his own or why he requires support in his day-to-day activities. The supporting evidence is scant, consisting only of the three letters from Mr. Shah's son, daughter-in-law and oldest grandson, in addition to his own narrative, all of which generally stated the same information. While it is understandable that Mr. Shah would be sad and depressed if required to return to India, there was no evidence of that Mr. Shah was in frail health, as claimed, or suffered from any physical or mental health condition. As the Officer noted, Mr. Shah had recently passed a medical examination for the purpose of extending his TRV.

[37] Contrary to Mr. Shah's submissions, the Officer did not consider the relevant H&C factors in isolation or in segments and did not make contradictory findings. The Officer considered the factors raised by Mr. Shah and those referred to in the relevant Guidelines and then conducted a global assessment. The Officer did not make contradictory findings in noting that the family ties in Canada were strong and attributing significant weight to this factor yet also finding that Mr. Shah would be returning to his home country where he had lived his whole life, worked, was educated and where he understands the language and customs. Both findings are supported by the evidence and are not inconsistent. Moreover, the findings address different factors; family ties and establishment. Contrary to Mr. Shah's submission that the Officer assumed that he had a social network in India, the Officer made no such findings or assumptions. The Officer's finding was limited to the fact that Mr. Shah could re-establish himself in India because of his familiarity with India and because there was no evidence of any impediments to do so.

[38] Contrary to Mr. Shah's submissions, his circumstances differ from those in *Makarenko* where Justice Manson found that the Officer's failure to consider the applicant's age (81) made the other conclusions unreasonable, for example, with respect to the applicant's ability to renew social ties in her home country. In the present case, the Officer noted Mr. Shah's age at the outset of the decision in setting out the background, later in the assessment of establishment, and again in the conclusion and global assessment, noting that Mr. Shah was an "elderly widower" and wanted to remain in Canada. The Officer's assessment of the relevant H&C factors was informed by Mr. Shah's personal circumstances, including his age.

[39] With respect to Mr. Shah's reliance on *Epstein*, at para 15, no two cases are identical. In *Epstein*, Justice LeBlanc found that the Officer failed to grasp the impact of separation on an elderly grandparent, noting that there was clear evidence of the applicant's dependency on her family for shelter, food, emotional and financial support. In the present case, the Officer repeatedly noted that there was little evidence to support the claims that Mr. Shah could not care for himself, re-establish himself in India or travel back and forth to Canada.

[40] The Officer acknowledged that Mr. Shah would experience some hardship arising from the separation from his family, but as noted in *Kanthasamy* at para 23, some hardship is inevitable and does not, on its own, warrant H&C relief.

B. *The Officer did not err in his assessment of the best interests of Mr. Shah's younger grandson.*

[41] In *Kanhasamy*, the Supreme Court of Canada (citing *Baker* at paras 74-75) reiterated the importance of assessing the BIOC in the context of an H&C application and noted that it is not enough to simply state that the interests have been considered. The child's best interests must be well identified and examined in light of all the evidence (*Kanhasamy*, at para 39).

[42] I do not agree with Mr. Shah's submission that the Officer was not "alert, alive and sensitive" to his younger grandson's best interests. Clearly the Officer assessed the BIOC in light of the evidence presented.

[43] The Officer set out an appropriate approach to a BIOC analysis in the context of an H&C application; first, to establish what is in the child's best interests; second, to determine the degree to which those interests would be compromised by one decision over the other; and, finally, to determine the weight that should be attached to the BIOC in the overall H&C application.

[44] The Officer followed that approach, determining that the best interests of the younger grandson are to be around his parents and to have his basic needs met, including education, medical care, and social support from family and friends. The Officer addressed the evidence that was before him, noting that there was little.

[45] Contrary to Mr. Shah's submission, the Officer considered the evidence submitted to support the close relationship between Mr. Shah and his grandson, including the photographs of

the two together over the years. The Officer expressly referred to the “photos taken with Sahil and Karan [the grandsons] at various [*sic*] stages of Karan’s life”.

[46] The Officer also clearly acknowledged that Mr. Shah had lived with his younger grandson for most of his grandson’s life. In addition, the Officer gave significant positive weight to family ties, which also acknowledged the relationship he had with his grandsons.

[47] Mr. Shah’s argument that the Officer should have relied on the letter from his older grandson, which described their particular relationship, to infer that the same relationship existed with his younger grandson and that his younger grandson’s interests would be negatively impacted, ignores the principle that the onus is on Mr. Shah to establish that H&C considerations justify the exemption from the requirements of the Act. The Officer was not required to read between the lines or draw an inference that the younger grandson’s best interests would be negatively affected. The letter from the older grandson did not even mention the younger grandson.

[48] Mr. Shah’s argument that the Officer focussed on irrelevant factors, such as the availability of medical care and education for his grandson, yet ignored relevant factors such as his grandson’s age and the role played by Mr. Shah in his grandson’s life and cultural education is without merit. The Officer considered the factors set out in the Guidelines to the extent that they applied. The Officer clearly noted the grandson’s age. The Officer noted that – other than the photographs and the letters which described that they had all previously lived together – there

was little evidence that the younger grandson's needs would not be met by his family in Canada, even in Mr. Shah's absence.

[49] In conclusion, the Officer's decision is justified, transparent and intelligible. While sympathetic to the plight of Mr. Shah and his desire to remain with his family in Canada, the Officer reasonably found that an exemption from the requirements of the Act was not warranted. The Officer noted other options that Mr. Shah could pursue, including another online interest to sponsor or an application for the Parent and Grandparent Super Visa.

JUDGMENT in file IMM-6078-18

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is dismissed.
2. There is no question proposed for certification.

"Catherine M. Kane"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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