Federal Court Cour fédérale

Date: 20200206

Docket: IMM-5720-18

Citation: 2020 FC 210

Ottawa, Ontario, February 6, 2020

PRESENT: Mr. Justice Norris

BETWEEN:

SUKH RAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant is a forty-four year old citizen of India. He arrived in Canada in 2004, obtained a work permit and began working as a cook. Between 2004 and 2015, he was able to renew his work permit several times. He worked for the same employer throughout this time. Since 2015, the applicant has been in Canada on a temporary resident visa.

[2] The applicant's wife and two children (an eighteen year old son and a sixteen year old daughter) live in India. The applicant's parents, his brother, and his three sisters all also live in India.

[3] In January 2013, the applicant applied for permanent residence under Ontario's Provincial Nominee Program [PNP]. The application was refused in 2014, however, because the applicant's daughter was found to be medically inadmissible under section 38(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. Pursuant to section 42(1) of the *IRPA*, her inadmissibility rendered all members of the family inadmissible.

[4] On May 10, 2017, the applicant filed another application for permanent resident status. This time he relied on humanitarian and compassionate [H&C] grounds under section 25(1) of the *IRPA* to seek an exemption from the in-Canada selection criteria so that his application could be processed from within Canada.

[5] The applicant's initial submissions in support of his H&C application had also addressed the question of whether his daughter was, in fact, medically inadmissible. The applicant argued that she was not but, even if she was, this ought not to stand in the way of the application for permanent residence. After these submissions were completed, the medical inadmissibility policy changed in June 2018. The applicant provided additional submissions contending that under the new policy his daughter is no longer medically inadmissible to Canada. The applicant himself does not appear to be inadmissible for any other reason. Thus, as ultimately presented

by the applicant, the sole issue to be determined on the H&C application was whether he should be permitted to apply for permanent residence from within Canada.

[6] The H&C application was supported by detailed submissions and extensive evidence concerning the applicant's establishment in Canada, the foreseeable consequences for the applicant and his family if he had to return to India, and the best interests of the children who would be directly affected by the decision.

[7] In a decision dated October 29, 2018, a Senior Immigration Officer refused the application, concluding that an exemption from the usual requirements of the law relating to in-Canada selection criteria was not warranted. The officer does not address the question of the applicant's daughter's medical inadmissibility.

[8] The applicant now applies for judicial review of this decision under section 72(1) of the *IRPA*. He submits that the decision to reject his H&C application is unreasonable.

[9] For the reasons that follow, I do not agree. This application for judicial review will therefore be dismissed.

[10] There is no dispute that the officer's decision should be reviewed on a reasonableness standard. This is well-established with respect to H&C decisions (see *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 at para 44 [*Kanthasamy*];

Kisana v Canada (Citizenship and Immigration), 2009 FCA 189 at para 18 [*Kisana*]; *Taylor v Canada (Citizenship and Immigration)*, 2016 FC 21 at para 16).

[11] That this is the appropriate standard has recently been reinforced by *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], where the majority of the Court set out a revised framework for determining the standard of review with respect to the merits of an administrative decision (at para 10). Applying *Vavilov*, there is no basis for derogating from the presumption that reasonableness is the applicable standard of review of the officer's decision.

[12] The majority in *Vavilov* also sought to clarify the proper application of the reasonableness standard (at para 143). The principles the majority emphasizes were drawn in large measure from prior jurisprudence, particularly *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 [*Dunsmuir*]. Although the present application was argued prior to the release of *Vavilov*, the footing upon which the parties advanced their respective positions concerning the reasonableness of the officer's decision is consistent with the *Vavilov* framework. I have applied that framework in coming to the conclusion that the officer's decision is reasonable; however, the result would have been the same under the *Dunsmuir* framework.

[13] As discussed in *Vavilov*, the exercise of public power "must be justified, intelligible and transparent, not in the abstract but to the individuals subject to it" (*Vavilov* at para 95). For this reason, an administrative decision maker has a responsibility "to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion" (*Vavilov* at para 96). A reasonable decision "is one that is based on an internally

coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). An assessment of the reasonableness of a decision must be sensitive and respectful yet robust (*Vavilov* at paras 12-13). Here, the onus is on the applicant to demonstrate that the officer's decision is unreasonable. Before the decision can be set aside on this basis, I must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

[14] In my view, the applicant has failed to establish a basis for interfering with the officer's decision.

[15] Section 25(1) of the *IRPA* authorizes the Minister to grant relief to a foreign national seeking permanent resident status who is inadmissible or otherwise does not meet the requirements of the Act. The Minister may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations under the Act. As the provision itself states, relief of this nature will only be granted if the Minister "is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national." These considerations include matters such as children's rights, needs and best interests; maintaining connections between family members; and averting the hardship a person would suffer on being sent to a place where he or she has no connections (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559 at para 41).

[16] In *Kanthasamy*, the Supreme Court of Canada endorsed an approach to section 25(1) that is grounded in its equitable underlying purpose. Writing for the majority, Justice Abella approved of the approach taken in *Chirwa v Canada (Minister of Manpower & Immigration)* (1970), 4 IAC 338, where it was held that H&C considerations refer to "those facts, established by the evidence, which would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another – so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the *Immigration Act*" (*Kanthasamy* at para 13). Section 25(1) allows for "a flexible and responsive exception to the ordinary operation of the *Act*," thereby mitigating the effects of a rigid application of the law in appropriate cases (*Kanthasamy* at para 19). It should therefore be interpreted to allow it "to respond flexibly to the equitable goals of the provision" (*Kanthasamy* at para 33). On the other hand, it is not intended to be an alternative immigration scheme (*Kanthasamy* at para 23).

[17] There will inevitably be some hardship associated with being required to leave Canada and "[t]his alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under s. 25(1)" (*Kanthasamy* at para 23). What does warrant relief will vary depending on the facts and context of the case (*Kanthasamy* at para 25). H&C relief is an exceptional and highly discretionary measure (*Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 15; *Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4). The onus is on an applicant to present sufficient evidence to warrant the exercise of such discretion in his or her case (*Kisana* at para 45; *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 5; *Ahmad v Canada (Citizenship and*

Immigration), 2008 FC 646 at para 31; *Zlotosz v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 724 at para 22).

[18] The fundamental question on an H&C application is whether an exception ought to be made in a given case to the usual operation of the law (see *Damian v Canada (Citizenship and Immigration)*, 2019 FC 1158 at paras 16-22).

[19] In a nutshell, the applicant argued in his application for H&C relief that an exception should be made for him because he wishes to support his family with income he earns in Canada, being required to leave Canada would disrupt the social and community ties he has established here, having to re-establish himself in India would be a significant hardship, and it would be in his children's best interests – particularly his daughter's – if they could become permanent residents of Canada too.

[20] The officer concluded that the applicant had not demonstrated that the in-Canada selection criteria operate unfairly in his case. On this application for judicial review, the applicant has not established that this decision is unreasonable. The officer's reasons are fully responsive to the applicant's submissions in support of the H&C application. They explain why the officer exercised the discretion conferred by section 25(1) as the officer did. The decision is "based on an internally coherent and rational chain of analysis" and it is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85).

[21] The evidence concerning whether the applicant was currently supporting his family economically was ambiguous at best. In his H&C application, the applicant stated that he had sent an average of approximately $10,000 CDN per year home to his family and had still been able to put aside significant savings. However, his application also stated that he had been unemployed since January 2015. While the applicant stated that he supports his wife, his two children, and his parents, he does not say how he does this, or to what extent, now that he is unemployed. As for the future, the applicant's plan was to return to his previous employment, which would provide a better income than he could earn in India, once he became a permanent resident. The officer reasonably determined that such circumstances did not warrant making an exception in the applicant's case.

[22] The officer also demonstrated the requisite degree of insight into and sensitivity for the best interests of the applicant's children (particularly his daughter). Unlike what is often the case in H&C applications where a child's best interests are engaged, the applicant's children have never lived in Canada. They have no connection to this country apart from the fact that their father has lived here for many years and he would like them to live here one day as permanent residents. Nevertheless, the interests of overseas children must be considered if they will be directly affected by the decision (as illustrated by, for example, *Gonzalo v Canada (Minister of Citizenship and Immigration)*, 2015 FC 526 [*Gonzalo*]; *Jani v Canada (Citizenship and Immigration)*, 2018 FC 1229; and *Kisana*). The officer did so here. Especially considering the attenuated connection between his children's best interests and the exception he was seeking, the applicant has failed to demonstrate that the officer's consideration of those interests is unreasonable.

[23] In many respects, the facts of the present case are strikingly similar to those of *Gonzalo.* However, unlike in that case (where an overseas family member was medically inadmissible to Canada at the time of the H&C application), the applicant has not shown that there is anything that legally prevents him from seeking permanent residence in the normal manner. While this is not a necessary pre-condition for H&C relief (see *Sidhu v Canada (Citizenship and Immigration)*, 2020 FC 133 at paras 12-13), it does explain why there was a different outcome in *Gonzalo.*

[24] The applicant submitted to the officer that the equities of his case favour granting an exemption to him because, had the current medical inadmissibility policy been in effect in 2014, his original application for permanent residence would have been accepted. There is no way to know whether this would have been the case or not. In any event, the previous application was decided under the policy in effect at the time. For its own reasons, the government decided to change that policy, as it was entitled to do. The applicant cannot bootstrap his H&C application with what is, in effect, a collateral attack on the earlier policy.

[25] The applicant also submits that the officer committed a reviewable error by not addressing the issue of his daughter's medical inadmissibility. I do not agree. There is no suggestion that the officer resolved this issue against the applicant or weighed it in any way against the merits of the applicant's request for relief. In the context of this case (including the applicant's submissions to the officer), the officer's silence can only mean that the officer was satisfied that the medical inadmissibility of the applicant's daughter was no longer an issue.

While it may have been preferable for the officer to have said this explicitly, the failure to do so does not vitiate the decision.

[26] The issue before the officer was whether it was unfair or inequitable to require the applicant to submit his new application for permanent residence in the normal manner. Balancing all of the relevant factors, the officer was not satisfied that the circumstances of the applicant's case warranted an exception from the usual requirements of the law relating to in-Canada applications for permanent residence. The decision exhibits the requisite degree of justification, intelligibility and transparency. There is no basis for me to interfere with it.

[27] The parties did not suggest any serious questions of general importance for certification under section 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-5720-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No question of general importance is stated.

"John Norris"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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