Federal Court  Cour fédérale

Date: 20210706

Docket: IMM-2855-20

Citation: 2021 FC 710

Ottawa, Ontario, July 6, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

CHAIN SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision made by an Immigration Officer [the Officer], dated June 11, 2020 [the Decision], which denied the Applicant's application for permanent residence based on humanitarian and compassionate [H&C] grounds under s 25(1) of the *Immigration and Refugee Protection Act,* SC 2001, c 27 [IRPA].

[2] As explained in more detail below, this application is allowed, because the Officer erred by failing to perform the required H&C assessment against the alternative of return to Kenya, the Applicant's country of citizenship.

II. **Background**

[3] The Applicant, Mr. Chain Singh, is a citizen of Kenya and a British overseas citizen. However, as the Applicant highlights in his submissions for this application, this form of British nationality does not give him a right of abode in the United Kingdom [the UK].

[4] The Applicant obtained permanent residence in Canada in 1985. However, he left Canada in 1995 to live in India and lost his permanent resident status in 2008, because he had spent too much time outside Canada. The Applicant subsequently visited Canada several times. He most recently entered Canada in 2015 on a super visa and has remained in Canada since that time. The Applicant has seven children, six daughters and one son. His children live in Canada and the UK. The Applicant has no family remaining in Kenya or India. He currently resides with his son and his son's wife and children in Vancouver, British Columbia.

[5] The Applicant submitted an application for permanent residence based on H&C factors in August 2016. That application was refused in April 2017. He then submitted another application for H&C relief in November 2017. That application was also refused, and the Applicant sought judicial review of the negative decision. In February 2020, the parties settled that application for judicial review, and the decision was sent back for re-determination by another officer. That re-determination is the Decision that is the subject of this application for judicial review.

[6] On March 21, 2020, the Applicant's counsel sent an In Canada Case Specific Enquiry to Immigration, Refugees and Citizenship Canada, enclosing the settlement documents to confirm that the application should be re-determined and providing one paragraph of additional submissions.

III. **Decision under Review**

[7] In the Decision at issue in this application, the Officer considered the Applicant's degree of establishment, the best interests of the children who would be impacted by his removal, risk and adverse country conditions, and other factors such as the hardship of the Applicant separating from his family.

[8] The Officer began by summarizing the Applicant's immigration history in Canada and then set out the legal test for evaluating an application for permanent residence on H&C factors under s 25(1) of IRPA, indicating that the Applicant had the onus to demonstrate that H&C considerations justify granting him an exception to normal requirements for obtaining permanent residence.

[9] In assessing the Applicant's establishment, the Officer found that the Applicant had travelled to Canada on three occasions between 2013 and 2015, that several of his adult children and their families live in Canada, and that he currently resides with his son and his family. The Officer also remarked that the Applicant has two daughters in the UK, but no family in India or Kenya. The Officer found that the Applicant had some volunteering involvement with a temple in Canada, but found that there was not much evidence as to the kind of voluntary service he

performed. The Officer found that the Applicant had established himself in Canada a little and gave this factor some weight.

[10] The Officer then turned to the best interests of the children [BIOC] who would be directly affected if he were removed from Canada. The Applicant has eight grandchildren in Canada and six others in the UK. Three of the Applicant's Canadian grandchildren provided letters in support of their grandfather, although the Officer noted that one letter was written by an adult grandchild who is not entitled to BIOC consideration. The two minor grandchildren stated that they wanted the Applicant to stay, that he looks after them sometimes, and that he has taught them Punjabi. The Officer also noted the Applicant's son's evidence about the importance of his father living with him, because culturally it is the male child who provides for his parents, and that it is important for his children to learn from and be physically and emotionally supported by the Applicant.

[11] The Officer noted these points as salient but observed that the Applicant has six other grandchildren outside of Canada to whom the same argument applies equally. The Officer also found a lack of detail regarding the physical or emotional support the Applicant could provide for his grandchildren. The Officer accepted that the Applicant occasionally looks after his grandchildren but found that the children who wrote letters were ten and sixteen, and the degree of care that the children need at an older age is less intensive. The Officer was also cognizant of the fact that both grandchildren's letters indicated that they were able to build and maintain a close relationship with the Applicant while he was overseas. The Officer therefore found that no significant negative impact on the best interests of the grandchildren had been identified.

[12] Under the heading of “Risk and Adverse Country Conditions,” the Officer explained that the Applicant had not raised any specific concerns under that factor.

[13] The Officer then looked at any other factors the Applicant raised for consideration, including the hardship of separating from his family in Canada and the fact that reunifying family is a key objective of IRPA. The Officer accepted that there is some hardship in separation from family but noted that the Applicant had not raised any issues specific to his health. The Officer also pointed out that the Applicant was previously a permanent resident of Canada but lost that status by living outside of Canada. The Officer noted that, had the Applicant been sponsored by his children to Canada, even as late as 2011, he would likely already be a permanent resident.

[14] The Officer noted that if this application were refused, the Applicant would have to leave Canada after his temporary resident status expired. The Officer stated that there are some questions as to where the Applicant can go, but that this decision is up to the Applicant. However, the Officer noted that the Applicant had previously resided in India for extended periods of time, and he likely could return there, or he could go to the UK where he has other family. The Officer also noted that, as the Applicant is in the possession of a super visa, he could later return to Canada. The Officer noted that the Applicant’s son expressed that he has a cultural duty to financially look after his father, but the Officer found that the Applicant could send money to wherever the Applicant resides and, if necessary, apply to sponsor his father under a family class application. The Officer therefore gave these factors little weight.

[15] Having weighed all of the H&C factors raised by the Applicant, the Officer provided a synthesis of the resulting analysis. The Officer gave some weight to the Applicant's establishment but explained that the Applicant had not demonstrated that the best interests of his Canadian grandchildren would be negatively impacted if he returned to India. The Officer recognized that the Applicant would face some hardship in separation from his family but concluded that is not unexpected. The Officer commented that the H&C process is not meant to subvert existing avenues for permanent residence and that the Applicant's son seemed aware of the existing avenues toward the Applicant becoming a permanent resident through family sponsorship but seemed to view that option as inconvenient and costly.

[16] The Officer also dismissed arguments raised by the Applicant's counsel that he will have difficulty surviving alone in India, because the Applicant has previously lived there for years and because his family has previously traveled to visit him in India. Additionally, he has a super visa and can return to Canada, or his family could choose to sponsor him. The Officer therefore was not satisfied that there were sufficient H&C considerations to justify granting the Applicant's application for permanent residence.

IV. **Issues and Standard of Review**

[17] As articulated by the Applicant in his written Memorandum of Argument, the issues for the Court's consideration in this application are whether it was unreasonable for the Officer to:

A. Erroneously characterize the Applicant as a Citizen of India/UK, with a right of entry, abode, and work, given that the Applicant's country of nationality to which he would be returned is Kenya;

B. Fail to conduct a hardship analysis; or

C. Fail to consider the hardship to the Applicant of being “stateless”.

[18] As suggested by this articulation of the issues, the applicable standard of review is reasonableness.

V. **Analysis**

[19] My decision to allow this application for judicial review turns on the first issue identified above. The Applicant relies on *Abdullah v Canada (Citizenship and Immigration)*, 2019 FC 954 [*Abdullah*], which held that an H&C assessment should not be based on the alternative of removal to a country where the applicant has no legal status or right to return (at para 26). In *Abdullah*, Justice McHaffie reviewed relevant jurisprudence of this Court, which held that assessing an H&C application with reference to a country where the applicant has no legal status is an error that renders a decision unreasonable (at para 17 *et seq*).

[20] The Applicant advanced his arguments based on *Abdullah* somewhat inconsistently between his written and oral submissions. In his Memorandum of Argument, he submitted that the Officer erred by failing to perform the required H&C assessment based on the alternative of return to Kenya, the Applicant’s country of citizenship. In his counsel’s oral submissions, he maintained this position but focused on an argument that the Officer failed to perform this assessment, with regard to all the evidence, in relation to return to the UK.

[21] In my view, the principle identified in *Abdullah* does not mandate an assessment in relation to the UK in the case at hand. While it is possible that the Applicant may be able to enter the UK, the evidence before the Officer was that the Applicant has no right of abode in that country. As Justice McHaffie explained, even where an applicant can return to a country based on a temporary ability to enter, the H&C assessment must consider potential for the removal from that country to the country of nationality (at para 26). Therefore, the Officer's error in the present case was not failing to assess the Applicant's circumstances from an H&C perspective against a return to the UK, but rather failing to perform that assessment against a return to Kenya.

[22] The Respondent would distinguish *Abdullah* on the basis that the applicant in that case was inadmissible to Canada for misrepresentation and therefore had no options other than to return to Syria, his country of nationality, which the officer failed to assess. I agree that there are features present in *Abdullah* that do not apply in the case at hand. Most notably, the evidence and argument in *Abdullah* included risk of persecution in Syria. As noted in the Decision in the case at hand, the Applicant did not raise any concerns of this nature in his H&C application.

[23] However, the principle identified in *Abdullah* remains applicable, and the Decision demonstrates that the Officer's analysis fails to accord with that principle. In considering the hardship that would be associated with separation from the Applicant's family in Canada, the Officer considered that the Applicant could likely return to India, where he had previously resided at the same address for extended periods of time, or to the UK, where he has other family. As I read the Officer's reasoning, the Applicant's familiarity with India or the presence

of family members in the UK could be expected to mitigate the hardship of being separated from his family in Canada. However, the Officer gave no consideration to the circumstances the Applicant would face if returned to his country of citizenship, Kenya.

[24] I note the Respondent's submission that an applicant for H&C consideration has the burden of adducing sufficient evidence to justify an exemption (see *Cantalejo v Canada (Citizenship and Immigration)*, 2019 FC 828 at para 17; *Garcia Garcia v Canada (Citizenship and Immigration)*, 2020 FC 300 at para 45). The Respondent argues that, following settlement of the judicial review of his previous H&C application, the Applicant had the opportunity to furnish additional and updated evidence but failed to do so meaningfully, instead providing only one paragraph of supplementary submissions.

[25] However, that one paragraph of supplementary submissions emphasizes that the Applicant cannot be removed to India or the UK, having no right to abode in either country, and refers to evidence supporting this submission. I appreciate that the Applicant did not submit any evidence raising issues of risk or hardship particular to Kenya. However, the H&C application was premised significantly on the hardship Applicant would experience as a result of separation from his family. Given that the Officer's assessment took into account factors associated with relocation to India or the UK that would mitigate that hardship, the Court cannot know whether the outcome would have been different if the Officer had performed that assessment against the alternative of returning to Kenya.

[26] I therefore find that the Decision is unreasonable. This application for judicial review will be allowed and the matter returned to a different officer for redetermination. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-2855-20

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter is returned to a different officer for redetermination. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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