Federal Court Cour fédérale

Date: 20240605

Docket: IMM-905-23

Citation: 2024 FC 849

Ottawa, Ontario, June 5, 2024

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

JAGDISH KAUR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant asks the Court to review and set aside a decision of a Senior Immigration Officer [the Officer] of Immigration, Refugees and Citizenship Canada denying her application for permanent residence in Canada. She sought an exemption from the requirements of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] on humanitarian and compassionate [H&C] grounds, pursuant to section 25 of the Act.

[2] I have not been persuaded that the Officer's decision is unreasonable and will dismiss this application.

I. Background

[3] The Applicant is an 83-year-old widowed citizen of India. She has one adult daughter with whom she lives in Canada, together with her son-in-law and two grandchildren.

[4] The Applicant has resided in Canada for the past six years. She entered on November 11, 2017, on a temporary resident visa [TRV] issued to her on September 21, 2017. She applied for an extension of her stay through a visitor record, which was granted. Her TRV expired on April 14, 2024.

[5] On February 10, 2022, the Applicant filed her application for permanent residence based on H&C grounds [the H&C Application]. It was refused on January 10, 2023.

II. Decision Below

[6] The Officer reviewed the H&C Application and determined that the Applicant was seeking an H&C exemption "on the basis of her establishment in Canada, the best interests of the child and the hardship she will face if required to leave Canada." This summary of the basis of the H&C Application is accurate and not challenged.

[7] With regard to her establishment in Canada, the Officer wrote "it is clear that the [Applicant's] family is close knit in Canada," acknowledging that she has many family members living in Canada. The Officer further noted that the Applicant formed relationships within her community, due in part through joining her local Gurudwara. The Officer found that the Applicant also demonstrated "sound financial management in Canada," as she has significant savings, a steady source of income, and pays taxes. Overall, the Officer gave the Applicant's factors for establishment in Canada "some positive weight."

[8] The Officer considered the hardships that the Applicant will face in India, including being separated from her family in Canada, having little support living alone as an elderly widow, and suffering from medical conditions. The Officer accepted that the Applicant would be negatively impacted by her removal given her close family ties, especially considering that she already suffers from depression and anxiety. However, the Officer also found that the Applicant has shown that she is adaptable and that she has several family members in India including her two sisters. The Officer further emphasized that the Applicant can minimize the hardship of physical separation through maintaining communication via phone and video calls, and that she "has the option of visiting Canada at any time if she wishes."

[9] The Officer also acknowledged that the Applicant requires assistance in everyday tasks such as getting groceries, walking long distances, and collecting medication. The Officer noted, however, that she has a personal helper in Canada and there is no indication that a similar person cannot be hired or other accommodations cannot be made for her in India.

[10] The Officer accepted that the Applicant suffers from high blood pressure, a brain hemorrhage, anxiety, and depression. However, the Officer noted that the Applicant did not provide evidence from the relevant health authorities in India supporting that she cannot receive appropriate treatment in India. In the absence of such documentation, the Officer conducted independent research and found that there is little evidence to support that assertion. Accordingly, the Officer assigned "low weight" to the Applicant's medical conditions.

[11] Finally, the Officer considered the best interests of the Applicant's grandchildren in Canada, who are both under 18 years of age. The Officer accepted that the Applicant has formed a close bond with her grandchildren and teaches them values, religion, and traditions. The Officer noted, however, that the children will still have their parents, and re-emphasized that the Applicant can maintain her relationship with them from abroad or with visits. On this factor, the Officer concluded that "it would be in the best interests of the children for the applicant to remain in Canada and continue to support them as they develop."

[12] Ultimately, the Officer did not find the circumstances warranted an exemption under section 25 of the Act. The Officer found that the Applicant's establishment in Canada, and the hardships she will face as a result of removal, were not sufficient to grant H&C relief. The Officer similarly found that the weight afforded to the best interests of the child [BIOC] was not enough to justify an exemption due to "insufficient evidence demonstrating a negative impact on the child."

III. Issue and Standard of Review

[13] The sole issue for determination on this application is whether the Officer's decision was reasonable. Both parties agree, and I concur, that the Officer's decision is reviewable on the standard of reasonableness, as articulated by the Supreme Court in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[14] None of the exceptions to the presumption of reasonableness review articulated by the Supreme Court in *Vavilov* and *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30, apply. Indeed, the case law has established that reasonableness governs judicial review of a discretionary decision on an application made under subsection 25(1) of the Act: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at para 44.

[15] Reasonableness is a deferential, but robust, standard of review: *Vavilov* at paras 12-13. It is the reviewing court's task to assess whether the decision as a whole is reasonable; that is, it 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.

IV. Legal Framework

[16] In *Kanthasamy*, the Supreme Court provided guidance on how to interpret and apply section 25 of the Act. It endorsed the approach set out in *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338 [*Chirwa*], which described H&C considerations

as “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:” *Kanthasamy* at para 13. However, the Supreme Court added at paragraph 23 that the H&C process is not an alternative immigration scheme and that “[t]here will inevitably be some hardship associated with being required to leave Canada,” which, on its own, is generally not sufficient to grant relief.

[17] What will warrant relief under section 25 of the Act depends on the facts and context of each case. The significant aspects of *Kanthasamy* are the Supreme Court’s clear directions to avoid imposing a threshold of unusual, undeserved, or disproportionate hardship; to consider and weigh all of the relevant facts and factors; and to “give weight to *all* relevant humanitarian and compassionate considerations in a particular case” [emphasis in original]: *Kanthasamy* at para 33; see also para 25.

[18] The onus is on the applicant to demonstrate that H&C considerations exist that warrant applying the exemption: *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 [*Kisana*] at para 45. Lack of evidence or failure to adduce relevant information in support of an H&C application is at the peril of the applicant: *Owusu v Canada (Citizenship and Immigration)*, 2004 FCA 38 at paras 5, 8.

V. Analysis

[19] In arguing that the decision is unreasonable, the Applicant makes three main submissions. I will deal with each in turn.

A. *The Applicable Legal Test*

[20] First, the Applicant says that the Officer erred in applying the wrong test for assessing H&C applications; specifically, she says that the Officer applied a hardship-based or extraordinary test rather than the correct test from *Chirwa*.

[21] While I agree with the Applicant that the correct approach for assessing H&C applications is the one set out in *Chirwa*, I do not find that the Officer misapplied the test. The Officer considered the hardship that the Applicant may face upon removal in combination with the other factors advanced in her application like the BIOC and her establishment in Canada. The hardships examined were those expressly raised by the Applicant in the H&C Application. Under *Kanthasamy*, officers evaluating H&C applications may not assess them using a hardship lens. However, hardship remains a relevant consideration, especially where an applicant emphasizes hardship in her application as in the case at bar: *Lewis-Asonye v Canada (Citizenship and Immigration)*, 2022 FC 1349 at para 47.

[22] I further find that the Officer did not err in characterizing H&C relief as "extraordinary." Keeping in line with the jurisprudence, I agree with this characterization: see, e.g., *Shackleford v Canada (Citizenship and Immigration)*, 2019 FC 1313 at para 16; *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at para 15; *Huang v Canada (Citizenship and Immigration)*, 2019 FC 265 at paras 20–21; *Nguyen v Canada (Citizenship and Immigration)*, 2017 FC 27 at para 29. If H&C relief is granted, it can permit an applicant to apply for permanent residence outside the ordinary course, which is to apply from outside Canada. To be able to remain in

Canada, rather than returning to their home country and seeking to immigrate in accordance with the applicable eligibility criteria outlined in the Act, is indeed exceptional and discretionary relief.

B. *The Best Interests of the Children*

[23] Second, the Applicant submits that the Officer erred in not being "alert, alive and sensitive" to the best interests of her grandchildren as required under *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] at paras 74–75: see also *Kolosovs v Canada (Citizenship and Immigration)*, 2008 FC 165 at paras 9–12; *Etienne v Canada (Citizenship and Immigration)*, 2014 FC 937 at para 9. In particular, she submits that the Officer minimized their interests by writing that they would remain in Canada with their parents, and that she may maintain a relationship with them through visits or alternate modes of communication including phone and video calls.

[24] It is undisputed that subsection 25(1) of the Act gives significant priority to the best interests of any children involved in assessing H&C applications. The primacy of the BIOC has additionally been confirmed by the Supreme Court: *Kanthasamy* at paras 40–41.

[25] I find that the Officer did not err in considering the BIOC. The Officer undertook a meaningful assessment of the BIOC, finding that it would be in their best interests for the Applicant to stay in Canada. However, it was concluded that the weight accorded to the BIOC was not enough to justify granting the requested H&C relief. This was an open and reasonable conclusion for the Officer to draw.

[26] In *Zlotosz v Canada (Citizenship and Immigration)*, 2017 FC 724 [*Zlotosz*], which the Respondent cites, this Court made a similar finding at paragraph 22:

> Here, the Officer observed that the Applicants did not show the child would be "adversely and significantly affected". This does not equate to using the wrong lens identified in *Kanthasamy*. It is perfectly clear that while the Applicants would have preferred that the Officer come to a different conclusion, the Officer's approach was justifiable based on the evidentiary record presented. The Federal Court of Appeal has rejected the notion that consideration of the BIOC simply requires that the officer determine whether the child's best interests favours non-removal, as this will almost always be the case (see for instance *Louisy v Canada (Citizenship and Immigration)*, 2017 FC 254 at para 11 [*Louisy*]; *Garraway v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 286 at paras 46-47; *Nguyen* at para 7). Rather, the law is clear that the onus rests squarely with the applicant to provide sufficient evidence on which to exercise positive H&C discretion. Here, the Officer applied a contextual approach to BIOC and found that the Applicants failed to provide such evidence.

[27] While the BIOC should be given substantial weight, it is not necessarily the determinative factor in every application for H&C relief: *Baker* at para 75; *Kisana* at paras 23–24; *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 para 12–13. The reasons have to demonstrate that the Officer was alert, alive, and sensitive to the BIOC, and gave it significant priority in the overall assessment, which I find was done here.

[28] Additionally, as the Court held in *Zlotosz* at paragraph 21, "[a]n assessment of hardship can, therefore, form part of the BIOC assessment, even if it cannot be used as a threshold that requires demonstrating that the hardship imposed on a child must reach a particular level." As such, the Officer's conclusion that the Applicant did not provide sufficient information demonstrating the "negative impact" her removal will have on the BIOC does not present a reviewable error.

C. *The Medical Evidence*

[29] Third, the Applicant submits that while her medical conditions were accepted, the Officer failed to appropriately consider the implications of the "medical reports" submitted: *Rezagh Sarab v Canada (Citizenship and Immigration)*, 2012 FC 969 at para 16; *Melgar Reyes v Canada (Citizenship and Immigration)*, 2013 FC 847 at paras 11–12. She further argues that the Officer undermined her diagnosis by requiring her to adduce evidence of the availability of adequate treatment, or lack thereof, in India: *Kanthasamy* at para 47; *Maharaj v Canada (Citizenship and Immigration)*, 2019 FC 78 at para 13.

[30] I agree with the Respondent that it is not entirely clear what medical reports are being referenced. In her Application Record, the only medical reports submitted are a Medical Surveillance for Tuberculosis report finding that she does not have symptoms of tuberculosis and a related X-ray report. In any event, the Officer in fact accepted the Applicant's medical conditions based on her written narrative. The onus remained on the Applicant to demonstrate any "implications" that she wished for the Officer to draw. I find that the Applicant did not meet her onus.

[31] I also find that the Officer did not erroneously undermine her medical conditions by noting that the Applicant did not adduce evidence to show that appropriate treatment is unavailable in India. This is not like the cases that the Applicant cites for support, where the officers erred in requiring additional evidence for a psychological diagnosis which they already accepted: *Kanthasamy* at para 47. Although not cited by the parties, this Court has held that

officers assessing such hardship based on medical conditions may consider how that hardship may be ameliorated, including considering the availability of treatment in the applicant's home country: *Ahsan v Canada (Citizenship and Immigration)*, 2023 FC 146 at para 22, citing *Akhtar v Canada (Citizenship and Immigration)*, 2022 FC 856 at paras 25–26; *Tutic v Canada (Citizenship and Immigration)*, 2022 FC 800 at paras 23–26; *Esahak-Shammas v Canada (Citizenship and Immigration)*, 2018 FC 461 at para 26; *Jaramillo Zaragoza v Canada (Citizenship and Immigration)*, 2020 FC 879 at para 54. While the availability of treatment cannot be an officer's exclusive focus, it is a relevant consideration in determining how much weight to afford an applicant's submission on hardship based on medical conditions in the overall H&C assessment.

VI. Conclusion

[32] Decisions made pursuant to section 25 of the Act are highly discretionary: *Braud v Canada (Citizenship and Immigration)*, 2020 FC 132 at para 52. Reviewing courts must keep this in mind when assessing reasonableness. In the case at bar, the Officer's decision is reasonable. The application for judicial review is therefore dismissed.

[33] The parties raised no question for certification and I agree none arise.

JUDGMENT in IMM-905-23

THIS COURT'S JUDGMENT is that this application is dismissed and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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