Federal Court  Cour fédérale

Date: 20110418

Docket: IMM-4170-10

Citation: 2011 FC 473

Ottawa, Ontario, April 18, 2011

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

DEVI SOMA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision dated May 11, 2010, refusing an application for permanent residency from within Canada on humanitarian and compassionate grounds pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act). The application for humanitarian and compassionate relief (hereinafter the H&C application) was refused by the Pre-Removal Risk Assessment Officer (the Officer).

Factual Background

[2] The applicant, Ms. Devi Soma, is a 58 year old citizen of India. Ms. Soma has three adult children: a son living in Canada, who is a Canadian citizen, a son living in Dubai, and a daughter in India.

[3] In 1998, the applicant, sponsored by her Canadian son, made an application from India to become a Canadian permanent resident as a member of the family class. Her application was refused.

[4] On May 20, 2003, the applicant arrived in Canada and made a claim for refugee protection. At her refugee hearing on May 4, 2004, the applicant sought protection on two grounds: persecution by authorities because she feared that they wrongly suspect her of having ties to militant groups in India, and her fear of returning to India as a woman of old age with no male relatives to care for her. Her application was denied by the Refugee Protection Division of the Immigration and Refugee Board (the Board) in June of 2004. The Board found that the applicant was not credible. The applicant's application for leave and judicial review of the Board's decision was denied on October 5, 2004.

[5] Throughout her time in Canada, the applicant has lived with her son and his family, and is helping to raise his son – her only grandchild. Since 2006, the applicant has been working on a farm and contributing to her family's income.

The Impugned Decision

[6] On May 11, 2010, the Officer rejected the applicant's H&C application, finding that it would not cause the applicant unusual, undeserved or disproportionate hardship to apply for permanent residency from outside of Canada.

[7] The Officer referred to the test for exercising the Minister's discretion in order to allow a foreign national who does not otherwise qualify under the Act to apply for permanent residency from within Canada. The Officer recognized that the onus is upon the applicant to demonstrate that she would face unusual and undeserved or disproportionate hardship if she was to submit her permanent residency application from abroad.

[8] The Officer analyzed the two bases for granting the H&C exemption: first, the applicant's establishment in Canada, and, second, risks the applicant would face if returned to India.

[9] With regards to her establishment in Canada, the Officer noted that the applicant has been living with her son's family since her arrival in 2003. She had been working in Canada since June of 2006. The Officer recognizes that the applicant "contributes financially and emotionally to the family's well-being".

[10] The Officer referred to the applicant's son's affidavit. In his affidavit, he stated that it is in his son's (grandmother's grandchild) best interests to have the applicant, the child's grandmother, in physical proximity. The Officer stated that the son was sponsoring the applicant in the H&C application.

[11] However, the Officer found that the evidence failed to demonstrate an unusual and undeserved or disproportionate hardship.

[12] First, the Officer found that the applicant had not provided any document demonstrating that her grandchild would suffer any hardship as a result of her absence. Although her son's affidavit attested that the son would face "adjustment problems" and that the applicant's absence would "have an impact on our children's future life," the Officer found that this was insufficient.

[13] Second, the Officer was of the view that the time that elapsed since the applicant had arrived in Canada did not constitute *de facto* establishment in Canada because it was not due to circumstances beyond the applicant's control. The Officer found that the applicant could have left Canada at any time following the refusal of her refugee claim in June of 2004 and the issuance of a removal order against her in October of 2004. The Officer stated that the applicant possessed a valid Indian passport at the time of the issuance of the removal order.

[14] Third, while recognizing the applicant's son's perceived duty to care for his mother as she ages, the Officer found that this duty could be accomplished if the applicant was in India. The Officer stated that the applicant lived in India while her son was in Canada from 1993 to 2003. The applicant has a son in Dubai and a daughter in India. Her daughter's family and the applicant's siblings in India can also care for her. The Board found that there was no evidence suggesting that the applicant's daughter in India could not care for the applicant.

[15] The Officer recognized the “positive elements” of the applicant’s stay in Canada, and found that the applicant had demonstrated a will to establish herself in Canada. The Officer found, however, that “these behaviours are normal and expected in such a case, and do not justify by themselves that it would amount to unusual and undeserved or disproportionate hardship if she was to submit a permanent resident application abroad.” The Officer recognized that while the applicant has the right to seek all avenues of remaining in Canada, this will ultimately make removal from Canada harder. The Officer found that since the applicant had lived most of her life in India and still had her daughter and siblings in India, it further mitigated the harshness of the readjustment.

[16] With regard to the risks faced by the applicant should she be returned to India, the Officer stated the test to be applied:

> The H&C assessment is lower in threshold than PRRA and is not limited to the PRRA’s specific legislative parameters of persecution: threat to life, torture and cruel and unusual treatment or punishment. For an H&C application, the PRRA officer assesses all elements of the application and decides if the risk or non-risk factors would amount to unusual and undeserved or disproportionate hardship.

[17] Regarding the applicant’s fear of being targeted by Indian authorities because they would think her tied to militants in India, the Officer found that this fear was not justified on the evidence.

[18] The Officer reviewed documentary evidence indicating that Indian nationals returning from abroad generally do not face trouble with Indian authorities if they complied with Indian laws when they departed. The Officer found that the applicant had complied with Indian laws and was properly authorized to leave India in 2003. The Officer further found that although some “high profile”

returnees may be detained and questioned by authorities, there was no evidence that the applicant was such a “high profile” individual.

[19] The Officer found that the applicant had not provided any additional personal or objective evidence that would support her allegations – previously rejected by the Board – that Indian authorities would be looking for her or wanting her:

> The applicant has not provided any personal, objective and independent evidence to support her claim that she is personally at risk in India based on past militant problems of her sons or of an employee, or that she is wanted by the Indian authorities, or because she claimed refugee status in Canada or because her son did. The applicant has not provided evidence that her name is on an police list of wanted persons or that she will be arrested upon her entry into India. There is no information or evidence on file supporting that the applicant’s name would be on a police list as per the information found in the document IND102975.E from the IRB.

[20] The applicant’s second ground for alleging risk upon return to India was that she would be an elderly woman living alone. The Officer found that the applicant had demonstrated that she is capable of working. Moreover, the Officer found that there is help available to elderly women in India in addition to help from their families. The Officer referred to documents indicating that there are community resources available to women who cannot be supported by their families, as well as a functional healthcare system.

Standard of Review

[21] The standard of review applicable to decisions on H&C applications is reasonableness: *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2009] FCJ No 713, at para 18. The Court must not determine whether the Officer’s decision was correct, but, rather,

"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, [2008] SCJ No 9, at para 47).

Analysis

[22] The applicant submits that the Officer's decision is unreasonable because of the following findings, which the applicant submits are not supported by the evidence:

1. The Officer's finding that the applicant had failed to demonstrate that the best interests of her grandchild depends on her presence in Canada;
2. The Officer's finding that the applicant could be supported by her son in Dubai if she were to return to India, and the Officer's finding that the applicant's daughter, daughter's family, and siblings in India could support her;
3. The Officer's finding that the applicant's Canadian son could support her if she were to return to India; and
4. The Officer's finding that the applicant had not demonstrated sufficient establishment in Canada, in particular insofar as she had not remained in Canada due to "circumstances beyond her control".

[23] With regard to the Officer's consideration of the best interests of the applicant's grandchild, the applicant submits that there could be no better authority than the child's father to inform the Officer of the child's best interests. The Officer specifically stated that aside from the father's assertion, there was no evidence of the child's dependence upon his grandmother, nor of any potential "adjustment problems" or future impacts that the child might suffer should his

grandmother return to India. Given the evidence, the Court finds it was properly considered by the Officer. For instance, there is no evidence stating the alleged importance of the relationship between the applicant and her grandchild.

[24] With respect to the Officer's finding that the applicant's other relatives could support the applicant in India, the applicant suggests that the Officer erred in assuming that such assistance would be available in the absence of any evidence to indicate as much. The Court finds that it was reasonable for the Officer to find that the applicant's relatives in India would assist with her readjustment and provide support. Indeed, when her son left for Canada in 1993, the applicant remained in India with her youngest son - who was 11 years old at that time - until 2003. The Court notes that the Officer also found that even if the applicant's family is unable to support her, there are considerable community resources available in India to support elderly women. The Court finds that the Officer's consideration with respect to the availability of assistance to the applicant in India and that living with her daughter in India would be "awkward", was reasonable. Again, no evidence was submitted to the contrary.

[25] Similarly, the applicant submits that the Officer erred by overlooking the obstacle that distance would play in relation to the support the applicant's Canadian son would be able to provide to the applicant if she were to return to India. The Court finds that the Officer was aware of the distance, but it was reasonable to conclude that despite the distance, the applicant's son could provide additional financial support to the applicant.

[26] Finally, the applicant submits that the Officer erred by finding that the applicant's prolonged stay in Canada has not led to her establishment in Canada because it is not due to circumstances beyond the applicant's control. Both parties have quoted Citizenship and Immigration Canada's Operational Policy Manual regarding inland processing of applications under section 25 of IRPA: *IP 5 Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds* (IP-5). Section 5.16 of IP-5 also states that "Positive consideration may be warranted when the applicant has been in Canada for a significant period of time due to circumstances beyond the applicant's control." (emphasis in original). IP-5 also states that an example of a circumstance beyond an applicant's control is where conditions in the country of origin are dangerous, necessitating temporary stays of removal over a long period of time, and where there is no other viable destination option for the applicant.

[27] The applicant submits that the delays in processing that led to the applicant's prolonged stay in Canada constitute "circumstances beyond her control."

[28] The Court finds that the Officer was reasonable in relying upon this Court's decision in *Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356, [2006] FCJ No 425, where Justice de Montigny held at paragraph 23 that legal proceedings do not constitute circumstances beyond an applicant's control:

> [23] […] it cannot be said that the exercise of all the legal recourses provided by the IRPA are circumstances beyond the control of the Applicant. A failed refugee claimant is certainly entitled to use all the legal remedies at his or her disposal, but he or she must do so knowing full well that the removal will be more painful if it eventually comes to it. […]

[29] Further, in considering all of the evidence adduced, the fact that the applicant works in Canada since 2006 does not amount to an unusual and underserved or disproportionate hardship if she was to submit a permanent resident application abroad.

[30] The applicant has not demonstrated that the Officer neglected to consider any evidence submitted by the applicant. It is trite law that the burden is borne on the applicant. The applicant has to place before the Officer all information available to support the H&C application (*Mann v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 567, [2002] FCJ No. 738). The Court finds that the Officer's decision was reasonable and based upon the material that was before the Officer. Consequently, the Court finds that this application for judicial review must be dismissed.

[31] No question was proposed for certification and there is none in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. No questions will be certified.

"Richard Boivin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4170-10
STYLE OF CAUSE:	DEVI SOMA v MCI
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	March 24, 2011
REASONS FOR JUDGMENT:	BOIVIN J.
DATED:	April 18, 2011

APPEARANCES:

Jean-François Bertrand	FOR THE APPLICANT
Zoé Richard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Bertrand, Deslauriers Montréal, Quebec	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT