Federal Court  Cour fédérale

Date: 20110621

Docket: IMM-5257-10

Citation: 2011 FC 739

Ottawa, Ontario, June 21, 2011

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

AJAYINDER SINGH SAHOTA
HARPREET KAUR SAHOTA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] The Applicants were denied their application to have their permanent residence application processed from within Canada. The immigration officer (Officer) determined that there were insufficient humanitarian and compassionate (H&C) grounds to justify an exception to the usual rule that permanent residence applications are processed from outside Canada.

II. BACKGROUND

[2] The Applicants are citizens of India who have two Canadian born children.

[3] The Applicants came to Canada in January 2002 and their refugee claim was denied in January 2004.

[4] In their H&C application, which was submitted in September 2004, the Applicants claimed that they had been accused of harbouring Sikh militants, that they were well established in Canada and that they had one Canadian child (at that time).

[5] Six (6) years later immigration officials reviewed the H&C application and invited further submissions. These submissions included increased levels of establishment by virtue of the establishment of a trucking business, and most importantly, the evidence that the youngest son suffered from eczema which would be exacerbated by the hot Indian climate. The Applicants also explained that they had never had the opportunity to leave Canada voluntarily because the Indian government had not issued them new passports.

[6] The Officer made three critical findings which are central to this judicial review:

(a) that the Applicants' prolonged stay in Canada was within their control;

(b) that, based on the Officer's own research (copies of which were not provided to the Applicants), the youngest son's eczema was treatable in India; and

(c) that in considering the best interests of the children, they would not suffer unusual and undeserved or disproportionate hardship if returned to India.

III. ANALYSIS

[7] The overarching standard of review for H&C decisions is reasonableness (*Mooker v Canada (Minister of Citizenship and Immigration)*, 2008 FC 518). The issues of proper legal test applied and procedural fairness are to be assessed under the correctness standard (*Gurshomov v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 1212).

[8] The Officer's analysis of the "best interests of the child" is legally flawed. The Officer distorted the analysis and applied the wrong legal test by imposing the burden of showing "disproportionate hardship" rather than the "best interests" test mandated by *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475.

While the ultimate question in an H&C application is "disproportionate hardship", the "best interests" analysis operates as a separate consideration. The Officer's failure to keep the two issues distinct results in an unreasonable assessment of the children's best interests.

[9] The Officer's "establishment" analysis is also unreasonable. The Officer incorrectly found that the Applicants' long stay in Canada was due to circumstances within their control. This error resulted in the Officer's conclusion that any hardship due to dislocation of establishment was self-induced.

[10] The Applicants could not obtain their passports from the Indian government in order to return to India voluntarily. The only other way to return to India was to be sent back by Canadian authorities; however, those very authorities failed to act on the Applicants' H&C application for six years. The Officer failed to take these facts into account in his conclusions.

[11] The Officer also failed to accord procedural fairness in failing to give notice of the results of his own research to contradict the Applicants' evidence. The research relied on was critical to the Officer's conclusion that the son's medical condition was treatable in India. Had the Applicants received notice of this research, they could have attempted to rebut the research, which research, they contend, is not accurate.

IV. CONCLUSION

[12] For all these reasons, this judicial review will be granted, the decision quashed and the matter remitted to a different officer for a new determination based on updated information.

[13] There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the decision is quashed and the matter is to be remitted to a different officer for a new determination based on updated information.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5257-10
STYLE OF CAUSE:	AJAYINDER SINGH SAHOTA HARPREET KAUR SAHOTA and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
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