Federal Court  Cour fédérale

Date: 20121214

Docket: IMM-1833-12

Citation: 2012 FC 1479

Ottawa, Ontario, December 14, 2012

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

KOBITA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *Act*], of a decision rendered by an immigration officer at the High Commission of Canada in Singapore (Immigration Section), dated January 3, 2012. The officer determined that the applicant did not meet the requirements for a permanent resident visa as a member of the family class pursuant to paragraph 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the *Regulations*] and that the applicant had not provided

sufficient evidence of humanitarian and compassionate [H&C] grounds to overcome the exclusion pursuant to subsection 25(1) of the *Act*.

Background

[2] The applicant, Ms Kobita, and her two sons, are citizens of Bangladesh. Her husband, Mr Maruf Ahmed, is a Bangladeshi citizen and a permanent resident of Canada. Ms Kobita and her sons sought to join him here. The immigration officer concluded that Ms Kobita and her children were not members of the family class pursuant to paragraph 117(9)(d) of the *Regulations* because Mr Ahmed had failed to declare them as dependants upon his arrival in Canada in 2005 and in his application for permanent residence, which was made in 1999.

[3] The officer also found that there was insufficient evidence of H&C grounds under subsection 25(1) of the *Act* to overcome the exclusion.

[4] Mr Ahmed first sought permanent resident status in Canada in 1999, prior to meeting the applicant. There is some confusing information about the history of the relationship between Mr Ahmed and Ms Kobita. Both were interviewed separately and indicated that they were married in 1999 in a religious ceremony but that the marriage was not registered. The couple had two sons, born in 2001 and 2004. In 2006 they were again married and the marriage was registered. There was some discrepancy in their description of the reasons for the two marriages, which the officer pursued extensively in questioning.

[5] Upon his arrival in Canada in 2005, Mr Ahmed declared that he was not married and did not have children. At the interview with the immigration officer in 2011, he explained that he indicated that he was not married because the marriage was not registered at the time. He also noted that he had advised his immigration consultant of his change in status since his original application in 1999 and the consultant advised him to say that he was not married. The consultant allegedly told Mr Ahmed that he could sponsor his family later, as his marriage was not registered at that time. There appears to be no satisfactory explanation for the failure to disclose the fact that he had two children, apart from the advice of the consultant.

[6] Since being granted permanent resident status, Mr Ahmed has returned to Bangladesh annually to visit his family. He supports them financially and is in frequent contact with them. Ms Kobita and the two boys live with her sister in Bangladesh. Despite the challenges to the family relationship given the distance apart, they are a family.

[7] Since Mr Ahmed did not declare his dependents upon arrival and they did not accompany him at that time, they are excluded as members of the family class pursuant to paragraph 117(9)(d) of the *Regulations*, which states:

117. […]	**117.** […]
Excluded relationships	Restrictions
(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if	9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes :
[…]	[…]
(*d*) subject to subsection (10), the sponsor previously made an	*d*) sous réserve du paragraphe (10), dans le cas où le répondant est

application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.	devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.

[8] The applicant does not dispute this exclusion finding.

[9] The immigration officer also found that there was a lack of sufficient evidence of H&C grounds to justify overcoming the exclusion and a lack of compelling evidence that the applicant and children were suffering undue hardship as a result of this exclusion.

Preliminary Issue

[10] As a preliminary issue, the respondent, in his written submissions, argued that the applicant was precluded from seeking judicial review because her sponsor had not exhausted the right to appeal the decision determining that the applicant and her sons were not members of the family class.

[11] Subsection 63(1) of the *Act* provides a right of appeal to the Immigration Appeal Division (IAD) against a decision not to issue a permanent resident visa. However, section 65 makes it clear that in such an appeal, the IAD is precluded from considering H&C grounds unless the applicant is a member of the family class.

[12] In the present case, there is no dispute that the applicant and her children are excluded from the family class. As such, an appeal to the IAD could not address the issues to be decided, i.e.

whether sufficient H&C grounds exist to overcome the exclusion. This Court has determined that in such cases, a judicial review should proceed: *Phung v Canada (Minister of Citizenship and Immigration)*, 2012 FC 585, [2012] FCJ No 599; *Huot v Canada (Minister of Citizenship and Immigration)*, 2011 FC 180, [2011] FCJ No 242.

[13] It should be noted that the respondent did not pursue this issue in his oral submissions.

Issues and Standard of Review

[14] The issue in this judicial review is whether the immigration officer's decision that there were insufficient H&C grounds was reasonable and whether the officer's analysis of the best interests of the children in its consideration of these grounds was reasonable.

[15] The parties agree that the applicable standard of review is reasonableness.

[16] In *Terigho v Canada (Minister of Citzenship and Immigration)*, 2006 FC 835, 2006 FCJ No 1061 at paras 6-7, Justice Mosley summarised the standard of review for decisions made on H&C grounds:

> [6] The appropriate standard of review for decisions made under section 25 is reasonableness. Considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role in the statutory scheme as an exception, the fact the decision-maker is the Minister, and the wide discretion evidenced by the statutory language: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193.
>
> [7] Reasonableness is not about whether the decision maker came to the right result. As stated by Justice Iacobucci in *Canada(Director of Investigation and Research) v. Southam*,

> [1997] 1 S.C.R. 748 at paragraph 56, an unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. See also *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at paras 55-56.

[17] The jurisprudence continues to remind the Court of its role on judicial review. The Court should show deference as long as the decision "falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paras 47, 53, 55; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 89.

[18] In considering whether the decision is reasonable, in accordance with the guiding principles, I have considered the extensive notes made by the officer, including those relating to the interviews with the applicant and her sponsor.

[19] The applicant submitted that the decision was unreasonable and raised three issues: that the officer fettered her discretion by excluding from the H&C grounds the family's desire to better themselves economically; that the officer misconstrued the evidence of the sponsor, Mr Ahmed, regarding his failure to disclose his wife and sons in the process of his application for permanent residence in Canada; and that the officer failed to consider the best interests of the children.

Did the officer fetter her discretion by excluding economic factors from the H&C considerations?

[20] The applicant notes that section 25 of the *Act* provides wide discretion to the officer to consider H&C grounds. The applicant submits that the officer erred in determining that economic

factors, particularly the applicant's and sponsor's evidence that they would have better economic opportunities in Canada, could not be considered as H&C grounds.

[21] The respondent submits that there was significant discussion about the better economic situation for the family in Canada, and that the officer considered this. However, the officer found that the economic prospects in Canada did not constitute an H&C consideration sufficient to overcome their exclusion.

[22] The record supports the respondent's position. The officer noted the evidence of the applicant and sponsor that their economic situation would be better. She also noted the applicant's evidence that she had a stable home in Bangladesh and concluded that they were not experiencing undue hardship. This finding was open to the officer to make based on the weight she attached to the economic factors and the overall assessment of undue hardship. I do not find that the officer fettered her discretion or that her finding falls outside the range of possible, acceptable outcomes.

Misrepresentations or Non-Disclosure of the Marriage and Children

[23] With respect to the sponsor's evidence concerning his failure to disclose his wife and sons, the applicant notes that Citizenship and Immigration Canada conducted an investigation of these misrepresentations and decided not to take any action against the applicant. Therefore, the immigration officer's focus on the misrepresentations is not justified. While it is a factor to be considered, the applicant offered an explanation: when he first applied, he did not have a wife or children, and when he arrived in Canada in 2005 he did not disclose that he was married because the marriage was not registered and because the immigration consultant had advised him not to do so,

apparently for the same reason (that the marriage was not registered). The consultant also told Mr Ahmed that he could seek to sponsor his family later. The applicant submits that his explanations about his failure to disclose he was married were not inconsistent.

[24] The respondent submits that a misrepresentation on an application for permanent residence is a relevant public policy consideration in an H&C assessment: *Li v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1292, [2006] FCJ No 1613 at paras 32-33 [*Li*]; *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2009] FCJ No 173 [*Kisana*].

[25] The respondent also noted that in *Pascual v Canada (Minister of Citizenship and Immigration)*, 2008 FC 993, [2008] FCJ No 1233, Justice Zinn addressed a similar issue and noted that officers are guided by operational guidelines (OP2 - Processing Members of the Family Class). These guidelines provide that where there are compelling reasons for not having disclosed the existence of a family member, it may be appropriate to take into account H&C considerations. Examples of such compelling reasons include where the sponsor believed the person was dead or his whereabouts were unknown or where disclosure would put the family member at risk. An inadvertent omission to declare a family member did not constitute a compelling reason in that case.

[26] The respondent submits that the misrepresentations in this case were not inadvertent, but deliberate. This is, therefore, not a compelling case to justify reliance on H&C grounds.

[27] The respondent also submits that in *Kisana*, the Federal Court of Appeal noted that factors favouring family reunification will not always outweigh the public policy concerns arising out of misrepresentation.

[28] It is important to consider the purpose of section 25 of the *Act* which is to permit applicants who would otherwise be inadmissible to become admissible based on H&C grounds.

[29] On the one hand, it appears to defeat the purpose of that section to dwell on the fact that the applicant is inadmissible as part of the H&C considerations. It is not disputed that the applicant is not a member of the family class and is inadmissible. The only way to permit admissibility is to overcome the exclusion on H&C grounds. Therefore, the immigration officer's reliance on the misrepresentations that resulted in the inadmissibility as a factor in the H&C considerations appears to defeat the purpose of section 25 of the *Act*.

[30] On the other hand, the jurisprudence has established that such misrepresentations should be considered.

[31] As noted above, the role of the Court is not to reweigh the evidence the officer considered. However, it is appropriate to explore whether this factor was determinative to the exclusion of other factors.

[32] As noted by Justice de Montigny in *Sultana v Canada (Minister of Citizenship and Immigration)*, 2009 FC 533, [2009] FCJ No 653 at para 25:

> 25 That being said, one must not forget that the presence of s.25 in the *IRPA* has been found to guard against *IRPA* non-compliance with the international human rights instruments to which Canada is signatory due to s.117(9)(d): *de Guzman v. Canada (Minister of Citizenship & Immigration)*, 2005 FCA 436 (F.C.A.), at paras. 102-109. If that provision is to be meaningful, Immigration officers must do more than pay lip service to the H&C factors brought forward by an applicant, and must truly assess them with a view to deciding whether they are sufficient to counterbalance the harsh provision of s.117(9)(d). As my colleague Justice Kelen noted in *Hurtado v. Canada (Minister of Citizenship & Immigration)*, 2007 FC 552 (F.C.), at para. 14,"...if the applicant's misrepresentation were the only factor to be considered, there would be no room for discretion left to the Minister under section 25 of the Act." This is indeed recognized in the OP 4 Manual on Overseas Processing, Appendix F, where officers are reminded that they should ensure "that their H&C assessments go beyond an explanation as to why applicants are described by R117 (9) (d) to consider the positive factors an applicant has raised in support of his/her request for an exemption from R117 (9) (d)".

[33] The officer's decision and CAIPS notes include a brief reference to the sponsor's explanation for his misrepresentation: that he received bad advice from an immigration consultant and that he derived no benefit from failing to declare his dependents. The officer then made extensive notes about the factors that countered the claim on H&C grounds, all of which related to the same misrepresentations and inconsistencies in the answers of the sponsor and the applicant about the registration of their marriage.

[34] After turning to the best interests of the children, which the officer determined would be best addressed by remaining in Bangladesh, the officer concluded that there were insufficient H&C grounds to overcome the applicant's exclusion. Despite the reference to the insufficient H&C grounds, it appears that the officer did not consider any other H&C grounds except the best interests

of the children and the misrepresentation, which, as noted above, works against H&C considerations. The officer appears to dwell on the misrepresentation, which is the reason for the exclusion and which was investigated – and not pursued further– by Citizenship and Immigration Canada. The sponsor's conduct in not declaring his dependents, whether due to the bad advice of the immigration consultant or to his view that an unregistered marriage was not a marriage, seems to haunt him, to a disproportionate extent.

[35] While the misrepresentation is a relevant factor to be considered, it should not be the only or the primary factor, as this would defeat the purpose of section 25 of the *Act*.

[36] As a result, the officer's decision with respect to the assessment of the H&C grounds is not reasonable.

Best Interests of the Children

[37] The applicant submits that the officer failed to adequately consider the best interests of the children and focussed only on the status quo, i.e. the children's life in Bangladesh, without considering the alternative of their life in Canada in a reunited family. The applicant submits that the officer relied on the fact that the children were doing well in school, had family connections in Bangladesh, that their father visited them there annually, and that they have limited knowledge of English, to conclude that it would be in their best interests to remain with their mother in Bangladesh. The officer failed to consider whether the best interests of the children would be served by coming to Canada and being together.

[38] The applicant noted the decision of Justice Mactavish in *Cordeiro v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1231, [2004] FCJ No 179 at paras 21-24 [*Cordeiro*], where she reiterated the principles set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] 2 SCJ No 39 [*Baker*], *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2003] 2 FC 555 [*Hawthorne*] and *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] FCJ No 457. These cases establish that it is incumbent on immigration officers to be alert, alive and sensitive to the interests of the children in question. To do so, the officer must ensure that the child's interests are identified and defined. The officer must determine how much weight should be given to the needs of the child in the circumstances of the case.

[39] In *Cordeiro*, Justice Mactavish found that the officer focussed on one part or one option and ignored the impact of leaving Canada on the child's close relationship with his sister. The officer was entitled to weigh the factors along with others, but it was an error to ignore the other option or factor.

[40] The applicant submits that, just as in *Cordeiro*, the officer only considered how the children's best interests could be met in Bangladesh and did not consider how the children's best interests would be met in Canada with both parents together and with the opportunities for better education, better economic stability and a more typical family life.

[41] The respondent submits that the officer was alert, alive and sensitive to the best interests of the children and did consider the pros and cons of remaining in Bangladesh with their mother, which is the situation they were accustomed to, and moving to Canada to live together as a family.

[42] The record shows that the officer reviewed the applicant's evidence that indicated the children had lived all their lives in Bangladesh, had a close relationship with family members there, were doing well in school and were happy. The officer noted the applicant's statement that the children missed their father, as did the applicant. The officer also noted the applicant's statement that she had no fear in Bangladesh, despite some generalized violence, and that she had no problems with the government.

[43] The officer appears to focus only on the situation in Bangladesh and made only one observation or finding with respect to the option of moving to Canada. The officer noted, in the context of summarising her considerations of the best interests of the children, that the applicant had indicated that the family would be better off economically in Canada. Nothing more was noted about how the best interests of the children would be met in Canada.

[44] I am mindful of the jurisprudence establishing that the officer is presumed to know that living in Canada would offer the child opportunities that they would not otherwise have (*Hawthorne*, above, at para 5) and that to compare a better life in Canada to life in the home country cannot be determinative of best interests as the outcome would almost always favour Canada (*Li*, above).

[45] The Supreme Court of Canada's decision in *Baker* set out the basic principles regarding a decision-maker's obligation to consider the best interests of the children when making H&C decisions:

> [F]or the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration.
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> *Baker*, above, at para 75.

[46] The Federal Court of Appeal has also held that a mere statement that the best interests of the child have been considered is insufficient:

> [A]n officer cannot demonstrate that she has been "alert, alive and sensitive" to the best interests of an affected child simply by stating in the reasons for decision that she has taken into account the interests of a child of an H & C applicant (*Legault*, at paragraph 12). Rather, the interests of the child must be "well identified and defined" (*Legault*, at paragraph12) and "examined ... with a great deal of attention" (*Legault*, at paragraph 31).
>
> *Hawthorne*, above, at para 32.

[47] The Federal Court of Appeal also noted that determining the best interests of the child should be the decision-maker's starting point, as opposed to examining different scenarios and working backwards to compare their impact on the child: *Hawthorne*, above, at paras 41, 43.

[48] This Court recently held in *Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166, [2012] FCJ No 184 [*Williams*], at para 64, that there is no 'hardship threshold' that must be 'met', but rather that the best interests of the child is truly the starting point of the analysis:

> There is no basic needs minimum which if "met" satisfies the best interest test. Furthermore, there is no hardship threshold, such that if the circumstances of the child reach a certain point on that hardship scale only *then* will a child's best interests be so significantly "negatively impacted" as to warrant positive consideration. The question is *not*: "is the child suffering enough that his "best interests" are not being "met"? The question at the initial stage of the assessment is: "what is in the child's best interests?"

[49] The Court in *Williams* also set out a three-step approach that decision-makers are to follow when assessing the best interests of the child:

> When assessing a child's best interests an Officer must establish first what is in the child's best interest, second the degree to which the child's interests are compromised by one potential decision over another, and then finally, in light of the foregoing assessment determine the weight that this factor should play in the ultimate balancing of positive and negative factors assessed in the application.
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> *Williams*, above, at para 63.

[50] This Court has more recently cautioned that not all cases will conform to the *Williams* framework, but that it is a "useful guideline" for decision-makers. However, it does not have the mandatory effect that a decision of the Supreme Court of Canada or Federal Court of Appeal would have: *Webb v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1060, [2012] FCJ No 1147 at para 13.

[51] In the present case, the officer concluded that the best interests of the children would be to continue to reside with their mother in Bangladesh as they do not appear to be suffering undue hardship as a result of their exclusion.

[52] Taking into consideration the record of the decision and the principles noted above, I find the officer's assessment of the best interests of the children to be unreasonable. The officer took the status quo as her starting point and determined that the status quo was sufficient without considering other options, including life in Canada with both parents. In addition, the officer focussed on the fact that the children were not suffering "undue hardship" due to their exclusion. For similar reasons as noted in *Williams*, there is no need to find that the children are suffering undue hardship before considering if their best interests could be met by moving to Canada.

[53] Finally, as noted in *Cordeiro*, the officer may weigh the pros and cons or the impacts of different scenarios, but the officer should not ignore or fail to consider one of those scenarios, i.e. how the best interests of the children could also be addressed by reuniting the family in Canada. Given that the family's goal in pursuing the application was to be together in Canada, that scenario should have been considered to determine if the best interests of the children could be met and then weighed or balanced against other scenarios. Based on the record before the Court, the officer failed to consider the alternatives in her assessment of the children's best interests.

Conclusion

[54] For the reasons noted above, the judicial review is allowed and the application for an exemption from inadmissibility pursuant to section 25 of *Act* should be re-determined by another immigration officer.

[55] No certified question was proposed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review is allowed and the application for an exemption from inadmissibility pursuant to section 25 of *Act* should be re-determined by another immigration officer.

2. No certified question was proposed.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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