Federal Court  Cour fédérale

Date: 20150126

Docket: IMM-5788-13

Citation: 2015 FC 100

Toronto, Ontario, January 26, 2015

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

ABJINDER SINGH PANNU

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision of Citizenship and Immigration Officer Susan Neufeld [CIC Officer], dated August 6, 2013, denying the Applicant's request for permanent residency based on humanitarian and compassionate considerations (H&C Application) under subsection 25(1) of the IRPA.

II. Facts

[2] The Applicant is originally from Ludhiana, India and was born November 23, 1986. He had previously visited Canada on three occasions.

[3] He arrived in Canada on February 22, 2006 and claimed refugee protection on July 17, 2006. His refugee claim was denied by the Refugee Protection Division [RPD] on August 28, 2008. His application for judicial review of this decision was denied by the Federal Court on December 18, 2008.

[4] The Applicant got married to his now estranged wife on August 29, 2009. His Canadian son was born on October 11, 2010. His son is presumed to reside with his estranged wife.

[5] His pre-removal risk assessment [PRRA] was refused on September 3, 2010.

[6] His application for permanent residence in Canada under the Spouse in Canada class was refused in March 2012, because his spouse withdrew her sponsorship due to a breakdown in marriage.

[7] The Applicant submitted a H&C Application on October 29, 2012, which was refused on August 6, 2013. This is the decision under review.

III. Contested Decision

[8] The CIC Officer denied the H&C Application, finding that the Applicant's removal from Canada would not constitute unusual, underserved or disproportional hardship. In the decision, the CIC Officer first concludes that the evidence before her, along with publicly available documentation, does not support that the Applicant is personally and directly impacted by discrimination and adverse country conditions in India or that avenues of recourse are not available to him in India.

[9] Second, in assessing the Applicant's establishment in Canada, the CIC Officer notes that there are discrepancies between the Applicant's income of $12,500 for 2011 as declared to Revenue Canada and his company's earnings of $12,000 a month. There are also discrepancies with his declared income and the monthly support he provides for his child.

[10] Also, while the evidence submitted shows that the Applicant volunteers in Canada, and has support from various friends, family and government representatives, the information provided does not indicate that the Applicant's removal from Canada will cause unusual, underserved or disproportionate hardship to any of these individuals. The CIC officer also notes that Applicant's removal order became effective fifteen days after the RPD refused his refugee claim in August 2008, he remained in Canada, got married in 2009 and made two permanent residence applications. The Applicant's establishment in Canada are therefore for reasons not beyond his control.

[11] Third, in assessing the best interest of the child, the CIC Officer, recognizes that the Applicant provided photographs of him and his son, that he is seeking sole custody of his son

and that he and his estranged wife have purchased a scholarship fund to assist in the cost of their child education. However, the Applicant did not provide information regarding the custody and residency of his son nor has he provided evidence that he maintains regular contact with him. The CIC Officer therefore concludes that although it is in the best interest of the child to be raised by both his mother and his father, the information provided does not support that it would be contrary to the best interest of the child if the Applicant were to return to India.

[12] The CIC Officer states that the Applicant would not have difficulties readjusting to Indian society and culture and that he has family in India who would support him. The CIC Officer finally concludes that the Applicant has not demonstrated that his removal from Canada would constitute unusual, underserved or disproportional hardship.

IV. Parties' Submissions

[13] The Applicant first submits that the CIC Officer failed to conduct a proper analysis of the impact of his removal on his young son, which makes the decision unreasonable. The Respondent retorts that the Applicant is simply disagreeing with the weight the CIC Officer gave to the evidence before her and that it is the Applicant who has the burden to provide sufficient evidence to demonstrate that his son would suffer adverse effects should the Applicant be removed from Canada.

[14] Second, the Applicant argues that the CIC Officer ignored evidence and made factually incorrect conclusions with regards to the Applicant's family in Canada and in India, along with his establishment in Canada. The CIC Officer therefore made unreasonable findings of fact based

on the evidence. The Respondent responds by first acknowledging that the CIC Officer appears to have made a mistake by stating that the Applicant "has his parents and siblings in India" (when in fact only the parents live in India), but that this error has no impact with regards to the end result of the decision. The Respondent also states that the error in the date with regards to the Applicant's spousal sponsorship is simply a typing error and is also immaterial and insufficient to overturn the decision. The Respondent finally adds that the CIC Officer correctly considered the relevant factors in the assessment of the Applicant's establishment in Canada. The decision is thus reasonable.

V. Issues

[15] The two issues of this case are as follows:

1. Did the CIC Officer err in his assessment of the best interests of the child?
2. Did the CIC Officer err in his analysis of the Applicant's degree of establishment in Canada?

VI. Standard of Review

[16] The issues identified above raise questions of mixed facts and law. The applicable standard of review is thus that of reasonableness. "Considerable deference should be given to immigration officers exercising the powers conferred by legislation, given the fact specific nature of the inquiry, it's role [subsection 25(1) of the IRPA] within the statutory scheme as an exception, the fact that the decision maker is the Minister, and the considerable discretion evidenced by the statutory language" (*Baker v. Canada (Minister of Citizenship and*

Immigration), [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39 at para 62). This standard was confirmed by the Federal Court of Appeal in *Kisana v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2009] F.C.J. No. 713 at para 18 and more recently in *Kanthasamy v. Canada (Minister of Citizenship and Immigration)*, 2014 F.C.A. 113, [2014] F.C.J. No 472 at para 32 and *Lemus v. Canada (Minister of Citizenship and Immigration)*, 2014 F.C.A. 114, [2014] F.C.J. No. 439 at para 18).

VII. Analysis

A. *Did the CIC Officer err in his assessment of the best interests of the child?*

[17] I have reviewed the Certified Tribunal Record and I am satisfied of the CIC Officer's conclusion that, based on the information provided, it would not be contrary to the best interests of the child if the Applicant was removed from Canada.

[18] When it comes to the best interests of children, the Federal Court of Appeal states in (*Owusu v. Canada (Minister of Immigration and Citizenship)*, 2004 FCA 38, at para 5) that:

> "[…] an immigration officer considering an H&C application must be "alert, alive and sensitive" to, and must not "minimize", the best interests of children who may be adversely affected by a parent's deportation: *Baker v Canada (Minister of Citizenship and Immigration)*, 2 S.C.R. 817 at para. 75. However, this duty only arises when it is sufficiently clear from the material submitted to the decision-maker that an application relies on this factor, at least in part. Moreover, the applicant has the burden of adducing proof of any claim on which the H&C application relies. Hence, if an applicant provides no evidence to support the claim, the CIC officer may conclude that it is baseless".

> In the case at bar, the closest the Applicant comes to demonstrating the role his son plays in his H&C Application is when he explains that his estranged spouse left him and took his son with her, that he is miserable without him, that he wants to be part of his life and that he filed for divorce and custody of his son. The Applicant further states: "I have known [the estranged wife] and her family's behaviour and know that the environment around my child is full of violence, shouting and bad language. […] I applied for custody of my child […] as right now I am thinking of the best interest of my child" [Applicant's record at page 40].

[19] The Applicant did not, however, provide any evidence to support his claim of his estranged wife and of her family's behaviour. The CIC Officer's decision notes that:

- The onus is on the Applicant to demonstrate best interests of his child, where pleaded. The Applicant as pointed to my recent decision in *Bautista v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 1008 [*Bautista*] for the proposition that BROC presumptively situates the child with his parents.
- However, there are two major distinctions between this case and *Bautista*. First I prefaced my findings in *Bautista* on highly compelling evidence that was submitted with the H&C. Second, the two children who had lived their entire lives in Canada, and were raised solely by their single mom, Mrs. Bautista, were in an entirely different predicament for the Applicant's son in this case.

[20] Here, the visa officer was provided with scant evidence to support the fact that his father was involved in his life, other than the fact that the Applicant made unsupported allegations against his ex-wife's ability to continue to care for the son, including his claim that he had filed

for sole custody. However, this was not substantiated by any Court Orders as other evidence (save for the pictures mentioned above): In fact, the actual H&C submissions talked exclusively from his perspective and the hardship on him, rather than on his son. The CIC Officer concluded that there is no evidence to support that the Applicant has regular and sustained contact with his son. Based on the information provided, this was a reasonable finding of the CIC officer. No intervention from this Court is warranted on this ground.

B. *Did the CIC Officer err in her analysis of the Applicant's degree of establishment in Canada?*

[21] The Applicant's main contention is that the CIC Officer erred in her consideration of the Applicant's establishment by ignoring evidence properly before her and by making unreasonable findings of fact based on the evidence. Although I acknowledge, and the Respondent agrees, that the CIC Officer's decision contains errors regarding (i) the date of the Applicant's spousal sponsorship, and (ii) the location of his sister, those errors do not amount to a reviewable error (*Paramanathan v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 338 at para 46; *Guerro Moreno v. Canada (Minister of Citizenship and Immigration*), 2011 FC 841 at paras 10-15).

[22] With respect to the Applicant's claim however that the majority of his establishment occurred while the Applicant was waiting for a final decision on his application for permanent residence as a spouse in Canada, pursuant to a permissive CIC policy the fact is that the vast majority of the Applicant's time in Canada was spent making, and awaiting the outcome of, other claims, including a refugee RPD judicial review , PRAA applications and sponsorship

application. The H&C (and now this JR of that H&C) were only a small portion of both in number and in time passage of this immigration history in Canada.

[23] As can be understood from the timeline described above, the Applicant and his wife have separated and the wife withdrew her spousal sponsorship in February 2012. They are no longer living together in Canada. It is only about eight months later, in October 2012 that the Applicant submitted his H&C Application. I am therefore of the opinion that the IP 8 Directive is inapplicable to this case. The Applicant established himself in Canada before his spousal sponsorship application. Part of his establishment is thus due to the Applicant staying in Canada following his removal order. Therefore, the CIC Officer's conclusion that it cannot be argued that the resulting hardship was beyond the Applicant's control is reasonable.

[24] The exemption under section 25(1) of IRPA is an entirely discretionary process (*Lalane v. Canada (Minister of Citizenship and Immigration*, 2009 FC 6 at para 11*; Baker supra* at para 51). Here, the Applicant did not fulfill his burden of proof in demonstrating that he would face unusual and undeserved or disproportionate hardship if he was to request permanent residency from India. The Applicant did not demonstrate that the best interests of his child or his establishment in Canada favoured a positive H&C Application. His H&C Application mainly discusses the difficulties he has suffered in Canada with regards to his marital relationship. The CIC Officer's decision certainly falls within a range of reasonable outcomes.

VIII. Conclusion

[25] Although the decision under review is not perfect, the CIC Officer's decision is reasonable. The decision falls within the range of possible and acceptable outcomes and must therefore be upheld.

[26] The parties were invited to submit questions for certification but none were proposed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review of the CIC Officer's decision dated August 6, 2013 is dismissed.

2. No question is certified.

"Alan Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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