Federal Court  Cour fédérale

Date: 20150715

Docket: IMM-6259-14

Citation: 2015 FC 871

Ottawa, Ontario, July 15, 2015

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

MALIK ALI KACHI,
RUBINA LALANI,
NABIL MALIK ALI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Malik Ali Kachi is a citizen of India.

- His wife Rubina Lalani is a citizen of Pakistan,

- Their son Nabil Malik Ali is a citizen of the United States.

- Their daughter Maheen Kachi is a Canadian citizen.

- They are all Shia Ismaili Muslims.

[2] Malik and Rubina met and married in the United States where neither had status. Their son Nabil was born there in 2000. Father and mother have not been to India and Pakistan this century. Nabil and Maheen have never been to either country.

[3] Father, mother and son came to Canada in 2008 and sought refugee status. Their claim was rejected, and they also received a negative pre-removal risk assessment.

[4] They applied for permanent resident status from within Canada on humanitarian and compassionate grounds. The officer determined that there would not be unusual, underserved or disproportionate hardship were they to follow the normal route and apply for permanent residence from outside Canada. This is a judicial review of that decision.

I. The Decision Under Review

[5] The officer was required to take into consideration the applicants' degree of establishment in Canada, the difficulties they would encounter if they were removed and the best interests of the children, both Nabil and Maheen. Maheen as a Canadian citizen cannot be removed, but as a young child she needs the love and care of her parents.

[6] In terms of establishment in Canada, both husband and wife are gainfully employed. Their children attend school, and all have been very active in the Ismaili community and have been extensively engaged in volunteer work. The officer thought this was not good enough. She said:

> However, I do not find that the applicants' degree of establishment is greater than what would be expected of other individuals attempting to adjust to a new country. Accordingly, I do not find that, on its own, the applicants' degree of establishment warrants the exercise of my discretion for the granting of an exemption from the in-Canada eligibility requirements.

[7] As to risk and adverse conditions, the applicants submitted that as Shia Ismaili Muslims they would face difficulties in both India and Pakistan. The officer found this was not a sufficient ground for an exemption. That finding was not unreasonable.

[8] The other factor in issue was family separation. The husband would be removed to India and the wife to Pakistan. The situation concerning the children is cloudy at best.

[9] The applicants filed extensive material about tensions between India and Pakistan and difficulties for a Pakistani spouse to obtain a long term Indian visa, or Indian citizenship. The evidence is that it is not impossible but the delays may be formidable.

[10] The officer said:

> I find that little documentary evidence has been provided to demonstrate that the applicants would not <u>eventually</u> be able to reside together as a family in either the PA's of his wife's country of citizenship.
>
> [My emphasis.]

II. Analysis

[11] In my opinion, the decision falls short of what is reasonable, both as to the degree of establishment in Canada and as to the future life of the family should husband, wife and son be removed.

[12] Unfortunately, the decisions that come our way in judicial review are ones in which the officer had determined there was an insufficient degree of establishment in Canada to exempt the applicants from applying for permanent residence from outside Canada.

[13] There are no cases which determine what is a sufficient degree of establishment.

[14] In this case, the entire family has been very active in various organizations. Had they come as permanent residents, there would have been no obligation whatsoever on their part to attend religious services, to partake in community activities, to volunteer, or to make friendships. In *Re Pourghasemi* (1993), 62 FTR 122, [1993] FCJ No 232 (QL), the Court determined that residence in the context of a citizenship application meant physical presence. Mr. Justice Muldoon had this to say at paragraph 3:

> It is clear that the purpose of paragraph 5(1)(c) is to insure that everyone who is granted precious Canadian citizenship has become, or at least has been compulsorily presented with the everyday opportunity to become, "Canadianized". This happens by "rubbing elbows" with Canadians in shopping malls, corner stores, libraries, concert halls, auto repair shops, pubs, cabarets, elevators, churches, synagogues, mosques and temples - in a word wherever one can meet and converse with Canadians - during the prescribed three years. One can observe Canadian society for all its virtues, decadence, values, dangers and freedoms, just as it is. That is little

> enough time in which to become Canadianized. If a citizenship candidate misses that qualifying experience, then Canadian citizenship can be conferred, in effect, on a person who is still a foreigner in experience, social adaptation, and often in thought and outlook. If the criterion be applied to some citizenship candidates, it ought to apply to all. So, indeed, it was applied by Madam Justice Reed in Re Koo, T-20-92, on December 3, 1992 [Please see [1992] F.C.J. No. 1107.], in different factual circumstances, of course.
>
> [My emphasis.]

[15] The Maliks were not compulsorily required to do anything. It is not good enough to say that their degree of establishment was insufficient without setting a benchmark.

[16] This deficiency in itself would be enough to justify granting judicial review.

[17] As to family separation, the record is not as fulsome as one would like. It would have been most helpful if information had been gathered from official sources, such as the Indian and Pakistani High Commissions. It is highly speculative to opine that "eventually" the family would be reunited. When exactly would that be? Can an Indian national who has not stepped foot in the country for over fifteen years sponsor his Pakistani wife? The evidence is far from clear. Such evidence as there is suggests that if Ms. Lalani resided in India on a visa, her life would be miserable.

[18] The manual *IP 5 Immigrant Applications in Canada made on Humanitarian and Compassionate Grounds* provides some useful guidelines in determining whether or not an H&C application should be granted. As regards family separation, reference was made to the

International Covenant on Civil and Political Rights, relevant principles of which include non-interference in family life, and the importance and protection of the family unit.

[19] One cannot simply assume that "eventually" the family will be reunited. A more detailed analysis of actual removal possibilities should have been considered.

[20] It will be recalled in *Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81, both parents were returning to the same country, Argentina, and were taking their Canadian children with them. There was no separation. The situation in this case is quite different.

JUDGMENT

FOR REASONS GIVEN;

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter is referred back for reconsideration before a different pre-removal risk assessment officer, in accordance with the directions herein.

3. There is no serious question of general importance to certify.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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