Federal Court  Cour fédérale

Date: 20161214

Docket: IMM-2255-16

Citation: 2016 FC 1370

Ottawa, Ontario, December 14, 2016

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

CHANDRA SHRESTHA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Shrestha is a citizen of Nepal who arrived in Canada in 2013 on a temporary foreign worker visa. His wife and two children, a son born in 1995 and daughter born in 2008, remain in Nepal.

[2] In July 2015, relying on section 25 of the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27) [IRPA], Mr. Shrestha sought an exemption on Humanitarian and Compassionate [H&C] grounds that would allow him to apply for permanent residence status from within Canada. The application was made in the aftermath of two earthquakes in the spring of 2015 in Nepal. The earthquakes are variously described in the documentary evidence placed before the Court as devastating, massive and huge.

[3] Mr. Shrestha's H&C request was denied in May 2016. The Officer concluded that the evidence presented was insufficient to establish that Mr. Shrestha's daughter's best interests would be negatively impacted by his return to Nepal. The Officer also concluded that the adverse country conditions evidence addressed general country conditions only and did not address the personal circumstances of the applicant or his family.

[4] The applicant argues that the decision reflects numerous reviewable errors. Specifically: (1) the Officer fettered his or her discretion by resorting to the usual laws and regulations under the IRPA in addressing the section 25 application; (2) the Officer adopted the incorrect test in considering the section 25 application; (3) the best interests of the child analysis was flawed and unreasonable; and (4) the decision is otherwise unreasonable.

[5] The application requires that I address two issues: (1) did the Officer identify the wrong test or fetter his or her discretion; and (2) is the decision reasonable. I am of the opinion that the Officer erred in concluding that there was insufficient evidence to establish a link between the

adverse country conditions evidence and Mr. Shrestha's personal circumstances. The application is granted for the reasons that follow.

II. Standard of Review

[6] The jurisprudence relating to the standard of review to be applied when reviewing the selection of the legal test in an H&C context has been the subject of differing views. The law on this question was recently canvased by Justice Richard Mosely in *Gonzalez v Canada (Minister of Citizenship and Immigration)*, 2015 FC 382 at paras 23 – 35. Justice Mosely concluded that the standard of correctness applies to an Officer's choice of the legal test in the context of an H&C application. This accords with the view I expressed in *D'Aguiar-Juman v Canada (Citizenship and Immigration*, 2016 FC 6 and the position of the parties in this matter. The parties do not dispute that a reasonableness standard of review is to be applied when considering the application of a legal test and the overall reasonableness of the decision.

III. Analysis

A. *Did the Officer identify the wrong test or fetter his/her discretion?*

[7] Mr. Shrestha argues that the Officer resorted to a strict application of the provisions of the IRPA in considering his section 25 application. In support of this position, he relies on *Aboubacar v Canada (Minister of Citizenship and Immigration)*, 2014 FC 714 [*Aboubacar*], arguing that the Officer failed to consider whether the facts and circumstances warranted an exception to the usual application of the IRPA as required in the section 25 context. I disagree.

[8] The Officer noted at the outset of its reasons that the decision to be made is whether "an exemption is justified based on humanitarian and compassionate grounds". The Officer then proceeded to analyze the evidence advanced in support of the application as it related to the child's best interests and the hardship relating to a return to Nepal. After completing this analysis, the Officer concluded that the evidence advanced in support of the application was insufficient to warrant an exemption under section 25. Having found the evidence insufficient to provide H&C relief, the Officer concluded that the usual IRPA requirements will apply.

[9] This differs from the situation in *Aboubacar,* upon which Mr. Shrestha relies. In *Aboubacar*, reliance was placed on the "usual application of IRPA laws and regulations" to discount the relevance of a lengthy presence in Canada and lengthy processing delay to deny an H&C application. This is not what occurred here. Rather, the Officer concluded that the evidence submitted was simply insufficient to warrant H&C relief. The Officer did not identify an incorrect test or fetter his or her discretion in considering the application.

B. *Is the decision reasonable?*

[10] With respect to the Officer's conclusions that there was insufficient evidence to warrant H&C relief, the respondent argues that the Officer reasonably concluded that the evidence relating to the child's best interests was vague and lacking in detail. The respondent further submits that the Officer's conclusion that there was insufficient evidence to warrant a positive decision and the decision to deny the application were also reasonable. I disagree.

[11] In an H&C context, an applicant is not required to demonstrate that the alleged hardship is not a hardship generally faced by others in the country. Rather, an applicant must demonstrate that being required to apply for permanent residence from outside Canada would cause unusual and undeserved or disproportionate hardship to the individual applicant. (*Aboubacar* at paras 4 – 8) In other words, the hardship must be personal but it need not be unique. As held by the Supreme Court in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 33, the words "unusual and undeserved or disproportionate hardship" are not to be treated as individual tests or thresholds in an H&C context. Rather these words are to be viewed as instructive when considering and giving weight to all relevant humanitarian and compassionate considerations in a particular case.

[12] In this case, there was significant evidence before the Officer that described the severity and the devastating impact of the earthquakes in Nepal in the spring of 2015. The evidence disclosed the impact the earthquakes had on basic health services, education and housing. It described that in the most heavily impacted regions of the country eighty percent of housing had been destroyed. It described ongoing disasters in the form of landsides and floods. It described serious disruption within the agricultural sector impacting food security. It described Nepal's weak economy, its position as one of the world's poorest countries, and its ineffective government. The evidence also indicates that it will take years for Nepal to recover from the earthquakes.

[13] This evidence of adverse conditions, while unquestionably general in nature, would allow one to reasonably infer that any individual living in or returning to Nepal, particularly if the

return was to the most severely impacted regions of the country, would suffer some hardship. Despite this, the Officer did not engage in any analysis of the evidence. Rather, the Officer acknowledged it and then dismissed it on the basis that it failed to demonstrate personal hardship for the applicant and his family.

[14] In *Aboubacar*, Justice Donald Rennie noted at paragraph 12 that claims for H&C relief must be supported by evidence but then stated "…there are circumstances where the conditions in the country of origin are such that they support a reasoned inference as to the challenges a particular applicant would face on return…". This is precisely the circumstance facing the Officer here. The country condition evidence reflects circumstances of widespread destruction, the absence of suitable housing, medical care and education as the result of a natural disaster. The evidence also demonstrated that recovery was to be measured in years, not weeks or months. In addition to this evidence of widespread hardship, there was also evidence before the Officer that the applicant and his family live in Kaski, one of the areas' most severely impacted by the earthquakes, that his family home was destroyed, his daughter's school was destroyed and his family's living arrangements were not certain.

[15] I do not take issue with the Officer's view that the information relating to the direct circumstances of the applicant and his family was limited. However, this evidence had to be assessed in concert with, not to the exclusion of, the country condition evidence. The Officer's failure to recognize that the country conditions evidence might itself be sufficient to warrant a positive H&C decision in some limited circumstances renders the decision unreasonable. The decision does not satisfy the requirements of justification, transparency and intelligibility.

IV. Conclusion

[16] The application is granted. The parties have not identified a question of general importance, and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is granted, the decision of the RAD is set aside and the matter is remitted for redetermination by a different decision-maker. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2255-16
STYLE OF CAUSE:	CHANDRA SHRESTHA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	DECEMBER 7, 2016
JUDGMENT AND REASONS:	GLEESON J.
DATED:	DECEMBER 14, 2016

APPEARANCES:

Raj Sharma	FOR THE APPLICANT
Maria Green	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stewart Sharma Harsanyi Barristers and Solicitors Calgary, Alberta	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Calgary, Alberta	FOR THE RESPONDENT