Federal Court Cour fédérale

Date: 20180607

Docket: IMM-4215-17

Citation: 2018 FC 596

Ottawa, Ontario, June 7, 2018

PRESENT: The Honourable Mr. Justice Norris

BETWEEN:

ABDUL MURSALIM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant, Abdul Mursalim, is a 28-year-old citizen of Bangladesh. His mother, Mahmuda Khanom, was recognized by Canada as Convention Refugee in 2013. After obtaining her status here, Ms. Khanom filed an application for permanent residence. She included the applicant and his younger brother, Abdul Muttakim, in the application as overseas dependents. Both were living in Bangladesh at the time.

[2] The applicant's mother and his brother were granted permanent resident status on January 16, 2015 but the applicant's application was refused. This refusal, however, was overturned on judicial review.

[3] The applicant's application had been supported by information indicating that although the applicant was then over 22 years of age, he had been enrolled continuously in and attending a post-secondary educational institution. His application was refused because the officer who considered it was not satisfied that the applicant in fact qualified as an overseas dependent.

[4] On judicial review, Justice Richard Southcott found that the officer had breached the duty of procedural fairness in assessing documentation relating to the applicant's academic history, including difficulties he had had as a result of Attention Deficit Hyperactivity Disorder. The application for permanent residence was referred back to a different officer for re-determination: see *Mursalim v Minister of Citizenship and Immigration*, 2016 FC 264 [*Mursalim*].

[5] The applicant re-applied for permanent residence. However, by this time he had completed his education and was employed. He therefore no longer qualified as an overseas dependent. Instead, he sought permanent residence on humanitarian and compassionate [H&C] grounds under s 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. This new application was refused on September 15, 2017 by a Visa Officer at the High Commission of Canada in Singapore.

[6] The applicant now applies for judicial review of that officer's decision pursuant to s 72(1) of the IRPA, arguing that the decision is unreasonable. The applicant submits that the officer applied the wrong legal test under s 25(1) of the IRPA. The applicant also submits that the officer committed reviewable errors in the assessment of the information and evidence provided in support of the H&C application. While the applicant originally also submitted that the officer erred in failing to conduct a best interests of the child analysis, this issue was abandoned at the hearing of the judicial review application.

[7] I have concluded that this application for judicial review must be allowed. The officer focused on whether denying the applicant permanent residence would cause him "unusual, undeserved or disproportionate hardship." In doing so, the officer applied the wrong legal test. In addition, the officer failed to address one of the most salient aspects of this case – the fact that the applicant lost the opportunity to become a permanent resident as an overseas dependent in 2015 because of a denial of procedural fairness and through no fault of his own. Now, with the passage of time, he no longer qualifies as an overseas dependent. This is not a merely incidental fact. It is the very reason the applicant must now seek permanent residence on H&C grounds instead of as an overseas dependent. The officer did not assess the equities of the applicant's case with this critical fact in mind. I am also satisfied that these errors require that the decision be set aside. Accordingly, it is not necessary to address the other issues raised by the applicant.

II. STYLE OF CAUSE

[8] The original style of cause names the respondent as the Minister of Immigration, Refugees and Citizenship. Although that is how the respondent is now commonly known, its

name under statute remains the Minister of Citizenship and Immigration: *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, s 5(2) and IRPA s 4(1).

[9] Accordingly, as part of this judgment, the style of cause is amended to name the respondent as the Minister of Citizenship and Immigration.

III. BACKGROUND

[10] The circumstances of the applicant's first application for permanent residence are set out in the judgment of Justice Southcott in *Mursalim*. There is no need to repeat them here.

[11] Justice Southcott returned the matter for re-determination on March 1, 2016. However, the applicant had completed his studies in October 2015 and therefore no longer met the definition of an overseas dependent. Accordingly, he provided additional documentation and detailed submissions seeking to establish that there were sufficient H&C considerations to overcome his ineligibility. The application was completed in mid-January 2017.

[12] Counsel for the applicant began her written submissions by explaining why the application for permanent residence was now being made under s 25(1) of the IRPA rather than as an overseas dependent:

> Had Mr. Mursalim been provided the opportunity to address the initial decision-maker's concerns prior to the decision to refuse his application, which the Federal Court stated was required pursuant to the duty of procedural fairness, Mr. Mursalim would have been found to be an overseas dependent as he had, at the time, been continuously enrolled in and attending a post-secondary institution. However, Mr. Mursalim was not provided with that opportunity and now, Mr. Mursalim is no longer a current student.

> He completed his studies in October 2015, while the application for Judicial Review was in process.

[13] The applicant's counsel then turned to the specific H&C factors being relied upon to support the exercise of discretion in favour of granting the application. Four in particular were identified:

- The applicant is the sole remaining member of his immediate family in Bangladesh. He has substantial familial and social ties to Canada, and no close familial ties remaining in Bangladesh;
- Continuing separation from the applicant would cause significant hardship to his family in Canada. In particular, the applicant's mother was suffering from depression and anxiety. This condition has worsened due to her fears for her son's well-being in Bangladesh and the fact that he is living there alone, without any emotional support;
- The applicant poses little risk of becoming a financial burden on Canadian society. Several family members who are well-established in Canada have pledged to support him financially as he integrates into Canadian society. They have all confirmed their belief that he would have no difficulty becoming a contributing member of society; and
- Country conditions documentation indicates that there would be significant hardship for the applicant if he had to remain in Bangladesh.

[14] The application was supported by extensive documentary evidence including a statutory declaration from the applicant's mother, medical reports concerning the applicant's mother's depression and anxiety, letters of support from numerous other family members, and information relating to conditions in Bangladesh.

IV. THE OFFICER'S DECISION

[15] The decision refusing the request under s 25(1) of the IRPA was communicated to the applicant by email dated September 15, 2017. The email simply repeats the language of the

provision and states the officer's conclusion that "it would not be justified by humanitarian and compassionate considerations to grant you permanent resident status or exempt you from any applicable criteria or obligation of the Act." The reasons for the decision are found in the officer's Global Case Management System [GCMS] notes.

[16] The officer's notes begin with the following observations:

> This appln was returned to the Singapore office for redetermination by another officer after it was found that the decision to remove the son, Abdul Mursalim (PA), as a dependent child from the initial appln, was procedurally unfair. I have reviewed the entire appln including the new information submitted in support of the PA. Though I am aware of the prior decision made on this appln, I am assessing the PAs appln as an appln to be re-determined.

This is the full extent of the officer's consideration of the connection between the previous application for permanent residence and the current one.

[17] With respect to the information and evidence offered in support of the application, the officer noted that the statutory declaration and letters relied on by the applicant were all written by members of the applicant's immediate family or close relatives. In the officer's view, the authors of the documents had a "vested interest" in the outcome of the application. Elsewhere in the reasons, the officer describes the family's statements as "self-serving" and "biased". In the absence of corroboration, the officer was not satisfied that the letters were "objective assessments" of the applicant's level of dependency on his family in Canada or his circumstances in Bangladesh. As a result, according to the officer, "the letters cannot be given full weight when deciding whether to grant the PA an exemption." In fact, the officer does not appear to have

given the statements from the applicant's family members much if any weight at all. While I have serious concerns about how the officer approached the family-sourced evidence, it is not necessary for me to resolve this issue.

[18] With respect to the applicant's family connections to Canada, and the absence of any close family connections in Bangladesh, the information compiled in support of the H&C application indicated that the applicant was the sole remaining member of his immediate family in Bangladesh. His father had passed away many years ago, his sister lives in the United Kingdom with her husband and children, and his two brothers and his mother live in Canada. The applicant's cousins and an aunt and uncle with whom he is very close also live in Canada. However, the officer was not satisfied that the evidence established a level of dependency on family in Canada which would warrant an exemption. The officer was also not satisfied that the applicant faced "undue hardship" because he had no family in Bangladesh. The officer found that the evidence showed that the applicant had established himself successfully in Bangladesh. He was working, volunteering, and traveling to destinations such as India and Sri Lanka.

[19] The submission concerning the hardship faced by the applicant's family because of their separation from him was supported by a number of letters from family members. It was also supported by a statutory declaration from Ms. Khanom in which she stated, among other things: "I worry for him all the time because of the hardship he must suffer without a loving family and the emotional support we can provide, and the hardship he faces every day due to country conditions in Bangladesh. This in particular causes me great fear." The officer acknowledged Ms. Khanom's concerns for her son but found that in fact the applicant was well-established in

Bangladesh, stating: “I am satisfied that this is a positive indication of the PA’s well-being against the concerns of his [mother].” The officer noted that the applicant’s sister lived in the United Kingdom and Ms. Khanom did not appear to be experiencing similar anxiety about her. The officer concluded from this that Ms. Khanom’s anxiety was not due to the fact of separation but rather was the result of her perception of the conditions in which the applicant was living in Bangladesh. However, the officer found that there was insufficient evidence to establish that the applicant was affected by adverse country conditions, noting his successful work and volunteer activities. This led the officer to the following conclusion: “I cannot be satisfied that the condition of the [mother] is sufficient H&C ground to grant an exemption for the PA.” The officer does not address any of the concerns expressed by other family members.

[20] As noted, the officer was not satisfied that the country conditions highlighted by the applicant actually applied to him. The officer appears to have appreciated that the documentation was intended to highlight general adverse country conditions rather than specific hardships the applicant himself was experiencing, mentioning the evidence of significant restrictions on freedom of expression. (The submissions also emphasized a number of other adverse conditions including serious human rights abuses, political instability, corruption, and widespread economic hardship.) However, the officer concluded that the information about general country conditions was irrelevant because it did not have a direct bearing on the applicant. The officer also noted that family members had described the conditions in Bangladesh in their letters but, again, found that these letters “remain biased.” In the end, the officer was “not satisfied that the country conditions in BGD are causing the PA unusual and undeserved, or disproportionate hardship if he were not to be granted an exemption.”

[21] In response to the applicant's submission that he would be a contributing member of Canadian society and would have his family's support while he established himself here, the officer acknowledged that the applicant's success in Bangladesh suggested that he would be able to make a positive contribution to Canadian society. However, the officer found that this was "insufficient in helping to determine whether the PA would suffer unusual and undeserved, or disproportionate hardship if he was not granted an exemption."

[22] Finally, the officer noted that while family reunification is one of the objectives of the IRPA, it did not assist the applicant. The Officer simply stated: "These objectives must be balanced with the entire facts of the case. In certain cases, families are not able to reunite causing continued separation." The officer did not identify any "facts of the case" that weighed against the objective of family reunification in this balancing in the applicant's particular case.

[23] At the conclusion of the GCMS notes, the officer summarized the reasons for denying the application as follows:

> I have analyzed and assessed the PAs H&C grounds with the information provided to support them. I have further analyzed and assessed how the H&C decision would affect the PA. I am not satisfied that the refusal to grant the request for an exemption would, more likely than not, result in unusual or undeserved, or disproportionate, hardship. Taking the entire assessment of the appln and the H&C factors into consideration, on a balance of probabilities, I am not satisfied that the PA has sufficient H&C factors present in his individual circumstance that would warrant an exemption under the Act and Regulations.

V. LEGAL FRAMEWORK

[24] Section 25(1) of the IRPA authorizes the Minister to grant relief to a foreign national seeking permanent resident status who is inadmissible or otherwise does not meet the requirements of the Act. The Minister may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations under the Act. Relief of this nature will only be granted if the Minister "is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national." The complete text of s 25(1) may be found in Annex I to these reasons.

[25] In *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61[*Kanthasamy*]), the Supreme Court of Canada endorsed an approach to s 25(1) that is grounded in its equitable underlying purpose. The humanitarian and compassionate discretion enacted in the provision is meant to provide flexibility to mitigate the effects of a rigid application of the law in appropriate cases (*Kanthasamy* at para 19). Justice Abella, writing for the majority, approved of the approach taken in *Chirwa v Canada (Minister of Citizenship and Immigration)*, (1970), 4 IAC 338, where it was held that humanitarian and compassionate considerations refer to "those facts, established by the evidence, which would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another – so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the *Immigration Act*" (*Kanthasamy* at para 13).

[26] Ministerial Guidelines for processing requests for H&C relief had directed immigration officers to consider whether an applicant had demonstrated either "unusual and undeserved" or "disproportionate" hardship. In *Kanthasamy,* Abella J. held that while these words could be

helpful in assessing when relief should be granted in a given case, they were not the only possible formulation of when there were H&C grounds justifying the exercise of discretion under s 25(1). Rather, Abella J. adopted the following approach (at para 33):

> The words "unusual and undeserved or disproportionate hardship" should therefore be treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). As a result, what officers should not do, is look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds, and use the language of "unusual and undeserved or disproportionate hardship" in a way that limits their ability to consider and give weight to *all* relevant humanitarian and compassionate considerations in a particular case. The three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond flexibly to the equitable goals of the provision.

[27] The majority's assessment of the H&C decision at issue in *Kanthasamy* provides guidance on how this test should – and should not – be applied. Justice Abella found (at para 45) that the Officer there had

> failed to consider Jeyakannan Kanthasamy's circumstances as a whole, and took an unduly narrow approach to the assessment of the circumstances raised in the application. She failed to give sufficiently serious consideration to his youth, his mental health and the evidence that he would suffer discrimination if he were returned to Sri Lanka. Instead, she took a segmented approach, assessed each factor to see whether it represented hardship that was "unusual and undeserved or disproportionate", then appeared to discount each from her final conclusion because it failed to satisfy that threshold. Her literal obedience to those adjectives, which do not appear anywhere in s. 25(1), rather than looking at his circumstances as a whole, led her to see each of them as a distinct legal test, rather than as words designed to help reify the equitable purpose of the provision. This had the effect of improperly restricting her discretion and rendering her decision unreasonable.

[28] *Kanthasamy* is often described as having widened the lens through which H&C applications must be considered compared to what was set out in the Ministerial Guidelines. The requirement to employ this wider lens is reflected in a number of recent decisions of this Court, including *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at paras 33-37 [*Marshall*]; *Patousia v Canada (Citizenship and Immigration)*, 2017 FC 876 at paras 41-45; *Abeleira v Canada (Citizenship and Immigration)*, 2017 FC 1008 at paras 33-34, 58; *Lobjanidze v Canada (Citizenship and Immigration)*, 2017 FC 1098 at paras 11-12; *Sivalingam v Canada (Citizenship and Immigration)*, 2017 FC 1185 at para 18; and *Stuurman v Canada (Citizenship and Immigration)*, 2018 FC 194 at para 24. These cases all affirm that hardship is not the sole or determinative factor to be considered in an H&C analysis and that all relevant factors must be considered.

VI. STANDARD OF REVIEW

[29] It is well-established in the jurisprudence that generally a denial of H&C relief under s 25(1) is reviewed on the reasonableness standard (*Kanthasamy* at para 44; *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 18; *Taylor v Canada (Minister of Citizenship and Immigration)*, 2016 FC 21 at para 16). Since the provision creates a mechanism to deal with exceptional circumstances and decisions under it are highly discretionary, decision-makers will be accorded a considerable degree of deference (*Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 15). On judicial review under the reasonableness standard, it is not the role of the Court to reweigh the evidence and relevant factors (*Kisana* at para 24) or to substitute its own view of a preferable outcome (*Canada (Citizenship and Immigration) v*

Khosa, 2009 SCC 12 at paras 59 and 61 [*Khosa*]). One exception to this general rule is issues of procedural fairness, which this Court reviews on a correctness standard (*Mursalim* at para 9; *Weng v Canada (Citizenship and Immigration)*, 2014 FC 778 at para 14; see also *Khosa* at para 43 and *Mission Institution v Khela*, 2014 SCC 24 at para 79).

[30] The deferential reasonableness standard of review presupposes that the decision-maker has applied the correct legal test. A decision will not be rational or defensible if the decision-maker has failed to carry out the proper analysis (*Lake v Canada (Minister of Justice)*, 2008 SCC 23 at para 41; *Németh v Canada (Justice)*, 2010 SCC 56 at para 10).

[31] When the applicable test is established in the jurisprudence, an administrative decision-maker has no discretion to adopt a different one and no deference is owed to a decision-maker's choice of test. The principle of universality requires that the same legal rules are applied in similar situations (*Housen v Nikolaisen*, 2002 SCC 33, at para 9). As Rothstein J. stated in his concurring opinion in *Khosa*, "[d]ivergent applications of legal rules undermine the integrity of the rule of law" (at para 90). The values of certainty and predictability are protected and promoted through judicial review, which is the "means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority" (*Dunsmuir v New Brunswick*, 2009 SCC 9 at para 28).

[32] The legal test under s 25(1) of the IRPA was settled in *Kanthasamy*. Until Parliament changes the law or the jurisprudence interpreting s 25(1) evolves, this is the test decision-makers must apply. As a result, the decision-maker's choice of test under s 25(1) will be reviewed on a

standard of correctness (*Gonzalez v Canada (Citizenship and Immigration)*, [2015] 4 FCR 535 at paras 23-34; *Taylor v Canada (Citizenship and Immigration)*, 2016 FC 21 at paras 16-18; *Shrestha v Canada (Citizenship and Immigration)*, 2016 FC 1370 at para 6; *Marshall* at paras 27-28; *Gesite v Canada (Citizenship and Immigration)*, 2017 FC 1025 at para 8; *Torres v Canada (Citizenship and Immigration)*, 2017 FC 715 at para 6; *Khokhar v Canada (Citizenship and Immigration)*, 2018 FC 555 at para 10). If a decision-maker does what the Supreme Court of Canada has said they should not do when assessing an application under s 25(1) of the IRPA, it is this Court's responsibility to intervene.

[33] Of course, whether the test applied by a decision-maker in a given case is consistent with settled law may not be obvious. A reviewing court must bear in mind that the application of a legal test to a specific set of circumstances is not simply a matter of quoting from the leading case chapter and verse or uttering some magic formulae or special words (*Marshall* at para 33). Substance must govern, not form. But where the reviewing court is satisfied that a decision-maker applied the wrong test in substance, no deference is owed to the decision-maker's choice of test or to the decision-maker's conclusions on the merits.

VII. ANALYSIS

[34] As I have indicated, in my view the determinative issue is: Did the officer apply the wrong test under s 25(1) of the IRPA?

[35] The applicant submits that the officer failed to apply the test articulated in *Kanthasamy* by considering hardship alone and not addressing all relevant factors in a broader sense. In particular, the officer's failure to consider the fact that the applicant would have been found to be

an overseas dependent but for the breach of procedural fairness identified by Justice Southcott shows that the officer did not follow the *Chirwa* approach, as mandated by *Kanthasamy* and its progeny.

[36] The respondent, on the other hand, submits that the officer applied the law correctly but simply found that there were no factors warranting H&C relief in this case. According to the respondent, the applicant's real complaint is with the officer's exercise of discretion, a matter to which this Court must show considerable deference.

[37] In my view, the officer applied the wrong test by considering hardship alone. Contrary to the direction given in *Kanthasamy*, hardship was the touchstone of the officer's analysis of each aspect of the H&C application. Put another way, the language used by the officer demonstrates that the application was viewed exclusively through the lens of hardship. At key points in the decision, the officer applied the test of "unusual and undeserved or disproportionate hardship" and did not engage in any further analysis once satisfied that this test had not been met. While the question of hardship is of course germane under s 25(1), and various forms of hardship were emphasized in the applicant's submissions, the officer used the language of "unusual and undeserved or disproportionate hardship" in a way that limited the officer's ability to consider and give weight to all relevant humanitarian and compassionate considerations in the applicant's case (cf. *Kanthasamy* at para 33; *Marshall* at paras 33-37).

[38] Not only is the *Chirwa* approach not evident in the officer's reasons, the reasons suggest that the officer in fact approached the H&C application exactly how it should not have been approached. The officer viewed each aspect of the application in isolation, taking the sort of segmented approach rejected by the majority in *Kanthasamy*. This led the officer to ignore a key

unifying element in this case – the fact that the applicant lost the opportunity to acquire status in Canada as an overseas dependent as a result of a denial of procedural fairness. This is why the applicant finds himself left behind in Bangladesh while the rest of his family members build new lives elsewhere, including many here in Canada.

[39] The unfairness that potentially calls for the exercise of H&C discretion is the loss of the opportunity, through no fault on the applicant's part, to have an arguable application for permanent residence as an overseas dependent decided fairly on the merits. The applicant may very well have succeeded in that application. Had that happened, he would now be well-along in establishing himself in Canada. With the passage of time, however, that opportunity is no longer open to him and now he must seek status in Canada under the more difficult H&C process. A reasonable and fair-minded person in a civilized society would judge this to be a misfortune potentially deserving of amelioration, especially considering how it has affected the applicant and his family and also considering the objective of family reunification. This circumstance engages the equitable underlying purpose of s 25(1) of the IRPA yet it plays no role whatsoever in the officer's decision. The Officer only mentions it in passing and does not weigh it at all in assessing the equities of the applicant's case, as *Kanthasamy* requires.

[40] Thus, in my view the officer failed to carry out the proper analysis under s 25(1) of the IRPA. As a result, the decision is not rational or defensible. It must be set aside.

VIII. Conclusion

[41] For these reasons, the application for judicial review is allowed. The officer's decision dated September 15, 2017, is set aside and the matter is remitted to a different immigration officer for re-determination in accordance with these reasons.

[42] The parties did not suggest any questions of general importance. I agree that none arise.

JUDGMENT in IMM-4215-17

THIS COURT'S JUDGMENT is that:

1. The name of the respondent is amended to The Minister of Citizenship and Immigration.

2. The application for judicial review is allowed, the Officer's decision dated September 15, 2017 is set aside, and the matter is remitted to a different immigration officer for re-determination in accordance with these reasons.

3. No question of general importance is stated.

"John Norris"
Judge

ANNEX I

Immigration and Refugee Protection Act, SC 2001, c 27

Humanitarian and compassionate considerations — request of foreign national

25(1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27

Séjour pour motif d'ordre humanitaire à la demande de l'étranger

25(1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

FEDERAL COURT

SOLICITORS OF RECORD

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