Federal Court Cour fédérale

Date: 20191218

Docket: IMM-3430-19

Citation: 2019 FC 1633

Toronto, Ontario, December 18, 2019

PRESENT: Mr. Justice Diner

BETWEEN:

SAHAB SINGH
NEHA JAYESHKUMAR SHAH

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Singh and Ms. Shah, the Applicants, seek to overturn the refusal of their application for permanent residence based on humanitarian and compassionate considerations. Theirs is a case of *déjà vu*: this is the second time that they come before this Court seeking judicial review of their application, and the Officer's decision repeats some of the errors made the first time round. Accordingly, their application will be granted and will go before an officer of the Respondent for a third time.

I. Background

[2] The Applicants are citizens of India. Each had made their own way to Canada before they met and became a couple – they were each previously married and had a child through these prior marriages. They have since had one child together in Canada, who is now just over a year old. Other commonalities between them include not only fractious relationships with their ex-spouses, but also their ex in-laws, who they both fear and who respectively – according to their narratives – threaten to kill them.

[3] As each had a separate life before coming together as a couple, I will begin with Mr. Singh's background. He came to Canada in 2013, and he alone originally filed the humanitarian and compassionate [H&C] application under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], which now forms the underlying subject of this judicial review.

[4] Mr. Singh contends that, after dating his ex-spouse secretly for many years, they married in January 2013 against her parents' will. Mr. Singh claims that as a result of the marriage, his in-laws subsequently threatened to kill him. He entered Canada in November 2013, seeking refugee protection based on his fear of being a victim of an honour crime. He has resided in Canada since that time.

[5] While in Canada, his former wife gave birth to their son in India. Shortly afterwards, she moved in with her parents in India and demanded a divorce. According to Mr. Singh, she did not

want to keep their son, so Mr. Singh's parents (also in India) paid to have their grandchild live with them.

[6] Mr. Singh's refugee claim was denied by the Refugee Protection Division [RPD] based on the existence of an internal flight alternative. He unsuccessfully appealed to the Refugee Appeal Division [RAD], which agreed with the RPD on the existence of an internal flight alternative and also found Mr. Singh's claims to lack credibility. This Court denied him leave to seek judicial review of the RAD decision. Mr. Singh then applied for a Pre-Removal Risk Assessment [PRRA], which was refused.

[7] In August 2017, Mr. Singh submitted an application for permanent residence on H&C grounds. This application was refused. He then sought leave of this Court to judicially review the refusal. The Minister consented to that leave application and, as a result, the proceeding was discontinued. The matter was sent back to a different officer for redetermination. By that time, Ms. Shah had already been added to the application.

[8] For her part, Ms. Shah married at a young age and was allegedly mistreated by her in-laws and her husband in India. She arrived in Canada to study in January 2011. She had valid temporary resident status as a student until November 2013, during which time she travelled to India on several occasions to visit her (now ex-) husband. She gave birth to their son in Canada in October 2012. She claims that her in-laws forced her to leave her son with them in India and that they subsequently mistreated him.

[9] On a visit to India in 2016, Ms. Shah allegedly discovered that her husband was having an affair. She brought her son back to Canada, after which she claims her in-laws have threatened to kill her. Ms. Shah submitted an application for restoration of her temporary resident status, which was approved in March 2014. She was issued a post-graduate work permit that was valid until March 2017. Her subsequent application for a work permit was refused in April 2017. In August 2018, Ms. Shah submitted an application for a Temporary Resident Permit, which was still pending at the time the H&C decision under review was rendered.

[10] Mr. Singh and Ms. Shah met in 2014 when he helped her secure a room where he was renting. In 2017, they began a romantic relationship. Once they met the definition of common-law partners, Mr. Singh added Ms. Shah to his H&C application. Their son was born in Canada in November 2018.

II. Decision under Review

[11] In the H&C decision dated May 16, 2019 [Decision], the Officer's refusal was based on three factors: adverse country conditions, establishment in Canada, and best interests of the three children [BIOC].

[12] First, regarding adverse country conditions, the Officer found that the Applicants had not met their evidentiary burden, and provided insufficient evidence to substantiate their fear of harm, harassment, and threats at the hands of their former in-laws in India. The Officer noted that these findings were not based on credibility, but rather on a lack of evidence.

[13] Second, regarding establishment, the Officer first noted that Mr. Singh and Ms. Shah have "a degree of establishment in Canada," recognizing that each has resided in Canada for a considerable amount of time and that they have both held employment here, giving positive weight to this factor. The Officer further recognized Mr. Singh's volunteering efforts, Ms. Shah's completion of a diploma program under difficult circumstances (being pregnant and a new mother), and their two Canadian-born children. The Officer found that these accomplishments showed that the couple are "resilient individuals" able to assimilate to the environment in Canada. The Officer concluded that precisely because of the indicia of adaptation (ability to find work and complete an education), the couple's resiliency would translate into the ability to assimilate into Indian society. The Officer felt that the relationships established in Canada need not end upon return to India due to the ability to communicate with modern technology.

[14] Regarding BIOC, the Officer noted that the children, like their parents, would be able to adjust to life in India. The Officer rejected the argument that the two Canadian children do not have status in India, noting that their parents may obtain status for their Canadian children and apply for citizenship from there. Again, the Officer cited the "insufficient evidence" to demonstrate that the family would suffer financially in India, given the skills and experiences gained in Canada: although their income might be lower, so too is the cost of living.

[15] Finally, the Officer observed that the Applicants' ability to adapt and find employment would assist with supporting the children in India, including Mr. Singh's child from his previous marriage who he continues to support. The Officer found insufficient evidence to establish the

violence that the Applicants alleged would befall their children in India at the hands of their former in-laws.

III. Analysis

[16] The Applicants, in their written materials, challenged the Decision on the basis of reviewable errors regarding all three of the key findings outlined above, but dispensed with the first (regarding adverse country conditions and veiled credibility findings) at the judicial review hearing, leaving only the second and third (establishment and BIOC) at issue before this Court.

[17] Both sides agree that H&C decisions must be reviewed on a standard of reasonableness, resulting in significant deference from this Court because of their discretionary nature (*Brambilla v Canada (Citizenship and Immigration)*, 2018 FC 1137 at para 8 [*Brambilla*]; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44 [*Kanthasamy*]). In applying the reasonableness standard of review, this Court will only intervene if the decision lacks justification, transparency or intelligibility (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). That is exactly what occurred in this case, and thus I cannot support the Decision.

[18] As the Respondent made no submissions at the hearing in response to the Applicants' arguments, and instead relied on their written submissions, I will keep the analysis short, explaining why the Officer erred on both the establishment and BIOC factors.

[19] It is noteworthy that this Officer had every reason to be aware of the deficiencies in the prior decision. That is because Applicants' counsel provided to the Officer their memorandum of

fact and law submitted with the first judicial review in 2017 – to which the Respondent consented – which explained why the initial H&C decision was unreasonable. In this judicial review, counsel for the Applicants pointed out that the two decisions display similar errors within the establishment and BIOC findings. The first officer found in the previous H&C decision that:

- the couple's establishment was diminished by their "failure to abide by Canadian Immigration Laws";
- "children are more resilient and adaptable to changing situations especially at such a young age"; the Officer was "not persuaded that the child would be unable to adapt or reintegrate or that his best interests would be compromised..."; and
- Mr. Singh had transferable skills due to his employment in Canada.

[20] In this second Decision, the Officer found that:

- the couple have a "degree of establishment in Canada," but while "having to return to India may cause them some disruption and anxiety, …they are resilient individuals who possess the ability to adapt to the environment in their home country...";
- given the children's young age, they would be able to assimilate in a new environment; and
- the Applicants have transferable skills and are adaptable individuals.

[21] Given these similar findings, Applicants' counsel found himself experiencing *déjà vu*. Like a boomerang, the same scenario returned, requiring his clients to raise repeat arguments in

this second judicial review application. The boomerang phenomenon occurs from time to time. It has been likened to a game of ping-pong between the Court and decision-maker (e.g. *Mendoza v Canada (Citizenship and Immigration)*, 2014 FC 715 at para 1; *Abeleira v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1008 at para 45).

[22] The boomerang phenomenon should be avoided. It wastes time, money and energy. It saps Court, government, and litigants' resources. It hurts applicants' peace of mind. Indeed, in this case, the Decision put Ms. Shah on the verge of deportation when, shortly after the latest H&C decision, she received a call-in notice for removal from the Canada Border Services Agency [CBSA]. Her counsel resorted to a last-minute request for deferral of deportation, which CBSA refused. Counsel then brought an emergency stay of removal before the Federal Court, which Justice Shore granted. This allowed Ms. Shah to remain in Canada with her two children and husband, and to be present in Court for this judicial review, to hear the following arguments and outcome.

A. *Establishment*

[23] The Officer's analysis regarding the Applicants' establishment in Canada was unreasonable because it turned positive factors that weigh in favour of granting an exemption into a justification for denying it. The Applicants highlight one portion of the establishment analysis as troubling, particularly in light of the errors made in the first H&C decision:

> While I recognize that having to return to India may cause them some disruption and anxiety, I am satisfied that they are resilient individuals who possess the ability to adapt to the environment in their home country after an initial period of adjustment. … While I have given positive consideration to their level of establishment in

> Canada, I find that their ability to assimilate to the environment in Canada demonstrates their ability to assimilate to the environment in their home country.
>
> [Emphasis added.]

To turn positive establishment factors on their head is unreasonable. The officer cannot, as s/he does here, use the Applicants' shield against them as a sword.

[24] This Court has previously criticized the use of such reasoning. In *Sosi v Canada (Citizenship and Immigration)*, 2008 FC 1300 [*Sosi*], the Court found against the officer's statement that "[t]he industriousness of this family also tends to demonstrate a high level of ability to re-integrate back into Kenyan society, especially when considering the prospect of them being reunited with their remaining children on their return" (*Sosi* at para 9). And relying on *Sosi*, Justice Rennie in *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 [*Lauture*]), wrote that "[u]nder the analysis adopted, the more successful, enterprising and civic minded an applicant is while in Canada, the less likely it is that an application under section 25 will succeed" (at para 26).

[25] Effectively, establishment means establishment in Canada. Establishment should be treated as a unique category, separate from other considerations such as the hardship (or lack thereof) an applicant may face upon removal. An officer should assess the establishment factor on its own and determine whether it weighs in favour of or against the application (*Lauture* at para 23).

[26] An officer should not evaluate hardship under the label of "establishment" lest these two factors be amalgamated into one, and the establishment factor be rendered meaningless. As this Court observed in *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at para 35, to do so improperly filters establishment through the lens of hardship.

[27] Including considerations of establishment in Canada when assessing an applicant's hardship upon return does not, by itself, render the Decision unreasonable (*Zhou v Canada (Citizenship and Immigration)*, 2019 FC 163; see also *Brambilla*). Commingling becomes problematic, however, when an officer ascribes positive weight to an applicant's establishment on the one hand but, on the other, uses the positive establishment attributes (resiliency, drive and determination), to attenuate future hardship.

[28] Here, the Officer committed this error by applauding the Applicants' successful ability to assimilate to the Canadian milieu, but then using those positive skills to their detriment, by asserting the ability to adapt and assimilate to the Indian milieu. This use of the positive establishment factor to turn the Applicants' skills against them was precisely the type of reasoning cautioned against by Justice Rennie in *Lauture* above. And the Officer committed a further unreasonable error in using similar logic in the BIOC analysis.

B. *BIOC*

[29] The Officer, once again, took the positive establishment factors of Mr. Singh finding gainful employment to support his family, and Ms. Shah completing her post-secondary

education in the face of difficult circumstances, to assert that they will be able to fare well and adapt to the job market and life in India such that they can provide for their children.

[30] This approach, however, does not truly address the children's best interests. A lack of hardship cannot serve as a valid substitute for a BIOC analysis any more than it can for an establishment analysis. Each factor must be assessed on its own, and be accorded the weight it deserves. The fact that the parents may be able to provide for the children in India does not replace a determination of where their best interests lie.

[31] Even without this problem, the Officer goes on to make two related errors within his BIOC analysis. First, he states that because the two Canadian children are young (one just over one year old, the other about six), they have the ability to assimilate to a new environment. This rationale has been deemed deficient (*Edo-Osagie v Canada (Citizenship and Immigration)*, 2017 FC 1084 at paras 27-29 [*Edo-Osagie*]). Taking the problematic reasoning to its logical conclusion, the younger the child, the less necessary a BIOC analysis becomes, because the greater their adaptability would be.

[32] Second, regarding financial support for the Applicants' two Canadian-born children, as well as Mr. Singh's child in India, the Officer found that although wages are lower in India, so is the cost of living. However, the Officer disregarded evidence to the contrary which Mr. Singh included in his submissions. The Officer failed to acknowledge the evidence that Mr. Singh's occupation would earn 200 Rupees a day, held against the minimum recommended salary of 18,000 Rupees per month. Rather, the Officer's speculation was improperly based on the fact

Mr. Singh had successfully made ends meet in Canada, without any regard for the evidence to the contrary regarding what would await him and his children in India.

[33] In sum, the Officer's BIOC determination was made on assumptions and without regard to the evidence, and ultimately based on the parents' past success in Canada. Officers must be careful to conduct a complete BIOC analysis. The Officer failed to do so in this case. Failing to sufficiently address the children's interests affected by the H&C decision results in an unreasonable decision (*Kanthasamy* at para 39).

IV. Conclusion

[34] As noted at the outset, in the first H&C decision, the officer used positives as negatives. In this second assessment, the Officer was already on notice of that deficiency, and should have been vigilant not to repeat his colleague's error of the double-edged sword. Each factor within an H&C application must be assessed independently. The Officer conflated the factors here, merging establishment with hardship. The same mistake occurred in the BIOC section: what were positives for the best interests of the children became commingled with negatives. The commingling of standalone H&C factors, using positives as negatives once again, fatally flawed this second Decision. This should not come as a surprise, given the information provided to the Officer after the discontinuance of the first litigation.

[35] I will accordingly grant the application and send the matter back for redetermination. I will also refrain from issuing an order for costs given the relevant rules, but make no assurance that the same would occur should the boomerang return anew.

JUDGMENT in IMM-3430-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.
2. The matter is remitted for another redetermination by a different officer.
3. Before issuing a third H&C decision in this matter, the new officer shall review these Reasons, and take them into account in adjudicating the application afresh. The reviewing officer shall also take into account the Applicants' second successful judicial review by reviewing their Memorandum of Fact and Law, provided subsequent to the Respondent's settlement (via discontinuance) of the Applicants' first judicial review.
4. No questions for certification were argued, and I agree none arise.
5. There will be no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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