Federal Court  Cour fédérale

Date: 20120720

Docket: IMM-8474-11

Citation: 2012 FC 918

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, July 20, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

KULWINDER KAUR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review filed under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) from a decision of the immigration officer (the officer), refusing to grant Ms. Kulwinder Kaur (Ms. Kaur) an exemption from the requirement of applying for permanent residence from outside Canada under subsection 25(1) of the IRPA.

[2] For the following reasons, this application for judicial review is dismissed.

II. Facts

[3] Ms. Kaur is a citizen of the Republic of India and is married to Surjit Singh Kandola, who is still living in India. They are the parents of two girls, one of whom is a Canadian citizen.

[4] Ms. Kaur arrived in Canada on December 3, 1996.

[5] She immediately claimed refugee protection; however, her claim was rejected on February 16, 1998.

[6] On November 15, 2010, Ms. Kaur filed an application for a Pre-Removal Risk Assessment (PRRA). Her PRRA application was denied on October 4, 2011.

[7] She then submitted an application for permanent residence on humanitarian and compassionate (H&C) grounds. On October 4, 2011, the officer refused the H&C application.

[8] That decision is the subject of the present application for judicial review.

III. Legislation

[9] Subsection 25(1) of the IRPA states:

25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, 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.	**25.** (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada, 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.

IV. Issue and standard of review

A. Issue

- ***Was the officer's decision refusing to grant Ms. Kaur an exemption under subsection 25(1) of the IRPA reasonable in this instance?***

B. Standard of review

[10] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 62 (*Dunsmuir*), the Supreme Court of Canada found that in an analysis with regard to the applicable standard of review, the first step is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question".

[11] It is well established in the jurisprudence that the decision of an officer is reviewable on a standard of reasonableness (see *Paz v Canada (Minister of Citizenship and Immigration)*, 2009 FC 412 at paragraphs 22 to 25). The Court must consider "the existence of justification, transparency and intelligibility within the decision-making process … [and] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, *supra*, at paragraph 47).

V. Positions of the parties

A. Ms. Kaur's position

[12] Ms. Kaur claims that she has been working since she arrived in Canada and that this has enabled her to amass a considerable amount of savings. In addition, she relies upon the officer's decision, in which it is acknowledged that she has made efforts to integrate into Canadian society.

[13] Ms. Kaur further asserts that the officer failed to consider the disproportionate hardship she would face in India. She noted that she had been detained illegally and had been subjected to mistreatment by the Indian police on the basis of her husband's political affiliations. Ms. Kaur maintains that she would be exposed to the same risks if she were to return to India.

B. Respondent's position

[14] The respondent argues that the officer correctly found that Ms. Kaur has not demonstrated a significant degree of integration into Canadian society. Therefore, applying for permanent residence from outside Canada would not cause her unusual, undeserved or disproportionate hardship. The respondent pointed out that the length of the applicant's stay in Canada and her level of integration, in and of themselves, are insufficient to warrant an exemption under subsection 25(1) of the IRPA (see *Klais v Canada (Minister of Citizenship and Immigration)*, 2004 FC 785 at paragraph 11; and *Lee v Canada (Minister of Citizenship and Immigration)*, 2005 FC 413 at paragraph 9).

[15] The respondent further notes the principle that the assessment of the degree of establishment is a finding of fact, which is entirely within the expertise of the officer. A reviewing court must show deference (see *Mathewa v Canada (Minister of Citizenship and Immigration)*, 2005 FC 914 at paragraph 17 (*Mathewa*)), according to the respondent.

[16] In addition, the respondent asserts that Ms. Kaur invoked the same risks she had claimed before the IRB. She must show that she would face a personalized risk if she were to return to India (*Mathewa*, above). The Court noted, in *Jakhu v Canada (Minister of Citizenship and Immigration)*,

2009 FC 159 at paragraph 27, that "it is insufficient for the applicant to base himself on the objective documentary evidence regarding the situation in a country in general in attempting to establish a risk for himself … [t]he applicant [bears] the onus of establishing a correlation between the particular facts of his case and the objective documentary evidence". In the absence of evidence supporting Ms. Kaur's position, the respondent submits that the officer could reasonably conclude that she would not suffer unusual, underserved or disproportionate hardship if she were to return to India.

VI. Analysis

- ***Was the officer's decision refusing to grant Ms. Kaur an exemption under subsection 25(1) of the IRPA reasonable in this instance?***

[17] The IP 5 Manual applicable to the processing of Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds states as follows with respect to subsection 25(1) of the IRPA:

> The criterion of "unusual, undeserved or disproportionate hardship" has been adopted by the Federal Court in its decisions on Subsection 25(1) de la IRPA, which means that these terms are more than simple guidelines. See *Singh v Canada (Minister of Citizenship and Immigration)*; 2009 Carswell Nat 452; 2009 FC 11.

[18] It was open to the officer to find the evidence submitted by Ms. Kaur to be insufficient and to conclude that she would not suffer unusual, undeserved or disproportionate hardship if she was required to apply for permanent residence from outside Canada. The Court notes that the onus is on

Ms. Kaur to demonstrate that she meets the criteria of the IRPA (*Owusu v Canada (Minister of Citizenship and Immigration)*, [2003] 3 FC 172) in order to be receive the exemption she is seeking.

[19] Ms. Kaur submits that the evidence in the record shows a significant degree of integration. The officer acknowledged that Ms. Kaur's efforts [TRANSLATION] "show a desire to put down roots" in Canada (see Tribunal Record at page 8), however, "it is settled law that the degree of establishment in and of itself is not determinative of an H&C application" (see *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1303 at paragraph 32; and *Singh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 11).

[20] Ms. Kaur claims she would be at risk of persecution if she were to return to India. The officer noted that [TRANSLATION] "in this application for a visa exemption, she repeated the same risk allegations … she provided no evidence from an independent source or explanations corroborating that she would face unusual, underserved or disproportionate hardship on the basis of political opinions attributed to her, membership in a particular social group, or on any other ground, if she were to leave Canada" (see Tribunal Record at page 7).

[21] The Court recognizes that "[t]he weight to be attached or assigned to particular factors or indicators of attachment is discretionary. On a standard of reasonableness, a reviewing court must examine the evidence to determine whether any reasons support the impugned decision. Therefore, it is not our role to re-examine the weight given to the different H&C factors by the Immigration Officer" (see *Williams v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1474 at paragraph 7).

[22] It should also be noted that the decision of the officer "for H&C applications is exceptional and discretionary and serves only to determine whether the granting of an exemption is justified" (see *Gomez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1301 at paragraph 27) and, furthermore, "the purpose of the H&C application is not to re-argue the facts which were originally before the Refugee Board, or to do indirectly what cannot be done directly, i.e., contest the findings of the Refugee Board" (see *Hussain v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 751 at paragraph 12).

[23] Ms. Kaur presented no evidence with regard to the best interests of her children and any harm they might suffer in the event that her application was refused. The Court does note, however, that Ms. Kaur's daughter, Sandeep Kaur, is married and well-established in Canada. She is also a Canadian citizen. As for her other daughter, Navjot Kaur, she is an adult now and is pursuing her university studies in India, where she lives with her father.

[24] Finally, the officer mentioned that Ms. Kaur provided no information about her nephews living in the city of Toronto. It was therefore impossible, according to the officer, to determine whether the best interests of these children could be invoked. The officer noted the following in his decision:

> [TRANSLATION]
>
> "With regard to her nephews in Toronto, she provided neither their names, ages nor how many she had, or any specific information with respect to their health, specific needs or vital interest that would lead one to conclude that their best interests would be adversely affected if she were to return to India. Conversely, her husband and daughter are in India and it is there that she herself used to live. With regard to

> the evidence adduced, I cannot therefore find that she would face unusual, undeserved or disproportionate hardship by having to apply for a permanent resident visa from India" (see Tribunal Record at page 8).

[25] The officer's decision in this case is reasonable and "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at paragraph 47). The officer reasonably determined that Ms. Kaur would not suffer unusual, undeserved or disproportionate hardship if she had return to India to file an application in accordance with the Act.

VII. Conclusion

[26] The officer reasonably found that Ms. Kaur would not suffer unusual, undeserved or disproportionate hardship if she were to return to India. The decision "falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law" (*Dunsmuir*, above, at paragraph 47).

JUDGMENT

THE COURT ORDERS AND ADJUDGES that:

1. the application for judicial review is dismissed; and

2. there is no question of general importance to certify.

"André F.J. Scott"

Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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