Federal Court  Cour fédérale

Date: 20131028

Docket: IMM-10224-12

Citation: 2013 FC 1081

Toronto, Ontario, October 28, 2013

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

SANTOSH PAUL AND
BAHADUR SINGH AHLUWALIA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] In the present Application the Applicants challenge a negative decision rendered by an Immigration Officer (Officer) with respect to their application to be granted permanent residence from within Canada on humanitarian and compassionate considerations pursuant to s. 25 of the *Immigration and Refugee Act* (*IRPA*). The Applicants argue that the Officer ignored the reality of their lives and, therefore, the decision rendered is unreasonable. For the reasons that follow I agree with this argument.

[2] To support the Applicants' application for landing, their Counsel provided the following particulars to the Officer in support of an argument that a positive humanitarian and compassionate decision should be rendered:

> The applicants are an elderly Indian couple; the male is 78 and the female 76. At this advanced age, they are becoming ever more reliant on the support of their children. This is particularly true for the female. In the past, in India they got such support from their elder son, Sushil. However, with his unexpected and tragic death at the age of 49 last January, they no longer have such support. Needless to say the death of their son has impacted the applicants severely. Their remaining two sons, Prit Kamal (PK) and Sunil have brought their parents to Canada, to look after them. The family now hopes to make the parents (and grandparents) stay in Canada with them permanently. While the death of their son still weighs heavily on them, they are much better to deal with it, surrounded by their family, as they are in Canada.
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> The applicants had three sons; two of them have been in Canada since 1996. They are both Canadian citizens, both doing well financially. They have families and children that love and support their grandparents. Prit Kamal (PK) Ahluwalia owns a successful, large and well known Indian restaurant in Toronto's theater district, Dhaba Indian Excellence, employing not only themselves but several others. In 2001 they purchased a condominium in downtown Toronto for $325,000. Clearly it is worth much more ten years later. They also have over $ 200,000 in funds with their bank. The other brother Sunil and his spouse are also well established, and earned just under $96,000 last year, and continue to work for Peel Plastic Products and Gate Gourmet respectively. All their children are doing well and pursuing education in Canada. They are all Canadian.
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> The parents are happy with them, and they are willing and able to support them. The 2 families are ready and willing to sponsor them, but the time needed to finalize the processing of such an application is well over 6 years, this would lead to prolonged periods of separation, which would be very difficult on the parents. In particular in light of their recent tragedy.
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> In light of their advanced years, the applicants wish to spend as much of what remains of their lives, with their children and grandchildren. If they await for a Family Class application to be finalized they would have to wait over 6 years, which they may not have, or which may constitute much of the time they have remaining. Therefore,

> they asks [sic] that they be allowed to remain in Canada, and that this application be granted so that they will not have to return to India, and be separated from their family.
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> (Applicants' Application Record, p. 23)

[3] The whole of the Officer's decision is addressed in the following three-part analysis.

[4] First, with respect to the Applicants' mental state arising from their son's death, the Officer found as follows:

> The applicants state that since their son in India who took care of them, died over two years ago, they were struggling emotionally, physically and mentally as they had no one left to take care of them. I can understand and empathize with the fact that their son in India left a huge emotional whole [sic] for this couple. However, I am not satisfied fully what extent their suffering actually was due to lack of evidence about this. As such, I am not giving much weight to this factor. The applicants still have each other and are not alone. I am not satisfied that they or the family could not find help in India to take care of them on a daily basis. Again, not taking this factor much into account.
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> The submissions contend that remaining to live in the house which they shared with their deceased son was leading them into depression and no desire to live. They also state that living in Canada with family helps them be supported and move on from their son's death. Again, insufficient evidence about their mental state has been demonstrated on this application. The fact that they do not want to live in the same house in understandable, but I am not satisfied that they could not find a new place to dwell especially with the help of their successful son from Canada. Living with their family in Canada could help them but I am not satisfied that having help in India would also not help them. As such, I cannot give much weight to this factor either.
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> [Emphasis added]

I have the following comments about this finding. Having found a huge emotional hole left in the Applicants' lives by the death of their son, and understanding and empathizing with them in their loss, in the very next breath the Officer discounts that very response. Obviously the suffering is the result of the death; on the evidence there is no other emotional factor in play. To say that the Applicants have each other is evidence that the Officer has missed the point of the application, to say the least. The Applicants are together, but in their condition, which the Officer has said is understandable, they critically need the ongoing support of their family in Canada. While the Officer admits that living with their family in Canada could help the Applicants, nevertheless, the Officer seems to believe that there is also similar care available for them in India. Again, this comment misses the point. The application for humanitarian and compassionate consideration is based on evidence that the care the Applicants require to stabilize and improve their lives is only the care of their family in Canada.

[5] Second, with respect to the need to acquire permanent residence on H&C grounds from within Canada rather than from overseas, the Officer found as follows:

> The application also surmises that presently it takes 47 months or 6 years to process parents and grandparents overseas for permanent residence. This they state is a prolonged separation that would be difficult. The fact that it takes that length of time to process parents is a situation that everyone in those circumstances must accept. It is not unique to this couple and it is standard processing time. As this is the regular procedure and timings I am not giving much weight to this factor. The applicants may continue to visit their family in Canada and are eligible to apply for visitor visas to return. I am also satisfied that sufficient evidence has been shown that the family are also financially capable to travel to India to be with their loved ones. As such, not much weight will be put on this factor either.
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> [Emphasis added}

I have the following comments about this finding. The fact that the Applicants are in their late 70's means that they might not be alive to survive the inordinate processing time which the Officer finds is normal. In this respect the Applicants have a special argument that might be described as unique. By expressing the idea that the Applicants' Canadian family can visit the Applicants in India is evidence of a failure on the part of the Officer to recognize the core reason for the making the s. 25 application: it is not about visits, it is about the urgent need to provide permanent residence in Canada.

[6] And third, with respect to the issue of establishment, the Officer found as follows:

> The applicant's [sic] establishment in Canada has also been looked at. The applicants have been here for a little over one year. They are at a retirement age and cannot work. Their family in Canada supports them and they are living in their house. They have two sons and their families who visit them and live with them. I am not satisfied that there is a sufficient level of establishment in Canada that it overcomes the fact that there is a lack of other humanitarian factors.
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> [Emphasis added}

I have the following comment about this finding. While establishment in Canada might be a primary factor in granting an H&C application, it is not a factor in the present case. The Applicants are not maintaining establishment. They are maintaining practical and emotional need for support of their family in Canada. In the passage quoted, the Officer seems to understand the situation at hand, but pays no attention to it. The last sentence in the passage just quoted is evidence that the Officer believes that there is no merit to the arguments presented. What is so very obvious about the Officer's decision is that it is devoid of any sense of compassion.

[7] As is well recognized in the review of decisions under s. 25 of *IRPA*, decision-making by immigration officers is assisted by the Minister's Guidelines which state as follows:

> A positive H&C decision is an exceptional response to a particular set of circumstances. The hardship of having to apply for a permanent resident visa from outside of Canada would pose, in most cases, an unusual and undeserved hardship that was not anticipated by the Act of Regulations. The hardship in most cases is the result of circumstances beyond a person's control. Or, that the hardship would have a disproportionate impact on the applicant due to their personal circumstances.
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> (IP 5 Operational Manual - Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds)

[8] The argument advanced to the Officer in the present case can be identified as one based on unusual, undeserved, and disproportionate impact. In *Damte v Canada (Citizenship and Immigration)*, 2011 FC 1212 at paragraphs 33 and 34, I have expressed what these considerations should mean:

> Thus, the Guideline test requires a subjective as well as an objective evaluation of hardship: unusual hardship might only require an objective analysis, whereas undeserved and disproportionate impact hardship requires both an objective as well as a subjective analysis. A subjective analysis requires that the facts be viewed from an applicant's perspective. In particular, a disproportionate impact analysis must reflect an understanding of the reality of life a person would face, in body and mind, if forced to leave Canada. In my opinion, to be credible in determining these essential features, a decision-maker must apparently, and actually, apply compassion.
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> Applying compassion requires an empathetic approach. This approach is achieved by a decision-maker stepping into the shoes of an applicant and asking the question: how would I feel if I were her or him? In coming to the answer, the decision-maker's heart, as well as analytical mind, must be engaged.

[9] In the end result, because I find that the Officer exhibited a profound misunderstanding of the evidence in reaching the decision under review, I find that the decision is unreasonable.

ORDER

THIS COURT ORDERS that for the reasons provided, the decision under review is set aside and the matter is referred back for redetermination by a different immigration officer. There is no question to certify.

"Douglas R. Campbell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-10224-12

STYLE OF CAUSE: SANTOSH PAUL AND BAHADUR SINGH AHLUWALIA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

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DATE OF HEARING: OCTOBER 24, 2013

REASONS FOR ORDER AND ORDER: CAMPBELL J.

DATED: OCTOBER 28, 2013

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