Federal Court Cour fédérale

Date: 20180515

Docket: IMM-3893-17

Citation: 2018 FC 510

Ottawa, Ontario, May 15, 2018

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

MAHBOOB ARSHAD

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is a judicial review of a refused humanitarian and compassionate [H&C] application made pursuant to section 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Initially, the Applicant applied for sponsorship under the Spouse or Common-law partner in Canada class, but as his wife was ineligible to sponsor him, the sponsorship application was converted into an H&C application. The Minister of Citizenship and Immigration's representative (the Officer) found that the H&C factors did not overcome the criminal inadmissibility and refused the H&C application on August 25, 2017.

II. Background

[3] The Applicant, Mahboob Arshad, is a 41 year old citizen of Pakistan who became a Canadian permanent resident on June 28, 1991. On October 2, 2009, he married a Canadian citizen, Satyam Matravadia, and together they have a son who was born on December 27, 2010. Their seven year old son suffers from congenital heart disease and requires medical services due to attention deficit hyperactivity disorder, oppositional defiant disorder, and autism.

[4] While in Canada, the Applicant was convicted of serious crimes. From 1999 to 2004, the Applicant was convicted of:

- fraud over $5000 contrary to section 380(1) of the *Criminal Code*;
- break and enter contrary to section 348(1)(a) of the *Criminal Code*; and
- possess housebreaking tools contrary to section 351(1) of the *Criminal Code*.

[5] Due to the criminal convictions, the Applicant received a deportation order. He appealed the deportation order, but failed to appear at the hearing which took place on February 1, 2006.

[6] On September 7, 2011, the Applicant was charged and later convicted with assault contrary to section 266 of the *Criminal Code* and death threats contrary to section 264.1(1)(a) of the *Criminal Code*.

[7] What started as a sponsorship application eventually turned into an H&C application. On May 5, 2016, after the Applicant's wife tried to sponsor him, Citizenship and Immigration Canada (CIC) sent a procedural fairness letter to the Applicant explaining that his spouse was ineligible to act as a sponsor because she receives social assistance for their son's medical condition, and that he could submit further information.

[8] On June 2, 2016, the Applicant's counsel responded to the procedural fairness letter and requested H&C consideration. On June 14, 2016, CIC transferred the Applicant's sponsorship application, and sent a letter to the Applicant which explained his sponsorship application was refused and that his H&C application was transferred to the Backlog Reduction Office in Vancouver. CIC sent another letter on June 22, 2016, providing the Applicant with a supplementary information form to fill out. The Applicant filled out and submitted this form on July 5, 2017.

[9] The H&C application was reviewed on August 25, 2017. After reviewing the Applicant's criminal history, establishment, Best Interest of the Child (BIOC), and other H&C factors, the Officer's decision gave "substantial weight to his criminality." In regards to the Applicant's establishment in Canada, the Officer acknowledged he has lived in Canada for 26 years and that he says he had his own business. However, the Applicant submitted no supporting evidence of

establishment. For example, there was no evidence of his schooling, his employment, community involvement, or the existence of his business. He also provided little evidence about his relationship with his family.

[10] The Officer found that the Applicant's contractor skills would allow him to find work in Pakistan where he would not face language barriers because he speaks Punjabi. Additionally, insufficient evidence was led to show his family would not support him while abroad.

[11] The Officer accepted that the Applicant is married to his wife. But the Applicant provided no evidence to show how he supports her or to corroborate his assertion that she suffers from post-traumatic stress disorder and high blood pressure. The Officer found little evidence of the Applicant's financial, physical, and emotional support of his wife and their son. In particular, the Officer found: "All I have before me are vague statements made by the applicant which, as noted above, are not supported with objective evidence." The Officer determined that the Applicant and his wife could maintain their relationship through telephone, letters, or social media, and that his wife could travel to Pakistan to visit him.

[12] The Officer then examined the BIOC. The Officer acknowledged that the Applicant is the biological father and that his son, who suffers from extensive medical problems, needs support from many services. However, insufficient evidence was submitted to show that the benefits would stop upon the Applicant's return to Pakistan.

[13] Overall, the Officer found insufficient evidence of every BIOC submission made by the Applicant. For example, insufficient evidence was provided about the role he plays in his son's life, his daily involvement, or his financial, emotional and physical support. The Officer additionally noted that if removed, the Applicant could communicate with his son through letters, telephone, and social media, and the two could visit together in Pakistan. While the Officer acknowledged the BIOC is an important factor given significant weight, the lack of evidence mitigated against this.

[14] The Applicant's H&C application stated that Pakistan is a death sentence for him because his family has enemies in Pakistan. Again the Officer noted that no corroborating evidence was submitted, and further noted the Applicant has been away from Pakistan for 26 years. After reviewing a 2016 US Department of State Country Report on Human Rights Practices in Pakistan, the Officer found that the Applicant could relocate.

[15] The Officer concluded the Applicant's extreme tendency to reoffend, history of violence, and history of failure to comply outweighed any compelling factors. Thus, on August 25, 2017, the Officer refused the H&C application.

[16] On September 11, 2017, the Applicant applied for judicial review of the decision.

III. Issue

[17] The sole issue on this judicial review is whether the Officer's H&C decision reasonably assessed the BIOC.

IV. Standard of Review

[18] The standard of review of a BIOC is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47, 53, 55, 62; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 52-62; *Kanthasamy v Canada (Minister of Citizenship and Immigration*), 2015 SCC 61 at para 44 [*Kanthasamy*]; *Agraira v Canada (Minister of Public Safety and Emergency Preparedness*), 2013 SCC 36 at para 50).

[19] An H&C application is a fact-driven exercise of discretion, so the Court will afford deference to the decision maker, and not reweigh the evidence (*Pierre v Canada (Minister of Citizenship and Immigration)*, 2010 FC 825 at para 23; *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 12 [*Owusu*]).

V. Analysis

[20] The Applicant submits the decision is not alert, alive, and sensitive to the BIOC.

[21] First, the Applicant's submission is that the Officer's finding of insufficient evidence of his relationship with his son is inconsistent with the evidence before the Officer. He submits evidence of his father-child relationship was contained in reports from a developmental consultant, a psychoeducational consultant, and a pediatrician. Therefore, he submits the Officer unreasonably found there was insufficient evidence. The Applicant also points out that the Officer's decision does not refer to all these reports.

[22] Second, the Applicant's submissions included argument that the decision exclusively weighed his criminal history, and therefore punishes his medically involved son because of his own past transgressions which would be an error. Further at the hearing the Applicant relied on *Lu* at paragraph 47 to say this decision has no line of analysis that leads from the evidence to the conclusion (*Lu v Canada (Minister of Citizenship and Immigration)*, 2016 FC 175 [*Lu*]).

[23] Third, relying on this Court's decision in *Phyang v Canada (Minister of Citizenship and Immigration)*, 2014 FC 81 at paragraph 20, the Applicant argued the Officer must compare the impact of him returning to Pakistan versus staying in Canada. He also says that the Officer should have known from the medical reports that the child could not travel to Pakistan to continue a relationship with father.

[24] At the heart of this decision is the material the Applicant provided in his application. It cannot be overstated in this matter that the onus is on the Applicant to submit relevant evidence and it is not for the Officer to have to mine through the documentation for the jewel that is now presented as being evidence that was not considered. Nor is it the Officer's role to follow "leads" and do further research (*Owusu* at paras 5, 8; *Abdullah v Canada* (*Minister of Citizenship and Immigration)*, 2017 FC 1059 at paras 22-23; *Garraway v Canada (Minister of Citizenship and Immigration)*, 2017 FC 286 at paras 31-33, 46, 55, 57-59).

[25] The Applicant's matter was initially a sponsorship application, but when he was given the opportunity to fill out the H&C application and submit further material he did just that. In his sponsorship application, the Applicant included what was then the current medical evidence of

his child. That medical evidence spoke to the child having had three heart surgeries and included two letters from health professionals. The Applicant's counsel agreed that they were written solely for the purposes of the application and are dated March 4, 2013 and March 6, 2013.

[26] When the sponsorship application later became an H&C application, the Applicant filed further recent and relevant up to date medical evidence about his son. That medical evidence included a report submitted with a letter dated April 7, 2016, from the Peel District School Board by psychoeducational consultant Dr. Kathleen Hicks Ph.D., C. Psych. and a report dated December 15, 2015, by his pediatrician, Dr. Sanjay Bhatia.

[27] These reports were submitted as supplementary information for the H&C application and are noted in the application under heading #10 that deals with the BIOC. It is reproduced below:

> 10. If applicable, considering the best interest of the child, provide information on any child affected by this decision.
>
> My 5 year old son has a complex congenital heart defect (CHD) and has already undergone 3 open heart surgeries. He is extremely attached with me, and I cannot function without my child. Due to constant exposure from birth to morphine and other countless medications, Abdul-Raheem is developmentally delayed and also has been diagnosed with extreme ADHD and ODD (combined type). Due to all these difficulties, he only attends school for 1 hour a day, and has been assigned a respite worker through Peel Children's Centre. In working with the respite worker, we are able to care for Abdul-Raheem so my wife can get a break from tedious child care responsibilities. Please find attached letters from Abdul-Raheem's pediatrician, also a psychoeducational report from the Peel District School Board.

[28] The Officer refers to the information contained in those reports as well as the other evidence provided in paragraph 10. What the Officer does not specifically reference is the older

reports and the surgical notes that were submitted with the earlier sponsorship application. The Applicant argued at the hearing that the Officer's finding that there was insufficient evidence regarding the Applicant's relationship with the son meant that he ignored evidence and that the matter should be sent back.

[29] I do not agree. Given the evidence before the Officer, the decision is well within the spectrum of decisions that could reasonably been made and supported by the evidence. First, none of the comments in the letters concerning the Applicant's involvement in his son's life are reflected in the application itself, in the independent letter from the school district, or the Applicant's current pediatrician.

[30] Second, the evidence specifically referred to is the most recent evidence provided. The Applicant's son was born on December 27, 2010. He was very young when the prior letters were written and had not yet had his final heart surgery. Meanwhile, the reports the Officer heavily relied on were more current and written after the child was assessed over a long period of time when the child was five years and three months old. These reports were independent, not written for immigration purposes, and dealt with the child's current medical care and schooling.

[31] The Officer acknowledged the BIOC "is an important factor and should be given significant weight in the assessment of humanitarian and Compassionate application; however, I am also aware that it is not necessarily a determinative factor" and found that the Applicant's criminal inadmissibly outweighed this and the other H&C factors. As Justice McDonald explained in *Chaudhary v Canada (Minister of Citizenship and Immigration)*, 2018 FC 128 at

paragraph 25 [*Chaudhary*], an officer is entitled to find that criminal history outweighs the positive H&C considerations.

[32] As Justice McDonald further explained in *Chaudhary*, this analysis must take into account the facts of the case (at para 35). When the Certified Tribunal Record (CTR) is reviewed it is hard not to think that more evidence exists then was provided. Repeatedly throughout the decision the Officer determined there was insufficient evidence. For example: the reasons illustrate the Officer considered how the removal would affect his son, but found that there was a lack of evidence that the son's medical treatment would cease upon the Applicant's removal, a lack of evidence that their extended family could not help, and a lack of evidence that the Applicant could not sustain their relationship through other means such as visits abroad, telephone, letters, and social media. Further, there was no medical evidence submitted to corroborate claims about the mother's medical condition to indicate why she could not care for her son without the Applicant. As a result of not submitting evidence, of which the onus is on the Applicant, if there is more to the picture it was not before the Officer to make the decision.

[33] At the hearing it was confirmed that there was no medical evidence that the child could not fly. But the Applicant argued that evidence from the school board report and the pediatrician's report showed that his disruptive behaviour would make it impossible to fly to Pakistan with the child. That argument must fail as that submission was never made to the Officer. It is not the role of the Officer to make diagnoses based on the behaviour identified in a report from the school board on managing educational needs to decide that the child could not fly

to Pakistan. That is far more than would ever be asked of an Officer deciding an H&C determination.

[34] No questions were presented for certification and none arose.

[35] The Respondent's name in the style of cause is incorrect. The correct name is *Minister of Citizenship and Immigration.* The parties agreed and the style of cause will be reflected as such.

JUDGMENT in IMM-3893-17

THIS COURT'S JUDGMENT is that:

1. The Respondent's name in the style of cause will be amended to read: *The Minister of Citizenship and Immigration*;

2. The application is dismissed;

3. No question is certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3893-17
STYLE OF CAUSE:	MAHBOOB ARSHAD v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP
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