

Federal Court



Cour fédérale

Date: 20191218

Docket: IMM-2721-19

Citation: 2019 FC 1638

Toronto, Ontario, December 18, 2019

PRESENT: Mr. Justice Diner

BETWEEN:

AMIT KAMALNAIN BHALLA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] In this judicial review, Mr. Bhalla asserts that the adjudicating officer [Officer] overlooked fundamental components of his application and, in doing so, issued an unreasonable decision. In it, the Officer found insufficient humanitarian and compassionate [H&C] grounds to grant an exemption from the normal requirement to file an application for permanent residence from abroad. After reviewing the written record and counsels' oral submissions, I agree with the Applicant and will therefore grant this judicial review.

I. Background

[2] The Applicant, Mr. Bhalla, is a 31-year-old citizen of India. He and his older brother immigrated to Canada from India in 2000 as accompanying dependants of their parents. His parents, however, separated not long thereafter. Mr. Bhalla lived with his mother and brother. His mother found it very difficult to provide for her boys; the three shared a basement apartment. In addition, Mr. Bhalla was being bullied at elementary school.

[3] Mr. Bhalla states that he experienced loneliness and depression. Due to the demands on her time, including the long working hours required to support her boys and pay the rent, his mother felt unable to tend to his emotional and psychological needs. She reluctantly made the decision to send her son to live with his father (her ex-husband) back in India, removing him from the difficult situation at school.

[4] However, this solution involved a difficult separation for Mr. Bhalla from his mother and brother, with whom he had a close relationship. He remained close with his mother through the years of separation while he lived in India: she apparently travelled regularly to India to visit him, often for extended periods of time.

[5] When his mother was diagnosed with an incurable cancer in 2017, Mr. Bhalla wanted to return to Canada to spend the remaining time with her and care for her. His brother had recently become engaged, and planned to move out of the family residence and in with his fiancée, such that it would become very difficult for him to provide the daily care requirements for his mother.

[6] Mr. Bhalla, having been resident in India from July 2001 to May 2017, failed to comply with the requirement that permanent residents be physically present in Canada for at least two years of the previous five-year period. Because Mr. Bhalla no longer complied with Canada's permanent residency [PR] requirements, the visa office decided not to issue him a travel document (allowing travel from India to Canada) unless he relinquished his PR status. Mr. Bhalla reluctantly did so, feeling he had no choice in the circumstances, and with his mother's prognosis worsening.

[7] Having relinquished his PR status, Mr. Bhalla received a visitor visa. He entered Canada on that visa in May 2017, and has remained in valid status ever since through a series of extensions. Mr. Bhalla cared for his mother for nearly 20 months before she passed away in December 2018 at the age of 63.

[8] In September 2017 – about 15 months before his mother's death – Mr. Bhalla submitted a PR application based on humanitarian and compassionate [H&C] considerations, attempting to regain the status that he had relinquished. This application focused on the need to remain in Canada to care for and spend time with his mother. In his H&C submissions, Mr. Bhalla's counsel wrote that "Amit will continue to lead a positive and productive life in Canada (if relief is granted) but his primary focus at this time is to provide much needed care for his mother and to support her and his older brother during this difficult time."

[9] Indeed, counsel's submissions also noted the importance of reuniting with his brother, which his mother had hoped to witness one day. As counsel explained:

Amit returned to Canada in early May 2017. His mother was ecstatic to see him; his mother had always wanted him to return to Canada and live with her. Amit writes that his mother always felt that it was her biggest mistake sending him back to India in 2001. His mother always wanted Amit to grow up in Canada with his brother, get a good education and have a brighter future. Amit writes that his older brother is helpful and supportive but "he has his own limitations". Saurabh goes to work every day and works hard for the needs and expenses of the family. There is a mortgage on their residence and he is the primary breadwinner.

[Emphasis added.]

[10] In short, Mr. Bhalla's desire to care for and spend his mother's remaining time by her side, after years of separation, formed the basis and focus of the H&C submissions. Nonetheless, other considerations formed an important part of the application, most notably the reunification of the two brothers and the availability of better opportunities in Canada.

[11] On December 11, 2018, Mr. Bhalla's counsel updated the Officer (as he had done intermittently during the processing of the application) in an effort to get a decision rendered. Counsel sent the following email, accompanied by a picture of the mother in the intensive care unit, showing her in a critical state and connected to various machines:

We are writing to inform you that, Mr. Bhalla's mother has been admitted to the Intensive Care Unit (ICU) due to Urospesis. Her doctor has advised that her prognosis is not good and that even if she is able to survive this, her life expectancy will not be more than six months. Please find attached a letter from her hematologist and picture of her in the ICU.

Mr. Bhalla's mother wished for her son to become a permanent resident of Canada and it is her dying wish that be done. We

submitted Mr. Bhalla's PR application under H&C application in September 2017 and that is still in process.

Given these exceptional, unexpected and unforeseen circumstances, a grant of relief under s. 25(1) is warranted.

[Emphasis added.]

Mr. Bhalla's mother died eleven days later.

II. Decision under Review

[12] In the Decision, the Officer determined that Mr. Bhalla had not established himself to a significant degree in Canada while he had permanent resident status: the evidence demonstrated only that he had lived in Canada for the duration of one school year as a 12-year-old boy.

[13] The Officer accepted that Mr. Bhalla was not responsible for the decision to leave Canada, but found that this factor was not determinative. The Officer noted that Mr. Bhalla lost his immigration status because of his failure to comply with the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], and submitted no evidence that health problems prevented compliance or evidence explaining why he did not try, as an adult, to regularize his immigration status.

[14] The Officer then considered Mr. Bhalla's family ties in Canada, which were described as meriting "special attention." Based on support letters submitted by family members in Canada, the Officer found that Mr. Bhalla's care for his mother was "highly beneficial and greatly appreciated" by his family.

[15] Ultimately, the Officer noted that: Mr. Bhalla's mother had died; the H&C was based on providing physical and emotional support to his mother; Mr. Bhalla no longer required an exemption to re-enter Canada (as he did in order to obtain his visitor visa when his mother was sick); and therefore was now able to apply for permanent residence from outside Canada. The Officer further noted that Mr. Bhalla provided documentary evidence of his establishment in India, and as a result would not suffer hardship upon return.

III. Analysis

[16] The sole question before this Court on judicial review is whether the Decision was reasonable. The parties agree that when reviewing an officer's decision to deny H&C relief under subsection 25(1) of the Act, this Court applies the deferential standard of reasonableness (*Cezair v Canada (Citizenship and Immigration)*, 2019 FC 1510 at para 13 [*Cezair*]; *Kanthisamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44 [*Kanthisamy*]).

[17] The Decision is unreasonable in two respects. First, and most importantly, it views the application from a paradigm of hardship, giving short – if any – shrift to the compassionate elements of the application. Indeed, the Officer did not address certain factors raised in the submissions accompanying the H&C application, including the mother's desire to see her boys reunited in Canada, and a brighter future for Mr. Bhalla in Canada. In short, the Officer failed to follow the guidance set out in *Kanthisamy* by elevating hardship above all other factors, including key compassionate elements that were raised not only in the original submissions, but also in follow-up communications sent to the Officer.

[18] As explained above, the Decision rests on the dual considerations that Mr. Bhalla (i) applied on the basis of taking care of his sick mother who has since passed, and (ii) demonstrated strong establishment in India. Both of these factors are clearly underscored by a hardship analysis, in that according to the Decision, there will be no hardship in applying from abroad in the normal course.

[19] That is certainly true, and the Applicant provided no evidence or argument to suggest that he could not apply from abroad. What he did provide, however, was a variety of reasons that the Officer should grant the exemption and exercise the discretion to allow the H&C application.

These reasons included:

- (i) his prior PR status in Canada, and the circumstances that compelled him to lose it, namely being sent home by his mother after her divorce and inability to address his personal difficulties;
- (ii) the reason for relinquishing his status, namely so that he could travel to Canada to be with and care for his ailing mother, and relieve his brother who had job and family responsibilities;
- (iii) the desire to be reunited with his brother in Canada; and
- (iv) the dying wish of his mother.

These were all compassionate elements of the case which, as mentioned above, and were either given short shrift, in the case of items (i) and (ii), or not addressed at all in the Decision in the case of items (iii) and (iv).

[20] Certainly, considering hardship does not invalidate an H&C decision. Indeed, hardship forms an important component thereof. *Kanthisamy* does not excise it from the analysis, and officers cannot thus be faulted for undertaking a legitimate hardship analysis that forms one plank of the H&C edifice. Rather, what the Supreme Court criticizes are shortsighted H&C assessments, being those assessed through the myopic lens of “unusual and undeserved or disproportionate” hardship. Elements that speak to the compassionate part of the assessment must be considered (see Justice Brown’s decisions in *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at paras 29-33; and *Lobjanidze v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1098 at paras 11-12).

[21] When balancing H&C factors, an officer must “substantively consider and weigh all the relevant facts and factors before them” (*Kanthisamy* at para 25, emphasis in original). An officer must place the positive and negative features of an application on the appropriate side of the figurative H&C scale before deciding the outcome. The officer’s job is then to weigh the two sides in deciding whether to grant the exceptional, discretionary remedy (*Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at para 15).

[22] Consequently, when an officer overlooks elements upon which the claim was staked, such as for Mr. Bhalla, the weighting cannot be assessed on the reasonableness standard of review – or any other standard for that matter (see *Cezair* at para 15). The balancing will necessarily be deficient because when a decision is silent on a factor, the reviewing Court cannot know whether the officer would have assigned positive, neutral, or negative weight to that relevant H&C consideration.

[23] Here, Mr. Bhalla's hardship (or the lack thereof), falls to the negative side of the H&C scale, in that the Officer concluded that the Applicant could easily apply from abroad. As the Officer acknowledged, the application involved many positives, including Mr. Bhalla's efforts to care for his mother, relieving family members from that role. However, missing from that positive side of the scale are items (iii) and (iv) above, both of which would likely fall on the compassionate side of the equation.

[24] I am not saying that hardship cannot be assessed alongside other factors – although certainly it is easier when the officer separates the analyses (see *Shackleford v Canada (Citizenship and Immigration)*, 2019 FC 1313 at paras 28-29; *Brambilla v Canada (Citizenship and Immigration)*, 2018 FC 1137 at paras 10-12). Rather, the Officer's error here was overlooking central elements of the application that uniquely invoked compassion rather than hardship – namely family reunification and the dying wish of his mother. Overlooking a mother's dying wish for her children was recently deemed unreasonable in an H&C decision (*Salde v Canada (Citizenship and Immigration)*, 2019 FC 386 [*Salde*]). And unlike the applicants' profiles in *Salde*, Mr. Bhalla previously (i) had prior permanent status in Canada, and (ii) maintained valid temporary status throughout the entire H&C application. Either way, the officer in *Salde* engaged in a selective review of the evidence (at para 23), much like in Mr. Bhalla's case.

[25] As is often said, this Court must not reweigh the evidence; it is the H&C officer's job – rather than the reviewing judge – to determine whether the circumstances would “excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another”

(*Kanthasamy* at para 21, quoting *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338 at 350). As the Officer overlooked central planks of the application, the matter must be reweighed by another officer, not this Court.

[26] I acknowledge that the Officer did consider – at least nominally – the evidence in respect of points (i) and (ii) above regarding Mr. Bhalla’s previous PR and subsequent loss of status. For instance, the Officer expressly reviewed the difficulties Mr. Bhalla faced as a child in Canada – including the harassment at school, financial difficulties and his parents’ separation – and accepted that Mr. Bhalla was not responsible for the decision to leave Canada. However, the Officer dismissed these circumstances by emphasizing Mr. Bhalla’s failure to comply with the Act. An officer engages in a “hollow exercise” when relying on the scheme of the Act to deny H&C applications (*Aboubacar v Canada (Citizenship and Immigration)*, 2014 FC 714 at para 20).

[27] The Officer’s comments that Mr. Bhalla “lost the status that had been granted to him as he did not comply with the requirements of the Act” and “knowingly renounced his permanent resident status” demonstrate a failure to give adequate consideration to the circumstances Mr. Bhalla faced when taking these actions. Mr. Bhalla left Canada as a child in order to escape a difficult situation, and he only renounced his status in order to support his mother through her terminal illness. These compassionate factors appear to have been left out of the equation.

[28] Finally, the Respondent argues that decisions do not have to be perfect, which is a correct statement in the realm of administrative and highly discretionary decision-making. However,

imperfect decisions come in various forms, from those blemished by minor irregularities in structure, to those tainted by major gaps in substance. Those with minor technical or structural gaps that do not impact the reasonability of the outcome should sustain judicial review; those that should not include decisions such as Mr. Bhalla's, which miss central compassionate planks. Such gaps in an application category premised on compassion do not allow the reviewer to know if the scale, properly weighted, would have indicated a positive or negative outcome.

IV. Conclusion

[29] Failing to weigh key compassionate factors, and placing undue weight on a lack of hardship, tends to tip the balance to a refusal. This is precisely what occurred to Mr. Bhalla and, following *Kanhasamy*, is unreasonable. A proper balancing of the H&C considerations – both pro and con – cannot occur without taking into account all of the key factors submitted by an applicant. I will accordingly grant Mr. Bhalla's application for judicial review.

JUDGMENT in IMM-2721-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.
2. The matter will be sent back for redetermination by a different officer.
3. No questions for certification were argued, and I agree none arise.
4. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2721-19

STYLE OF CAUSE: AMIT KAMALNAIN BHALLA V THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

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