Federal Court Cour fédérale

Date: 20220315

Docket: IMM-5451-20

Citation: 2022 FC 339

Toronto, Ontario, March 15, 2022

PRESENT: Mr. Justice Diner

BETWEEN:

KULDEEP SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] The Applicant, a 43-year old citizen of India, began studying the Sikh faith at the age of 14 and became a priest at the Golden Temple in Armistar before being invited to work at a series of temples in Southwestern Ontario beginning in 2007. His wife, their two children, and his mother live in India. The Applicant has worked continuously as a Sikh priest in Canada since 2012. Because of his limited capabilities in English, the Applicant claims not to have the

prerequisites to apply for the Canadian Experience Class or Skilled Worker programs. In January 2019, he applied for an exemption from the requirement to apply for permanent residence from abroad on the basis of humanitarian and compassionate (H&C) grounds. The Applicant now seeks judicial review of the decision refusing his request. For the reasons that follow, I am dismissing his application.

II. H&C Decision under Review

[2] In a decision dated October 16, 2020, a senior immigration officer (the Officer) outlined the legislative and exceptional basis of an H&C application, pursuant to s 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ["*IRPA*"], and addressed (i) establishment; (ii) hardship, and (iii) best interests of the child (BIOC), weighing each of these factors separately.

[3] First, regarding establishment, the Officer considered the support letters and photographs that were submitted and found that they demonstrated the Applicant's stable employment and deep connection to his community, for which positive weight was attributed. Less positive were the Officer's observations regarding limited language competency: the Officer noted the absence of evidence of efforts to improve those skills and that the other routes to permanent residence were unavailable, as claimed. The Officer further pointed out that several of his support letters were largely replicated, with only names and contact information having been changed, which diminished their probative value. Finally, the Officer gave little weight to tax assessments, noting gaps in the years submitted, and insufficient evidence demonstrating the correct reporting. The

Officer concluded that establishment weighed positively in favour of the Applicant, but not significantly so.

[4] Second, regarding hardship, the Officer considered the submissions on resulting financial difficulties for his family members in India, noting proof of some indirect money transfers, but lacking proof of any direct transfers to his family members or proof of needs or of hardship from his wife and children. Regarding the Applicant's claim that his professional contacts in India were lost, resulting in no employment prospects, the Officer found his previous employment and experience suggested the availability of work and capacity to obtain employment, with little to suggest he would be unable to re-establish connections. As for emotional hardship to his congregants, the Officer found he could maintain relationships at a distance and that "there are other priests at the temple and there is no indication of a lack of knowledge or work on their part that would jeopardize the activities of the Temple." Based on these observations, the Officer attributed little weight to hardship resulting from applying for permanent residency abroad.

[5] Third, on BIOC, the Officer considered the Applicant's submissions regarding the youth he assists in Canada. The Officer noted a period of adjustment, but nothing suggesting an absence of other priests who could assist with teachings, in addition to an ability to continue to assist remotely. As for the Applicant's two children in India, the Officer noted the absence of evidence from the family in India, whether relating to their specific needs or what he was providing. The Officer pointed out that reunification may actually benefit his children after their long separation while their father has been away from them in Canada. The Officer gave the BIOC assertions little weight.

[6] Weighing these three considerations, the Officer concluded the Applicant's circumstances did not warrant an H&C exemption. The Applicant now challenges that refusal.

III. Analysis

[7] The Parties agree that reasonableness is the default standard of review that applies to an immigration officer's decision on whether to grant an exemption to permanent residency requirements based on H&C grounds.

[8] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*], which set out a revised framework to determine the standard of review, provides no reason to depart from the reasonableness standard followed in previous case law for H&C review (*Bhalla v. Canada (Citizenship and Immigration)*, 2019 FC 1638 [*Bhalla*] at para 16).

[9] A court conducting reasonableness review scrutinizes the decision maker's decision in search of the hallmarks of reasonableness – justification, transparency and intelligibility – to determine whether it is justified in relation to the relevant factual and legal constraints that brought the decision to bear (*Vavilov*, at para 99). Both the outcome and the reasoning process must be reasonable (*Vavilov*, at para 83).

[10] While H&C decisions are exceptional and highly discretionary, warranting significant deference (*Miyir v. Canada (Citizenship and Immigration)*, 2018 FC 73 at para 12), officers must "substantively consider and weigh all the relevant facts and factors before them" (*Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at para 25, emphasis in

original). Where elements are overlooked, particularly central compassionate planks, the balancing will necessarily be deficient because those gaps in the reasons prevent the Court from knowing whether, if properly considered, the officer would have assigned them positive, negative or neutral weight (*Bhalla*, at paras 21, 28).

[11] The Applicant also raises procedural fairness concerns associated with, what he considers to be, veiled credibility findings made by the Officer, to which he submits he was entitled to respond. As the Federal Court of Appeal has now repeatedly held, questions of procedural fairness are not decided according to any particular standard of review, but rather are legal questions for which the focus ought to be "whether a fair and just process was followed having regard to all the circumstances" (*Osman v. Public Service Alliance of Canada*, 2021 FCA 227 at para 7).

[12] The Applicant raises three separate issues. First, as noted above, he submits the Officer made two credibility findings against him without providing him with an opportunity to respond, (i) with respect to his reported income, and (ii) with respect to the financial assistance provided to his family. Second, he submits the Officer unreasonably speculated on his employment prospects in India. Third, he submits that the Officer unreasonably conflated establishment with hardship. I do not agree, as explained below.

A. *The Officer did not make veiled credibility findings*

[13] Relying on *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 [*Khosa*] at para 43 and *A.B. v. Canada (Citizenship and Immigration)*, 2020 FC 498 at paras 94-95, the

Applicant asserts that the Officer made implicit credibility findings without providing an opportunity to respond, amounting to a breach of procedural fairness.

[14] The Applicant submits that when the Officer pointed out that the Applicant included incomplete tax and banking records in his application, and found this to be insufficient to establish that the correct amount of income had been reported to the CRA, the Officer was alluding that the Applicant had been dishonest in his tax findings.

[15] The Applicant's establishment in Canada was significant to his application and he submits this allusion, without a chance to respond, robbed him of a procedurally fair determination to which he was entitled. The Applicant also submits that by noting that the Applicant's wife, children and family were not the stated recipients on the transfer receipts he provided, the Officer was casting doubt on the evidence that the Applicant provides support for his wife, something to which the Applicant attested in his sworn statement, which is entitled to a presumption of truthfulness.

[16] I am unpersuaded by the Applicant's insistence that these conclusions constitute veiled credibility findings. Rather, both for tax returns, and the transfers to family members, the Officer clearly and repeatedly justified his findings on the basis of an insufficiency of evidence to establish the Applicant's claim.

[17] I cannot agree that there was an allusion in the Decision to any dishonesty in the filing of tax returns. The Applicant asserted in his application that he had a demonstrated history of sound

financial management. In weighing this assertion, the Officer noted that there were gaps in the group of tax assessments that the Applicant chose to submit and that all of the assessments, dating back to 2012, appeared to only have "been processed in 2018, shortly before applying for permanent residency in Canada."

[18] The Applicant does not contest - and it is apparent from the record - that assessments for 2013 and 2016 are indeed missing. Given the incomplete assessments that were included as evidence it was open to the Officer to find that it was unclear whether the Applicant continuously and correctly declared his annual revenue. In light of the identified gaps, this conclusion was reasonable on its face; it made no inference with regard to the missing assessments other than that they could not be taken into consideration. I do not agree with the Applicant that the Officer was making a veiled credibility finding regarding his finances.

[19] Similarly, the Officer did not make a credibility finding - tacit or otherwise - on payments the Applicant sent to his family. Rather, the Officer highlighted the absence of evidence of the family's particular circumstances that could warrant a finding of hardship if the Applicant were to leave Canada. Neither his wife nor children wrote or submitted documentation regarding the financial support needed or given. Instead, the Applicant stated in his statutory declaration in support of his H&C application (i) that he sent money to his wife both directly and indirectly through friends, since it was not always possible for his wife to collect the money, and, (ii) that his family depended on the support he sent for their everyday expenses.

[20] The Officer concluded that while the Applicant had claimed to send support both directly and indirectly to his wife, none of the money transfer receipts indicated a direct transfer, as her name did not appear on any of the receipts, an apparent contradiction between his testimony and the documents he provided in corroboration. However, the Officer also expressed empathy with the Applicant's wife, acknowledging it may not always be easy to collect funds herself.

[21] I cannot agree that the Officer's findings were anything more than statements of fact regarding the application: there was no evidence of direct transfers to the Applicant's wife (rather, only to assorted bank accounts, including the Applicant's) in e-transfer receipts provided. Nor does the Officer appear to disbelieve the Applicant. Rather, the Officer simply notes the lack of supporting documents.

[22] Indeed, the Officer states that while the amounts transferred could be considered significant, the Applicant provided no evidence of his family's particular circumstances, needs, or uses of the transfers.

[23] The Applicant invokes the presumption of truthfulness that attaches to sworn testimony (*Maldonado v. Canada (Minister of Employment & Immigration)*, [1980] 2 F.C. 302, 1 A.C.W.S. (2d) 167 [*Maldonado*] at para 5). However, *Maldonado*, and all the subsequent cases the Applicant cited in his written submissions in support of this principle, concerned either refugee claims or pre-removal risk assessments (*Shafi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 714; *Cho v. Canada (Citizenship and Immigration)*, 2010 FC 1299; *Bozik v. Canada (Citizenship and Immigration)*, 2017 FC 961; *Ibrahim v. Canada (Citizenship*

and Immigration), 2014 FC 837; *I.I. v. Canada (Citizenship and Immigration)*, 2009 FC 892; *Whudne v. Canada (Citizenship and Immigration)*, 2016 FC 1033; *Shaiq v. Canada (Citizenship and Immigration)*, 2009 FC 149; *Dundar v. Canada (Citizenship and Immigration)*, 2007 FC 1026), where the claimant's burden of proof, and the evidence that can reasonably be required in support is not the same as in an H&C application.

[24] There are material differences between an inland H&C application, and a claim in the refugee context, from which *Maldonado* originated, for which some comment is warranted here. I will summarize three of the primary differences, relating to (i) purpose, (ii) context and (iii) process.

[25] First, the purpose of refugee claims is to provide safe haven from persecution or protection from danger of torture or cruel and unusual punishment. Refugees, by definition, must claim status outside of their country of nationality; they have no choice (*Convention relating to the Status of Refugees*, July 28, 1951, 189 UNTS 137,Art 1; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984., 1465 UNTS 85, Art 1; *IRPA*, ss 96-97; Lorne Waldman, *The Definition of Convention Refugee*, 2nd ed (Toronto: LexisNexis, 2019) at 1-2.).

[26] Inland H&C applicants, on the other hand, are applying for a special exemption from the usual requirement to apply for immigration status from abroad, doing so instead from within Canada under s 25 of the *IRPA*. It is well-recognized that H&C claims are exceptional and not

meant to be treated as an alternative immigration stream or an appeal for failed refugee claimants (*Kanthasamy*, at para 40).

[27] Rather, the purpose of H&C applications, explored in depth by the Supreme Court in *Kanthasamy*, is to provide equitable relief allowing for an exemption to the regular requirement to apply from abroad, where the Minister is "of the opinion that it is justified by [H&C] considerations relating to the foreign national" (*IRPA*, s 25; *Kanthasamy*, at para 10). As the legislature has made explicit with s 25(1.3) of the *IRPA*, the Minister may not consider the factors relevant to ss 96 and 97 claims, and must instead "consider elements related to the hardships that affect the foreign national."

[28] Second, context is at the essence of both the refugee and H&C pathways to permanent residency. In the former, claimants are fleeing persecution or danger to their lives. They often lack the time and or the ability to gather evidence of the risks they have left behind, often carrying only their bare essentials with them. They may not have the time or the capacity to gather and carry photographs, letters, identity papers, arrest warrants, and the like. Even if they had time to gather documentation, carrying such evidence may only further endanger their lives during encounters with authorities in their flight to Canada.

[29] Similar obstacles may arise for those who claim status in Canada under a *sur place* claim, because the risk arises after the claimants have departed and when they are no longer in their country to obtain documentation. Accordingly, procedural safeguards are required to ensure that

a requirement for corroboration does not put claimants in an impossible situation (*Senadheerage v. Canada (Citizenship and Immigration)*, 2020 FC 968 at paras 24-36).

[30] H&C applicants, on the other hand, have often spent some time in Canada, and are thus more able to gather and document their case, and often do not share the same evidentiary challenges as refugees, given the different factors associated with making a successful claim. Many H&C applicants have failed in their refugee claims, and must convince an H&C officer to exempt them from normal processing requirements based on factors including establishment in Canada, hardship and BIOC. This brings me to the third distinction: process.

[31] The process for an in-Canada refugee claim, as prescribed by the *IRPA*, the *Immigration and Refugee Protection Regulations*, SOR/2002-227 and the *Refugee Protection Division Rules*, SOR/2012-256, consists of numerous pre-hearing steps, the completion of forms including a detailed narrative, submission of written evidence, and ultimately, the oral hearing. Ever since *Singh v. Minister of Employment and Immigration*, [1985] 1 SCR 177, an oral hearing has been mandated for refugee claimants.

[32] Refugee hearings before the IRB consist of a robust process, described by the Court of Appeal as inquisitorial (*Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198 at para 29), which allows for testing of oral evidence, and gaps in written evidence. The content of the duty procedural fairness to which refugee claimants are entitled is significant throughout the process (see *Baker v. Canada (Minister of Citizenship and*

Immigration), [1999] 2 SCR. 817 at paras 21-28 for the relevant factors to determine the content of the flexible and variable duty of procedural fairness in differing contexts).

[33] This stands in contrast to H&C applications, which have more relaxed requirements on the administrative decision-making spectrum, with a paper-based process, significant discretion afforded to officers, and a correspondingly reduced expectation as to the content of the duty of procedural fairness compared to a more participatory judicial process (*Baker* at paras 23-27, 31-34). H&C applicants are not entitled to expect an interview, and claimants bear the onus of including pertinent and sufficient evidence to support their submissions (*Baker*, at para 34; *Singh v. Canada (Citizenship and Immigration*), 2022 FC 339 at paras 24-27; *Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 [*Owusu*] at para 8-9).

[34] Accordingly, where a particular assertion is central to an application, and where it is reasonable for an H&C officer to expect that it be accompanied by additional details or corroboration under the circumstances, even a sworn statement may be held to be insufficient, in spite of the presumption of truthfulness and without necessarily constituting a credibility finding (see *Yang v. Canada (Citizenship and Immigration)*, 2018 FC 296 at paras 69, 74; also see *Lin v. Canada (Citizenship and Immigration*), 2022 FC 341 at paras 28-29).

[35] The quantity and quality of evidence required to substantiate an assertion will vary from case to case and across the different categories of immigration law. Fact-finders deciding these applications are entitled to significant deference where findings of sufficiency are concerned, so

long as they are explained, and not used as a disguised means of making credibility findings (*Magonza v. Canada (Citizenship and Immigration*), 2019 FC 14 at para 35).

[36] That a claimant graduated from university, or possesses certain language competencies, for example, are facts for which sufficiency concerns will be subject to different levels of stringency in a work or study permit application, as compared to an asylum claim, depending on the nature of the immigration application and the importance of the fact itself, in the context; each context is unique and must be considered in its own light. In the H&C context, where evidence that could reasonably be expected is unavailable - in this case evidence of hardship - it falls to the claimant to provide an explanation, at the outset, of why it was not possible to include such evidence in the application.

[37] H&C applicants must put their best foot forward, since it is not the role of the Officer to fill in the blanks of an application (*Brambilla v. Canada (Citizenship and Immigration)*, 2018 FC 1137 at para 19; *Lin* at para 22). Failure to do so is at their own peril (*Owusu*, at para 8).

[38] Having reviewed three of the major differences between in-Canada refugee claims and H&C applications, I would note also that *Vavilov* compels this Court on judicial review to recall that reasonableness "takes its colour from the context" and that each decision must be considered and evaluated in its own unique light (*Vavilov*, paras 89-90).

[39] Here, after spending years in Canada with ample time to submit sufficient evidence speaking to the hardship that will be visited on the Applicant's family if he returns to them in

India, I find the Officer's rationale to be reasonable. The Officer highlighted that the Applicant's claim that his family depended on support he provided for their everyday expenses was not supported by any letters from his wife or children, education records, or any information or evidence whatsoever of their needs or circumstances. Consequently, the Officer concluded the evidence was insufficient to establish they would suffer hardship as a result of his return to India.

[40] This conclusion was open to the Officer, particularly since it was reasonable to expect that objective or corroborative evidence of the family's needs ought to have been easily accessible and simply was not provided. It was not the Officer's role to fill in the blanks in the application.

[41] Thus, in the unique circumstances of the present case, and despite the Applicant's sworn statement that his family in India depend on his support, I am unable to agree that the Officer's conclusion was a veiled credibility finding, that an oral hearing was required, or that any breach of procedural unfairness occurred. I am satisfied that a fair and just process was followed.

B. *The employment findings were reasonable*

[42] The Applicant submits that the Officer's findings with regard to his employment prospects were speculative and that the Officer summarily dismissed the evidence that it would be difficult for him to find work in India, where he has lost his professional contacts after ceasing to work there since 2012. I cannot agree.

[43] The Officer specifically acknowledged that the Applicant had lost touch with his professional contacts in India, but noted his previous work in several temples there, including the Golden Temple in Armistar, suggested both the availability of work in his native India, and his capacity to find work, given his significant background in the clergy. The Officer also found no evidence to suggest the Applicant would be unwilling or unable to re-establish connections and obtain such work again in the future, particularly in light of his familiarity with Indian culture, language and traditions, in addition to his Canadian work experience.

[44] The Applicant may disagree with the Officer's evaluation of the evidence, but far from conjecture, the Officer's conclusions were a reasonable inference based on an assessment of the evidence submitted, namely the Applicant's successful and continuous record of employment as a religious leader in India and Canada up to this point. Much like with the prior finding criticized by the Applicant, his assertion regarding the difficulty he was likely to face finding employment, which was his onus to establish, also lacked any supporting documents (*Latif v. Canada (Public Safety and Emergency Preparedness)*, 2020 FC 104 at para 68).

[45] Without having provided anything more in terms of evidence to support his contention that he would be unable to find similar work in India, other than his opinion, it was rational and justified for the Officer to conclude as he did. Again, there is a difference between an officer simply accepting all statements of an Applicant absent any substantiation or corroboration, and disbelieving or finding an applicant not to be credible: (*Ferguson v. Canada (Citizenship and Immigration)*, 2008 FC 1067 at paras 26-28; *Lin*, at para 33-36).

C. *Establishment findings were reasonable*

[46] Finally, the Applicant contends that it was unreasonable for the Officer to conclude that the Applicant could continue to provide religious instruction remotely if he were to leave Canada, and to focus exclusively on hardship. According to the Applicant, the Officer failed to assess broader humanitarian considerations aside from hardship, which is a reviewable error, consistent with *Kanthasamy,* at para 47, and subsequent Federal Court jurisprudence (see for instance *Osun v. Canada (Citizenship and Immigration)*, 2020 FC 295 at para 19; *Marshall v. Canada (Citizenship and Immigration)*, 2017 FC 72 at paras 33-37).

[47] While I accept the undeniable importance, abundantly supported by the jurisprudence of this Court, of assessing broad humanitarian and compassionate considerations separately from hardship, I am unable to agree with the Applicant's submission that the Officer in this case failed to do so.

[48] Rather, the Officer divided the considerations that were assessed into three separate sections of the decision, namely (i) personal circumstances and establishment, (ii) hardship, and (iii) best interests of the child. Each of these three considerations was assessed in turn and accorded its own weight. The Officer assessed the Applicant's establishment in Canada separately, attributing positive weight to the Applicant's time spent in Canada, continuous employment and, specifically, his deep community involvement. Regarding BIOC, the Officer also noted that the Applicant, his two children aged 13 and 14, along with his wife would benefit

from the opportunity to spend time together (which, as an aside, I also find to be a justifiable conclusion).

[49] The challenged finding regarding virtual communication with his community is in the subsequent hardship section of the Decision, which was in direct response to the Applicant's arguments that he would face hardship if he were forced to abandon his religious duties in Canada. As such, it is simply inaccurate to state that the Officer failed to assess broader humanitarian considerations, aside from hardship. The hardship of his departure was considered separately from establishment, and the two were not conflated. I cannot agree that the Officer viewed establishment through the lens of hardship here.

IV. Conclusion

[50] Having found the Officer's conclusions to have been clearly based on an insufficiency of evidence, and not on credibility, I am satisfied that a fair and just process was followed having regard to all the circumstances. I also find that the other elements of the Officer's decision, and underlying rationale, to be reasonable.

JUDGMENT in file IMM-5451-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. The parties raised no questions for certification and I agree that none arise.
3. No costs will be issued.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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