Federal Court  Cour fédérale

Date: 20220427

Docket: IMM-3592-21

Citation: 2022 FC 618

Ottawa, Ontario, April 27, 2022

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

ZAHEER AHMED

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of a Senior Immigration Officer of the Human Migration and Integrity Division of Immigration, Refugees, and Citizenship Canada (the "Officer"), dated December 21, 2020. The Officer refused the Applicant's application for permanent residence from within Canada on humanitarian and compassionate (H&C) grounds

(the "Decision") pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "*Act*").

II. Background

[2] The Applicant, Zaheer Ahmed, is a 60-year-old male citizen of Pakistan. He is a Shia Muslim.

[3] On or about November 5, 2002, the Applicant arrived in Canada and made a claim for refugee protection on the basis that he feared persecution on the ground of his religion. In February 2004, the Refugee Protection Division of the Immigration and Refugee Board of Canada refused the Applicant's refugee claim finding that he could access adequate state protection in Pakistan. The Applicant did not seek leave for judicial review of his refugee claim refusal.

[4] In May 2005, the Applicant married his current spouse (a Canadian citizen who he met in 2002) who sponsored him in Canada until he was granted permanent resident status on December 20, 2008.

[5] The Applicant's spouse has three children in Canada from a previous marriage (currently aged 31, 29, and 26), who the Applicant considers his stepsons. The Applicant also has four biological children from a previous marriage (ages unknown, who he speaks to regularly on the phone) and siblings, all in Pakistan. The Applicant's previous spouse is deceased.

[6] In the summer of 2009, two of the Applicant's stepsons alleged that they were sexually assaulted by an uncle in Canada. Charges were brought against the uncle; however, threats from the uncle and family in Pakistan and in Canada led to the charges being withdrawn.

[7] As a result of circumstances surrounding the foregoing, on December 1, 2010, the Applicant was convicted of public mischief and obstruction of justice and sentenced to 67-day pre-sentence custody, two 90-day intermittent sentences to be served concurrently, two three-year probations to be served concurrently, and a discretionary prohibition order for ten years.

[8] The Applicant has also been the subject of several other convictions as follows:

i. An undisclosed charge and conviction for which he was on bail (which he breached the conditions of) in 2010;

ii. April 19, 2011: public mischief and failure to comply with recognizance for which he received a conditional sentence of nine months;

iii. June 27, 2011: attempt to commit obstruction of justice for which he received a 90-day intermittent sentence and 36-month probation;

iv. July 19, 2013: impaired driving for which he was prohibited from driving for two years and fined $4000;

v. December 23, 2013: two charges of possession of property obtained by crime over $5000 for which he was given a 12-month conditional sentence on each charge and 12-month probation;

vi. January 12, 2017: assault and uttering threats for which he was given a conditional discharge and 18-month probation;

vii. September 2019: sexual assault and uttering death threats for which he was given a conditional discharge and a 12-month conditional sentence; and

viii. October 2019: impaired driving for which he was fined and given a one-year probation.

[9] In June 2012, a report was prepared pursuant to subsection 44(1) of the *Act* finding that there were reasonable grounds to believe that the Applicant was inadmissible on grounds of serious criminality for receiving a conditional sentence of more than six months according to paragraph 36(1)(a) of the *Act*, in respect to the April 2011 conviction. As a result, on May 7, 2014, a deportation order was issued and the Applicant lost his permanent residence status.

[10] On June 18, 2014, the Applicant submitted a Pre-Removal Risk Assessment (PRRA) application followed by submissions dated December 5, 2014 and April 11, 2018. On December 21, 2020, the Applicant's PRRA was refused by the Officer. The Applicant has been granted leave for judicial review of the refusal of his PRRA application in file no. IMM-3742-21.

[11] In light of the inadmissibility finding and the loss of his permanent resident status, on December 23, 2014, the Applicant filed an H&C application seeking an exemption from the requirements of the *Act* to facilitate the processing of his application for permanent residence from within Canada. The Applicant sought H&C relief on the following grounds:

i. His establishment in Canada;

ii. The best interests of his three stepchildren; and

iii. The risk and adverse country conditions that he would face upon removal to Pakistan, including fears of discrimination as a Shia Muslim and retaliation from his stepsons' uncle's family in Pakistan.

[12] The Officer refused the Applicant's H&C application in a Decision dated December 21, 2020, communicated to the Applicant on May 17, 2021. The Applicant seeks an order quashing the Officer's Decision and remitting the matter to a different officer for reconsideration.

III. Decision Under Review

[13] After considering all of the evidence that was presented by the Applicant, including evidence and submissions with respect to the circumstances brought forward by the Applicant for his H&C application and PRRA application, the Officer was not satisfied that the H&C considerations before them justified an exemption under subsection 25(1) of the *Act* and they refused the Applicant's H&C application.

A. *Establishment in Canada*

[14] The Officer gave some weight to the Applicant's degree of establishment based on the following:

i. The Applicant has lived in Canada for a significant period of time – approximately 18 years at the time of the Decision;

ii. Separation of the Applicant from his spouse would undoubtedly be difficult but was only one factor in the global assessment. In addition, the Applicant's spouse was in Pakistan for a period of two years from 2010 to 2012 and there was insufficient evidence of how this separation affected the relationship. Therefore, the Officer was not satisfied that the Applicant and his spouse could not maintain their relationship from a distance;

iii. The Applicant has provided evidence of his connections and contributions to his religious community;

iv. The Applicant stated that he has worked for many years and is able to support his families in both Canada and Pakistan with his car rental business. Yet the Officer noted a lack of objective evidence of the Applicant's business and financial management; and

v. The Applicant stated that he is the primary supporter of his family and his spouse does not work outside the home. Yet the Officer noted that one of his stepsons is the owner/manager of the car rental business and would be able to ensure that the Applicant's spouse was financially supported.

B. *Best Interests of the Children*

[15] The Officer found that the best interests of the Applicant's three stepchildren (aged 24, 27, and 29 at the time of the Decision) was a minor factor in his H&C application. While the Officer noted that the Applicant has provided ongoing and meaningful support to his stepsons, they are all young adults and independent – not children.

[16] The Officer did not discount the Applicant's relationship with his stepsons, but found that there was insufficient evidence that the Applicant's return to Pakistan would adversely affect the stepsons to a degree that an exemption was warranted.

C. *Risk and Adverse Country Conditions*

[17] The Officer gave the factor of risk and adverse country conditions some weight but was not satisfied that sufficient evidence was presented to warrant an exemption, noting the following:

i. The Applicant stated that as a Shia Muslim he would face discrimination and secular violence should he return to Pakistan. Yet the Applicant returned to Pakistan in 2012 (as did his spouse in 2010 for a period of two years) and insufficient evidence was provided as to how country conditions adversely affected them while in Pakistan;

ii. The Applicant stated that he has several medical conditions and that returning to Pakistan would compromise his health due to adequate services. However, the Officer noted that the Applicant's four children and siblings continue to live in Pakistan and insufficient evidence was provided as to how adverse country

conditions affected their safety, security, sense of wellbeing, or access to employment and health care; and

iii. While the Officer had sympathy for the difficult situation, the Applicant's criminal record and the circumstances surrounding the charges (*i.e.* the family dispute) did not weigh in favour of the Applicant's H&C application. The Officer also noted the outstanding (at the time of the Decision) charges in 2019 for which the Applicant failed to provide any submissions or updates.

IV. Issues

[18] The issue is whether the Officer's Decision was reasonable.

V. Standard of Review

[19] The standard of review is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paragraph 25).

VI. Analysis

[20] Subsection 11(1) of the *Act* requires foreign nationals to apply for a visa before entering Canada. Subsection 25(1) of the *Act* provides the Minister of Immigration, Refugees, and Citizenship (the "Minister") the discretionary authority to exempt foreign nationals from the requirement under subsection 11(1) if it is justified on the basis of H&C considerations.

[21] The Applicant bears the onus of establishing that H&C relief is warranted and that their personal circumstances are such that having to go outside of Canada to apply for a visa would cause a degree of hardship that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another" (*Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61[*Kanthasamy*] at paragraph 21). The presence of *some* degree of hardship does not necessarily mean that an H&C application will be successful (*Kanthasamy* at paragraph 23).

[22] The application of the "unusual and undeserved or disproportionate hardship" standard (as set out in the Minister's Guidelines) is supported by a non-exhaustive list of factors, such as establishment in Canada, ties to Canada, the best interests of any children affected by their application, factors in their country of origin, health considerations, consequences of the separation of relatives, and any other relevant factors. Relevant considerations are to be weighed cumulatively as part of the determination of whether relief is justified in the circumstances and should not fetter the immigration officer's discretion to consider all relevant factors (*Kanthasamy* at paragraphs to 27 to 33).

[23] In addition, a decision under subsection 25(1) will be found unreasonable if the interests of children affected by the decision are not sufficiently considered. A decision-maker must do more than simply state that the interests of a child have been taken into account; those interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence (*Kanthasamay* at paragraph 39). The "best interests" principle applies to all children under 18 years of age (*Kanthasamy* at paragraph 34).

[24] Absent H&C relief, the Applicant would be required to apply for permanent residence in Canada from Pakistan.

[25] The Applicant argues that the Decision was unreasonable because the Officer made the following errors:

i. The Officer's determination that the Applicant and his spouse would not suffer sufficient hardship was predicated on the erroneous factual finding that they endured a two-year separation;

ii. The Officer adopted an unreasonable segmented and "shifting" approach to H&C relief which is fatal to the transparency and intelligibility of the Decision;

iii. The Officer applies an impermissibly high threshold for H&C relief as demonstrated by the finding that the Applicant's spouse will not be "destitute" if the Applicant returns to Pakistan and that the circumstances in Pakistan are not so "dire";

iv. The Officer failed to engage with core arguments and evidence concerning the hardship the Applicant would face due to adverse country conditions and mitigating circumstances surrounding the Applicant's criminal history; and

v. The Officer failed to justify various findings that evidence provided by the Applicant was insufficient.

[26] The Respondent's position is that the Decision was reasonable and the Officer's assessment was commensurate with the evidence provided and the purpose of section 25 of the *Act*.

[27] A decision may be rendered unreasonable where an officer makes material factual errors that result in important and sufficient adverse conclusions (*Kazembe v. Canada (Citizenship and Immigration)*, 2020 FC 856 at paragraphs 20 to 23).

[28] The Officer gave weight to the Applicant's marriage and noted that a separation between the Applicant and spouse would be undoubtedly difficult. However, the Officer also highlighted that family unification was only one factor in the global assessment. The Officer then stated:

> I further note, based on the statement made by the spouse appears she travelled to Pakistan in 2010 and returned to Canada approximately two years later and insufficient evidence was provided as to how this long separation affected their relationship. As such I am not satisfied the applicant and his spouse could not find other means to maintain their relationship from a distance.

[29] It appears that the Officer may have erred in finding that the Applicant's spouse was in Pakistan from 2010 to 2012 – when she may actually have made two separate months' long trips to Pakistan in 2010 and 2012 – and thus erroneously inferred that the Applicant and his spouse could maintain a long distance relationship should the Applicant return to Pakistan.

[30] The Officer's erroneous factual finding does not appear to be material to the Decision. The Officer gave the Applicant's marriage weight and noted that this was only one factor in their Decision. In addition, the erroneous finding appears to be a supplemental comment to highlight

potential means available to mitigate any hardship the Applicant and his spouse may face upon their separation.

[31] In addition, I find that the Officer did not unreasonably segment or "silo" their Decision. The Officer assessed each of the H&C factors brought forward by the Applicant and noted the weight afforded to each, finding that, upon global assessment of all the submissions and evidence, that an H&C exemption was not warranted in the Applicant's circumstances. The Officer did not simply recite facts without any analysis or weighing of those facts (*Senay v. Canada (Citizenship and Immigration)*, 2021 FC 200 at paragraphs 34 and 41 to 42).

[32] Furthermore, I do not find that the Officer applied an incorrect or elevated standard (*Aupura v. Canada (Citizenship and Immigration*, 2018 FC 762 at paragraph 23). As stated above, H&C relief is an exceptional form of relief that may be provided to those applicants who bring evidence to demonstrate that such relief is warranted based on their personal factors and circumstances that rise to a sufficient magnitude to invoke subsection 25(1) of the *Act*.

[33] To this point, Justice Zinn in *Zhang v. Canada (Citizenship and Immigration)*, 2021 FC 1482 [*Zhang*] at paragraph 23 states:

> There is a significant difference between observing that this exceptional relief is provided for <u>because</u> the personal circumstances of some are such that deportation falls with more force on them than others, and stating that the relief is available <u>only to those who demonstrate</u> the existence of misfortunes or other circumstances that are <u>exceptional relative to others</u>. The first explains why the exemption is there, while the second purports to identify those who may benefit from the exemption. The second imports a condition into the exception that is not there. [Emphasis in original].

[34] The Officer's use of the words "dire" and "destitute" were used in the context of evaluating whether the Applicant's personal circumstances are such that his removal would "fall with more force" on him such that the exceptional H&C relief provided for under subsection 25(1) of the *Act* was warranted, not that they were exceptional when compared to others (*Usiayo v. Canada (Citizenship and Immigration)*, 2022 FC 509 at paragraphs 19 to 22).

[35] While it is not expected that a decision maker respond to every argument and piece of evidence, the "failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it" (*Thapachetri v. Canada (Citizenship and Immigration)*, 2020 FC 600 at paragraphs 21 to 23, citing *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 25). In addition, findings of insufficiency of evidence must be explained with the consideration of the evidence on the record or by providing a rationale for the finding (*Sarker v. Canada (Citizenship and Immigration)*, 2020 FC 154 at paragraph 11).

[36] I find that the Officer unreasonably failed to engage with certain core arguments and evidence, and failed to justify various findings that evidence provided by the Applicant was insufficient, given the following:

i. The Applicant made extensive submissions in respect to the hardship that the Applicant would suffer in Pakistan due to his health conditions and lack of availability of care, as well as the discrimination and violence against Shia Muslims. It is not clear from the Decision what evidence the Officer engaged with on these points or why it proved

insufficient. The Officer failed to engage with the evidence that the Applicant and his spouse felt unable to leave their residence or faced threats, respectively, during their visits to Pakistan upon the deaths of immediate family.

ii. Moreover, how the adverse country conditions affect the Applicant's family are not relevant and appear to stray into an unreasonable, lack of transparent decision.

[37] While I do find that the Officer reasonably engaged with the factor of the best interests of the children and the Applicant's criminal record, their lack of transparent, intelligible engagement with the core hardship and adverse country condition arguments and insufficiency of evidence renders the Decision unreasonable.

JUDGMENT in IMM-3592-21

THIS COURT'S JUDGMENT is that

1. The application is allowed and the matter is referred to a different officer for reconsideration.
2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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