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Dockets: IMM-3226-07
IMM-3227-07

Citation: 2008 FC 412

Montréal, Quebec, April 7, 2008

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

NAVEED AKRAM CHOUDHARY
SAFIA NAVEED

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants apply for judicial review of two negative decisions rendered by the same PRRA officer:

a. The first decision, dated May 28, 2007, in file IMM-3226-07, concerns an application for permanent residence from within Canada on humanitarian and compassionate (H & C) grounds and a request for an exemption from the requirement to obtain a permanent resident visa prior to coming to Canada (subsection 11(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27

(the *Act*)). The application is rejected by the H & C officer (the officer) on the basis of insufficient H & C grounds to justify an exemption under subsection 25(1) of the *Act*;

b. The second decision rendered on May 29, 2007, in file IMM-3227-07, concerns the assessment of a pre-removal risk (PRRA) application. The PRRA officer (the officer) concludes in his decision that the applicants have not discharged themselves of their burden to prove, on a balance of probabilities, that they are not at risk for one of the reasons in paragraph 97(1)(*a*) or (*b*) of the *Act* should they return to Pakistan, their country of nationality or habitual residence.

[2] At the applicants' request and by decision of this Court both files have been joined and were heard jointly. The present judgment will therefore address both applications with respect to the date of the decisions in review.

Facts

[3] The applicant Choudhary and his wife Safia Naveed are both citizens of Pakistan. Mr. Choudhary was active in the Shia Muslim community and claims that he was targeted by the Sunni extremist group Sipah-e-Sahaba (SSP) for speaking out against fundamentalist violence and terrorism. The applicants allege that they were attacked several times, but that the police did not do anything to help them.

[4] On February 14, 2002, the police allegedly came to arrest Mr. Choudhary at the applicants' home in their absence. He claims that they informed his father that a complaint had been filed against him for publicly insulting the Sunni faith, resulting in a criminal charge of blasphemy.

[5] Forced to leave their son behind, as travel arrangements could not be made for him, the couple fled to Canada via the United States in March 2002, arrived on April 14, 2002, and claimed refugee status on April 15, 2002.

[6] The applicants' refugee claim was dismissed by the Refugee Protection Division (RPD) on December 14, 2002 on the basis that they did not credibly establish their identities and thus their entire story was not credible.

[7] This Court rejected, on March 24, 2005, their application for leave to have the decision of the RPD judicially reviewed and a request to reopen their claim with further documentation was rejected on July 8, 2005 by the RPD.

[8] The applicants then filed on November 16, 2006, for a PRRA and on December 27, 2006, for a waiver of immigrant visa requirements based on humanitarian and compassionate (H & C) grounds. Both were refused by the same officer in late May 2007.

[9] The applicants claim their son left behind was kidnapped on November 2, 2006 and would still be missing. They also allege that a "fatwa" (*warrant for arrest*) was issued against the applicant

Choudhary pursuant to the criminal charge of blasphemy. Ms. Naveed's claim of risk is based on that of her husband.

[10] The couple have three young Canadian-born children and Mr. Choudhary obtained full-time work only for a brief period before their H & C hearing.

[11] On November 16, 2006, the applicants submitted their PRRA application and on December 27, 2006 they submitted their H & C application completed with an update on March 29, 2007.

[12] On August 9, 2007, the Applicants filed their applications for leave and for judicial review against the negative PRRA and H & C decisions.

Standard of Review

[13] In light of the recent Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9 (QL), it is clear that the standard of patent unreasonableness has now been abandoned, and that courts conducting a standard of review analysis must now focus on two standards, those of correctness on a question of law and charter; and, reasonableness, on a question of credibility or appreciation of facts.

[14] The jurisprudence is clear in stating that the decision maker's credibility analysis is central to its role as trier of facts and that, accordingly, its findings in this regard should be given significant deference. The grant of deference supports a reasonableness standard of review and implies, as the

Court held at paragraph 49 of *Dunsmuir*, *supra*, that courts will give “due consideration to the determinations of decision makers” when reaching a conclusion. Accordingly, the first issue will be reviewed on the standard of reasonableness and the second question on a standard of correctness.

I - <u>The PRRA decision</u>

[15] Although the officer notes correctly in his decision that only new evidence is intended to be considered in a PRRA application, he nevertheless states that a specified list of documents were examined and considered in order to ensure procedural fairness.

[16] The officer finds that the applicants have credibly established their identities since the RPD hearing and therefore assesses their risk in Pakistan on that basis. He also notes that although the evidence shows sectarian violence in Pakistan affecting all minority groups in the country, the government has nevertheless enacted laws and taken action to crack down on terrorist groups including the SSP. The country’s documentation shows that blasphemy cases normally result in release on bail or dropped charges.

[17] Fatwas are only of consequence if issued by a proper body. The officer assessed the copy of the fatwa allegedly issued against Mr. Choudhary and found that there is no means, in the evidence, to determine whether it was issued by a proper body. He therefore gave little weight to the fatwa produced in evidence and therefore found that the applicants failed to prove the presence of a personalized risk.

Issues

[18] There are essentially two issues at play:

1. Is the analysis of the evidence by the officer unreasonable?
2. Does his negative PRRA decision constitute a violation of sections 7 and 12 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) or the United Nations Convention Against Torture (Convention Against Torture)?

Analysis

[19] The applicants have invited this Court to review the RPD's credibility finding first. It must be reasserted that the PRRA is not an appeal of a negative refugee finding, nor is the judicial review of the PRRA a licence to review all decisions made with respect to the applicants.

[20] The applicants have asserted that the officer's treatment of the RPD decision as final is unreasonable. But let us not forget that the applicants made two evaluation requests against the RPD decision; a request to reopen and an application for judicial review. The Court finds that the applicants have had sufficient attention given to any of the errors alleged against the RPD's decision and therefore that it was correctly viewed as final by the officer.

[21] The argument that the officer erred in law by relying on the findings of the RPD must also be rejected from the outset. This Court has regularly held that it is open to the PRRA officer to base his or her findings on those of the RPD (*Yousef v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 864, [2006] F.C.J. No. 1101 (QL)).

[22] The applicants have next asserted that the officer improperly assessed the evidence, citing specific extracts of the proof he allegedly did not consider. The respondent counters that the PRRA officer relied on many documentary sources, including those provided by the applicants and that the applicants have, at best, demonstrated that the objective documentary evidence is not totally unequivocal. The officer is tasked with weighing and analysing that evidence, and his findings and conclusion should not be vacated except where unreasonable.

[23] The applicants are asking this Court to reweigh the evidence and come to the contrary conclusion. That is not the role of the Court on judicial review. This Court does not see in what way the officer's decision was unreasonable and therefore the decision will not be vacated on this issue.

International Obligations

[24] The applicants also assert that the officer's decision is contrary to the obligations imposed on Canada by its international commitments, including the Convention Against Torture. In essence, their argument is that the PRRA is not an effective assessment since "practically everyone is refused without regard to the evidence", that the *Charter* should be interpreted in conformity with Canada's international obligations, which is not the case, and thus the officer's decision is contrary to the *Charter*.

[25] It is well established that a deportation order, with respect to a person who is not a Canadian citizen, is not contrary to the principles of fundamental justice and that the execution of such order

is not contrary to sections 7 or 12 of the *Charter* (*Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711). It cannot therefore be said, as argued by the applicants, that the PRRA decision in this case violates either the Convention Against Torture or the *Charter*. This argument does not stand the analysis of subsection 97(1) of the *Act* which refers specifically to torture and is therefore the basis of an effective assessment pursuant to Canada's international obligations (*Sidhu v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 39, [2004] F.C.J. No. 30 (QL)).

[26] The officer's decision is well reasoned and based on a thorough and thoughtful analysis of the situation facing the applicants upon their return to Pakistan. Their claims of fear of torture, as well as cruel treatment, were specifically evaluated. The Court cannot see how that decision is anything other than a safety valve in the refugee system for those who might be otherwise returned to torture in violation of Canada's international obligations.

[27] For the foregoing reasons, the Court will dismiss the application for judicial review produced in file IMM-3227-07 against the PRRA decision of May 29, 2007.

II -<u>The H & C decision</u>

[28] The officer first sets out the factors to consider on an H & C application from inside Canada, as set out in the Processing Manual IP5 - Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds.

[29] The officer then assesses the applicants on the factors of “establishment by prolonged inability to leave Canada”, “best interests of the children” and objectively “personalized risk”, and finds that there are insufficient H & C grounds to allow the applicants to apply for permanent resident status from within Canada.

Issues

[30] This proceeding raises three issues:

1. Did the officer err by failing to properly consider the best interests of the applicants’ three Canadian-born children?
2. Did the officer err in law by assessing the wrong criteria in coming to the decision?
3. Did the officer err by failing to properly consider the evidence?

[31] Applicants bear the onus to satisfy the decision makers that their personal circumstances are such that the hardship of having to obtain a permanent resident visa outside from Canada would be unusual and undeserved or disproportionate.

Best interest of the children (BIC)

[32] After reviewing the applicants' establishment and integration in Canada, the officer finds that they have provided few details of their establishment in Canada since 2002 and, on the basis of his analysis of the information in their files, the officer concludes that there are insufficient H & C grounds to grant them the waiver. The Court notes that the applicants do not really contest this finding.

[33] As a rule the best interest of the children has been found by this Court to be an important factor to consider when assessing H & C applications. Knowing this rule the applicants insist on this factor in their contestation of the H & C decision and contend that the IO completely failed to properly consider the best interests of their Canadian-born children.

[34] They argue that the negative finding of the officer violates the rights of the children to a family life as enshrined in international covenants and they contend that families who have been in Canada for several years, are economically well established and have Canadian-born children should generally be accepted on an H & C application.

[35] The BIC is one factor among others to be considered by the officer in his assessment of an H & C application but these interests do not constitute necessarily the determinative factor acting as an impediment to removal of the family (*Bolanos v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1032, [2003] F.C.J. No. 1331 (QL)).

[36] The case law on the BIC, beginning with the case of *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39 (QL), consistently sets out the duty imposed on the officer of remaining alive, alert and sensitive to the best interests of affected children: “That is not to say that children’s best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children’s interests are given this consideration.” A negative finding will stand except where it can be shown that the officer did not meet this duty because “the interests of children are minimized, in a manner inconsistent with Canada’s humanitarian and compassionate tradition and the Minister’s guidelines”.

[37] The applicants invite the Court to intervene and set the case law in a new direction. They suggest that a short period of living in Canada, financial establishment and Canadian-born children are indicia which should generally permit a family to remain on an H & C application. The Court must however point out that it is clear in the *Act* that the H & C decision is meant to remain an exceptional exemption from the normal immigration process to alleviate undue or extreme hardship. It is open only to Parliament to change the nature of the H & C assessment, not to this Court.

[38] In the case at bar, the officer was clearly “alive, alert and sensitive” to the children’s interests as can be seen in his reasons and the elements he considered. That was his prerogative and the Court will not vacate the decision on this issue since the officer’s findings are reasonable and quite relevant to the evidence analyzed.

Criteria assessed

[39] The applicants contend that the officer erred in looking primarily at the risk facing the family on its return to Pakistan rather than undue or excessive hardship. The Court notes in this regard that the argument which underlies their entire application is that of the risk to them on return. The officer did assess their establishment in Canada and found it to be insufficient to overcome the negative factors. The applicants did not argue much against that finding. The Court cannot find that the officer failed to assess the relevant factors for an H & C decision.

Assessment of the evidence

[40] The applicants also submit that the officer erred in the assessment of the evidence showing personalized risk to Mr. Choudhary. The Court finds this an interesting argument, given the applicants' complaint of an over-analysis of this issue. That said, the Court finds, as in the related PRRA decision, that the applicants have not demonstrated that the officer's decision on this issue is unreasonable.

[41] The officer referred directly to documentary evidence of sectarian violence and to the evidence provided by the applicants. The officer found, even if the questions about the authenticity of the documents provided by the applicants were set aside, that the evidence remains insufficient to establish objectively the existence of personalized risk.

[42] Having reviewed the file, the Court concludes that the findings of the IO were open to him on the evidence, are reasonable and should therefore stand.

[43] For the foregoing reasons, The Court will dismiss both applications.

Questions submitted by applicants for certification

[44] The applicants proposed for certification two questions they consider serious and of general importance pursuant to section 74(*d*) of the *Act*:

Question No. 1

> Do the guarantees of Articles 23 and 24 of the *International Covenant on Civil and Political Rights* regarding the protection of family life and the protection of children mandate the acceptance of requests for residence based on humanitarian consideration when there are Canadian children or a Canadian spouse who is affected by the decision in the absence of significant negative countervailing considerations?

Question No. 2

> Is there an obligation on the part of the PRRA officer to consider the criteria of Article 3(2) of the Convention Against Torture regarding a situation of massive, systematic and flagrant human rights abuses when assessing the possibility of a risk of return under Canadian law?

[45] In the case of *Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, [1994] F.C.J. No. 1637 (C.A.) (QL), the Federal Court of Appeal states that:

> [4] In order to be certified pursuant to subsection 83(1), a question must be one which, in the opinion of the motions judge, transcends the interests of the immediate parties to the litigation and contemplates issues of broad significance or general application … but it must also be one that is determinative of the appeal. The certification process contemplated by section 83 of the *Immigration Act* is neither to be equated with the reference process established by section 18.3 of the *Federal Court Act*, nor is it to be used as a tool to obtain from the Court of Appeal declaratory judgments on fine questions which need not be decided in order to dispose of a particular case.

[46] In addition in *Huynh v. Canada*, [1995] 1 F.C. 633, 646 (T.D.), confirmed by the Federal Court of Appeal at [1996] 2 F.C. 976 (C.A.), this Court states that to justify its certification the question must raise not only a question of law of general application but it must be new and not already determined by the Federal Court of Appeal or the Supreme Court of Canada.

[47] The issue raised in question no. 1 has been canvassed by the Federal Court of Appeal, in *Legault v. Canada (Minister of Citizenship and Immigration),* [2002] 4 F.C. 358 (C.A.), at paragraph 12, also in *Langner v. Canada (Minister of Employment and Immigration)* (1995), 184 N.R. 230 (C.A.) at paragraphs 8, 9 and 11 as well as by the Supreme Court of Canada in *Baker*, *supra*, at paragraph 75. Simply put, the presence of Canadian children does not call to a certain result in the context of an application under section 25 of the *Act*. Their presence does not in itself constitute an impediment to the "refoulement" of a parent illegally residing in Canada nor does it lead to a right to have a parent remain in Canada.

[48] Moreover, in *De Guzman v. Canada (Minister of Citizenship and Immigration),* 2005 FCA 436, [2006] 3 F.C.R 655 (F.C.A.), at paragraph 87 and following, the Federal Court of Appeal considered the impact of international human rights instrument to which Canada adhered, including the *International Covenant on Civil and Political Rights* which Canada has ratified but has not legislated upon.

[49] The question no. 1 is not new and has been determined by the Federal Court of Appeal and the Supreme Court of Canada and accordingly the Court refuses to certify this question.

[50] The issue raised in question no. 2 touches the scope of the PRRA officer's discretion contained at sections 113*(c)* and 96 to 98 of the *Act*. Paragraph 97(1)*a*) of the *Act* providing that a person is in need of protection when he is personally subject to a danger, "believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture".

[51] The general human rights situation in Pakistan and the presence of personal risk was considered by the officer in this case. The question no. 2 raises factual issues that do not transcend the applicants' interest nor constitute an issue of broad significance or general application that should lead to a certification pursuant to the criteria set forth in the case of *Liyanagamage, supra*, at paragraph 4.

[52] For the foregoing reasons, the Court refuses to certify the two questions.

JUDGMENT

FOR THESE REASONS THE COURT:

DISMISSES the applications for judicial review of the H & C decision produced in file IMM-3226-07 and of the PRRA decision produced in file IMM-3227-07, and

REFUSES TO CERTIFY the questions proposed by the applicants for both files.

"Maurice E. Lagacé"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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