Date: 20070726

Docket: IMM-587-07

Citation: 2007 FC 779

OTTAWA, Ontario, July 26, 2007

PRESENT: The Honourable Max M. Teitelbaum

BETWEEN:

RANJIT BACHAN SINGH MOOKER
KANWALJIT KAUR
AMRITPAL KAUR MOOKER
MANJINDER SINGH MOOKER

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by an immigration officer, (the "Officer"), dated January 22, 2007, wherein the Officer determined that there were no humanitarian and compassionate (H&C) factors justifying an exemption for the applicants from the requirement that an application for permanent residence be made from outside Canada.

[2] The applicants are a family of four. The principal applicant, Ranjit Bachan Singh Mooker and his two adult children, Amritpal and Manjinder, are citizens of Kenya. The principal applicant's wife, Kanwaljit Mooker is a citizen of India and has residence in Kenya. The applicants came to

Canada from Kenya in 2002. Their refugee claims were refused and they were subsequently removed to the U.S. where they stayed for six months. They returned to Canada in 2004 and have remained here since that time.

[3] In their application for H&C consideration the applicants put forward a number of reasons why they should be granted H&C relief. First, they submitted they are well-established in Canada. The primary applicant is working as a machinist in a permanent, full-time position. The son, Manjinder, worked full-time in Canada until he went back to school in September 2006 to study mechanical engineering technology at Sheridan College. The daughter, Amritpal Kaur Mooker, works part-time at DWS logistics and studies at Sheridan College. She hopes to get into a nursing program in Canada. The applicants have never relied on social assistance and have used their savings to support themselves and to pay for Amritpal and Manjinder's education. The applicant also provided evidence of community involvement.

[4] The applicants also requested H&C relief on the grounds that it is in the best interest of the children to remain in Canada. At the time of the Officer's decision Manjinder was 24 years old and Amritpal was 22 years old. The applicants fear that Amritpal and Manjinder will face discrimination should they return to Kenya as there is discrimination against South Asians there. They submit that returning to Kenya would cause them serious emotional trauma. To this effect, they included psychological reports for both Amritpal and Manjinder done by Dr. J. Pilowsky. Amritpal's assessment indicates that her psychological condition has significantly deteriorated and that she suffers from a Major Depressive Episode of moderate severity. Manjinder's assessment indicates

that he suffers from a Major Depressive Episode of moderate severity and from symptoms of anxiety. Manjinder's psychological assessment indicates that he has become overwhelmed by the persistent anxiety about his family's future and has become emotionally exhausted. The assessment concludes that there is every indication that his clinical symptoms have become pervasive and interfere with all relevant areas of functioning.

[5] The applicants also submit that they would face disproportionate, unusual and undeserved hardship if forced to apply for permanent residence from outside Canada because of the situation in Kenya. They submit that a return to Kenya would be particularly hard for Amritpal as an Asian woman because the documentary evidence indicates that women in Kenya are second-class citizens who face discrimination. The applicants also submits that the family is at risk of persecution, cruel and unusual treatment and torture at the hands of Kenyan nationalists and point out that the family has been subjected to physical and verbal abuse, as well as theft and destruction of their property.

THE DECISION UNDER REVIEW

[6] The Officer considered the three grounds raised by the applicants. With respect to the applicants' submission that they fear returning to Kenya, the Officer noted that the applicants suffered verbal and physical attacks from African Kenyans and that in February 1999 the principal applicant was attacked, beaten and robbed. The Officer also noted that the applicants' home was broken into by Kenyan nationalists in June 2000. Their home was robbed again in May 2001 although it is not clear whether Kenyan nationalists were responsible. The Officer noted the Refugee Board had concluded that the Asian population in Kenya faces periodic discrimination but

that the treatment did not amount to persecution. The Officer reviewed the current country conditions in Kenya and concluded that there had been no significant change in the overall country conditions. She further noted that the applicants have recourse available to them should they experience ethnic intolerance as a documentary evidence indicates that state protection is available in Kenya. The Officer acknowledged that the applicants attempted unsuccessfully on two occasions to access state protection but then suggests that the applicants should have sought protection at other levels than the police. The Officer concluded the applicants had failed to establish that they would face personalized risk to their life or risk to the security of their person if they returned to Kenya.

[7] In considering risk, the Officer considered psychological reports for Amritpal and Manjinder. She noted that Amritpal's report stated that her condition had significantly deteriorated and that she suffers from Major Depressive episode of moderate severity and symptoms of anxiety. The Officer noted that although the assessment indicated that Amritpal's coping mechanisms had been severely drained it also noted that "Ms. Mooker is a bright and hardworking young woman who has adapted remarkably well to this country. She has taken on the responsibility of emotionally supporting her family while endeavouring to build a career and integrate more fully into her new community."

[8] With respect to Manjinder, the Officer noted that his assessment indicated that he suffers from Major Depressive Episode of moderate severity and from symptoms anxiety. The assessment also noted that "I believe that this bright young man will be able to forge a successful future as an outstanding member of his community. Mr. Mooker impressed me as hardworking and studious,

and he is fully committed to his career as an engineer…" It is not clear from the Officer's decision what impact Dr. Pilowsky's comments as to Amritpal and Manjinder's personal qualities had on her determination.

[9] The Officer noted that no diagnostic test was provided and no description of level of functioning was provided in either Amritpal or Manjinder's assessment. Moreover, she noted that there was insufficient evidence to indicate that Amritpal and Manjinder were currently receiving continuing treatment. Even if there did require treatment, she held that the applicants had not provided documentary evidence to the effect that treatment would not be available in Kenya. She also noted that that documentary evidence obtained through independent research shows that depressive illnesses are highly responsive to treatment. She noted that health services in Kenya are provided by the government, private individuals, churches, and voluntary organizations and that governmental health care services are provided on national, provincial and district level and that mental health care is integrated into general health care at the district level. The Officer concluded that the evidence does not suggest that Amritpal and Manjinder would be unable to obtain treatment in Kenya.

[10] The second factor considered by the Officer is the applicants' degree of establishment in Canada. The Officer noted that the family initially supported itself on its savings in Canada. She also noted that the primary applicant had been continuously employed as a machinist since March 2002 and Amritpal and Manjinder were currently studying and both had work experience in Canada. The Officer noted that the family has extensive community involvement as they attend

temple and volunteer their time preparing and serving meals to the congregation. She also noted that they have made donations to various charities. The Officer concluded the applicants' level of establishment does not exceed what is reasonably expected after having resided in the country for a period of 4 and a half years and that the degree of establishment is not such that it makes the pursuit of permanent residence in the normal manner a cause of hardship which was not anticipated in the *Immigration and Refugee Protection Act* and the *Immigration and Refugee Protection Regulations*.

[11] The final factor considered by the Officer is the best interests of the children. Amritpal and Manjinder were both born in Kenya and resided there from 1992 until the family left in November 2001. The Officer noted that they attended school in Kenya and that they have been exposed to Swahili language and culture. She then went on to conclude that the applicants had not established that the general consequences of relocating and resettling back to their home country would have a significant negative impact on Amritpal and Manjinder which would amount to unusual, undeserved or disproportionate hardship.

[12] In addition to the factors raised by the applicants, the Officer considered how the applicants would likely adapt upon return to Kenya. She noted that the applicants speak, read and write English, one of Kenya's official languages. She also noted that the applicants were well-established in Kenya with the primary applicant being professionally employed prior to their departure. Finally, she noted that while in Canada the applicants worked in a variety of fields and the abilities they have acquired are transferable employment skills.

ISSUES

[13] This case raises the following issues:

1. Did the Officer err in determining that the applicants were not sufficiently established in Canada that leaving would cause unusual or undue hardship?

2. Did the Officer apply the correct test with respect to the risk assessment portion of H&C decision?

3. Was the Officer alive, alert and sensitive to the best interests of the children?

ANALYSIS

Degree of establishment

[14] The standard of review for humanitarian and compassionate decisions is reasonableness *simpliciter* (*Baker v. Minister of Citizenship and Immigration*, [1999] 2 S.C.R. 817). This is also the applicable standard of review to the issue of whether the Officer erred in considering the degree of establishment of the applicants as such a determination requires applying a legal test, i.e. usual and undeserving hardship, to the facts of the present case.

[15] The applicants submit that the Officer's decision with respect to establishment is unreasonable. I am satisfied that the Officer was quite thorough in considering all aspects of the applicants' situation including the applicants' employment history in Canada and their community involvement. The Officer also considered how likely the applicants were to be able to re-establish themselves in Kenya and considered the applicants' background and experiences, including their work experience, employment skills and connections to Kenya, before concluding that there is

insufficient evidence to indicate that they would be unable to re-establish themselves in Kenya. The Officer reasonably concluded that the applicants' level of establishment does not exceed what is reasonably expected after having resided in the country for a period of four and a half years. Moreover, the degree of establishment is only one factor to be considered in an H&C assessment and is not in itself determinative (*Klais v. Minister of Citizenship and Immigration*, 2004 FC 785; *Irimie v. Minister of Citizenship and Immigration* (2000), 10 Imm. L.R. (3d) 206).

Risk assessment

[16] The question of whether the Officer applied the correct test in assessing risk in an H&C application is a question of law and therefore must be reviewed on the standard of correctness (*Pinter v. Minister of Citizenship and Immigration*, 2005 FC 296).

[17] The applicants submit the Officer erred by failing to apply the appropriate standard when assessing the risk factors within the H&C application by only assessing whether the applicants faced risk of torture or risk to life rather than assessing whether the discrimination the applicants would face upon return to Kenya would amount to unusual hardship. The applicants rely on *Pinter* where Chief Justice Lufty held that the risk considerations within an H&C fall below the threshold of risk to life or cruel and unusual punishment. They also cite *Ramirez v. Minister of Citizenship and Immigration*, 2006 FC 1404, wherein the Court cited *Pinter* and held that

> [42] It is beyond dispute that the concept of "hardship" in an H&C application and the "risk" contemplated in a PRRA are not equivalent and must be assessed according to a different standard. As explained by Chief Justice Allan Lutfy in *Pinter v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 296:

> [3] In an application for humanitarian and compassionate consideration under section 25 of the Immigration and Refugee Protection Act (IRPA), the applicant's burden is to satisfy the decision-maker that there would be unusual and undeserved or disproportionate hardship to obtain a permanent resident visa from outside Canada.
>
> [4] In a pre-removal risk assessment under sections 97, 112 and 113 of the IRPA, protection may be afforded to a person who, upon removal from Canada to their country of nationality, would be subject to a risk to their life or to a risk of cruel and unusual treatment.
>
> [5] In my view, it was an error in law for the immigration officer to have concluded that she was not required to deal with risk factors in her assessment of the humanitarian and compassionate application. She should not have closed her mind to risk factors even though a valid negative pre-removal risk assessment may have been made. There may well be risk considerations which are relevant to an application for permanent residence from within Canada which fall well below the higher threshold of risk to life or cruel and unusual punishment. [Emphasis Added]
>
> […]
>
> [45] While it may be that violence, harassment and the poor health and sanitary conditions may not amount to a personalized risk for the purposes of a PRRA application, these factors may well be sufficient to establish unusual, undeserved or disproportionate hardship…

[18] The respondent for its part submits that if the Officer's decision is read in its totality it is clear that the Officer applied the correct standard. The respondent submits that the Officer referred to "risk to life" because the applicants submitted that they faced risk to life in their H&C application. The respondent relies on the Court's decision in *Doukhi v. Minister of Citizenship and Immigration*, 2006 FC 1464, where the Court held that:

> [24] As evidence that the Officer applied the higher threshold applicable in PRRAs instead of the lower threshold applicable in the H&C context, the Applicant points to page 3 of the H&C Applications - Notes to File where the Officer writes (Tribunal Record, H&C Applications - Notes to File, p.16):
>
> > … the objective documentary evidence does not support the applicant's conclusions that the nature and severity of the situation amounts to persecution, or that Lebanese State policies or practices amount to persecution against the Palestinians.
>
> …
>
> [25] Before addressing whether this evidence is proof that the Officer applied the higher threshold applicable in PRRAs instead of the one applicable in the H&C context, it is essential to note that the Applicant raised the issue of persecution in his submissions in support of it's H&C Application as indicators that he would face 'unusual and underserved or disproportionate hardship'.
>
> …
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> [26] Taking into account the Applicant's own submissions as to his risk of persecution, in my view it is logical that the Officer would undertake an analysis as to whether the Applicant would face persecution if returned to Lebanon. Furthermore, the Officer was justified in using the term "persecution" in his decision, even though he was dealing with an H&C application. Having read the Officer's decision, I can note that the Officer does not use the term "persecution" or conduct an analysis as to whether persecution exists other than to respond to the Applicant's suggestion that he would face persecution as a Palestinian refugee living in a refugee camp in Lebanon.

[19] In the present case, the Officer did not simply use the language of risk to life only to respond to the applicants' submission but also explicitly stated that this was the test on an H&C application. The Officer held that "In the context of this H&C application, the issue is whether there are reasonable grounds to believe that the applicant would be at risk for loss of life or a risk to the security of his person, should he return to Kenya." Later the Officer concluded that "the applicants have failed to establish that they face personalized risk to their life or risk to the security of their person if they are returned to Kenya." The Officer clearly applied the PRRA standard. As *Pinter* and *Ramirez* make clear it is a reviewable error to apply the PRRA standard in an assessment of an H&C application.

[20] The respondent submits that the Officer reasonably found that state protection is available to the applicants and, therefore, any error with respect to the standard to be applied is not determinative. This argument would be persuasive had the Officer provided a reasonable assessment of the availability of state protection. The Officer noted that the applicants had attempted to seek state protection on two separate occasions but the police would not take a report. She then went on to conclude that adequate state protection was available. Given the evidence of the applicant's attempts to seek state protection, the Officer was required to provide a thorough explanation as to why this did not rebut the presumption of state protection. In my view, the Officer's assessment of the availability of state protection is not strong enough to negate the Officer's error with respect to the standard to be applied in H&C decisions.

Best interests of the child

[21] In *Hawthorne v. Minister of Citizenship and Immigration*, 2002 FCA 475, the Federal Court of Appeal held that an H&C decision will be found to be unreasonable if the officer was not "alive, alert and sensitive" to the best interests of the child:

> [31] Counsel agreed that, under the legal test established by *Baker* and *Legault* for reviewing officers' exercise of discretion, the refusal to grant Ms. Hawthorne's H & C application could be set aside as unreasonable if the officer had been "dismissive" of Suzette's best interests. On the other hand, if the decision-maker had been "alert, alive and sensitive" to them (*Baker*, at para. 75), the decision could not be characterized as unreasonable.

[22] The applicants submit that the psychological report presented to the Officer indicated that the children, Amritpal and Manjinder, were depressed about their potential return to Kenya and that

the Officer erred by not considering these reports when she looked at the best interests of the children.

[23] Although the Officer did not consider the psychological reports under the heading of best interests of the children in her decision, this in itself does not indicate the Officer was not “alive, alert and sensitive” to the interests of the children given that she considered the reports in other sections of her decision. The Officer considered the psychological assessments of Amritpal and Manjinder and reasonably concluded that since there was no evidence indicating that they were currently receiving continuing treatment and no evidence indicating that any required treatment would be unavailable to them in Kenya this factor was not a reason to grant H&C relief.

[24] The Officer also considered how well equipped Amritpal and Manjinder would be to return to Kenya. She considered their work experience in Canada and concluded that it would benefit them in Kenya. She also considered their connections to Kenya, including the fact that they had both lived there from 1992-2001 and that Manjinder had received some post-secondary education there. She concluded that adjustments to Kenya would be minimal. In my view, the Officer was alive, alert and sensitive to the best interests of the children.

[25] The Officer did not err in her assessment of the best interests of the child and her assessment of the degree of establishment of the applicants in Canada. She did, however, err by applying the PRRA standard in the risk assessment portion of the applicants’ H&C decision.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is allowed and the matter is to be returned for a new hearing before a different immigration officer in accordance with the above reasons. No question was submitted for certification.

"Max M. Teitelbaum"
Deputy Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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