Date: 20071221

Docket: IMM-1746-07

Citation: 2007 FC 1356

Ottawa, Ontario, December 21, 2007

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

ROOP SINGH
DEVI MADHU
MITALI KAUR
RAJAT SINGH

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] Roop Singh (the "principal applicant") and three other members of a family of five seek to quash the March 8, 2007 decision of an Immigration Officer (the "officer") who refused their application for permanent residence to Canada based on humanitarian and compassionate grounds (the "H&C application"). Their H&C application was anchored on three elements: risk to their lives and security if forced to return to India to make their application for permanent residence, their

establishment in Canada and the best interest of their children two of which were born in India and 19 month old Karishma born in Canada.

[2] Their judicial review application raises three principal issues:

1) Whether the tribunal failed to properly assess their H&C application by adopting the test under section 97 of the *Immigration and Refugee Protection Act* (*IRPA*) rather than the test mandated by the operational guidelines, namely, they would suffer unusual, excessive or disproportionate hardship if returned to their country of nationality to make their application for permanent residence to Canada from there;

2) Whether the tribunal erred in its risk assessment by misconstruing the nature of the risk which the principal applicant was alleging. The applicants' counsel argues the tribunal missed the mark by not examining the February 2005 threat made against him; and

3) Whether the tribunal actually considered the best interest of the children arguing that, yes, they were mentioned in the officer's decision but really, in actual fact, their best interests were not assessed or taken into account.

[3] Underlying the first issue is the fact the officer who decided the H&C application on March 8, 2007 also ruled, that same day, their application for a pre-removal risk assessment (PRRA).

Facts

[4] The Singh family are citizens of India and are Sikhs. The source of their fears stems from the riots and violence aimed at the members of the Sikh community which took place in New Delhi in 1984 after the assassination of Prime Minister Indira Gandhi. It is alleged the principal applicant's father (the "father") had witnessed the riots in his neighbourhood in New Delhi where Roop Singh was raised and had also recognized its organizers who were influential members of the Congress Party (the "organizers"). His father went to the police who refused to lay charges; his father continued his efforts to bring the organizers to justice but to no avail. They also say the State is unable to protect them.

[5] In 2004, the government of India established a Commission of Inquiry into the 1984 riots at which the father was called to testify; it is alleged he identified the organizers of the riots in his area. After giving his testimony, his father was harassed by these persons.

[6] On November 16, 2004, when he returned home from work at Indian Airlines where he was an accounting supervisor, Roop Singh found his father clutching his chest; he died minutes later. Roop Singh did not request an autopsy to determine the cause of death.

[7] After being informed by a family friend, his father had been seen earlier in the day with the three organizers, Roop Singh went to the police, made a complaint and also told them he himself had been a witness to the 1984 riots in his area. The police refused to do anything according to the principal applicant.

[8] In February 2005, Mr. Singh was stopped in his neighbourhood by goons who assaulted him and told him he would die like his father. He says he complained to the police who said he was lying. The threats continued.

[9] In March 2005, his daughter was followed home from school by unknown persons. The principal applicant, it is alleged, received a telephone call threatening his daughter with kidnapping.

[10] The family, who had obtained visitors' visas for Canada and the United Kingdom in 2004 fled India on April 19, 2005 to England. They remained in England for eight days. The principal applicant sought advice on refugee applications in the U.K. but did not file for refugee protection there.

[11] The family then travelled to Canada arriving on April 27, 2005. They remained until May 9, 2005. They returned to the U.K. purportedly to make a refugee application but apparently that opportunity was not available. Ultimately, the family returned to Canada on June 8, 2005 where they made their refugee application.

[12] Their refugee claim was refused on June 2, 2006 by the Refugee Protection Division (the "RPD") finding the principal applicant's story not to be credible because of contradictions between his point of entry statement (POE), his personal information form (PIF) and his testimony; in addition, the RPD found his story to be implausible. The applicants then sought permission to commence judicial review proceedings in this Court but were denied leave on September 18, 2006.

[13] On November 14, 2006, their H&C application was received in Vegreville and transferred to Montreal for determination on February 14, 2007. On November 24, 2006, their PRRA application was received in Montreal.

[14] As noted, the officer rendered his decision in respect of both the H&C application and the PRRA application on March 8, 2007.

[15] On April 27, 2007, the applicants sought leave and judicial review for both applications. I understand leave with respect to the PRRA has been denied.

[16] On June 22, 2007, a judge of this Court stayed the execution of the removal order against the applicants.

The Tribunal's Decision

[17] The officer identified four H&C factors raised by the applicants in their written submissions:

- Establishment in Canada;
- Risk to life and security;
- The best interests of all the couple's three children; and,
- Other factors i.e. the principal applicant's health problems.

[18] She then reviewed all of the evidence which had been submitted by the applicants in support of the four factors identified.

[19] Under establishment, the officer reviewed Mr. Singh's work history as well as letters indicating the applicants' implication in their temple and generally attesting to their good character.

[20] Under risk, the officer reviewed the risks alleged by the principal applicant which was the same risk as he had alleged in his PIF considered by the RPD and in his PRRA application. The officer reviewed the findings of the RPD.

[21] Under the best interests of the children, the officer considered all of the evidence contained in their written submissions which demonstrated how well Mitali, then age 13, and Rajat, then age 11 were doing at school and the friendships they had developed.

[22] Under other factors, the officer mentioned the November 21, 2006 letter from Dr. Tang concerning Mr. Singh's depression.

[23] The officer then provided her analysis. She first referred to the Minister's guidelines in the operational manual known as IP-5 to the effect the applicants have the onus of satisfying the decision maker that their personal circumstances are such that they would encounter unusual, undeserved or disproportional hardship if required to return to India to apply for and obtain a visa for landing in Canada.

[24] The officer then analysed the four factors identified above based on the applicants' submissions.

[25] Under risk, the officer, in essence, replicated the wording she had used in her PRRA decision issued, as noted, on the day same as the negative H&C decision. She referred to India as the largest parliamentary democracy in the world, noted the population mix of Sikhs in India, the basis of the applicants' fear because of their being Sikhs, the changes of attitudes in India since 1984 in terms of violence and discrimination against Sikhs pointing to a specific problem, however, in Jammu and Kashmir. The officer identified current problems in India including, violence towards women and concluded none of those problems were raised by the applicants in their submission. The officer referred to the fact the applicant had mentioned in his submissions he had left a very good job in India which, according to him, was proof of his fear.

[26] Specifically, she referred to a recent letter the principal applicant had received from his brother mentioning goons had recently broken into his home and were inquiring for the principal applicant. The officer accorded this letter little weight principally because of the paucity of the information it contained. Referring to the RPD's finding the principal applicant was not credible, the officer concluded the brother's letter was not sufficient to establish risk to life or security of the applicants.

[27] In terms of establishment, the officer found the principal applicant had enjoyed in Canada steady employment for one year i.e. since 2006. She referred to the family's efforts to learn French and the fact they were well liked in the community and the children at school. She concluded, however, considering the applicants had been in Canada for less than two years, she was not satisfied from the evidence submitted their establishment was such as to warrant exemption from the normal rule that permanent residents' visas must be obtained outside of Canada. She was not

satisfied the compliance with this normal requirement would occasion them unusual, unjustified or excessive hardship.

[28] She then considered the best interest of the children which she stated was an important factor. In terms of the last born Canadian child of 19 months, she expressed the view the interest of that child was to be with her parents. In terms of Mitali and Rajat, the officer noted the evidence of their success at school and the friendships developed. She found, however, large family support available in India and considered that the principal applicant to have demonstrated sufficient resourcefulness as indicative of the ability to provide for the family if returned to India. On this point, the officer concluded, after considering what had been noted and after having considered the best interest of the three children concerned, noting they had demonstrated a good capacity for integration in Canada that, however, she did not consider the elements presented in the record demonstrated sufficiently they would incur unusual, unjustified or excessive hardship if required to comply with the normal requirement of making an application for permanent residence abroad. She stated she considered the age of the children, the level of their integration, the consequences on their education and the totality of the evidence to base her conclusion that the best interest of the children were not sufficient to justify an exemption.

[29] Finally, in terms of other factors, she held the health problems raised by the principal applicant were not sufficiently established in the evidence to demonstrate the principal applicant would suffer consequences if his application for H&C factors was refused since there was no evidence his depression could not be treated in India. She was not satisfied this factor was a sufficient and important factor.

Analysis

[30] For the reasons expressed below, I am of the view this application for judicial review must be dismissed. The standard of review of an H&C decision, on the merits, is reasonableness. This standard of review for H&C decisions on the merits was recognized by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. An unreasonable decision is one that is not supported by any reasons that can stand up to a somewhat probing examination. A Court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. (See *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.)

[31] A review of the officer's decision, in my view, clearly shows what the basis for her decision was. After reviewing the evidence submitted by the applicants in support of their H&C factors, the officer was not satisfied this evidence was sufficient to justify an exemption from the normal requirement under the *Immigration and Refugee Protection Act* (IRPA) that persons seeking landing in Canada must be in possession of a permanent residence visa before coming to Canada for that purpose.

[32] It is well established, in this Court's jurisprudence, that:

- The onus is on the applicants to establish the existence of sufficient H&C factors justifying an exemption from normal legal requirements in IRPA;

- That onus means the applicants must submit for review by the decision maker sufficient probative and reliable evidence to support the existence of those H&C factors. The applicants must put their best foot forward and cannot complain later on if they did not lead sufficient persuasive evidence because it is not a function of this Court on judicial review to reweigh the evidence before the decision maker for the purpose of substituting its decision for that reached by a tribunal (See *Mann v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 567; see also *Samsonov v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1158); the corollary to the requirement an applicant is required to put his/her best foot forward is the obligation by the decision maker to consider and weigh that evidence.

[33] These principles have a direct impact on counsel for the applicants' submission of a lack of analysis by the decision maker in reaching her conclusions on establishment, best interest of the children and the principal applicant's health factors. I cannot accept this argument.

[34] A comparison between the evidence and the submissions made by the applicants and the officer's analysis clearly establishes she faithfully reviewed all of the evidence, analysed it and concluded it was not sufficient on each point (establishment, best interest of the children and other factors) to warrant an exemption. In my view, the level of the officer's analysis was directly

proportional to the level of the evidence submitted to her for consideration. The officer could not be expected to analyse evidence which was not before her.

Issue no. 1

[35] The jurisprudence of this Court is to the effect the test underlying an H&C application is hardship. As pointed out by my colleague Justice de Montigny in *Ramirez et al v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1404, the test of hardship in an H&C application and the concept of "risk" contemplated in a PRRA application "is not equivalent and must be assessed according to a different standard". He went on to say at paragraph 43 of his reasons: "It is perfectly legitimate for an officer to rely on the same set of factual findings in assessing an H&C application and a PRRA application provided that these facts are analyzed through the right analytical prism."

[36] As stated by Justice O'Keefe in *Dharamraj v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 674 at paragraph 24: "there is a higher burden on the applicants to establish risk for the purposes of a PRRA than there is for H & C purposes. Consequently, there may be circumstances where risk would be relevant for an H & C application but not for a PRRA application." At paragraph 25, he found: "In the present case, the officer merely adopted the assessment of risk made by the IRB and the PRRA officer without further analysis for the purpose of the H & C application. In my opinion, the officer made an unreasonable decision because she did not consider the risk factors in the context of the H & C application."

[37] The applicants' written submissions in respect of their H&C application are found at page 562 of the certified tribunal record. The risk outlined there is the same risk as alleged by them

before the IRB and in their PRRA applications namely risk to their life because the organizers of the 1984 riots will kill them if they returned to India since they fear he will testify against them in the context of efforts by the government of India, through the Commission of Inquiry, to bring to justice those responsible for the 1984 riots.

[38] The written submissions stressed one factor which was said not to have been raised before the IRB as proof of Mr. Singh's fear. It was submitted that it was not plausible or logical Mr. Singh would leave his important and well remunerated position at Indian Airlines unless the risk to his life and that of his family was true.

[39] The tribunal expressed its conclusion on this point by stating: "After analyzing the risks alleged, I am of the opinion the applicants have not demonstrated objectively a personalized risk to life and/or security."

[40] In reaching this conclusion, the tribunal specifically took into account and made specific reference to the applicants' written submissions with respect to Mr. Singh's employment. The officer was not satisfied the applicants had led sufficient evidence to demonstrate that employment and the circumstances of his leaving it.

[41] In the circumstances of this case, the jurisprudence cited by counsel for the applicants is of no application. The crux of the officer's decision is that the risk alleged for H&C purposes is not substantiated; it does not exist. If that is the case, the risk alleged cannot be the foundation for hardship for H&C purposes.

[42] Furthermore, the applicants did not raise for consideration by the officer any other circumstance associated with that risk which might have persuaded her on the lesser burden associated with hardship.

[43] The case at hand is not similar to *Ramirez,* above, where Justice de Montigny stated at paragraph 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.”

[44] Counsel for the applicant referred to Justice de Montigny’s decision in *Kaur v. the Minister of Citizenship and Immigration*, 2005 FC 1491 and submitted it to be very similar to the case before me. I do not agree. The *Kaur* case referred to me was not an H&C decision but was one made by the IRB.

Issue no. 2

[45] A review of the record establishes the officer did not misconstrue the risk alleged by ignoring the true nature of Mr. Singh’s fear arising out of the February 2005 attack he says he suffered at the hands of goons.

[46] The certified tribunal record consisting of the material before the officer when making her decision contains at pages 542 to 550 her PRRA decision which is referenced and incorporated into her H&C decision.

[47] At page 545, the officer clearly states why Mr. Singh was allegedly attacked in February 2005. The allegation was that he had contacted the police suggesting he could identify the organizers of the 1984 riots.

Issue no. 3

[48] The Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 stated that an immigration officer must be "alert, alive and sensitive to the interests of children".

[49] Counsel for the applicant argues the officer's decision minimized the best interests of the children as there is no serious analysis of those interests. In my view, a reading of the officer's decision does not support the applicants' submission.

[50] The officer, once again, referred to the applicants' written submissions where the benefits to the children of staying in Canada were identified in terms of an assurance of quality education and enhanced freedom and opportunities.

[51] In her decision, the officer took into account the evidence submitted and their degree of integration. The officer referred to their age, the level of establishment, the consequences on their education as well as the totality of the evidence with regards to their best interests. The officer stated she was not satisfied that all of the elements of the record exhibiting undue, unjustified or excessive hardship if the applicants were to make their application abroad for permanent residence to Canada.

In her opinion, all of the factors identified by the applicants to be in the best interests of the children were not sufficient to justify an exemption from Canada's immigration law that those who want to reside in Canada must come to this country have been screened abroad.

[52] The applicants have not satisfied me by reference to the jurisprudence cited that the officer committed a reviewable error in reaching the decision she did with respect to her analysis of the best interests of the children.

[53] For all of these reasons, this judicial review application must be dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this judicial review application is dismissed. No certified question was proposed.

"François Lemieux

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Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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