Date: 20080421

Docket: IMM-4310-07

Citation: 2008 FC 521

Ottawa, Ontario, April 21, 2008

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

LAKHWINDER SINGH RANJI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS and THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a Pre-Removal Risk Assessment Officer's decision of August 15, 2007 refusing Mr. Ranji's application on humanitarian and compassionate grounds for permanent resident status.

I. BACKGROUND

[2] Mr. Ranji is a citizen of India who entered Canada as a visitor on April 8, 1997. His claim for refugee status was refused on March 13, 1998.

[3] Mr. Ranji's application for a Pre-Removal Risk Assessment was rejected August 15, 2007. On January 26, 2005, he applied for permanent resident status in Canada on humanitarian and compassionate grounds under section 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27.

[4] Both the PRRA application and the H&C application were considered and rejected by the same officer. The PRRA determination is not under review in this case.

II. THE HUMANITARIAN AND COMPASSIONATE EXCEPTION

[5] A waiver of the normal requirements to obtain a permanent resident status by making an application under section 25 on humanitarian and compassionate grounds is an exceptional procedure that is not intended to regularly supplant Canada's immigration rules. Justice Shore succinctly set out the exceptional nature of this process in *Hamzai v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1108, [2006] F.C.J. 1408, at paragraph 19, as follows:

> A decision made on H&C grounds is an exceptional measure and, moreover, a discretionary one. The existence of an H&C review offers an individual special and additional consideration for an exemption from Canadian immigration laws that are otherwise universally applied. (*Legault v. Canada* (*Minister of Citizenship and Immigration*), 2002 FCA 125, [2002] F.C.J. No. 457 (QL), at paragraph 15.)

[6] In order for the officer to exercise his or her discretion in favour of an applicant, the applicant must show that his or her personal circumstances are such that "unusual or undeserved or disproportionate hardship" would be caused to the applicant if he or she were required to leave

Canada to apply for a visa in a normal fashion: *Irimie v. Canada* (*Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1906; *Uddin v. Canada* (*Minister of Citizenship and Immigration)*, 2002 FCT 937, [2002] F.C.J. No. 1222.

[7] When reviewing the officer's discretionary decision made on humanitarian and compassionate considerations, this Court must be satisfied either that the officer's decision was unreasonable or that there was a breach of procedural fairness to the applicant: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

[8] The reasonableness standard must be read in light of the recent decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9.

III. ALLEGED ERRORS

[9] Mr. Ranji submits that the officer's decision is unreasonable because of the following four errors, considered individually and collectively:

1. The officer discounted that Applicant's establishment factors as not being anything beyond what is "naturally" expected of a person;

2. The officer engaged in a risk analysis appropriate to PRRA or convention refugee claim rather than that appropriate to an H&C application;

3. The officer failed to conduct a fulsome assessment of the children's best interests; and

4. The officer unreasonably analyzed the hardship caused by the Applicant's anxiety and stress.

IV. ANALYSIS AND DECISION

[10] I am not satisfied that there is merit to the second and last ground of review advanced by the Applicant; however, it is my view that there is merit to the first and third ground advanced.

(a) Degree of Establishment and Family Ties in Canada

[11] The officer noted that Mr. Ranji had been in Canada for approximately 10 years. During that time he had been continually employed and had never received social assistance. The officer found that he was financially independent and had purchased a house with his brother, with whom he lived. It was also found that he had a good civil record in Canada.

[12] The officer noted the Applicant's employment and community ties and stated that "it is commendable that a certain level of establishment has taken place" but she assessed it as being "of a level that is naturally expected of him".

[13] Accordingly, while the officer found that Mr. Ranji had established himself in Canada to a "certain extent", she found that it was "of a level that is naturally expected of him". It was determined that while severing his family and employment ties in Canada would be difficult, the hardship would not amount to unusual and underserved or disproportionate hardship of the sort that would be required for the exercise of the discretion to grant the H&C application.

[14] Counsel argued that the officer's reasoning with respect to the Applicant's establishment was inconsistent with the policy guidelines set out in the Immigration Manual and was approached in such a fashion that positive factors were turned into negative factors, thus perverting the officer's discretion.

[15] Counsel referred to Chapter IP 5 of the Immigration Manual below which sets out a list of questions intended to guide offices in their assessment of an applicant's degree of establishment in Canada.

> The degree of the applicant's establishment in Canada may include such questions as:
>
> - Does the applicant have a history of stable employment?
> - Is there a pattern of sound financial management?
> - Has the applicant integrated into the community through involvement in community organizations, voluntary services or other activities?
> - Has the applicant undertaken any professional, linguistic or other study that shows integration into Canadian society?
> - Do the applicant and family members have a good civil record in Canada (e.g., no interventions by police or other authorities for child or spouse abuse, criminal charges)?

[16] The Applicant argued that there was nothing in these guidelines to limit consideration of employment or volunteer work or other forms of establishment as positive factors only if the person has established beyond that which is "naturally expected" of a person. It was submitted that in

viewing these establishment characteristics in this fashion, the officer inserted a more onerous test for establishment than the guidelines require.

[17] Further, it was argued, the Applicant's accomplishments were significant given his background, his low level of education, his limited English, and his lack of occupational skills. Despite these circumstances, as was noted by officer, the Applicant maintained steady employment in Canada, co-purchased a home and financially supported his family in India.

[18] I am not persuaded that the officer applied a more onerous or an incorrect test in assessing the Applicant’s establishment in Canada. She did exactly the sort of analysis called for in the guidelines. She asked each of the questions posed therein and there is no dispute that the responses she gave to the question asked accorded with the evidence submitted by the Applicant.

[19] What the Applicant is truly challenging is the officer’s assessment of the “degree” of establishment. In this respect, I am concerned that the officer may have failed to consider these establishment factors within the context of Mr. Ranji’s particular circumstances.

[20] In assessing H&C applications the officer is required to examine the unique circumstances of a particular applicant.

[21] The officer's legal basis for assessing an H&C submission is found in s.25 (1) of the *Immigration and Refugee Protection Act* which specifically notes that humanitarian and compassionate considerations must relate to the "circumstances concerning the foreign national".

25. (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	25. (1) Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.
[emphasis added]	[pas dans l'original]

[22] When the officer concluded that the evidence of establishment was no greater than is "naturally expected of him", that determination was required to be made based on the particular circumstances of the Applicant. Therefore, the officer must consider the evidence presented with respect to the background and characteristics of the Applicant.

[23] Mr. Ranji came to Canada approximately 10 years ago. He has only a grade eight education in India and was a farmer there. He is neither well-educated nor skilled.

[24] Despite those circumstances, he has been continuously employed, save for a two month period, in unskilled positions earning no more than $50,000 annually but has managed to accumulate a sizable bank account, co-purchase a residence with his brother, develop a significant equity in the residence, purchase an RRSP, financially support his family in India including sending his two children to private school in India, and has provided letters of support from community and social groups for his activities with them.

[25] The officer made no reference to Mr. Ranji's personal circumstances as set out above and there is no evidence that the officer considered them in concluding that he did no more than was naturally expected of him.

[26] While the officer is not obligated to recite in the decision every evidentiary fact placed before him or her, it is expected that the important and significant facts will be described and that there will be some discussion of the consideration given them.

[27] The delicate balancing this Court must do in such circumstances was well set out by Justice Evans in *Cepeda-Guiterrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. 1425:

[15] The Court may infer that the administrative agency under review made the erroneous finding of fact "without regard to the evidence" from the agency's failure to mention in its reasons some evidence before it that was relevant to the finding, and pointed to a different conclusion from that reached by the agency. Just as a court will only defer to an agency's interpretation of its constituent statute if it provides reasons for its conclusion, so a court will be reluctant to defer to an agency's factual determinations in the absence of express findings, and an analysis of the evidence that shows how the agency reached its result.

[16] On the other hand, the reasons given by administrative agencies are not to be read hypercritically by a court (*Medina* v. *Canada (Minister of Employment and Immigration)* (1990), 12 Imm. L.R. (2d) 33 (F.C.A.)), nor are agencies required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it (see, for example, *Hassan* v. *Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 (F.C.A.). That would be far too onerous a burden to impose upon administrative decision-makers who may be struggling with a heavy case-load and inadequate resources. A statement by the agency in its reasons for decision that, in making its findings, it considered all the evidence before it, will often suffice to assure the parties, and a reviewing court, that the agency directed itself to the totality of the evidence when making its findings of fact.

[17] However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains* v. *Canada (Minister of Employment and Immigration)*, (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency’s burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

[28] Given the importance of Mr. Ranji's personal circumstances, the failure of the officer to reference them in her decision leads me to conclude that the officer failed to consider them when assessing his establishment. That failure, in these circumstances, is a failure to consider relevant and proper evidence and is thus an error of law.

(b) The Children's Best Interests

[29] Section 25 (1) specifically obligates the officer to consider the best interests of any child directly affected by the application.

[30] The Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 held that while the best interests of children is an important consideration it is not the primary one. Where the best interests of the children is minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.

[31] Mr. Ranji has two children: Navneet Kaur Ranji born January 28, 1996, and Navdeep Singh Ranji born September 6, 1997. He supports both and sends them to private schools in India because, in his words, "there are serious problems with the public school system". He submitted that if he were to return to India he would not be in a position to maintain his children in these schools and they would not receive the quality education they are now able to receive.

[32] In examining this aspect of the application the officer considered the United States Country Report on Human Rights Practices, India 2006 and concluded that it showed that there was a universal and free primary and secondary education available in India for both boys and girls and that enrolment was estimated to be at 98%.

[33] The officer concluded that the Applicant had not presented sufficient evidence on the children's prospective education to justify the exemption.

[34] Counsel for the Applicant argues that the officer made a selective analysis of that report with respect to education in India. I agree.

[35] A reading of the report indicates that the officer was factually inaccurate in stating that the report showed that enrolment at school in India is at 98%. The following passage from the report relates to the age group of the Applicant's children.

> The constitution provides for free, compulsory education for children between the ages of six and 14 years of age. However, the government did not enforce this provision. In practice, children in poor and rural areas often did not attend school. UNICEF and the National Institute of Educational Planning Administration (NIEPA) reported that approximately 60 percent of the 203 million children between the ages of six and 14 were in schools, and net attendance in the primary level was 66 percent of enrollment.

[36] It is troubling that the officer failed to assess the impact on these children's education given her finding that Mr. Ranji could regain employment in India as a farmer. Farming in India, as elsewhere, takes place in rural areas. The report relied upon by the officer not only sets out a level

of school attendance below the 98% she cites but also indicates that in poor and rural areas children often did not attend school at all.

[37] In my view, in misstating the evidence and in failing to consider the impact on the children's education if they were placed into a rural environment should their father return to India and take up farming, as was presumed by the officer, constitutes a reviewable error.

V. DECISION

[38] While decision of officers in H&C matters are to be given the greatest deference, for all of the reasons set out above, this application for judicial review is allowed, and the H&C application of the Applicant is referred back to a different officer for reconsideration.

[39] While counsel for the Applicant suggested a certified question, in light of this result and the reasons for it, the question proposed is not a serious question of general importance which would be dispositive of an appeal.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the decision of the officer under review be set aside and the matter be referred back for re-determination before a different officer.

"Russel W. Zinn"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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