Date: 20090210

Docket: IMM-2644-08

Citation: 2009 FC 126

Ottawa, Ontario, this 10th day of February 2009

Present: The Honourable Orville Frenette

BETWEEN:

GURCHARN SINGH MANN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act") of the decision of a Pre-Removal Risk Assessment Officer (the "officer"), dated June 9, 2008, denying the applicant's humanitarian application for permanent residence in Canada.

Facts

[2] The applicant, born on October 10, 1952, is a citizen of India. He is a Sikh and is from Punjab. He is married and has two children. His wife and children are in India and he financially supports them with his earnings in Canada. In India he acted as a Sikh priest and was a member of a musical group.

[3] The applicant came to Canada on December 6, 1985 as a visitor but overstayed his visa which expired on June 25, 1986. During his time in Canada, he has had the full advantage of the immigration processes available to him. He stated his intent to make a refugee claim on March 4, 1987. He was determined to have no credible basis to his refugee claim on June 29, 1990. A warrant for removal was issued on November 14, 1990 which he failed to report for and was only subsequently found and arrested on August 3, 1997. The applicant was released on a bond with reporting conditions. The applicant's first application for landing on Humanitarian and Compassionate ("H&C") grounds filed on November 24, 1999 was refused on February 21, 2001.

[4] The applicant made his second application for permanent residence from within Canada on H&C grounds on November 8, 2004. This second H&C application was the subject of a judicial review, dated April 30, 2008, wherein the applicant sought to obtain an order of *mandamus* to set a time frame to process and decide this H&C application (Federal Court docket IMM-2033-08).

[5] On April 11, 2005, his second H&C application was transferred for processing to the Mississauga Immigration Centre. The applicant's application is based on his successful establishment and integration in Canada for 22 years, and the hardship and risk to his life if returned

to India. The decision refusing this second H&C application was rendered on June 9, 2008, i.e. more than four years after its presentation. The applicant obtained a stay of removal on May 15, 2008 (2008 FC 612), wherein the judge noted the weakness of the applicant's arguments.

[6] The applicant also submitted an application for Pre-Removal Risk Assessment on August 6, 2004, which was refused on January 5, 2005.

[7] The officer acknowledged that it is reasonable to expect that a level of establishment would take place yet felt that the applicant's length of stay in Canada has been prolonged by his own actions. Despite his establishment and the acknowledged fact that the applicant will face some difficulties having to re-adapt to life in India, the officer was not satisfied that having to apply for permanent residence from outside Canada is a hardship that is unusual, undeserved or disproportionate.

[8] The issue in the present case is whether the officer's decision was unreasonable.

The Standard of Review

[9] The standard of review when dealing with the assessment of facts is that of reasonableness (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190; *Kamara v. Canada (M.C.I.)*, 2008 FC 785, [2008] F.C.J. No. 986 (QL); *Nasir v. Canada (M.C.I.)*, 2008 FC 504, [2008] F.C.J. No. 634 (QL)).

Analysis

[10] The applicant argues that the officer failed to make any reasoned assessment of his establishment and integration into the community in Canada during his 23 years here. He alleges the officer ignored his contributions to the church and the musical group he forms part of. Furthermore, he contends that the officer relied on generalizations as to his right to work, study and participate in various community activities and applied the wrong test in assessing the H&C application. He did not consider adequately the risk of returning to India.

[11] The applicant also argues that it is unreasonable for the officer to not give significant weight to the length of time or establishment that he has had in Canada. He cites Justice Russel W. Zinn's recent decision in *Ranji v. Canada (M.P.S.E.P.)*, 2008 FC 521, [2008] F.C.J. No. 675 (QL), whereby Justice Zinn held that in assessing an H&C application, the officer is required to examine the unique circumstances of a particular applicant:

> [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.

Finally he concludes:

> [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.

[12] In the case at bar, the applicant originally arrived in Canada on December 6, 1985 as a visitor but overstayed his visa which expired on June 25, 1986. His wife and children remain in India. During his stay in Canada, he has had the full advantage of the immigration process. Every single application however failed. Moreover, he has had a deportation order issued against him for which he failed to report for removal in 1990 and remained underground until 1997.

[13] The Inland Processing Manual (IP 5) published by Citizenship and Immigration Canada states:

> 5.21 Prolonged stay in Canada has led to establishment
>
> Positive consideration may be warranted when the applicant has been in Canada for a significant period of time due to circumstances beyond the applicant's control.

[14] This rule was applied by Deputy Judge Maurice Lagacé in *Sabharwal v. Canada (M.C.I.)*, 2008 FC 1128, [2008] F.C.J. No. 1412 (QL), where he dismissed the claim of lengthy establishment in Canada to support a positive H&C application because there was no evidence the period of time was due to "circumstances beyond his or her control".

[15] Here, the applicant alleges the officer did not consider his particular circumstances. A simple reading of the decision nevertheless shows that the officer extensively considered these particular circumstances. He considered the applicant's long 23-year stay, his employment record, his involvement in his community and his religious and musical activities. He, however, determined what was obvious i.e. that the extended stay argument flawed, since during the first two years he was a visitor and for the next seven years, after a refugee claim was rejected, he disappeared. After he was arrested in 1997, he exhausted all processes available under the law, which were dismissed, during the next 11 years. Therefore this lengthy time period is due to his own voluntary actions.

[16] It is difficult to understand why he continued to stay in Canada while his wife and two children resided in India.

[17] There appear to be no inoperative legal impediment for him not to return to India.

[18] In regards to the applicant's musical activities, Justice Michael L. Phelan, in his reasons for granting a stay of removal on May 15, 2008 (2008 FC 612) wrote:

> [18] . . . Reliance on interference with the Applicant's ability to play in his musical band or teach in his temple is so weak an

> argument as to undermine the seriousness of the challenge to the immigration processing system.
>
> [. . .]
>
> [29] The Court is mindful that this Applicant has sullied his "clean hands" by disappearing for seven years. Nor is the Court particularly persuaded in the Applicant's favour by his multiple use of immigration procedures.

This conclusion can be applied in the case at bar.

[19] The officer considered all of the applicant's submissions and rendered a decision based upon a rational and reasoned conclusion which amply satisfies the requirements set out in *Dunsmuir*, *supra*.

[20] Finally, the last allegation that the officer did not consider the evidence of the risk factor if the applicant is returned to India is simply not accurate. The officer spent extensive time in his decision considering this factor of the evidence including recent documentary evidence.

[21] He noted the following conclusion from that evidence:

> . . . Since the elevation of Manmohan Singh as India's first Sikh prime minister, the divide between Sikhs and Hindus had been bridged.

[22] In any event, the risk allegations had been repeatedly rejected by the Refugee Division and the Pre-Removal Risk Assessment unit and again by the officer in his second H&C application.

[23] In my view, the applicant has exhausted all his recourses and can still pursue his last H&C application outside of Canada.

[24] For all of these reasons, this application must be dismissed.

JUDGMENT

The Court orders that this application for judicial review is dismissed.

No serious question of general importance is certified.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

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