Date: 20090318

Docket: IMM-2849-08

Citation: 2009 FC 277

Ottawa, Ontario, this 18th day of March 2009

Present: The Honourable Orville Frenette

BETWEEN:

Satish Chander SHARMA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), of the Immigration Appeal Division's (the "IAD") decision to refuse the applicant's request for relief from deportation on humanitarian and compassionate ("H&C") grounds.

The facts

[2] The applicant is a citizen of India, although he has not resided in that country since 1976. After living in Dubai for fourteen years, he came to Canada on February 13, 1990, having been granted permanent residence as an entrepreneur. His wife and children were similarly granted permanent residence status, but have not joined him in Canada. The applicant claims in his affidavit that he and his wife, who now lives in India, have become estranged because of their lengthy separation. However, in his testimony he stated that he is still married to her and hopes she will come to Canada to live with him. His children reside in the United States.

[3] As an entrepreneur, certain terms and conditions were imposed on the applicant, which are stated on his Record of Landing. Accordingly, to maintain his status as a permanent resident he had to:

> - Establish, purchase, or make a substantial investment in a business or commercial venture in Canada significantly contributing to the economy and creating or continuing employment opportunities in Canada for one or more Canadian citizens or permanent residents, other than self and dependants;
>
> - Participate actively and on ongoing basis in the management of that business or commercial venture;
>
> - Provide evidence within two years of date of landing at Montreal, Quebec of compliance with above conditions.

[4] The applicant claims that he was not initially aware of these conditions; when he did become aware of them, he was told by his then-attorney that they were just formalities that he would have removed.

[5] Shortly after landing, the applicant claims he established a business, Saras International, which he allegedly registered in Toronto and Montreal. The purpose of the business was to export goods to and from the Middle East, India and Canada. The business, however, failed shortly after it was born; a shipment of shirts scheduled to arrive at the port in Montreal was delayed and never collected by the wholesaler; it therefore had to be auctioned at port. At the time, the applicant was overseas "drumming up business" and had left his sister-in-law in charge of overseeing matters while he was away. She, however, became ill, was hospitalized and died in 1991. The applicant claims he was not informed of the missed shipment until he returned to Canada after a three-month absence.

[6] After the business failed, the applicant claims to have immediately contacted his counsel, who told him he had nothing to worry about, and reassured him that he would contact the applicant if there were any problems. In the meantime, he suggested to the applicant that he find a job and gain some stability, while he looked after matters with Citizenship and Immigration Canada ("CIC"). When the applicant received no news from his counsel, he assumed that all was well as far as his status.

[7] In November 2002, the applicant began working at MITS Air Conditioning Inc. as a design engineer where he continued to work at the time of his application.

[8] In February 2003, the applicant applied to become a Canadian citizen. On August 17, 2004, while in Niagara Falls, Ontario, he was informed by a Border officer that immigration officials in Montreal wanted to speak to him, but was not told why. The applicant claims to have subsequently

called the immigration officials in Montreal twice, but received no response. Later, he got a letter from immigration officials in Montreal asking for information about his status. He consulted a lawyer in Toronto, and says he only then learned that CIC had been looking for him for many years. The immigration officials had tried to contact him in 1991, without success. A warrant was issued against him in 1997, and it was later cancelled.

[9] Because of the delay in processing his application for citizenship, the applicant requested in February 2005 a permanent resident card, and that the conditions of his status be removed on H&C grounds. He received a phone call to inform him of an interview with an officer in Montreal on February 16, 2005, but missed the interview. His permanent residence card was denied on this basis.

[10] On November 14, 2006, the applicant testified before the Immigration Division on this issue, conceding that he had breached the conditions of his landing. The Immigration Division therefore ordered his removal. He appealed to the IAD, requesting special relief, pursuant to paragraph 67(1)(*c*) and subsection 68(1) of the Act. His appeal was dismissed. It is this decision that is the subject of the present review.

The decision under review

[11] The IAD rendered its decision on June 3, 2008. The tribunal member notes at the outset that the applicant accepts that the conditions of his landing have been violated; what he seeks is relief on H&C grounds. He further notes that the onus is on the applicant to show that he should not be removed from Canada.

[12] The IAD sets out the list of non-exhaustive factors described in *Ribic v. Canada (M.E.I.)*, [1985] I.A.B.D. No. 4 (QL), and confirmed in *Chieu v. Canada (M.C.I.)*, [2002] 1 S.C.R. 84, to consider when exercising its discretionary jurisdiction in removal order appeals. Those factors include: members of the applicant's family and their dislocation, family and community support available to the applicant in Canada, and the degree of hardship that would be caused by his return. The member notes at paragraph 10 of his decision, leaning on a previous decision of the IAD in *Dakka v. Canada (M.C.I.)*, [2003] I.A.D.D. No. 657 (QL):

> . . . In cases involving a failure to fulfill terms and conditions for landing, an important factor to consider is the circumstances surrounding the failure to meet the terms and conditions of landing, including the extent to which the entrepreneur made serious efforts to comply with the terms and conditions of his landing.

[13] The rest of the decision is divided into several subheadings that generally track the "*Ribic*" factors. The first, however, deals with the applicant's failure to comply with the terms and conditions of his landing. The tribunal notes that, in addition to the shipment of shirts, the applicant testified at the hearing about another failed shipment, namely of wastepaper. The combined loss from these two failed shipments was, it is alleged, the downfall of the business.

[14] The tribunal observes, however, that the applicant adduced no documentation regarding either the consignment of shirts and its seizure, or the shipment of wastepaper. Nor did the applicant provide documentation evincing the business' alleged registration in 1990. A form was introduced for the Québec Commission des normes du travail as evidence that Saras International was doing business in Montreal in 1990; however the IAD comments at paragraph 13 of the decision:

> . . . the form is something that the appellant would have completed, not the government agency. It is also incomplete and does not indicate whether the business is active. As such, all it establishes is that the appellant, or someone on his behalf, partially filled out a form indicating that he worked for Saras International.

[15] The IAD also points out that the evidence suggests CIC was not satisfied that the applicant had ever started a business. In a Narrative Report dated November 25, 2005, an immigration officer notes that a check with the Inspector General of Financial Institutions had revealed that "no such business exists or ever existed under that name or the subject's name".

[16] Moreover, the IAD does not find the applicant's explanation regarding the lost shipment of shirts plausible. In particular, the tribunal doubts how it could be that the applicant remained ignorant of the loss for so long, if he was closely managing the business, as required by the conditions of his landing. No evidence was provided by either the applicant's brother or the sister-in-law about the lost shipment.

[17] At paragraph 16, the IAD member identifies a "pattern of the appellant rejecting any responsibility for his failure to meet his conditions of landing". The member writes:

> [17] One incident of a lost telephone message or an oversight by legal counsel might be believable, but in this case the appellant is trying to explain away a series of incidents in which he should have contacted CIC but did not. The appellant knew when he was conditionally landed that he had two years to satisfy CIC that he had met his conditions. I find that it is more likely than not that he was avoiding the immigration authorities because he had not complied with his conditions of landing. I reject as implausible his explanations that various other people were at fault for this lack of contact.

The IAD's conclusion on this point is set out at paragraph 19:

> . . . Given my concerns as set out above, I do not accept the appellant's testimony that he started a business and that it failed because a shipment of shirts was seized without his knowledge. Given the inconsistencies and implausibilities in his testimony and the lack of any pertinent documentary evidence regarding Saras International, I do not accept the appellant's testimony that he started and managed a business with the intention of fulfilling his conditions of landing. He has failed to establish on a balance of probabilities that he ever started a company, let alone that there is a reasonable explanation for his failure to meet his terms and conditions of landing.

The IAD found that this factor "weighed heavily against the appellant".

[18] The second major heading of the IAD's analysis deals with the length of time the applicant has spent in Canada, and his establishment. In this regard, the IAD identifies conflicting evidence about whether the applicant has in fact been consistently a resident of Canada since 1990. The member relies on several statements made by the applicant's wife to immigration authorities on occasions when she was seeking a visa to Canada to show that he lived and worked elsewhere during this period. In the same Narrative Report mentioned above, relied on by the tribunal, the immigration officer writes (at page 216):

> In his application to obtain Canadian citizenship, received on February 10, 2003, the subject declared a total of 66 days of absence during the 4 previous years.
>
> On his permanent resident card, received on January 25, 2005, the subject declared a total of 77 days of absence from Canada since January 2000.
>
> These statements were contradicted by the subject's spouse, who said on March 17, 2004, in her application for a visitor visa that they (she and the subject) returned to live in India in 2001, having lived in Dubai for the previous 25 years, where the subject owned and operated his company. In each of her four visa applications, she said

> that she wanted to visit her brother-in-law, her nephew or both, never to visit her spouse who, according to his statements, was living in Canada. The invitations to visit Canada always came from the subject's brother, not her spouse.
>
> All of the documents and statements on file lead us to believe that the subject never settled or lived permanently in Canada.

[19] The IAD does not find the applicant's explanations for these statements plausible. Moreover, the IAD notes that CIC was unable to track down the applicant during searches it conducted in December 1991, June 1992, July 1994 and December 1996. Nor were tax returns filed by the applicant prior to 1998, and in 1999, 2000 and 2002 his reported income did not demonstrate a living wage.

[20] The tribunal therefore concludes on this point, at paragraph 27 of the decision:

> Given these concerns, the appellant's testimony was not enough to establish on a balance of probabilities that he has been continuously residing in Canada since being landed. While I accept he has likely been here since starting with Mitsubishi Electric in 2002, he was not able to meet his burden of establishing on a balance of probabilities that he was residing in Canada before that. His wife's statements and the inability of CIC to find him – and his failure to provide a reasonable explanation for either – prevented him from meeting his evidentiary burden.

[21] With respect to what remains of the establishment analysis, the tribunal observes that the applicant does not have any family in Canada except his brother. He is employed in a full-time job and owns his own home; indeed, the tribunal acknowledges at paragraph 29 that "since starting work at Mitsubishi Electric in 2002, the appellant has been doing quite well and is a contributing member of society", which weighs in his favour. Nevertheless, the member concludes:

> . . . because I am not satisfied he was present in Canada in the 1990s and because his immediate family does not live in Canada, in the overall balancing of factors, I treat the appellant's establishment as a neutral factor that neither weighs for nor against granting the appeal.

[22] The tribunal finds no evidence of family members in Canada who would be dislocated by the applicant's removal, nor evidence of any hardship that would face the applicant in India, the country where he grew up and continues to have family. The tribunal dismisses the applicant's argument that, at 66, he would have great difficulty finding work in India, no evidence having been submitted to support this statement. The tribunal concludes that he should have no trouble, as a skilled professional "working for a multinational company".

Relevant legislation

[23] The following provisions of the Act are relevant to the present review:

27. (1) A permanent resident of Canada has the right to enter and remain in Canada, subject to the provisions of this Act.	**27.** (1) Le résident permanent a, sous réserve des autres dispositions de la présente loi, le droit d'entrer au Canada et d'y séjourner.
(2) A permanent resident must comply with any conditions imposed under the regulations.	(2) Le résident permanent est assujetti aux conditions imposées par règlement.
[…]	[…]
41. A person is inadmissible for failing to comply with this Act (*a*) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of this Act; and (*b*) in the case of a permanent resident, through failing to comply with subsection 27(2) or section 28.	**41.** S'agissant de l'étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte ou omission — commis directement ou indirectement en contravention avec la présente loi et, s'agissant du résident permanent, le manquement à l'obligation de résidence et aux conditions imposées.

[…]

63. …

(3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.

[…]

67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,

(*a*) the decision appealed is wrong in law or fact or mixed law and fact;

(*b*) a principle of natural justice has not been observed; or

(*c*) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

[…]

68. (1) To stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

[…]

63. …

(3) Le résident permanent ou la personne protégée peut interjeter appel de la mesure de renvoi prise au contrôle ou à l'enquête.

[…]

67. (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :

a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;

b) il y a eu manquement à un principe de justice naturelle;

c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

[…]

68. (1) Il est sursis à la mesure de renvoi sur preuve qu'il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

The issue

[24] The applicant raises the following issue: Did the IAD reach an unreasonable conclusion based on the evidence that was before it?

Positions of the parties

[25] The applicant alleges that the IAD misinterpreted evidence and drew unreasonable conclusions.

[26] In particular, the applicant contests the negative inference drawn by the IAD from the applicant's inability to provide evidence, apart from the document from the Quebec Commission des normes du travail, showing that Saras International was registered in Montreal and Toronto. According to the applicant, he had explained at the hearing that the documents relating to his business were at his brother's home, having been in the possession of his sister-in-law. The sister-in-law has since died and the brother, moved. These explanations are not mentioned in the decision, which suggests, for the applicant, that they were not taken into account.

[27] In addition, the applicant objects to the tribunal's reliance on the statements of his estranged spouse, which suggest he has not continually resided in Canada since 1990. Again, the applicant provided an explanation at the hearing; this explanation was not found to be plausible by the tribunal. The applicant also contends that CIC's lack of success in locating him ought not to be given great weight; according to the applicant, he had been assured by his then-counsel that the conditions of his landing would be removed, and that he would be alerted if there were any problems. The applicant also notes that he has frequently travelled in and out of Canada to the

United States and to India, and was never informed by Canadian Border Services that he was sought by CIC, except on the occasion in Niagara Falls in 2004.

[28] To explain why he did not have a living wage for several years prior to 2002, the applicant clarifies that after losing his business, he struggled financially, and did not earn a steady income until he was employed at MITS Air Conditioning Inc. in 2002. The applicant notes that in the decision the tribunal incorrectly names Mitsubishi Electric, a multinational company, as his employer. The evidence states that Mitsubishi Electric is an affiliated company and in his testimony the applicant refers to that company.

[29] In his affidavit, the applicant recalls that he testified about his sister-in-law's death at the hearing; however, the tribunal refers to her in its decision as though she were still alive, indicating, for instance, that she might have provided evidence supporting some of his claims. More generally, he asserts that his friends and social network are in Canada and writes, at paragraph 42 of his affidavit:

> I know no other home, other than Canada. As I said before, my life has been centered here for nearly two decades now. To be told that I have to leave now is a huge and devastating blow to me.

[30] The respondent contends that the applicant's arguments do not undermine the reasonableness of the IAD's decision regarding the circumstances surrounding the applicant's failure to meet the terms and conditions of his landing. The tribunal found the applicant's explanations for the failure of his business, and the absence of documents showing that it had been registered, implausible. The fact that these documents were allegedly located at the applicant's

brother's home in 1991 does not address these concerns about plausibility. There was no explanation as to why he could not have attempted to obtain these documents to support his claim.

[31] The respondent notes that it is not clear the IAD was aware of the sister-in-law's death, because the applicant's statement in his affidavit in this regard is ambiguous, and no excerpt from the transcript is in the record to confirm the applicant's statements at the hearing; however it is evident from the testimony that she died in 1991. The respondent emphasizes that the onus was on the applicant to satisfy the IAD that H&C considerations warranted special relief; he did not do so. In the Minister's view:

> The IAD reasonably and properly concluded that the Applicant's failure to meet the terms and conditions of his landing weighed heavily against him.

[32] With respect to the applicant's establishment in Canada, the respondent recalls that the tribunal found this to be a neutral consideration, weighing neither for nor against the applicant's case. The respondent argues that evidence before the IAD supported its conclusions regarding his wife's statements that he has not consistently resided in Canada since 1990. Moreover, the applicant produced no evidence from his wife to support his explanations. Corroboration of the wife's claims can be found in the immigration officer's notes stating the applicant was a resident of Dubai and was "owner or part owner of Saras Electrical Works in Dubai" (page 262 of the Tribunal Record).

[33] As far as the applicant's claims that he did not learn that CIC was looking for him until 2004, this is, it is argued, merely a disagreement about the weight that the tribunal accorded to the applicant's claims.

[34] The respondent asserts that the tribunal's decisions regarding the applicant's family's relocation and the hardship he would face if he had to return to India, were reasonable. Finally, the respondent argues that the errors pointed to by the applicant – namely, the mistake about his employer, which is MITS Air Conditioning, and not Mitsubishi Electric, and references to the now-deceased sister-in-law – are immaterial errors, given that:

> . . . The IAD relied primarily on the lack of documentary evidence regarding Saras International and its finding that it was implausible that the Applicant would have had day-to-day management responsibility for the company in 1990 and yet have known nothing about the arrival of the only goods that the company had imported in Canada and their auction at port.

[35] Neither of the IAD's purported factual errors bears on these concerns.

Analysis

Standard of review

[36] Since the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, the standard of review for factual determinations of mixed fact and law is reasonableness *simpliciter*. Factual determinations are not to be disturbed in review if these are "within the range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at paragraph 47). Recently, in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, the Supreme Court of Canada reminded us that the standard of reasonableness requires deference to decisions of administrative tribunals.

Is the IAD's decision unreasonable, perverse or capricious?

[37] The applicant admitted that he did not conform to the conditions to which he agreed upon his landing in Canada in 1990 as an entrepreneur to establish within two years a "substantial investment in a business or commercial venture in Canada significantly contributing to the economy and creating or continuing employment opportunities in Canada for one or more Canadian citizens or permanent residents other than self and dependants".

[38] His family and two children did not follow him to Canada.

[39] The applicant submits the Board made a "lot of errors" and was quite unfair.

[40] He mentions a purported error which was not exact concerning his mentioning Mitsubishi Electric. He worked for MITS Air Conditioning Inc., a related company and in his own testimony he referred to Mitsubishi.

[41] The applicant states that the IAD accepted that he had, since 2002, been employed full time in Canada, yet accepted his wife's testimony that he resided in Dubai and worked for a company he co-owned, i.e. Saras Electrical in Dubai.

[42] The applicant argues that the IAD should have accepted his version of the facts because his wife lied to be able to enter Canada. Yet, in his testimony, he declares that he is still married and hopes his wife will come to live with him in Canada. Furthermore, corroboration for his wife's version can be found in the immigration officer's notes where the facts related to her version are

recorded. She also received an invitation to come to Canada from the applicant's own brother who lives in Canada.

[43] The applicant contests the IAD's decision that before 1998, no income tax declarations were made and his declarations for 2000 and 2002 did not demonstrate a living wage. He did not adduce evidence to contest these findings.

[44] The applicant contests the IAD's findings as to his establishment in Canada. He contests his wife's assertions that they both lived for 25 years in Dubai and in 2001 returned to live in India.

[45] His explanations as to his frequent excursions outside Canada for periods up to four months are implausible, as the IAD found.

[46] The applicant contests the IAD's findings as to the company he supposedly operated in Canada, Saras International. Besides his wife's affirmation that he operated a company in Dubai, Saras Electrical, there is no evidence that the company was ever registered either in Montreal or Toronto. A search of government agencies in Canada failed to find such a registered company.

[47] The applicant argues the IAD made factual mistakes which taint its decision. These minor factual errors weigh very little in the balance of the decision.

[48] As mentioned before, when the applicant came to Canada in 1990 as an entrepreneur he signed firm conditions to operate a business contributing to Canada's economy and invest substantial money within two years. He failed to respect these obligations.

[49] The immigration officer and the IAD considered all of the evidence produced and considered extensively four factors in appeal, to wit: (a) the circumstances surrounding the applicant's failure to comply with the terms and conditions associated with his landing as an entrepreneur; (b) the length of time and establishment in Canada; (c) family in Canada and the dislocation that removal would cause; and (d) hardship in the country of removal.

[50] The applicant alleges that these factual findings were erroneous, or that the IAD failed to consider his evidence and drew unreasonable conclusions.

[51] An analysis of his allegations reveals that he wishes the Court to re-weigh the evidence. The problem with this argument is that courts on judicial review cannot simply re-weigh the evidence and substitute their opinions unless the decision does not, according to *Dunsmuir*, *supra*, "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law"; or, if you wish, constitutes perverse and capricious findings under paragraph 18.1(4)(*d*) of the *Federal Courts Act* (*Sahil v. Minister of Citizenship and Immigration*, 2008 FC 772, at paragraphs 9 and 10; *Matsko v. Minister of Citizenship and Immigration*, 2008 FC 691, at paragraph 8; and *Barm v. Minister of Citizenship and Immigration*, 2008 FC 893, at paragraph 12).

[52] In a decision concerning a landed immigrant in the entrepreneurial class, *Said Elias Touchan et al. v. Minister of Citizenship and Immigration*, 2005 FC 1329, Justice Yvon Pinard dismissed an application for judicial review against a removal order where the entrepreneur did not live up to the conditions and terms of his landing. This case bears some similarities with the present one.

[53] Fundamentally, the IAD's decision is based upon the facts and law and certainly falls within the range of possible, acceptable outcomes as enunciated in *Dunsmuir*, above. Even with a microscopic analysis of the decision, I cannot detect any flaw that could justify this Court's intervention. Consequently, the application must be dismissed.

JUDGMENT

The application for judicial review of the decision of the Immigration Appeal Division to refuse the applicant's request for relief from deportation on humanitarian and compassionate grounds is dismissed.

No question of general importance is to be certified.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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