Date: 20091006

Docket: IMM-1313-09

Citation: 2009 FC 1006

Ottawa, Ontario, October 6, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ANIL SHARMA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicant has filed an Application for Judicial Review challenging a decision of the Pre-Removal Risk Assessment (PRRA) Officer, dated January 30, 2009, denying his application to be dispensed from filing an application for permanent residence from outside Canada on humanitarian and compassionate (H&C) grounds, pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

II. Facts

[2] The Applicant, Mr. Anil Sharma, a citizen of India, has been in Canada since September 2002. Mr. Sharma claimed refugee protection which was denied on December 18, 2003. He filed an application for Leave against the decision of the Immigration and Refugee Board (IRB) which was rejected by the Federal Court, on June 11, 2004. On January 30, 2009, Mr. Sharma's PRRA application was denied.

[3] Mr. Sharma's H&C grounds are mainly based on risk factors upon his return to India and also on his degree of establishment in Canada:

> **Reasons provided by applicant:**
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> In his initial application, the applicant submitted that he has his own company and submits documentation regarding his financial and employment status. He also states that he cannot travel to any other country to submit his application. He believes that he should be given the privilege of applying from within Canada based on humanitarian and compassionate grounds. The applicant also submitted that he should not be forced to return home and submitted the immigration and Refugee Board (IRB) decision as supporting evidence of the risks he would be facing should he return to India.
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> In the September 2008 update, the applicant reiterates the same story and allegations than the ones initially submitted to the Tribunal of the IRB. The applicant fears persecution and threats to his person at the hands of criminals, the *Tyegi Gang* and claims that he cannot get protection because of police corruption. The applicant also submits that he has truly established himself, pays his taxes, has successfully integrated and adapted to Canadian society.

(Applicant's Record, H&C Applications – Notes to File at p. 7).

[4] Subsequent to Mr. Sharma's evidence, the Officer found that Mr. Sharma did not demonstrate sufficient H&C grounds to warrant granting an exemption. Mr. Sharma had not

demonstrated that he would suffer unusual, undeserved or disproportionate hardship if he had to obtain a visa in the usual manner, i.e. outside Canada.

III. Analysis

[5] The Court is in complete agreement with the position of the Respondent.

[6] The IRPA requires that a foreign national who wishes to reside in Canada must apply for and obtain a permanent resident visa before entering Canada. The IRPA also provides for an Immigration Officer to exempt a foreign national from this requirement if the Officer (or Minister) is of the opinion that an exemption is justified for H&C considerations (subsection 11(1) and section 25 of the IRPA).

[7] As Justice Yves de Montigny wrote in *Serda v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 356, 146 A.C.W.S. (3d) 1057:

> [20] One of the cornerstones of the *Immigration and Refugee Protection Act* is the requirement that persons who wish to live permanently in Canada must, prior to their arrival in Canada, submit their application outside Canada and qualify for, and obtain, a permanent resident visa. Section 25 of the Act gives to the Minister the flexibility to approve deserving cases for processing within Canada. This is clearly meant to be an exceptional remedy, as is made clear by the wording of that provision … (Emphasis added).

[8] "The H & C decision-making process is a highly discretionary one that considers whether a special grant of an exemption is warranted" (*Kawtharani v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 162, 146 A.C.W.S. (3d) 338 at para. 15).

[9] The onus is on Mr. Sharma to demonstrate that the hardship he would suffer, if required to apply for permanent residence in the usual manner, would constitute unusual, undeserved or disproportionate hardship, which is the criteria adopted in the following decisions, *inter alia:* *Owusu v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 94, 228 F.T.R. 19 (F.C.A.); *Monteiro v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1322, 166 A.C.W.S. (3d) 556 at para. 20; *Samsonov v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1158, 157 A.C.W.S. (3d) 822; *Hamzai v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1108, 152 A.C.W.S. (3d) 137 at para. 21; *Liniewska v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 591, 152 A.C.W.S. (3d) 500 at para. 9; *Ruiz v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 465, 147 A.C.W.S. (3d) 1050 at para. 35 and *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 F.C. 358 (C.A.) at paras. 23, 28).

[10] In *Serda*, above, Justice de Montigny wrote the following:

> [21] It would obviously defeat the purpose of the Act if the longer an applicant was to live illegally in Canada, the better his or her chances were to be allowed to stay permanently, even though he or she would not otherwise qualify as a refugee or permanent resident. This circular argument was indeed considered by the H & C officer, but not accepted; it doesn't strike me as being an unreasonable conclusion.

[11] "This Court has repeatedly held that the hardship suffered by the applicant must be more than mere inconvenience or the predictable costs associated with leaving Canada, such as selling a house or a car, leaving a job or family or friends" (*Hamzai*, above; reference is also made to *Monteiro*, above at para. 20 and *Liniewska*, above at para. 9).

[12] This Court should not interfere with an Officer's decision unless the decision is unreasonable, bearing no inherently logical analysis in the Officer's reasons from the evidence before him that could lead the Officer to his conclusion (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 (S.C.C.); *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247).

[13] It is not the role of this Court to re-examine the weight given by an Officer to the various factors considered by the Officer when deciding whether or not to grant an H&C exemption to a foreign national (*Legault*, above).

Standard of Review

[14] Since the recent Supreme Court decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the applicable standard of review is reasonableness:

> [51] Having dealt with the nature of the standards of review, we now turn our attention to the method for selecting the appropriate standard in individual cases. As we will now demonstrate, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.
>
> …
>
> [53] Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Mossop*, at pp. 599-600; *Dr. Q*, at para. 29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated. (Emphasis added).

[15] The Officer noted that Mr. Sharma brought forward the same allegations of risk that he presented before the IRB; however, the IRB rejected his request for protection as state protection is in place for him in India. On June 11, 2004, the Federal Court dismissed Mr. Sharma's Application for Leave and for Judicial Review against that decision. The Officer further noted that in an H&C application, risk is more broadly assessed in the context of an applicant's degree of hardship.

[16] The Officer concluded his analysis in the following manner:

> After analysis of the evidence provided by the applicant to support his allegations I conclude that the applicant has not demonstrated that he would be personally at risk should he return to India. The applicants did not submit sufficient evidence to demonstrate that he would be a person of interest or a target for a criminal gang namely the Tyagi gang. The applicants did not submit sufficient evidence to corroborate facts and events related to his personal situation as alleged.
>
> Even if the risk study in a request for a visa exemption has a broader scope than a risk analysis done for a claim for protection at the RPD or in a PRRA application, after a careful review of all the evidences submitted by the applicant, I am not satisfied that the applicant is at risk if he returns to India and that his personal circumstances warrant exemption from the permanent resident visa requirement. The applicant did not discharge himself of the onus to establish a risk of return in his country that would amount to an unusual and undeserved or disproportionate hardship.

(Applicant's Record, H&C Applications – Notes to file at p. 8).

[17] In the recent case of *Jakhu v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 159, [2009] F.C.J. No. 203 (QL), wherein a negative H&C was challenged, this Court stated the following with respect to an applicant's reliance on the general documentary evidence:

> [27] In any event, it is insufficient for the applicant to base himself on the objective documentary evidence regarding the situation in a country in general in attempting to establish a risk for himself: see, for example, *Nazaire* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 416; *Hussain* v. *Canada*

> *(Minister of Citizenship and Immigration)*, 2006 FC 719. The applicant bore the onus of establishing a correlation between the particular facts of his case and the objective documentary evidence, which he has failed to do. (Emphasis added).

[18] The criteria used in the analysis of Mr. Sharma's H&C application was to determine if an application for permanent residence outside of Canada, would not cause him unusual, undeserved, or disproportionate hardship. Clearly, the Officer neither ignored the evidence before him nor misunderstood the issue he had to decide (*de Guevara v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1115, 141 A.C.W.S. (3d) 807 at par. 12).

[19] The Officer assessed the risk factors alleged by Mr. Sharma and considered the relevant documentary evidence. The Officer's decision and reasons reflect a detailed analysis of Mr. Sharma's submissions and his findings are supported by the evidence.

[20] The Officer did demonstrate that he considered risk factors in regard to unusual, undeserved or disproportionate hardship. His conclusion was negative.

[21] The Officer applied the correct test in assessing Mr. Sharma's H&C application.

[22] In his memorandum, Mr. Sharma claims that the Officer erred in assessing the length of time spent in Canada as well as his degree of establishment in Canada.

[23] In the case of *Lee v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 413, 138 A.C.W.S. (3d) 350, Justice Pierre Blais stated that, while the time spent in Canada and the

establishment in the community are important factors, they are not determinative of the application for permanent residence on H&C grounds:

> [9] In my view, the officer did not err in determining that the time spent in Canada and the establishment in the community of the applicants were important factors, but not determinative ones. If the length of stay in Canada was to become the main criterion in evaluating a claim based on H & C grounds, it would encourage gambling on refugee claims in the belief that if someone can stay in Canada long enough to demonstrate that they are the kind of persons Canada wants, they will be allowed to stay… (Emphasis added).

[24] In a similar case, Justice Edmond Blanchard explained that H&C applications have little to do with whether the applicants become role models in the Canadian society. Rather, the standard to be met is whether applying for permanent residence from abroad would cause unusual excessive or undue hardship:

> [21] The applicant further contends that the officer did not examine the totality of the evidence regarding establishment. The applicant argues that the officer had sufficient evidence before her to conclude that the applicant was established in Canada. In this regard, the officer determined that the applicant had some level of establishment but she was not satisfied that this level of establishment outweighed other factors respecting hardship.
>
> [22] The applicant has the onus of proving that the requirement to apply for a visa from outside of Canada would amount to unusual, undue or disproportionate hardship. The applicant assumed the risk of establishing himself in Canada while his immigration status was uncertain and knowing that he could be required to leave. Now that he may be required to leave and apply for landing from outside of Canada, given that he did assume this risk, the applicant cannot now contend, on the facts of this case, that the hardship is unusual, undeserved or disproportionate. The words of Mr. Justice Pelletier in *Irmie v. M.C.I.* (2000), 10 Imm. L.R. (3d) 206 (F.C.T.D.), are applicable to this case:
>
> > I return to my observation that the evidence suggests that the applicants would be a welcome addition to the Canadian community. Unfortunately, that is not the test. To make it the test is to make the H & C process an ex post facto screening device which supplants the screening process contained in the *Immigration Act* and *Regulations*. This would encourage gambling on refugee claims in the belief that

> if someone can stay in Canada long enough to demonstrate that they are the kind of persons Canada wants, they will be allowed to stay. The H & C process is not designed to eliminate hardship; it is designed to provide relief from unusual, undeserved or disproportionate hardship. There is no doubt that the refusal of the applicants' H & C application will cause hardship but, given the circumstances of the applicants' presence in Canada and the state of the record, it is not unusual, undeserved or disproportionate hardship.... (Emphasis added).

(*Uddin v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 937, 116 A.C.W.S. (3d) 930).

[25] In the same vein, reference is also made to *Mann v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 567, 114 A.C.W.S. (3d) 508:

> [11] I wish to note the able submissions of counsel for the applicant and the sympathy that, in my view, the applicant's case attracts. The sympathy evoked flows particularly from the length of time that the applicant has been in Canada, the difficulties that he has encountered and, it would appear, overcome while in Canada, his new relationship in Canada and the Canadian born child of that relationship, and, what I conclude must be an obvious reality, that the applicant is now closer to his relatives and friends in Canada than he is likely to be to his family members in India, particularly having regard to the length of time he has been absent from India and the divorce proceedings that he has instituted in India. That being said, I cannot conclude that the Immigration Officer ignored or misinterpreted evidence before her, took into account irrelevant matters or failed to consider the best interests of the applicant's Canadian born child. I am satisfied that the Immigration Officer's notes, quoted earlier in these reasons, reflect consideration of all of the factors placed before her by the applicant and that she was bound to consider. That I might have weighed those factors differently is not a basis on which I might grant this application for judicial review. (Emphasis added).

(Also, *Serda*, above).

[26] Moreover, the establishment in Canada is but one factor among others that the H&C Officer must weigh in coming to a decision. It is not a deciding factor in and of itself (*Samsonov*, above at para. 18).

[27] An applicant has a high threshold to meet when requesting an exemption from the application of subsection 11(1) of the IRPA. The H&C process is designed not to eliminate the hardship inherent in being asked to leave after one has been in place for a period of time, but to provide relief from "unusual, undeserved and disproportionate hardship" caused by an applicant is required to leave Canada and apply from abroad in the normal fashion. That Mr. Sharma must leave a job or family is not necessarily undue or disproportionate hardship; rather it is a consequence of the risk Mr. Sharma took by staying in Canada without landing (*Monteiro*, above; *Williams v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1474, 154 A.C.W.S. (3d) 689 at para. 9).

[28] The Officer's reasons meet the test for adequacy as they inform Mr. Sharma of the reasons for which his application was denied and they do not prejudice his ability to seek judicial review.

[29] It is well established that reasons serve two main purposes: to ensure the parties know that the issues have been considered and to allow the parties to file an appeal or an application for judicial review (*Via Raid Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25, 100 A.C.W.S. (3d) 705 (C.A.); *Townsend v. Canada (Minister of Citizenship and Immigration)*, 2003

FCT 371, 231 F.T.R. 116; *Fabian v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1527, 244 F.T.R. 223).

[30] In *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, the Supreme Court of Canada held that the inadequacy of reasons is not a free-standing right of appeal, in that, it does not automatically constitute a reviewable error. A party seeking to overturn a decision on the basis of the inadequacy of reasons must show that the deficiency in reasons has occasioned prejudice to the exercise of a legal right to appeal (reference is also made to *R. v. Kendall* (2005), 75 O.R. (3d) 565, 66 W.C.B. (2d) 633 at para. 44 (Ont.C.A.)).

[31] In *Siman v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1283, [2008] F.C.J. No. 1624 (QL), this Court rejected the applicant's argument that the reasons of the H&C Officer were insufficient:

> [45] According to the Respondent, the officer clearly stated that the Applicant's degree of establishment in Canada was not beyond the norm of what would reasonably be anticipated of an individual living in Canada for less than four years and the normal hardship of having to sever community and employment ties to apply in the manner contemplated by the legislation does not amount to unusual and undeserved or disproportionate hardship. The officer also noted that the alleged economic difficulties of having to apply for a permanent resident visa from the Philippines do not extend beyond the usual hardship anticipated by the legislation. The officer's reasons are therefore sufficient to address the Applicant's alleged grounds of unusual and undeserved or disproportionate hardship and to allow her to exercise her right to file an application for leave and for judicial review.
>
> [46] The Court finds that the officer has provided cogent and sufficient reasons to justify his refusal to grant an H&C to the Applicant. She has not demonstrated that the officer erred. (Emphasis added).

IV. Conclusion

[32] For all of the above reasons, the Officer has properly considered Mr. Sharma's situation; and Mr. Sharma's attempt to ask the Court to re-weigh the evidence is not warranted.

JUDGMENT

THIS COURT ORDERS that

1. The application for judicial review be dismissed;

2. No serious question of general importance be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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