Federal Court  Cour fédérale

Date: 20120518

Docket: IMM-6784-11

Citation: 2012 FC 612

Ottawa, Ontario, May 18, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

BALBIR SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Balbir Singh, seeks judicial review of an Officer's negative decision regarding his application for permanent residence on humanitarian and compassionate (H&C) grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

I. Facts

[2] A citizen of India, the Applicant came to Canada on September 6, 2001. He made an unsuccessful refugee claim based on a fear of persecution by Indian authorities suspecting he collaborated with Sikh militants. He subsequently applied for permanent residence on H&C grounds in 2007, with further submissions provided by new counsel in 2010.

II. Decision Under Review

[3] The Officer found that the Applicant had not demonstrated his personal circumstances were such that rejecting his application would result in unusual and undeserved or disproportionate hardship. He would not accord probative value to the 3 affidavits and letter submitted by the Applicant. Despite addressing documentary evidence of the risks facing the Applicant, various factors regarding his establishment in Canada, and the best interests of the child; the Officer still found that there would be an insufficient level of hardship if the Applicant returned to India.

III. Issue

[4] The sole issue raised by the Applicant is whether the Board erred in its consideration of his establishment in Canada.

IV. Standard of Review

[5] Determinations on H&C grounds are to be afforded deference and reviewed on a standard of reasonableness (see *Ahmad v Canada (Minister of Citizenship and Immigration)*, 2008 FC 646, 2008 CarswellNat 1565 at para 11; *Inneh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 108, 2009 CarswellNat 239 at para 13).

[6] As a consequence, this Court will only intervene in the absence of justification, transparency or intelligibility and an acceptable outcome defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

V. Analysis

[7] In considering the Applicant's establishment in Canada, the Officer referred to several positive factors; including his employment as a chef at a restaurant, paying taxes, and community involvement. The Officer nonetheless found this was insufficient to demonstrate the required degree of hardship. The Applicant initially failed to pursue an Indian passport and remained in Canada for reasons that were not beyond his control. Commenting on a letter from the Applicant's employer that he was important for business at the restaurant and would represent a loss, the Officer would not accord this weight. The Applicant had taken the risk of establishing himself despite his uncertain immigration status as had his employer in giving him responsibilities knowing it was possible he would eventually have to leave Canada.

[8] The Applicant asserts that the Officer's assessment in this regard was unreasonable, since it minimized his accomplishments and focused on the risk he took to establish himself in Canada. In support of this position, he relies on the decisions of this Court in *Raudales v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 385, [2003] FCJ no 532 at para 18; *Jamrich v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 804, [2003] FCJ no 1076 at para 29; and *Amer v Canada (Minister of Citizenship and Immigration)*, 2009 FC 713, [2009] FCJ no 878 at paras 11-13.

[9] Having considered these cases, I do not find them directly analogous to the case at bar. While the officers were faulted for failing to conduct a proper assessment of establishment in those instances by suggesting that the applicants were not in a different position than others in Canada for a period of years; that is not what occurred here.

[10] The Officer provided a rather detailed consideration of the positive factors relevant to establishment but nonetheless found this was not sufficient to constitute unusual or undeserved and disproportionate hardship. Contrary to the Applicant's submissions, this cannot be dismissed as a mere listing or failure to consider personal circumstances. The reference to the risk the Applicant took in establishing himself despite his uncertain status was in addition to this initial assessment.

[11] I must agree with the Respondent that the determination regarding the Applicant in this instance more closely resembles that of *Mann v Canada (Minister of Citizenship and Immigration)*, 2009 FC 126, [2009] FCJ no 151 at para 15 where the officer gave extensive consideration to an

applicant's particular circumstances and noted the lengthy time period remaining in Canada was due to his own voluntary actions. The approach was considered reasonable.

[12] I should also stress consistent recognition by this Court that for the purposes of discretionary decisions on H&C grounds there "should be something other than that which is inherent in being asked to leave after one has been in place for a period of time...the fact that one would be leaving behind friends, perhaps family, employment or a residence would not necessarily be enough to justify the exercise of discretion" (see *Irimie v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ no 1906 at para 12; *Buio v Canada (Minister of Citizenship and Immigration)*, 2007 FC 157, [2007] FCJ no 205 at para 36). The Officer is justified in weighing all of these aspects before determining if the Applicant will face the requisite degree of hardship on return.

[13] The Applicant further contests the suggestion that the decision to remain in Canada was not beyond his control. The delay was not in failing to secure a passport as the Officer implied, but in waiting to be issued a Pre-Removal Risk Assessment (PRRA). He applied for and received valid work permits. He refers to *Lin v Canada (Minister of Citizenship and Immigration)*, 2011 FC 316, [2011] FCJ no 395 wherein a seven year delay in resolving an applicant's status in Canada was considered a "shared responsibility between the Applicant and the Respondent."

[14] As the Respondent argues, and I agree, this principle has since been distinguished. Considering the holding in *Lin*, above, Justice Richard Mosley in *Singh v Canada (Minister of Citizenship and Immigration)*, 2011 FC 813, [2011] FCJ no 1014 at para 11 stressed that the timeframe was exceedingly long in that instance and the applicant had become firmly established

over that period. He further remarked that there was no mention in *Lin*, above, of the evidence that supported this firm degree of establishment.

[15] Moreover, this Court maintains that while applicants are entitled to use all legal remedies at their disposal, choosing to do so would not constitute circumstances beyond their control (*Gonzalez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 81, [2009] FCJ no 123 at para 29; *Luzati v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1179, [2011] FCJ no 1450 at para 21; *Gill v Canada (Minister of Citizenship and Immigration)*, 2011 FC 863, [2011] FCJ no 1072 at para 30; *Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356, [2006] FCJ no 425 at para 23).

[16] Along similar lines, I cannot accept that the Officer erred in his treatment of the letter from the Applicant's employer that his leaving would be detrimental to the business. While the Applicant would have expected that greater weight be given to this evidence, it is not unreasonable when the Officer provides some degree of justification, transparency and intelligibility for his or her approach (for a similar holding see *Olaopa v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1292, [2011] FCJ no 1574 at para 25).

[17] In general, the Applicant's submissions assume if his establishment in Canada were addressed differently by the Officer, his application would be granted. I must note, however, that in the discretionary weighing of H&C grounds attachment "is a factor to be considered, but it is not, nor can it be, the determining factor, outweighing all others" (*Irimie*, above at para 20).

VI. Conclusion

[18] For these reasons, the Applicant has not demonstrated a reviewable error by the Officer in considering his level of establishment in Canada. His application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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