Date: 20060314

Docket: IMM-2104-05

Citation: 2006 FC 329

Ottawa, Ontario, March 14, 2006

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

MANJIT SINGH JAKHU

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of a decision by an immigration officer, dated March 22, 2005, which refused to grant the applicant an exemption on humanitarian and compassionate (H&C) grounds to permit inland processing of his permanent residence application.

[2] The applicant, Manjit Singh Jakhu, seeks an order quashing the immigration officer's decision and remitting the matter for redetermination by a different immigration officer.

Background

[3] The applicant, a citizen of India, stated that he is a Punjabi Sikh who fled India because he was being persecuted by the police on suspicions that he had connections with terrorists. In November 2000, police raided the applicant's home and beat him and his wife. They were taken to the police station for interrogation, where his wife died of a heart attack. The applicant came to Canada in December 2000 and made an unsuccessful claim for refugee status. He left behind three children in India in the care of his parents.

[4] Soon after arriving in Canada, the applicant met his second wife, a permanent resident of Canada who had also been recently widowed. They were married on March 1, 2001. On April 6, 2001, the applicant filed an application for a permanent resident visa from within Canada on H&C grounds (the H&C application), which was supported by his wife's sponsorship application.

[5] On December 5, 2001, the applicant's wife gave birth to their son, Herinder. The baby was delivered prematurely by Caesarean section. The applicant's wife had

difficulties looking after the baby while recovering from her operation, and due to financial constraints, the applicant could not take time off work to look after her. They did not have any family members in Canada and the applicant's wife's parents were deceased. They applied, unsuccessfully, for a visitor visa for the applicant's mother to come to Canada to help out.

[6] Because of these circumstances, it was decided that the applicant's wife would travel to India with the baby and stay with the applicant's parents who could look after her and the baby. It was expected that she would remain in India for four to six months before returning to Canada. Unfortunately, on January 20, 2002, a little over one week after arriving in India, she passed away from complications related to her delivery, and baby Herinder was left in the care of the applicant's parents. Herinder returned to Canada with his babysitter in March 2002. Since then, Herinder has been in the care of the applicant, apart from a trip to India from December 23, 2002 to June 1, 2003, during which Herinder was cared for by the applicant's parents. Herinder is also cared for by his live-in babysitter.

[7] The H&C application was referred to a Pre-Removal Risk Assessment (PRRA) officer to assess the issue of risk upon return. This resulted in a negative risk opinion dated November 8, 2004.

[8] On March 22, 2005, an immigration officer refused the H&C application. This is the judicial review of that decision.

Reasons for the Decision

[9] The immigration officer considered the applicant's degree of establishment in Canada, the risk upon return to India, and the best interests of the applicant's four children. The officer made the following findings.

[10] Degree of Establishment

The immigration officer noted that the applicant has worked and amassed some savings and formed connections within his community during the four years that he has been in Canada. The immigration officer, however, was not satisfied that the applicant's personal ties to Canada are more or less important than those he formed as a result of blood or community ties in his country of origin, where his close family members reside. The immigration officer stated that the applicant's savings and job skills learned in Canada may assist him during the period of adjustment and upon his return to his country of origin.

[11] Risk upon Return

The immigration officer had read the negative risk opinion and noted the reply submissions of counsel. The officer decided that the risk opinion was reasonable and the issue of risk had been adequately dealt with.

[12] Best Interests of the Children

The immigration officer noted the unfortunate events of the death of the applicant's sponsor/second wife and the premature birth of their son, Herinder.

[13] Based on the doctor's assessment that was provided, the immigration officer found that Herinder is progressing well and does not have a medical condition requiring special medical attention. It was also noted he is cared for by a live-in babysitter in Canada and a reference letter was provided by the babysitter.

[14] The immigration officer was satisfied that Herinder should be able to adjust to his new surroundings if the applicant were to return to India with the child. The immigration officer stated that Herinder appears to have adjusted to previous travel and care arrangements when he travelled to India in 2002 and 2003 and was left in the care of the applicant's parents in India. The immigration officer found minimal documentary evidence attesting to the applicant's concern that his parents are unable to care for Herinder due to their age. It was noted that the applicant's father is 59 years old while

his mother is 56 years old, and they currently live with three sons and three grandchildren in their family home. It was further noted that the applicant's wife and son had travelled to India for the express purpose of being cared for by the applicant's parents, and the applicant was able to make care arrangements for his son in India. The immigration officer was not satisfied that the applicant could not make similar care arrangements if he were to take Herinder with him to India.

[15] The immigration officer found that Herinder's best interests would be served by reuniting him with his close and extended family upon his return to India. Herinder would benefit from the care, guidance, support and rebuilding of family ties with his close and extended family, which he had enjoyed during his past stays in India. It was also noted that Herinder had travelled with his babysitter.

[16] With respect to the applicant's three other children in India, who are all under the age of 12, the immigration officer stated that they had enjoyed a relationship with Herinder while he was in India. The immigration officer found that the best interests of the applicant's three children in India would be served upon the applicant's return to his country of origin, because the children would enjoy the physical presence, care and guidance of their natural father.

[17] The immigration officer was therefore not satisfied that the applicant would experience undue, undeserved or disproportionate hardship if required to apply for a permanent resident visa in the normal manner outside of Canada.

Issues

[18] The applicant submitted the following issues for consideration:

1. Did the immigration officer fail to be alert, alive and sensitive to the best interests of the applicant's Canadian born child and his other children?

2. Did the immigration officer fail to properly consider the applicant's degree of establishment in Canada?

Applicant's Submissions

[19] The applicant submitted that the jurisprudence required the officer to be alive, alert and sensitive to the best interests of the children involved.

[20] The applicant submitted that the best interests of a child cannot be considered in a vacuum but should be contextualized and determined based on the specific circumstances of the case (see, generally, *Momcilovic* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FC 79 and *Qureshi* v. *Canada (Minister of*

Citizenship and Immigration) (2000), 196 F.T.R. 85 at paragraph 18 (T.D.)). In the present case, we are dealing with a Canadian born child who has lost his mother and is being raised by his father and a female caregiver who lives in the same house as him.

[21] The applicant submitted that the immigration officer gave short shrift to the role of Herinder's caregiver in his life and the hardship he would endure if he were to be separated from her. It was submitted that she is currently the only maternal influence in his life, and has travelled with him to India and back. It was submitted that Herinder has formed a deep attachment to her, but the immigration officer did not consider the impact that separation will have on the child. The applicant submitted that the immigration officer erred by failing to take this important factor into consideration in the assessment of the interests of the child (see *Momcilovic*, above).

[22] The applicant further submitted that the immigration officer erred in the analysis of the degree of establishment by failing to consider that the applicant had formed attachments in Canada after he met and married his second wife. It was submitted that as the applicant's wife was a permanent resident of Canada, he reasonably expected that he would be sponsored by his wife and allowed to remain in Canada permanently. He therefore conducted his affairs with a view toward his permanent establishment in Canada, and established much deeper roots in Canada than he would have had he not been eligible to be sponsored by his wife. The applicant submitted that his firm

establishment was attested to by the numerous letters from friends, co-workers and community leaders.

[23] The applicant submitted that the fact that he may be able to start his life over again in India should not have been relevant to the immigration officer's assessment. It was submitted that given the unique context in which this application was made, after the sudden death of his spouse/sponsor, and given his establishment in Canada on the basis that he was eligible for sponsorship, the immigration officer was bound to evaluate whether applying from abroad would cause the applicant disproportionate hardship.

Respondent's Submissions

[24] The respondent submitted that the applicant is not entitled to a particular outcome. To successfully challenge a negative H&C decision, the applicant must show that the immigration officer erred in law, acted in bad faith, or proceeded on an incorrect principle (see *Tartchinska* v. *Canada (Minister of Citizenship and Immigration)* (2000), 185 F.T.R. 161 at paragraph 17 (T.D.)). The standard of review is that of reasonableness (see *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at 857 to 858).

[25] The respondent submitted that the weighing of relevant factors is not the function of a court reviewing the exercise of ministerial discretion. So long as the totality of the evidence was properly examined, the question of weight remains entirely within the expertise of the immigration officer (see *Lee* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FC 413 at paragraphs 7 and 13).

[26] In response to the applicant's argument that the immigration officer gave short shrift to the role of the caregiver and the impact of separation on the child, the respondent submitted that the applicant failed to provide evidence of any consequences the child might face if separated from his caregiver. It was submitted that the brief letter provided by the caregiver only makes reference to the child to state that she is the "baby boy's Baby sitter". The respondent submitted that the immigration officer did consider the minimal evidence provided regarding the caregiver by noting the reference letter from the caregiver. It was submitted that the immigration officer need not go further in the analysis.

[27] The respondent submitted that the immigration officer's reasons illustrate that she was alive, alert and sensitive to the interests of the applicant's child. The respondent submitted that in reaching a conclusion that an H&C exemption was unwarranted, the immigration officer balanced the interests of the affected child with the other factors in

the application, such the applicant's establishment in Canada and his and his son's family ties to India.

[28] The respondent submitted that the officer's reasons demonstrate a thorough consideration of the applicant's establishment in Canada. It was submitted that hardship suffered by the applicant must be more than the mere inconvenience or the predictable costs associated with leaving Canada (see *Irimie* v. *Canada (Minister of Citizenship and Immigration)* (2000), 10 Imm. L.R. (3d) 206 at paragraphs 12, 17 and 26 (T.D.)). The respondent submitted that on the facts of this case, it cannot be said that it was unreasonable for the officer to determine that the applicant would not suffer undue or undeserved hardship if he were to apply to immigrate to Canada through the normal procedure.

Analysis and Decision

[29] Standard of Review

The appropriate standard of review for a decision of an immigration officer on an H&C application is reasonableness *simpliciter* (see *Baker*, above).

[30] **Issue 1**

Did the immigration officer fail to be alert, alive and sensitive to the best interests of the applicant's Canadian born child and his other children?

Subsection 25(1) of IRPA requires the decision-makers in H&C applications to take into account the best interests of children directly affected.

[31] In the present case, the applicant's son, Herinder, is a child directly affected by the decision. Herinder was being cared for by a friend's mother during the day when the applicant was at work. The officer noted in her notes taken at the interview:

> . . . I then noticed child appears comfortable with the babysitter.

[32] Submissions presented to the officer contained the following extract:

> It is incumbent on you to consider Mr. Jakhu's son. In his short life, he has already known too much tragedy. He has never known the love and warmth of his mother. His father has been the centre of his world for as long as he can remember. They have an exceptionally strong bond, and Mr. Jakhu spends every minute of his free time with this son. During the day Mr. Jakhu's son is looked after by a friend's mother in the house where he rents a room. Mr. Jakhu's son is also very attached to her. She is the only maternal figure in his life, and he has a deep attachment to her.
>
> In Canada, he has stability and a sense of belonging and family. He will be starting school in September with his playmates and cannot wait. Though he has lost his mother, he is a happy well adjusted young boy, who has opportunities in Canada, that he would certainly not have in India.

[33] The notes and the submissions indicate to me that the applicant's son had a good relationship with his babysitter. From the record, I would agree that she is the only maternal figure that he has.

[34] I have reviewed the officer's decision and I can find no analysis or discussion of the possible effect on Herinder due to his separation from his babysitter. In my view, the officer must at least address this evidence in reaching her decision. I believe it is particularly so in this case as the officer stated:

> I have carefully reviewed all of the information presented and available to me and I do not make this decision lightly.

[35] I am of the opinion that the decision is not reasonable as the information concerning the babysitter does not appear to have been considered. I cannot know what the officer's decision might have been had this analysis been carried out.

[36] As a result, the application for judicial review is allowed and the matter is remitted to a different officer for redetermination.

[37] Because of my finding on Issue 1, I need not deal with the remaining issue.

[38] Neither party wished to submit a proposed serious question of general importance for my consideration.

JUDGMENT

[39] **IT IS ORDRED that** the application for judicial review is allowed and the matter is remitted to a different officer for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

An H&C application is permitted under section 25 of IRPA, which provides:

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.
(2) The Minister may not grant permanent resident status to a foreign national referred to in subsection 9(1) if the foreign national does not meet the province's selection criteria applicable to that foreign national.	(2) Le statut ne peut toutefois être octroyé à l'étranger visé au paragraphe 9(1) qui ne répond pas aux critères de sélection de la province en cause qui lui sont applicables.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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