Date: 20081202

Docket: IMM-1527-08

Citation: 2008 FC 1338

Ottawa, Ontario, December 2, 2008

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

GUNWANT RAI
SURINDER KAUR a.k.a. KURAMI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] [49] Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers.As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

(As specified by the majority in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.R. 190).

II. Judicial Procedure

[2] This is an application for judicial review of an Immigration Officer's decision, rendered on March 4, 2008, dismissing the Applicants' application for permanent residence based on humanitarian and compassionate (H&C) grounds pursuant to section 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA),

III. Facts

[3] The Applicants, Mr. Gunwant Rai and Ms. Surinder Kaur a.k.a. Kurami, are citizens of India. The principal Applicant, Mr. Rai, arrived in Canada in 1989.

[4] In 1992, Mr. Rai claimed refugee status. After a first refusal, which was quashed by the Federal Court, the claim was again refused in 1995.

[5] In 1992, Mr. Rai was issued a conditional departure notice, which became effective on April 11, 1997.

[6] In 1998, Mr. Rai filed a permanent residence application under H&C which was accepted at the first assessment on April 21, 1998. At the second assessment, the application was denied by reason of his inadmissibility, having been convicted on two counts of sexual assault in 2000 (CTR at pp. 302 and 306; also, Exhibit "B" attached to the Affidavit of Francine Lauzé).

[7] In 2003, Mr. Rai filed an application for a Pre-Removal Risk Assessment (PRRA) (CTR at pp. 467 and 497; also Exhibit “C” attached to the Affidavit of Francine Lauzé). This application was refused on October 8, 2003 (CTR at p. 453).

[8] After failing to report as directed for removal from Canada on February 16, 2004, a warrant for Mr. Rai’s arrest was issued on February 17, 2004 (Exhibit “D” attached to the Affidavit of Francine Lauzé and CTR at p. 330).

[9] In July 2007, Mr. Rai filed another application for permanent residence under H&C. This H&C, which is at issue in the case at bar, was refused on March 4, 2008 (CTR at p. 247).

[10] The Officer determined that the Applicants had not provided sufficient H&C considerations to warrant an exemption from the requirements of subsection 11(1) of the IRPA. In particular, the Officer did not believe that the Applicants would suffer unusual, undeserved, or disproportionate hardship if required to apply for permanent residence from outside Canada.

[11] Ms. Kaur arrived in Canada in March 2004 and claimed asylum. In support of her refugee claim, she alleged that she lost her daughter in 1985 and that her husband disappeared in 1994. This allegation was a false declaration made in an attempt to mislead the immigration authorities although Ms. Kaur did correct her statement subsequently; nevertheless, the original claim had been made.

IV. Issue

[12] Did the Officer err in the consideration of her H&C decision?

V. Legislative Scheme

[13] An application for consideration to remain in Canada on H&C grounds under subsection 25(1) of the IRPA is comprised of two separate and distinct assessments (Section 68 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations); also, IP-5 Manual "Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds").

[14] The first assessment consists of determining whether the Applicants should be exempted from the selection criteria related to becoming permanent residents from within Canada. The Applicants bear the onus of satisfying the Immigration Officer that the H&C factors present in their circumstances are sufficient to warrant an exemption. More specifically, the Applicants must satisfy the Immigration Officer that their personal circumstances are such that they would face unusual, undeserved, or disproportionate hardship if required to apply for a permanent resident visa from outside Canada.

[15] The second assessment consists of determining whether the Applicants intend to establish permanent residence in Canada and whether they are admissible (Section 68 and paragraphs 72(*b*) and (*e*) of the Regulations).

[16] In the case at bar, the application for permanent resident status based on H&C grounds was rejected as part of the first assessment. In other words, the Officer determined that there was a failure to establish unusual, undeserved, or disproportionate hardship in applying for a permanent resident visa from outside Canada.

VI. Standard of Review

[17] The standard of review applicable to an Officer's decision regarding whether or not to grant an exemption based on H&C considerations is reasonableness (*Tikhonova v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 847, [2008] F.C.J. No. 1068 (QL); *Ahmad v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 646, 167 A.C.W.S. (3d) 974 at paras. 10-13).

[18] As stated recently in *Tikhonova*, above, the Court will intervene only if the decision falls outside the realm of possible and acceptable outcomes in light of the facts and the law:

> [16] …When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para. 47). Put another way, the Court may only intervene if the Officer's Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[19] Based on the documents and information provided to the Officer, the request for exemption was based on two H&C grounds; (1) the degree of establishment in Canada; and (2) the risk of return to India to apply for a visa.

VII. Analysis

Degree of Establishment

[20] Specifically, the Immigration Officer noted that the Applicants' degree of establishment in Canada was insufficient to cause hardship in case they had to apply for a permanent resident visa from India. The Applicants take issue with this finding for several reasons.

a) Account of Criminal Conviction

[21] First, the principal Applicant alleges that the Officer was not entitled to consider his criminal convictions for sexual assault; however, the IP-5 Manual that contains guidelines applicable to such applications explicitly states that a criminal conviction is a relevant consideration under the first step of the assessment (IP-5, sections 11.2 and 11.3).

[22] Section 11.2 of the IP-5 Manual states that in assessing an applicant's degree of establishment in Canada at the first-step assessment, the Officer may direct his thoughts to the question of whether the applicant has a "good civil record in Canada (e.g. no interventions by police or other authorities for child or spouse abuse, criminal charges)" (IP-5, section 11.2, p. 25).

[23] Section 11.3 of the IP-5 Manual enunciates the process to follow if, "prior to or during the consideration of H&C factors, a known or suspected inadmissibility is identified" (IP-5, section 11.3, p. 26). It states:

> The relationship between such facts and the H&C decision is important since officers are not making a determination of admissibility or inadmissibility at this point. They are looking at all the applicant's personal circumstances, as provided by

> the applicant and as known to the Department, to determine if there are sufficient reasons for making a positive H&C decision.
>
> The facts relating to the known or suspected inadmissibility may be relevant to the H&C decision (for example, the applicant has a criminal conviction). When considering the H&C decision, officers must not be concerned with whether or not the conviction makes the applicant inadmissible. However, they may consider factors such as the applicant's actions, including those that led to and followed the conviction.

[24] The process established by IP-5 was approved by Justice Eleanor Dawson in *Espino v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 74, 308 F.T.R. 92, a decision confirmed by the Federal Court of Appeal at 2008 FCA 77, 164 A.C.W.S. (3d) 680:

> [35] I do not accept that the existing process is perverse, or contrary to the intent of Parliament because it treats all forms of inadmissibility in the same fashion. To use the example cited by the applicants, I do not agree that at the first step of the assessment "[t]he worst criminals are put at the same level […] as the most technical offenders of the [Act]". While it is true that no decision as to inadmissibility is made at the first step, as section 11.3 of IP 5 (set out above) makes clear, facts relating to inadmissibility may be relevant to the humanitarian and compassionate decision.

[25] The fact that the principal Applicant would have received a minimal sentence, that his probation term and all conditions were completed and that he was eligible for a pardon was taken into account by the Officer when she concluded that disregard for Canadian laws is a negative element regarding the degree of establishment. In that sense, the Officer’s conclusion is not arbitrary, as alleged by the principal Applicant.

[26] Similarly, the principal Applicant alleges that the Officer failed to consider why he was unable to obtain a pardon; however, he did not adduce any evidence to support his allegation that it

is impossible to obtain a pardon for an individual who does not have a status in Canada or that a pardon would have been granted to the principal Applicant.

b) Proof of Employment

[27] Second, the principal Applicant contends that the Officer erred in concluding that there was no evidence that he had been working since 2004.

[28] The principal Applicant did not submit a single document to corroborate his allegation that he has been working since 2004. Furthermore, during his cross-examination on affidavit, the principal Applicant stated that he did not work at the present time, and that he had worked only on occasion since 2004.

[29] The principal Applicant argued that it was sufficient for him to establish that he worked in Canada for 15 years. This allegation has no merit.

[30] The H&C application was filed in 2007, thus the principal Applicant's current employment is the most relevant part of his professional experience.

[31] The principal Applicant has worked illegally for several years. The principal Applicant had a work permit from 1994 to 2001 only. At times, he worked in Canada while there was an outstanding warrant for his arrest.

[32] It was not for the Officer to take into account illegal work. Such a result is not desirable. As Justice Marc Nadon rightly observed:

> [21] More importantly, the Guidelines certainly do not suggest that an applicant must pursue self-sufficiency at all cost and without regard to the means. I therefore disagree with the Applicants" argument that "[i]t is irrelevant whether self-sufficiency is pursued with or without a work permit." In my opinion, the source of one"s self-sufficiency is very relevant; otherwise, anyone could claim an exemption on the basis of self-sufficiency even if that self-sufficiency derived from illegal activities. I appreciate that in this case the Applicants worked honestly, albeit illegally. Nonetheless, the Applicants knowingly attempted to circumvent the system when they chose to continue working without authorization. Indeed, despite being told during their first interview that they were not authorized to work and that they should cease, there was no indication that the Applicants had given up their employment at the time of the second interview. Moreover, their lawyer had cautioned them about the risks of working without a work permit as well as on the ostensible benefit of showing self-sufficiency (regardless of its source), and they chose to remain in Canada and work illegally.
>
> [22] I understand that the Applicants hoped that accumulating time in Canada despite a departure order against them might be looked on favourably insofar as they could demonstrate that they have adapted well to this country. In my view, however, applicants cannot and should not be "rewarded" for accumulating time in Canada, when in fact, they have no legal right to do so. In a similar vein, self-sufficiency should be pursued legally, and an applicant should not be able to invoke his or her illegal actions to subsequently claim a benefit such as a Ministerial exemption. Finally, I take note of the obvious: the purpose of the exemption, in this case, was to exempt the Applicants from the requirement of applying for status from abroad, not to exempt them from other statutory provisions such as the requirement of a valid work permit.

(*Tartchinska v. Canada (Minister of Citizenship and Immigration)* (2000), 185 F.T.R. 161, 96 A.C.W.S. (3d) 112).

[33] The Officer rightly concluded that the principal Applicant did not submit any evidence to establish that he worked as of 2004.

[34] Furthermore, because no proof of employment was provided, the Officer reasonably concluded that the principal Applicant would not face unusual, undeserved, or disproportionate hardship linked to the termination of employment if required to apply for a permanent resident visa from outside Canada. She also reasonably concluded that there is no pattern of sound financial management (CTR at pp. 250-251).

c) "Psychological" Assessment

[35] The principal Applicant also alleges that the Officer ignored the psychological report, dated February 15, 2002. This allegation is inaccurate. At page 5 of the reasons, the Officer provides clear reasons for dismissing this evidence:

> Pour commencer, le requérant a, par le passé, consulté un spécialiste de la santé mentale. Cependant, cette consultation était reliée aux difficultés qu'il éprouvait suite à ses problèmes légaux de l'année 1999 pour assaut sexuel. L'instabilité psychologique de l'époque était reliée non à des procédures d'immigration mais à des procédures criminelles au Canada. En conséquence, je n'accord pas de poids à ce document pour venir supporter des difficultés inhabituelles, injustifiées ou excessives en cas de retour en Inde. (Translation not available.)

[36] Further, the principal Applicant contends that the Officer erred in discarding a psychological report from Mr. David Woodbury, dated April 25, 2007, at page 310 of the Officer's Record.

[37] The most fundamental flaw of this argument is that Mr. Woodbury is an orientation counselor and not a psychologist. Mr. Woodbury cannot provide psychological diagnosis.

[38] This Court has already ruled that Mr. Woodbury's reports should not be considered as psychological reports:

> [6] … In the words of the learned Judge, the burden rests on the appellant to show that the inferences drawn by the Refugee Division could not reasonably have been drawn. On the issue of lack of spontaneity at the hearing, the applicant relies exclusively on Mr. Woodbury's Diagnostic Interview Report. The respondent's position is that the CRDD gave appropriate weight to this Report. Its author is an Orientation Counsellor and not a Clinical Psychologist with the necessary competence to provide diagnosis of the applicant's alleged post-traumatic stress syndrome… (Emphasis added.)

(*Singh v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1376, 110 A.C.W.S. (3d) 1113).

[39] The principal Applicant's alleged depressive state is not corroborated by any other evidence. In fact, asked whether there had been any clinical or medical follow-up, the principal Applicant did not state in any clear terms that he was followed for his condition, which would be logical if he were suffering from Post-traumatic Stress Disorder, Major Depressive Episode and Physical Abuse of Adult.

[40] The principal Applicant decided to seek professional assistance in regard to his "state" and, then, only once, on April 14, 2007, upon the advice of his counsel, and that was eighteen years after arriving in Canada.

Was risk of return adequately considered by the Officer?

[41] The principal Applicant contends that the Officer erred in his assessment of him as a Sikh rather than a Hindu; furthermore, at paragraph 9 of his Further Memorandum, he contends that his affidavit contains a "simple error" when he declares being a Sikh, rather than a Hindu.

[42] The following appears from the transcript of Mr. Rai's Cross-examination on Affidavit:

Q. Mr. Rai, you state at paragraph 2 of your Affidavit that you are Sikh. I invite you to read the passage if you can. Are you Sikh?

A. I have already mentioned in the beginning that I was born in a Hindu family and now when it comes to the religion there is not much or there is no difference in that.

Q. There is no difference between the Sikh religion and the Hindu religion?

A. No, what exactly I meant to say was that we, human beings, are all the same. There is no difference. We all have the skin, we all have the same blood, skin and on.

Q. No, we understand, Mr. Rai, but the question is whether you belong to one or the other religion, either by birth or culturally or you were raised in one of the religions, because you also have to understand that when you came to Canada and you claimed asylum, your fear of prosecution was based on some events which are important to your religion. That is why we're asking the question.

A. Yes, it's true, and it's very like that. When I came to Canada the situation was very bad, but I want to add this thing also to it, that at that time we were in danger, there is still a danger.

Q. I understand, but it doesn't answer my question. The question is what religion you are?

A. I belong to Hindu religion.

Q. Thank you.

A. And the other thing is that I love the religion in the human beings.

Q. If we can go back to paragraph 2 of your Affidavit then, which states:

I am a fifty-four (54) year old Sikh male from India.

The qualification of being a Sikh is not correct?

A. No.

(Transcript on Cross-Examination on Affidavit at pp. 6-8).

[43] In addition, the documents provided to the Officer in his H&C Application are as follows:

[44] Mr. Woodbury's report states that Mr. Rai is Sikh and a follower of Master Gurwinder Singh (CTR at p. 312; Transcript at pp. 12-14).

[45] He submitted a letter stating that he volunteers at a Sikh temple (Transcript at pp. 8-11; CTR a p. 284).

[46] Mr. Rai's wife is stated to be Sikh (CTR at pp. 156, 216 and 238).

[47] The Officer cannot be faulted for providing a summary based on the evidence itself. The Officer considered Mr. Rai to be a Sikh for the purpose of an assessment of risk of return on the basis of evidence in the record.

Other factors weighed by the Officer

[48] The Officer considered other factors before rendering her decision.

[49] First, she considered whether there was a prolonged inability to leave Canada which would have led to Mr. Rai's establishment. In the case at bar, Mr. Rai voluntarily stayed in Canada despite the fact that he had no status and was subject to a removal order since 2004. The fact that Mr. Rai is still in Canada is imputable to him (CTR at p. 250).

[50] Second, Mr. Rai knows his country's language and culture.

[51] Third, Mr. Rai is presently estranged from his son who resides somewhere in the United States. His return to India would not aggravate the separation (CTR at p. 250).

[52] Fourth, Mr. Rai's wife, herself, has no status in Canada, which could have caused a separation of the couple (CTR at p. 250).

[53] Fifth, it is reasonable to assume that family members of Mr. Rai could provide temporary support upon his return to India (CTR at p. 250).

[54] Finally, the Officer concluded that the petition and reference letters submitted by Mr. Rai cannot outweigh the other elements considered by her (CTR at p. 251).

[55] The Officer appropriately considered and weighed all the available information and her reasons are reasonable in regard to the evidence.

VIII. Conclusion

[56] The Applicants did not show that this Court's intervention is warranted; therefore, the application for judicial review is dismissed.

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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