Date: 20090304

Docket: IMM-927-08

Citation: 2009 FC 230

Ottawa, Ontario, March 4, 2009

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

INDERPAL SINGH HANSRA
SUKHJOT KAUR HANSRA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] The Applicant requests judicial review of a decision that did not exempt him from legislation barring his right to sponsor his wife because he had been convicted of a sexual offence and five years had not elapsed since the completion of his sentence. The First Secretary of the Family Class and Refugee Unit of the Canadian High Commission in New Delhi, India (Official)

found that there were insufficient humanitarian and compassionate grounds to justify an exemption from the applicable prohibition on sponsorship applications.

[2] The Applicant was caught by paragraphs 133(1)*(e)*(i) and (2)*(b)* of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations):

133. (1) A sponsorship application shall only be approved by an officer if, on the day on which the application was filed and from that day until the day a decision is made with respect to the application, there is evidence that the sponsor	**133.** (1) L'agent n'accorde la demande de parrainage que sur preuve que, de la date du dépôt de la demande jusqu'à celle de la décision, le répondant, à la fois :
…	…
(e) has not been convicted under the Criminal Code of	*e)* n'a pas été déclaré coupable, sous le régime du Code criminel :
(i) an offence of a sexual nature, or an attempt or a threat to commit such an offence, against any person, or	(i) d'une infraction d'ordre sexuel ou d'une tentative ou menace de commettre une telle infraction, à l'égard de quiconque,
…	…
(2) Despite paragraph (1)*(e)*, a sponsorship application may not be refused	(2) Malgré l'alinéa (1)*e)*, la déclaration de culpabilité au Canada n'emporte pas rejet de la demande de parrainage dans les cas suivants :
…	…
(b) if a period of five years	*b)* le répondant a fini de

or more has elapsed since the completion of the sentence imposed for an offence in Canada referred to in paragraph (1)*(e)*.	purger sa peine au moins cinq ans avant le dépôt de la demande de parrainage.

II. BACKGROUND

[3] The Applicant, a male Canadian citizen, was convicted on October 7, 2004 of three counts of sexual assault. His probation was completed on January 6, 2007.

[4] While on probation, the Applicant was allowed to travel to India. While in India he married on March 19, 2006 and subsequently returned to Canada.

[5] He claims that it was only upon returning to Canada that he became aware that he was unable to sponsor his wife because five years had not elapsed since his sentence was completed.

[6] The Applicant then returned to India to be with his wife from August 2006 to April 15, 2007.

[7] The Applicant, having returned to Canada, filed an H&C application seeking to obtain an exemption from the five-year bar. As part of the H&C application, a psychological report was filed stating that the Applicant was suffering severe emotional hardship as a result of being separated from his wife.

[8] The H&C application was denied on the basis that the H&C considerations did not justify an exemption as they did not overcome the ineligibility due to the commission of serious criminal offences.

[9] The Officer noted the Applicant's grounds; that the marriage was genuine, that it was conducted in accordance with Sikh culture and faith, that separation was unreasonable and of undue hardship, that it would be difficult for the Applicant to live in India having not done so for several years, and that family reunification is a fundamental aspect of Canadian immigration policy. The Officer specifically noted the findings in the psychological report.

[10] The Applicant raised two issues: (1) the insufficiency of the reasons, and (2) the unreasonableness of the Officer's conclusions.

III. ANALYSIS

A. *Standard of Review*

[11] The standard of review of an H&C matter has been held to be reasonableness (*Ahmad v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 646). Given the highly discretionary nature of the decision, the Court must accord deference to the factual findings and weighing of factors.

[12] In regard to the more specific issue of the adequacy of reasons, this is a matter of procedural fairness to which the standard is correctness (*Adu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 565). Even though *Adu* was decided before *Dunsmuir* (*Dunsmuir v. New Brunswick*, 2008 SCC 9), it is the appropriate standard. The issue of adequacy of reasons has also been described as a matter to be reviewed on its merits without any standard of review. This is a matter of a distinction without a difference and results in the same analytical framework.

B. *Adequacy of Reasons*

[13] As this issue was argued first, I will deal with it first. The Respondent supplemented the Record by submitting an affidavit which attempted to amplify or explain the decision.

[14] As was held in several cases in this Court (*Sklyar v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1226; *Santhirasekaram v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1188; *bin Abdullah v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1185), this is a tactic which cannot generally be permitted. A decision must stand on its own. There may be circumstances where it is necessary to set context or defend against allegations of unfairness but a party may not supplement the very reasons, as found in the decision and CAIPS notes, with additional reasons or explanations.

Two quotes are sufficient to confirm this Court's view of this matter:

> **11** While there may be instances where the reasons for the decision are properly contained in not only the decision letter and the CAIPS notes but also in an affidavit (see *Hayama v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1643, 2003 FC 1305), the Court is concerned when the evidence submitted

> post-filing of an application for judicial review attempts to fill in gaps in the record of decision on the very points in issue and does so by adding major elements to the Record. The attempt to supplement the Record must be approached with caution when attempted by either an applicant or a respondent. If admissible, the Court must assess its weight. In this case, greater weight is given to the pre-application record than to the affidavit.
>
> *Skylar v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1226 at paragraph 11
>
> **15** This is not a situation where the officer is merely elaborating on cursory reasons for an assessment provided in CAIPS notes. What the officer has done with her affidavit is to provide an entire line of reasoning that is not reflected anywhere in her notes. In all of the circumstances, I am thus satisfied that little weight should be attributed to the explanation for the decision provided by the officer in her affidavit.
>
> *bin Abdullah v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1185 at paragraph 15

[15] Therefore, I give no weight to the affidavit. Indeed, an effort to buttress the reasons with an affidavit could be considered an admission that the reasons were inadequate.

[16] That said, the fact remains that the reasons were adequate. The Officer stated both the positive and negative factors in this H&C. The Officer also articulated the reasons for the decision sufficiently for the Applicant to know the basis for the decision. The Officer was not required to write a treatise on the clear intent of the Regulations and the difficulty of overcoming that presumptive bar to sponsorship.

[17] The case of *Adu*, above, is distinguishable from this case. In *Adu* there were nothing but positive factors listed and therefore it was impossible to know what the negative factor was which resulted in the decision. *Adu* is of no assistance to the Applicant.

C. *Reasonableness of Decision*

[18] The Applicant's position is that the Officer did not consider the totality of the evidence and particularly did not consider the psychological report.

[19] There is no basis for this submission. The CAIPS notes disclose that all of the points raised by the Applicant were considered. Specifically, the Officer noted the psychological report and the finding of depression.

[20] The Applicant's arguments in this Court – that there was a conditional sentence, a single lapse of judgment, a desire to start a family – do not undermine the reasonableness of this discretionary decision.

[21] Considered as a whole, this decision is reasonable. There was a rational basis for the Officer's choice of the preservation of the regulatory scheme over the personal discomforts of the Applicant.

[22] The fact remains that the Applicant undertook marriage without regard for his criminal convictions. His ignorance of the law is not something which should be condoned to avoid a waiting period.

IV. CONCLUSION

[23] Therefore, this judicial review will be dismissed. There is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-927-08
STYLE OF CAUSE:	INDERPAL SINGH HANSRA SUKHJOT KAUR HANSRA and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 26, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	Phelan J.
DATED:	March 4, 2009

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