Date: 20090417

Docket: IMM-4196-08

Citation: 2009 FC 386

Ottawa, Ontario, April 17, 2009

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

MOHABIR DUDHNATH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This judicial review concerns a decision of the Immigration Appeal Division (IAD) which dismissed the Applicant's appeal of a visa officer's decision that he had failed to comply with his residency obligations as a permanent resident under s. 28 of the *Immigration and Refugee Protection Act* (IRPA).

[2] The essential problem for this Applicant is the failure to contest a 1997 decision of the Canadian Visa Office responsible for Guyana, which denied him a Returning Resident Permit.

II. BACKGROUND

[3] In May 1995, Mr. Dudhnath, a citizen of Guyana, became a permanent resident, having been sponsored by his sister.

[4] At that time, and disclosed to Canadian immigration authorities, the Applicant was in a common-law relationship with a woman in Guyana and had two children, who are also in Guyana.

[5] The Applicant was employed as a machinist from July 1995 to August 1996, at which time he left Canada to return to Guyana.

[6] The purpose of Mr. Dudhnath's return to Guyana was to marry his common-law wife and then to return to Canada after three weeks. Once in Guyana, he became ill and both the wedding and his return were postponed. He was advised by an immigration consultant that he was permitted to be outside Canada for six months. At the beginning of February 1997, the Applicant finally married.

[7] On February 21, 1997, the Applicant attempted to leave for Canada but, at the time of boarding, his Canadian Record of Landing was missing. That same day, upon reporting the loss to

the Canadian High Commission, he was advised to apply for a Returning Resident Permit, which he then did.

[8] By letter of March 10, 1997, the High Commission wrote requesting additional information. The next day, the Applicant was denied the Returning Resident Permit on the basis that he had abandoned Canada. The refusal letter indicated that immigration authorities suspected that the Applicant had sold his Record of Landing to a would-be immigrant. He was also informed, in the letter, that a final determination of his permanent residence status was only possible by an adjudicator at the Canadian port of entry. No legal proceeding was taken against the decision to deny the Applicant a Returning Resident Permit.

[9] From then to the present, there were sporadic attempts to regularize his Canadian situation. In fact, very little was actually done until 2007 when the Applicant, through another immigration consultant retained by his landed immigrant parents, applied for a Returning Travel Document.

[10] Prior to 2007, the attempts to deal with the Applicant's status – attempts which he argues showed a continuing intent to return to Canada – consisted of having a lawyer obtain a certified copy of the Record of Landing (on the basis of which the Applicant attempted to board a plane in Guyana to return to Canada), and retaining a Canadian immigration consultant to sue the Canadian government (about which nothing came to pass).

[11] In respect of the current attempt to obtain a Returning Travel Document, the Canadian High Commission denied the application because the Applicant had not met the required number of days of physical presence in Canada as required by paragraph 28(2)*(a)* of IRPA and because insufficient humanitarian and compassionate (H&C) grounds were shown to overcome his failure to meet this requirement.

Section 28(2)*(a)* reads:

28. (2) The following provisions govern the residency obligation under subsection (1):	**28.** (2) Les dispositions suivantes régissent l'obligation de résidence :
(a) a permanent resident complies with the residency obligation with respect to a five-year period if, on each of a total of at least 730 days in that five-year period, they are	*a)* le résident permanent se conforme à l'obligation dès lors que, pour au moins 730 jours pendant une période quinquennale, selon le cas :
(i) physically present in Canada,	(i) il est effectivement présent au Canada,
(ii) outside Canada accompanying a Canadian citizen who is their spouse or common-law partner or, in the case of a child, their parent,	(ii) il accompagne, hors du Canada, un citoyen canadien qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents,
(iii) outside Canada employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province,	(iii) il travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,

(iv) outside Canada accompanying a permanent resident who is their spouse or common-law partner or, in the case of a child, their parent and who is employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province, or	(iv) il accompagne, hors du Canada, un résident permanent qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents, et qui travaille à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,
(v) referred to in regulations providing for other means of compliance;	(v) il se conforme au mode d'exécution prévu par règlement;

[12] The Applicant appealed the decision to the IAD. He centred his appeal on the IAD's discretionary authority under paragraph 67(1)*(c)* of IRPA:

67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	**67.** (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :
…	…
(*c*) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all	*c*) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures

the circumstances of the case.	spéciales.

[13] The IAD enumerated the factors it considered in exercising its discretion:

a. the extent of non-compliance of the appellant's residency obligation;

b. the length of time the appellant spent in Canada before leaving;

c. the degree to which the appellant has any establishment still in Canada;

d. the reasons for the appellant leaving and remaining outside of Canada;

e. the degree of hardship to family members resident in Canada;

f. the best interest of a child affected by the decision.

[14] Applying those factors, the IAD made the following key determinations:

a. that the Applicant had not returned to Canada nor made any attempts to do so within the five years prior to his application for a Returning Resident Permit;

b. that the IAD could not "second guess" the High Commission's decision in 1997 but could note that the 1997 incident showed an attempt to enter Canada;

c. that the Applicant had only been in Canada 13 months;

d. that the Applicant had no establishment in Canada and had no evidence that a job was available;

e. that the Applicant's parents and siblings lived in Canada yet had not visited him in Guyana (the Court notes that any efforts to deal with the Applicant's situation were backed by his supportive parents including their attendance in Court);

f. that the best interests of the children were not served by leaving them for an indeterminate time in Guyana pending his sponsorship of them. Further, that the Applicant had not made arrangements for their care, that they would not face hardship if they and the Applicant stayed in Guyana, and that they would continue to have access to their mother (who was now estranged from the Applicant) in Guyana.

III. ANALYSIS

A. *Standard of Review*

[15] I adopt the conclusion of *Barm v. Canada (Minister of Citizenship and Immigration),* 2008 FC 893, that in this type of case the standard of review is reasonableness with significant deference owed to findings of fact in the context of a highly discretionary decision.

[16] The Supreme Court's decision in *Canada (Citizenship and Immigration) v. Khosa,* 2009 SCC 12, released shortly after the hearing of this matter, did not alter the standard of review analysis, as regards judicial reviews in the Federal Court, called for in *Dunsmuir v. New Brunswick,* 2008 SCC 9. *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817, still sets the standard of review of reasonableness for H&C decisions.

[17] The question is whether this decision falls within a range of reasonably acceptable outcomes within the context of an H&C application.

B. *Decision*

[18] The Applicant has placed too much reliance on “intent”, both as an applicable principle and as to its application in this case.

[19] Intent may be a relevant factor under H&C considerations in s. 67 but it does not dominate the analysis of factors.

[20] The IAD did a thorough analysis of the relevant factors. The critical factor was the 1997 decision to deny the request for a Returning Resident Permit. That decision, based on allegations that the Applicant had sold his Record of Landing, concluded that the Applicant had abandoned Canada.

[21] In the absence of any challenge to the 1997 decision, the High Commission and the IAD had to accept that finding. Given that finding, the sporadic and ineffective efforts to return to Canada are not sufficient evidence of intent to remain or to acquire residency.

[22] The IAD’s consideration of the H&C factors was sufficient and comprehensive. Although the analysis of the best interests of the children may have raised issues, it is not for the Court to reweigh the evidence.

[23] In sum, the Applicant's efforts to rebut any finding of abandonment or to establish H&C grounds to permit a return to Canada were "too little and too late". The Applicant is left with the option of applying to enter Canada in the same way most others must.

IV. CONCLUSION

[24] For these reasons, and despite the best efforts of counsel, 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-4196-08
STYLE OF CAUSE:	MOHABIR DUDHNATH and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 3, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	Phelan J.
DATED:	April 17, 2009

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