Federal Court  Cour fédérale

Date: 20110118

Docket: IMM-2788-10

Citation: 2011 FC 50

Ottawa, Ontario, January 18, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MIRZA, SOHAIL RASHID

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The humanitarian and compassionate (H&C) decision-making process is a highly discretionary one that considers whether a special grant of an exemption is warranted. It is widely understood that invoking subsection 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) is an exceptional measure, and not simply an alternate means of applying for

permanent resident status in Canada (*Barrak v Canada (Minister of Citizenship and Immigration)*, 2008 FC 962, 333 FTR 109, at paras 27, 29; *Doumbouya v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1186, 325 FTR 186, at para 7; *Pannu v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1356, 153 ACWS (3d) 195, at para 26).

[2] It was up to the Applicant to demonstrate that the hardship he would suffer, if required to apply for permanent residence in the normal manner, would be unusual, undeserved or disproportionate, which are the criteria adopted by the jurisprudence (*Paul v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1300, [2009] FCJ No 1698 (QL/Lexis), at para 5; *Paz v Canada (Minister of Citizenship and Immigration)*, 2009 FC 412, 176 ACWS (3d) 1124, at paras 15-18; *Tikhonova v Canada (Minister of Citizenship and Immigration)*, 2008 FC 847, 170 ACWS (3d) 170, at para 17).

[3] The difficulties inherent in having to leave Canada are not sufficient (*Paz*, above; *Singh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 11, 340 FTR 29; *Ahmad v Canada (Minister of Citizenship and Immigration)*, 2008 FC 646, 167 ACWS (3d) 974, at para 49).

II. Background

[4] The Applicant, Mr. Sohail Rashid Mirza, is a citizen of Pakistan. He came to Canada in July 2002 after having spent nearly 15 months in the United States without claiming refugee status.

[5] After his arrival, the Applicant claimed refugee status in Canada. His refugee claim was refused by the Immigration and Refugee Board (IRB), on January 24, 2003, based on lack of

credibility. The IRB held that the inconsistencies and contradictions in the Applicant's testimony, the different declarations made by the Applicant before the Immigration Officer during his interview and in his Personal Information Form (PIF), undermined his credibility.

[6] The IRB did not believe that the Applicant suffered from the incidents of persecution in Pakistan as he alleges. The IRB wrote in its decision:

> … the panel does not believe the claimant suffered past persecution at the hands of the SSP, and given the current situation in Pakistan, the panel does not find that there is an objective basis to the claimant's well-founded fear of persecution.

(IRB Decision, Tribunal Record, at p 287).

[7] On September 6, 2003, the Federal Court denied Mr. Mirza's leave application with respect to the negative decision of the IRB.

[8] The Applicant has **three children who are all residing in Pakistan**. His other siblings (two brothers) also live in Pakistan.

III. Decision under Review

[9] After considering all of the relevant factors contained in the Applicant's application, the Officer concluded that the facts and information he submitted did not demonstrate that there are unusual and undeserved or disproportionate hardships for the Applicant if he is required to submit his Permanent Residence Application from outside Canada.

[10] Before arriving at the conclusion, the Officer considered all the relevant factors in this particular case, including the degree to which the Applicant has established himself in Canada, the best interests of his three children in Pakistan and the difficulties to return to Pakistan after 8 years in Canada.

IV. Analysis

[11] The Court considered and accepted the position of the Respondent.

[12] The Applicant has not demonstrated that the Officer erred in the determination of the application for permanent residence based on H&C grounds.

Statutory Framework and Standard of Review

[13] Subsection 11(1) of the IRPA provides that all foreign nationals seeking admission to Canada must first apply to an officer for a visa or for any other document that may be required by the *Immigration and Refugee Protection Regulations*, SOR/2002-227 prior to entering Canada.

[14] Pursuant to section 25 of the IRPA, the Minister is authorized to grant a foreign national permanent resident status or an exception from any applicable criteria or obligation of the IRPA if the Minister is of the opinion that it is justified by H&C considerations. The decision of an officer not to grant an exemption under section 25 of the IRPA does not remove the right of the Applicant to apply for landing from outside Canada.

[15] Many factors exist which an officer can take into account when making a H&C decision, including the manner in which an applicant entered and remained in Canada, whether the grounds on which an applicant claims an exemption are due to his own making and whether an applicant has possible employment or relatives in his/her country of origin. No one factor is determinative (*Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 FC 358).

[16] The onus is on the Applicant to demonstrate that he would face unusual and undeserved or disproportionate hardship by having to apply for permanent resident status outside of Canada (*Arumugam v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 985, 211 FTR 65, at paras 16-17 (TD)).

[17] As to the meaning of the expression "unusual, undeserved or disproportionate" in this context, the Court in *Singh*, above, quoted with approval the following dicta of Justice Yves de Montigny in *Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356, 146 ACWS (3d) 1057:

> [19] With regard to the meaning of the words "unusual, undeserved or disproportionate" in this context, the following remarks by Justice Yves de Montigny in *Serda* … were cited with approval in *Doumbouya*, above, at paragraph 9:
>
> > [20] …
> >
> > In assessing an application for landing from within Canada on Humanitarian and Compassionate grounds made pursuant to section 25, the Immigration Officer is provided with Ministerial guidelines. Immigration Manual IP5 - Immigration Applications in Canada made on Humanitarian or compassionate Grounds, a manual put out by the Minister of Citizenship and Immigration Canada, provides guidelines on what is meant by Humanitarian and Compassionate grounds …

…

The IP5 Manual goes on to define “unusual and undeserved” hardship and “disproportionate” hardship. It states, at paragraphs 6.7 and 6.8:

6.7 Unusual and underserved hardship	**6.7 Difficulté inhabituelle et injustifiée**
Unusual and undeserved hardship is:	On appelle difficulté inhabituelle et injustifiée:
- the hardship (of having to apply for a permanent resident visa from outside of Canada) that the applicant would have to face should be, in most cases, unusual, in other words, a hardship not anticipated by the Act or Regulations; and	- la difficulté (de devoir demander un visa de résident permanent hors du Canada) à laquelle le demandeur s'exposerait serait, dans la plupart des cas, inhabituelle ou, en d'autres termes, une difficulté non prévue à la Loi ou à son Règlement; et
- the hardship (of having to apply for a permanent resident visa from outside of Canada) that the applicant would face should be, in most cases, the result of circumstances beyond the person's control.	- la difficulté (de devoir demander un visa de résident hors du Canada) à laquelle le demandeur s'exposerait serait, dans la plupart des cas, le résultat de circonstances échappant au contrôle de cette personne.
6.8 Disproportionate hardship	**6.7[sic] Difficultés démesurées**
Humanitarian and compassionate grounds may exist in cases that would not meet the "unusual and undeserved" criteria but where the hardship (of having to apply for a permanent resident visa from outside of Canada) would have a disproportionate impact on the applicant due to their personal circumstances.	Des motifs d'ordre humanitaire peuvent exister dans des cas n'étant pas considérés comme "inusités ou injustifiés", mais dont la difficulté (de présenter une demande de visa de résident permanent à l'extérieur de Canada) aurait des répercussions disproportion-nées pour le demandeur, compte tenu des circonstances qui lui sont propres.

(Emphasis added).

[18] The H&C decision is not a simple application of legal principles but rather a fact-specific weighing of many factors. As long as the immigration officer considers the relevant, appropriate factors from a H&C perspective, the Court cannot interfere with the weight the immigration officer gives to the different factors, even if it would have weighed the factors differently (*Legault*, above, at para 11; reference is also made to *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 2 SCR 3, at paras 34-37).

Officer entitled to weigh the evidence and the appropriate factors

[19] In the present case, the Officer took into consideration the particular situation of the Applicant, including the efforts made by the Applicant to integrate into Canadian society and to support himself financially and the risks of return alleged.

[20] The Officer concluded that the Applicant did not establish that his situation meets the threshold of unusual, undeserved or disproportionate hardship if he had to return to Pakistan to apply for permanent residency.

[21] It was reasonable for the Officer to conclude as he did.

[22] Essentially, the Applicant argues that the Officer erred by not finding that his application warranted the exercise of his discretion. The Applicant's submissions simply amount to a disagreement with the weight assigned to the evidence he submitted with respect to his work and social activities in Canada; however, the weighing of relevant factors is not the function of a Court

reviewing the exercise of ministerial discretion (*Agot v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 436, 232 FTR 101, at para 8; *Legault*, above).

[23] The Officer considered all the relevant factors, positive and negative, and put the appropriate weight on each of these factors. There is no proof that the weight ascribed by the Officer to any of the relevant factors was disproportionate so as to amount to an unreasonable appreciation of the evidence.

[24] Furthermore, the Federal Court has determined that this factor is not overriding and is only one of the factors to be taken into consideration:

> [30] … the officer found that severing her community and employment ties in Canada would not have a significant negative impact that would justify an exemption under humanitarian and compassionate considerations. This is a conclusion that she could legitimately draw from the evidence submitted to her, and I am unable to find it was unreasonable to so conclude. In any event, it must be remembered that the degree of establishment is only one of the factors to be taken into consideration to determine if an applicant would suffer undue, undeserved or disproportionate hardship if returned to his or her country of origin. (Emphasis added).

(*Pannu*, above).

The risks of return as part of the H&C

[25] In the present case, the Officer noted that the Applicant raised the same risks that were part of his claim before the IRB; however, the IRB did not believe the narrative on which the risks of return were based and rejected the claim.

[26] Given that the IRB's decision rejecting the Applicant's claim for refugee protection was challenged before the Federal Court which declined to grant judicial review, the conclusions drawn by the Refugee Protection Division (RPD) remain in place (*Hausleitner v Canada (Minister of Citizenship and Immigration)*, 2005 CF 641, 139 ACWS (3d) 115, at para 34).

[27] Furthermore, contrary to the Applicant's allegation, the Officer assessed the Applicant's risks of return not on the basis of the higher threshold of a Pre-Removal Risk Assessment (PRRA) determination, but on examination of the impact of the risk factors on the Applicant and whether he would face undue hardship in having to apply for a permanent residence visa from outside Canada (Officer's notes, at p 2).

[28] It is important to note that the relief under section 25 of the IRPA is an exceptional remedy dependent on the Minister's discretion. An applicant is not entitled to a particular outcome, even if there are compelling H&C considerations at play. The Minister is entitled to balance H&C considerations against public interest reasons that might exist for refusing to grant an exceptional remedy (*Pannu*, above, at para 29).

V. Conclusion

[29] A decision is unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable and can stand up to a somewhat probing examination, then the decision is not unreasonable and the reviewing court is not to interfere.

[30] The decision rendered by the Officer is not unreasonable since the reasons entirely support the conclusion reached.

[31] The documents filed by the Applicant in support of the judicial review do not demonstrate any error on the part of the Officer in the decision as rendered.

[32] For all of the above reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be dismissed with no question for certification.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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