Federal Court  Cour fédérale

Date: 20110630

Docket: IMM-5447-10

Citation: 2011 FC 813

Ottawa, Ontario, June 30, 2011

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

PARWINDER SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 of the decision made on August 20, 2010, by a Pre-Removal Risk Assessment Officer refusing the applicant's application for permanent residence from within Canada on humanitarian and compassionate grounds.

[2] For the reasons that follow, the application is dismissed.

BACKGROUND

[3] The applicant is a citizen of India. He came to Canada under a false passport on August 17, 2003 and claimed refugee protection on September 13, 2003. On October 5, 2004, his refugee claim was rejected. He sought leave to commence an application for judicial review, but leave was refused on March 3, 2005.

[4] The applicant sought humanitarian and compassionate ["H&C"] relief on April 8, 2005; his H&C application was based on the risk he faced if returned to India and on establishment in Canada. Around the same time, he applied for a Pre-Removal Risk Assessment. On June 29, 2008, the applicant made updated submissions in his H&C application.

DECISION UNDER REVIEW

[5] The officer found that the applicant had not provided any additional evidence which would allow him to depart from the factual findings of the Immigration and Refugee Protection Board ["the Board"]. As the Board had determined that there was no serious possibility that the applicant would face persecution if he was returned to India, the officer found that there was, therefore, insufficient evidence that the applicant faced risk in India which could amount to hardship.

[6] The officer then considered the applicant's establishment in Canada. The officer summarized the applicant's evidence of steady employment, financial independence and community involvement. The officer also considered Immigration Manual IP5, which states that

establishment may warrant H&C relief where it results in a prolonged stay in Canada because of circumstances beyond the individual's control. The officer stated that, had the applicant stayed in Canada because of circumstances beyond his control, the evidence would have been given some positive weight; however, as the applicant chose to remain in Canada despite being subject to a departure order, the officer gave no weight to the evidence of establishment which post-dated the unsuccessful leave decision.

[7] The officer went on to examine the evidence of establishment prior to the leave decision, but found that it did not demonstrate hardship that would justify H&C relief.

ISSUES

[8] This application raises only one issue:

a. Did the officer fetter his discretion and fail to consider the evidence of establishment which post-dates the leave decision?

ANALYSIS

Standard of Review

[9] The issue of whether the officer fettered his discretion is one of procedural fairness. A standard of review analysis is not required where procedural fairness is in question. The proper approach is to ask whether the requirements of procedural fairness and natural justice in the particular circumstances have been met. Deference to the decision-maker is not at issue. See:

Ontario (Commissioner Provincial Police) v MacDonald, 2009 ONCA 805, 3 Admin LR (5th) 278 at para 37 and *Bowater Mersey Paper Co v Communications, Energy and Paperworkers Union of Canada, Local 141*, 2010 NSCA 19, 3 Admin LR (5th) 261 at paras 30-32.

a. *Did the officer fetter his discretion and fail to consider the evidence of establishment which post-dates the leave decision?*

[10] The officer did not fetter his discretion or fail to consider the post-leave-decision evidence. Rather, the officer considered it and decided to give it no weight because it resulted from the applicant's choice to remain in Canada without status and not from circumstances beyond his control. As counsel for the applicant fairly acknowledged, the officer's reasons are commendably clear on this point.

[11] The applicant seeks to rely on the decision in *Lin v Canada (Minister of Citizenship and Immigration)*, 2011 FC 316, 2011 CarswellNat 661. However, that decision is of little assistance in this application. The reasons are exceedingly brief, consisting of only three paragraphs. In those three paragraphs, Justice Campbell notes both that the processing time of the application was unusually long (in that case, seven years) and that, in that time, Ms. Lin became "firmly established" in Canada. There is no mention in the decision of what evidence supported this firm degree of establishment. Further, it appears from the decision that Ms. Lin was never subject to a removal order while she was becoming established.

[12] At the hearing, the applicant submitted that the Federal Court of Appeal decision in *Hinzman v Canada (Minister of Citizenship and Immigration)* 2010 FCA 177, 321 DLR (4th) 111

stands for the proposition that evidence of establishment up to the date of the officer's decision must be considered. This argument is based on a statement in paragraph 40 of *Hinzman* that "…the H&C officer had the duty to look at all of the appellant's personal circumstances." I agree with the respondent that this statement is taken out of the context of that decision which turned on the failure of the officer to consider the evidence of the appellant's religious and moral beliefs in assessing whether he would suffer disproportionate hardship if returned to the United States.

[13] Although the officer did not consider the applicant's establishment in light of the fact that his application took almost five and a half years to process, this failure is not a reviewable error as the post-leave decision evidence does not change the outcome of the decision. In his consideration of the post-leave-decision establishment, the officer found that, had the establishment resulted from circumstances beyond the applicant's control, he would have accorded it "some positive weight." Notably, the officer stops short of saying that the evidence would lead to a different conclusion or that it would be determinative of his application. In any event, establishment is only one of the factors to be considered in assessing an H&C application, and the applicant's establishment following the leave decision does not appear to be sufficient to warrant H&C relief on its own.

[14] In my view, the decision in *Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356, 146 ACWS (3d) 1057 is determinative of this application. In that decision, Mr. Justice Yves de Montigny was faced with the same issue that is now before me – that is, whether the officer fettered her discretion in not considering evidence of establishment after the applicants became subject to a removal order. At paragraphs 19 to 24, Justice de Montigny found that:

> The Applicants, knowing that further time in Canada waiting for their legal processes to be completed would mean more alleged difficulty in returning to their home country, and knowing that they had been ordered to be removed, made the choice to stay anyway. This cannot be equated to a "prolonged inability to leave Canada", which is one of the situations where the Applicant's degree of establishment may be a factor to be considered pursuant to section 11.2 of the IP5 Manual.
>
> One of the cornerstones of the Immigration and Refugee Protection Act is the requirement that persons who wish to live permanently in Canada must, prior to their arrival in Canada, submit their application outside Canada and qualify for, and obtain, a permanent resident visa. Section 25 of the Act gives to the Minister the flexibility to approve deserving cases for processing within Canada. This is clearly meant to be an exceptional remedy […]
>
> It would obviously defeat the purpose of the Act if the longer an applicant was to live illegally in Canada, the better his or her chances were to be allowed to stay permanently, even though he or she would not otherwise qualify as a refugee or permanent resident. This circular argument was indeed considered by the H & C officer, but not accepted; it doesn't strike me as being an unreasonable conclusion. […]
>
> [I]t cannot be said that the exercise of all the legal recourses provided by the IRPA are circumstances beyond the control of the Applicant. A failed refugee claimant is certainly entitled to use all the legal remedies at his or her disposal, but he or she must do so knowing full well that the removal will be more painful if it eventually comes to it. […]
>
> In any event, the Immigration Officer did not refuse to consider the establishment of the Applicants in Canada, but decided to give this factor little weight. It cannot be said, therefore, that she fettered her discretion; quite to the contrary, she looked at all the circumstances before concluding as she did, and therefore exercised her discretion.

[15] As in *Serda*, the officer in this application considered the post-leave-decision evidence of the applicant’s establishment in Canada but ultimately gave it no weight. This conclusion was open to the officer in light of the facts of this application.

CONCLUSION

[16] Accordingly, the application for judicial review is dismissed. No question was proposed for certification and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Micheal Crane	FOR THE APPLICANT
Melissa Mathieu	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MICHEAL CRANE Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
MYLES J. KIRVAN Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT