Federal Court  Cour fédérale

Date: 20120629

Docket: IMM-8382-11

Citation: 2012 FC 835

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, June 29, 2012

PRESENT: The Honourable Justice Scott

BETWEEN:

JUJHAR SINGH GILL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review filed under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001 c. 27 [IRPA] from a decision of the immigration officer (the officer) rendered September 21, 2011, refusing to grant permanent resident status to Jujhar Singh

Gill (Mr. Gill) or an exemption from any applicable criteria or obligation for an application on humanitarian and compassionate considerations [H&C] under subsection 25(1) of the IRPA.

[2] For the following reasons, this application for judicial review is dismissed.

II. Facts

[3] Mr. Gill is a citizen of the Republic of India. He is married to Kulwinder Gill who lives in India with their children Jagjot Gill and Prabjot Gill. His parents and brother live in Canada.

[4] He is a shareholder in a printing company and is the owner and driver of a transportation company.

[5] On August 9, 1997, Mr. Gill arrived in Canada. He filed a refugee claim based on his fear of persecution by the Indian police force because of his affiliation with the Akali Dal Mann party.

[6] On May 4, 1999, the IRB rejected Mr. Gill's refugee claim based on his lack of credibility.

[7] On August 10, 1999, the Federal Court dismissed his application for leave and judicial review of the IRB decision.

[8] On April 14, 2010, Mr. Gill filed an application for a pre-removal risk assessment [PRRA]. His PRRA application was denied on September 12, 2011.

[9] On January 19, 2004, Mr. Gill filed an application for permanent residence under humanitarian considerations [H&C]. His application was denied on September 21, 2011. That decision is the subject of the present judicial review.

III. Legislation

[10] Subsection 25(1) of the IRPA states:

25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	**25.** (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

IV. Issue and standard of review

A. Issue

- ***Did the officer err by finding that Mr. Gill would not experience any unusual, underserved or disproportionate hardship if he were to file his application for permanent residence abroad?***

B. Standard of review

[11] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 62, the Supreme Court stated that the appropriate standard of review for decisions on H&C applications is reasonableness (see also *Paz* v *Canada (Minister of Citizenship and Immigration)*, 2009 FC 412 at paras 22-25).

[12] Therefore, the Court must consider "the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

V. Position of the parties

A. Position of Mr. Gill

[13] Mr. Gill submits that the time that passed since his refugee claim has allowed him to settle and integrate in Canada. He cites the officer's decision that states he showed a willingness to integrate into Canadian society, through both his business success and his community involvement.

[14] Mr. Gill also claims that the officer did not sufficiently consider the hardships he would face should he return to India, after 13 years away from the country. Mr. Gill also notes that he would have trouble finding a job in India.

[15] Additionally, Mr. Gill restates that he was detained arbitrarily and tortured by the Indian police force because of his political affiliations. He states that these same risks will exist should he return.

B. Position of the respondent

[16] The respondent supports the officer's finding that Mr. Gill did not establish that the problems he would face by submitting his application for permanent residence outside Canada would be unusual and unjustified or excessive.

[17] Moreover, the respondent notes that the degree of establishment in Canada is only one factor among many to consider when assessing an H&C application. The respondent cites *Lynch v Canada (Minister of Citizenship and Immigration)*, 2009 FC 615 at para 20, that states that "[t]he test to be

applied by an immigration officer when reaching a decision under section 25 of the IRPA is to determine whether the person who requests an exception would suffer unusual, undeserved or disproportionate hardship if he were to follow the normal requirements of the Act."

[18] The respondent adds that it is not enough to act as a good Canadian citizen and "simply being employed in Canada and acting as a responsible citizen is not sufficient... [O]ther factors must be present justifying humanitarian and compassionate grounds" (see *Adams v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1193 at para 34).

[19] Additionally, the respondent states that the separation of family members does not justify an exemption under section 25 of the IRPA. Mr. Gill does not present any evidence showing that this separation would lead to unusual and undeserved or excessive hardship.

[20] According to the respondent, Mr. Gill should not be rewarded for having accumulated time in Canada (see *Perez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 757 at para 7).

[21] Moreover, according to the respondent, the case law is clear. The immigration officer does not sit in appeal of an IRB decision. He is not to review the findings of the Board (see *Akinosho v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1194 at para 10).

VI. Analysis

- ***Did the officer err by finding that Mr. Gill would not experience any unusual, undeserved or disproportionate hardship if he were to file his application for permanent residence abroad?***

[22] The officer did not err by finding that Mr. Gill would not experience any unusual, undeserved or disproportionate hardship if he were to file is application for permanent residence abroad.

[23] "The H&C decision-making process is a highly discretionary one that considers whether a special grant of an exemption is warranted" (see *Doumbouya* v *Canada (Minister of Citizenship and Immigration)*, 2007 FC 1186 at para 7; *Kawtharani v Canada (Minister of Citizenship and Immigration)* [*Kawtharani*], 2006 FC 162 at para 15). It is therefore Mr. Gill's responsibility to prove that the hardships he should face, if he were to submit his application for permanent residence abroad, would be unusual, undeserved or disproportionate (see *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 23).

[24] The *Immigration Applications in Canada made for Humanitarian or Compassionate Grounds* guide clarifies the meaning of "unusual, undeserved or disproportionate" as follows:

> **5.10 The assessment of hardship**
>
> The assessment of hardship in an H&C application is a means by which CIC decision-makers determine whether there are sufficient H&C grounds to justify granting the requested exemption(s).
>
> The criterion of "unusual, undeserved or disproportionate hardship" has been adopted by the Federal Court in its decisions on subsection 25(1), which means that these terms are more than mere guidelines.

> See *Singh v Canada (Minister of Citizenship and Immigration)*; 2009 Carswell Nat 452; 2009 CF 11.
>
> ...
>
> Individual H&C factors put forward by the applicant should not be considered in isolation in a determination of the hardship that an applicant would face; rather, hardship is determined as a result of a global assessment of H&C considerations put forth by the applicant. In other words, hardship is assessed by weighing together all of the H&C considerations submitted by the applicant. Hardship must be unusual and undeserved or disproportionate...
>
> **5.11 Factors to consider in assessment of hardship**
>
> Subsection A25(1) provides the flexibility to grant exceptions to overcome the requirement of obtaining a permanent residence visa from abroad, to overcome class eligibility requirements and/or inadmissibilities, on humanitarian and compassionate grounds.
>
> Officers must assess the hardship that would befall the applicant should the requested exemption not be granted.
>
> Applicants may base their requests for H&C consideration on any number of factors including, but not limited to:
>
> - establishment in Canada;
> - ties to Canada;
> - the best interests of any children affected by their application;
> - factors in their country of origin (this includes but is not limited to: Medical inadequacies, discrimination that does not amount to persecution, harassment or other hardships that are not described in A96 and A97);
> - health considerations;
> - family violence considerations;
> - consequences of the separation of relatives;
> - inability to leave Canada has led to establishment; and/or
> - any other relevant factor they wish to have considered not related to A96 and A97.

[25] Mr. Gill alleges that he is established in and has ties to Canada. He states that he is well integrated in the country and that after 13 years away, he would have trouble finding a job in India.

Moreover, he claims that he would be tortured by the police should he return to his country of origin.

[26] In his decision, the officer recognized there was [TRANSLATION] "a willingness to settle" (see tribunal record at page 8) but made a negative finding in response to [TRANSLATION] "the issue of whether such efforts were sufficient to justify the exception, the visa exemption as per [the *Immigration Applications in Canada made for Humanitarian or Compassionate Grounds* guide]" (see tribunal record at page 8).

[27] The Court endorses the officer's analysis that the establishment in Canada factor is only one of many others and that:

> [TRANSLATION]
> If this were the criterion, the H&C review process would become an ex post facto screening device that prevails over the review process set out in the Immigration Act and regulations. This would encourage people to take a chance claiming refugee status believing that if they can stay in Canada long enough to show they are the type of person Canada is looking for, they will be allowed to stay. The purpose of the H&C application process is not to eliminate hardships; it is designed to provide relief from unusual, undeserved or disproportionate hardship." (see tribunal record at page 8)

[28] Moreover, the Court must note that the inherent hardship of leaving Canada is not sufficient in itself to warrant an exemption under subsection 25(1) of the IRPA (see *Kawtharani, supra*, at para 16).

[29] In this case, although Mr. Gill succeeded in business in Canada and he acted in an exemplary manner, the officer could find that his return to India would not result in any unusual,

undeserved or disproportionate hardship. Moreover, the officer notes that Mr. Gill's wife and children still live there and that [TRANSLATION] "his strongest ties are there" (see tribunal record at page 8).

[30] Since Mr. Gill did not submit any new evidence to clearly establish he would have trouble finding employment in India or that he would be tortured because of his political affiliations, the Court does not see any reason to intervene in this case.

[31] On this, the Federal Court of Appeal stated that "the purpose of the H&C application is not to re-argue the facts which were originally before the Refugee Board, or to do indirectly what cannot be done directly, i.e., contest the findings of the Refugee Board." (see *Hussain v Canada (Minister of Citizenship and Immigration)*, [2000] FCA No 751 at para 12).

[32] Mr. Gill's application for judicial review shall be dismissed for the above-noted reasons.

VII. Conclusion

[33] The officer reasonably found that Mr. Gill would not experience any unusual, undeserved or disproportionate hardship if he were to file his application for permanent residence in India. The officer's decision falls within the possible and acceptable outcomes in respect of the facts and applicable law (*Dunsmuir, supra*, at para 47). Mr. Gill's application for judicial review is therefore dismissed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that:

1. the application for judicial review is dismissed; and

2. there is no question of general interest to certify.

"André F.J. Scott"

Judge

Certified true translation

Elizabeth Tan, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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