Federal Court Cour fédérale

Date: 20140917

Docket: IMM-555-14

Citation: 2014 FC 891

Ottawa, Ontario, September 17, 2014

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

GURJIT SINGH SOMAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of an unnamed officer of the High Commission of Canada, Immigration Section in New Delhi India, refusing the Applicant's application for permanent residence as a member of the family class.

I. Issues

[2] The issues are as follows:

A. If a single finding of the Officer's decision is unreasonable, should the overall decision of inadmissibility which is based on other grounds that are not challenged be upheld? Whether the Officer properly conducted an equivalency analysis under paragraph 36(1)(c) of the IRPA;

B. Did the Officer also fail to consider the humanitarian and compassionate request of the Applicant?

II. Background

[3] The Applicant is a citizen of India. He first came to Canada illegally by way of England in September 1997 and subsequently made a refugee claim in Montreal on September 17, 1997, which he abandoned weeks later when he left for the United States. He was travelling under his given name "Hardip Singh Somal".

[4] The Applicant submitted a refugee claim in Michigan in January of 1998 under the same name "Hardip Singh Somal". This claim was denied July 10, 1998.

[5] The Applicant remained in the United States and was arrested on October 10, 2002, for driving under the influence in Seattle, Washington. He was convicted and completed the term of his sentence on or about April 16, 2004.

[6] In November 2002, the Applicant legally changed his name in India to "Gurjit Singh Somal", and obtained new documents with an incorrect date of birth (May 15, 1975) with his father's help from India, since he remained in the United States throughout this process. The Applicant's father also helped him obtain a passport with his new name and incorrect date of birth, in 2003. The passport remained in India; the Applicant received photocopies of it in the United States.

[7] In November 2005, the Applicant paid $3,000 for assistance from someone at the Indian Consulate in California to obtain a new passport (when he already had a valid Indian passport issued to his name, "Gurjit Singh Somal"). This passport did not include his former name as an "alias".

[8] The Applicant re-entered Canada in or about September 2006. Sometime the next year, his cousin introduced him to his now wife, Ramjit Kaur Somal. They married December 29, 2007. Ramjit had a young son from a previous relationship, Manjot, and had the couple's son, Lakhjot Singh Somal, in May 2009.

[9] The Applicant submitted an application for permanent residence on February 28, 2008, under the Spouse or Common-Law Partner in Canada Class [SCLPC].

[10] The Applicant's application was approved in principle on August 13, 2009, after a June 23, 2009 interview at the CIC Admissions office.

[11] The Applicant's SCLPC application was subsequently refused on April 25, 2012, due to a finding of inadmissibility into Canada under subsection 36(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. He voluntarily departed to India on May 29, 2012, and has remained there with his son and stepson.

[12] The Applicant submitted an application for permanent residence in Canada under the family class in August 2012 and underwent an interview with his wife on December 23, 2013, in New Delhi.

[13] The Officer refused the application by letter dated December 27, 2013. One of the grounds of refusal was inadmissibility for serious criminality under paragraph 36(1)(c) of the IRPA. As a result of being found inadmissible under paragraph 36(1)(c) of the IRPA, the Applicant is precluded from appealing to the Immigration Appeal Division [IAD], pursuant to section 64 of IRPA.

[14] The Officer based his overall decision of inadmissibility on his evaluation of a number of grounds, including the Applicant's equivalency of crimes committed in India and the United States. The Officer found that the Applicant had committed crimes under section 191 of the *Indian Penal Code* and under the *United States of America Code 1543*, which the Officer determined to be equivalent to subsections 57(1) and 57(2) of the Canadian *Criminal Code*, RSC, 1985, c C-46. The Officer's finding of inadmissibility was based on sections 11, 6, 31(1)(c) and 36(2)(b) of the IRPA. The Applicant only requests review of the Officer's finding of inadmissibility under paragraph 36(1)(c).

[15] The Applicant was also found inadmissible on the basis of criminality, of not being a member of a family class, and not being in a genuine marriage, none of which are challenged by the Applicant.

III. Standard of Review

[16] The standard of review is reasonableness, as the questions before the Court are of mixed fact and law (*Kathirgamathamby v Canada (Minister of Citizenship and Immigration)*, 2013 FC 811).

IV. Analysis

[17] The relevant statutory provisions are attached as Schedule "A".

A. *If a Single Finding of the Officer's Decision is Unreasonable, Should the Overall Decision of Inadmissibility Which is Based on Other Grounds that are not Challenged be Upheld? Whether the Officer Properly Conducted an Equivalency Analysis Under Paragraph 36(1)(C) of the IRPA.*

[18] It is in consideration of the decision in its entirety that a determination by this Court should be made. The decision as a whole is still reasonable if an error within it does not affect the ultimate outcome and reasonableness of the decision.

[19] An inadmissibility finding under paragraph 36(1)(c) of IRPA requires an officer to conduct an equivalency analysis between the foreign offences pondered and the equivalent suggested in Canadian legislation, as established by the Federal Court of Appeal in *Hill v*.

Canada (Minister of Employment and Immigration) (1987), 73 NR 315 (FCA) [*Hill*] and summarized in *Pardhan v Canada (Minister of Citizenship and Immigration)*, 2007 FC 756 at paras 10-11 [*Pardhan*]. There are three ways of making such a determination:

i. by comparing the precise wording in each statute both through documents and, if available, through the evidence of experts in the foreign law in order to determine the essential elements of the respective offences;

ii. by examining the evidence, both oral and documentary, to ascertain whether that evidence is sufficient to establish that the essential elements of the offence in Canada had been proven in the foreign proceedings, whether precisely described in the initiating documents or in the statutory provision in the same words or not;

iii. a combination of the two.

[20] While it is possible for a statement of the offences and then a brief finding of inadmissibility to fulfill the requirements of *Hill*, a bare statement of the two provisions and a determination in the reasons is not adequate to fulfill the equivalency analysis required under paragraph 36(1)(c) of the IRPA (*Pardhan* at para 14).

[21] The Applicant admits in his initial memorandum of argument the following:

> … notwithstanding the fact that some of the other findings of inadmissibility may be sustainable, the Court must review this inadmissibility finding because if it is set aside the Applicant will have access to the IAD of the Immigration and Refugee Board and will therefore have a right to an equitable review of all of the circumstances of his case before the Division in order to overcome any other grounds of inadmissibility.

[22] In considering the applicability of paragraph 36(1)(c) of the IRPA, the Officer made a determination of inadmissibility based on the commission of acts in violation of section 191 of the *Indian Penal Code* and the *United States of America code 1543* (among other violations mentioned in the notes, for which Canadian equivalencies were not included). As the Applicant states there is no evidence that the Officer "considered the wording of the relevant foreign and domestic offences to determine the essential ingredients of the respective offences." In the words of Applicant's counsel, the finding of inadmissibility was a "mere recitation of the language found in the respective offence provisions" which is insufficient to meet the required level of analysis (*Applicant's Reply Memorandum of Argument*, para 14).

[23] Further, the first step in an inadmissibility analysis under paragraph 36(1)(c) of the IRPA requires an officer to identify the acts meant to constitute indictable offences outside of Canada before embarking on an equivalency analysis. The Officer failed in this case to conduct such an initial analysis and merely states that the Applicant committed certain offences, without further discussion. I find that the GCMS notes along with the letter of refusal do not constitute a proper equivalency analysis.

[24] I do, however, find that the Officer's decision to refuse the Applicant's application as a whole was reasonable. The decision was based on a number of findings of inadmissibility, none of which are challenged by the Applicant, including criminality, not being a member of a family class, and not being a genuine marriage which, independent of the paragraph 36(1)(c) consideration, would be reasonable grounds for a decision inadmissibility.

[25] The facts that the Applicant has been found not a member of a family class, or that he is inadmissible due to criminality, remain and therefore his application should be dismissed.

B. *Did the Officer also Fail to Consider the Humanitarian and Compassionate Request of the Applicant?*

[26] The Applicant argues that the IRPA puts a statutory obligation on officers when it is requested by the foreign national applying to consider humanitarian and compassionate [H&C] grounds, and that the Officer failed to do so in this case.

[27] The Applicant states that the repeated referrals to the upset that it will cause the Applicant's family and his children in particular constituted H&C concerns, and that the Officer should have taken these referrals into consideration, and failed to do so.

[28] While the Officer does not make any specific mention of H&C considerations in his reasons for refusal or in his letter of refusal, it is not necessary for an officer to mention each individual consideration in their reasons given, as long as the Officer's decision as a whole can be viewed as reasonable (*Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65 at para 3).

[29] During the interview, the Officer repeatedly included questions to determine the level of hardship that would be put upon the Applicant and his family should his application be denied. The Applicant made little mention of issues that would face his children should they remain in India and his wife come and join them to live. He only stated at the very end of the interview

that “we are living happily, and if our application is refused then it will spoil my life, my wife’s life and my children’s life will be ruined.” Considering the Applicant’s wife’s statement that they could live together as a family in India without any problem, it was not unreasonable for the Officer to think that the best interests of the child in the case at hand do not outweigh the Applicant’s other issues concerning admissibility.

[30] The Officer conducted sufficient questioning to determine that the Applicant does not qualify for H&C considerations. There was ample opportunity afforded the Applicant to bring forward evidence to support H&C considerations and he failed to do so.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. There is no question for certification.

"Michael D. Manson"
Judge

ANNEX "A"

Immigration and Refugee Protection Act, SC 2001, c 27

Application before entering Canada

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

Visa et documents

11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

Obligation — answer truthfully

16. (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.

Obligation du demandeur

16. (1) L'auteur d'une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous éléments de preuve pertinents et présenter les visa et documents requis.

Humanitarian and compassionate considerations — Minister's own initiative

25.1 (1) The Minister may, on the Minister's own initiative, examine the circumstances concerning a foreign national who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act 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.

Séjour pour motif d'ordre humanitaire à l'initiative du ministre

25.1 (1) Le ministre peut, de sa propre initiative, étudier le cas de l'étranger qui est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 — ou qui ne se conforme pas à la présente loi; 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.

Serious criminality

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable

Grande criminalité

36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

by a maximum term of imprisonment of at least 10 years.

Criminality
(2) A foreign national is inadmissible on grounds of criminality for
(b) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;

Criminalité
(2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :
b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions qui ne découlent pas des mêmes faits et qui, commises au Canada, constitueraient des infractions à des lois fédérales;

Right to appeal — visa refusal of family class
63. (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.

Droit d'appel : visa
63. (1) Quiconque a déposé, conformément au règlement, une demande de parrainage au titre du regroupement familial peut interjeter appel du refus de délivrer le visa de résident permanent.

No appeal for inadmissibility
64. (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.

Restriction du droit d'appel
64. (1) L'appel ne peut être interjeté par le résident permanent ou l'étranger qui est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée, ni par dans le cas de l'étranger, son répondant.

Serious criminality
(2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least six months or that is described in paragraph 36(1)(b) or (c).

Grande criminalité
(2) L'interdiction de territoire pour grande criminalité vise, d'une part, l'infraction punie au Canada par un emprisonnement d'au moins six mois et, d'autre part, les faits visés aux alinéas 36(1)b) et c).

FEDERAL COURT

SOLICITORS OF RECORD

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