Federal Court  Cour fédérale

Date: 20170413

Docket: IMM-309-16

Citation: 2017 FC 367

Ottawa, Ontario, April 13, 2017

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

GURMEET SINGH BRAH

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Proceeding

[1] The Applicant has applied for judicial review of a decision of a Minister's Delegate dated September 6, 2015 to refer him to the Immigration Division [ID] of the Immigration and Refugee Board [IRB] for an admissibility hearing [the Referral Decision] pursuant to subsection 44(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA]. The Referral Decision was based on a case review and recommendation to refer dated August 13, 2015 [the

Recommendation]. This application is brought pursuant to subsection 72(1) of the IRPA. The Applicant seeks an order setting the Referral Decision aside.

II. Background

[2] The Applicant is a 40 year old citizen of India who became a Canadian permanent resident on July 28, 2003. The Applicant's wife was born in India but has lived in Canada since she was a teenager and became a Canadian citizen in 1997. She is legally blind. The Applicant is the family's sole breadwinner. The couple have three Canadian-born children: ages 13, 10, and 3.

[3] On September 19, 2008, the Applicant began an explicit online chat with Natasha, a 14 year old female in London, Ontario. On September 22, 2008, the Applicant drove to London to have paid sex with Natasha, who was, in reality, an undercover police officer. The Applicant was arrested. He pled guilty and was convicted on October 25, 2011 of luring a child under sixteen years of age, and communicating for the purposes of engaging in prostitution with a person under eighteen years of age, contrary to paragraph 172.1(1)(b) and subsection 212(4) of the *Criminal Code*. Both offences carry a maximum sentence of ten years. The Applicant was sentenced to 15 months for each offence, to be served concurrently. He was released after 10 months for good behaviour.

[4] The Applicant completed a number of remedial programs while incarcerated. He and his wife attended marriage counselling. She supports his efforts to stay in Canada.

[5] The Applicant was reported as inadmissible for serious criminality pursuant to subsection 44(1) of the IRPA on February 16, 2012. On December 3, 2012, his case was referred to the ID for an admissibility hearing pursuant to subsection 44(2) of the IRPA, and January 15, 2013 was selected as the hearing date.

[6] Since the Applicant was not available on the January date, the hearing was rescheduled to be heard on February 11, 2013. However, on that date, the CBSA withdrew its request for a hearing because the Minister's Delegate had not signed the form dated December 3, 2012, which was the formal referral to the hearing. The CBSA stated that in these circumstances, it was not clear that the Minister's Delegate had reviewed the Applicant's file.

[7] A letter dated February 22, 2013, invited the Applicant to make submissions about why a removal order should not be issued against him. The deadline for his response was March 18, 2013 and he chose not to make submissions. Thereafter, the Respondent took no further steps towards the Applicant's removal for two years. In the meantime, on June 19, 2013, the law changed.

[8] Prior to June 19, 2013, section 64 of the IRPA provided that permanent residents who were found by the ID to be inadmissible for serious criminality could appeal to the Immigration Appeal Division [the IAD] on humanitarian and compassionate [H&C] grounds if they received a sentence of less than two years. This would have included the Applicant since his sentence was fifteen months. However, after June 19, 2013 only those whose sentence was less than six

months had access to the IAD. The new law therefore prevented the Applicant from making an appeal to the IAD on H&C grounds.

[9] An Operational Bulletin issued by Citizenship and Immigration Canada dated September 10, 2013 made it clear that "for persons whose referral to the ID for serious criminality was signed by the Minister's Delegate after June 19, 2013, the new definition of serious criminality…will apply and they do not have the right to appeal." Accordingly, because the Minister's Delegate did not sign a referral before June 19, 2013, he lost his right of appeal to the IAD.

[10] A CBSA officer reactivated the file and called the Applicant's home on February 13, 2015. The officer advised the Applicant's wife that her husband was again being given the opportunity to make submissions about why a removal order should not be made against him. She was surprised to receive the call as she had been under the impression that immigration proceedings against her husband had ended. This time, the Applicant provided submissions dated April 25, 2015 [the Submissions] in which he conceded that he is inadmissible pursuant to paragraph 36(1)(a) of the IRPA. However, he asked that a referral not be made to the ID due to "the totality of the surrounding circumstances." The Submissions described the circumstances in detail.

[11] An Officer reviewed the Applicant's file on August 13, 2015 and, notwithstanding the Submissions, recommended that he be referred for an admissibility hearing. The supervising Minister's Delegate concurred and signed the Referral Decision on September 6, 2015. The

Applicant was informed by letter dated September 28, 2015 that he had been referred to the ID for an admissibility hearing.

[12] On February 2, 2016 Madam Justice Heneghan dismissed the Applicant's motion to stay the admissibility hearing pending the outcome of this judicial review. The admissibility hearing took place on March 15, 2016. The Applicant was found inadmissible and a deportation order was issued.

[13] The Applicant sought leave to judicially review the deportation order and Madam Justice Heneghan denied leave on February 2, 2016. As well, on March 31, 2017 she dismissed a motion to reconsider her decision on the issue of leave.

III. The Issues

1. *Abuse of Process*

[14] The Applicant says that the Referral Decision should be set aside because it is the product of an abuse of process. The Applicant says that the Respondent was negligent when it failed to sign the form for the referral on December 3, 2012. Given this negligence, the Respondent was obliged to proceed promptly to complete a referral after the deadline for the Applicant's submissions passed on March 18, 2013. The Applicant says that it would have been reasonable to have made the referral to the ID before the law changed on June 19, 2013 because a referral had already been recommended and there were no fresh submissions to be considered.

2. *Unreasonable conclusion*

[15] The Applicant also says the Referral Decision is unreasonable because the Officer concluded that the Applicant's wife should have produced more evidence of her inability to work.

IV. Discussion and Conclusions

1. *Abuse of Process*

[16] The Applicant characterizes the failure by the Minister's Delegate to sign the referral form dated December 3, 2012 as negligence. In my view, it is not clear whether the Minister's Delegate ever saw the form. There is no doubt that the Respondent thought that the recommendation to refer had been accepted because a hearing was scheduled, but there is no clear evidence about the events that resulted in the failure of the Minister's Delegate to sign the form. In these circumstances, while mistakes were clearly made, I am not prepared to conclude that there was negligence.

[17] In my view, the relevant delay for the purpose of the abuse of process allegation is the period of three months from March 18, 2013, which was the deadline for the Applicant's submissions, and June 19, 2013 when the law changed. The delay after June 19, 2013 until the CBSA reactivated the file in 2015 is not relevant because it benefited the Applicant in that he was able to remain in Canada with his family.

[18] I have concluded that a delay of three months is not sufficient to support a finding of abuse of process in the absence of any evidence of ill will or intentional delay on the part of the officers at CBSA. Since the delay was not unreasonable, there is no need to consider whether the Applicant was prejudiced by the delay.

2. *Unreasonable Conclusion*

[19] The Recommendation read as follows:

> Having acknowledged that Ms. [*sic*] Brah's spouse is legally blind, I also note that there is also insufficient evidence to suggest that Ms. Raj herself is unable to obtain employment. As noted in the submissions provided by counsel, Ms. Raj successfully completed a co-op position with a dental clinic and that she graduated from Sheridan College with a degree in Business Human Resources.
>
> [my emphasis]

[20] The officer failed to mention that the letter from Halton Dental Group dated January 16, 1997 shows that Harpreet completed a co-op program at the clinic when she was in high school. Further, her diploma (not a degree) from Sheridan College was fifteen years old. It was granted in 2000. In 2001 she married and has since had three children and she has never worked.

[21] Since she has no current educational credentials, no training and no work experience and since she is legally blind, it is my conclusion that the officer's suggestion that she should have adduced more evidence to show that she is unable to work is unreasonable.

V. Certification

[22] Counsel for the Applicant said at the conclusion of the hearing that he had no question to pose for certification and did not ask for time to consider a question. Nevertheless, he posed the following question after the hearing in a letter dated April 7, 2017:

> Is it an abuse of process for IRCC to delay convoking an applicant for an admissibility hearing until a change in the law adverse to the applicant has come into force?

[23] I agree with the Respondent's submission dated April 7, 2017 that the answer to this question will turn on the facts of each case. Accordingly, it is not a question of general importance.

[24] On April 7, 2017, counsel for the Applicant submitted a further question which I declined to consider.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review in IMM-309-16 is hereby granted and the question of whether this case should be recommended for referral to the ID for an admissibility hearing is to be reconsidered by a different officer.

"Sandra J. Simpson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-309-16
STYLE OF CAUSE:	GURMEET SINGH BRAH v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 5, 2017
JUDGMENT AND REASONS:	SIMPSON J.
DATED:	APRIL 13, 2017

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