Date: 20080502

Docket: IMM-4369-07

Citation: 2008 FC 518

Ottawa, Ontario, May 2, 2008

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

RANJIT BACHAN SINGH MOOKER
MAJINDER SINGH MOOKER
KANWALJIT KAUR
AMRITPAL KAUR MOOKER

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision dated October 4, 2007 of Humanitarian and Compassionate (H&C) Officer, S. McCaffery (Officer), pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), refusing the applicants' application for permanent residence on H&C grounds.

ISSUES

[2] The applicant raises three issues in the present application:

a) Did the Officer err in applying an incorrect test in the risk assessment portion of the H&C decision?
b) Did the Officer err in assessing the applicants' claim of hardship?
c) Did the Officer err in assessing the applicants' degree of establishment and integration into Canadian society?

[3] For the following reasons, the application for judicial review shall be dismissed.

FACTS

[4] The applicants are a family of four who came to Canada on February 6, 2002 and made a claim for refugee protection. The principal applicant, Mr. Rajit Bachan Singh Mooker, is a citizen of Kenya, born on October 8, 1958 in India. He is married to Kanwaljit Kaur, born January 5, 1958, and is a citizen of India. Together they have two children, a son Manjinder Singh Mooker, born November 7, 1982, and a daughter, Amritpal Kaur Mooker, born May 5, 1984. Both children are citizens of Kenya.

[5] The applicants' claim for refugee protection before the Immigration and Refugee Board (Board) was rejected on March 10, 2003. They applied for a Pre-Removal Risk Assessment (PRRA) on December 15, 2003, and received a negative decision on April 5, 2004.

[6] The applicants were subsequently removed from Canada to the United States on May 18, 2004. They initiated a refugee claim in the United States, but abandoned it, and returned to Canada

on November 18, 2004. They made a second PRAA application upon their return. The applicants also had a pending H&C application, initiated in September of 2003. On January 11, 2007, they received negative decisions on both the second PRRA and the H&C applications.

[7] The applicants made an application for leave and judicial review to this Court on February 8, 2007, challenging the negative H&C decision. The Court allowed the application for judicial review in part, on the grounds that the H&C officer erred by applying the PRRA standard in the risk assessment portion of the H&C request. The Court found no error in the assessment of the best interests of the child or in the assessment of the degree of establishment of the applicants in Canada. The judicial review was granted on July 26, 2007 and the H&C application referred back for redetermination.

[8] The applicants made further submissions to the Officer relating primarily to the risk factors. They submitted that they would face undue, disproportionate and undeserved hardships if they were required to apply for permanent resident status from outside of Canada. They submitted that they are at risk because of the discrimination they face as South Asians living in Kenya, and because they are targets of criminals because of their ethnicity and gender. They also argued that they should be granted an exemption on H&C grounds because of their high degree of establishment in Canada.

DECISION UNDER REVIEW

[9] The applicants' request for an exemption based on H&C grounds was refused by letter dated October 4, 2007. The Officer's reasons are contained in the notes to file. The reasons include a

detailed case history, and a review of the applicants' submissions, including all of the documents filed in support of the application. The Officer provides summaries and excerpts from the documentary evidence submitted by the applicants, as well as the documentary evidence consulted by him in the course of his research. Before providing notes on all of the documents, the Officer notes: "The documentation is too voluminous for extensive note taking here, but I have considered all of it." The Officer reviews the findings of the Refugee Protection Division of the Immigration and Refugee Protection Board in the decision dated March 3, 2003.

[10] The Officer's concludes that he is not satisfied that the circumstances of the case are such that the applicants should be granted an exception from the usual requirements of the Act. The conclusion is premised on the following reasons:

a) The Officer finds that the applicants settled and adapted as well as might be expected for a family who has been in Canada for five and a half years. He notes that the two adult children work part-time and go to school, the principal applicant is working and Ms. Kaur provides childcare to a member of the community. He notes some ties to the community as shown by the supporting documentation.

b) The Officer finds that the hardships now in view were not unforeseeable in the normal working of the Act, and they were within the control of the applicants. The Officer notes that the applicants were, or could have been, aware of the process they were entering into in Canada. By prolonging their stay, as a result of the ordinary working of the Act, the applicants would have been aware of the hardships and disappointments which might follow a negative decision. The Officer concludes that

he is not satisfied that the consequences of their removal would be disproportionate, and that the family could return to Kenya and continue to prosper in reasonable safety.

c) The Officer writes that the applicants' key submission is that they face risk upon return, which might not meet the threshold required to obtain refugee protection, but which could nevertheless constitute hardship. The Officer determines that the evidence does not support the allegation of risk. Rather, he points to the fact that Kenya is a poor country with significant disparity between the rich and the poor. The evidence shows high crimes rates, and a generalized risk of crime, particularly in areas dominated by Mungiki and other organized crime groups. The Officer finds that Kenya has been unique among East African countries in valuing its South Asian minorities, who may be resented in some circles, but are generally well established through political, business and social ties.

d) The Officer finds that state protection is not so deficient as to make wealth, and the risk of being a target of criminal activity, a hardship in and of itself. The Officer notes that Kenya is a democracy, and that the reformist government in place had made real efforts to improve law enforcement and the rule of law. In particular the Officer finds that part of the reformist agenda is to bring Mungiki under control, and that the police and state shows no inclination to collude with organized crime.

[11] The Officer concludes that the totality of the evidence regarding establishment and risk does not satisfy him that the applicants should be granted an exemption from the ordinary requirements of the Act on H&C grounds.

ANALYSIS

Standard of Review

[12] This Court has previously held that the review of H&C decisions should be afforded considerable deference, and that the applicable standard was reasonableness *simpliciter* (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817).

[13] Following the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, review of H&C decisions should continue to be subject to deference by the Court, and are reviewable on the newly articulated standard of reasonableness (*Dunsmuir*, at paragraphs 47, 55, 57, 62, and 64).

[14] For a decision to be reasonable there must be justification, transparency and intelligibility within the decision making process. The decision must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, at paragraph 47).

[15] However, the first issue in the case at bar is a question of law, which in the context of the review of H&C decisions, this Court has found to be reviewable on a standard of correctness (*Mackiozy v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1106 at paragraph 9,

[2007] F.C.J. No. 1428; *El Doukhi v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1464, at paragraph 11, [2006] F.C.J. No. 1843; *Mooker v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 779, at paragraph 16, [2007] F.C.J. No. 1029). It is my opinion that the standard of correctness should continue to be applied when determining if the correct test was applied with respect to the risk assessment portion of an H&C decision (*Dunsmuir*, at paragraphs 55, 57, 62, and 64).

Did the Officer err in applying an incorrect test in the risk assessment portion of the H&C decision?

[16] The applicants submit that the Officer stated the correct test but did not apply it. The applicants contend that the Officer erroneously applied the test applicable to a PRRA decision in the determination of the H&C application. While the risk in a PRRA decision must amount to a risk to life or of cruel and unusual punishment or torture, risk is assessed differently in an H&C application. In the context of the present case, the Officer must ask himself whether the risk factors amount to unusual, undeserved or disproportionate hardship. In *Ramirez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1404, at paragraphs 42 and 45, [2006] F.C.J. No. 1763, Justice de Montigny outlines the test, and carefully reviews the case law on this point:

> [42] It is beyond dispute that the concept of "hardship" in an H&C application and the "risk" contemplated in a PRRA are not equivalent and must be assessed according to a different standard. As explained by Chief Justice Allan Lutfy in *Pinter v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 366, 2005 FC 296:
>
> > [3] In an application for humanitarian and compassionate consideration under section 25 of the *Immigration and Refugee Protection Act* (IRPA), the applicant's burden is to satisfy the decision-maker that there would be unusual and undeserved or

> disproportionate hardship to obtain a permanent resident visa from outside Canada.
>
> [4] In a pre-removal risk assessment under sections 97, 112 and 113 of the IRPA, protection may be afforded to a person who, upon removal from Canada to their country of nationality, would be subject to a risk to their life or to a risk of cruel and unusual treatment.
>
> [5] In my view, it was an error in law for the immigration officer to have concluded that she was not required to deal with risk factors in her assessment of the humanitarian and compassionate application. She should not have closed her mind to risk factors even though a valid negative pre-removal risk assessment may have been made. There may well be risk considerations which are relevant to an application for permanent residence from within Canada which fall well below the higher threshold of risk to life or cruel and unusual punishment. [Emphasis Added]

. . .

[45] While it may be that violence, harassment and the poor health and sanitary conditions may not amount to a personalized risk for the purposes of a PRRA application, these factors may well be sufficient to establish unusual, undeserved or disproportionate hardship. I would therefore adopt the following conclusion reached by Justice O'Keefe in *Dharamraj v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 853, 2006 FC 674:

> [24] There is no dispute that there is a higher burden on the applicants to establish risk for the purposes of a PRRA than there is for H&C purposes. Consequently, there may be circumstances where risk would be relevant for an H&C application but not for a PRRA application.
>
> [25] In the present case, the officer merely adopted the assessment of risk made by the IRB and the PRRA officer without further analysis for the purpose of the H&C application. In my opinion, the officer

> made an unreasonable decision because she did not consider the risk factors in the context of the H&C application.

[17] The applicants also rely on the decision of Justice Teitelbaum in *Mooker*, above, in which they were successful in making the same argument.

[18] The applicants further allege that by applying the incorrect test, the Officer ignored evidence which might meet the lower threshold of risk relevant to the assessment of hardship.

[19] The line of cases relied upon by the applicants (*Ramirez* and *Mooker*, above; *Dharamraj v. Canada (Minister of Citizenship and Immigration),* [2006] F.C.J. No. 853, 2006 FC 674; *Pinter v. Canada (Minister of Citizenship and Immigration),* [2005] F.C.J. No. 366, 2005 FC 296) imposes upon H&C Officers the requirement that the generalized risk of violence, or risks flowing from discrimination, be considered according to the appropriate test. It does not go so far as to require the Officer to conclude that discrimination and a risk of generalized violence always constitute undue, undeserved or disproportionate hardship.

[20] I am of the opinion that the officer considered and applied the correct test in the assessment of the risk portion of the H&C decision. At page 34 of the notes to file, the Officer stated:

> It has been submitted that a key element of their application is risk, a risk which might not meet a threshold which would indicate a need for international protection, but nevertheless serious enough to impose hardship by itself or in combination with other factors.
>
> The evidence will not support the risk submissions. …

[21] It is clear from the above mentioned passage that the Officer understood that risk could be assessed for the purposes of refugee protection according to a higher threshold, as well as for the consideration of undue hardship, according to a lower threshold. The Officer was cognizant of the Court's decision in *Mooker*, above in which the application was sent back for re-determination.

Did the Officer err in assessing the applicants' claim of hardship?

[22] The applicants submit that the officer erred in his assessment of the hardship they would face if required to make an application for permanent residence from outside of Canada. The applicants submit that the IRB decision dated March 10, 2003, the PRRA decision dated April 5, 2004, and the PRRA and H&C decisions dated January 11, 2007 all noted instances of discrimination against Kenyans of South Asian origin. The applicants argue that these four previous determinations, as well as the Officer's own finding that there exists a generalized risk of crime in all areas of Kenya, clearly indicate a lack of personal security amounting to unusual, undeserved or disproportionate hardship.

[23] By making this argument, the applicants attempt to equate a lack of personal security with undue, undeserved or disproportionate hardship. I disagree.

[24] The Officer specifically considered the evidence of discrimination against South Asians, and provided reasons why he did not find that the applicants would suffer unusual, undeserved or disproportionate hardship. Notably, the Officer cited evidence before him indicating that South

Asians in Kenya are subjected to occasional resentment, but they are “well established in elite circles, where they have established solid political, business and social ties.”

[25] The reasons provided by the Officer are justified, and intelligible. It was reasonably open to the Officer to conclude that any difficulties arising from the applicants’ South Asian ethnicity in Kenya would not amount to unusual, undeserved or disproportionate hardship. It is not the role of this Court to reweigh the evidence that was before the decision maker. Though the applicants may not agree with the outcome of the decision, it falls within the range of possible, acceptable outcomes which are defensible in respect of the evidence he had before him.

[26] The applicants submit that the Officer’s preference of the documentary evidence with respect to the treatment of South Asians in Kenya, over the four previous findings and the applicants’ own evidence is a reviewable error. They also argue that the Officer failed to give reasons for preferring the documentary evidence, and that as well constitutes an error.

[27] I am of the opinion that the Officer carefully reviewed the documentary submissions of the applicants, as well as other documents, and acknowledged certain instances of discrimination and crime which the applicants might face if returned to Kenya. It was open to the Officer to prefer certain documentary evidence over other sources. The Officer was not bound by the previous determinations made in the context of a PRRA application or a refugee claim, since he must assess the facts on H&C grounds. Assessing documentary evidence as it related to the risk of undue,

undeserved or disproportionate hardship falls squarely within the functions of an H&C Officer. In the present case, the Officer did so diligently.

[28] The applicants argue that the Officer erred by addressing the issue of state protection, which is not relevant to the assessment of an H&C application, and thereby erred in the assessment of hardship.

[29] It is clear from the Officer's reasons that state protection was addressed only in the context of the risk assessment. The Officer wrote at page 35 of the notes to file:

> Therefore, even taken at face value, Mr. Mooker's statement, that he was a victim of African nationalist youth, "likely" members of Mungiki, would have to be weighed against the availability of state protection, even where the risk is described simply in terms of hardship. …

[30] It was open to the Officer, in the circumstances, to consider state protection in so far as it might bear on the assessment of risk and therefore hardship. In fact, it was the applicants who raised the issue of state protection in their submissions to the Officer, and that it was therefore open to him to examine the question.

[31] The applicants contend that the Officer did not consider the totality of the evidence, particularly with regard to gender, and that he did not give any actual regard for the evidence of discrimination against women in his analysis.

[32] While a more fulsome analysis of the risks faced by the female applicants might have been preferable, in the circumstances, I do not find that the applicant has raised a reviewable error.

Did the Officer err in assessing the applicants' degree of establishment and integration into Canadian society?

[33] The applicants allege that the Officer erred in assessing the degree of establishment and integration of their family into Canadian society. They argue that the Officer should not have considered whether their level of establishment was exceptional, but whether being uprooted from Canada would cause excessive hardship. The applicants restate certain points demonstrated by the evidence, namely that they have nothing to return to in Kenya, they have friends, relatives and associates in Canada, a strong community, employment and courses of education. The applicants further submit that they meet all five criteria proposed in the Inland Processing Manual Chapter 5, *Immigrant Applications made in Canada on Humanitarian and Compassionate Grounds*, at paragraph 11.2, used to evaluate the degree of establishment:

> The degree of the applicant's establishment in Canada may include such questions as:
>
> - Does the applicant have a history of stable employment?
> - Is there a pattern of sound financial management?
> - Has the applicant integrated into the community through involvement in community organizations, voluntary services or other activities?
> - Has the applicant undertaken any professional, linguistic or other study that show integration into Canadian society?
> - Do the applicant and family members have a good civil record in Canada (e.g., no interventions by police or other authorities for child or spouse abuse, criminal charges)?

[34] While the evidence does demonstrate a significant degree of establishment, it was open to the Officer to weigh establishment as one factor among many. The Officer found that the degree of establishment shown by the applicants resulted from the ordinary working of the immigration and refugee legislation, and was within the control of the applicants.

[35] In *Nazim v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 125, at paragraph 15, [2005] F.C.J. No. 159, Justice Rouleau writes:

> [15] The humanitarian and compassionate process is designed to provide relief from unusual, undeserved or disproportionate hardship. The test is not whether the applicant would be, or is, a welcome addition to the Canadian community. In determining whether humanitarian and compassionate circumstances exist, immigration officers must examine whether there exists a special situation in the person's home country and whether undue hardship would likely result from removal. The onus is on the applicant to satisfy the officer about a particular situation that exists in their country and that their personal circumstances in relation to that situation make them worthy of positive discretion.

[36] I am satisfied that the Officer in this case considered all of the evidence before him. His conclusion that the applicants' circumstances do not warrant an exemption from the requirement to make an application for permanent residence from outside of Canada was justified, and intelligible, and fell within a range of acceptable outcomes.

[37] The parties did not submit questions for certification and none arise.

JUDGMENT

THIS COURT ORDERS that the application for judicial review is dismissed. No question is certified.

"Michel Beaudry"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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