Date: 20081007

Docket: IMM-506-08

Citation: 2008 FC 1128

Montréal, Quebec, October 7, 2008

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

KULJIT SINGH SABHARWAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, a citizen of India, seeks judicial review of a refusal to grant an exemption on humanitarian and compassionate (H&C) grounds from the statutory requirement that he apply for permanent resident status from outside Canada. That decision, dated January 17, 2008, was rendered by a pre-removal risk assessment (PRRA) officer.

[2] The applicant had his refugee claim rejected on July 22, 2005 on the basis of a lack of credibility. Leave for judicial review was dismissed on November 7, 2005. The application for an H&C waiver was filed in December 2005.

[3] The applicant submitted that applying for permanent residence from India would put him at risk of arbitrary imprisonment and torture as a falsely accused supporter of militants and failed refugee claimant. He also contended that it would cause him undue and disproportionate hardship because he was established in Canada, as shown by his employment, linguistic ability and the presence of his wife and father in Canada. He finally submitted that he would be financially unable to support his family if required to apply from India because he would be unemployed.

Impugned decision

[4] The PRRA officer noted that the risks alleged by the applicant were identical to those he had asserted before the RPD, and gave considerable weight to the Panel's finding that he was not credible. In light of the failure of the applicant to provide evidence which would establish the contrary and the documentary evidence which showed that failed asylum seekers were generally not at risk upon their return to India, the officer found that no waiver could be given on the basis of risk. The applicant does not contradict these findings.

[5] The officer then turned to the question of undeserved or disproportionate hardship based on the applicant's personal situation and found that the written representations wrongly asserted that he would be "un immigrant idéal". The question was not whether an applicant would be a "good" immigrant but whether the hardship he or she would face having to apply for status from outside Canada would be unnecessarily undue. He rejected the argument that the applicant would lose his job and found that he had acquired transferable work experience and savings and did not provide sufficient evidence to support a conclusion that he would not be gainfully employed in India.

[6] The officer also noted that insufficient information had been provided to allow him to assess the best interests of the applicant's two minor children, both of whom remain in India. He also noted that the applicant's wife is in Canada, but with no status. He ascribed greater weight to the applicant's family ties to India than those to Canada. As a result, the officer found that the applicant would not face undue, undeserved or disproportionate hardship if required to apply for permanent resident status from outside Canada.

Issues

[7] The applicant contends that the officer failed to provide adequate reasons and based his negative findings on speculation.

Standard of review

[8] Reasons must permit the person about whom the decision is taken and a reviewing Court to understand the basis for that decision. This is a requirement of natural justice and will result in the decision being vacated if found not to exist. Basing a decision on speculation, for its part, is an error of fact as set out in paragraph 18.1(4)(*d*) of the *Federal Courts Act* as it is a decision not based on the evidence before the tribunal and is therefore necessarily unreasonable.

Adequacy of reasons

[9] The applicant argues that since the PRRA officer did not state that he purposely contributed to or otherwise prolonged his stay in Canada, one can conclude that his stay was beyond his control.

As such, that factor needed to be considered in the context of his establishment. Further, he contends that the reasons of the PRRA officer amount to nothing more than a recitation of the facts and a negative conclusion, which is a reviewable error: *Adu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 565.

[10] The respondent counters that it is evident from reading the applicant's submissions and the officer's notes on file that the PRRA officer adequately addressed them. She notes in particular that the applicant's stay in Canada after the rejection of his claim for refugee status in 2005 resulted entirely from his own action. The applicant has failed to rebut the presumption that the officer had considered all of the evidence.

[11] I would note that the assessment of H&C considerations is governed by the guidelines set out in section 11.2 of Chapter 5 of the Inland Processing Manual (IP5). This section reads:

> 11.2 Assessing the applicant's degree of establishment in Canada
>
> The applicant's degree of establishment in Canada may be a factor to consider in certain situations, particularly when evaluating some case types such as:
> - parents/grandparents not sponsored;
> - separation of parents and children (outside the family class);
> - de facto family members;
> - prolonged inability to leave Canada has led to establishment;
> - family violence;
> - former Canadian citizens; and
> - other cases.
>
> (emphasis added)

[12] The relevant language for the question of the length of time in which the applicant has established him or herself in Canada is whether they were able to leave the country during that time.

There is no evidence here that the applicant asserted to the officer that he was not able to do so, and thus the officer's failure to consider that as a factor of his establishment was not an error. Likewise, the applicant's contention that the decision as a whole was inadequate as being simply a recitation of the facts is unfounded. The officer explained why he gave little weight to certain arguments and evidence provided by the applicant and thereby fulfilled the duty to provide adequate reasons.

[13] The applicant also argues that the PRRA officer speculated about the best interests of his children and thereby came to an erroneous decision. He notes that the officer initially stated that he had not identified particular considerations which would allow an assessment of the best interests of his minor sons, but then asserted that it was in their best interest "to be reunited with at least one parent as quickly as possible." For this reason, the applicant claims that the evaluation of the applicant's family situation is unreasonable.

[14] The respondent counters that the officer did not speculate, but rather examined the applicant's family ties and came to the conclusion that those in Canada were insufficient to show undue or disproportionate hardship. She further submits that the Court should be guided by *Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, where it was found that the best interests of children need not be examined where references to those interests are oblique and cursory.

[15] The Court disagrees with the applicant that this was speculation on the part of the officer. First, the point being made by the officer at that point of his decision was that there was insufficient

evidence to show that the applicant's family connections in Canada were strong enough to cause him undue, undeserved or disproportionate hardship by requiring him to apply for permanent resident status from outside the country as required by statute. Further, seeing that the applicant's spouse is in Canada without legal status and that the children are left behind in India, the officer only applies here a rule of common sense, when he states that it would be in the best interest of the children "to be reunited with at least one parent as quickly as possible". This statement does not constitute speculation on the part of the officer, and certainly does not constitute an error justifying the intervention of this Court.

[16] The officer in the case currently under review found that there was insufficient ground to justify the exercise of his discretion. The applicant was unable to show any error in the officer's reasoning and conclusion, justifying the intervention of this Court.

[17] For the foregoing reasons, and seeing that the officer provided adequate reasons and did not base his negative findings on speculation, the application for judicial review will be dismissed. No questions were proposed for certification and none arise on the facts of this case.

ORDER

THIS COURT ADJUDGES AND ORDERS that the application is dismissed. No questions are certified.

"Maurice E. Lagacé"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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