Date: 20090213

Docket: IMM-4715-07
IMM-1258-08

Citation: 2009 FC 159

OTTAWA, ONTARIO, FEBRUARY 13, 2009

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

HARJIT SINGH JAKHU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application by Mr. Harjit Singh Jakhu for judicial review of a decision, rendered February 28, 2008, by Darin Jacques, rejecting his application for permanent residence because of insufficient humanitarian and compassionate grounds ("H&C").

[2] The applicant had also filed an application for *mandamus* on November 7, 2007, to compel the Minister's delegate to rule on his H&C application. This application was filed on the same day the applicant's wife submitted a sponsorship application, which demonstrated their recent marriage.

[3] Since the H&C decision has now been rendered, the application for *mandamus* is now moot. Counsel for the applicant conceded as much at the hearing. The following reasons will therefore address only the application for judicial review of the negative H&C decision.

BACKGROUND

[4] The applicant is a thirty-year-old Sikh from the Punjab. He arrived in Canada from India on September 16, 2000, and claimed refugee protection that same day. On November 16, 2001, Mr. Jakhu received a negative determination by the Immigration and Refugee Board ("IRB" or the "Board"). The Board found that the applicant was not credible, that he was not a trustworthy witness, and that his alleged subjective fear was not reasonably grounded on an objective basis. The Board also stated that the applicant provided no reliable documentation specific to his own claim and that, even if the Board were to accept that the Punjab police had an interest in him, the applicant could relocate elsewhere in India and avail himself of an Internal Flight Alternative ("IFA"). The Federal Court refused leave on May 13, 2002.

[5] On February 20, 2004, the applicant requested a permanent residence exemption based on H&C grounds. This application was refused on December 11, 2006. On April 25, 2007, the Federal Court refused Mr. Jakhu's application for leave against that negative H&C decision.

[6] On August 8, 2005, the applicant submitted a Pre-Removal Risk Assessment ("PRRA") application based essentially on the same story and allegations as the ones he had already presented to the IRB. The result of that PRRA was a negative decision rendered December 11, 2006. Once again, the Federal Court refused leave to review that decision on April 12, 2007.

[7] Finally, Mr. Jakhu made his second H&C application on July 16, 2007. As previously mentioned, Mr. Jakhu's wife submitted a sponsorship application on November 7, 2007. The applicant also provided updates to his application on October 24, 2007 and on February 4, 2008.

THE IMPUGNED DECISION

[8] In a detailed decision, the PRRA officer started off by summarizing briefly the reasons provided by the applicant as to why the requirement to obtain a visa in India would cause him unusual and undeserved or disproportionate hardship. He noted that the applicant brought forward the same allegations of risk that he brought before the IRB. He also noted that the applicant's refugee claim was rejected because of a lack of credibility and sufficient evidence. However, he acknowledged that the assessment of risk is more broadly canvassed in the context of an H&C application, and therefore he continued to evaluate the risk factors.

[9] The applicant first submitted being at risk as a member of Akali Dal, an opposition party in India. Even if some members have alleged fear of ill-treatment in the past, the PRRA officer determined on the basis of documentary evidence that these members are able to seek help from the authorities. The applicant submitted two written statements from the president of Akali Dal. One

of them refers specifically to the applicant; it states that the applicant would be subject to persecution and torture if he were to return to India. The PRRA officer accepted these documents as evidence of the applicant's membership, but was not satisfied that it rebutted the documentary evidence according to which members of that political party do not generally face risk because of their political affiliation. According to the officer, these documents were inadequate first because the writers did not indicate that they had direct knowledge of the police persecution outlined in the applicant's allegations, and second because their speculations as to the potential risk upon return to India were tempered by the fact that they were forwarding a political agenda.

[10] The applicant also alleged that he was targeted by Indian authorities as a suspected militant. While the PRRA officer recognized that in specific areas there was cause for concern that police and security forces were committing human rights violations, he nevertheless found that Sikhs who fear local authorities may ask for protection from the National Human Rights Commission ("NHRC"). Referring to the U.S. Department of State Report of 2007, the officer admitted that some human rights groups claim that this government body is hampered by numerous organizational and legal weaknesses. The PRRA officer then discussed a medical certificate submitted by the applicant, but dismissed it as it did not provide a conclusion regarding the source of the applicant's injuries. Similarly, the officer gave little weight to various written statements, affidavits and a petition which reiterate the applicant's risk allegations, as it was impossible to determine if the sources of these documents personally witnessed the events which they relate.

[11] Finally, the officer refers to reports from the UNHCR and the UK Home Office to the effect that since 1996, Sikhs are less frequently subject to ill-treatment and are entitled to diverse constitutional guarantees. Given the improved situation for Sikhs in India, he concluded that there is insufficient evidence that Mr. Jakhu would be subject to any threat due to his nationality, and that there would not be undue and undeserved or disproportionate hardship if he applied for permanent residence from India.

[12] As for the applicant's links to Canada, the PRRA officer first considered his employment in Canada. The officer mentioned that he must determine whether the applicant's established links in Canada are sufficient in that, if they were broken, undue hardship would result, not whether the applicant is making a contribution to Canadian society. Applying that standard, the officer concluded that the applicant's efforts in consistently working since his arrival and in creating an enterprise were insufficient to warrant exceptional consideration. Not only would he have made a similar effort to provide for himself on a financial level under any circumstances, but these entrepreneurial skills would be transferable to India.

[13] With respect to the applicant's marriage, the officer stressed that marriage is not automatically considered sufficient grounds for a positive H&C decision. In the present case, the applicant knew that his situation was precarious; he had already applied for an exemption and had been turned down; he had received a negative PRRA assessment; and he would have been deported but for the expiry of his travel documents. The couple could therefore have reasonably anticipated a potential period of separation for immigration processing from abroad.

[14] The applicant stated that his father, who lives in Canada, was suffering severe depression due to the fear that his son may be returned to India. The applicant submitted two medical letters to that effect, one of which stated that despite the father's condition he was able to travel back and forth to India. The officer concluded that the father would therefore be able to visit his son in India. Moreover, the officer was of the view that hardship for the applicant's father was not a determinant factor in his son's request for exemption.

[15] Finally, the officer was not convinced that it was necessary for the applicant to be present at the birth of his child and found that the wife and child could visit him in India. Not only was he not satisfied that the child would suffer unusual and undeserved or disproportionate hardship if the applicant had to apply for permanent residence from abroad, but the best interests of a child could not outweigh the many other factors the officer must consider when making such a decision.

ISSUES

[16] Counsel for the applicant has raised five separate arguments dealing with various aspects of the PRRA officer's decision. I shall address these arguments by grouping them around the same headings as those considered by the PRRA officer: a) the risk assessment; b) the links to Canada; and c) the best interests of the child.

PRELIMINARY MATTER

[17] A few days before the hearing, counsel for the applicant filed a motion to obtain permission to submit a report by a human rights lawyer in India as part of the judicial review of the applicant's

case. This so-called report was not filed as an affidavit and was not sworn, yet it referred explicitly to the applicant. Counsel vaguely referred to international legal authorities and s. 24 of the *Canadian Charter of Rights and Freedoms* (the "Charter") as the basis for introducing this new piece of evidence.

[18] Nor surprisingly, counsel for the respondent vigorously opposed the filing of this new material. After hearing submissions from both parties, I dismissed the motion, essentially for the reasons put forward by the respondent. Not only was there no explanation for the late submission of this report, but more importantly, it would detract from the basic tenet of a judicial review according to which the reviewing court must take the file as it was before the original decision-maker. Neither s. 24 of the Charter nor international legal norms can disrupt this long established rule of administrative law, and it is to be noted that no Canadian authority has been submitted for that extraordinary proposition. Quite to the contrary, counsel for the applicant has recently been prevented from introducing new evidence in much the same fashion: *Yansane* v. *Ministre de la Citoyenneté et de l'Immigration*, 2008 CF 1213.

ANALYSIS

[19] The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "IRPA" or the "Act") requires that a foreign national who wishes to live in Canada permanently must apply for and obtain a permanent resident visa before entering Canada. However, the Act also allows an immigration officer to exempt a foreign national from this requirement if the officer (or the Minister) is of the

opinion that an exemption is justified by H&C considerations relating to him (ss. 11(1) and 25 of the *Act*): see *Serda* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 356.

[20] The grant of an exemption is clearly an exceptional remedy, and it was up to the applicant to demonstrate that the hardship he would suffer, if required to apply for permanent residence in the normal manner, would be unusual, undeserved or disproportionate: see *Owusu* v. *Canada (Minister of Citizenship and Immigration)*, 2003 FCT 94 (F.C.A.); *Monteiro* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 1322; *Samsonov* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 1158; *Hamzai* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 1108; *Liniewska* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 591; *Ruiz* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 465; *Legault* v. *Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358 (F.C.A.).

[21] There is no dispute between the parties that the applicable standard of review with respect to the ultimate decision of the H&C officer is reasonableness. This is well established since the decision of the Supreme Court of Canada in *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, and this standard has consistently been applied ever since. This standard has not been displaced as a result of the decision rendered by the Supreme Court in *Dunsmuir* v. *New Brunswick*, [2008] 1 S.C.R. 190. Given the discretionary nature of the decision to exempt an applicant from the normal requirements of the Act and the central role played by the facts in such a decision, the deferential standard of reasonableness remains the applicable standard. Such

a standard does not call for intrusiveness, but requires the reviewing court to look into both the process and the substantive result to ensure that it is defensible. As the Court stated:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with 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, ibid.*, at para. 47.

[22] Turning to the assessment of the risk faced by the applicant if he is returned to India, it was argued that the officer erred both in his evaluation of both the subjective and objective risks. Counsel for the applicant submitted that the officer used the wrong criterion in assessing the risk, and imposed a standard more appropriate to a PRRA claim than to an H&C application. It was also contended that the officer erred by disregarding corroborative documentary evidence, and by misinterpreting the objective documentary evidence relating to the current situation of Sikhs in India.

[23] Having carefully examined the evidence upon which counsel for the applicant relies, and the country documentation that was before the officer, I have come to the conclusion that the officer did not err by applying the wrong legal test for assessing risk, that he provided cogent reasons for rejecting the corroborating evidence submitted by the applicant, and that his assessment of the country conditions and his finding that the situation has much improved for Sikhs in India is borne out by the various country reports that were before him.

[24] The applicant brought forward the same allegations of risk that he had previously presented in the context of his refugee claim and of his PRRA. These allegations were repeatedly rejected due to a lack of credibility and insufficient evidence. The applications for judicial review of all these previous decisions were all rejected. Yet, the H&C officer entertained the applicant's allegations once more, on the basis that risk is more broadly assessed when hardship is the criterion. There is not a shred of evidence that the officer applied the wrong test in his analysis of risk, and counsel for the applicant has not substantiated his claim with any reference to a misguided application of the test that the officer purports to apply. Indeed, the officer concluded his review of all three facets of the risk alleged by the applicant (risk as a member of Akali Dal, risk as a suspected militant, and risk as a Sikh in India) with the same conclusion that he is not satisfied the applicant would face unusual and undeserved or disproportionate hardship. As a result, there is absolutely no evidence that the officer applied the wrong test in assessing the applicant's risk.

[25] As for the so-called corroborating evidence, the officer gave cogent reasons for rejecting it. Most of that evidence is second-hand, and the authors merely rely for their account on the applicant or his family's story. As for the medical certificate, it does establish that the applicant was treated for traumatic injury, but it does not provide a definitive conclusion as to the source of the injuries. Having read these documents, I come to the conclusion that the officer was entitled to give them little weight and did not err in doing so.

[26] Counsel for the applicant also faulted the officer for having misunderstood the objective country documentation, and for having found that the situation for Sikhs in India has improved over

the last 10 to 15 years. Relying mostly on outdated evidence, he claims that the situation in India is much grimmer than that painted by the officer. Once again, a careful reading of that documentation, and in particular of the U.S Department of State Country Reports on Human Rights Practices and of the Home Office (U.K.) Operational Guidance Note for the year 2007 has persuaded me that the officer's analysis of the situation is fair and balanced, and accurately reflects the current condition of Sikhs in India. To be sure, the officer was not blind to the shortcomings of the human rights record in India, and noted, for example, that Amnesty International found that torture and violence in police custody continued to be regularly reported. The officer also reported that some human rights groups claim the NHRC is hampered by numerous organizational and legal weaknesses. However on the whole, he found that Sikhs could find protection in India, that ordinary members (as opposed to high-profile militants) of Akali Dal party do not generally face risk because of their political affiliations, and that Sikhs can relocate anywhere in India. While counsel for the applicant may disagree with that finding, it is well supported by the evidence that was before the officer, which he no doubt consulted as is made clear by his numerous references to it.

[27] In any event, it is insufficient for the applicant to base himself on the objective documentary evidence regarding the situation in a country in general in attempting to establish a risk for himself: see, for example, *Nazaire* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 416; *Hussain* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 719. The applicant bore the onus of establishing a correlation between the particular facts of his case and the objective documentary evidence, which he has failed to do.

[28] All in all, the officer assessed the risk factors alleged by the applicant and considered the relevant documentary evidence. The officer's decision and reasons reflect a detailed analysis of the applicant's submissions and of the documentary evidence, and his findings on the issue of the situation of Sikhs in India are supported by the evidence. Moreover, he assessed the risk factors submitted by the applicant against the appropriate standard. As a result, I have not been persuaded that this is a case where the intervention of this Court would be warranted.

[29] Counsel for the applicant also claims that the officer erred in assessing the length of time spent in Canada as well as his degree of establishment in Canada. It is clear, however, that as much as time spent in Canada and the establishment in the community are important factors, they are not determinative of the application for permanent residence on H&C grounds. Otherwise, as stated by Justice Blais (then sitting on this Court) in *Lee* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FC 413, at para. 9, "it would encourage gambling on refugee claims in the belief that if someone can stay in Canada long enough to demonstrate that they are the kind of persons Canada wants, they will be allowed to stay". One must never lose sight of the fact that on an H&C application, the test to be met is whether applying for permanent residence from abroad would cause unusual, undeserved or disproportionate hardship: see *Uddin* v. *Canada (Minister of Citizenship and Immigration)*, 2002 FCT 937; *Mann* v. *Canada (Minister of Citizenship and Immigration)*, 2002 FCT 567.

[30] While the applicant's case no doubt attracts sympathy, this is not sufficient to overturn the decision of the H&C officer. As he emphasized, the applicant would already have been deported

but for the expiry of his travel documents. Having married despite the fact that he is currently under a deportation order, he could have reasonably anticipated a potential period of separation in order to process his immigration application from abroad. It would obviously defeat the purpose of the Act if, the longer an applicant was to live illegally in Canada, the better were his chances to stay, even though he would not otherwise qualify as a refugee or permanent resident. Moreover, establishment in Canada is but one factor among others that the H&C officer must weigh in coming to a decision; it is not a deciding factor, in and of itself: *Samsonov* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 1158; *Kawtharani* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 162; *Souici* v. *Canada (Minister of Citizenship and Immigration)*, 2007 FC 66.

[31] Finally, counsel for the applicant submits that the officer failed to explain why he refused to take into account the best interests of the child. Once again, I cannot entertain that argument. The officer was clearly alert and sensitive to the best interests of the child, and he provided reasons why the child would not suffer unusual and undeserved or disproportionate hardship if the applicant had to apply for permanent residence from abroad. He explained that the evidence was directed at the well-being of the mother and did not indicate how the applicant's absence would negatively impact the newborn child. He also indicated that the applicant's wife and his child could visit him in India while he was applying for permanent residence. Finally, he added that the applicant had not provided any statement indicating his affective links with the child and did not mention fatherhood in his submissions. While the applicant and, for that matter, this Court, may disagree with the assessment of the officer, it cannot be said that the officer was blind to the best interests of the applicant's child. Again, it must be remembered that the H&C process is designed not to eliminate

the hardship inherent in being asked to leave after having sojourned in Canada for a period of time, but to provide relief from unusual, undeserved and disproportionate hardship caused if an applicant is required to leave Canada and apply from abroad in the normal fashion. That the applicant must leave a job or family is not necessarily undue or disproportionate hardship; rather, it is a consequence of the risk the applicant took in staying in Canada without landing.

[32] For all the above-mentioned reasons, this application for judicial review is therefore dismissed. Counsel for the applicant proposed to turn into certified questions two of the reliefs that he sought by way of this judicial review. Counsel for the respondent opposed that strategy, arguing that the proposed issues are much too general and based on unproven and controversial assumptions. I agree with the respondent that the proposed questions do not meet the test elaborated for certification purposes. Not only are they too vague to be of any usefulness, but they would not be determinative of the appeal. There shall accordingly be no certified questions.

ORDER

THIS COURT ORDERS that this application for judicial review is dismissed.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4715-07 IMM-1258-08
STYLE OF CAUSE:	**HARJIT SINGH JAKHU v. MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	February 3, 2009
REASONS FOR ORDER AND ORDER:	de Montigny, J.
DATED:	February 13, 2009

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