Federal Court  Cour fédérale

Date: 20100125

Docket: IMM-5962-09

Citation: 2010 FC 83

Vancouver, British Columbia, January 25, 2010

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

TEJINDER SINGH KHOSA

Applicant

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Mr. Khosa married his sponsor knowing he was without status in Canada subsequent to his release from immigration detention on a $3,000 bond and conditions. Twelve days later, Mr. Khosa met his spouse, Lauren Jayne Patricia Baker, a Canadian citizen. On May 11, 2008, approximately one-and-one half months after meeting, Mr. Khosa and Ms. Baker married and began cohabiting. A party cannot expect to use circumstances of harm to secure a stay of removal (*Benedict v. Canada (Solicitor General)*, 2004 F.C. 555, at para. 22.

[2] Mr. Khosa has been in Canada since 2005. Since this time he has had the benefit of a number of immigration processes, including consideration for permanent residence under the Live-in Caregiver Class and a Pre-Removal Risk Assessment. Although Mr. Khosa does not have a criminal record in Canada, he does not have clean hands. Mr. Khosa disregarded Canadian immigration laws by partaking in unauthorized work.

[3] It is well established in the jurisprudence that a tribunal is presumed to have considered all the evidence before it, unless there is clear and convincing evidence to the contrary. Moreover, the decision-maker is not obliged to refer to all the evidence in the reasons.

[4] "The Officer reasonably, in my view, had concluded that the marriage was not genuine. Much of the evidence and observations related to the genuineness of the Applicant's marriage is also relevant to whether the marriage was entered into primarily for the purpose of acquiring permanent residence in Canada. The lack of genuineness presents strong evidence that the marriage was entered into for the purpose of gaining status. Moreover, the Officer had before her the evidence that the Applicant was married only after he was reported to immigration officials and that he has a seven-year history of not complying with immigration regulations. These were relevant considerations that were weighed by the Officer." As stated by Madam Justice Snider in *Sunil Dutt Sharma v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1131.

II. Introduction

[5] The Applicant, Mr. Tejinder Singh Khosa, seeks an interim order staying the execution of his removal pending leave for judicial review of an Immigration Officer's decision denying his application for permanent residence as a member of the Spouse or Common-law Partner in Canada Class application. Mr. Khosa has failed to establish all three elements necessary to obtain a stay of his removal order.

[6] Mr. Khosa is scheduled to leave Canada on January 27, 2010. Since Mr. Khosa's arrival in Canada, in September 2005, he has unsuccessfully engaged Canada's immigration system to avert his removal to India.

III. Background

[7] On September 29, 2005, Mr. Khosa entered Canada at the Vancouver International Airport. He was issued a work permit to work as a live-in caregiver under the live-in caregiver program.

[8] On December 10, 2007, Citizenship and Immigration Canada (CIC) received Mr. Khosa's application for permanent residence under the Live-In Caregiver Class.

[9] On March 6, 2008, the Canada Border Services Agency (CBSA) arrested and detained Mr. Khosa at Supreme Pizza where he was working illegally. In an interview with a CBSA Officer, Mr. Khosa stated that he has been working at Supreme Pizza as a kitchen helper since April 2007, making $8.00 an hour. Mr. Khosa also stated that he knew he was not supposed to be working at the

restaurant. Mr. Khosa was detained pursuant to section 55 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

[10] On March 7, 2008, the CBSA Officer issued a report under section 44 of the IRPA stating that Mr. Khosa is a foreign national who is inadmissible on the basis of failing to comply with conditions imposed under the IRPA and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations). The CBSA Officer noted that Mr. Khosa was working in an occupation for which he was not authorized, for an employer for whom he was not authorized and in a location for which he was not authorized. He was referred for an admissibility hearing before the Immigration and Refugee Board of Canada (IRB).

[11] On March 10 2008, Mr. Khosa was released from immigration detention on a $3,000 bond and conditions.

[12] On March 22, 2008, Mr. Khosa met his sponsor, Ms. Lauren Jayne Patricia Baker, a Canadian citizen.

[13] On May 11, 2008, approximately one and a half months after meeting, Mr. Khosa and Ms. Baker married and began cohabitating.

[14] On June 6, 2008, CIC received Mr. Khosa's application for permanent residence under the Spouse or Common-law Partner in Canada Class.

[15] On July 22, 2008, Mr. Khosa's admissibility hearing was held before the IRB.

[16] On July 31, 2008, the IRB decided on Mr. Khosa's admissibility hearing. The IRB was satisfied that Mr. Khosa was working at Supreme Pizza, performing unauthorized work, and was in contravention of his work permit. The IRB subsequently held that Mr. Khosa failed to comply with section 29(2) of the IRPA and is inadmissible pursuant to paragraph 41(*a*) of the IRPA.

[17] On July 31, 2008, an Exclusion Order was issued against Mr. Khosa.

[18] On or around October 1, 2008, Mr. Khosa submitted a Pre-Removal Risk Assessment (PRRA) application. Mr. Khosa alleged that he faced a risk of extrajudicial sanctions because he may be suspected of being a Sikh militant.

[19] On November 4, 2008, Mr. Khosa's application for permanent residence pursuant to the Live-In Caregiver Class was refused.

[20] On June 9, 2009, Mr. Khosa and Ms. Baker were interviewed together and separately for the purpose of Mr. Khosa's application for permanent residence as a member of the Spouse or Common-law Partner in Canada Class.

[21] On November 3, 2009, an Immigration Officer refused Mr. Khosa's application on the basis that Mr. Khosa did not demonstrate that he is a spouse as defined in section 4 of the Regulations, and that the marriage was considered to be for the purpose of acquiring status under the IRPA.

[22] On November 4, 2009, a PRRA Officer denied Mr. Khosa's PRRA application on the basis that there is no serious possibility that he would suffer persecution pursuant to section 96 of the IRPA or would be subjected personally to a risk to life or of cruel and unusual punishment pursuant to section 97 of the IRPA. The PRRA Officer noted that Mr. Khosa was unlikely to be of interest to the authorities in India if removed.

[23] Mr. Khosa is scheduled for removal from Canada to Delhi, India on January 27, 2010 at 12:45 a.m. Mr. Khosa is to report to the Canadian Immigration Centre at Vancouver International Airport at 8:45 p.m. on January 26, 2010 to obtain his travel documents and to complete departure requirements. He will be travelling on a valid Indian passport.

IV. Issue

[24] The issue before the Court on this stay motion is whether Mr. Khosa has satisfied the three-part test for an order staying his removal from Canada by showing that:

a. there is a serious issue with respect to the Immigration Officer's decision to be tried;

b. he would suffer irreparable harm if the stay application is refused; and,

c. the balance of convenience favours staying the removal order.

(*Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302, 11 A.C.W.S. (3d) 440 (F.C.A.)).

[25] The Court is in full agreement with the position of the Respondents.

V. Analysis

A. *Relevant Legislative Provisions*

[26] To obtain a permanent resident visa as a member of the Spouse or Common-law Partner in Canada Class, Mr. Khosa had to meet the requirements set out by the IRPA and the Regulations.

[27] Section 12(1) of the IRPA provides:

12. (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.	**12.** (1) La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.

[28] Section 4 of the Regulations provides the definition of spouse:

4. For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner, a conjugal partner or an adopted child of a person if the marriage, common-law	**4.** Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait, le partenaire conjugal ou l'enfant adoptif d'une personne si le mariage, la relation des conjoints de fait ou

partnership, conjugal partnership or adoption is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the Act.	des partenaires conjugaux ou l'adoption n'est pas authentique et vise principalement l'acquisition d'un statut ou d'un privilège aux termes de la Loi.

[29] Section 124 of the Regulations defines the membership parameters of the Spousal or Common-law Partner Class:

124. A foreign national is a member of the spouse or common-law partner in Canada class if they	**124.** Fait partie de la catégorie des époux ou conjoints de fait au Canada l'étranger qui remplit les conditions suivantes :
(*a*) are the spouse or common-law partner of a sponsor and cohabit with that sponsor in Canada;	*a*) il est l'époux ou le conjoint de fait d'un répondant et vit avec ce répondant au Canada;
(*b*) have temporary resident status in Canada; and	*b*) il détient le statut de résident temporaire au Canada;
(*c*) are the subject of a sponsorship application.	*c*) une demande de parrainage a été déposée à son égard.

[30] In the present case, Mr. Khosa did not satisfy the Immigration Officer that he met both requirements in section 4 of the Regulations: (1) that the marriage was genuine; and, (2) that he had not entered the marriage for the purpose of remaining in Canada.

B. *Serious Issue*

[31] There is no merit to Mr. Khosa's argument that the Immigration Officer did not provide sufficient reasons for both branches of the test under section 4 of the Regulations. Reading the Immigration Officer's reasons as a whole demonstrates that the Officer questioned whether the marriage was genuine or simply cosmetic for the purpose of immigration (*da Silva v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1138, 161 A.C.W.S. (3d) 974 at paras. 11-12).

[32] A strong link exists between the two prongs of the test. Specifically, the Court has found that the lack of genuineness presents strong evidence that a relationship is entered into for the purpose of gaining status. It is Mr. Khosa who bears the evidentiary burden on both prongs of the test (*Sharma v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1131, [2009] F.C.J. No. 1595 (QL) at paras. 16-18; *Huang v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 771, 107 A.C.W.S. (3d) 117 at para. 7).

[33] In the present case, the same evidence that the Immigration Officer reviewed to find that the spousal relationship was not genuine was the same evidence that satisfied her that the relationship was entered primarily to obtain Canadian permanent resident status. The Immigration Officer notably found Mr. Khosa lacking in credibility. It is also significant that she noted cause and effect as to the timing of Mr. Khosa's arrest and the section 44 inadmissibility report and the subsequent marriage shortly thereafter.

[34] The Immigration Officer found on the basis of the following evidence that the marriage is not genuine:

a) Mr. Khosa stated that he did not give his wife a ring when he proposed, whereas his wife stated that Mr. Khosa did;

b) Mr. Khosa said he and his wife both paid for the rings, whereas his wife stated that Mr. Khosa did;

c) Mr. Khosa stated that his wife uses birth control pills, whereas his wife stated that they only use condoms;

d) Mr. Khosa and his wife provided discrepant answers on how often Mr. Khosa contacts his family;

e) Mr. Khosa and his wife provided inconsistent answers concerning their bedding and what each other wore to bed; and,

f) Mr. Khosa and his wife provided inconsistent answers about how many televisions they have in their home.

[35] The incumbent logic of the Immigration Officer's substantiation of key inconsistencies and the overall picture that arose during the interviews with Mr. Khosa and his wife, in addition to Mr. Khosa's lack of credibility as demonstrated, indicate that both the genuineness of the marriage and purpose of the marriage were fully considered, in further examples subsequently discussed below.

[36] It is well established in the jurisprudence that a tribunal is presumed to have considered all the evidence before it, unless there is clear and convincing evidence to the contrary. The decision-maker is not obliged to refer to all the evidence in its reasons (*Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (F.C.A.) (Q.L.))

[37] In this case, the Immigration Officer explicitly noted that she reviewed all the information and submissions from Mr. Khosa. The Immigration Officer placed greater weight on: Mr. Khosa's lack of credibility, the lack of joint assets; the timing and meeting of Mr. Khosa and his wife; the inconsistencies in Mr. Khosa and his wife's answers during the interview; and, Mr. Khosa's misrepresentations of his address and work history. Mr. Khosa is essentially seeking for this Court to place greater weight on the evidence that his wife is a 50% beneficiary on his life insurance policy and the photographs he submitted. It is not the role of the Court to re-weigh evidence (*Kengkarasa v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 714, 158 A.C.W.S. (3d) 973 at paras. 35, 38; *Singh v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 673, 170 A.C.W.S. (3d) 147 at para. 10; *Daniel v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 392, 156 A.C.W.S. (3d) 1144 at paras. 16-17).

[38] Equally devoid of merit is Mr. Khosa's assertion that the Immigration Officer erred in her credibility findings because she misconstrued the evidence. Specifically, Mr. Khosa states that the Immigration Officer misunderstood the evidence with respect to his addresses in his application and his parents' approval of his marriage. To the contrary, the Immigration Officer's findings on these inconsistencies are supported by the evidence.

[39] A review of Mr. Khosa's In-Canada Application for Permanent Resident Status (Application) shows the contradiction in his address listing. Under box 14 of Schedule 1 of the Application, Mr. Khosa states that he lived at 2488 McLeod Avenue from September 2005 to October 2007. Yet, on the Client History Update Form, which Mr. Khosa completed on July 14, 2008, he states that he lived at 2488 McLeod Avenue from October 2005 to June 2008. The Immigration Officer therefore did not err in finding that Mr. Khosa has not been consistent in providing his address information.

[40] The Immigration Officer did not misconstrue the evidence concerning the families' approval of the marriage. In Mr. Khosa's statement entitled "Development of our Relationship", attached to the Application, he stated that he and his wife's family members did not agree with the marriage and would not attend the marriage. At the interview, Mr. Khosa stated that his parents gave his wife jewellery and saris as wedding gifts. Based on this evidence, it was not unreasonable for the Immigration Officer to find that Mr. Khosa's statements were contradictory.

[41] In addition, the Immigration Officer's credibility findings were based, in part, on Mr. Khosa's failure to disclose his work at Supreme Pizza on the Application. The Immigration Officer noted that the illegal work arrangement resulted in a section 44 inadmissibility report being issued, prior to Mr. Khosa submitting the Application for Permanent Residence Status.

[42] From an interview, the Immigration Officer concluded that Mr. Khosa was not forthcoming with requested information. This finding was based on her observation that:

a) Mr. Khosa provided vague and confusing answers concerning his immigration status in Canada and the reason for his exclusion order;

b) Mr. Khosa stated that his wife knew everything about his immigration situation, whereas his wife stated that she knew little about Mr. Khosa's immigration status and history.

[43] Mr. Khosa's allegation that the Immigration Officer should have questioned the couple's inconsistencies with a request for their answers is not substantiated (*Dasent v. Canada (Minister of Citizenship and Immigration)* (1996), 107 F.T.R. 80, 61 A.C.W.S. (3d) 570 at para. 5; leave to appeal to S.C.C. refused, [1996] S.C.C.A. No. 141; *Oppong v. Canada (Minister of Citizenship and Immigration)* (1996), 193 N.R. 306, 60 A.C.W.S. (3d) 1217 at para. 3; leave to appeal to S.C.C. refused, [1996] S.C.C.A. No. 140).

[44] Credibility findings are entitled to deference. In this case, the Immigration Officer's credibility finding is fully supported by the contradictions and inconsistencies in Mr. Khosa's evidence (*Kengkarasa*, above, at paras. 1, 19).

[45] Mr. Khosa has failed to demonstrate a serious issue with respect to the Immigration Officer's decision.

C. *Irreparable Harm*

[46] Contrary to Mr. Khosa's assertion, irreparable harm does not necessarily result when there is a finding that there is a serious issue to be tried. If this Court finds that there is a serious issue to be

tried, Mr. Khosa bears the onus of adducing clear and convincing evidence (not speculative and based on a series of possibilities) that he will suffer irreparable harm if removed to India at this time. He has not done so (*Diallo v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 84, [2009] F.C.J. No. 126 (QL) at para. 27; *Daniel*, above, at para. 24).

[47] Mr. Khosa asserts that he will suffer irreparable harm because he will be separated from his wife. It is well established in the jurisprudence that separation from a spouse does not constitute irreparable harm. Such prejudice does not exceed the usual personal inconveniences of removal. Deportation inevitably causes some psychological and emotional hardship. As stated by the Federal Court of Appeal in *Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261, 132 A.C.W.S. (3d) 547:

> [13] The removal of persons who have remained in Canada without status will always disrupt the lives that they have succeeded in building here. This is likely to be particularly true of young children who have no memory of the country that they left. Nonetheless, the kinds of hardship typically occasioned by removal cannot, in my view, constitute irreparable harm for the purpose of the *Toth* rule, otherwise stays would have to be granted in most cases, provided only that there is a serious issue to be tried… [Emphasis added].

(Reference is also made to *Daniel*, above.)

[48] Mr. Khosa married his sponsor knowing that he was without status in Canada. A party cannot create the circumstances of the harm which are then relied upon to secure a stay of removal (*Benedict v. Canada (Solicitor General)*, 2004 FC 555, 130 A.C.W.S. (3d) 822 at para. 12).

D. *Balance of Convenience*

[49] A serious issue, in and of itself, demonstrating irreparable harm, does not establish a balance of convenience in the applicant's favour. Each of the tri-partite tests must be established individually (*Daniel*, above, at paras. 29-31; *Ahmed v. Canada (Solicitor General)*, 2004 FC 686, 131 A.C.W.S. (3d) 304 at para. 4).

[50] Under the IRPA, the Minister of Public Safety and Emergency Preparedness (PSEP) is responsible for maintaining and protecting the security of Canadian society and the integrity of Canada's immigration and refugee system. This entails the enforcement of removal orders as soon as is reasonably practicable which is to preserve the integrity of Canada's immigration and refugee system (IRPA at. s. 3(2) and s. 48(2); *Jama v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 374, 166 A.C.W.S. (3d) 297 at para. 7; *Dugonitsch v. Canada (Minister of Employment and Immigration)*, (1992), 53 F.T.R. 314, 32 A.C.W.S. (3d) 1135 at para. 15).

[51] The fact that a person seeking a stay order has no criminal record, is not a security concern, or is socially integrated in Canada, does not constitute a balance of convenience that favours granting a stay order. Successful integration into Canadian society is not sufficient to overcome the public interest in the integrity of the administration of Canada's immigration laws (*Selliah*, above, at paras. 21-22).

[52] Mr. Khosa has been in Canada since September 2005. Since this time he has had the benefit of a number of immigration processes including consideration for permanent residence under the

Live-In Caregiver Class, and a PRRA. Although Mr. Khosa does not have a criminal record in Canada, he does not have clean hands. Mr. Khosa disregarded Canadian immigration laws by partaking in unauthorized work (*Ksiezopolski v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1402, 134 A.C.W.S. (3d) 682 at paras. 7-8).

[53] Only in exceptional cases does an applicant's interest outweigh the public interest. Mr. Khosa has not demonstrated an exceptional case that would warrant delaying the Minister of PSEP's duty to ensure that the objectives of the IRPA are met (*Dugonitsch*, above, at para. 15; *Selliah*, above, at para. 22).

VI. Conclusion

[54] Mr. Khosa has failed to establish all three elements necessary for this Court to grant an order staying execution of the removal order.

[55] For all of the above reasons, the Applicant's application for a stay of execution of the removal order is denied.

JUDGMENT

THIS COURT ORDERS that the Applicant's application for a stay of execution of the removal order be denied.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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