Federal Court  Cour fédérale

Date: 20110614

Docket: IMM-3138-10

Citation: 2011 FC 691

Ottawa, Ontario, June 14, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

PINDER SINGH BRAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the decision of a delegate of the Minister of Citizenship and Immigration (Minister's Delegate), dated 1 April 2010 (Decision), which refused the Applicant's application for permanent residence status from within Canada based on humanitarian and compassionate (H&C) considerations.

BACKGROUND

[2] The Applicant is a citizen of India. He was sponsored by his wife and entered Canada as a permanent resident in 1993. Two years later, they divorced.

[3] In 1995, the Applicant was arrested by the United States Immigration and Naturalization Services in Minnesota on three counts of evading the immigration laws of the United States. He pled guilty to one count and served 119 days in prison. Upon his release in 1995, he was deported to Canada. He was then subject to a report under section 27 of the former *Immigration Act* due to his conviction outside Canada of an offence that, if committed in Canada, would have been punishable by a maximum prison term of 10 years. In 1997, a deportation order was issued to remove the Applicant from Canada; this deportation order was declared valid by the Immigration Appeal Division (IAD) in 2000. The Applicant lost his permanent residence status but was not removed from Canada due to his fear of returning to India. In 2003, a Pre-Removal Risk Assessment officer found that the Applicant would be at risk of torture and that there would be a risk to life and cruel and unusual treatment and punishment if he were to be returned to India. Therefore, the deportation order against the Applicant was stayed in 2008.

[4] The IAD in 2000 also noted that German authorities had arrested a man who was travelling under a false passport and questioned this man in relation to pending charges in India for offences involving terrorism. The man said that the Applicant had supplied him with the false passport.

[5] The Applicant remarried in 2003; he lives with his second wife and their three minor children. He states that he is responsible for their support and actively involved in their care.

[6] In February 2008, the Applicant applied for permanent residence based on H&C considerations; his application was supported by a spousal sponsorship application filed by his wife. This was the Applicant's second such application, the first having been refused in 2002. On 1 April 2010, the Minister's Delegate rejected the application, having found that there was a lack of sufficient H&C grounds to waive the Applicant's inadmissibility for serious criminality for the purposes of permanent residence. This is the Decision under review.

DECISION UNDER REVIEW

[7] The Minister's Delegate first addressed the Applicant's criminal conduct and the "severe" implications that may have resulted therefrom, as set down in the 2000 decision of the IAD which refused the Applicant's appeal of his 1997 deportation order. She stated that, although the Applicant appeared to be leading a stable lifestyle with no further criminal involvement, "lack of new convictions does not in and of itself provide insight into a person's beliefs, morals or future plans." Moreover, she defined her task as not to examine whether the Applicant was rehabilitated but to discern whether there were sufficient H&C grounds to warrant an exemption to his inadmissibility.

[8] The Minister's Delegate quoted extensively from the decision of the IAD, which had reviewed the Applicant's "very serious" contravention of the US immigration laws and had found that the Applicant's offence was not an isolated incident of human smuggling (as he had claimed).

Moreover, the decision stated that the Applicant's prospects for rehabilitation were "mixed" since he lacked genuine remorse and was not candid about the circumstances of his offence, most particularly his association with known terrorists. The Minister's Delegate concluded that there had been "no change in [the Applicant's] outlook on this issue since his 2000 hearing before the IAD." She noted that the Applicant's offence was not only criminal but was directly related to the integrity of Canada's immigration laws.

[9] With respect to the humanitarian and compassionate considerations, the Minister's Delegate observed that the Applicant lives with his wife and minor children and that it was "clearly in the best interests of these children to reside with their father." However, she observed, a negative decision on the application would not effect his removal from Canada and hence a separation from his wife and children. The Minister's Delegate again referred to the 2000 IAD decision, which stated that the Applicant's first marriage appeared to have been driven by immigration considerations and that the Applicant currently has no contact with the child of that marriage.

[10] The Minister's Delegate recognized the Applicant's many letters of support from community members, who described him as a peace-loving family man and business owner. She found that the credibility of some of the letters was undermined by the fact that their content was identical to that of other letters, with only the name of the letter-writer being different. She acknowledged that the Applicant owns a home and is self-employed in his own company and has never collected social assistance; however, based on her comparison of the monthly income and monthly expenditures, it appears that the family is struggling financially.

[11] The Minister's Delegate did not consider country conditions, as the Applicant was in no danger of being removed due to the 2008 stay of his removal order. She recognized that the Applicant would certainly experience a level of discomfort from not having indeterminate leave to remain in Canada. However, she found that this did not outweigh the nature and severity of the Applicant's inadmissibility. The Minister's Delegate concluded that the Applicant would not suffer any undue, undeserved or disproportionate hardship if an exemption was not granted him at the time and that sufficient humanitarian and compassionate considerations did not exist to warrant waiving his inadmissibility.

ISSUES

[12] The Applicant formally raises the following issues:

i) Whether the Minister's Delegate fettered her discretion in executing the H&C analysis;

ii) Whether the H&C analysis was reasonable with respect to the Applicant's rehabilitation and degree of establishment in Canada, the weighing of positive and negative factors, and the hardship and risk resulting from a negative outcome; and

iii) Whether the Minister's Delegate failed to observe a principle of natural justice.

The Applicant, however, also refers to other grounds of review, such as bias, in the body of his arguments.

STATUTORY PROVISIONS

[13] The following provisions of the Act are applicable in these proceedings:

Humanitarian and compassionate considerations	**Séjour pour motif d'ordre humanitaire**
25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	**25.** (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.
[…]	[…]
Serious criminality	**Grande criminalité**
36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36.** (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
(*a*) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment	*a*) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou

of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

(*b*) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

(*c*) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

Criminality

(2) A foreign national is inadmissible on grounds of criminality for

Criminalité

(2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :

(*a*) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions à toute loi fédérale qui ne découlent pas des mêmes faits;

(*b*) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions qui ne découlent pas des mêmes faits et qui, commises au Canada,

Parliament;

constitueraient des infractions à des lois fédérales;

(*c*) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation;

(*d*) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.

d) commettre, à son entrée au Canada, une infraction qui constitue une infraction à une loi fédérale précisée par règlement.

Application

(3) The following provisions govern subsections (1) and (2):

Application

(3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :

(*a*) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;

a) l'infraction punissable par mise en accusation ou par procédure sommaire est assimilée à l'infraction punissable par mise en accusation, indépendamment du mode de poursuite effectivement retenu;

(*b*) inadmissibility under subsections (1) and (2) may not be based on a conviction in respect of which a pardon has been granted and has not ceased to have effect or been revoked under the *Criminal Records Act*, or in respect of which there has been a final determination of an acquittal;

b) la déclaration de culpabilité n'emporte pas interdiction de territoire en cas de verdict d'acquittement rendu en dernier ressort ou de réhabilitation — sauf cas de révocation ou de nullité — au titre de la *Loi sur le casier judiciaire*;

(*c*) the matters referred to in paragraphs (1)(*b*) and (*c*) and (2)(*b*) and (*c*) do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed

c) les faits visés aux alinéas (1)*b*) ou *c*) et (2)*b*) ou *c*) n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui, à l'expiration du délai réglementaire, convainc le

period, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated; …	ministre de sa réadaptation ou qui appartient à une catégorie réglementaire de personnes présumées réadaptées;

STANDARD OF REVIEW

[14] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[15] The standard of review for a decision based on humanitarian and compassionate considerations under subsection 25(1) is reasonableness. See *Barzegaran v Canada (Minister of Citizenship and Immigration)*, 2008 FC 681 at paragraphs 15-20; *Zambrano v Canada (Minister of Citizenship and Immigration)*, 2008 FC 481 at paragraph 31.

[16] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47; and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59.

Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[17] A breach of natural justice is reviewable on the correctness standard and will result in the decision being set aside. See *Dunsmuir*, above, at paragraph 129.

ARGUMENT

The Applicant

Decision Was Unreasonable

Minister's Delegate Fettered Her Discretion

[18] The Applicant argues that the Minister's Delegate fettered her discretion by relying too heavily on the 2000 IAD decision. This outdated assessment of the Applicant's likelihood of rehabilitation has been overtaken by his 15-year history of abstention from any wrongdoing and his ongoing contribution to Canadian society. The Minister's Delegate herself recognized that it would be in the best interests of the Applicant's children to have their father remain with them in Canada. The Applicant contends that it is "absurd" to suggest that an alleged lack of remorse in 2000 should affect an application brought forward in 2010. See *Dee v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FC 345, [2000] FCJ No 223 (QL) at paragraph 19.

[19] The Applicant states that reliance on his past criminal conduct to the exclusion of all other factors represents a failure to balance all circumstances of the case and constitutes a fettering of discretion. Justice Karen Sharlow of this Court, relying on the Federal Court of Appeal decision in *Lau v Canada (Minister of Employment and Immigration)*, [1984] 1 FC 434, [1984] FCJ No 57 (QL), stated in *Pushpanathan v Canada (Minister of Citizenship and Immigration)* (1999), 50 Imm LR (2d) 74, [1999] FCJ No 380 (QL) at paragraphs 11-15, that appeals "would be futile if the fact of the commission itself is sufficient to deny the appeal."

Factual Errors Affected Balancing of Factors

[20] The Applicant argues that the Minister's Delegate made several serious factual errors. She inferred that the Applicant's first marriage was not *bona fide* despite having no evidentiary basis for doing so. She inferred that the Applicant was not rehabilitated when, in fact, he clearly is. Finally, she exaggerated the seriousness of the criminal charges of which the Applicant was convicted; there was no evidence of ongoing efforts at human smuggling.

[21] The Applicant observes that the Federal Court of Appeal in *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, found it appropriate for an officer to balance the positive aspects of an application against criminality. Although the Minister's Delegate purported to do this, she so misconstrued the facts of the offence that the positive factors (namely, best interests of the children, establishment, genuine marriage, risk and rehabilitation) were not appropriately balanced against the Applicant's criminality.

Failure to Consider Rehabilitation

[22] The Applicant contends that rehabilitation is the key issue in assessing whether an exemption to inadmissibility is warranted. Paragraph 36(3)(*c*) of the Act indicates that an applicant must overcome inadmissibility by waiting until the prescribed time has expired following completion of the sentence and then satisfying the Minister that he has rehabilitated himself. Justice William McKeown in *Thamber v Canada (Minister of Citizenship and Immigration),* 2001 FCT 177 at paragraph 16, relied upon the following definition of rehabilitation:

> Rehabilitation means only that the risk of further criminal activity is assessed to be improbable. Applicants may be considered rehabilitated when they demonstrate that they have been leading a stable lifestyle with no further criminal involvement…. Rehabilitation may be demonstrated by the passage of time and through an examination of the person's activities and lifestyle pre and post offence. Rehabilitation does not mean that there is no risk of further criminal activity, only that the risk is assessed to be unlikely. The person's reason for wanting to come to Canada is not a consideration for rehabilitation but is an important factor when determining whether to facilitate the application.

[23] The Applicant submits that his 15-year abstinence from criminal activity carries no weight with the Minister's Delegate, despite jurisprudence which states that a "clean" criminal record is compelling evidence of rehabilitation. See *Velupillai v Canada (Minister of Citizenship and Immigration),* [2002] IADD No 863 at paragraph 20.

Establishment Not Properly Assessed

[24] In *Raudales v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 385 at paragraph 19, Justice Eleanor Dawson stated that, "[a]bsent a proper assessment of establishment, … a proper determination could not be made as to whether requiring [the Applicant] to apply for permanent residence from abroad would constitute hardship that is unusual and undeserved or disproportionate."

[25] The Applicant argues that the Minister's Delegate erred in her assessment by allowing the "long shadow of the past to bias her assessment of the current situation." The first marriage of the Applicant has little bearing on the application. The only relevant factor in relation to marriage is his current family, whose interests the Minister's Delegate has minimized and treated with extreme brevity. The Decision makes little mention of the benefit to these children of having their father remain in Canada and no mention of their need for emotional stability nor of the hardship that they will endure if they must move to a foreign country or be separated from their father. In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] SCJ No 39 (QL), the Supreme Court of Canada held that an officer who has minimized the best interests of the child has acted unreasonably. Moreover, where the best interests of the child mitigate in favour of an application (as in this case), the officer must provide cogent reasons why other factors require a negative determination. See *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475.

[26] The Applicant further asserts that the Minister's Delegate has minimized his entrepreneurial accomplishments and the respect that he enjoys in the community. He alleges that the Decision fails to consider the totality of the evidence. Moreover, it is biased, highly inadequate, concerned only with the immediate outcome and unresponsive to the long-term implications of rejecting the application.

Decision Minimizes the Applicant's Hardship

[27] The Minister's Delegate finds that, because the Applicant is not removable, hardship and risk are moot. This severely minimizes the Applicant's hardship. He cannot return to India to apply for permanent residence because he is at risk there. Therefore his wife cannot sponsor him into Canada. Without permanent residency status, the Applicant cannot come and go from Canada and he can never acquire citizenship. The Decision does not appreciate this.

[28] For the above reasons, the Applicant contends that the Decision of the Minister's Delegate is unreasonable and should be set aside.

Failure to Inform Applicant of Policy Change Constitutes a Breach of Natural Justice

[29] The Applicant submits that, in July 2009, there was a policy change which entitled him to switch his application from a humanitarian application (which required him to seek an exemption from the usual requirements) to a spousal application (in which he was entitled, as of right, to be processed). He also claims that it is the usual practice to provide applicants with the opportunity to

update submissions where there has been a significant delay between the submission of the application and the rendering of the decision. In the instant case, the Applicant applied in 2008 but the Decision was not rendered until 2010. The Applicant argues that he should have been offered the opportunity to switch to a spousal application. Although in a spousal application he would still have to seek an exemption from inadmissibility, the exemption would be considered within the context of a spousal application where he had a right to be sponsored. The Applicant argues that the balancing in the latter context is different.

[30] The Applicant accepts that a failure to provide him an opportunity to update information does not constitute a breach of natural justice *per se*. However, he contends that a breach has occurred here nonetheless. First, the Minister's Delegate deprived the Applicant of an opportunity to update information and then relied on the Applicant's failure to provide updated information. Second, there was a policy change and the Applicant was not given any opportunity to choose to have his case processed under the more favourable policy. See *Rogers v Canada (Minister of Citizenship and Immigration)*, 2009 FC 26.

The Respondent

Natural Justice

[31] The Respondent contends that the change in policy had no substantial effect on the Applicant's application for permanent residence. The Applicant wanted an opportunity to overcome his criminal inadmissibility to Canada and to obtain permanent residence status, and that is precisely the assessment that was undertaken by the Minister's Delegate when she examined the Applicant's

H&C application and his spousal sponsorship application. Informing the Applicant of the change in policy would mean only that, instead of making two applications (namely, a spousal sponsorship and an H&C), the Applicant would have been able to seek exemption from his inadmissibility *within* a spousal sponsorship application. Even if the Minister's Delegate did err in not advising the Applicant of the policy change, the error had no material effect; the outcome would have been the same. For this reason, the Respondent submits that it is justifiable to disregard the error. See *Cartier v Canada (Attorney General)*, 2002 FCA 384 at paragraphs 32-33.

Minister's Delegate Did Not Fetter Her Discretion

[32] The Respondent argues that it was incumbent upon the Minister's Delegate, in making her Decision, to consider both the Applicant's criminality, as outlined in the 2000 IAD decision, as well as the H&C factors. As the Decision demonstrates, the Minister's Delegate conducted a detailed assessment of the Applicant's submissions and his H&C grounds. The assertion that the Minister's Delegate fettered her discretion is unfounded. The Applicant disagrees with the weighing of the evidence and the outcome of the Decision but, as these tasks are within the expertise of the decision maker, the Court should not intervene. See *Sema v Canada (Minister of Citizenship and Immigration)* (1995), 30 Imm LR (2d) 249, [1995] FCJ No 1148 (QL) (FCTD); and *Sidhu v Canada (Minister of Citizenship and Immigration)* (2000), 97 ACWS (3d) 740 [2000] FCJ No 741 (QL) (FCTD).

Factual Errors Are Not Material

[33] The Respondent submits that, even if the Minister's Delegate did err by raising the matter of the Applicant's previous marriage, the Decision as a whole is supported by the evidence; the Applicant's previous marriage was in no way determinative of the outcome of the application. See *Nyathi v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1119; *Law Society of Upper Canada v Ryan*, 2003 SCC 20; and *Cartier*, above. The Respondent further argues that the Applicant's submissions regarding the H&C assessment carried out by the Minister's Delegate again amount to a request for this Court to re-weigh the evidence.

Hardship

[34] The Respondent contends that the Applicant's submissions concerning hardship effectively argue that his stay of removal entitles him to a successful H&C application and the grant of permanent residence status in Canada. He cites no authority for this claim. The Minister's Delegate was mindful of the issue of hardship; she considered it and came to a reasonable conclusion. There are no grounds for the Court's intervention.

The Applicant's Reply

[35] The Respondent does not dispute the breach of natural justice but argues that it made no difference because the outcome would have been the same. The Applicant contends that this is incorrect. For both spousal and H&C applications, the applicant must satisfy the officer that an

exemption from the inadmissibility requirement is justified. However, in the context of a spousal application, the Applicant has an absolute right to apply for permanent residence status from within Canada and need not establish H&C grounds. Within the context of an H&C application, however, the applicant must satisfy the officer that it is appropriate to grant an exemption to the normal requirement of applying for permanent residence status from outside Canada. In this way, an H&C application is more onerous for the applicant.

[36] The Applicant challenges the Respondent's assertion that he is merely asking the Court to re-weigh the evidence. The Applicant has raised serious factual errors, failure to consider relevant evidence and failure to base the H&C application on current circumstances. Contrary to the Respondent's statements, these errors are material and the Minister's Delegate relied upon them. Taken as a whole, they vitiate the Decision.

The Respondent's Further Memorandum

[37] The Respondent notes that the decision to grant or to refuse an exemption to inadmissibility based on H&C grounds is highly discretionary. Although the Applicant challenges the treatment of the evidence by the Minister's Delegate, the Respondent submits that her actions were reasonable, justifiable and consistent with the duty with which she was charged.

[38] The 2000 IAD decision was properly before the Minister's Delegate. It was open to her to note its observation that some of the Applicant's decisions have been driven by immigration considerations; for example, with respect to the Applicant's first marriage, he and his wife never

lived together. It was also open to the Minister's Delegate to note that the IAD remarked in 2000 on the Applicant's lack of remorse, particularly given that the Minister's Delegate herself noticed in 2010 that the Applicant still lacked remorse. Moreover, he denied any contact with any terrorist group; he refused to acknowledge the possibly severe implications of his attempt to smuggle suspected Sikh terrorists into Canada, an offence to which he pled guilty is the US; and he provided no explanation as to why he committed the offence and why he would not take similar action in the future. The Respondent submits that the Applicant's lack of progress in this respect was relevant and that the Minister's Delegate properly noted that the Applicant's lack of convictions alone did not provide sufficient insight into his beliefs, morals or future plans.

[39] The Respondent submits that the Applicant has failed to show that the Minister's Delegate ignored relevant information and that she is, therefore, presumed to have considered all of the evidence. For example, contrary to the Applicant's submissions, the Minister's Delegate acknowledged that he owned his own company and that, in 2007, his total net profits equalled $988. She expressly recognized that it was in the best interests of the children that the Applicant reside with them. She was not required to consider a hypothetical situation in which the Applicant would be deported at some later date; there is no danger of that at present and, if the situation were to change, the Applicant can make further applications at that time. It was also reasonable for her to find that the current inability to remove the Applicant from Canada alleviated the hardship of not acquiring permanent residence on H&C grounds. The Minister's Delegate acknowledged that the Applicant will be at risk if he returns to India. However, the fact that the Applicant cannot return to India does not require her to grant him permanent residence status.

[40] With respect to the Applicant's natural justice arguments, the Minister's Delegate, in her affidavit dated 16 December 2010, identifies Operational Bulletin 126 (OB 126) as the July 2009 document containing the policy change to which the Applicant refers. She notes that OB 126 does not require the Minister to advise applicants of the policy change. Furthermore, she indicates that the consideration of the Applicant's application would have been the same, whether he applied in the Spouse in Canada class or the H&C class.

[41] The Respondent, therefore, disputes the Applicant's argument that the exercise of discretion is somehow different in a spousal application as opposed to an H&C application. In the Applicant's case, the exercise of discretion is the same in both applications because, in asking for H&C consideration, the Applicant is not simply requesting to remain in Canada while his application is being processed; rather, he is asking to be exempted from inadmissibility for serious criminality. Such an H&C application is different from one in which the H&C relief requested is simply to remain in Canada while the application is being processed. This request is decided not in a local Citizenship and Immigration Canada office but rather at National Headquarters in Ottawa due to the issue of serious criminality.

ANALYSIS

[42] The Applicant has raised a wide range of issues as grounds for review. While I disagree with the Applicant on some issues, I nevertheless agree that there is sufficient error in the Decision to warrant returning it for reconsideration.

[43] As regards alleged factual errors about the *bona fides* of the first marriage and inferences that the charges against the Applicant were more serious, I think the Minister's Delegate was entitled to rely upon the earlier Decision of the IAD, which provided sufficient information and findings for the Minister's Delegate in this case to conclude as she did. There was nothing unreasonable about this.

[44] As regards the fettering of discretion and the allegation that the Minister's Delegate relied upon one single fact – the commission of the offence in 1995 – to the exclusion of all others, I do not think the Decision bears this out. Leaving aside the problem about rehabilitation, the Minister's Delegate also refers to, and relies upon, the seriousness of the offence, the lack of evidence of remorse, the Applicant's failure to acknowledge any terrorist connections, the lack of any explanation as to why he committed the offence, and the threat posed by the offence to the integrity of Canada's immigration laws. Hence, I see no fettering of discretion in the way described by the Applicant other than may have occurred with respect to the rehabilitation issue, which I discuss below.

[45] The Minister's Delegate discounts the need to examine fully the best interests of the children and the Applicant's wife because "a negative decision on this particular application will not effect Mr. Brar's removal from Canada and hence a separation from his wife and children."

[46] The Applicant says that this is not good enough because the stay may be lifted at some time in the future. Hence, the Minister's Delegate should have assessed the impact upon the children and wife that any future removal might bring.

[47] The approach of the Minister's Delegate to this issue is that the interests of the children and the Applicant's wife can be discounted because "a negative decision on this particular application will not effect Mr. Brar's removal from Canada and hence a separation from his wife and children."

[48] In declining to address the best interests of the children, the Minister's Delegate ignores the fact that the stay could be lifted at some time in the future. The Applicant's status in Canada is contingent and provisional. Should the Respondent seek his removal it is not clear how and when the best interests of the children will come into play and whether those interests will receive due consideration. Conceptually at least, it might be possible for the Applicant to submit a further H&C application if the stay is lifted and he faces removal but, at the very least, the Minister's Delegate should have considered and explained how the interests of the children would be addressed prior to any removal, or whether it is in the best interests of the children that their father should continue to have a contingent status in Canada and be subject to removal if the Respondent decides that conditions in India present no further risk. We know from *Simoes v Canada (Minister of Citizenship and Immigration)* (2000), 187 FTR 219, [2000] FCJ No 936 (QL) and related cases that the mere existence of a pending H&C application will not prevent removal. The Minister's Delegate concedes that "it is clearly in the best interests of these children to reside with their father – especially while they remain minors." Having made this concession, the Minister's Delegate then ignores the interests of the children on the basis that a negative decision "will not effect Mr. Brar's removal from Canada …." In my view, this simply begs the question of how and when the interests of the children will be addressed and why, given that it is in their best interests to reside with their father, those interests should not be taken into account when considering his precarious and

contingent right to remain in Canada. In my view, then, the Minister's Delegate's refusal to address these issues related to the best interests of the children gives rise to a reviewable error.

[49] As regards the Minister's Delegate's treatment of hardship and risk as being essentially moot because the Applicant cannot be removed to India, I do not fully understand what the Applicant means by complaining that risk "impacts on the ability of the family to fully integrate." The family may live under a cloud because the Applicant has no permanent right to remain in Canada and could, if conditions in India change, be removed at some time in the future. However, the evidence suggests that, under present conditions, this family is doing well.

[50] The family is presently fully integrated. Hence, the Applicant appears to be saying that the Minister's Delegate should speculate about what might happen if the stay is reviewed and he becomes subject to removal in the future. In the event that the stay is lifted, this will mean that risk has been examined and a decision has been made that there is no risk to the Applicant if he is returned to India. This will not mean, of course, that there is no hardship so that, once again the approach of the Minister's Delegate does not examine or explain how this factor will be addressed prior to the Applicant's removal. Does the Minister's Delegate assume that, prior to any future removal, the Applicant will have the benefit of a further H&C assessment that will examine hardship issues? It is by no means clear to me whether this assumption lies behind the Decision. The Respondent may well seek to remove the Applicant prior to any such agency application being made or considered, which would mean that the Applicant could find himself outside of Canada even though there has been no decision that has fully addressed the best interests of his children or unusual, disproportionate and undeserved hardship. I would be less concerned about the Minister's

Delegate's decision to discount these factors at present if she had explained how and when they will be considered prior to any removal in the future.

[51] I do not think that a breach of natural justice can be established on these facts. The Applicant refers to conceptual differences between the two kinds of application but it seems to me that the reality in this instance would be that the Applicant would have to satisfy the exemption requirement irrespective of whether his H&C application was converted to a spousal sponsorship under the change in policy that came into effect in July 2009. Any failure to allow the Applicant to choose what kind of application to make can have no practical consequences on these facts.

[52] I agree with the Applicant that the Minister's Delegate failed to take into account the important issue of rehabilitation when balancing positive and negative factors to decide whether an exemption was appropriate.

[53] The Minister's Delegate erred in this regard because a lengthy period without charges or convictions is compelling evidence of rehabilitation, so that the Minister's Delegate should have given due weight to this factor instead of basing her conclusions upon the status quo at the time of the 2000 IAD decision.

[54] The Minister's Delegate says that she notes counsel's submissions on rehabilitation but then says, "I need not specifically try to draw any conclusions as to Mr. Brar's likelihood of re-offending."

[55] The Minister's Delegate then goes on to state as follows:

> In my opinion, lack of new convictions does not in and of itself provide insight into a person's beliefs, morals or future plans.

[56] This may be so, but rehabilitation and Mr. Brar's likelihood of re-offending are significant factors to consider when looking at what Mr. Brar is likely to do in the future, and they cannot be discounted in the way the Minister's Delegate attempts to discount them. Mr. Brar's years of responsible living as a provider for his family and a productive member of his community are really given no weight in this Decision. The offence occurred 15 years ago and the IAD provided its analysis in 2000. Since then, much has happened of a positive nature which cannot be left out of the balance when considering an exemption. The Respondent concedes that the Minister's Delegate should take rehabilitation into account but argues that this has occurred and that, in the exercise of her discretion, the Minister's Delegate has found that the positive aspects of the Applicant's rehabilitation are outweighed by negative factors, such as lack of remorse. My reading of the Decision, however, is that this highly significant, positive factor is given no weight: "lack of new convictions does not in and of itself provide insight into a person's beliefs, morals or future plans." What the Minister's Delegate does not explain is how much weight she afforded the Applicant's positive rehabilitation in light of her view that she "need not specifically try to draw any conclusions as to Mr. Brar's likelihood of reoffending." If the Minister's Delegate does not draw conclusions as to whether the Applicant will re-offend, then there is nothing positive to balance against the negative factors that she cites and upon which she relies. In effect, it means that the Applicant's years of rehabilitation were given no weight and left out of account.

[57] The Minister's Delegate says that she need not consider rehabilitation when dealing with an exemption application or at least she discounts the Applicant's positive accomplishments since the 2000 IAD decision to such a degree that they are given no weight. In my view, this is a reviewable error. It undermines the whole Decision and renders it unreasonable.

[58] In the instant case, the Decision does not indicate whether the Applicant, in his application for permanent residency, specifically requested an exemption from inadmissibility based on his rehabilitation. However, according to section 5.27 of Citizenship and Immigration Canada's inland processing manual "IP5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds" (Manual IP5) this is immaterial:

> When the applicant does not directly request an exemption, but facts in the application suggest that they are requesting an exemption for the inadmissibility, officers should treat the application as if the exemption has been requested. [original emphasis]

[59] The Minister's Delegate, in commenting upon the record before her, acknowledges that "Counsel's written submission dated March 6, 2008 raise the issue of Mr. Brar's rehabilitation." In these circumstances, it seems clear that the Minister's Delegate had a duty to consider Mr. Brar's rehabilitation. In carrying out this duty, Manual IP5 states that

> [Officers] … may consider factors such as the applicant's actions, including those that led to and followed the conviction. Officers should consider: the type of criminal conviction; what sentence was received; the length of time since the conviction; whether the conviction is an isolated incident or part of a pattern of recidivist criminality; and any other pertinent information about the circumstances of the crime.

[60] In the instant case, the Officer, first, should have treated the Applicant's application for permanent residency as including a request for an exemption to his inadmissibility based on

rehabilitation. Second, she should have considered, *inter alia*, the length of time since the conviction, and she should have considered the Applicant's actions following the conviction, including his stable employment, family life and community involvement.

[61] The evidence suggests that the Applicant has had a stable lifestyle with no criminal involvement for 15 years. In *Thamber v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 177, at paragraphs 17-18, the applicant, who had been convicted of drug trafficking, had applied for permanent residency on the basis of criminal rehabilitation; he had not re-offended for a period of ten years. Justice William McKeown observed that, in denying the applicant's application, the Minister acted unreasonably. Justice McKeown identified the applicant's freedom from criminal activity as "perhaps the most important factor," stating:

> The officer mentions other factors which certainly can be considered, but to omit perhaps the most important factor to be considered in such decisions constitutes a reviewable error.
>
> In the case of *Dee v. M.C.I.*, [2000] 3 F.C. 345 (T.D.), a very similar case to the present one, the applicant had been free of any criminal activity for a period of seventeen years and was almost sixty years old. In the present case, the Applicant is slightly younger and has ten years of no criminal activity. However, the essence of the cases is the same. On the facts in *Dee*, the matter was returned to the Minister for reconsideration. As such, I am also issuing an order allowing this application and directing the Minister to reconsider the matter in a manner not inconsistent with these reasons.

[62] A further reviewable error occurs, in my view, in the Minister's Delegate's analysis of establishment. The Minister's Delegate simply concentrates upon figures related to corporate profit and personal income. The point is made that the Applicant does not seem to be doing all that well financially. Other factors such as community involvement are left out of account.

[63] In *Raudales*, above, Justice Dawson held that establishment is a relevant factor to consider when assessing an H&C application and that absent a proper assessment of establishment, a proper determination cannot be made as to whether an applicant would suffer hardship if required to apply for permanent residence from abroad. See also *Jamrich v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 804.

[64] *Raudales*, *Jamrich* and subsequent jurisprudence from this Court have quoted with approval the following guidelines, contained in Manual IP5 for the assessment of "establishment" in Canada:

1. Does the applicant have a history of stable employment?
2. Is there a pattern of sound financial management?
3. Has the applicant remained in one community or moved around?
4. Has the applicant integrated into the community through involvement in community organizations, voluntary services or other activities?
5. Has the applicant undertaken any professional, linguistic or other studies that show integration into Canadian society?
6. Do the applicant and their family members have a good civil record in Canada?

[65] In *Raudales*, at paragraph 19, the Court states:

> Establishment is, pursuant to the Minister's guidelines as found in Chapter 5 of the Inland Processing Manual, a relevant factor to consider when assessing an H&C application. Absent a proper assessment of establishment, in my view, a proper determination could not be made in this case as to whether requiring Mr. Figueroa Raudales to apply for permanent residence from abroad would constitute hardship that is unusual and undeserved or disproportionate.

[66] In *Jamrich*, at paragraphs 24 and 28-29, the Court further supported the proposition in *Raudales* and confirmed that the assessment of the application must be in accordance with the evidence before the officer:

> Nevertheless, the evidence before the IC was strong and convincing. In fact, I have some difficulty in reconciling the IC's finding of facts with her ultimate conclusion. The Applicant parents have both worked on a regular basis from January 1996 up until and after the hearing, with short periods when they received welfare.
>
> …
>
> The case at bar is similar than (*sic*)that of *Raudales*, *supra*. The IC does have very broad discretion in assessing the Applicants (*sic*) application. That assessment must however be in accordance with the evidence before her.
>
> In my view, the IC made an unreasonable finding of facts: the IC's conclusions that "their establishment is no more than is expected of any refugee who is given similar opportunities in Canada" and that she is "not satisfied that in their case, their establishment can be considered so different and significant that it differs from what is expected from any other person who resides in Canada while undergoing the refugee determination process" are patently unreasonable in the circumstances of this case.

[67] Furthermore, in *Amer v Canada (Minister of Citizenship and Immigration)*, 2009 FC 713, at paragraphs 13-14, the Court confirms the view in *Raudales* and *Jamrich* that a reviewable error in addressing establishment is a sufficient ground for allowing an application for judicial review:

> The *Jamrich* decision was made pursuant to the Act and pursuant to the *Immigration Manual: Inland Processing 5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds*. I see no basis in principle to disagree with the approach taken by the Court in *Jamrich* and I am satisfied that the Applicant has shown the Officer committed a reviewable error in the manner of addressing the issue of establishment.
>
> Although this error is a sufficient ground for allowing this application for judicial review, I will briefly address the arguments

> raised about the Officer's treatment of the best interests of the Applicant's children and the adequacy of the reasons.

[68] In my view the Minister’s Delegate’s treatment of establishment in the present case is far too selective and cursory to meet the demands of the relevant case law.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed, the Decision is quashed, and the matter is returned for reconsideration by a different Minister's Delegate.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	**PINDER SINGH BRAR** **and** **THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
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DATE OF HEARING:	February 9, 2011
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DATED:	June 14, 2011

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