Federal Court  Cour fédérale

Date: 20110711

Docket: IMM-5818-10

Citation: 2011 FC 863

Ottawa, Ontario, July 11, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

HARJIT SINGH GILL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for judicial review of a decision of Immigration Officer L.M. Nunez (the Officer) dated September 27, 2010, wherein the Officer decided not to grant the Applicant an exemption to apply for permanent residence from within Canada on humanitarian and compassionate grounds.

[2] Based on the reasons below, this application is allowed.

I. Background

A. *Factual Background*

[3] The Applicant, Harjit Singh Gill, is a 51 year-old citizen of India. He came to Canada in 1996 and sought refugee protection. His claim was denied on December 18, 1997. His subsequent application for leave to judicially review that decision was also refused.

[4] Although the Applicant was under a removal order, he stayed in Canada and submitted an in-Canada application for permanent residence. This application was refused in January, 2000. He submitted another application for permanent residence from within Canada on humanitarian and compassionate (H&C) grounds. This application was also unsuccessful, and was refused on June 29, 2004.

[5] Following the first H&C refusal, the Applicant submitted a second in-Canada H&C application on September 29, 2004. His submissions focused on evidence of his establishment in Canada, such as his role as President and major shareholder of Bollywood Basics Inc., a restaurant specializing in Indian cuisine, his employment as a chef, his savings and his involvement in the Sikh community. The application was submitted to the Hamilton Citizenship and Immigration Canada (CIC) office for processing.

[6] After not hearing from the Hamilton CIC office for some time, the Applicant's former counsel got in touch with the office sometime in 2008, only to learn that the Applicant's file had been inadvertently archived. Since the Applicant had relocated to Mississauga in the interim, his file needed to be transferred to the Mississauga CIC office. This was confirmed by way of letter to the Applicant, dated May 2, 2008.

[7] On May 14, 2009, and again on July 13, 2009, the Applicant's counsel wrote to the CIC Mississauga office to request expedited processing.

[8] By letter dated September 16, 2010 the Mississauga CIC office requested updated information due to the date of the original submissions. The letter emphasized that the Applicant should, "***Please submit any and all information and other documents you wish considered at this time.***" (Emphasis in original)

[9] On September 16, 2010, the Applicant provided the CIC office with updated information. The Applicant indicated in his submissions that he provided financial support for his wife and two children in India. Without his Canadian income, he would not be able to continue to send his children, aged 18 and 20, to private school. Although he receives rental income from property he owns in India, it is not sufficient to support his family and his earlier efforts at farming had failed. Furthermore, the Applicant indicated that he doubted he would be able to find gainful employment in India due to his age, length of absence from the country and redundant skills as an Indian chef in India. He also highlighted his integration into Canada through volunteer work. He submitted

documentary evidence including account statements showing that he had amassed savings during his time in Canada and letters of support from friends.

[10] The Applicant's application was denied by letter dated September 27, 2010.

B. *Impugned Decision*

[11] The Officer summarized the Applicant's submissions. Under "Degree of Establishment" the Officer noted that the Applicant had 8 years of schooling, was employed as a chef, volunteered at the temple, paid taxes, and had savings valued at over $70,000 plus $11,000 in U.S. funds and a car.

[12] Under the "Decision and Rationale" the Officer decided that although the Applicant had been in Canada for over 14 years, his level of establishment was not unusual and therefore did not warrant favourable processing. The Officer also noted that the Applicant's family is in India, and that his considerable savings would assist him in resettling in India and continuing to provide for his family until he is able to find suitable employment. The Officer considered that the Applicant's chef skills may come in handy and otherwise he could manage his own land. Although the Officer acknowledged that the Applicant had a long sojourn in Canada, he had been under a removal order since 1997 and chose to remain in Canada despite various negative decisions. That factor alone did not warrant a positive decision.

[13] The Officer also considered the best interests of the children. The savings accumulated would cover the cost of the rest of their studies in India, therefore the Officer was not satisfied that the best interests of the children would not be met if the Applicant left Canada to apply in the normal way.

[14] The Officer was of the opinion that the fine qualities the Applicant's friends attested that he possessed would assist the Applicant in resettling alongside his loved ones in India. Based on all of the information, the Officer was not satisfied that the Applicant's case warranted favourable processing as he was not satisfied that the Applicant would suffer undue and undeserved or disproportionate hardship.

II. Issues

[15] The Applicant submits that the Officer's decision was unreasonable, in that:

(a) The Officer erred in law in assessing the Applicant's degree of establishment and integration in Canada;

(b) The Officer erred in law in assessing the hardship the Applicant would suffer if returned to India;

(c) The Officer reached his decision without the full record, in violation of the principals of natural justice.

III. Standard of Review

[16] The appropriate standard of review to apply to the findings of fact and assessment of evidence in an H&C decision is reasonableness. Judicial deference to the decision is appropriate where the decision demonstrates justification, transparency and intelligibility within the decision making process, and where the outcome falls within a range of possible, acceptable outcomes defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

[17] The Applicant also alleges that the decision is unreasonable in part because the reasons are inadequate. This is an issue of procedural fairness and is typically reviewable on a standard of correctness (*Adu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 565, 139 ACWS (3d) 164 at para 9). However, there is some caselaw that suggests that because the primary function of reasons is to ensure that an administrative decision is justified, transparent and intelligible, adequacy of reasons is in fact reviewable against a standard more similar to reasonableness (*Nicolas v Canada (Minister of Citizenship and Immigration)*, 2010 FC 452, 367 FTR 223 at para 11). Either way, the analytical framework remains the same.

IV. Argument and Analysis

A. *Did the Officer Err in Assessing the Applicant's Establishment and Integration?*

[18] The Applicant submits that that the Officer's reasons regarding the Applicant's establishment are deficient because: 1) the reasons are inadequate to support the conclusion that the Applicant's establishment was "not unusual" and 2) the Officer failed to consider the Applicant's personal circumstances and thus reached a conclusion without regard for the evidence.

[19] The Respondent submits that the reasons are adequate, in that they are clear, precise, intelligible and demonstrate that the Officer had a grasp of the issues raised by the Applicant. Moreover, the Officer did have regard to the Applicant's personal circumstances, and noted these in the reasons.

[20] The Officer did not dispute that the Applicant is established in Canada. As the Respondent submits, the Officer must consider whether an exemption from the IRPA is warranted by assessing hardship. Establishment is but one factor to be considered in assessing hardship, and establishment in and of itself is not a determinative factor in an H&C application (*Ahmed v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1303, 372 FTR 1 at para 32).

[21] In the present matter, the Officer considered it natural that some degree of establishment would occur over the course of a 14-year stay in the country. He concluded that the Applicant's degree of establishment was not unusual such that it warranted favourable processing. The

Applicant argues that the Officer does not adequately explain why his degree of establishment is not unusual.

[22] I agree with the Respondent. The Officer's reasons with respect to establishment and integration are clear and cogent. As the Respondent submits, a positive H&C decision is an exceptional measure and, moreover, it is discretionary in nature. Although the Applicant might be able to make a strong case for why he would make a good permanent resident, H&C applications are not alternative streams for immigration to Canada, and a positive decision is not guaranteed just because the Applicant feels he can check off the required boxes.

[23] As evidenced by the reasons, the Officer was clearly aware of the Applicant's submissions and utilized the suggested measures of establishment listed in the processing manual (proper considerations include whether the applicant has a history of stable employment, if there is a pattern of sound financial management, and if the applicant has integrated into the community). The Applicant argues that the Officer merely restates the facts, then states a conclusion with no explanation or analysis. I disagree. The Officer is, of course, under a duty to provide adequate reasons that allow the Applicant to understand the basis of the refusal, but he is not required point-by-point to construct an alternative argument that supports his conclusion. The Respondent cites, and I approve of Justice Roger Hughes' statement in *Rachewiski v Canada (Minister of Citizenship and Immigration)*, 2010 FC 244, 365 FTR 1 at para 17:

> [17] Frequently, the Court is taken microscopically through the reasons provided by an Officer in counsel's endeavour to demonstrate shortcomings, omissions and mistakes. There is no requirement that the reasons be of a quality attributable to the Supreme Court of Canada or that they detail every piece of evidence provided and every argument raised. They are to be an intelligible

> and transparent justification of the result sufficient to enable the reader to appreciate whether the decision was within the appropriate bounds of reasonableness.

[24] The reasons need to be read as a whole. While the Applicant may have established himself in Canada, the Officer did not merely state that his degree of establishment in Canada was insufficient. The Officer went on to discuss how elements of that establishment – significant savings, developed work skills – operated to mitigate any hardship that the Applicant would face in having to re-establish himself in India. The Officer also noted that the Applicant would be reunited with his family if he returned to India. While the Applicant might face hardship after removal, the Officer was not convinced that it would rise to the level of undue or disproportionate hardship. The reasons make this clear and are adequate.

[25] The Applicant contends that the Officer failed to take into account the Applicant's personal circumstances in rendering his decision. However, a review of the decision shows that the Officer listed the allegedly ignored circumstances, such as the Applicant's grade 8 education, suggesting that he did in fact consider them.

[26] Though the Applicant's degree of establishment might be commendable and the success he experienced as a new-comer to Canada more unlikely given his limited education, the Officer still has the discretion to determine how to weigh these considerations. In the present matter the Officer did not find that the Applicant's personal circumstances would cause an unreasonable impact on the Applicant should he have to apply for permanent residence from abroad, and thus the Officer concluded that he would not suffer undeserved or disproportionate hardship (*Lee v Canada*

(Minister of Citizenship and Immigration), 2005 FC 413, 45 Imm LR (3d) 129 at para 11). The Applicant has not shown that this was an unreasonable determination.

B. *Did the Officer Err in Assessing Hardship?*

[27] The Applicant submits that the Officer disregarded the evidence in finding that the Applicant would be able to establish himself in India and that the Applicant would not suffer undue hardship due to lack of viable employment opportunities. In the Applicant's submissions he explained that he would be unable to find gainful employment in India because his skills as an Indian chef would not be valued in urban areas and because there are not many restaurants in the rural area where he is from. Additionally, although the Applicant owns land, he is not skilled as a farmer and would be unable to make a living farming. As a result, the Applicant takes the position that the Officer must have ignored the evidence in order to state, "He has acquired chef skills that may come in handy otherwise he can manage his land."

[28] I am not convinced that the Officer ignored the Applicant's submissions. Once again, the Officer noted that the Applicant took the position that his chef skills would not be transferable. And as the Respondent points out, the Officer never suggests that the Applicant resort to farming, but merely states that the Applicant's savings coupled with the land income would allow him to continue to provide for his family while he looks for suitable employment. Counter to the Applicant's submissions, the Officer finds that the Applicant will not be totally cut-off from a stream of income. Although the Applicant disagrees with the Officer's assessment, he has not shown it to be unreasonable.

[29] The Applicant cannot argue on the one hand that he came to Canada and did well for himself despite many obstacles, but on the other, that those same attributes will be of no assistance in re-establishing himself in India. The Officer did not ignore the evidence, rather he rejected the Applicant's submissions, which the Applicant concedes the Officer is entitled to do.

[30] No one disputes that the Applicant will experience some degree of hardship should he be required to leave Canada, however, the Officer found that it would not be undeserved or disproportionate. The Applicant chose to establish himself in Canada knowing that his immigration status was uncertain and that he might be required to leave at some point. His stay in Canada is not a result of circumstances beyond his control. He cannot now argue before this Court that his long stay in Canada prevents him from being able to return to his country of citizenship because the skills he developed in Canada during his extended stay would be less lucrative at home (*Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356, 146 ACWS (3d) 1057 at para 23).

C. *Did the Officer Breach the Principals of Natural Justice?*

[31] The Applicant submits that the Officer made his decision solely on the basis of the updated September 2010 submissions because CIC misplaced the Applicant's initial submissions. The Applicant argues that this constitutes a breach of natural justice as the Officer made the decision without the benefit of the entire record.

[32] The Respondent concedes that the Applicant's initial application and submissions were not before the Officer for consideration, but argues that since the Applicant did not suffer prejudice as a result of this breach of procedural fairness, this does not constitute a reviewable error. The Respondent urges the Court to follow the holding in *Yassine v Canada (Minister of Employment and Immigration)* (FCA), 172 NR 308, 27 Imm LR (2d) 135, where, citing the Supreme Court decision in *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202, the Federal Court of Appeal created an exception to the general rule for cases where "the demerits of the claim are such that it would in any case be hopeless" and "the claim could only be rejected" (paragraphs 9-10). In such circumstances, returning the matter to the decision-maker because of a procedural irregularity would serve no purpose.

[33] The Applicant's case illustrates a significant failing in CIC's record keeping system. The initial submissions contained proof of the Applicant's role as president and shareholder in a restaurant business. By September 2010, however, this information was no longer up-to-date, as at the time the decision was made, the Applicant was no longer an owner of the restaurant. I take note of the Respondent's position that the Applicant's one-time part-ownership of a restaurant was perhaps not material to the decision, but I cannot say with any certainty that the Applicant's original submission would not have affected the outcome of this matter. I follow the reasoning of Justice Anne Mactavish in *Hussain v Canada (Minister of Citizenship and Immigration)*, 2004 FC 259, 40 Imm LR (3d) 177. She wrote at para 25:

> [25] The failure of the Board to consider the submissions of one party, albeit inadvertently, is a beach of procedural fairness. In all of the circumstances, I cannot say with any degree of certainty that the applicants' final submissions would not have had any effect on the outcome of the case.n" [sic] As a consequence, the decision of the Board should be set aside, and the matter remitted to a differently

> constituted panel for reconsideration on the basis of a complete record.

The Applicant's right to procedural fairness has been breached. Accordingly, I will allow this judicial review.

V. Conclusion

[34] No question was proposed for certification and none arises.

[35] In consideration of the above conclusions, this application for judicial review is allowed and the matter is remitted to a different officer for reconsideration.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter is to be remitted to a different officer for reconsideration.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-5818-10**
STYLE OF CAUSE:	**HARJIT SINGH GILL v. MCI**
PLACE OF HEARING:	**TORONTO**
DATE OF HEARING:	**JUNE 9, 2011**
REASONS FOR JUDGMENT AND JUDGMENT BY:	**NEAR J.**
DATED:	**JULY 11, 2011**

APPEARANCES:

Naseem Mithoowani	FOR THE APPLICANT
Nicole Padararu	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lorne Waldman Waldman & Associates Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General Canada	FOR THE RESPONDENT