Federal Court Cour fédérale

Date: 20130322

Docket: IMM-2613-12

Citation: 2013 FC 295

Ottawa, Ontario, March 22, 2013

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

TEJINDER SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Mr. Singh, is a 40 year old citizen of India who became a permanent resident of Canada on November 21, 1997. On May 8, 2010, a departure order was issued against him for having been found inadmissible pursuant to section 41(*b*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], as he failed to comply with the residency obligation for permanent residence set out in section 28 of the IRPA. Section 28 provides, subject to prescribed exceptions, that permanent residents are required to be physically present in Canada for 730 days in every five-year period in order to maintain their permanent resident status. He appealed this

decision to the Immigration Appeal Division [IAD], which dismissed his appeal on March 6, 2012. He now seeks to judicially review this decision.

Background

[2] The applicant came to Canada in 1991, when he was 19 years of age, and became a permanent resident in 1997. He is the father of four children, three of whom are born from a past relationship with Ms. Daljit Kaur. The applicant and Ms. Kaur married on December 11, 1994 and have two daughters and a son, who were all born in Canada and are respectively 18, 16 and 11 years of age.

[3] The applicant and his family moved to India in 2004. The same year, the applicant and Ms. Kaur separated and Ms. Kaur returned to Canada with their son. Their daughters stayed with their father in India as they were attending school there.

[4] Since 2003, the applicant has been going back and forth to India, allegedly to look after property owned by his deceased father. In 2007, the applicant and his daughters returned to Canada and started living with the applicant's sister and her family, his mother and another sister. The applicant alleges that his three children mostly stay with him and sometimes with their mother.

[5] Also in 2007, while in India, the applicant married Ms. Harpreet Kaur. They had a son born in India on October 28, 2008.

[6] In May 2010, the applicant was stopped at the border at Niagara Falls as he was trying to enter Canada. He was interviewed by two Canadian Border Services Agency officers and a departure order was issued against him as a result of prolonged periods of absence from Canada.

[7] The applicant first appealed the departure order under section 63 of the IRPA on May 12, 2010. On January 19, 2011 the applicant withdrew his appeal and on April 18, 2011 he applied for reconsideration on humanitarian and compassionate [H&C] grounds, alleging that there were sufficient H&C considerations, taking into account the best interests of children directly affected by the impugned order, to warrant granting special relief to the applicant.

[8] Since the issuance of the departure order, the applicant has been staying in Canada, with the exception of a two month long travel to India from February to April 2011.

Decision under Review

Credibility

[9] The IAD found that the applicant was not a credible witness and therefore it did not give his testimony much weight. For the most part, the applicant's testimony was found to be vague and lacking in details; he was evasive and not straightforward on a number of issues, such as his landing in Canada and the circumstances leading up to his being granted permanent residence, the circumstances of his marriage with his first wife, and the full date of birth of his daughters and youngest son. The IAD found this last information to be particularly important because the applicant was asking for special relief in view of the best interest of his children.

[10] Moreover, the IAD noted that during his interview with the port of entry officer, the applicant did not mention that he was remarried since 2007 and had another son in India, although he was questioned on several occasions about his marital status and the number of his children. He simply stated that he was divorced since 2003 and had three children in Canada.

[11] The IAD stated that the applicant did not provide any documentary evidence to corroborate his allegation that he financially supports his children in Canada and that his testimony was unclear on that subject. The applicant's testimony was also inconsistent and unclear when asked about his daughters' contact with his new wife, the duration of their stay in India, and with whom they currently live in Canada. During his interview the applicant stated that his first son lives with his ex-wife, but he testified at the hearing before the IAD that he lives mostly with him and only occasionally visits his mother.

[12] As regards the reason of the applicant's absence from Canada, the IAD noted that he did not provide any documentary evidence on his dealings with land and property issues in India other than general testimony and vague references to fraud and documentary fraud. He also failed to provide evidence of his business dealings in Canada, such as tax-related documentation from Revenue Canada.

Relevant H&C Factors

[13] Considering the relevant factors established in *Bufete Arce, Dorothy Chicay v Minister of Citizenship and Immigration* (IAD VA2-02515), [2003] IADD No 370, and *Yun Kuen Kok & Kwai Leung Kok v Minister of Citizenship and Immigration* (IAD VA2-02277), [2003] IADD No 514

(also cited in *Ambat v Canada (Minister of Citizenship and Immigration)*, 2011 FC 292 at para 27, [2011] FCJ No 377), the IAD determined that there were insufficient H&C considerations to overcome the applicant's breach of the residency requirement. In addition to the best interests of a child directly affected, the following non exhaustive factors are particularly relevant in appeals based on H&C grounds under section 63 of the IRPA:

(i) the extent of the non-compliance with the residency obligation;
(ii) the reasons for the departure and stay abroad;
(iii) the degree of establishment in Canada, initially and at the time of hearing;
(iv) family ties to Canada;
(v) whether attempts to return to Canada were made at the first opportunity;
(vi) hardship and dislocation to family members in Canada if the appellant is removed from or is refused admission to Canada;
(vii) hardship to the appellant if removed from or refused admissions to Canada; and,
(viii) whether there are other unique or special circumstances that merit special relief.

[14] The applicant stated that the reasons for his departure and overstay abroad were him having to deal with three things: his father's land and property, his daughters' education in India from 2004 to 2007, and his English teaching business in India since 2008. The IAD found that the applicant's business and new family in India did not justify his breach of the residency obligation especially that since 2007 he has not tried to sponsor his wife and son to come to Canada.

[15] The other reasons provided by the applicant were not supported by sufficient documentary evidence. The IAD added that the applicant's daughters were present at the hearing and could have been called to testify on their studies in India, which they were not. The IAD gave little weight to the letters from two public schools in India as they both post-dated the applicant's departure order

and since no report cards were submitted as corroborating evidence.

[16] The IAD found the applicant's evidence of establishment in Canada to be insufficient. It stated that while the applicant had ties to Canada due to family living here, as well as some business involvements in Canada (at least on paper and according to his vague testimony), this evidence is insufficient to prove establishment in Canada as one would expect from a permanent resident. The IAD notably underlined that the applicant had a two month stay in India since the issuance of his departure order; which showed that he had important ties in India.

[17] As regards the applicant's business activities in Canada, the IAD found that much of the evidence provided was dated after the departure order (including his certificate of qualification for heavy duty diesel equipment training and some business licenses); that there was very little evidence that the alleged businesses were operational (with one exception); that the applicant did not provide any tax-related documents or financial statements regarding those businesses (including TJ Auto Glass); and that the applicant's bank statements showing deposits, withdrawals and balances were not backed up by any other evidence.

[18] As regards the applicant's family ties, the IAD found this to be a neutral factor noting that other than his three children, the applicant has a mother, a sister, a brother-in-law and two nieces, with whom he lives. However, he also has a wife and a three and a half year old son in India.

[19] As regards the hardship factor, the IAD found that the applicant would face very little hardship if he had to leave Canada considering that he has a family and a functioning business in

India and that he has been spending considerable amounts of time there during the past few years. The IAD further stated that the fact that the applicant chose not to sponsor his wife and son to come to Canada is reflective of his intention to stay in India.

[20] As regards the applicant's family, the IAD found that the applicant's mother would not face undue hardship as a result of the departure of his son because she lives with her daughters in Canada and would be able to travel to India or to the United States to meet with her son or communicate with him by phone.

[21] Finally, the IAD noted that while the applicant's son is still relatively young, his daughters are much older and have spent long periods of time separated from their father. The IAD found that despite this fact, if the separation is unbearable for the applicant's daughters they can go and stay with their father in India, where they have already lived and attended school, or visit their father during their vacations. They will continue to be financially supported by their father and live with their grandmother, aunts and mother, as they did in the past when their father was in India.

[22] As regards the best interest of the children, the IAD stated that the applicant's children, whether the ones in Canada or the one in India, were going to face some kind of separation from their father but that this was generally due to decisions made by the applicant himself, in particular his decision to breach his residency obligation rather than sponsoring his current spouse and youngest son. Considering these facts, the IAD found that the hardship to the applicant's children and their best interest were neutral factors in the H&C assessment.

[23] The IAD concluded that the applicant failed to meet his burden of establishing that sufficient H&C considerations warranted special relief in these circumstances, and his appeal was accordingly dismissed.

<u>Issues and Standard of Review</u>

[24] The applicant raises the following issues in this application for judicial review:

1. Did the IAD err in law when considering the best interest of the applicant's children because it was not alert, alive and sensitive to their interests?

2. Did the IAD err in law in its assessment of the applicant's establishment in Canada and the hardship he would face if returned to India?

[25] The jurisprudence is abundant that such issues, including the IAD's credibility findings, call for reasonableness as the standard of review, as they pertain to issues of fact: *Wei v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1084 at paras 36-39, [2012] FCJ No 1173; *Tai v Canada (Minister of Citizenship and Immigration)*, 2011 FC 248 at para 48, [2011] FCJ No 289; *Ikhuiwu v Canada (Minister of Citizenship and Immigration)*, 2008 FC 35 at paras 15-16, [2008] FCJ No 35 [*Ikhuiwu*]; and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 58, [2009] 1 SCR 339 [*Khosa*].

[26] Applying the standard of reasonableness, the Court should not intervene unless it is demonstrated that the IAD came to a conclusion that is not transparent, justifiable and intelligible or within the range of acceptable outcomes based on the evidence before it (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190; *Khosa*, above, at para 59). It is therefore not

for this Court to substitute its own view of a preferable outcome, nor is it its function to reweigh the evidence (*Khosa*, above, at paras 59-61).

Analysis

[27] The applicant takes issue with the IAD's assessment of the best interest of his Canadian born children and of the evidence of his establishment in Canada. However, much of the applicant's argument is a challenge to the weight given to the evidence by the IAD, and its balancing of the relevant H&C factors. None of these arguments are sufficient to justify the Court's intervention. I find that the impugned decision is entirely supported by the evidence on record and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[28] The applicant cited Justice Campbell's decision in *Kolosovs v Canada (Minister of Citizenship and Immigration)*, 2008 FC 165, [2008] FCJ No 211 [*Kolosovs*], arguing that the IAD failed to consider the relevant factors in assessing the children's best interests, as enumerated in s. 5.12 of the Immigration Manual IP-5, namely (i) the age of the child; the level of dependency between the child and the H&C applicant; (ii) the degree of the child's establishment in Canada; (iii) the child's links to the country in relation to which the H&C decision is being considered; (iv) medical issues or special needs the child may have; (v) the impact to the child's education; and (vi) matters related to the child's gender. However, the applicant did not specify which of these factors was ignored or under-evaluated by the IAD.

[29] The applicant submits that the IAD misconstrued the evidence when it found that the applicant was unable to provide the full dates of his children's birth as he did in fact provide the correct days and months of his three children's birth dates at the hearing. The applicant particularly takes issue with the IAD's finding that this information is "very important" given the fact that the applicant is asking for special relief in view of the best interests of his children.

[30] As I review the transcripts of the hearing, the applicant did in fact indicate that his second daughter was born in 1996, while she was in fact born in 1997. Furthermore, the IAD's comment with respect to the importance of the slip in the applicant's testimony concerned his ability to remember his youngest son's birth date; which is also confirmed by the transcripts.

[31] The applicant argues that the IAD made contradictory findings of fact when it gave little weight to the letters from the children's school as proof of their schooling in India and, at the same time, found that the applicant's daughters can move to India to live with their father as they have lived there before. I do not find this assessment to be perverse, capricious or contradictory, as the applicant suggests.

[32] The applicant only highlights minor issues in the impugned decision. The IAD did not question the fact that the applicant's daughters were attending school in India. Secondly, the IAD determined that the applicant's decision to move to India was generally not sufficient to justify his overstay. The IAD extensively discussed the applicant's particular circumstances. The gist of the IAD's decision was that the applicant was unable to provide adequate justification for his failure to comply with his residency obligation, and not that the breach was a "dominating and determining

circumstance" (*Frankie Hak Wo Lau v Minister of Employment and Immigration*, [1984] 1 FC 434). In addition, the applicant's testimony was generally considered as not credible and trustworthy for reasons with which the applicant did not take issue in this application for judicial review.

[33] Regardless of the reasonableness of the two findings discussed above, nothing indicates to me that the IAD did not display the awareness and sensitivity called for in *Kolosovs*, above, at paras 9-12 or failed to assess the likely degree of hardship to children upon the removal of the applicant to India; it rather balanced that hardship against other relevant factors (*Hawthorne v Canada (Minister of Citizenship and Immigration)* (CA), 2002 FCA 475 at paras 4-6, [2003] 2 FC 555). In view of all of the circumstances of this case, it was clearly open to the IAD to find that the applicant's children would not be unduly affected by their father's departure as this was what they have experienced for several years.

[34] The applicant argues that a conclusion as to his lack of credibility should not be drawn from the absence of evidence, and that the fact that the documents regarding his employment and community involvement post-dated the issuance of the departure order should not be used to undermine the reliability of those documents. However, the date of the documents was only a factor that the IAD reasonably took into consideration in assessing the H&C factors. The lack of precision of the evidence, the absence of corroborative evidence with many respects, and the insufficient of special circumstances were other reasons provided in support of the conclusion that the applicant's ties and establishment in Canada were not sufficient to override his breach of the statutory requirement that is imposed on him as a permanent resident.

[35] In conclusion, the applicant failed to present to the Court any arguments other than taking issue with the IAD's assessment of part of the evidence before it, which I have determined to be reasonable in the circumstances (*Ikhuiwu*, above, at paras 18, 32-34). For this reason, the present application for judicial review should be dismissed. No question of general importance was proposed by counsel and none arises from this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The applicant's application for judicial review is hereby dismissed with no question of general importance for certification.

"Jocelyne Gagné"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2613-12
STYLE OF CAUSE:	TEJINDER SINGH v MCI
PLACE OF HEARING:	Toronto, Ontario
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