Date: 20080107

Docket: IMM-3465-06

Citation: 2008 FC 15

Ottawa, Ontario, January 7, 2008

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

INDER SINGH
GURSHARAN KAUR

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. OVERVIEW

[1] This is the judicial review of one of many refusals to grant the Applicant a visa based upon the fact that he is believed to be a people-smuggler. It is time to have this issue properly and fairly addressed and not in the mechanistic manner his visa applications appear to have been considered.

II. BACKGROUND

[2] The principal Applicant had first applied for a temporary resident's visa in August 1996 which was refused. All the subsequent visa refusals have been based on this 1996 refusal.

[3] The 1996 refusal was based on an interview with Mr. Singh wherein he claimed to have been duped into smuggling a technician into the Netherlands. The visa officer concluded that Mr. Singh was heavily involved in smuggling people into other countries.

[4] The 1996 visa refusal was not challenged. The Applicant then made visa applications in August and October 2005, both of which were refused on the basis of the facts in the 1996 visa refusal. In the second of the 2005 refusals, the Applicant had been interviewed and the visa officer was not satisfied with the explanations for trips to countries in Europe known for human smuggling. Neither of the 2005 visa refusals were challenged.

[5] In the 4th visa application process conducted in 2006, the subject of this judicial review, the visa officer simply relied on the admissions made in 1996. No interview was conducted.

III. ANALYSIS

[6] While the Court will show considerable deference to a visa officer's consideration of the facts, considerably less deference will be shown where the decision is based on an erroneous finding of fact made in a perverse or capricious manner. Where the decision involves the application of

specific facts under the *Immigration and Refugee Protection Act* (IRPA) or other issues of law, I adopt the reasoning in *Boni v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 68, and conclude that the appropriate standard of review is reasonableness *simpliciter*.

[7] There are at least three problems with this visa refusal; (1) the consideration of the Applicant's alleged human smuggling, (2) the failure to consider the fact that the Netherlands (the country where the alleged human smuggling occurred) has issued Mr. Singh a visa, and (3) the failure to consider all the circumstances including evidence of rehabilitation.

[8] With respect to the first matter, the allegation of human smuggling, s. 117 of IRPA makes human smuggling an offence in Canada if it is done or assisted in being done "knowingly". Mr Singh has always admitted the fact that smuggling occurred but has always denied that he was "knowingly" involved.

[9] Were Mr. Singh's grounds exclusively the denial he made in 1996, then it could be considered a collateral attack on the 1996 refusal – whatever the flaws may have been in that initial decision. However, the visa issued by the Netherlands at the very least required a consideration of whether an offence occurred in the Netherlands. Mr Singh's 2006 visa application was rejected because he was held to have been inadmissible under paragraph 36(1)(c) of IRPA:

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 :
…	…

(*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.

[10] With respect to the second matter, the Netherlands' visa, the visa issued on August 8, 2005 was contained in the Applicant's passport. While the Applicant had no right to an interview, an interview would have allowed him to deal with the matter. The officer's failure to address the significance of the visa was due to the officer exercising his discretion not to conduct an interview or to even inquire into its significance.

[11] With respect to the third matter, the officer never considered that even if the Applicant was liable for human smuggling, it was one incident ten years ago. There is no evidence of any subsequent offences anywhere. There is evidence of extensive travel without incidents, a record of stable employment, available funds and the existence of family in Canada.

[12] Section 36 of the IRPA, the provision under which the visa application was rejected, also contains exceptions to inadmissibility due to rehabilitation. Paragraph 36(3) provides:

36. (3) The following provisions govern subsections (1) and (2):	**36.** (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 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;

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 ministre de sa réadaptation ou qui appartient à une catégorie réglementaire de personnes présumées réadaptées;

(*d*) a determination of whether a permanent resident has committed an act described in paragraph (1)(*c*) must be based on a balance of probabilities;

d) la preuve du fait visé à l'alinéa (1)*c*) est, s'agissant du résident permanent, fondée sur la prépondérance des probabilités;

and

(*e*) inadmissibility under subsections (1) and (2) may not be based on an offence designated as a contravention under the *Contraventions Act* or an offence under the *Young Offenders Act*.

e) l'interdiction de territoire ne peut être fondée sur une infraction qualifiée de contravention en vertu de la *Loi sur les contraventions* ni sur une infraction à la *Loi sur les jeunes contrevenants*.

[13] Section 18(2)(c) of the *Immigration and Refugee Protection Regulations* deems certain persons to be rehabilitated:

18. (2) The following persons are members of the class of persons deemed to have been rehabilitated:

18. (2) Font partie de la catégorie des personnes présumées réadaptées les personnes suivantes :

…

…

(c) persons who have committed no more than one 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, if all of the following conditions apply, namely,

c) la personne qui a commis, à l'extérieur du Canada, au plus une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation si les conditions suivantes sont réunies :

(i) the offence is punishable in Canada by a maximum term of imprisonment of less than 10 years,

(i) l'infraction est punissable au Canada d'un emprisonnement maximal de moins de dix ans,

(ii) at least 10 years have elapsed since the

(ii) au moins dix ans se sont écoulés depuis le

day after the commission of the offence,

moment de la commission de l’infraction,

(iii) the person has not been convicted in Canada of an indictable offence under an Act of Parliament,

(iii) la personne n’a pas été déclarée coupable au Canada d’une infraction à une loi fédérale punissable par mise en accusation,

(iv) the person has not been convicted in Canada of any summary conviction offence within the last 10 years under an Act of Parliament or of more than one summary conviction offence before the last 10 years, other than an offence designated as a contravention under the Contraventions Act or an offence under the Youth Criminal Justice Act,

(iv) elle n’a pas été déclarée coupable au Canada d’une infraction à une loi fédérale punissable par procédure sommaire dans les dix dernières années ou de plus d’une telle infraction avant les dix dernières années, autre qu’une infraction qualifiée de contravention en vertu de la Loi sur les contraventions ou une infraction à la Loi sur le système de justice pénale pour les adolescents,

(v) the person has not within the last 10 years been convicted outside of Canada of an offence that, if committed in Canada, would constitute an offence under an Act of Parliament, other than an offence designated as a contravention under the Contraventions Act or

(v) elle n’a pas, dans les dix dernières années, été déclarée coupable, à l’extérieur du Canada, d’une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale, autre qu’une infraction qualifiée de contravention en vertu de la Loi sur les contraventions ou une

an offence under the Youth Criminal Justice Act,	infraction à la Loi sur le système de justice pénale pour les adolescents,
(vi) the person has not before the last 10 years been convicted outside Canada of more than one offence that, if committed in Canada, would constitute a summary conviction offence under an Act of Parliament, and	(vi) elle n'a pas, avant les dix dernières années, été déclarée coupable, à l'extérieur du Canada, de plus d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par procédure sommaire,
(vii) the person has not been convicted outside of Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament.	(vii) elle n'a pas été déclarée 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.

[14] The officer never turned his mind to these provisions. It was unreasonable to continue to rely solely on the 1996 visa refusal without considering the case in its totality. For these reasons, the decision will be quashed.

[15] The Applicant suggested that the Court should direct the Respondent to issue a visa or at least indicate what the result of a referral back should be.

[16] While there may be situations where justice demands such a direction, this is not one of them. The Applicant is entitled to have his visa application reviewed fully and fairly – to be able to address in a real manner the allegations (stated and implied). The Court would think, however, that an interview would be the starting point of a fair process in this case but will nevertheless leave that matter to the new officer assigned to reconsider the application.

[17] The Court would also consider that the Applicant's application should be assigned some priority reconsideration.

IV. CONCLUSION

[18] Therefore, this application for judicial review is granted, the visa refusal decision quashed and the matter remitted to another visa officer or superior for reconsideration in accordance with these reasons.

[19] There is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is granted, the visa refusal decision is quashed and the matter is to be remitted to another visa officer or superior for reconsideration in accordance with these reasons.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. Marshall E. Drukarsh	FOR THE APPLICANTS
Ms. Marina Stefanovic	FOR THE RESPONDENT

SOLICITORS OF RECORD:

GREEN AND SPIEGEL LLP Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANTS
MR. JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT