Date: 20081114

Docket: IMM-5481-07

Citation: 2008 FC 1263

Ottawa, Ontario, this 14th day of November 2008

Present: The Honourable Mr. Justice Pinard

BETWEEN:

SINGH, Jarnail

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for the judicial review of a pre-removal risk assessment ("PRRA") officer's decision dated November 29, 2007, refusing the applicant's request for an exemption from the requirement to obtain a permanent resident visa from outside Canada, based on humanitarian and compassionate ("H&C") grounds, filed under subsection 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act").

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[2] The applicant, Jarnail Singh, is a citizen of India, from the state of Punjab. He is a practicing member of the Sikh religion.

[3] The applicant arrived in Canada from India on October 3, 2003 and sought refugee protection on October 6, 2003. A negative determination came down from the Immigration and Refugee Board on May 18, 2004 based on the question of the applicant's identity, not on any consideration of the merits. Leave for judicial review was refused on September 15, 2004.

[4] On January 31, 2005 Mr. Singh applied for permanent residence on humanitarian or compassionate grounds, pursuant to subsection 25(1) of the Act. In the affidavit accompanying his application for refugee status, he described three incidents of arbitrary detention by Indian police:

- August 15, 1985: Following the assassination of Hindu worshippers by unidentified Sikhs near the Sikh temple in his village, the applicant (who was present at the temple at the time of the killing) was falsely accused of providing shelter to the killers. After four days of detention and torture, he was released and told to locate his cousin, a suspected militant, within a month. The applicant later learned that the station house officer had accepted a heavy bribe from the applicant's family for his release.

- September 2, 1995: Following the assassination of a Chief Minister of Punjab, the applicant and his uncle were detained for three days and tortured by police, who interrogated them about the applicant's cousin. Both men were hospitalized thereafter; his uncle died of his injuries.

- September 15, 2003: The applicant discovered two revolvers on a portion of land he farmed that belonged to his cousin. He reported the matter to the police, and again was accused of complicity with his cousin. He was interrogated and tortured for five days, then released because of bribes paid to the station house officer. His photograph and fingerprints were taken, and he was threatened with death if he did not locate the hidden ammunition, his cousin and his associates, within the next thirty days. It was after this last episode that the applicant decided to flee India.

[5] The applicant reports that his wife and three children continue to suffer threats from the police, and have been forced to flee their home. The applicant fears that, should he return to India, he will be interrogated for his past activities and regarding his stay in Canada.

[6] Since his arrival in Canada, the applicant has held a valid work permit. He has been continuously employed since September 2004, first as a taxi driver, and then, since September 2005, as a self-employed truck driver. He is a member of the Sikh community in Montréal, and does volunteer work at his temple.

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[7] In reasons dated November 29, 2007, the PRRA officer who considered Mr. Singh's application concluded that he would not face unusual or disproportionate hardship were he required to apply for permanent residency from India.

[8] The issues raised in the present case are the following:

1. Did the officer err in failing to consider evidence within the record that materially supported the applicant's claim?
2. Did the officer err by applying the wrong test in his analysis of the applicant's H&C claim?

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1. Did the officer err in failing to consider evidence within the record that materially supported the applicant's claim?

[9] It is well-established that the decision of an immigration officer made pursuant to subsection 25(1) of the Act is reviewable on a standard of reasonableness (see *Baker v. Canada (Minister of Citizenship and Immigration*, [1999] 2 S.C.R. 817, and *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190).

[10] I agree with the applicant that the officer was selective in his consideration of the documentary evidence before him. For instance, the officer relied on various sources to support his conclusion that general conditions for Sikhs in India have stabilized since 1995. While acknowledging the fact that Amnesty International "found that torture and violence in police custody continued to be regularly reported in Punjab," he also accepted that this was due to difficult working conditions faced by police officers. No mention is made in his reasons of the U.S. State Department's observations in its country report that, as late as 2006, "Government forces continued arbitrary and unlawful deprivation of life of those in their custody." According to the U.S. Department of State's *Country Reports on Human Rights Practices – 2006: India* (March 6, 2007), in that year:

> . . . Major problems included extrajudicial killings of persons in custody, disappearances, torture and rape by police and security forces. The lack of accountability permeated the government and security forces, creating an atmosphere in which human rights violations often went unpunished.

[11] The report later adds, at page 7, "The law prohibits torture and generally did not allow for confessions extracted by force to be admissible in court; however, authorities often used torture during interrogations to extort money and as summary punishment."

[12] On the question of relocation in India to avoid persecution and unusual and undeserved or disproportionate hardship, the officer nowhere mentions the following evidence from the *UK Country of Origin Information Report – India*, "Internal Relocation for Sikhs", at paragraph 19.103, that was before him, which contradicts his conclusions:

> The US Citizenship and Immigration Services, in a response to a query (updated on 22 September 2003), noted that:
>
> "Observers generally agree that Punjab police will try to catch a wanted subject no matter where he has relocated in India. Several say, however, that the list of wanted militants has been winnowed [whittled] down to 'high-profile' individuals. By contrast, other Punjab experts have said in recent years that any Sikh who has been implicated in political militancy would be at risk anywhere in India. Beyond this dispute over who is actually at risk, there is little doubt that Punjab police will pursue a wanted suspect […]."
>
> (My emphasis.)

[13] I agree with the applicant that *Thang v. The Solicitor General of Canada*, [2004] F.C.J. No. 559 (QL), 2004 FC 457 (citing *Cepeda-Gutierrez v. Minister of Citizenship and Immigration*, [1998] F.C.J. No. 1425 (QL)) states the applicable principle in this case: "the more central a document is to the issue to be decided, the greater the obligation on the decision-maker to deal with it specifically." In *Cesar v. Minister of Citizenship and Immigration*, [2004] F.C.J. No. 642 (QL), 2004 FC 536, Justice Mosley adds at paragraph 23: "where there is probative evidence contradictory to the Board's own findings on a relevant and important issue to the claim, and this is

not mentioned by the Board, an apprehension is raised that the Board failed to consider it." See also *Kaur v. Minister of Citizenship and Immigration*, [2005] F.C.J. No. 1858 (QL), 2005 FC 1491. I believe that this principle applies equally to PRRA officers as to other decision-makers.

[14] There is some ambiguity in the jurisprudence of this Court as to whether *Cepeda-Gutierrez* requires that evidence not addressed by a decision-maker be "specific and personal to the applicant", as opposed to merely "general documentary evidence" (see, for instance, *Nation-Eaton v. Minister of Citizenship and Immigration*, [2008] F.C.J. No. 370 (QL), 2008 FC 294, at paragraph 20). Nevertheless, even if one were to insist on finding reviewable error only where there is a failure to consider evidence "specific and personal to the applicant," such error is present here because nowhere in his reasons does the officer consider the evidence in the record regarding the link between Mr. Singh's mistreatment and his alleged relationship with his cousin; instead, he focuses on the applicant's religion as the sole basis for his misfortune.

[15] Accordingly, I find that the officer's failure to specifically address probative evidence that materially contradicted his own findings constitutes an error rising to a level of unreasonableness that justifies this Court's intervention.

2. Did the officer err by applying the wrong test in his analysis of the applicant's H&C claim?

[16] This second question is one of law and bears on the proper test to apply in an application under subsection 25(1) of the Act. It therefore attracts review on a standard of correctness. In

Ramirez v. Minister of Citizenship and Immigration, [2006] F.C.J. No. 1763 (QL), 2006 FC 1404, 304 F.T.R. 136, Justice de Montigny, at paragraph 42, writes:

> [42] It is beyond dispute that the concept of "hardship" in an H&C application and the "risk" contemplated in a PRRA are not equivalent and must be assessed according to a different standard. As explained by Chief Justice Allan Lutfy in *Pinter v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 366, 2005 FC 296:
>
> > [3] In an application for humanitarian and compassionate consideration under section 25 of the *Immigration and Refugee Protection Act* (IRPA), the applicant's burden is to satisfy the decision-maker that there would be unusual and undeserved or disproportionate hardship to obtain a permanent resident visa from outside Canada.
> >
> > [4] In a pre-removal risk assessment under sections 97, 112 and 113 of the IRPA, protection may be afforded to a person who, upon removal from Canada to their country of nationality, would be subject to a risk to their life or to a risk of cruel and unusual treatment.
> >
> > [5] In my view, it was an error in law for the immigration officer to have concluded that she was not required to deal with risk factors in her assessment of the humanitarian and compassionate application. She should not have closed her mind to risk factors even though a valid negative pre-removal risk assessment may have been made. <u>There may well be risk considerations which are relevant to an application for permanent residence from within Canada which fall well below the higher threshold of risk to life or cruel and unusual punishment.</u> [Emphasis added]

[17] This Court has in several cases emphasized the importance of assessing an H&C claim through the lens of "hardship", as distinct from that of "risk" applied in relation to a PRRA (see *Uddin v. Minister of Citizenship and Immigration*, [2003] F.C.J. No. 460 (QL), 2003 FCT 316;

Serda v. Minister of Citizenship and Immigration, [2006] F.C.J. No. 425 (QL), 2006 FC 356, and *Sha'er v. Minister of Citizenship and Immigration*, [2007] F.C.J. No. 297 (QL), 2007 FC 231).

[18] In this case, the officer concludes his analysis of risk factors by stating:

> Based on the available documentation, the applicant could re-establish himself elsewhere in India thereby avoiding unusual and undeserved or disproportionate hardship. As a result, I am inclined to assign only limited weight to this factor for granting an exemption on humanitarian and compassionate grounds.
>
> (My emphasis.)

[19] However, it is not enough to merely employ the language found in Citizenship and Immigration Canada's operational manual regarding hardship ("IP 5 - Immigration Applications in Canada Made on Humanitarian or Compassionate Grounds"); the analysis must reflect that this was the test actually applied (see *Latifi v. Minister of Citizenship and Immigration*, [2006] F.C.J. No. 1739 (QL), 2006 FC 1389, at paragraphs 28 to 36). Here, the officer summarizes his findings regarding risk as follows:

> Individually, the pieces of evidence submitted by the applicant do not conclusively establish that he was the victim of torture at the hands of Indian authorities. However, taken as a whole, these submissions do provide limited support for the applicant's allegations about serious mistreatment by the police. Nevertheless, the following documentation points towards an improved situation in India, particularly for Sikhs, which indicates that the applicant could relocate to avoid persecution.
>
> (My emphasis.)

[20] This passage shows that the focus of the officer's analysis was the personalized risk of torture or persecution that the applicant faced in India at the hands of the police. The ensuing

passages turn to the prospect of further persecution or torture based on his religion, emphasizing the relative improvement in conditions for Sikhs in India, and consequently the unlikelihood that the applicant would face further mistreatment. There is no consideration given to the hardship that would be faced by the applicant or his family in view of other factors, such as his family's continued harassment in India by the police, and the applicant's fearfulness due to his apparent notoriety with the police based on his association with his cousin.

[21] I therefore find that the officer erred in law by applying the incorrect test to the H&C analysis in his determination of hardship.

* * * * * * * *

[22] For all the above reasons, the application for judicial review is allowed, the PRRA officer's decision dated November 29, 2007 is set aside and the matter is sent back to a different PRRA officer for reconsideration in accordance with the above reasons.

JUDGMENT

The application for judicial review is allowed. The decision of a pre-removal risk assessment ("PRRA") officer dated November 29, 2007, refusing the applicant's request for an exemption from the requirement to obtain a permanent resident visa from outside Canada, is set aside and the matter is sent back to a different PRRA officer for reconsideration.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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