Date: 20090507

Docket: IMM-4362-08

Citation: 2009 FC 461

Ottawa, Ontario, May 7, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

YOUSUF ALI GILLANI,
NOOR JEHAN GILLANI YOUSUF HAJIM

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Due to the specific fact pattern, particular to this case, it is probable and even likely that the Applicants will face undue hardship in Pakistan due to their religious background, as duly recognized Ismailis, a minority of a minority. The lessons of the past, and even more recently, due to the tragedies perpetrated in regard to the Tutsis in Rwanda and the Isaac tribe in Somalia, as well as the continued unfolding situation in Darfur, Sudan, are indicators that action is all too-often taken after the fact when it is too late for so many. As a general principle, are cases in the Courts, as they unfold early on, not to serve as indicators as to protective action which can be taken before it is too late?

II. Introduction

[2] The Applicants, citizens of Pakistan, have filed an application for judicial review challenging a decision rendered, on July 30, 2008, by Citizenship and Immigration Canada, denying the Applicants' to file an application for permanent residence from within Canada on humanitarian and compassionate considerations (H&C), pursuant to section 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

III. Preliminary remarks

[3] The Applicants request that the style of cause be amended to remove the name of Pervaiz Ali Yousuf as one of the Applicants. In fact, the Immigration Officer refused Mr. Pervaiz Ali Yousuf's application for permanent residence from within Canada based on H&C grounds because he was otherwise accepted, independently of his parents.

[4] Consequently references to the "Applicants" relate to Yousuf Ali Gillani and his wife Noor Jehan Gillani Yousuf Hajim.

IV. Role of the Immigration Officer

[5] As noted by the Immigration Officer, at page 7 of the Applicant's Record, in an application filed pursuant to section 25 of the IPRA, the Immigration Officer must assess if the Applicant would face unusual, undeserved or disproportionate hardship if he were to file his application for permanent residence from outside Canada in the usual manner provided at section 11 of the IRPA

(*Kharrat v. Canada (Minister of Citizenship and Immigration*, 2007 FC 842, 160 A.C.W.S. (3d) 536).

V. Standard of Review

[6] At paragraph 7 of their Memorandum of Argument, the Applicants cite *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, and indicate the applicable standard of review is that of reasonableness *simpliciter*.

[7] In March 2008, the Supreme Court of Canada held, in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 180, at paragraph 45, that there should now be two standards of review, namely correctness and reasonableness.

VI. Issue

[8] Did the deciding officer breach the principles of fairness and draw erroneous conclusions without regard to the evidence provided in support of the Applicants' application for permanent residence from within Canada based on H&C grounds?

VII. Background

[9] In their H&C application, the Applicants submit that they will face risks to their lives and safety due to religious persecution as a minority group if required to return to Pakistan. They also fear reprisal for having lived outside of the country since 1989 given that they would be perceived

as being wealthy and thus targeted. They will be unable to obtain protection from the authorities in Pakistan for these risks.

VIII. Analysis

[10] At page 7 of the tribunal's record, the Immigration Officer recognizes the fears and allegations of risk put forward by the Applicants and discounts them; however, in the analysis of the situation in Pakistan that follows, on page 8 of the tribunal's record, the Immigration Officer makes the following statements confirming the risks to the Applicants:

> … I acknowledge that problems exist in Pakistan, killings occur, and acts of violence happen; although difficult to achieve, documentary evidence indicates that the government has taken the initiative to recognize the concerns and rights of its citizens…
>
> … The Constitution states, subject to law, public order and morality, every citizen shall have the right to profess, practice, and propagate his religion; however, in practice the Government imposes limits on freedom of religion.
>
> The Government took some steps to improve its treatment of religion minorities during the period covered by this report, but serious problems remained…
>
> …
>
> While the political situation in Pakistan continues to materialize, and incidents of violence continue to occur, the circumstances, particularly as they apply to these applicants, have not fundamentally changed…

[11] In these statements, the Immigration Officer confirms that there are serious problems in Pakistan in regard to the treatment of minority religious groups and the officer concludes that this does not constitute hardship for the Applicants, members of the Shia Muslim minority. It must be recalled, however, that the record clearly shows that the Applicants are Ismaili, who are separate and distinct even from the Shia Muslim minority. They are followers of the Agha Khan and are

active in the Ismaili Community in Canada. This Community's work is documented for its humanitarian outreach activities. The objective documentary evidence, in addition to the personal documents of the Applicants specify their volunteer Ismaili Community work in Canada, which is included in the tribunal record. In addition, the index on page 107, clearly points out items 91 to 101, specifying threats to, and the treatment of Ismailis in Pakistan.

[12] The Immigration Officer then concludes that state protection is available to the Applicants in the event that they are targeted; however, this statement suggests that the Immigration Officer is applying the threshold used in the case of a refugee claim, and not the unusual, undeserved or disproportionate hardship threshold. If the Applicants require protection from the state, it is because they will have been targeted and thus will have suffered a significant level of hardship.

[13] The Immigration Officer fails to recognize that state protection must be effective and not simply lie in the legislation and efforts of a government to protect its citizens (*Lopez v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1341, 168 A.C.W.S. (3d) 370 at paras. 18-20).

[14] At page 9 of the tribunal's record, in the section entitled "Spousal, Family or Personal Ties that would Create Hardship if Severed", the Immigration Officer discussed family relations in Canada and concludes that there is no evidence that the Applicants' children are in Canada and of any ties to the other family members in this country.

[15] The forms submitted by the Applicants, relied upon by the Immigration Officer, declare that both the Applicants' son and daughter are living in Canada with or near the Applicants' family. In addition, the Immigration Officer recognizes that both children are now permanent residents of Canada. In fact, the Applicants' son, Pervaiz Ali Yousuf, was initially included in the H&C application, and was refused by the Immigration Officer since he recently became a resident through another program. Thus, it is unreasonable for the Immigration Officer to assume that the Applicants' children are not living in Canada.

[16] Mrs. Gillani refers to her husband's form about the answer in the same section, confirming that neither have any ties to Pakistan and nobody to return to in their country.

[17] The Immigration Officer concludes that there is insufficient evidence indicating the level of establishment of the Applicants and focuses primarily on the Applicants' employment when evaluating the degree of establishment in Canada.

[18] The Immigration Officer draws a negative inference because the principal Applicant allegedly did not indicate in what capacity he was self-employed and that he provided no details of this business. This factual finding is erroneous.

[19] On page 17 of the tribunal's record, at section 3.H of the principal Applicant's supplementary information form regarding current and future financial support, the Applicant declares the following:

> My son & wife are working, and I am trying to establish myself by starting my own business. I have already imported artificial flowers from Hong Kong, in partnership under business name Dollar Warehouse.

[20] At pages 29 and 30 of the record, the Applicant provides a certificate confirming the imports from China as well as a receipt for the imports under the name Dollar Warehouse. The principal Applicant also indicates, “own business” as his intended occupation.

[21] The Immigration Officer makes similar erroneous findings about Mrs. Gillani, stating that she is employed as a cashier at Café on the Go and that she is self-employed. Mrs. Gillani indicates that her intended occupation is to be “self-employed” and, consequently, she provides no information about this future, intended employment.

[22] The Immigration Officer erred in drawing a negative inference from an alleged lack of information regarding the Applicants’ employment since the information was provided and demonstrates the Applicants’ establishment.

[23] Finally, the Immigration Officer draws a completely speculative conclusion regarding the feasibility of the Applicant’s return to Pakistan.

[24] The Immigration Officer states that the Applicants have gained transferable employment skills that will help them resettle in Pakistan; however, the Immigration Officer had previously alleged that the Applicants provided little information about their employment in Canada thus making it difficult to determine what skills the Applicants did acquire.

IX. Conclusion

[25] For the all of the above reasons, the application for judicial review is allowed and the matter is returned for a *de novo* examination by a different Immigration Officer.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be allowed and the matter be returned for a *de novo* examination by a different Immigration Officer.

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"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4362-08
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