Federal Court Cour fédérale

Date: 20121016

Dockets: IMM-1745-12
IMM-9265-11

Citation: 2012 FC 1203

Ottawa, Ontario, October 16, 2012

PRESENT: The Honourable Mr. Justice Zinn

Docket: IMM-1745-12

BETWEEN:

SIMRANJEET WALIA, SARIKA SHARMA

Applicants

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Docket: IMM-9265-11

AND BETWEEN:

SIMRANJEET WALIA, SARIKA SHARMA

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] For the reasons that follow, both of these related applications for judicial review are allowed.

Background

[2] Simranjeet Walia and Sarika Sharma are married citizens of India. Mr. Walia is Sikh; Mrs. Sharma, Hindu. They have two Canadian-born children, ages 5 and 2.

[3] Mr. Walia arrived in Canada in September 2001 on a study permit. He received extensions of status until September 2006. In March 2006, Mr. Walia was found to have misrepresented his employment history on a permanent residence application. As a result, he was determined to be inadmissible for two years under s. 40(2)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. He was issued a voluntary departure notice advising him to leave Canada by May 31, 2007. Despite his inadmissibility, Mr. Walia continued to apply for status. He was ultimately granted until February 14, 2008, to leave Canada but he did not do so.

[4] Mrs. Sharma arrived in Canada in April 2003. She received extensions of her status until September 2007, and has remained in Canada without status since that time. In May 2008, an inadmissibility report, as provided for in section 44 of the Act, was prepared against Mrs. Sharma.

[5] The applicants made a refugee claim in December 2008. They claimed that because of their religious differences they will become the victims of honour killings by Mr. Walia's family if they return to India. The refugee claim was rejected in November 2010 based on findings of a lack of a well-founded fear of persecution, the availability of state protection, and the availability of three internal flight alternatives in India.

[6] The applicants made an application for permanent residence within Canada on humanitarian and compassionate (H&C) grounds on March 12, 2009. By decision of February 14, 2012, it was not approved. Application IMM-1745-12 is their application for judicial review of that decision.

[7] The applicants made an application for a Pre-Removal Risk Assessment (PRRA) in May 2011. By decision of November 16, 2011, it was rejected. Application IMM-9265-11 is their application for judicial review of that decision.

Lack of Clean Hands

[8] The respondent submits that both applications ought to be dismissed because the applicants have not come to the Court with clean hands. Attention was drawn to the following facts:

1. Mr. Walia provided fraudulent documents in his skilled worker application;
2. Mr. Walia continued to apply for status despite his inadmissibility resulting from the above-noted misrepresentation;

3. Mr. Walia agreed to leave Canada, and was granted additional time to purchase his own ticket but he did not do so and he did not leave;

4. Mr. Walia, instead of leaving, filed a refugee claim approximately seven years after initially coming to Canada; and

5. Mrs. Sharma "submitted an application for a study permit to attend Mohawk College on or about October 10, 2007, but she failed to actually register or even respond to the school's offer of admission.

[9] The applicants say that the issue of clean hands was adjudicated upon by the stay motion judge who noted their conduct but nonetheless stated that he was not prepared to dismiss the motions on that basis. They submit that the respondent is therefore barred from relitigating this issue. Alternatively, they submit that Mr. Walia has already paid the price for his misrepresentation by being barred from applying for status for two years. They further submit that it is inconsistent for the respondent to take money for the H&C application from their hands and then come before this Court and argue that those same hands are unclean.

[10] In *Poveda Mayorga v Canada (Minister of Citizenship & Immigration)*, 2010 FC 1180, at para 18, this Court considered the jurisprudence relating to cleans hands:

> In *Thanabalasingham v Canada (Minister of Citizenship & Immigration)*, 2006 FCA 14 (F.C.A.), at para. 9, the Federal Court of Appeal stated that "if satisfied that an applicant has lied, or is otherwise guilty of misconduct, a reviewing court may dismiss the application without proceeding to determine the merits or, even though having found reviewable error, decline to grant relief." The Court added, (at para. 10) that the factors to be taken into account in deciding whether to dismiss an application in this manner include:

> ...the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question, the need to deter others from similar conduct, the nature of the alleged administrative unlawfulness and the apparent strength of the case.

[11] I agree with the motion judge that "some of the conduct of [Mr. Walia] should not be condoned;" however, like the motion judge I am not prepared to dismiss these applications for that reason. The degree to which their misconduct "undermines" the present proceeding is not of such a magnitude that the court is prepared to refuse to consider their applications, especially given, as I indicate below, that both decisions under review are flawed.

The H&C Decision

[12] The applicants submit that the officer was not "alert, alive, and sensitive" to the interests of their children and reference the following passage from the H&C decision in support of this submission: "The children's physical welfare will be addressed together with that of their parents under the Risk section below."

[13] The applicants say that it was an error to mix the children's assessment with the parents', and that the physical welfare of the children should have been addressed and assessed in the context of their best interests and not part of the overall risk assessment. I agree.

[14] The officer's decision to conduct a joint analysis caused the officer to not fully appreciate the children's interests and their risks. The children are Canadian citizens who, given their ages and family circumstances, have no option but to remain with their parents. They are not, as the

officer suggests in the following passage, merely immigrants to India, whose risk and interest is the same as all others:

> The applicants also fear for their physical welfare, and that of their children, as a result of the "various armed militant groups targeting civilians throughout the country." I have read the DFAIT Travel Advisory and Human Rights Watch's World Report. I am cognizant that India does not enjoy the same level of law and order as Canada, and the applicants will have concerns regarding their personal security. I recognize that the applicants naturally prefer to live in Canada with their family as living in an environment of terrorist threats would be a greater hardship. However the adverse country conditions in India are faced by the general population, including prospective immigrants; the impact does not appear to be greater for the applicants' family [emphasis added].

[15] The question the officer was required to address was not whether the risk to these children would be greater, lesser, or equal than the risk others face; rather, he was required to address where their best interests lay. It is clear from the documentary evidence that they face a significant risk to life and health in India and this should have been given significant weight when considering their parents' H&C application. It was not. As a result, the decision reached is unreasonable.

The PRRA Decision

[16] The applicants submit that the officer erred in failing to apply the correct legal test which is whether there would be more than a mere possibility of persecution. They point to the officer's use of the following phrases: "[T]he applicants have submitted insufficient objective evidence to corroborate that this fate would befall the female applicant upon her return to India" and "the evidence provided does not corroborate that they would be personally targeted [emphasis added]."

[17] The respondent highlights that the officer, in the concluding paragraph, used the correct test: "In conclusion, having considered the evidence in its totality, I find that the applicants have provided insufficient new evidence to satisfy me that there is more than a mere possibility that they will be persecuted in India."

[18] I agree with the submission of the respondent that administrative reasons are not to be read microscopically for their use of applicable legal tests and terminology, but rather as a whole. However, the only evidence to be found in these reasons that reflects that the proper test was employed is the boilerplate statement above. When one examines the reasons given by the officer that preceded that statement, one can only conclude that the wrong test was used. Accordingly, the result is unreasonable and the application must be returned to be assessed properly.

[19] The respondent submits that even if this error occurred, there was a finding in the unchallenged refugee determination that the applicants had failed to rebut the presumption of state protection and this was not challenged.

[20] All the officer says in this regard is as follows: "The applicants have provided insufficient evidence to demonstrate a significant change in country conditions or state protection since the decision of the IRB that would affect their PRRA application." The applicants submit that the 2010 US DOS Report published after the IRB hearing and considered by the officer but

not submitted by the applicants is new evidence and they say that it contradicts the IRB finding on state protection.

[21] It is arguably new evidence and as such was deserving of consideration. A mere statement that there is "insufficient evidence to demonstrate a significant change in country conditions or state protection" without saying why this report does not change anything makes the decision less than transparent.

Conclusion

[22] Both decisions must be quashed. Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. These applications are allowed;

2. The decision made February 14, 2012, is set aside and the applicants' application for permanent residence within Canada on humanitarian and compassionate grounds shall be remitted to a different officer for decision;

3. The decision made November 16, 2011, is set aside and the applicants' Pre-Removal Risk Assessment application shall be remitted to a different officer for decision; and

4. No question is certified in either application.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-1745-12**
STYLE OF CAUSE:	SIMRANJEET WALIA ET AL v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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STYLE OF CAUSE:	SIMRANJEET WALIA ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 6, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	ZINN J.
DATED:	October 16, 2012

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