

Federal Court



Cour fédérale

Date: 20170831

Docket: IMM-3759-16

Citation: 2017 FC 792

Ottawa, Ontario, August 31, 2017

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

HARJEET KAUR GILL

Applicant

and

**THE MINISTER OF CITIZENSHIP &
IMMIGRATION CANADA**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Harjeet Kaur Gill [Mrs. Gill], seeks judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA] of the decision of Senior Immigration Officer P. Campbell [the Officer], refusing her application for permanent residence on humanitarian and compassionate grounds [H&C Application].

[2] Mrs. Gill is a national of India. Before coming to Canada, she lived in Gill, a small village in India. Mrs. Gill was previously married and had two children, but her husband died in 1998. Mrs. Gill and her two sons inherited income-producing farm property from her husband, after which Mrs. Gill's sons moved away — one to Australia and the other to New Zealand.

[3] In 2013, Mrs. Gill's younger son moved back from New Zealand. According to Mrs. Gill, the younger son had problems with drinking and gambling, and lost the money from his inherited land (and potentially the land itself) gambling. He became increasingly demanding of Mrs. Gill that she give him money or sell the land to him so he would have an income. Mrs. Gill refused as the land was her only source of income. The son then began to harass Mrs. Gill, beating her on several occasions and leaving bruises on her body and face.

[4] In August 2015, a neighbour overheard the son beating Mrs. Gill. He tried to get the son to stop. The neighbour took photos of the bruises on Mrs. Gill's face in case she wanted to report the incident to the police. She did not wish to report it as she feared the police would tell her son and he had threatened that he would kill her if she either went to the police or sought medical attention. She was also concerned that, living in a small village, she might be shunned if she reported her son to the police as family matters are to be kept private.

[5] Mrs. Gill's niece, who was unaware of the son's behaviour, invited Mrs. Gill for a visit. The niece lives in Canada with her husband and children, along with her mother, Mrs. Gill's sister. Mrs. Gill obtained a visitor visa and arrived in Canada on October 15, 2015. While she was staying with her niece, Mrs. Gill divulged her son's behaviour to the family. The family contacted their lawyer for advice and Mrs. Gill filed the H&C Application that is the subject of this review.

[6] For the reasons that follow, I find that the Officer's decision is not reasonable. The Officer drew conclusions that were not justified given the evidence. The Officer also failed to sufficiently explain critical statements in the reasons with the result that the reasoning process leading to the outcome was neither intelligible nor transparent.

II. The Decision under Review

[7] The Officer rejected the H&C Application on August 25, 2016. The Officer found that Mrs. Gill had been in Canada for a very short period of time and had minimal establishment.

[8] Regarding Mrs. Gill's allegation of abuse by her son, the Officer found that Mrs. Gill did not seek refugee protection on her arrival in Canada, or at any point thereafter, despite the assistance of her family and legal counsel. The Officer found someone fleeing abuse and fearing for their life would seek refugee protection within a reasonable time frame. Nonetheless, the Officer continued to examine the claim of abuse.

[9] The Officer found that there was insufficient evidence of abuse. There were no police or witness statements related to the incident. The statement made by the neighbour included no date for the incident and no explanation as to why his letter was not given to the police in India.

[10] The Officer noted that, while Mrs. Gill was able to go to the police station to obtain a good character letter, she did not report the abuse to the police. The Officer found that obtaining the good character letter showed that Mrs. Gill had the wherewithal to make a complaint to police. Noting at some length the US Department of State report, the Officer found that there are avenues of redress for domestic abuse in India, and Mrs. Gill could have availed herself of them.

[11] The Officer found that Mrs. Gill likely had friends, acquaintances, and social networks in India and that she would be returning to a place with a familiar language, culture, and familial network that would allow for reintegration. The Officer found that Mrs. Gill's brother lives in India and she could re-establish that relationship. There was insufficient evidence that the brother could not provide financial support and re-integration assistance. The Officer concluded that Mrs. Gill's return to India would not represent a hardship.

[12] Weighing all the factors, the Officer found that H&C relief was not warranted. While Mrs. Gill may have an understandable wish to remain in Canada, "not wishing to return to India is not sufficient reason to allow the applicant to become a permanent resident of Canada."

III. Issue and Standard of Review

[13] The only issue is whether the Officer's decision was reasonable.

[14] The parties agree, as do I, that the standard of review for the Officer's decision is reasonableness, as it involves questions of mixed fact and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53, [2008] 1 SCR 190 [*Dunsmuir*].

[15] In conducting a reasonableness review, the Court applies a deferential standard and recognizes there may be a range of possible, acceptable outcomes. A reasonableness review looks at the qualities that make a decision reasonable. Both the process of articulating the reasons and the outcomes are considered. The decision-making process must display justification, transparency and intelligibility. The decision itself must fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir* at para 47.

IV. **The Alleged Errors in the Decision**

[16] Mrs. Gill argues that the Officer committed several fatal errors in finding that she would suffer no hardship if returned to India:

1. The Officer's decision was based on an improper credibility finding;
2. The Officer's conclusions were not open to him/her based on the evidence;
3. The Officer misapprehended the nature and severity of the hardship faced by her if she returned to India;
4. The Officer failed to adequately assess Mrs. Gill's establishment in Canada.

[17] In support of these allegations, Mrs. Gill points to several specific findings made by the Officer which are said to be perverse or in error. In addition, Mrs. Gill takes issue with the lack of analysis provided by the Officer with respect to the rejection of specific evidence and explanations put forward by Mrs. Gill, as well as the Officer's failure to consider the totality of the evidence; she alleges the evidence was considered piecemeal.

[18] The findings, which are determinative in my decision to allow the H&C Application, concern the Officer's reliance upon Mrs. Gill's failure to: (1) claim refugee protection when arriving in Canada; (2) report her son's abuse to the police; and (3) show that she could not rely on her brother for financial and emotional support.

V. **Analysis**

A. *Failure to Claim Refugee Protection*

[19] Mrs. Gill says that the Officer made a negative credibility finding that, by not seeking refugee protection, it somehow showed Mrs. Gill was not fleeing abuse. In effect, this wrongly created new criteria to consider on an H&C application and, as a result, the Officer did not

properly analyze the application. The Minister suggests that, while the Officer noted the son's abuse and questioned why Mrs. Gill had not filed a refugee claim, the Officer nonetheless examined the information that had been submitted on Mrs. Gill's behalf.

[20] Mrs. Gill points to subsection 25(1.3) of the *IRPA* which specifically states that, in examining a request of a foreign national under subsection 25(1), the Minister may not consider the factors that are taken into account in determining whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1). However, elements related to the hardships that affect the foreign national may be considered. By referring to the failure to make a refugee claim and then finding that such failure showed the abuse claim was not genuine, the Officer contravened this provision and the decision was fatally tainted by this improper approach.

[21] The Minister points out that, after questioning why Mrs. Gill did not claim protection, the Officer went on to consider her allegations of abuse. The Officer did not apply a refugee test but was simply dissatisfied with the evidence proffered by Mrs. Gill. To the Minister, the objective of subsection 25(1.3) is to prevent applicants from re-litigating their refugee claims while allowing them to argue hardship would occur if they returned to their country of origin.

[22] The Minister submits Mrs. Gill is not entitled to be believed. The Officer weighed the evidence and made an adverse finding, which is an acceptable outcome.

[23] I agree with Mrs. Gill that the Officer's credibility finding was improper. The Officer made a negative credibility finding against Mrs. Gill on the basis that she did not make a refugee

claim. When considering the abuse allegation, the Officer noted that Mrs. Gill did not make a claim for refugee protection when she arrived and had not made a claim “to date” on the basis of the abuse suffered at the hands of her son. The Officer then went on to say that “someone fleeing abuse and fearing for their life would seek [refugee] protection within a reasonable time frame.” It is my view that the Officer’s statement cannot reasonably be taken any other way than to find that, because Mrs. Gill failed to make a claim for refugee protection on arrival in Canada, the Officer did not believe Mrs. Gill’s story of abuse.

[24] The Officer ignored the fact that Mrs. Gill did not have any basis upon which to make a refugee claim. The evidence before the Officer was that Mrs. Gill came to visit her niece and family. It was only after she arrived and told them of her son’s abuse that the family arranged for her to consult with their lawyer, Cecil Rotenberg, who recommended that she pursue an H&C claim.

[25] There is no doubt that Mrs. Gill obtained well-informed legal advice as to the appropriate claim to make. Mrs. Gill did not face risk of abuse by her son throughout India. As such, there was no point in making a claim for refugee protection. By considering her failure to make a refugee claim and then making a negative credibility finding as a result of that “failure”, the Officer relied on facts that would not support a refugee claim and used them to find that Mrs. Gill did not make a refugee claim. By stating that, the Officer strongly implied that Mrs. Gill ought to have made a claim for protection if she feared for her life at the hands of her son.

[26] Ultimately, the Officer determined that, by not making a claim for protection, Mrs. Gill’s credibility about whether her son was abusing her was affected. On these facts, that conclusion

was illogical and perverse, as it was not open to the Officer based on the evidence. It was not appropriate in the context of an H&C application to consider the failure of Mrs. Gill to seek protection unless that failure related to her hardship claim. No such relationship was mentioned by the Officer.

[27] When the Officer found that “someone fleeing abuse and fearing for their life would seek [refugee] protection within a reasonable time frame”, it was clear that the Officer did not believe Mrs. Gill had suffered abuse at the hands of her son. There is simply no other reason to mention that undisputed fact. The Officer’s finding tainted the balance of the analysis to the point that the line between credibility and sufficiency of evidence cannot be determined on the basis of the reasons provided.

B. Failure to Report Son’s Abuse to the Police

[28] The Officer found that Mrs. Gill did not provide a reasonable explanation for not reporting her son’s abuse to the police given that she was able to obtain from the police a clearance letter, believing she needed it to visit Canada.

[29] The Minister says the Officer discounted the photographic evidence provided by the neighbour because there were no police or medical reports to confirm the assault; the witness letter provided was undated and unsworn and the Officer was entitled to find that it was not satisfactory. Similarly, the medical report was based on one single interview with Mrs. Gill and essentially was hearsay. There was no evidence that there was a current treatment plan for Mrs. Gill’s PTSD and the Officer dealt with the medical report appropriately.

[30] In addition, there was no independent corroboration of Mrs. Gill's story nor was there any contemporaneous corroboration of the abuse through police reports or medical reports.

[31] The Minister says Mrs. Gill conceded that she was not at risk when she stated in her memo that she would not qualify as a Convention refugee because she only faced risk in her village and not in every part of the country. She simply did not want to move somewhere else in India.

[32] The Minister notes that, while Mrs. Gill may claim she did not go to the police because she was fearful of retribution by her son, another explanation would be that the events did not actually occur. To make such an allegation in her application to the Officer would be relatively safe as her son would suffer no repercussions in India as result of such accusation. The Minister points out that the Officer is not required to ignore those circumstances and instead simply accept Mrs. Gill's claim.

[33] If the Officer in the decision had put forward some of the arguments made by counsel for the Minister, then the decision-making process would have been more transparent and intelligible. But the Officer provided very little reasoning for many of the conclusions.

[34] Mrs. Gill's statutory declaration, submitted with her H&C Application, indicated she did not go to the police because her son threatened to kill her if she did. The Officer excerpted at some length from the United States Department of State, *2015 Country Reports on Human Rights Practices - India*, 13 April 2016 [DOS Report] concerning human rights in India, along with protection for and social services available to women, particularly those suffering from

abuse. Mrs. Gill points out that the DOS Report clearly states that social pressure prevents many women from reporting domestic abuse and that underreporting of crimes — including kidnapping, rape, dowry deaths, and domestic abuse — is likely.

[35] The Officer found that Mrs. Gill had the “wherewithal” to obtain a police clearance report and it would therefore be reasonable to believe that Mrs. Gill had the “wherewithal” to make a complaint to the police. Based on the DOS Report and Mrs. Gill obtaining a police clearance, the Officer found that Mrs. Gill could have sought state assistance to deal with her son’s abuse. However, the Officer did not address the finding in the DOS Report that social services for women are generally only available in metropolitan areas and that some police officials in smaller towns are reluctant to register crimes against women.

[36] The evidence before the Officer was that Mrs. Gill’s life and livelihood were in the small village of Gill. Yet the Officer concluded, without explanation and despite the conclusions in the DOS Report, that police protection would be available to Mrs. Gill. Despite the same report saying social pressures prevented women from reporting abuse, the Officer also concluded, without any explanation, that Mrs. Gill would not face social pressures if she reported the abuse by her son. While the Officer need not mention every piece of evidence, where the unmentioned evidence is highly relevant and appears to squarely contradict the Officer’s decision, the Court can and, in this case does, infer that the evidence was not considered by the tribunal: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 at para 17.

[37] The fact that Mrs. Gill was able to obtain a police clearance report does not equate to an ability to file a domestic abuse report against her son. The DOS Report clearly sets out why Mrs. Gill would not want to file such a report. The Officer’s conclusion simply flies in the face

of reason. The question before the Officer was not whether Mrs. Gill was physically able to attend at the police station. The question was, given the nature of the consequences she would face if she filed a complaint against her son, both from her son and from the village, was Mrs. Gill required to file a complaint with the police as evidence of the abuse perpetrated by her son.

[38] The Officer's reasons do not show the Court or Mrs. Gill why, given the evidence before the Officer, conclusions which appear to contradict the evidence or are unsupported by the evidence were made by the Officer. Without that, the *Dunsmuir* criteria are not met and the findings cannot be said to fall within the range of possible, acceptable outcomes defensible on the facts and law. As such, the decision is unreasonable.

C. *Failure to Show Availability of Financial and Emotional Support from Brother*

[39] The Officer found that, even if her son did abuse Mrs. Gill, there were other avenues of support available to her in India. The Officer suggested Mrs. Gill could move out of her village and that it was feasible for her to return to India and resume her relationship with her brother. This would also accomplish family reunification and, as a result, if Mrs. Gill returned to India it would not be a hardship. The Officer found there was insufficient evidence that the brother could not assist Mrs. Gill.

[40] The evidence in the report by Dr. Pilowsky, which was before the Officer, states that Mrs. Gill's brother is her only relative in India. It adds that he lives far away and has never been supportive, so Mrs. Gill does not foresee him as being able to assist her in any way. It runs contrary to the evidence for the Officer to conclude that there is a relationship between Mrs. Gill and her brother that can be resumed.

[41] The Minister says the information in the medical report about the brother is hearsay. Mrs. Gill simply did not want to move to somewhere else in India. The Minister also says that Mrs. Gill has managed to move a world away by coming to Canada so she would be able to relocate in India.

[42] Counsel for the Minister also points to Mrs. Gill's admission that she would not face the risk of abuse by her son in every part of the country, which shows there is a viable alternative for her in India. Also, as the Officer did not have that information, the Minister says Mrs. Gill did not put the complete picture before the Officer.

[43] The Officer performed no analysis of whether Mrs. Gill would face hardship if she was required to move to another part of India to avoid abuse by her son. The evidence with respect to the brother was his age, 71, and the medical report information that he lives far away and has never been supportive of Mrs. Gill. With respect to relocating within India, the Officer merely notes that Mrs. Gill's brother lives in India and, based on no evidence at all, finds that it is feasible for Mrs. Gill to return to India and "resume her relationship with her brother". The assumption made by the Officer is that at one time Mrs. Gill had a relationship with her brother, who is 13 years older than her and who moved away while she has always resided in her village. The Officer simply speculated that her brother would be willing and able to assist her.

[44] The Minister argues that the fact that Mrs. Gill managed to relocate to Canada somehow shows she can successfully relocate within India. That submission overlooks the fact that Mrs. Gill's sister and her sister's daughter, son-in-law and their children, to whom she has become very attached, are all present in Canada to assist her. In India, she has no family other than her abusive son in her home village and her older non-supportive brother in a distant village.

[45] In noting Mrs. Gill's relatively brief establishment of less than one year in Canada, the Officer did not consider the emotional support provided to her here and the lack of any kind of support in India other than the existence of her brother. The Officer acknowledges that going back to India will cause "some dislocation" and claims that Mrs. Gill can stay in touch with her Canadian family by "other means". The Officer failed to weigh those observations against the supportive family Mrs. Gill enjoys in Canada and the information in the medical report that she suffers from PTSD and that, "if she were ordered to return to India . . . her PTSD condition would immediately re-emerge".

[46] The medical report also notes that, while in Canada, Mrs. Gill's PTSD is in remission because she has safe living conditions and no longer has to fear random assaults by her son. Instead of addressing that, the Officer notes that there is no corroborative evidence that Mrs. Gill currently requires medical treatment or that, if it is required, she would not be able to access or receive treatment in India.

[47] In *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 [*Kanthasamy*], the Supreme Court of Canada reviewed certain fundamental principles that exist when considering an H&C application. Two of these principles apply here. Neither of them were recognized or applied by the Officer.

[48] The fact that an applicant's mental health would likely worsen if they were removed to another country is a relevant consideration that must be identified and weighed, regardless of whether there is treatment available in that other country: *Kanthasamay* at para 48. In this case, the Officer found there was not sufficient corroborative evidence that Mrs. Gill currently requires medical treatment and, in any event, she failed to show there was a lack of treatment in India.

Those findings are not only at odds with the *Kanhasamy* principles, but they also misapprehend the evidence in the psychological report. Dr. Pilowsky stated that Mrs. Gill's PTSD and chronic symptoms were in remission as a result of her family life and safe living conditions in Canada. That explains why no evidence of her currently requiring treatment was provided to the Officer. What was also said in the report was that if returned to India, Mrs. Gill's PTSD would immediately re-emerge and her current psychological condition would deteriorate. The Officer did not refer to that consequence of removal nor weigh it in the overall assessment of hardship to Mrs. Gill.

VI. Conclusion

[49] The circumstances of an applicant have to be taken and considered as a whole, not segmented and assessed separately: *Kanhasamay* at para 45. While the Officer stated that the evidence had been considered in its entirety, it is not apparent that this occurred. It appears that each subsequent finding by the Officer flowed from the initial disbelief of the basis for Mrs. Gill's H&C Application — that she fears her physically abusive son.

[50] The Officer was aware that Mrs. Gill was afraid of reprisals from her son if she informed the police. The Officer was also aware that the last attack was witnessed by a neighbour and that she had submitted photographs showing her injuries. These statements are found in the Officer's summary of submissions.

[51] Although the witness statement from the neighbour was not sworn, the Officer indicated it had been "carefully considered". The Officer did not reject either the witness statement or the accompanying photograph of Mrs. Gill's bruised face. The Officer instead found there was insufficient objective evidence to conclude there had been abuse at the hands of the son primarily

because there were no medical reports or police reports and because there was no date as to when the incident took place. No mention was made by the Officer of Mrs. Gill's statutory declaration which was submitted with her H&C Application and attested both to the abuse by her son and the approximate date (August 2015) that photographs were taken. The Officer also did not address the explanation in Mrs. Gill's statutory declaration that "I did not approach the police in fear that my younger son would beat me up some more".

[52] Insofar as the Officer rejected the credibility of Mrs. Gill's abuse claim, it is difficult to separate out the analysis of credibility from the statement that there was insufficient evidence. While the Officer purports to determine the issue on the basis of a lack of corroborating evidence, the evidence has to be considered as a whole and there is no evidence that was done. It is not clear whether lack of corroboration made the evidence insufficient despite Mrs. Gill's statutory declaration or because the Officer had already discounted it on credibility grounds. In other words, without the improper credibility finding based on failure to claim refugee protection, it is not clear whether the Officer would have made the same decision on Mrs. Gill's claim of the abuse by her son.

[53] The Officer's decision to deny H&C relief is highly dependent on the finding that Mrs. Gill could return to her village without fearing domestic abuse from her son. The fact that the decision refers to Mrs. Gill's friends and social networks in her village of Gill is a strong indicator that the Officer was not analyzing the hardships involved in moving to a new city within India. At the same time, the Officer's conclusion that there would be no hardship in moving back to the same city because she would have developed "friends, acquaintances and

social networks” is obviously untenable if Mrs. Gill would continue to suffer domestic abuse by her son.

[54] The Officer’s conclusions on hardship and the resulting determination not to grant the H&C Application is only reasonable if the underlying analysis of whether Mrs. Gill would face domestic abuse in her home village was reasonable. In this case, this analysis was not reasonable. It was tainted by a flawed credibility finding and the conclusions on Mrs. Gill’s ability to report the assault to police which either do not flow from the evidence or, if they do, the connection is not sufficiently explained so as to make the reasoning intelligible and transparent.

[55] The application is therefore allowed and the matter is returned for redetermination by a different officer.

[56] Neither party suggested there is a serious question of general importance for consideration on these facts.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed and the matter is returned for redetermination by a different officer. There is no question for certification.

“E. Susan Elliott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: HARJEET KAUR GILL v THE MINISTER OF
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