

Federal Court



Cour fédérale

Date: 20090623

Docket: IMM-5117-08

Citation: 2009 FC 656

Ottawa, Ontario, June 23, 2009

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

TULSIE PERSAUD KANDHAI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Tulsie Persaud Kandhai seeks judicial review of a decision refusing his application for a humanitarian and compassionate exemption. For the reasons that follow, I have determined that it is appropriate to consider Mr. Kandhai's application, notwithstanding his history of repeatedly lying to Canadian immigration authorities. I have also concluded that the reasons given for refusing Mr. Kandhai's H&C application were insufficient. As a consequence, the application for judicial review will be allowed.

Background

[2] Mr. Kandhai is an Indo-Guyanese citizen of Guyana. He was married in Guyana in 1982, and he and his wife had three children together. In 1988, Mr. Kandhai's brother and nephew were killed when their boat was rammed by another boat, allegedly because of the racial conflict between the Indo-Guyanese and Afro-Guyanese populations.

[3] Mr. Kandhai says that doctors refused to perform autopsies on his relatives, and their deaths were never investigated by the police. When he tried to convince the police to investigate the killings, Mr. Kandhai claims that his family received death threats, and were told to close down their business. The family farm was vandalized, and the family was robbed twice.

[4] All of Mr. Kandhai's sisters and brothers fled Guyana within a year of their brother's death. One sister was granted refugee protection in Canada, and two of Mr. Kandhai's brothers received positive H&C decisions. Two other sisters immigrated to the United States, one of whom subsequently came to Canada. Mr. Kandhai's parents also came to Canada, with the result that his entire family is now in Canada, with the exception of his one sister living in the United States.

[5] Mr. Kandhai himself left Guyana for the United States in 1989, along with his wife and children. He completed a nursing course in the United States, and the family had green cards. Mr. Kandhai and his wife separated in 1992, and divorced in 1994. While Mr. Kandhai's wife had custody, he remained in contact with his children and supported them financially.

[6] Unbeknownst to Mr. Kandhai, after his divorce, his brother and his ex-wife began a relationship. Mr. Kandhai found out about the relationship in 1998, when he caught the pair together. Mr. Kandhai slapped his ex-wife, and was subsequently charged with and convicted of assault. Mr. Kandhai spent three weekends in jail, and attended anger management classes.

[7] Mr. Kandhai's wife married Mr. Kandhai's brother, and the couple moved to Canada with the children in 1999. The marriage ended shortly thereafter, and Mr. Kandhai reconciled with his wife in Canada in 2003. They have been living as common-law partners since then.

[8] Prior to his formal move to Canada in 2003, Mr. Kandhai had worked as a nurse in Niagara Falls, New York, while residing in Toronto with his parents in order to be closer to the children. Mr. Kandhai did not attend an immigration hearing in the U.S. arising from his assault conviction, and lost his green card as a result. After he came to Canada, Mr. Kandhai started a vending machine business in Toronto, which he continues to operate. He also volunteers for a counselling phone line and at a tennis club.

[9] Mr. Kandhai claims to be particularly close to his 13-year-old niece, who is diabetic. He acts as a father figure for the girl, as she has no contact with her biological father. He also has been able to assist with her medical needs, since he is a nurse. In addition, he is close to his parents and helps them with their medical problems.

The “Clean Hands” Issue

[10] The decision under review relates to Mr. Kandhai’s third H&C application, which was filed in 2007. In his affidavit filed in support of his application for judicial review, Mr. Kandhai admits that he was not truthful on this most recent H&C application, as he indicated on the form that he was divorced, when in actual fact, he was living in a common-law relationship with his ex-wife.

[11] The respondent argued at the hearing that Mr. Kandhai had not come before the Court with “clean hands”, given his admitted misrepresentation in his 2007 H&C application. The respondent submitted that the Court should decline to entertain Mr. Kandhai’s application for judicial review on this basis alone.

[12] Mr. Kandhai indicated on his application for an H&C exemption that he was divorced. Mr. Kandhai says in his affidavit that he did not reveal that he had reconciled with his wife as he was afraid of what the Officer would think of the whole situation.

[13] Mr. Kandhai argued at the hearing that while his misrepresentation as to his marital situation was undoubtedly an error in judgment, it was not made with the intent of securing an advantage in relation to his H&C application, and thus had no negative effect on the integrity of the Canadian immigration process. Indeed, his misrepresentation could only have served to weaken Mr. Kandhai’s application, which would have been strengthened by the presence of a common-law partner in Canada.

[14] After the hearing of this matter, it came to the Court's attention from a review of the certified tribunal record that Mr. Kandhai's misrepresentation in this case may not have been an isolated error in judgment, and that he may have made misrepresentations in relation to his earlier H&C applications. This was drawn to the parties' attention, by Direction of the Court, and counsel were given the opportunity to make further submissions in this regard.

[15] It is now conceded that in both his 2003 and 2005 H&C applications, Mr. Kandhai indicated that he had never been charged with, or convicted of, a criminal offence in another country, when that was not in fact the case. These misrepresentations were clearly made by Mr. Kandhai in order to gain an advantage in relation to his applications, and thus had the potential to undermine the integrity of the immigration process.

[16] It also bears noting that Mr. Kandhai indicated his marital status as "divorced" in both his 2003 and 2005 H&C applications. While we do not know precisely when it was in 2003 that Mr. Kandhai reconciled with his wife, it is clear that, at a minimum, he had also misrepresented his marital status in his 2005 H&C application.

[17] The Federal Court of Appeal considered the "clean hands" issue in *Thanabalasingham v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 20. There, the Court noted that if a reviewing court were to find that an applicant has lied, or is otherwise guilty of misconduct, the Court may dismiss an application for judicial review without deciding the merits of the

application. It is also open to the Court to decline to grant relief to an applicant, even if it is determined that the decision-maker has erred: at para. 9.

[18] In deciding whether or not to exercise its discretion in this regard, the Federal Court of Appeal observed that the task for the reviewing Court is to strike a balance between “maintaining the integrity of and preventing the abuse of judicial and administrative processes”, and “the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights”: *Thanabalasingham*, at para. 10.

[19] At paragraph 10 of its decision, the Federal Court of Appeal identified the following factors which may be taken into account in this exercise:

... [T]he 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, the importance of the individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand.

[20] Other factors may be relevant in a given case, and not all of the above factors will necessarily be relevant in a particular case: *Thanabalasingham*, at para. 11.

[21] Several factors militate in favour of the Court declining to entertain Mr. Kandhai's application for judicial review. Insofar as the seriousness of the misconduct is concerned, the misrepresentation in this case is not an isolated “error in judgment”, as his counsel argued at the

hearing of the application. Rather, it appears to be part of a pattern of deceit on the part of Mr. Kandhai in his dealings with Canadian immigration authorities, one that has extended over a number of years, and several applications.

[22] Moreover, at least some of Mr. Kandhai's misrepresentations were clearly calculated to assist him in gaining an advantage to which he might otherwise not be entitled. Clearly, there is a need to deter others from such conduct.

[23] Insofar as the importance of the individual rights affected by the decision under review are concerned, Mr. Kandhai has now had the benefit of two risk assessments. Both the Immigration and Refugee Board and a Pre-removal Risk Assessment officer have determined that Mr. Kandhai would not be at risk, were he required to return to Guyana.

[24] That said, there are other considerations that favour the exercise of the Court's discretion in Mr. Kandhai's favour. While Mr. Kandhai's pattern of misconduct is serious, it does not appear that he sought to gain any advantage through the misrepresentation made in connection with his 2007 H&C application. As his counsel has pointed out, Mr. Kandhai's H&C application may well have been strengthened had he acknowledged that he had a wife in Canada. In these circumstances, it is difficult to see how Mr. Kandhai's misrepresentation regarding his marital status would have undermined the integrity of the immigration process insofar as this H&C application is concerned.

[25] Moreover, Mr. Kandhai appears to have come forward voluntarily with his admission of misrepresentation. There has been no suggestion that he only admitted the misrepresentation in his most recent H&C application when he was caught in a lie, or when he otherwise became aware that “the jig was up”.

[26] Insofar as the apparent strength of Mr. Kandhai’s case is concerned, for the purposes of this “clean hands” analysis, suffice it to say that he has a very strong case.

[27] Finally, Mr. Kandhai’s H&C application affects the best interests of children, and, in particular, his young niece. Mr. Kandhai’s niece has significant medical problems, and he plays an important role in her medical care. The importance of this role was recognized by Justice Gibson in a related proceeding, where, in staying Mr. Kandhai’s removal from Canada, he found that irreparable harm would be suffered by the niece if Mr. Kandhai were no longer able to assist with her care. However blameworthy Mr. Kandhai may be, it cannot be said that his niece is in any way at fault for his misconduct.

[28] Balancing all of these factors, I have concluded that I should exercise my discretion in Mr. Kandhai’s favour and consider the merits of his application for judicial review.

Analysis

[29] Mr. Kandhai has raised a number of issues on his application for judicial review. Most of these issues really relate to the sufficiency of the H&C officer’s reasons. Given my conclusion in

relation to this issue, it is not necessary to address the officer's treatment of the issue of Mr. Kandhai's potential inadmissibility.

[30] As the sufficiency of reasons engages a question of procedural fairness, it is for the Court to determine whether the reasons in issue are sufficient: see *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, at para. 43.

[31] While the reasons given by the officer in this case for refusing Mr. Kandhai's H&C are fairly lengthy, they are simply not sufficient.

[32] It is true that the officer did address Mr. Kandhai's establishment in Canada, his personal relationships in this country, the care that he provides for his elderly parents, the best interests of the children who would be affected by his removal from Canada (including his niece), his ties to Guyana, the hardship that he would face if returned to Guyana, and his civic history. However, the officer's analysis in relation to several of these issues is seriously lacking.

[33] That is, in a number of instances, the officer recites Mr. Kandhai's submissions, sometimes at considerable length, and then simply offers the conclusion that these factors were not sufficient to justify the granting of an exemption, without any explanation as to why that is.

[34] An example of this is the officer's treatment of the best interests of Mr. Kandhai's niece. In this regard, the officer recites Mr. Kandhai's assertion that he acts as a father figure to his niece, as

well as his claim that because of his medical training, he has been assisting her in dealing with her illness, including with the medication and dietary restrictions resulting from her diabetes. The officer also refers to the evidence from Mr. Kandhai, his sister and his niece as to the negative effect that his removal from Canada will have on the emotional well-being of the child, as well as the studies of adolescent behaviour that show that children do much better where they have constant parental figures in their lives.

[35] The officer accepted that Mr. Kandhai's niece would benefit from the continued involvement of her uncle in her life, and further accepted that she would face some distress if he had to leave her. The officer then concludes the consideration of this issue by stating that "I have considered the best interest of the child and find there is insufficient evidence to indicate that the applicant moving to Guyana would have a significant negative impact to the child that would amount to unusual, undeserved or disproportionate hardship".

[36] With respect, these 'reasons' are not really reasons at all. They essentially consist of a review of the facts coupled with the statement of a conclusion, without any analysis to back it up. We know that the officer did not accept that Mr. Kandhai's removal from Canada would result in unusual, undeserved or disproportionate hardship to Mr. Kandhai's niece. We do not, however, know why that is. This is not sufficient as it leaves Mr. Kandhai in the unenviable position of not knowing why his application was rejected: see, for example, *Adu v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 693, at para. 14.

[37] Similar conclusory findings are made by the officer in relation to other issues raised by Mr. Kandhai such as his establishment in Canada.

Conclusion

[38] For these reasons, the application for judicial review is allowed.

[39] The matter is remitted to a different H&C officer for re-determination. The H&C officer shall be entitled to consider all of the facts relevant to Mr. Kandhai's H&C application, including his history of misrepresentation, in deciding whether the discretion conferred by section 25 of the *Immigration and Refugee Protection Act* should be exercised in Mr. Kandhai's favour.

Certification

[40] Neither party has suggested a question for certification, and none arises here.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, and the matter is remitted to a different H&C officer for re-determination in accordance with these reasons; and
2. No serious question of general importance is certified.

“Anne Mactavish”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5117-08

STYLE OF CAUSE: TULSIE PERSAUD KANDHAI v. MCI

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: June 3, 2009 and,
Additional submissions: June 4, 8 and 15, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** Mactavish J.

DATED: June 23, 2009

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