Date: 20040226

Docket: IMM-5823-02

Citation: 2004 FC 288

Ottawa, Ontario, this 26th day of February, 2004

Present: The Honourable Justice James Russell

BETWEEN:

HARJIT SINGH

SATINDER KAUR

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

[1] This is an application pursuant to s. 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*"), for judicial review of a decision of Pre-Removal Risk Assessment Officer R. Klagsbrun ("Officer") dated October 25, 2002 ("Decision"), wherein the Officer determined that Harjit Singh ("Male Applicant") and Satinder Kaur ("Female Applicant") (collectively the "Applicants") would not be subject to a risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment if returned to their country of nationality.

BACKGROUND

[2] The Applicants came to Canada in 1988 and made a refugee claim. Their claim was rejected, but the claims of their three children were accepted. The Applicants were granted an exemption on humanitarian and compassionate grounds in 1994. In 2000, their application for landing was rejected.

[3] In 2000, the Male Applicant received notification from the Minister of Immigration that he had been convicted of a criminal offence in India. Based on this, he was given an opportunity to make further submissions. After he made submissions, the immigration officer dealing with the matter concluded that he was inadmissible and rejected the application for landing of both Applicants.

[4] An application for leave to commence an application for judicial review was brought and that application was dismissed. However, the Applicants then brought forward new evidence. This new evidence showed that the Male Applicant had been accused of perjury as a result of testifying at a bail hearing that he had never been back to India. Based on the information in the possession the Peel Police that the Male Applicant had been convicted in India of an offence, and had been in India, he was charged with perjury. The Male Applicant's counsel successfully defended him, and the Crown stayed the charge. At the trial, the police in India were unable to corroborate that the Male Applicant had been in India.

[5] The fact that the charges against the Male Applicant were stayed by the Crown had not been before the immigration officer who rejected the landing application and, as a result, the Applicants filed a new application for consideration on humanitarian and compassionate grounds, which is still pending.

[6] The Applicants were served with notification that they were going to be removed and applied for a pre-removal risk assessment. In his submission, the Male Applicant said he was at risk in India as a result of persecution. He also submitted that his wife was in grave danger as a result of the fact that she had kidney failure. The Applicants asked the Officer to consider these facts and to grant a constitutional exemption from ss. 97(1)(*b*)(iv) of *IRPA* that requires that the risk not be as a result of being subjected to inadequate medical facilities or medical care.

DECISION UNDER REVIEW

[7] The Officer noted that the Male Applicant had also indicated he would be tortured if returned to India. She also noted that he indicated that his wife would die because she required dialysis. The Officer noted that the Applicants' refugee claim was rejected in 1992 and there had been no previous pre-removal risk assessment. She concluded there was insufficient evidence to indicate that the Male Applicant was at risk because he had been out of India for 14 years, and there was insufficient persuasive evidence the Applicants would be arrested and detained by the police upon their return.

[8] The Officer then reached the following conclusions concerning the health issues of the Female Applicant:

> Counsel indicated in his submissions that the female applicant has complete kidney failure and requires dialysis three times a week. Counsel indicated she would not have access to dialysis in India and does not have the money to afford dialysis and has no resources. The documentary evidence indicates that there are medical facilities to deal with dialysis. According to section 97.1(4) of the Immigration and Refugee Protection Act, risk to life or risk of cruel and unusual treatment must not be caused by the inability of the country of return to provide adequate medical or health care. Medical care exists in India. Therefore, not providing adequate medical or health care to deal with kidney failure is not on my mandate to consider.
>
> Counsel considered I have the power under section 7 of the Charter to disregard section 97 that precludes consideration based on lack of medical

resources. In my opinion, PRRA officers are not considered a tribunal with the jurisdiction to consider Charter arguments nor was it the intent of the legislator to provide PRRA officer with the discretion to ignore the relevant provisions of IRPA and the Regulations.

RELEVANT LEGISLATION

[9] Sections 96 and 97 of the *IRPA* define a Convention refugee and person in need of protection as follows:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture;

96. A qualité de réfugié au sens de la Convention - le réfugié - la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques_:

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays don't elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée_:

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la

or	Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant_:
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes - sauf celles infligées au mépris des normes internationales - et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

[10] The following sections of the *Constitution Act, 1982* were noted by the Applicants:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
...	...
52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution	52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

is, to the extent of the inconsistency, of no force or effect.

ISSUES

[11] The Applicants raise the following issues:

Did the Officer err in law in rejecting the claim by finding that it was based on inadequate medical facilities within the exception in 97(1)(*b*)(iv) of *IRPA* so that the risk was caused by the inability of that country to provide adequate health or medical care?

Did the Officer err in law in concluding that she did not have the jurisdiction to grant a constitutional exemption?

ANALYSIS

Standard of Review

[12] The issues raised in this application involve questions of law. I regard the applicable standard of review to be correctness. However, my conclusions are the same irrespective of the standard that is applied.

Adequacy and Accessibility

[13] In the Decision, the officer acknowledges that "Counsel indicated she [the Female Applicant] would not have access to dialysis in India and does not have the money to afford dialysis and has no resources."

[14] The Officer dealt with these issues as follows:

Documentary evidence indicates that there are medical facilities to deal with dialysis. According to section 97(1)(*iv*) of the *Immigration and Refugee Protection Act*, risk to life, or to a risk of cruel and unusual treatment or punishment must not be caused by the inability of the country of return to provide adequate health or medical care. Medical care exists in India. Therefore, not providing adequate health or medical care to deal with her kidney failure is not in my mandate to consider.

[15] The Applicants do not dispute the finding that there are medical facilities in India to deal with dialysis. But their point is that the Female Applicant cannot access such facilities for various reasons but, primarily, impecuniosity. Hence, the Applicants say that the Decision fails completely to deal with the issue of access to appropriate health care and the officer has committed a reviewable error.

[16] The Respondent says that the issue of access is dealt with because it falls within the health and medical care exception set out in ss. 97(1)(*b*)(iv) of *IRPA*:

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

[17] The Respondent argues that the Officer's conclusion that availability and access to medical care in India "is not in my mandate to consider," is correct.

[18] Counsel were unable to provide me with any case directly on point. The issue before me, then, boils down to a matter of statutory interpretation. Are the access issues raised by the Applicants subsumed in the exception contained in ss. 97(1)(*b*)(iv)?

[19] The Applicants argue that ss. 97(1)(*b*)(iv) only deals with adequacy; it does not deal with the ability of any particular applicant to access health and medical facilities for any reason, including impecuniosity. The provision directs the Officer's attention to the "country" and not the person in need of health or medical care. A purposive interpretation of *IRPA*, say the Applicants, supports their interpretation of the provision and if Parliament had wanted to exclude persons in the position of the Female Applicant from raising her health risks in a pre-removal risk assessment it would have done so specifically.

[20] The Respondent points out that the Officer refers at several points in the Decision to the Female Applicant's health issues but correctly excludes them from the analysis because of ss. 97(1)(*b*)(iv). The Decision relies on the concept that the Female Applicant's inability to access health care in India is just another way of saying that India does not provide adequate health or medical care for someone in the Applicant's position. The Respondent argues that "adequate" means "equal to what is required." A purposive and contextual reading of the provision must lead to the conclusion, says the Respondent, that adequacy subsumes accessibility. The Female Applicant is asserting, in effect, that she should not be removed to India because that country does not provide the free, universal health care that she requires because of her particular ailment and her financial position. The Respondent says that this is a factor that belongs in a H & C consideration under s. 25 of *IRPA* and not in a pre-removal risk assessment.

[21] The Respondent also refers the Court to the clause by clause analysis of *IRPA* contained in *Bill C-11* which has the following to say about s. 97 and health facilities:

> Cases where a person faces a risk due to lack of adequate health or medical care can be more appropriately assessed through other means in the Act and are excluded from this definition. Lack of appropriate health or medical care are not grounds for granting refugee protection under the Act.

[22] The conclusions of the Court on this issue are based on the assumption that the Officer did not feel the need to address the sufficiency of the Female Applicant's evidence regarding accessibility and concluded that such evidentiary concerns were not relevant because ss. 97(1)(*b*)(iv) precluded any consideration of health issues on these facts.

[23] I believe the honest answer to this issue is that it is not entirely clear what Parliament's intent was in this regard, and that we are left to deal with a statutory provision that, on the facts of this Application, is somewhat ambiguous. The Applicants' arguments would mean accepting that Parliament intended to exclude risks based upon the non-availability of adequate health care but not risks associated with a particular applicant's ability to access adequate health care. *Bill C-11* tells us that lack of "appropriate" health or medical care are not grounds for granting refugee protection under *IRPA* and that these matters are more appropriately assessed by other means under the statute.

[24] This leads me to the conclusion that the Respondent is correct on this issue. A risk to life under s. 97 should not include having to assess whether there is appropriate health and medical care available in the country in question. There are various reasons why health and medical care might be "inadequate." It might not be available at all, or it might not be available to a particular applicant because he or she is not in a position to take advantage of it. If it is not within their reach, then it is not adequate to their needs.

[25] On this issue then, I believe the Officer was correct and committed no reviewable error.

Jurisdiction to Consider *Charter* Arguments

[26] Counsel for the Applicants invited the Officer to disregard s. 97 of *IRPA* on the medical issue raised by the Female Applicant on the basis of s. 7 of the *Charter*. The Officer concluded in the Decision that PRRA officers do not have the jurisdiction to do this and refused to entertain such considerations. The Applicants say this was a reviewable error.

[27] Once again, in my opinion, this matter is not entirely clear and counsel on both sides provided the Court with extremely able and persuasive arguments on this jurisdictional issue.

[28] The Applicants point, amongst many factors, to the complex legal and factual determinations that fall to a PRRA officer and the life and death risks that such an officer is called upon to assess. Relying upon *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur* (2003), 310 N.R. 22; 2003 SCC 54; [2003] S.C.J. No. 54, the Applicants argue that a presumption that the Officer had the jurisdiction to determine questions of constitutional validity arose in the case at bar. For guidance, the Applicants refer the Court to paras. 41 and 42 of the *Martin, supra*, decision:

> 41. Absent an explicit grant, it becomes necessary to consider whether the legislator intended to confer upon the tribunal implied jurisdiction to decide

questions of law arising under the challenged provision . Implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors will include the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations, including the tribunal's capacity to consider questions of law. Practical considerations, however, cannot override a clear implication from the statute itself, particularly when depriving the tribunal of the power to decide questions of law would impair its capacity to fulfill its intended mandate. As is the case for explicit jurisdiction, if the tribunal is found to have implied jurisdiction to decide questions of law arising under a legislative provision, this power will be presumed to include jurisdiction to determine the constitutional validity of that provision.

> 42. Once this presumption has been raised, either by an explicit or implicit grant of authority to decide questions of law, the second question that arises is whether it has been rebutted. The burden of establishing this lies on the party who alleges that the administrative body at issue lacks jurisdiction to apply the *Charter*. In general terms, the presumption may only be rebutted by an explicit withdrawal of authority to decide constitutional questions or by a clear implication to the same effect, arising from the statute itself rather than from external considerations. The question to be asked is whether an examination of the statutory provisions clearly leads to the conclusion that the legislature intended to exclude the *Charter*, or more broadly, a category of questions of law encompassing the *Charter*, from the scope of the questions of law to be addressed by the tribunal. For instance, an express conferral of jurisdiction to another administrative body to consider *Charter* issues or certain complex questions of law deemed too difficult or time-consuming for the initial decision maker, along with a procedure allowing such issues to be efficiently redirected to such body, could give rise to a clear implication that the initial decision maker was not intended to decide constitutional questions.

[29] The Respondent, on the other hand, argues that PRRA officers have no such jurisdiction because there is no explicit authority granted by *IRPA*, no implied jurisdiction, and, in fact, there is clear indication in *IRPA* that Parliament intended to exclude such matters from the jurisdiction of PRRA officers. Also, relying heavily on the *Martin*, *supra*, decision, the Respondent points out that, in the case of PRRA officers, the jurisdiction granted is very different from that given to Divisions of the Board under s. 162(1) of *IRPA*, where jurisdictional power are specifically mentioned. In this regard, the Respondents invite the Court to apply and follow the decision in *Tétrault-Gadowry v. Canada(Employment and Immigration Commission)*, [1991] 2 S.C.R. 22 and to conclude that the role of PRRA officers is heavily circumscribed by *IRPA* and the Regulations and they are not in a position to deal with multi-faceted constitutional questions. Any legal issues that come before PRRA officers are merely part of the risk assessment to be done in accordance with s. 96 and s. 97 of *IRPA*.

[30] Counsel for the Applicants was particularly concerned that the role of PRRA officers under the scheme embodied in *IRPA* should not be minimized. They make extremely important decisions and for a significant number of people the PRRA

assessment may be the only assessment of risks that they receive. I regard the Applicants' arguments in this regard as perhaps good reasons why PRRA officers should have been given constitutional jurisdiction. However, reviewing the facts of the case at bar against the criteria set out in *Martin*, *supra*, I have to conclude that the Respondent's arguments are the more convincing on this issue. In the absence of an express grant, I cannot conclude that it was the intent of the legislator to confer upon PRRA officers an implied jurisdiction to decide constitutional questions of the kind urged upon the Officer by the Applicants. The pre-removal risk assessment process is not, in my opinion, an appropriate forum for the resolution of complex legal issues, including the interpretation and application of the *Charter*.

[31] On this issue, then, my conclusion is that the Officer was correct to decline the Applicants invitation to disregard s. 97 of *IRPA* by way of s. 7 of the *Charter* and there was no reviewable error in this regard.

[32] Counsel are requested to serve and file any submissions with respect to certification of a question of general importance within seven days of receipt of these Reasons for Order. Each party will have a further period of three days to serve and file any reply to the submission of the opposite party. Following that, an Order will be issued.

"James Russell"

JFC

FEDERAL COURT OF CANADA

Names of Counsel and Solicitors of Record

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