

Case Name:
**Ponaich v. Canada (Minister of Citizenship and
Immigration)**

**Santokh Singh Ponaich, appellant, and
Minister of Citizenship and Immigration, respondent**

[2008] I.A.D.D. No. 1994

[2008] D.S.A.I. no 1994

No. VA6-02994

Immigration and Refugee Board of Canada
Immigration Appeal Division
Vancouver, British Columbia
Edmonton, Alberta

Panel: Margaret Ostrowski

Heard: July 9, 2008.

Decision: October 17, 2008.

(31 paras.)

Appearances:

Appellant's Counsel: Brij Mohan.

Minister's Counsel: Nancy McIver.

Sponsorship

Reasons for Decision

INTRODUCTION

1 Santokh Singh PONAICH ("the appellant") appeals from a refusal to issue a permanent resident visa to Talwinder Singh PONAICH (the "applicant") from India as his dependent son pursuant to subsection 11(1) of the *Immigration and Refugee Protection Act* (the "Act")¹. Paragraph 117(1)(b) of the *Immigration and Refugee Protection Regulations* (the "Regulations")² defines who is a member of the family class.

2 The visa officer determined that the applicant was over the age of 22 and that the documents do not satisfactorily establish that he has depended on the appellant financially since before the age of 22. Accordingly the visa officer found that the applicant did not correspond to the definition of dependent according to section 2 of the *Regulations* and accordingly he is not considered a member of the family class.

3 At issue in this case is whether the applicant is excluded from membership in the family class by the operation of section 2 of the *Regulations*.

4 A hearing before the Immigration Appeal Division (the "IAD") is a hearing *de novo* and additional evidence that was not before the visa officer may be taken into account. The burden of proof on a balance of probabilities rests with the appellant.

BACKGROUND AND RELEVANT EVIDENCE

Appellant

5 The appellant is 64 and works at the university in cleanup. He has no education here or in India. He came to Canada nine years ago sponsored by his daughter (her husband and son are in India) with whom he now lives and he is a Canadian citizen. He is married and has four children - Kulwant, Tarlochan, Talwinder, and Daljeet. His oldest daughter and two sons live in India. The appellant has about \$50,000 in the bank and owns a home³. He said that he will take care of the applicant when he comes to Canada.

6 The applicant cannot speak or hear and is not able to work and he has not gone to school. He lives with his brother, Tarlochan Singh, who looks after him after the appellant came to Canada. Talwinder sometimes receives food, tea or milk from neighbours. Money (50,000 rupees two or three times per year) is sent to Tarlochan by the appellant and his wife for the applicant and to be deposited in Tarlochan's bank account to be used whenever someone gets sick. His daughter actually sends the money (from 1999 to 2003) because the appellant and his wife are not educated - he does not speak or write English and cannot write Punjabi. The applicant does not have a bank account as he cannot see or hear. The appellant left 150,000 rupees for the applicant when he left India.

7 Tarlochan has been sick for about six months and the appellant sent Tarlochan money for his medical treatment about two or three times. He was in need of funds because of the weather - the farm income (Tarlochan works on the farm that the appellant owns) had gone down - and the

medical expenses came all at once.

8 In 1998⁴, the medical officer said that the applicant could be productive if he received some kind of training. The appellant said that the applicant went to a school in Jalandhar for the deaf and mute about 10 or 12 miles away but did not stay as he did not want to be away from the family. They took him to a doctor in Ludhiana.

9 When the appellant applied to come to Canada, he included the applicant in his application. The applicant did not come because his daughter had some arguments with her husband and that she needed her parents right away. They waited six years to sponsor the applicant because the appellant was short of money. He started working eight days after arrival.

Parminder Singh (*Friend of Appellant*)

10 Parminder Singh testified that she visited India in January 2001 and brought \$1,000 to Tarlochan.

Kuldeep Kaur

11 Kuldeep Kaur knows the appellant - his wife and she belongs to the same village. She testified that she has brought money to India twice in the amount of \$1,000 each time about six or seven years ago and she delivered the money to Tarlochan.

Appellant's daughter

12 The appellant's daughter is 32 years old and is a cashier at Tim Horton's. She said that her two brothers live in the same house because Talwinder, the applicant, is deaf and mute. She sponsored her parents to Canada on June 28, 1999. She does the banking for her parents (they have a joint account since 2005). She would send money through persons who were going to India; her parents would give her the money and she would give persons who were going to India the money. She testified that money was always sent to Tarlochan for the applicant every six months. They have trust in Tarlochan that he will use the money for his brother. Her parents also sent money when Tarlochan was sick (30,000 rupees in 2005) and for home repairs (\$3,000 and \$5,000). She said that Tarlochan did not really need money.

13 She said that the applicant was deleted from the initial sponsorship application because she was having trouble with her ex-husband. Immigration officials were not willing to give the applicant a visa - they said that he was not dependent and was overage and could take care of himself in India. She wanted her parents to come right away. When her parents wanted to later sponsor him, they did not have enough income at that time.

14 She said that the applicant needs someone's company, he needs help to take a shower and does not realize when he should be taking a bath and change clothes, and he requires assistance to go to

the doctor. The applicant walks around the streets where there are no cars. When the applicant gets angry with Tarlochan, he asks his cousins for help (he sometimes would get 100 rupees to buy something from the shops).

15 She said that the bank account at the TD Canada Trust⁵ was first opened in 1999 in her mother's name and when the house was bought it was put into their joint names.

16 She said that in regards to Tarlochan's statements at the interview that he gets 10,000 rupees every six months and received it about seven times, she said that she sends 50,000 rupees every six months. She last sent money in June 2008 in the amount of \$1,200. The applicant needs about 6,000 or 7,000 rupees per month. Between 1999 and 2003 there was money sent through the Indo Canadian money exchange and sent with Kuldeep Kaur and Parminder Singh.

17 She said that at the time of the interview, Tarlochan was sick. He started telling them about 2004 that he was sick but did not know the nature of it and found out in 2005. He was mostly in bed, gets high temperature, and is weak. Tarlochan gets income from the farm - his wife looks after farm now that he is sick but he can walk around the farm. There is about one full time servant who takes care of the farm and she will hire more at the harvest time. It is a medium size farm - wheat, rice and sugar cane - and more than one cow and one buffalo. The brothers are living in the father's house.

Appellant's wife

18 The appellant's wife testified that when she was in India, they both looked after the applicant and that he is now looked after by Tarlochan. They both went back on March 7, 2004 to India and took 30,000 rupees. She said that every year they would send 100,000 rupees. She said that the appellant has sent money for Tarlochan for medical needs but does not know how much and that money was also sent to repair the house. She said that her daughter does the banking. She said that the applicant did not come to Canada in 1999 because her daughter had problems with her husband.

Tarlochan Singh Ponaich

19 Tarlochan is 39 years old and has been living in the same village for 39 years in the appellant's house. His parents live in Edmonton and he has one brother and two sisters. He said that the applicant is deaf and dumb and cannot speak or hear but can wash, shower and eat. He said his own medical condition is that he does not feel well - his typhoid has not recovered. He and his wife take care of the applicant and that his parents take care of the applicant financially. Before his parents were in Canada, they looked after the applicant. When they left for Canada, they left money (over 100,000 rupees) for him and after that they sent money. For the upkeep of the applicant, the cost is 10,000 per month and they send 50,000 rupees for six months. Since 1999, his father sent money twice by persons and all other times through the Western Union. He said that it is enough to take care of the applicant and any money left over is deposited into a bank account.

20 He said that he did not tell the visa officer that his uncle and his sister help support the applicant but at that time his typhoid condition was still prevalent and affected his memory. He said that he had typhoid and it went into an advanced condition that could not be properly treated. He said that his father once sent money for the repair of the roof - 300,000 and about 30,000 rupees was sent when his health was not good. He said that he does not remember saying that the applicant lived at his paternal uncle's home. He said that the applicant walks to the uncle's place and they bring him back. The neighbours give the applicant food to pacify him when there have been fights. He said that there were attempts to educate him but that it was not successful. He said that his father did not take the applicant with him when he went to Canada because his sister had an argument with her husband. He said that he told his parents that he was not well and to take the applicant; the applicant cannot work in the fields but can take signals. He confirmed that the applicant does not just roam around all day - he eats, rests, goes for a walk and comes home every night to sleep. He said that his wife cooks his meals.

ANALYSIS

21 The issue is whether the applicant can be described as a dependent child in respect of a parent. The applicable section of the *Regulations* defining a dependent child is as follows:

"Dependent child", in respect of a parent, means a child who

(b) is in one of the following situations of dependency, namely,

(iii) is 22 years of age or older and has depended substantially on the financial support of the parent since before the age of 22 and is unable to be financially self-supporting due to a physical or mental condition.

22 I have considered the testimony of the witnesses, the evidence, and the submissions of the Minister's counsel and the appellant.

23 In the Record at page 71, there were notes of an immigration officer that medical attaché Brian Dobie on June 4, 1998 said that the applicant if given the appropriate training could "work and be a productive member of society". The letter however was not in evidence from Brian Dobie and I am not able to assess his qualifications in regards to such an opinion. I note however that in the refusal letter itself, the immigration officer stated when attempting to interview the applicant that the applicant was "unable to understand not only my questions but even the basic gestures made to you". The immigration officer said also that "based on our subsequent conversation with your brother, it was determined that it is difficult to communicate with you and that nobody understands you". The applicant's brother was interviewed on behalf of the applicant. The evidence was that the applicant has never worked at a job and walks around the village and that he can take signals from the brother. There was testimony that the applicant was brought to school but left after one day and

that he had been brought to a doctor. The evidence is that the applicant has been cared for physically by others all his life - the appellant and his wife until they came to Canada - and then the applicant's brother and his wife. I have heard nothing that says anything contradicting that.

24 At the interview the applicant's brother gave different evidence in regards to the role of the applicant's uncle and how often monies were sent by the appellant than at the hearing. He explained at the hearing that he had been sick with typhoid and that his memory had not been good at the time of the interview. He gave evidence at the hearing that the appellant sent 50,000 rupees every six months, that any leftover monies went into the bank account, and that there had been two money deliveries in person. I was persuaded as to the veracity of the personal deliveries of monies as the persons delivering the monies testified and confirmed that they had done so. Regarding the sending of monies, there were some Western Union receipts in evidence as well as some TD Canada Trust and Indo Canadian Money Exchange receipts. I did not find the many bank statements included in evidence meaningful as they did not indicate at all what monies were being sent to India. The Minister's counsel pointed out that there was no "paper trail". I have considered this issue closely and do not consider it imperative that there be a "paper trail" but there must be trustworthy evidence if I am to believe that funds were sent.

25 The appellant's daughter testified that she actually was the one sending the money as her father is illiterate and that she did his banking for him. She testified in a clear and straightforward manner and I found her to be a credible witness. That being so, her evidence was that she regularly sent 50,000 rupees every six months, that the family depended on Tarlochan to use this money to support the applicant and further testified that at the time of the interview, her brother, Tarlochan was sick and he is still sick now but can walk around the farm. I am persuaded by her evidence that the evidence of Tarlochan at the interview was less than reliable because of his illness. Furthermore, I note that Tarlochan lives on the property owned by the appellant and makes income from the appellant's property so in that way, the appellant is subsidizing Tarlochan who is caring for the applicant. There was a credible explanation by Tarlochan at the hearing that the applicant wanders over to the uncle's home in the village and sometimes is there and that when he quarrels with Tarlochan he goes to his cousin's and that neighbours will feed him on occasion. As the test is substantial dependence, I do not find those incidences of others assisting the applicant on an *ad hoc* basis to deprecate that dependence.

26 I find it unreasonable that the immigration officer, as expressed in the refusal letter, would expect the applicant to receive money directly (and presumably to have a bank account) even though the applicant is deaf, mute and has no education. In the same refusal letter, the officer said to the applicant that "no one understands you" and that the applicant was unable to understand even the basic gestures made to him. Therefore I do not find it an issue that the appellant sent money to Tarlochan for the support of the applicant.

27 Both the appellant's daughter and son testified that 50,000 rupees was sent every six months. The daughter estimated the applicant's living expenses to be approximately 6,000 to 7,000 per

month and Tarlochan estimated the cost to be about 10,000 per month. As I find on a balance of probabilities that the appellant did send regular support.

28 I find it to be a persuasive explanation by the appellant's daughter regarding why the appellant did not sponsor the applicant sooner and why he was removed from the initial sponsorship - that she was having marital difficulties and needed her parents to come right away (she has since divorced the ex-husband) and that the application would be held up by the denial of the applicant and that the appellant was not making sufficient income to sponsor the applicant after they arrived. He then wanted to establish a home so that he could take care of the applicant. I find this credible as he was making little money and then with a \$35,000 down payment, bought a home for the family.

29 I do not find it a problematic issue that the appellant also sent funds for Tarlochan's medical care and for repair for his own house.

30 In summary, as I have found there is credible evidence that the appellant has substantially supported the applicant since before he was 22 years old and that there is evidence that the applicant has never been able to support himself due to an inability to speak and hear, I find that the applicant is a member of the family class.

DECISION

31 The applicant is not excluded by the provisions of subsections 117(1) and 117(2) of the *Regulations*. The appeal of Santokh Singh PONAICH is allowed.

NOTICE OF DECISION

The appeal is allowed. The officer's decision to refuse a permanent resident visa is set aside and the officer must continue to process the application in accordance with the reasons of the Immigration Appeal Division.

"Margaret Ostrowski"

17 October 2008

cp/e/qlspt

1 Immigration and Refugee Protection Act, S.C. 2001, c. 27. 11(1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document shall be issued if, following an examination, the officer

is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

2 *Immigration and Refugee Protection Regulations*, SOR/2002-227. **117(1)** A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is **(b)** a dependent child of the sponsor.

3 He bought a house for \$142,000 three years ago with his wife and paid \$35,500 down.

4 Record, page 63.

5 Exhibit A-1, Tab B-2.