Federal Court  Cour fédérale

Date: 20151223

Docket: IMM-6817-14

Citation: 2015 FC 1417

Ottawa, Ontario, December 23, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

THANATHAKARAN PARAMANAYAGAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision of an Immigration Officer (Officer), dated September 2, 2014, rejecting the Applicant's in-land permanent residence application on humanitarian and compassionate (H&C) grounds made pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act).

II. Background

A. *Facts*

[2] The Applicant is a 33 year-old Tamil male from the city of Jaffna, in northern Sri Lanka. He fled Sri Lanka in May 2010 and entered Canada on August 13, 2010 aboard the *MV Sun Sea*. He made a refugee claim soon after alleging he faced harassment and persecution from Sri Lankan armed forces and paramilitaries. The Refugee Protection Division (RPD) refused the Applicant's claim in December 2012 and leave for judicial review of the RPD's decision was denied.

[3] In April 2014, the Applicant filed an application for permanent residence from within Canada based on H&C grounds relying on his degree of establishment in Canada, country conditions in Sri Lanka for young, middle-aged Tamils, specifically discrimination faced by Tamils in Sri Lanka, and the best interests of his uncle's children whom he provides support for in Canada.

[4] The Applicant currently lives with his uncle, works two jobs, and assists an elderly neighbour with daily tasks such as doing groceries and attending doctor appointments.

B. *The Impugned Decision*

[5] In rejecting the Applicant's H&C application, the Officer found that the Applicant was not sufficiently established in Canada. The Officer also found insufficient evidence to suggest

that the Applicant would have difficulty finding employment if he were to return to Sri Lanka since he was "born and educated in Sri Lanka and speaks the native language." The Officer further noted that the Applicant may be in a position of competitive advantage if he were to return because of work experience acquired in Canada.

[6] In assessing the best interests of the Applicant's cousins, the Officer noted that while the Applicant shares a close bond with them, there was insufficient evidence to demonstrate that the children would suffer a negative impact should the Applicant return to Sri Lanka to apply for permanent residence from there. In addition, the Officer found that the Applicant could maintain a close relationship with his cousins by phone and email.

[7] Regarding the country conditions, the Officer found that the Applicant did not fit the profile of persons harassed and threatened by the government, notably journalists, activists, and Tamils with ties to the Liberation Tigers of Tamil Eelam (LTTE). In rejecting the Applicant's H&C application on these grounds, the Officer found notably that "[t]he applicant provided little evidence that he experienced discrimination as a Tamil in Sri Lanka."

C. *The Applicant's Challenge*

[8] The Applicant contends that the Officer applied the wrong test in assessing hardship by confusing the H&C hardship analysis with the risk analysis made in the context of a Pre-Removal Risk Assessment since the Officer required the Applicant to establish a personal hardship over and above that faced by Tamils currently living in Sri Lanka.

[9] The Applicant also contends that the Officer erred in the hardship analysis by failing to consider or explain why discrimination of Tamils in Sri Lanka does not constitute undue or unusual hardship. He further argues that the Officer unreasonably found that the Applicant has a "viable option" to relocate to Colombo to escape the poor living conditions in Jaffna, where the Applicant's family resides, since the Officer's finding in this regard is based on pure speculation.

[10] The Applicant is not challenging the Officer's findings regarding his degree of establishment in Canada and the best interests of his uncle's children.

III. Issues and Standard of Review

[11] The issue raised by this judicial review application is whether the Officer, in concluding as he did and in the manner in which he did in assessing the country conditions and risk of future discrimination, committed a reviewable error as contemplated by section 18.1(4) of the *Federal Courts Act*, RSC, 1985, c F-7.

[12] As is well-settled, the purpose of H&C applications made under section 25 of the Act is to seek an exemption from Canadian immigration laws that are otherwise universally applied. (*Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, at para 57, [2002] 1 SCR 84 [*Chieu*]. Such applications are "essentially a plea to the executive branch for special consideration which is not even explicitly envisioned by the Act" (*Chieu*, above at para 64; *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113, at para 40 [*Kanthasamy* FCA]; *Nicayenzi v Canada (Citizenship and Immigration)*, 2014 FC 595, at para 12, 457 FTR 65).

[13] Decisions taken on H&C applications made under section 25(1) of the Act have therefore been held to be highly discretionary and the standard of review applicable to such decisions is the reasonableness standard (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, at para 44 [*Kanthasamy* SCC]; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at paras 31 and 56, [1999] SCJ No 39 [*Baker*]; *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125, at para 15, 293 FTR 285). This means that the Court will only interfere with the Officer's decision if it falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]; *Kanthasamy* FCA, above at paras 81 to 84).

[14] However, when it comes to the test to be applied by immigration officers when considering an application for H&C relief under section 25 of the Act, the jurisprudence of this Court is divided. Some judges, relying on the Federal Court of Appeal's decision in *Toussaint v Canada (Citizenship & Immigration)*, 2011 FCA 146 (FCA), at para 29, which, in their view, has not been overturned by *Kanthasamy* FCA, and is, therefore, binding on them, have taken the position that the appropriate applicable standard of review in such instances is correctness (*Vuktilaj v Canada (Citizenship and Immigration)*, 2014 FC 188, at paras 28 to 30, 449 FTR 8; *Gonzalez v Canada (Citizenship and Immigration)*, 2015 FC 382 at paras 30 to 34).

[15] Others are of the view that the standard of correctness sits uncomfortably with Supreme Court jurisprudence since *Dunsmuir* which reiterates the Supreme Court's position that reasonableness should be presumed where a decision-maker is interpreting its enabling

legislation (*Diabate v Canada (Citizenship and Immigration)*, 2013 FC 129, at paras 10 to 17, 427 FTR 87 [*Diabate*]; *Charles v Canada (Citizenship and Immigration)*, 2014 FC 772 at para 22, 461 FTR 12, *Canada (Citizenship & Immigration) v Khosa*, 2009 SCC 12, at para 44, [2009] 1 SCR 339; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, at para 50, [2013] 2 SCR 559).

[16] Here, I do not believe this question to be determinative of the outcome of this case as although I conclude that the Officer applied the correct test, I find that his assessment of the country conditions and risk of future discrimination is flawed and justifies the Court's intervention.

IV. Analysis

[17] Subsection 25(1) of the Act confers on the Minister of Citizenship and Immigration the discretionary authority to exempt foreign nationals from the Act's requirements if the exemption is justified by humanitarian and compassionate considerations. Such considerations exist when denying the exemption would result in hardship which is "unusual and undeserved or disproportionate" (*Kanthasamy* FCA, above at para 41). While Subsection 25(1) was not intended to duplicate refugee proceedings, evidence from those proceedings can nonetheless be considered for the purpose of determining whether an H&C applicant will face a level of hardship that is "unusual and undeserved or disproportionate" if returned to his/her country of origin (*Kanthasamy* FCA, above at para 73).

[18] It is now well-settled that adverse country conditions may be used to demonstrate hardship in the context of an H&C application. In this respect, Justice Mary Gleason, now a judge of the Federal Court of Appeal, held in *Diabate*, above, that in assessing country conditions "[i]t is both incorrect and unreasonable to require, as part of that analysis, that an applicant establish that the circumstances he or she will face are not generally faced by others in their country of origin" since the frame of analysis for H&C consideration "involves consideration of whether the hardship of leaving Canada and returning to the country of origin would be undue, undeserved or disproportionate" (*Diabate*, above at para 36).

[19] However, when applicants rely on country conditions as a basis of their H&C application, they must demonstrate that the "adverse country conditions […] have a direct negative impact" on them (*Caliskan v Canada (Citizenship and Immigration)*, 2012 FC 1190, at para 22, 420 FTR 17; *Kanthasamy* FCA, above at para 76). Put another way, such applicants "must show either that [the adverse country conditions] will probably affect them or, at the very least, that living in [adverse] conditions […] is itself an unusual and undeserved or disproportionate hardship" (*Vuktilaj*, above at para 36). H&C applicants must therefore be able to "show a link between the evidence of hardship and their individual situations. It is not enough just to point to hardship without establishing that link" (*Kanthasamy* FCA, at para 48; see also *Lalane v Canada (Citizenship and Immigration)*, 2009 FC 6, 338 FTR 224 at para 1).

[20] In light of the foregoing, I am of the view that the Officer applied the correct legal test when he considered the hardship component of the Applicant's application. As evidenced by his reasons for decision, the Officer was concerned with whether the Applicant was able to establish

how the findings in the country documentation reports "relate to his personal circumstances", demonstrate a "link between the evidence and his personal situation", or "advancing persuasive objective evidence […] [demonstrating] that he would be personally subjected to hardship in Sri Lanka to the extent that it would justify an exemption under humanitarian and compassionate considerations".

[21] I do not think that it can be reasonably inferred from the impugned decision that the Officer required the Applicant to show that his hardship, as a middle-aged Tamil in or from the North of Sri Lanka, would be worse than others similarly-situated. At the time the Officer considered the Applicant's H&C application, the case law was clear that the Applicant had the burden of demonstrating that adverse country conditions will probably cause him a personal and direct hardship should he apply for permanent residence status from Sri Lanka.

[22] That being said, I am of the view that the Officer's finding that the Applicant failed to demonstrate a personal unusual and undeserved or disproportionate hardship in Sri Lanka, is unreasonable.

[23] Immigration officers making humanitarian and compassionate determinations must consider and weigh all relevant facts and factors (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at paras 74-75). In the present case, adverse country conditions affecting middle-aged Tamil men in or from the North of Sri Lanka was one of these factors the Officer was obliged to consider. This factor had to be assessed by the Officer not in terms of the risks these conditions might represent for the Applicant, as would be the case of a

refugee claim analysis under sections 96 and 97 of the Act, but in terms of the hardship those conditions would represent to the Applicant if he were to return to Sri Lanka in order to seek permanent residence status in Canada (*Kanthasamy* FCA, at para 73). In this respect, the Officer's decision is, in my view, problematic in two respects.

[24] First, the Officer failed to properly assess the Applicant's H&C grounds related to country conditions and discrimination. In assessing country conditions, the Officer accepted that living standards in Jaffna are "not ideal". Indeed, according to the evidence on record, Jaffna is a predominately Tamil area, which has high levels of poverty (55% of households live under a poverty line of less than US $1 per day per person), food insecurity (55% of households are food insecure), and lack of suitable housing (nearly 40% of persons displaced by the war are still living with host families) (see IRIN Asia, Sri Lanka: Focus on Food Insecurity in Jaffna, April 24, 2014). Persons residing in the area who have been displaced by the war live in difficult conditions that do not "conform to international "Sphere" standards, which set forth the minimum requirements in disaster response for shelter, food security, water and sanitation, and health services" (United States Department of State, Country Reports on Human Rights Practices for 2013, Sri Lanka 2013 Human Rights Report, at 33[Human Rights Report]).

[25] However, the Officer found that the Applicant had a viable option in relocating to another area of Sri Lanka such as Colombo. While I agree with the Respondent that it was open to the Officer to indicate that the Applicant could reside anywhere in Sri Lanka, this statement does not negate the Officer's duty to assess the Applicant's H&C application against the country conditions as a whole. In this regard, the Officer failed, in my view, to properly address the

Applicant's claim of the unusual and undeserved hardship he would likely endure in Sri Lanka given the evidence on record pointing to discrimination against young Tamil men.

[26] The present case is distinguishable from *Kanthasamy* since the Officer did not conduct any analysis on the question of future discrimination if the Applicant were to return to Sri Lanka (see *Kanthasamy v Canada (Citizenship and Immigration),* 2013 FC 802 at para 36). The Officer makes no mention of the evidence put forward by the Applicant to the effect that Tamils have suffered "longstanding, systematic discrimination in university education, government employment, and other matters controlled by the government" (Human Rights Report, above at 50). The Officer also made no mention that "Tamils throughout the country, but especially in the north and east, reported that security forces and paramilitary groups frequently harassed young and middle-aged Tamil men" (Human Rights Report, at 50).

[27] Moreover, the Officer's reasons include an excerpt from a 2012 United Kingdom Home Office Country of Information Report on Sri Lanka which states that "[d]iscrimination against […] the ethnic Tamil minority continued, and a disproportionate number of victims of human rights violations were Tamils" (at 60). Despite this, the Officer provided no reasons or analysis as to how he came to the conclusion that evidence of discrimination against Tamils in Sri Lanka does not personally affect the Applicant, even if he were to relocate to Colombo, or how evidence of discrimination does not amount to hardship when the Applicant is a Tamil who must return to Sri Lanka in order to apply for Canadian permanent residence status from abroad.

[28] Furthermore, in assessing the Applicant's employment prospects, the Officer's comment that the Applicant would not have difficulty finding employment in Sri Lanka because he "speaks the language" is purely speculative in nature as counsel for the Applicant indicates that the Applicant does not speak Sinhala, the dominant language in Sri Lanka, and since a 2012 Freedom House report entitled Sri Lanka: Countries at the Crossroads 2012, indicates that "[t]hose who study in Tamil and cannot speak Sinhala fluently are at a disadvantage when seeking employment in Colombo or with the civil service" (at 9).

[29] As Justice Donald Rennie, now a judge of the Federal Court of Appeal, explained in *Aboubacar v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 714, at para 12:

> [12] While claims for humanitarian and compassionate relief under section 25 must be supported by evidence, there are circumstances where the conditions in the country of origin are such that they support a reasoned inference as to the challenges a particular applicant would face on return . . . . This is not speculation, rather it is a reasoned inference, of a non-speculative nature, as to the hardship an individual would face, and thus provides an evidentiary foundation for a meaningful, individualized analysis as required by *Kathasamy*.

[30] This view on adverse country conditions is equally applicable to the case at bar regarding the discrimination component of the Applicant's H&C application and should have been considered by the Officer.

[31] Second, the Officer found that although country conditions "are far from perfect in Sri Lanka", the Applicant did not have the profile of individuals subject to harassment and threats from Sri Lankan police and security forces. However, this is a risk analysis, not a characterization of the evidence of poor country conditions within the H&C framework. On that

point, the case law was clear when the impugned decision was rendered, that the Officer had a duty to go one step further and decide whether evidence of adverse country conditions demonstrated that the Applicant would suffer a personal undue and undeserved or disproportionate hardship (*Diabate*, above at para 36; *Kanthasamy* FCA, above at para 75).

[32] In *Somasundaram v Canada (Citizenship and Immigration),* 2014 FC 1165, the Court allowed an application of judicial review of an officer's H&C decision and in doing so, dismissed the officer's profile argument as not addressing the question of discrimination. It held as follows:

> [39] As to the Applicant's profile, it may be that the Officer was suggesting that because the evidence does not support that the Applicant is an activist, LTTE sympathizer or journalist, he does not fit the profile described in the quoted extract from the USDOS Report as being at risk of attacks and harassment. Alternatively, the Officer may have been relying on the Applicant's profile as depicted by the RPD in its decision. In any event, this is unclear and does not address the question of discrimination based on his Tamil ethnicity if he were to return to Sri Lanka. Further, while the Officer need not have accepted the Applicant's depiction of his profile, given that the RPD had not accepted that he was or would be suspected of LTTE association, she was obliged to clearly identify what she determined his profile to be for the purposes of the H&C application and to consider whether as a young Tamil male from the north, in his particular circumstances, he would personally suffer discrimination amounting to unusual and undeserved, or disproportionate hardship.
>
> [40] In other words, despite her words to the contrary, the Officer's focus was on the RPD's credibility findings in her analysis of the adverse country condition evidence, which findings were primarily concerned with risk, and she did not assess the evidence through the lens of the s. 25(1) test, being whether the Applicant would personally and directly suffer unusual and undeserved, or disproportionate hardship if returned to Sri Lanka.

[33] As in *Somasundaram*, above, I find that the Officer was obliged to clearly identify what he determined the Applicant's profile to be for the purposes of the H&C application and to consider, in a forward-looking perspective, whether as a middle-aged Tamil male from the north, he would personally suffer, in his particular circumstances, discrimination amounting to unusual and undeserved, or disproportionate hardship. The Officer clearly failed to do so.

[34] For all these reasons, the Applicant's judicial review application is granted and the matter is referred back to a different immigration officer for redetermination. This will allow for the Applicant's H&C application to be reconsidered in light of the Supreme Court of Canada decision in *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, rendered on December 10, 2015.

[35] No question of general importance has been proposed by the parties. None will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review application is granted;

2. The matter is referred back to Citizenship and Immigration Canada to be redetermined by a different immigration officer; and

3. No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Ms. Karina Thompson	FOR THE APPLICANT
Ms. Asha Gafar	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Karina Thompson Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT