Federal Court Cour fédérale

Date: 20170119

Docket: IMM-2636-16

Citation: 2017 FC 72

Ottawa, Ontario, January 19, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

HAROLD LAWRENCE MARSHALL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review by Harold Lawrence Marshall [the Applicant] pursuant to s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*], of a decision made by an Immigration Officer [Officer or Minister's Representative], dated May 26, 2016, in which the Applicant's application for permanent resident [PR] status on

humanitarian and compassionate [H&C] grounds was denied [the Decision]. The application is granted for the following reasons.

II. Facts

[2] The Applicant is a 65-year-old U.S. citizen. He came to Canada in 1976 to avoid registering for the US military service; the draft ended in 1973, but registration for military service apparently continued to be required. In addition, he claimed fear of repercussions for avoiding military registration in 1976. He also claimed that he experienced severe racism as an African-American.

[3] Before his arrival in Canada in 1976, the Applicant had several drug-related police charges pending in the USA. At the time of his application, he had put the drug problem behind him; he had been drug free for 12 years.

[4] The Applicant suffered from drug addiction for many years and was deported back to the United States of America [USA] after a charge of possession of a controlled substance in 1985.

[5] He returned to Canada shortly thereafter using fraudulent identity documents; he has remained here since. By the time he returned to Canada, President Carter’s 1977 pardon of those who failed to register for the draft was in place.

[6] After his return, the Applicant lived and worked under a false name. Some thirty years later, he applied for permanent resident status on H&C grounds in May 2015, citing unusual,

undeserved and disproportionate hardship coupled with his establishment in Canada as grounds upon. His H&C application was filed before the Supreme Court of Canada released its decision in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44 [*Kanthasamy*], when the general test for H&C was unusual, undeserved and disproportionate hardship. His H&C submissions therefore focussed on hardship as was the norm at that time.

[7] The Immigration Officer, acting as a representative of the Minister of Citizenship and Immigration, did not make a decision until May 26, 2016, approximately six months after the Supreme Court of Canada's decision in *Kanthasamy*, a case which changed the law on H&C. The Officer dismissed the Applicant's request for H&C permission to apply for permanent resident status from inside Canada.

[8] In terms of establishment, he had been in Canada for 40 years by the time of the decision of the Minister's Representative except for the brief period after he was deported. The Applicant has worked a handful of jobs since his arrival in Canada; his most recent began in 2007 as a self-employed painter. He has been heavily involved in community radio. He first worked with a community radio station out of Ryerson University, CKLN, and currently works on Regent Radio in Regent Park, Toronto. He goes by the name Victor Bains Marshall. He also volunteers with the 12 Step Program, counselling recovering drug addicts, particularly within the African-Canadian community.

[9] As part of his application for H&C, he submitted a very large number of what I would call very good quality character and reference letters written by various members of the

community, including both his ex-wife and a woman with whom he has resided for the past 10 years (he remains close friends with both and their families). These letters indicate his importance to and involvement within the community.

[10] The Applicant has six siblings residing in the USA but each faces their own struggles and are all unable to provide or support him if he is sent back. He has an older daughter who also resides in the USA, but little information is provided about her.

[11] The Applicant's medical issues began in 2009 and have since escalated. He has been diagnosed with Hepatitis C and stage 4 cirrhosis (end stage). He attends the Sherbourne Health Centre [Sherbourne], which is known for its provision of care and support of Hepatitis C clients, for basic medical and nursing care.

[12] The Ontario Government, for reasons of its own, has not provided the Applicant with an OHIP card despite repeated requests supported by his family physician. Sherbourne has been providing health services free of charge thus far. Nevertheless, due to a life-threatening infection in 2012, he incurred a large bill at St. Michael's Hospital that he is still in the process of repaying. It appears he is able to obtain emergency treatment without an OHIP card.

[13] His family physician of five years advises as follows in a report dated December 16, 2015:

> …Mr. Marshall has been diagnosed with **Hepatitis C**, a disease which if left untreated, can result in cirrhosis (scarring) of the liver and a resultant impairment in liver function which itself can lead to diabetes and a life threatening build up of toxins in the body.

> Mr. Marshall has recently been diagnosed with **stage 4 cirrhosis (end stage)** and is at risk EVERY day of decompensated liver disease. Mr. Marshall has demonstrated early signs of impaired liver function for several years, including hepatitis-induced diabetes. Now the risk is greater: if left untreated, Mr. Marshall's liver might further fail, leading to a build up o fluid around his abdomen (ascites) which can become infected; to a state of reversible dementia called hepatic encephalopathy; to liver cancer; and to death. At present, Mr. Marshall is without access to OHIP-covered health care and he cannot afford to pay for health care out of pocket. A number of investigations and treatments are indicated, available, funded through OHIP and absolutely necessary in order to preserve Mr. Marshall's health and his life.
>
> [emphasis in original]

[14] An earlier report from 2014, the same family physician states:

> I am concerned that without access to basic health care, including medications, Mr. Marshall's condition will further deteriorate. <u>Should he be forced to return to the USA, I am certain he would not have access to the care that he needs and would die</u>. We have the ability to provide this care – in fact the Sherbourne Health Centre is known for its provision of care and support of Hepatitis C clients – Mr. Marshall only needs to be granted access to health care for this to happen.
>
> [emphasis added]

[15] Another report from a physician at Sherbourne states:

> I have educated the patient that he has early stages of cirrhosis but his health is at significant risk of deterioration if he defers the required care for his HCV and cirrhosis. It is imperative that he have health coverage to receive appropriate care. Without health coverage he <u>will almost certainly die</u> of liver related complications.
>
> [emphasis added]

[16] The Applicant alleged that, at his age and with his absence of work history in the States, it would be difficult, if not impossible, for him to become employed there should he be deported. Other than what is stated by his family physician as noted above, he provided no other evidence of inability to obtain appropriate medical care in the USA. It does not appear that the family physician has any expertise qualifying her to make the statement she made concerning the availability of medical care in the USA.

III. Decision

[17] On May 26, 2016, the Minister's Representative denied the Applicant's application for PR status on H&C grounds.

[18] Despite commending the Applicant's very substantial achievements as a volunteer in the community, which were granted "significant weight", the Officer says the Applicant can do volunteer work in the USA, noting also the large number of Alcoholics Anonymous and Narcotics Anonymous services operating across the USA – more than 60,000 of the former alone:

> …volunteer work with recovering addicts is not unique to Canada. In other words, in the event the Applicant is required to return to the USA, he can reasonably seek volunteer work with organizations which treat and assist those battling with addiction.

[19] The Officer made note of the lack of evidentiary support for the Applicant's employment after the 1980's and assigned very little weight to employment in terms of establishment. Also noted was the fact there was little evidence of discrimination against him in the USA.

[20] Despite having noted that the Applicant's family members in the USA are incapable of helping him to settle, the Officer concluded that the Applicant's submissions demonstrated that these family members "love [him] very much and he loves them"; therefore, "[a]t the very least they may offer some emotional support."

[21] The Officer assigned significant weight to the strong bonds formed between the Applicant and his ex-spouse, as well as the woman with whom he lived for 10 years, and their families. The Officer noted the Applicant's many friends in Canada, but concluded:

> Should the Applicant return to the USA, he may very well suffer a degree of hardship not having his close friends nearby and he may miss the immediate support they provide for him. However, the Applicant need not completely sever his ties to his Canadian friends, should he return to the USA; the Applicant can reasonably maintain his Canadian friendships in a variety of ways including visiting each other in person.

[22] The Officer found that the Applicant had provided insufficient evidence to demonstrate there is a "serious possibility he faces discrimination in the USA or that he faces mistreatment or prosecution due to his failure to register for possible military service," and, further, should he find himself a victim of racial discrimination, he would have a "viable course of action" in seeking help from the authorities. The Officer references an Encyclopedia.com page that discusses President Carter's 1977 pardon of those who had fled or failed to register for the draft. Referring to a 2016 human rights report by Freedom House, the Officer concluded that

> While some objective documentary sources point to racial discrimination being a problem in the USA, I find that the USA has laws and policies in place to prevent discrimination and assist those who are victims of discrimination.

[23] The Officer also made note of the Applicant's medical diagnosis of Hepatitis C and cirrhosis and the substantial hospital bill he had incurred, but found, correctly in my view, that the Applicant provided little evidence of his inability to receive the relevant medical treatment in the USA. Referring to the website welfareinfo.org, the Officer concluded "I find that the social assistance programs in the USA are reasonable and accommodating."

[24] In summary, the Officer concluded:

> While 40 years is a significant length of time, the number of years spent in Canada, in and of themselves, under illegal circumstances, is not a reason to grant relief under humanitarian and compassionate grounds.
>
> I accept and view very positively the contributions the Applicant has made in Canada, in his community. I also accept and am deeply sympathetic that the Applicant will likely experience a degree of hardship having to uproot himself and re-establish himself in a country he abandoned a long time ago. However, in the USA the Applicant will very likely have access to medical treatment and he will be reasonably protected from any possible discrimination. In the USA the Applicant can reasonably access the social programs which include employment and housing set up to assist USA citizens who are in need of assistance.
>
> In the USA, the Applicant can reasonably access recovery programs and volunteer opportunities.
>
> In the USA, the Applicant will have an opportunity to reunite with his family members and this could prove to be a positive event in the Applicant's life. …

[25] The Applicant seeks judicial review of this decision.

IV. Issues

[26] In my respectful view, and recognizing that a number of issues were raised, the determinative issue in this case is whether the Officer incorrectly used the hardship lens to assess the Applicant's positive H&C factors in light of *Kanthasamy.* I have concluded that the Officer committed reviewable error in this respect, and as a consequence, the decision must be set aside and remanded for redetermination. Therefore I will not address the other issues.

V. Standard of Review

[27] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." While an Officer's H&C findings are reviewed on the standard of reasonableness: *Kanthasamy* at para 44, his or her choice of the legal test is subject to review on the correctness standard: *Valenzuela v Minister of Citizenship and Immigration* 2016 FC 603 at para 19; *Scarlett v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1051 at para 10.

[28] In *Dunsmuir* at para 50, the Supreme Court of Canada explained what is required when conducting a review on the correctness standard:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

VI. Analysis

[29] In my respectful opinion, the Supreme Court of Canada in *Kanthasamy* changed the legal tests representatives of the Minister must use to assess H&C applications. Undoubtedly, prior to *Kanthasamy*, hardship was the general test although the courts had acknowledged that it was not the only test.

[30] *Kanthasamy* reviewed the history of the Minister's humanitarian and compassionate discretionary power enacted set out in section 25 of *IRPA*. The Supreme Court of Canada re-established that *Chirwa v Canada (Minister of Citizenship and Immigration)*, [1970] IABD No 1 [*Chirwa*] provided an important governing principles for H&C assessments, principles that are to be applied along with the older "hardship" analysis required by the Guidelines:

> [13] The meaning of the phrase "humanitarian and compassionate considerations" was first discussed by the Immigration Appeal Board in the case of *Chirwa v. Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338. The first Chair of the Board, Janet Scott, held that humanitarian and compassionate considerations refer to "those facts, established by the evidence, which would excite in a reasonable man [*sic*] in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the Immigration Act": p. 350. This definition was inspired by the dictionary definition of the term "compassion", which covers "sorrow or pity excited by the distress or misfortunes of another, sympathy": *Chirwa*, at p. 350. The Board acknowledged that "this definition implies an element of subjectivity", but said there also had to be objective evidence upon which special relief ought to be granted: *Chirwa*, at p. 350.

[31] The Supreme Court of Canada then stated as follows:

> [21] But as the legislative history suggests, the successive series of broadly worded "humanitarian and compassionate" provisions

> in various immigration statutes had a common purpose, namely, to offer equitable relief in circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another": *Chirwa*, at p. 350.

[32] As to hardship the Supreme Court of Canada said that that the hardship tests continue to apply, but added:

> [33] The words "unusual and undeserved or disproportionate hardship" should therefore be treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). As a result, what officers should not do, is look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds, and use the language of "unusual and undeserved or disproportionate hardship" in a way that limits their ability to consider and give weight to *all* relevant humanitarian and compassionate considerations in a particular case. The three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision.
>
> [emphasis in original]

[33] In reviewing the reasons of the Officer, I am unable to detect any appreciation of the *Chirwa* approach. In my respectful opinion, H&C Officers should not only consider the traditional hardship factors, but in addition, they must consider the *Chirwa* approach. I do not say that they must recite *Chirwa* chapter and verse, nor that there are any magic formulae or special words these Officers must use. But the reviewing courts should have some reason to believe that the Officers have done their job, that is, that H&C Officers have considered not just hardship but humanitarian and compassionate factors in the broader sense.

[34] The Applicant submits that the Minister's representative assessed every factor through the lens of hardship, and hardship to the Applicant, and that in doing so the Officer applied the

wrong legal test. I have reviewed the Officer's reasons and have come to the conclusion that the Applicant is correct.

[35] In my respectful view, the Officer's assessment of the Applicant's establishment was indeed filtered through the lens of hardship. The Officer gave significant weight to the support he received in respect of his years of community volunteer work, radio work and music – but immediately discounts it by referring to his ability to do volunteer work in the USA, i.e., he will not suffer much hardship. In my view, this focus on what he can do in the USA also runs afoul of what Justice Rennie, then of this Court, said in *Lauture v Minister of Citizenship and Immigration* 2015 FC 336 at 25: "… an analysis of the applicant's degree of establishment should not be based on whether or not they can carry on similar activities in Haiti. Under the analysis adopted, the more successful, enterprising and civic minded an applicant is while in Canada, the less likely it is that an application under section 25 will succeed."

[36] The Officer gave weight to establishment ties due to the close relationships he has formed in Canada, and gave significant weight to the support he received from his family – but immediately discounted it by observing the Applicant may maintain his Canadian friendships in a variety of ways including visiting, i.e., he will not suffer much hardship. As to the Applicant's siblings in the USA, the Officer, in my respectful view almost gratuitously suggested "they may offer some emotional support to the Applicant": I am unable to see how that support would differ from that he received in Canada given their own struggles and challenges. In other words, the Officer suggests his hardship would be attenuated. The focus again is on hardship and its amelioration.

[37] The hardship-centric analysis continues with respect to the Applicant's medical conditions, where the Officer focuses on health care availability in the USA. The Officer concludes that the Applicant provided "very little evidence that he would be unable to receive medical treatment for his condition in the USA." While there was, in my respectful view no evidence of treatment problems in the USA, except the single sentence already noted, again the focus in on hardship to the Applicant. It is worth noting that this sort of focus on treatment options in an applicant's home country was criticized by the majority in *Kanthasamy*:

> [47] Having accepted the psychological diagnosis, it is unclear why the Officer would nonetheless have required Jeyakannan Kanthasamy to adduce *additional* evidence about whether he did or did not seek treatment, whether any was even available, or what treatment was or was not available in Sri Lanka. Once she accepted that he had post-traumatic stress disorder, adjustment disorder, and depression based on his experiences in Sri Lanka, <u>requiring further evidence of the availability of treatment, either in Canada or in Sri Lanka, undermined the diagnosis and had the problematic effect of making it a conditional rather than a significant factor.</u>
>
> [emphasis added]

[38] No deference is owed where the wrong test is employed; the correctness standard of review is engaged. In focussing on hardship the Officer applied the wrong legal test. Therefore, judicial review must be granted and the Officer's decision must be aside.

VII. <u>Certified Question</u>

[39] Neither party proposed a question to certify, and no such question arises.

VIII. Conclusions

[40] The application is granted and the matter must be remanded for redetermination. No question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that judicial review is granted, the Decision of the Immigration Officer is set aside, the matter is remanded to a different decision-maker for redetermination, no question is certified and there is no order as to costs.

"Henry S. Brown"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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