Federal Court  Cour fédérale

Date: 20170306

Docket: IMM-2782-16

Citation: 2017 FC 264

Ottawa, Ontario, March 6, 2017

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

JOSWY SURAJ D'SOUZA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is a judicial review of a decision by a senior immigration officer [the Officer] of Citizenship and Immigration Canada [CIC] dated June 2, 2016, refusing the Applicant's application for an exemption from the requirements of the *Immigration and Refugee Protection Act*, SC 2001, c 27, based on humanitarian and compassionate [H&C] grounds, to allow his application for permanent residence to be processed from within Canada.

[2] As explained in greater detail below, this application is dismissed, because the Applicant has not demonstrated that the Officer's decision falls outside a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

II. Background

[3] The Applicant, Joswy Suraj D'Souza, is a citizen of India and a practicing Roman Catholic. After completing his studies in India, Mr. D'Souza spent considerable time as a foreign worker in Saudi Arabia and Israel. He alleges that he received threats to his life and fears persecution in India based on his religious beliefs.

[4] Mr. D'Souza came to Canada on February 18, 2007 and claimed refugee status. His claim was rejected, and his application for leave and judicial review of that decision was dismissed for failure to perfect the application, which he attributes to inadequate legal representation.

[5] Between then and 2014, Mr. D'Souza submitted three unsuccessful H&C applications. He states that he understood his previous counsel would be appealing or seeking judicial review of the negative decisions but that his counsel instead filed successive H&C applications.

[6] Mr. D'Souza then retained his current counsel and filed a fourth H&C application, which was rejected on October 14, 2015. He filed an application for leave and judicial review, which was discontinued as the Respondent consented that the decision be set aside and the matter be referred back to be re-determined by a different officer. That redetermination, dated June 2, 2016, is the subject of this judicial review.

[7] Mr. D'Souza has been issued work permits, the latest of which is valid until March 2017. He is a professional floor installer and has maintained steady employment in this trade in Canada, beginning a business as a sole proprietorship in 2010 which was later incorporated in 2014.

III. Issues and Standard of Review

[8] Mr. D'Souza's written submissions do not set out specific issues for the Court's consideration. He submits that the Officer's decision is reviewable on the standard of reasonableness, relying on the articulation of that standard by the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, as whether the decision falls outside a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[9] I agree that this is the applicable standard and have applied this standard to the arguments raised by Mr. D'Souza at the hearing of this application.

IV. Analysis

[10] As a preliminary point, the Respondent noted at the hearing that Mr. D'Souza's oral submissions largely raised arguments that had not been set out in his written submissions. This appears to be attributable in part to Mr. D'Souza not having received the reasons for the Officer's decision until they were provided by the Respondent and in the Certified Tribunal Record in the course of this application, notwithstanding that his Notice of Application states that he had received written reasons from the tribunal. The Respondent also noted that Mr.

D’Souza did not avail himself of the opportunity to file a Further Memorandum of Fact and Law after receiving the reasons. However, notwithstanding the lack of advance notice of the arguments intended to be advanced by Mr. D’Souza at the hearing, the Respondent did not object to the Court considering those arguments.

[11] Mr. D’Souza’s arguments focused significantly upon his degree of establishment in Canada, noting the Officer’s positive findings in that regard. The Officer found that, during Mr. D’Souza’s time in Canada, he has maintained a good civil record and become “somewhat established” through employment, involvement in the community, his religious observance and relations with individuals in Canada. Mr. D’Souza contrasts this finding with the Officer’s subsequent acknowledgement that he has been in Canada for approximately nine years and that during that time he has become established. The Officer also concludes later in the decision that Mr. D’Souza has established himself in Canada and that it is reasonable to assume that he has fostered relationships and that the separation may be difficult for him.

[12] In support of his position that the decision is unreasonable, Mr. D’Souza argues that these represent inconsistent findings as to his degree of establishment but also that overall the evidence and the Officer’s conclusions demonstrate a significant degree of establishment, such that his H&C application should have been allowed. He submits that the Officer’s only negative finding, which must have been responsible for his application being refused, is the conclusion that his work experience and skills would be transferable upon a return to India, which he argues to be speculation by the Officer without any evidentiary support.

[13] Having reviewed the decision as a whole, I find no error in the Officer's consideration of Mr. D'Souza's establishment in Canada. The various references to establishment do not read as inconsistencies, but rather as the Officer accepting Mr. D'Souza's submission that he has established himself in Canada to a degree such that he would experience difficulties in returning to India. However, the Officer also considered Mr. D'Souza's ties to persons in Canada and India, noting that his mother and four siblings continue to reside in India, and found that he had not demonstrated that the consequences of resettling back to his home country would have a significant negative impact on him or others in either country. Overall, the Officer's reasons demonstrate that, while his degree of establishment was a factor operating in Mr. D'Souza's favour, the Officer was not satisfied that Mr. D'Souza's circumstances warranted the granting of an H&C exemption. It is also settled law that an applicant's degree of establishment is not sufficient in itself to justify exempting the applicant from the requirement to obtain an immigrant visa from outside Canada (see *Singh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 11 [*Singh*], at paras 51-52). I find nothing unreasonable in the Officer's treatment of this factor.

[14] I also find no error in the Officer's consideration of Mr. D'Souza's employment prospects upon return to India. In the course of the analysis, the Officer noted that the burden of proof rests with an applicant to provide evidence to substantiate the grounds of his application and to show the hardship that would be faced if the requested exemption is not granted. The Officer also considered Mr. D'Souza's statement that he would be unable to secure unemployment in his trade as a tile installer if he were to return to India. However, the Officer noted that Mr. D'Souza has had worldly work experience and training in his employment in

Israel and in Saudi Arabia and concluded that he had not put forth documentary evidence to support that he would be unable to re-establish himself professionally as a tile installer, in the hospitality service industry, or in a different profession upon his return to India. I find that the Officer's identification of the burden of proof upon Mr. D'Souza is consistent with the case law (see *Singh*, at para 52) and that the treatment of this aspect of the application falls within the range of possible, acceptable outcomes.

[15] Mr. D'Souza also argues that the Officer erred in failing to take into account the fact that the period of time he has been in Canada is attributable to his involvement in immigration processes and therefore outside his control. He relies on Section 5.14 - Establishment in Canada, of CIC's manual entitled *IP 5 Immigration Applications in Canada made on Humanitarian or Compassionate Grounds* [IP 5], which states that positive H&C consideration may be warranted where there is a period of inability to leave Canada of a considerable duration that is due to circumstances beyond the applicant's control. Section 5.14 provides examples of circumstances beyond the applicant's control, including where an applicant is awaiting a decision on an immigration application and spent several years in Canada with status.

[16] Mr. D'Souza refers the Court to the application of this factor in *Lin v Canada (Minister of Citizenship and Immigration)*, 2011 FC 316 [*Lin*], in which Justice Campbell granted judicial review because the officer considering an H&C application failed to analyse the fact that the applicant's establishment occurred over a period of seven years while that application was under consideration. Mr. D'Souza notes that the periods between submission and decision in his first three H&C applications were, respectively, 598 days, 353 days and 88 days. Between the date of

his fourth H&C application, the decision in which was set aside, and the date of the hearing of this application for judicial review, a further 721 days elapsed. These periods cumulatively total 6 years and 7 months, during which Mr. D'Souza had valid work permits and was establishing himself in Canada.

[17] I do not find the reasoning in *Lin*, or in Section 5.14 of IP 5, applicable to Mr. D'Souza's circumstances. As noted in paragraph 22 of *Richardson v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1082 [*Richardson*], *Lin* has frequently been distinguished, as the timeframe in *Lin* was exceedingly long, having been found by Justice Campbell to be unreasonable. In *Richardson,* Justice Boivin noted that, while applicants are entitled to use all legal remedies at their disposal, choosing to do so does not constitute circumstances beyond their control. During the 6 years and 7 months to which Mr. D'Souza refers, he has submitted a series of H&C applications and has pursued legal remedies in relation to the two most recent negative decisions. He is entitled to have pursued such processes, but the length of time he has been in Canada pursuing them cannot be characterized as outside his control. There is no evidence before the Court that the period of time consumed by any of these processes is unreasonable, as the 7 years in connection with one H&C application was found to be in *Lin.*

[18] Mr. D'Souza also takes issue with the Officer's consideration of the hardship he argues he would experience in returning to India based on country conditions surrounding the treatment of Christians. He is a practising Roman Catholic and argues that, due to the escalation of violence against Catholics in all parts of India, his life would be at risk. Mr. D'Souza notes that his counsel submitted a number of links to Internet articles, showing escalating violence against

Christians, that the Officer questioned why the full articles were not provided for consideration, and that it is not clear if the Officer considered these articles. However, Mr. D'Souza submits that the Officer nevertheless acknowledged that the documentary evidence indicates that minority religious groups experience violence in India. Mr. D'Souza therefore challenges the reasonableness of the Officer's finding that the country conditions in India would not have a direct negative impact on him such as would warrant an H&C exemption.

[19] I find no reviewable error in the Officer's consideration of the country condition documentation. As noted by Mr. D'Souza, the Officer acknowledged that the evidence supported a conclusion that religious violence is an issue in India. However, the Officer also concluded that the evidence demonstrated that each religious group in India faces incidents of violence and that Mr. D'Souza did not link any of the documentary evidence to hardships that he specifically would face in India. The Respondent submits that Mr. D'Souza's position amounts to an argument that every Christian would face hardship in returning to India that would justify granting an H&C exemption.

[20] I find no basis to conclude that the Officer erred in consideration of the country conditions or the resulting hardship that Mr. D'Souza would experience on return to India. Mr. D'Souza has not demonstrated that the officer's findings are unsupported by the evidence or outside the range of possible, acceptable outcomes based on that evidence.

[21] The Officer's analysis can be distinguished from the decision in *Roshan v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1308 [*Roshan*], upon which Mr. D'Souza

relies. In that case, Justice Bell allowed the judicial review application of an applicant who feared harm upon return to Iran because he was an atheist. However, this result turned on specific errors made by the H&C officer, which Justice Bell found to render the decision unreasonable. The officer based the decision in part on the fact that the applicant had lived in Iran for 30 years with no problems related to his atheism, notwithstanding the evidence that his atheism was of recent genesis. The officer also accepted evidence regarding the treatment of atheists by the government of Iran but discounted it completely by observing that atheism is becoming more accepted in Iran, without establishing a link between this increased acceptance by some citizens and the state's actions toward atheists. The decision by the Officer in the case at hand does not demonstrate reviewable errors of the sort that influenced the outcome in *Roshan*.

[22] Having considered Mr. D'Souza's arguments, I find no basis to conclude that the Officer's decision falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law. The decision is therefore reasonable, and this application for judicial review must be dismissed.

V. Certified Question

[23] Mr. D'Souza proposes that the Court certify the following question for appeal:

> Does the Officer's decision fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law?

[24] This is not a serious question of general importance, as it relates solely to the application of the standard of review to the particular facts of this case. It is therefore not an appropriate question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2782-16
STYLE OF CAUSE:	JOSWY SURAJ D'SOUZA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 14, 2017
JUDGMENT AND REASONS:	SOUTHCOTT, J.
DATED:	MARCH 6, 2017

APPEARANCES:

Suvendu Goswami	FOR THE APPLICANT
Rachel Hepburn-Craig	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Suvendu Goswam Barrister & Solicitor, Notary Public Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT