Federal Court  Cour fédérale

Date: 20170329

Docket: IMM-3979-16

Citation: 2017 FC 328

[ENGLISH TRANSLATION]

Ottawa, Ontario, March 29, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

KAMARIYA NDIKUMANA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

DECISION AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) regarding a decision (the Decision) rendered on August 31, 2016, by Mr. Lanthier, Senior Immigration Officer (the Officer), denying the

applicant, Kamariya Ndikumana, permanent resident status on humanitarian and compassionate grounds pursuant to subsection 25(1) of the IRPA.

[2] Ms. Ndikumana is a 68-year-old citizen of Burundi. She arrived in Canada in June 2003. Shortly after, Ms. Ndikumana filed a claim for refugee status, which was denied in July 2004. An application for leave and judicial review of that decision was also denied by the Federal Court.

[3] Given a temporary suspension of removal (TSR) to Burundi in effect at the time and until 2009, Ms. Ndikumana remained in Canada although her application had been denied. Ms. Ndikumana filed an application for permanent residence on humanitarian and compassionate grounds (HC application) in 2008, and pursuant to the measures introduced after the TSR was lifted, Ms. Ndikumana was able to stay in the country pending the outcome of her application. A second deferral of removals to Burundi was implemented in December 2015, when the Canadian government announced an administrative deferral of removals (ADR). This ADR is still in effect today.

[4] Ms. Ndikumana's HC application was denied in 2011, and a second application filed in 2012 was also denied in 2013. A negative decision was also rendered in 2013 in the context of her pre-removal risk assessment (PRRA). Since then, Ms. Ndikumana has remained in Canada without status.

[5] In February 2016, Ms. Ndikumana filed her third HC application. The application was denied by the Officer on August 31, 2016. That decision is the subject of this judicial review. The Officer found that Ms. Ndikumana did not meet the criteria for granting permanent resident status on humanitarian and compassionate grounds, although he acknowledged that Ms. Ndikumana has been living in Canada for more than 12 years and that she has become integrated into society in many ways, including through employment and volunteering in the community. However, the Officer gave her establishment little weight in his review, given that her stay in Canada was the result of both circumstances beyond her control and her choice to remain in Canada without status after the first TSR was lifted in 2009, and after her PRRA application was denied.

[6] With respect to adverse conditions in the country of origin, the Officer found that there is a significant socio-political crisis in Burundi, but that since the Canadian government introduced an ADR in December 2015, she would not be returning to Burundi immediately. Ms. Ndikumana could stay in Canada as long as the ADR remains in effect. The Officer therefore gave little weight to the hardship that Ms. Ndikumana could face. The Officer also identified other elements that could not support the granting of permanent resident status, including the following facts:

- Ms. Ndikumana will remain in Canada without status until the suspension is lifted, which is normal, but she could still get a work permit;
- Women experience violence and discrimination in Burundi, but because Ms. Ndikumana did not make any specific allegations in this regard, this element would be given little weight;
- Ms. Ndikumana’s allegations of persecution were not credible, and she failed to prove her contentions.

[7] After having reviewed all aspects of the case, the Officer found that Ms. Ndikumana had failed to establish the existence of sufficient humanitarian and compassionate grounds to warrant the granting of permanent resident status. The HC application was therefore denied.

II. Analysis

[8] Ms. Ndikumana raised the following two questions:

1. Procedural fairness: Was there a breach of procedural fairness in finding that Ms. Ndikumana's application lacked credibility without providing her with an opportunity to address these concerns?

2. Unreasonable findings: Did the Officer err in making unreasonable and overly restrictive findings, in light of the evidence?

[9] These two questions respectively concern the two standards of review, correctness and reasonableness. The standard for reviewing the first question concerning procedural fairness is correctness (*Mission Institution v. Khela*, 2014 SCC 24 at para. 79), where the Court must conduct its own analysis and may, if it disagrees with the decision-maker's reasoning, substitute its own view (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 50 [*Dunsmuir*]).

[10] The second question, as to whether the Officer erred in questions of fact and law in his analysis of the HC application, is reviewable under the standard of reasonableness (*Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras. 43-44 [*Kanthasamy*]). When reviewing a decision under the reasonableness standard, the Court must determine whether the decision falls within a "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para. 47).

1. *Procedural fairness*

[11] Ms. Ndikumana alleged that there was a breach of procedural fairness in not allowing her to respond to the credibility issues raised by the Officer. She stated that the failure to grant her an interview was inconsistent with the right to participate required by the duty of procedural fairness.

[12] This question must be reviewed under the standard of correctness. The Court finds that, contrary to what Ms. Ndikumana stated, the Officer did not have to call her for an interview, or grant [TRANSLATION] "meaningful participation in the decision-making process" to give her the opportunity to defend her credibility.

[13] The content of the duty of procedural fairness varies according to the circumstances of each case, and the duty of fairness is met if the person had an opportunity to present their case fully and fairly (*Kisana v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para. 45 [*Kisana*]; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras. 21 and 30).

[14] In the context of HC applications, it is clear that is incumbent upon the applicant to prove his allegations. As such "an officer is under no duty to highlight weaknesses in an application and to request further submissions" (*Kisana* at para. 45). The Court of Appeal further noted that an officer charged with responding to an HC application is under no obligation to ask for more

information if the evidence is not sufficiently compelling (*Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at paras. 9-10).

[15] In short, in the context of an HC application, it is settled law that an applicant does not possess the right to an interview, and the officer is not obliged to give him an opportunity to respond to the credibility issues in his application (*Azziz v. Canada (Citizenship and Immigration)*, 2015 FC 850 at paras. 19-21). I therefore do not find any breach of procedural fairness in this case.

2. *Unreasonable findings?*

[16] Ms. Ndikumana alleged that the Officer's decision was unreasonable in light of the evidence, for three reasons. Firstly, she criticized the fact that the Officer gave little weight to the difficult conditions in Burundi, citing the ADR to Burundi. Secondly, she argued that if her application were rejected on the basis of the ADR, her having to remain in Canada without status would pose a number of constraints and to find otherwise was unreasonable. Thirdly, she submitted evidence that women are victims of discrimination and violence in Burundi, and she contended that she did not need to make specific or personal allegations in this regard. Similarly, she alleged that the Officer did not consider all aspects of her application and that his review was too restrictive and unreasonable.

[17] First of all, the Officer gave little weight to the fact that there are difficult conditions in Burundi because Ms. Ndikumana would not return to Burundi if her application were denied, given the ADR. This finding is reasonable. The facts are very similar in *Nicolas v. Canada*

(Citizenship and Immigration), 2014 FC 903 [*Nicolas*], in which Noël J. found that the decision to deny the HC application on the grounds that the woman could not prove that there were adverse conditions in Haiti, although there was a TSR in effect, was reasonable (*Nicolas* at para. 32).

[18] Therefore, an officer is not necessarily obliged to allow an HC application because there is a TSR (or an ADR) in effect. It is widely accepted that "in the context of an H&C Application, the existence of a TSR with regard to a specific country cannot automatically lead to specific outcome, whether positive or negative" (*Likale v. Canada (Citizenship and Immigration)*, 2015 FC 43 at para. 40 [*Likale*]; see also *Alcin v. Canada (Citizenship and Immigration)*, 2013 FC 1242 at para. 55).

[19] In this case, it would not be unreasonable to find that Ms. Ndikumana will continue to benefit from the ADR, and that she will not have to deal with current conditions in Burundi.

[20] In *Likale*, the officer's decision was found to be reasonable because the applicant did not demonstrate that returning to his country would cause him hardship that would be unusual or disproportionate, "once the TSR is lifted" (*Likale* at para. 36). The Court concluded that it was reasonable to note that "the applicant can continue to avail himself of the TSR and remain in Canada," and that this analysis is consistent with humanitarian values (*Likale* at para. 38).

[21] The finding that Ms. Ndikumana will not have to suffer from current conditions in Burundi, given that a TSR is currently in effect, is therefore reasonable.

[22] Secondly, with respect to problems involved in having to remain in Canada without status if the HC application is denied, the Officer's findings are again reasonable. As in *Likale*, the applicant failed to demonstrate that remaining in Canada without status indefinitely because of the TSR would cause her unusual hardship. Such a finding is therefore reasonable (*Likale* at para. 13).

[23] The Officer did in fact review this argument with respect to Ms. Ndikumana. He found that, while remaining in Canada without status may cause inconvenience, it is a normal consequence of the decision to remain in Canada without status (at least for the years between the lifting of the TSR in 2009 and the introduction of the ADR in 2015). The Officer's finding therefore fully meets the test of reasonableness.

[24] Finally, the Officer's finding regarding violence and discrimination against women in Burundi is also reasonable. Ms. Ndikumana asserted that because she is a woman and because the Officer recognizes that women are experiencing hardship in Burundi, it is unreasonable to state that she has not made specific allegations in this regard. Ms. Ndikumana supported her statement by citing *Kanthasamy*, which stipulates that "discrimination can be inferred where an applicant shows that he or she is a member of a group that is discriminated against" (*Kanthasamy* at para. 53).

[25] Contrary to what Ms. Ndikumana asserted, I am not of the view that the Officer erred on this point. Under subsection 25(1) of the IRPA, an applicant must demonstrate unusual and undeserved or disproportionate hardship (*Kanthasamy* at para. 26). In his review, the decision-

maker weighed all relevant humanitarian considerations, including the fact that women are experiencing hardship in Burundi. The decision-maker was therefore right in addressing the hardship facing women in Burundi, while pointing out that Ms. Ndikumana did not mention a personalized risk. The fact that Ms. Ndikumana did not mention a personalized risk is therefore not a mistake, especially considering that the Officer did in fact review the general risk that women are exposed to in Burundi.

[26] Secondly, Ms. Ndikumana challenged the Officer's decision, arguing that his review of her application and the circumstances cited was too narrow, requiring that the hardship be unusual, undeserved and disproportionate. However, the Court does not agree with her on this point.

[27] It should be noted that it is not this Court's role to review the various pieces of evidence or the relative importance given by the decision-maker to the various factors (*Kanthasamy v. Canada (Citizenship and Immigration)*, 2014 FCA 113 at para. 99). As long as the decision falls with a range of possible acceptable outcomes in the circumstances, a decision-maker must be cautious about substituting his own view for that of an officer (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 17).

[28] In asserting that the Officer has applied the various criteria too stringently, Ms. Ndikumana is actually asking the Court to reweigh the various factors reviewed by the Officer, which the Court must refrain from doing. As long as the decision is transparent, intelligible and falls within a range of possible, acceptable outcomes which are defensible in

respect of the facts and law, a Court ought not to interfere (*Dunsmuir* at para. 47). That is the case here. Consequently, there is no error on this point.

III. Conclusion

[29] As a result, this application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. There is no question to be certified;

3. No costs are awarded.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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