Federal Court  Cour fédérale

Date: 20180125

Dockets: IMM-1382-17
IMM-1383-17

Citation: 2018 FC 73

Ottawa, Ontario, January 25, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

SAREDO SOULEIMAN MIYIR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-1383-17

AND BETWEEN:

SINAN SOULEIMAN MIYIR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] The Applicant sisters, both Djibouti nationals, are ethnically Somalian and members of the Issa tribe. They state that if they return to Djibouti, their religious and domineering mother will send them to an extremist Koranic school and force them to marry "good Muslim men". The Applicants depose that they traveled to Canada on July 5, 2014, aided by their sympathetic father, for the purpose of fleeing Djibouti and their mother's coercion.

[2] The sisters' claims for refugee status in Canada were rejected by the Refugee Protection Division [RPD] and Refugee Appeal Division [RAD] of the Immigration and Refugee Board, which both rendered negative decisions on the basis of credibility. Leave for judicial review was also refused by this Court.

[3] Following the rejection of their refugee claims, the Applicants each pursued humanitarian and compassionate applications [H&Cs] under section 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The H&Cs, accompanied by detailed submissions from counsel, relied on two factors: (i) the hardship the Applicants would face if returned to Djibouti, and (ii) their establishment in Canada.

[4] The officer who reviewed the two H&Cs [Officer] found that the Applicants had not demonstrated circumstances warranting relief [Decisions]. The Decisions are almost identical, except for certain personal identification differences. Although each Decision became the subject

of a different application for judicial review, those applications were advanced upon identical written submissions and argued before me concurrently. Therefore, this judgment, which will be filed in both IMM-1382-17 and IMM-1383-17, resolves both applications and all points herein refer to both Decisions equally.

[5] For the reasons that follow, I find that the Officer did not analyze how adverse conditions facing women and Issa tribe members in Djibouti might result in hardship to the Applicants. The Decisions are, thus, unreasonable and will be returned for reassessment.

II. The Parties' Positions

[6] I note at the outset that, while the Applicants' written materials impugned the Officer's "establishment" analyses, this position was not advanced at the hearing and will not be dealt with in this judgment.

[7] Aside from "establishment", the Applicants raise two grounds of review. First, they argue that the Officer refused to consider any of the circumstances which were dismissed as not credible in the Applicants' refugee claims, thereby effectively fettering discretion. Specifically, the Applicants submit that, while the Officer correctly identified that the RPD and RAD's refugee analyses could not be re-conducted as part of the H&C analysis, the Officer should have nevertheless considered those same circumstances under a "hardship" lens.

[8] Second, the Applicants submit that the Officer erred in the manner identified in *Diabate v Canada (Citizenship and Immigration)*, 2013 FC 129, by requiring them to demonstrate that

country conditions in Djibouti would affect them in ways distinct from the general experiences of women in Djibouti. These two issues are interrelated because they both focus this Court's attention on the Officer's analysis of the alleged "hardship" the Applicants would experience if returned to Djibouti. The Applicants argue that both errors are of a legal nature, raising a correctness standard of review.

[9] The Respondent counters by referring to *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza*]. Although *Raza* concerned a Pre-Removal Risk Assessment [PRRA], the Respondent submits that *Raza* applies equally to H&Cs on the point that while H&Cs are not appeals or reconsiderations of failed refugee claims, they may raise some or all of the same factual and legal issues as claims for refugee protection. In such cases there is thus a risk of wasteful and potentially abusive relitigation (*Raza* at para 12).

[10] Here, the Respondent argues that the Officer reasonably refused the Applicants' attempt to use "updated" evidence to relitigate their failed refugee claims. The Respondent contends that the Officer was simply not persuaded that the Applicants' new, corroborative evidence overcame the determinations made by the RPD, upheld by the RAD, and ultimately by this Court when leave was denied. The Respondent further argues that *Diabate* does not apply since the Applicants advanced their case on the basis of circumstances that would affect them personally.

[11] The Respondent argues that the Applicants' H&Cs turned on credibility and not on the correct legal analysis of accepted facts. Accordingly, it submits that the issues raised in these Applications attract a reasonableness standard of review.

III. Analysis

A. *Standard of Review*

[12] As noted by Justice Brown in a series of three recent decisions in this area, the H&C exemption is an exceptional and highly discretionary remedy, in the nature of extraordinary or special relief (*Nguyen v Canada (Citizenship and Immigration)*, 2017 FC 27 at para 29). Significant deference is owed to the deciding officer (*Li v Canada (Citizenship and Immigration)*, 2017 FC 841 at para 15; *Herman v Canada (Citizenship and Immigration)*, 2017 FC 842 at para 10)).

[13] That said, deference is not a blank cheque and there must be reasoned reasons to ground a justified outcome (*Njeri v Canada (Citizenship & Immigration)*, 2009 FC 291 at para 12, cited in *Varatharasa v Canada (Citizenship and Immigration)*, 2017 FC 11 at para 6). In light of these observations, I am not persuaded that either issue raised by the Applicants attracts a correctness review.

[14] I will examine the issues raised on a reasonableness standard, staying within the strictures of exceptionality and deference while ensuring that the Decisions are indeed justified.

B. *Assessing the "Hardship" of Adverse Country Conditions in H&C Applications*

[15] In *Kanthasamy v Canada (Citizenship and Immigration*, 2015 SCC 61 [*Kanthasamy*], the Supreme Court of Canada clarified how the factor of "hardship" fits into an H&C analysis. Prior

to *Kanthasamy*, the Ministerial Guidelines on H&Cs directed decision-makers to consider whether applicants would face "unusual and undeserved or disproportionate hardship" if not granted an exemption. However, in *Kanthasamy* the Supreme Court held that the words "unusual and undeserved or disproportionate hardship", which do not appear in section 25(1), should not limit a decision-maker's ability to consider all factors that may be relevant in a particular case (*Kanthasamy* at para 33). Rather, an H&C decision-maker must apply section 25(1) with regard to its equitable goals, which means considering whether the applicant's "circumstances as a whole" justify exemption (*Kanthasamy* at paras 32, 45).

[16] For the purposes of the Applications now before this Court, it is notable that *Kanthasamy* did not reject the concept of "hardship" in H&C applications altogether; to the contrary, the Supreme Court's analysis in *Kanthasamy* indicates that "hardship", assessed equitably, flexibly, and as part of the applicant's circumstances as a whole, remains important to H&C analyses (*Mulla v Canada (Citizenship and Immigration)*, 2017 FC 445 at para 13; *Nwafidelie v Canada (Citizenship and Immigration)*, 2017 FC 144 at para 22 [*Nwafidelie*]).

[17] This shift in the legal framework for H&C analyses, and the continuing role of "hardship", is reflected in the updated Ministerial Guidelines on H&Cs, which were amended after the publication of *Kanthasamy* on December 10, 2015. As of the date of this judgement, the Guidelines' "hardship" section reads as follows:

> As of December 10, 2015, there is no hardship "test" for applicants under subsection 25(1); however the determination of whether there are sufficient grounds to justify granting an H&C request will generally include an assessment of hardship. Therefore, hardship continues to be an important consideration in determining whether

> sufficient humanitarian and compassionate considerations exist to justify granting an exemption and/or permanent resident status**.**
>
> In many cases, hardship will arise as a result of the requirement in section 11 that foreign nationals apply for a permanent resident visa before entering Canada. In other words, a decision maker would consider the extent to which the applicant, given their particular circumstances, would face hardship if they had to leave Canada in order to apply for permanent residence abroad. Although there will inevitably be some hardship associated with being required to leave Canada, this alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under subsection 25(1) (*Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61; *Rizvi v. Canada* (*Minister of Citizenship and Immigration*), 2009 FC 463).
>
> [Emphasis added]

[18] Under the heading "[f]actors to consider in a humanitarian and compassionate assessment", the updated Guidelines direct decision-makers to consider the applicant's ties to Canada, as well as factors in the applicant's country of origin, including adverse country conditions. The updated Guidelines also instruct decision-makers to:

> … consider the applicant's circumstances relative to others living in their country when considering whether sufficient H&C grounds exist to justify an exemption. The assessment is not a comparison of life in Canada versus life in the country of origin. It is an assessment of the hardship that would result if the applicant is not granted the exemption or a permanent resident visa.
>
> [Emphasis added]

[19] Therefore, where adverse conditions in an applicant's country of origin form part of an applicant's H&C circumstances, the decision-maker must consider those conditions in determining whether an equitable exemption is warranted. Typically, this will mean assessing the "hardship" of returning to those conditions.

[20] However, a decision-maker must not confuse (i) the H&C analysis with (ii) the refugee analysis required under sections 96/97 of IRPA. These two analyses are sometimes erroneously conflated because both may require a decision-maker to consider conditions in a claimant's country of origin. This is improper, as the 2012 legislative revisions to section 25(1) make clear:

25(1.3) In examining the request of a foreign national in Canada, the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national.	25(1.3) Le ministre, dans l'étude de la demande faite au titre du paragraphe (1) d'un étranger se trouvant au Canada, ne tient compte d'aucun des facteurs servant à établir la qualité de réfugié — au sens de la Convention — aux termes de l'article 96 ou de personne à protéger au titre du paragraphe 97(1); il tient compte, toutefois, des difficultés auxquelles l'étranger fait face.

[21] One error that this Court has identified in this area is the erroneous consideration of "personalized" risk in H&C applications. For refugee purposes, the claimant must show that he or she faces a "personalized" risk of persecution not borne by members of the general population. However, the "personalized risk" required in a refugee claim analysis has no place in an H&C analysis, as explained by Justice Gleason: "[i]t is both incorrect and unreasonable to require, as part of [the H&C] analysis, that an applicant establish that the circumstances he or she will face are not generally faced by others in their country of origin" (*Diabate* at para 36), a principle that this Court continues to follow (see *Martinez v Canada (Citizenship and Immigration)*, 2017 FC 69 at para 12).

[22] In summary, the refugee and H&C analyses are distinct, but they need not be based on distinct factual circumstances. Nothing precludes a claimant in an H&C application from adducing evidence of facts argued in a failed refugee proceeding. In such cases, the H&C decision-maker is prohibited from repeating the refugee analysis or improperly importing its standards, but nevertheless must still determine whether the same facts, insufficient to ground a refugee claim, justify H&C relief. The Supreme Court specifically recognized this point in *Kanthasamy*:

> 51 […] s. 25(1.3) does not prevent the admission into evidence of facts adduced in proceedings under ss. 96 and 97. The role of the officer making a determination under s. 25(1) is to ask whether this evidence, along with any other evidence an applicant wishes to raise, though insufficient to support a s. 96 or s. 97 claim, nonetheless suggests that "humanitarian and compassionate considerations" warrant an exemption from the normal application of the *Immigration and Refugee Protection Act*. In other words, the officer does not determine whether a well-founded fear of persecution, risk to life, and risk of cruel and usual treatment or punishment has been established — those determinations are made under ss. 96 and 97 — but he or she can take the underlying facts into account in determining whether the applicant's circumstances warrant humanitarian and compassionate relief.

C. *The Officer's "Hardship" Analysis*

[23] The Applicants asked the H&C Officer to consider the hardship they would experience if returned to Djibouti from two perspectives. Their first argument was based on the same facts advanced in their refugee claims: they submitted that, if returned to Djibouti, they would face forced marriage and extremist religious schooling at the hands of their mother. However, the Applicants' second argument was that they would experience hardship in Djibouti for reasons wholly unconnected to their mother, namely, simply because they were women and members of the Issa tribe.

[24] With respect to the first argument, I agree that the Applicants, in substance, were asking the Officer to revisit determinations made by the RPD and RAD. Indeed, in their written representations to the Court in these Applications, the Applicants explicitly dispute the reasonableness of the RPD and RAD decisions, saying that the RPD decision was based on minor evidentiary inconstancies, a selective reading of the materials, and stereotypic reasoning, and that the RAD was a mere "rubber stamp" of the RPD decision.

[25] Although it was open to the Applicants to pursue their first argument, they faced a difficult task in attempting to overcome the RPD and RAD's credibility determinations in the particular factual backdrop in this matter. As the Respondent points out, the Applicants' new evidence was merely corroborative of a story already found not to be credible (*Gomez v Canada (Citizenship and Immigration*, 2005 FC 859 at para 5).

[26] The Officer considered the Applicants' new evidence but did not believe that it was sufficiently credible to establish that the Applicants' mother would force them to marry or to attend an extremist religious school if they returned to Djibouti. I agree with the Respondent that this finding is entitled to deference. It follows, therefore, that the Officer was not required to consider the "hardship" the Applicants said they would face at the hands of their mother, or if they fled their mother's coercion, because the underlying factual circumstances were found not to be credible. In other words, where an H&C applicant does not establish certain facts relied upon, any hardship those facts might lead to need not be considered by the H&C officer.

[27] However, that does not end matters. The Officer in this case accepted the Applicants' second submission, which was that women in Djibouti generally face unfavourable circumstances. In fact, the Officer expressly acknowledged some of these conditions, finding that women in Djibouti « souffrent en effet de violence conjugale et aussi de discrimination en matière d'emploi et d'héritage » ([TRANSLATION] "are victims of spousal violence and discrimination based on employment and heritage"). The Applicants' counsel submitted several pages of written representations before the H&C Officer squarely and centrally addressing the hardship the Applicants said they would face as women and Issa tribe members if returned to Djibouti, but the Officer did not consider these arguments.

[28] The Decisions that followed were organized under only three subtitles: (i) « Identité »" ([TRANSLATION] "Identity"), (ii) "Risques et conditions défavorables dans le pays d'origine" ([TRANSLATION] "Risks and unfavorable conditions in the country of origin"), and (3) « Etablissement et liens au Canada » ([TRANSLATION] "Establishment and ties to Canada"). Of course, form is not determinative, and the Decisions could have been considered reasonable if they implicitly addressed the Applicants' submissions on the hardship they would face in Djibouti as women and members of the Issa tribe (including in the Decisions' *pro forma* sections). But the Decisions do not even mention the word "hardship".

[29] While accepting that women in Djibouti face adverse conditions, the Officer noted that the situation in Djibouti affected women "in general" and not the Applicants "personally", concluding that:

> Je partage l'opinion de la requérante que la situation générale des femmes à Djibouti notamment au niveau économique et social est

> préoccupante. Les femmes souffrent en effet de violence conjugale et aussi de discrimination en matière d'emploi et d'héritage. Cependant, la requérante ne démontre pas que cette situation l'affecte elle à titre personnel plutôt qu'indistinctement la majorité de la population de sexe féminin. Je suis donc d'avis que les conditions défavorables à Djibouti ne justifient la dispense ici demandée.
>
> [TRANSLATION] I share the applicant's opinion that the overall situation of women in Djibouti, especially at the economic and social level, is worrisome. Indeed, women are victims of spousal violence and discrimination based on employment and heritage. However, the applicant does not show that this situation affects her personally, but rather most of the female population in general. It is therefore my view that the unfavourable conditions in Djibouti do not justify the waiver requested here.

[30] While the precise meaning of this finding is unclear (did the Officer mean that the Applicants would be sheltered from the conditions faced generally by women, or that the Applicants would merely face conditions borne by all women in Djibouti?), I accept the Applicants' argument that the Officer's language evokes the error identified in *Diabate*. I further agree with the Applicants that there was no need for them to lead direct evidence showing they would "personally" experience discrimination (*Kanthasamy* at paras 53-54). The Officer should have inferred discrimination in the areas noted based on the Applicants' membership in a group that faces discrimination. The amended Guidelines underline this point:

> In assessing whether an applicant will be affected by discrimination, discrimination can be inferred where an applicant shows that they are a member of a group that is discriminated against. Evidence of discrimination experienced by others who share the applicant's profile is relevant under subsection 25(1), <u>whether or not the applicant has evidence that they have been personally targeted.</u>
>
> [Emphasis added]

[31] This should have thus led the Officer to comment on “hardship”, even if only briefly. But to omit any such comment entirely was to provide — at least in this area — “unreasoned reasons”, and for me to simply accept these reasons on account of deference would be tantamount to endorsing a blank cheque.

[32] In conclusion, I find that the Officer did not engage with the Applicants’ evidence and submissions that they would experience hardship as women and Issa tribe members if returned to Djibouti. This component of the Applicants’ argument did not depend upon the Officer’s acceptance of the facts found not to be credible by the RPD and RAD, and it was squarely addressed in their written materials. The Officer’s Decisions were therefore unreasonable.

[33] Having regard to the above analysis, I would summarize the key takeaways for the purposes of these Applications as follows:

1. An H&C applicant may allege that he or she will face “hardship” upon return to his or country of origin, and such a circumstance must then be factored into the consideration of whether to grant H&C relief;
2. Where the alleged “hardship” in the country of origin is based on facts found not to be credible in a failed refugee claim, nothing precludes the applicant from raising those same facts in an H&C application. However, it is the applicant’s onus to overcome those prior negative credibility determinations;
3. If “hardship” is argued based upon facts that the H&C officer indeed accepts, the officer must then consider whether “hardship” justifies H&C relief, in a holistic, flexible, and equitable manner as required by *Kanthasamy*; and

4. The H&C officer must be careful not to conflate the refugee analysis with the "hardship" the applicant may face applying from abroad. For instance, an H&C applicant need not show that adverse country conditions affect him or her more severely than the general population. Further, an applicant need not lead direct evidence of discrimination if he or she belongs to a group that experiences discrimination.

IV. Conclusion

[34] Because the Officer did not consider whether the Applicants would experience hardship in applying from Djibouti as women and members of the Issa tribe, the Decisions were unreasonable. The Applications are accordingly allowed. No questions for certification were argued and none arise.

JUDGMENT in IMM-1382-17 and IMM-1383-17

THIS COURT'S JUDGMENT is that:

1. These applications are granted.

2. These matters are referred back for reconsideration by a different officer.

3. No questions for certification were argued, and none arises.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1382-17
STYLE OF CAUSE:	SAREDO SOULEIMAN MIYIR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	IMM-1383-17
STYLE OF CAUSE:	SINAN SOULEIMAN MIYIR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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