Federal Court Cour fédérale

Date: 20180601

Docket: IMM-5124-17

Citation: 2018 FC 571

[ENGLISH TRANSLATION]

Ottawa, Ontario, June 1, 2018

PRESENT: Mr. Justice Grammond

BETWEEN:

ABDOUL NASSER SADOU MARAFA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Marafa is a citizen of Niger. His claim for refugee protection in Canada and his pre-removal risk assessment application were both denied. He sought humanitarian and compassionate [H&C] relief to apply for permanent residence from within Canada. His application was denied. He is now seeking judicial review of that decision, alleging that the Officer who denied the application [the Officer] had misconstrued the applicable criteria for an

H&C application. I am allowing his application, since the Officer failed to consider the living conditions in Niger, where Mr. Marafa would be returning. This omission renders his decision unreasonable.

[2] Section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] provides that the Minister may grant an exemption to certain provisions of the Act "if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national". The decision is discretionary. The decision-maker must weigh several relevant factors, but there is no rigid formula that determines the outcome. This Court reviews decisions of this nature on a standard of reasonableness (*Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909, at paragraph 44 [*Kanthasamy*]). In that context, my role is not to assess the relevant factors or to exercise the decision-maker's discretion anew, but to verify that the decision-maker identified the relevant factors and gave them due consideration. I must also ensure that the decision under review is based on a defensible interpretation of the applicable legal principles and a reasonable assessment of the evidence.

[3] The hardship the applicant would face if he were to return to his home country is one of the relevant factors in assessing an H&C application. Mr. Marafa contends that the Officer incorrectly assessed this factor. According to Mr. Marafa, the Officer applied the wrong test in refusing to consider the general conditions in Niger. The Officer did so because he found that the conditions affect the entire population there and not Mr. Marafa in particular. The following excerpt from the decision summarizes the Officer's reasoning:

> [TRANSLATION] Although the situation is not perfect, the documentation submitted and consulted does not make it possible to establish a connection with the applicant's personal situation because it refers to the general conditions in the country. The documentation submitted and consulted regarding the situation in Niger indicates that the conditions the applicant would face are not different from those the rest of the country's population faces, since they are not related to a specific characteristic or status of the applicant. Consequently, I give little weight to the factors in his country of origin.

[4] Many decisions of our Court emphasize that, for an H&C application, officers must not limit their assessment of the hardship the claimants would face in their home country to hardship connected to a personal characteristic of the claimant (see, for example, *Shah v Canada (Citizenship and Immigration)*, 2011 FC 1269 at paras 67-73; *Diabate v Canada (Citizenship and Immigration)*, 2013 FC 129 at paras 32-36; *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 at paras 30-31; *Rubayi v Canada (Citizenship and Immigration)*, 2018 FC 74 at paras 14-25). In reality, an officer who commits this error is confusing the criteria applicable to an H&C application, governed by section 25 of the Act, with those that define a person in need of protection pursuant to section 97.

[5] The respondent cites three decisions by this Court that seem to put forwrd a different approach (*Lalane v Canada (Citizenship and Immigration)* [*Lalane*], 2009 FC 6; *Joseph v Canada (Citizenship and Immigration)* [*Joseph*], 2015 FC 661; *Ibabu v Canada (Citizenship and Immigration)* [*Ibabu*], 2015 FC 1068). The reasoning behind these three decisions is succinctly expressed in *Lalane* (at para 1):

> The allegation of risks made in an application for permanent residence on humanitarian and compassionate grounds (H&C) must relate to a particular risk that is personal to the applicant. The applicant has the burden of establishing a link between that

> evidence and his personal situation. Otherwise, every H&C application made by a national of a country with problems would have to be assessed positively. . .

[6] With respect for my colleagues, I find that this reasoning exaggerates the scope of the dominant line of cases mentioned above and neglects the discretionary nature of a decision on an H&C application. Considering a factor does not necessarily mean that the decision will be favourable to the applicant. Therefore, considering the general conditions in the country of removal does not result in the prohibition of any removal to certain countries where living conditions are particularly difficult.

[7] The reasoning in *Lalane*, *Joseph* and *Ibabu* is difficult to reconcile with the Supreme Court of Canada's decision in *Kanthasamy*. In fairness to my colleagues, I note that *Kanthasamy* was rendered after their decisions. In that decision, the Supreme Court rejected a silo approach to the factors relevant to an H&C application and affirmed that officers must "consider and give weight to all relevant humanitarian and compassionate considerations" (paragraph 33, italics in the original). In reality, refusing to consider the living conditions in the country of removal is tantamount to saying that the applicant is being sent to an imaginary country. Such a detached approach is contrary to the spirit of *Kanthasamy*.

[8] Given the conclusion that I have reached, there is no need for me to examine Mr. Marafa's arguments on the evidence regarding his establishment in Canada.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed, and the matter is referred to a different officer for redetermination;
2. No question is certified.

"Sébastien Grammond"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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