Federal Court		Cour fédérale

Date: 20101104

Docket: IMM-5199-09

Citation: 2010 FC 1090

Ottawa, Ontario, November 4, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

VASANTHANAYAKI KANDASAMY

Applicant

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of the decision of an immigration officer (the officer) dated October 7, 2009, which refused the applicant's application under subsection 25(1) of the Act to have her application for permanent residence processed from within Canada based on humanitarian and compassionate (H&C) grounds.

[2] The applicant requests that the decision be set aside and the matter referred back to a different immigration officer for reconsideration and the convocation of an in-person interview.

Background

[3] The applicant is a citizen of Sri Lanka who fears persecution at the hands of the Liberation Tigers of Tamil Eelam (LTTE) and various other groups. She is of Tamil nationality herself and claimed the LTTE pressured her to join. She also claimed that she was harassed and abused by pro-government groups who suspected her of being an LTTE spy.

[4] With the assistance of a smuggler, the applicant was able to get into the United States in 2004 and on April 26, 2005, entered Canada with false documentation and shortly thereafter made a refugee claim. On or about May 30, 2006, the Refugee Protection Division of the Immigration and Refugee Board (the Board) determined that she was not a refugee or a person in need of protection, finding generally that the applicant was not credible. Leave to commence judicial review was granted by this Court, but ultimately Mr. Justice Robert Barnes held that the Board did not make any reviewable errors and dismissed the application (see *Kandasamy v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 791).

[5] In September of 2007, the applicant submitted a pre-removal risk assessment (the PRRA application) and the H&C application with the assistance of an immigration consultant. The applicant updated her submissions in May 2008 and again on October 6, 2009. There was no oral

hearing. In the earlier submissions, the applicant continued to assert the same fears of returning to Sri Lanka and cited the resumption of violence between the LTTE and the Sri Lankan Armed Forces as a source of increased risk. In the final submission, the applicant submitted that the situation in Sri Lanka is at its worst and on top of that, the applicant's profile as a 36 year old Tamil female places her at the highest risk of persecution. Numerous documents and articles on country conditions were submitted in support of these allegations.

[6] With respect to establishment and ties in Canada, the applicant mentioned that she has a brother who is a Canadian citizen and a sister who is a permanent resident. She also submitted evidence of her employment, attendance at English as a Second Language courses and volunteer activities at a local temple.

[7] On October 7, 2009, the officer rendered negative decisions for both of the applicant's applications. This application for judicial review only addresses the decision with respect to the applicant's H&C application.

The Officer's Decision

[8] With respect to the risks of hardship if returned, the officer did not find that the documentary evidence submitted substantiated the applicant's claims. The documents related to general country conditions and conditions faced by the general population. The officer also noted that according to one report, since the end of the war with LTTE rebels in May 2009, the conditions in Sri Lanka,

while far from ideal, have continued to steadily improve. The situation remains dire for some Tamils displaced by the conflict. Most of the Tamils detained in camps are young males unable to produce identity documents. Having read and considered all of the documents, the officer felt that they did not support the applicant's assertion that hardship associated with the risk of returning to Sri Lanka would be unusual and undeserved or disproportionate.

[9] Turning to personal ties and degree of establishment in Canada, the officer noted the applicant's two siblings in Canada but felt there was insufficient evidence to indicate that severing those ties would amount to unusual and undeserved or disproportionate hardship. The officer noted the applicant's four years in Canada while receiving due process in the refugee protection program and noted the applicant's good civil record while in Canada. The officer also noted the applicant's employment as a newspaper carrier, her English courses and her volunteering. Ultimately, the officer found the information insufficient to support a view that the applicant was established in Canada and remarked that the applicant knew, or ought to have known, that removal from Canada was a possibility following her negative refugee decision.

[10] Finally, the officer considered the difficulties of readjusting to life in Sri Lanka and found that although the applicant would have some, her network of family there could support her in the transition. In short, she had not demonstrated that returning to Sri Lanka would be an unusual and undeserved or disproportionate hardship on the applicant.

Issues

[11] The issues are as follows:

1. What is the standard of review?
2. Was the officer's decision reasonable?
3. Was the applicant entitled to be given notice of concerns with her application or an oral hearing?

Applicant's Written Submissions

[12] The applicant submits that the facts suggest that the officer viewed the PRRA application no differently than the H&C application and allowed the Board's decision to weigh too heavily in those decisions. The officer misapplied the separate legal tests. Evidence regarding the human rights situation in Sri Lanka was to be assessed separately and differently in her H&C application.

[13] In addition, the officer made a further error by failing to take account of the applicant's profile as a 36 year old Jaffna Tamil. Instead, the officer seemed to indicate that her plight in Sri Lanka would be no different than anyone else's. The reports before the officer pointed out that Jaffna Tamils are largely displaced and noted that foreign governments and NGOs have been very critical of their treatment. Clearly, the hardships faced in Sri Lanka are not felt equally among the general population. The error went to the heart of the decision and renders it unreasonable.

[14] Finally, the applicant asserts that an oral hearing was required. In several places within the decision, the officer notes concerns with the application or areas where the evidence was insufficient. The officer was required to send a letter requesting more information on these topics or to convoke an in-person interview to ask the applicant questions regarding these concerns. Failure to do either was a breach of the duty of fairness.

Respondent's Written Submissions

[15] The respondent submits that the officer did not err by having due regard to the Board's decision. The applicant's lack of credibility was not legally or properly something the officer could so easily disregard when assessing the H&C application – the allegations of hardship based on risk were identical to those rejected as not credible by the Board. The application is incongruous as it is based on the same alleged risks of hardship that were found to be totally false by the Board and the applicant ignores the materially changed conditions in her country.

[16] The officer did not fail to account for the applicant's profile. There was no evidence in the documents which singled out individuals matching her profile. It was young Tamil males without proper documents who were detained and even they were released quickly.

[17] The respondent submits that the applicant's primary argument that the officer conflated the two legal tests is spurious and does not specifically identify how the officer allegedly did so. Fundamentally, the same risk factors facing an applicant will often be relevant in both PRRA and

H&C applications. The applicant concedes that the officer specifically stated the correct legal test for H&C applications and it was no error to consider some of those same facts in relation to that test. With regard to that test, the applicant's alleged hardship cannot be characterized as unanticipated or beyond her control, given her negative refugee determination.

[18] Finally, the respondent submits that the applicant is wrong to suggest that the officer had a duty to bring all concerns to the applicant's attention. There is no such duty, even where an officer finds an application deficient. The onus is on the applicant to adduce all relevant evidence and to put her best case forward to satisfy the officer that there were sufficient H&C grounds to warrant an exemption from the usual process.

Analysis and Decision

[19] **Issue 1**

What is the standard of review?

H&C applicants seek a special exemption from the regular rules which every other prospective immigrant to Canada is expected to follow. The discretion conferred on the Minister is assessing H&C applications allows for flexibility to approve deserving cases not anticipated in the Act.

[20] The applicant says the officer's ultimate decision was unlawful and ought to be quashed.

[21] The standard of review for H&C decisions is reasonableness (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39 (QL)). The deferential standard encompasses all determinations of mixed fact and law within the decision as well as the ultimate disposition of the application (see *Canada (Minister of Citizenship and Immigration) v. Patel*, 2008 FC 747, [2009] F.C.R. 196 at paragraph 14).

[22] Findings of fact made within an H&C decision, if challenged, are subject to the standard of review imposed by paragraph 18.1(4)(d) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339).

[23] The applicant's suggestion that the officer erred by confusing and using the wrong legal test is an issue of pure law and will be assessed for correctness (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190).

[24] Elemental determinations by the officer (be they of law, fact or mixed fact and law) can render the ultimate decision unreasonable if shown to seriously impugn the merits and basis for that ultimate decision.

[25] Matters of procedural fairness such as the applicant's claim that an oral hearing was required, are not subject to any deference and will be reviewed against the standard of correctness (see *Karimi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1010, 160 A.C.W.S. (3d) 860 at paragraph 16).

[26] **Issue 2**

Was the officer's decision reasonable?

The applicant has pointed to several perceived errors in the decision which she claims will so severely impugn the merits of the decision that it will be found unreasonable in the face of such errors.

[27] In my view, the applicant has failed to establish any error in the decision and therefore it is unnecessary to proceed to the next step and consider the reasonableness of the ultimate decision.

[28] The first error alleged by the applicant is that the officer, who also conducted the applicant's PRRA, conflated the two legal tests and applied the PRRA risk of persecution test to her H&C application. This allegation lacks merit and lacks any degree of specificity. I am left with a bare allegation to which I cannot agree.

[29] The officer set out the correct legal test for H&C applications which considers whether the applicant will face undue, undeserved or disproportionate hardship if forced to apply for permanent residency abroad. The officer repeated the hardship-focused nature of the test multiple times throughout the decision and in my view, stayed appropriately on topic. It is not an error for the officer to consider risk to the applicant upon her return to Sri Lanka. Indeed, it would have been a reviewable error had the officer not considered that risk as a component of the hardship facing the applicant.

[30] Similarly, it was not an error for the officer to consider that the allegations of risk were identical in nature to the allegations the applicant made before the Board and to thus make use of the Board's decision. The applicant's claim before the Board was based on the extremely dangerous situation in Sri Lanka in general and especially for persons matching her profile. Her claim was bolstered and individualized by allegations of her own personal experiences with the LTTE and other alleged persecutors. The Board did not believe any of the applicant's personalized allegations. Similarly in her H&C application, the applicant adamantly submitted that there are risks facing persons of her profile, but also included the same personalized allegations the Board found not credible. The officer was correct to summarily dismiss those allegations and not engage in an improper rehearing of the Board's credibility findings.

[31] The officer did consider the evidence with respect to the applicant's profile and the new documentary evidence regarding country conditions in Sri Lanka. Indeed, Sri Lanka is a country whose conditions have certainly changed. It is evident that the officer understood the essence of the applicant's argument; that a 36 year old female Tamil faces a higher degree of risk than the general population. However, there was simply no evidence placed before the officer which singled out the applicant's demographic group as a group experiencing higher than usual risk. The officer did note evidence that many Tamils have been displaced since the LTTE's defeat. She also noted that many were detained in camps until such time as Sri Lankan authorities were able to interview them and screen them to identify Tamil combatants. Most of those detained were young Tamil males. Since the applicant is female, it was not unreasonable for the officer to surmise that these reports did not indicate a disproportionate risk of hardship to the applicant's demographic group. There was no

indication that a 36 year old female Tamil returning to the country with no profile or history of involvement in the conflict would be subject to any more risk than anyone else in the country.

[32] While it may have been an oversimplification to state that the documentary articles related only to conditions faced by the general population, because clearly some articles singled out certain groups, it was not an error for the officer to take notice that the applicant's specific group was not identified.

[33] The applicant asserts in argument that the officer failed to give fair consideration to credible evidence that was contrary to her result. However, the applicant fails to point to anything from the documentary evidence that stood in stark contradiction to her conclusions.

[34] Even though it is unnecessary to continue, I would find that the ultimate conclusion of the officer was reasonable. As noted, the H&C exemption is a discretionary provision to address instances of severe hardship not anticipated by the Act and usually the result of circumstances beyond the person's control. Hardship suffered by an applicant must be more than the mere inconvenience and the predictable hardship associated with leaving Canada. It is only when such hardship in a particular case is undue and undeserving or disproportionate, that consideration under section 25 becomes engaged.

[35] In the present case, the applicant's hardship can hardly be described as unanticipated as the applicant has stayed in Canada after a failed refugee claim and ought to have known removal was a

possibility. In addition, she has no children, dependants or partner spouse in Canada, separation from whom may have enhanced a claim of disproportionate hardship. While she explained that she had employment, education and volunteer activities in Canada, she did not explain how such activities would put her in the special category of persons who ought to be considered for a special exemption on H&C grounds.

[36] **Issue 3**

Was the applicant entitled to be given notice of concerns with her application or an oral hearing?

The answer to the question posed by the applicant is simply no. While the officer is obliged to consider all evidence submitted by the applicant, the law is clear that there is no duty on an officer to disclose any concerns or to seek clarification of information provided or to elicit additional information. As this Court has held, this would create a never-ending process.

[37] In *Carreiro v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 342, [2002] F.C.J. No. 449, Mr. Justice Marc Nadon cited with approval, the comments of Mr. Justice John Richard in *Bara v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 992 at paragraph 15:

> The officer is not required to put before the applicant any tentative conclusions he may be drawing from the material before him, not even as to apparent contradictions that concern him. However, if he relies on extrinsic evidence, not brought forward by the applicant, he must give him a chance to respond to the evidence….

[38] The onus is on the applicant to adduce all relevant evidence to satisfy the officer that there are sufficient H&C grounds to warrant an exemption and it is on the basis of the evidence presented that the immigration officer makes his or her decision (see *Mann v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 567, 21 Imm. L.R. (3d) 109 at paragraph 16). There is no duty to elicit additional information. Even where the immigration officer finds that the application is deficient, this Court has repeatedly held that there is no duty on the officer to request additional documents or facts (see *Arumugam v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 985, 211 F.T.R. 65, at paragraphs 16 and 17 and *Rodriguez v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 414 at paragraphs 4 and 5).

[39] With respect to an oral hearing, H&C applications will usually not require an oral hearing unless the issue of credibility is central and cannot easily be resolved any other way but through an in person assessment (See *Baker* above). In the present case, the officer accepted all of the applicant's evidence with respect to her establishment in Canada and did not doubt the credibility of such evidence though she found it insufficient. The only issue with respect to credibility was the same claims which had been rejected by the Board and were not subject to reconsideration by the officer. In my view, there is no basis upon which to find that the process offered to the applicant was anything but fair.

[40] As a result, the application for judicial review is dismissed.

[41] Neither party wished to submit a proposed question of general importance for my consideration for certification.

JUDGMENT

[42] **IT IS ORDERED that** the application for judicial review is dismissed.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27

11.(1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	11.(1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
. . .	. . .
25.(1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	25.(1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.
. . .	. . .

72.(1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

72.(1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

FEDERAL COURT

SOLICITORS OF RECORD

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