Federal Court  Cour fédérale

Date: 20140110

Docket: IMM-10702-12

Citation: 2014 FC 28

Ottawa, Ontario, January 10, 2014

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

JOHN LIE LIM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of D. Takhar, Senior Immigration Officer at Citizenship and Immigration Canada (CIC), refusing John Lie Lim's (the Applicant) second application for permanent residence based on humanitarian and compassionate (H&C) grounds. The decision was rendered on August 27, 2012.

Facts

[2] The Applicant, born December 30, 1954, in Indonesia, is Christian and of Chinese ethnicity.

[3] The population of Indonesia is largely Muslim, and the Applicant argues he was the target of various attacks because of his religious beliefs and ethnicity. He alleges he was the victim of three verbal and physical attacks in public places, in 1971, 1974 and 1979 respectively. In 1989, the Applicant alleges men in army uniforms searched his house without a warrant, and verbally and physically attacked him. The Applicant submits that he did not report the 1971 incident because he did not want to worry his mother. He alleges that he reported the 1974 incident to the police, but that the police never investigated the matter. As for the 1979 incident, the Applicant says a security guard saw the incident, but did not intervene and blamed the Applicant for causing problems. He did not report the latest incident in 1989.

[4] In 1991, the Applicant left Indonesia and went to the United States, where he lived as a visitor and refugee claimant. He returned to Indonesia in June 1996 when he was ordered to leave the country by the U.S. authorities. He stayed in Indonesia until October 1997. He then went back to the United States, again as a visitor and refugee claimant, and lived there until his claim was denied in 2006.

[5] On May 25, 2006, the Applicant was refused a temporary resident visa by Canadian officials in New York. He nevertheless decided to come to Canada and entered from the United States on foot through an unsupervised border in July 2006.

[6] Following his arrival in Canada, the Applicant made a claim for refugee protection. He subsequently made a first H&C application and a Pre-removal risk assessment (PRRA) application. These three applications were unsuccessful, and his applications for leave and judicial review of the

negative Immigration and Refugee Board decision and of his first H&C application were also denied. The Applicant did not challenge the negative PRRA decision.

[7] The Applicant made a second H&C application on essentially the same grounds as the first H&C application. In this second H&C application, he alleged that:

(a) The Indonesian government has revoked his citizenship rendering him unable to return to the country to apply for permanent residence in the normal manner. The Applicant alleges that he went three times to the Indonesian consulate and provided the authorities with the requested information, but never heard back from them;

(b) He would face undue hardship due to widespread discrimination against ethnic Chinese and Christians in Indonesia, and would not be able to practice Christianity in Indonesia as freely as he does in Canada;

(c) He has become so firmly established in Canada since his arrival in 2006 and experiences anguish and stress whenever he imagines being sent away, that requiring him to apply for a permanent resident visa from outside the country would cause him undue hardship. The Applicant also adds that he suffers from depression, takes antidepressant medication, and has contemplated committing suicide;

(d) He has no family ties in Indonesia. The Applicant alleges that his parents and two brothers are deceased, and he believes his sister is deceased as well, since he has not heard from her in more than 10 years. He has no living relatives or friends in Indonesia; and

(e) The life expectancy in Indonesia is lower than in Canada.

[8] The H&C Officer reviewed the evidence and the Applicant's submissions and concluded on August 27, 2012 that requiring him to apply for permanent residence from outside Canada would not result in unusual and undeserved or disproportionate hardship.

Decision under review

[9] The Officer first addressed the Applicant's claim for protection based on religion and ethnicity. She generally concluded that there was insufficient evidence to support the Applicant's case. Regarding the Applicant's submission pertaining to religious extremism in Indonesia, the Officer concluded that:

(a) The factors used to determine the application of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 *(IRPA* or the *Act)* cannot be used in the analysis of undue hardship for an H&C application, under subsection 25(1.3) of the *Act*;

(b) Persons who receive less favourable treatment as a result of differences are not necessarily victims of persecution; and

(c) The Indonesian Constitution and other laws protect religious freedom and do not discriminate against any recognized religious group.

[10] Regarding the Applicant's submission pertaining to his Chinese ethnicity, the Officer based her conclusion on improved and still improving legal conditions for Indonesian-born ethnic Chinese people. She also stated that Chinese Indonesians are now legally recognized, and that in 2008 the Indonesian Assembly passed an anti-discrimination act that sets a minimum jail term for discriminatory acts.

[11] The Officer then addressed the Applicant's submission regarding his establishment in Canada. The Officer came to the conclusion that the Applicant has provided insufficient evidence to demonstrate that his establishment went beyond that which can normally be expected from persons having lived in this country for six years. With respect to the Applicant's integration in the community, the Officer found there was insufficient evidence supporting the Applicant's claim that his departure would result in an undue hardship to the church he belongs to and indicating why he could not continue with similar activities upon his return to Indonesia. The Officer also acknowledged the Applicant's efforts and progress regarding his language proficiency, but noted that a certain level of integration within the community is to be expected during the refugee process. As for his three years of part-time employment as an evening custodian at his church, the Officer found that it did not demonstrate a sufficient pattern of stable employment, and underlined that the Applicant had sufficient funds to assist him in his re-integration in Indonesia.

[12] The third matter addressed by the Officer is the Applicant's psychological issues. While the Applicant mentions that he suffers from depression and takes antidepressant medication, the Officer noted that these new allegations are not supported by additional pertinent evidence indicating that the Applicant's mental functioning has been compromised or that his medical condition has caused some impairment in social functioning, nor indicating that if he required counselling or assistance, including medications, he would be unable to access or receive such treatment in his country of origin. The Officer therefore concluded that the Applicant had not discharged the onus of proving the inability of Indonesia to provide medical treatment.

[13] The Officer then turned to the Applicant's submission that he has no family or friends in Indonesia. Despite the hardship the Applicant would face due to a lack of family or friends in Indonesia, the Officer found that it could not be considered an unusual, undeserved or disproportionate hardship because he had adapted well both in the United States and in Canada without the assistance of any family members or friends. The Applicant has also lived the majority of his life in Indonesia, and would therefore not be returning to an unknown environment.

[14] Finally, the Officer addressed the Applicant's submission pertaining to his statelessness. The Officer concluded that the Applicant did not provide sufficient evidence confirming the loss of his Indonesian citizenship, nor did he provide sufficient evidence indicating that he had exhausted all means to re-acquire his citizenship.

Issues

[15] This application raises one central issue: was the Officer reasonable in deciding that obtaining a visa from outside Canada does not constitute unusual and undeserved or disproportionate hardship?

[16] Although many grounds of undue hardship were discussed in the Officer's decision, only three were more extensively addressed by the parties in their written and oral submissions, namely lost citizenship, discrimination and psychological issues.

Analysis

[17] I agree with the Respondent that the standard of review applicable to the H&C Officer's exercise of discretion is that of reasonableness. As a result, the decision of the Officer is entitled to a high degree of deference: see *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2013 FC 802 at para 10; *Gelaw v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1120 at para 14. The issue for this Court is not whether the Court would make the same decision, but rather whether the decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 89.

[18] The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country: *Chiarelli v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 711. Subsection 11(1) of the *IRPA* and section 6 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, provide that a foreign national must apply for a visa before entering the country:

Application before entering Canada	Visa et documents
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.

Permanent resident	Résident permanent
6. A foreign national may not enter Canada to remain on a permanent basis without first obtaining a permanent resident visa.	6. L'étranger ne peut entrer au Canada pour s'y établir en permanence que s'il a préalablement obtenu un visa de résident permanent.

[19] Subsections (1) and (1.3) of Section 25 of the *IRPA* gives the Minister the discretion to approve deserving cases for processing from within Canada based on H&C grounds. However, in examining an H&C request, the Minister may not consider the factors that are taken into account in determining whether a person is a Convention refugee or person in need of protection:

Humanitarian and compassionate considerations — request of foreign national	Séjour pour motif d'ordre humanitaire à la demande de l'étranger
25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, 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	25. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, 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

relating to the foreign national, taking into account the best interests of a child directly affected.	l'enfant directement touché.
Non-application of certain factors	Non-application de certains facteurs
(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.	(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.

[20] Ministerial guidelines inform the meaning of H&C grounds and indicate that applicants must establish that they would face unusual, undeserved or disproportionate hardship if they were required to file their respective applications for permanent residence from outside the country: Immigrant Applications in Canada Made on Humanitarian or Compassionate (H&C) Grounds, Chapter IP 5 (*IP-5 Guidelines*), sections 1.4 and 5.10; *Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356 [*Serda*] at para 20; *Doumbouya v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1186 at para 6. The Federal Court of Appeal and this Court have consistently held that an exemption under section 25 of the *IRPA* is indeed an exceptional and discretionary remedy: *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 15; *Serda*, above, at para 20.

Lost citizenship

[21] I agree with counsel for the Respondent that there is no merit to the Applicant's allegation that the Officer erred in her assessment of whether the Applicant could reclaim his Indonesian citizenship. The Officer relied on the *Indonesian Nationality Act*, and more specifically on section 32 of that *Act*, which provides a means by which Indonesians who lose their citizenship in the manner described by the Applicant can apply to have it reinstated.

[22] In the first H&C application, the Applicant also alleged that he could not reclaim his Indonesian citizenship and claimed to have been advised by a consular officer that the process to reinstate his citizenship "would be complicated and very long" and that he would have to produce his refugee and H&C documentation to show what claims he had made against the Indonesian government. The H&C Officer in that application relied on the *Indonesian Nationality Act* and found no legal support for the consular official's statements. This Court found that it was reasonably open to the Officer to rely on the Indonesian citizenship legislation over the statements of a consular officer.

[23] The Applicant now submits that it was not unreasonable for the Officer to look at the Indonesian law to conclude that he can regain his citizenship, but claims that she erred in finding that he did not exhaust all means to re-acquire his citizenship and failed to consider an email from the Applicant's therapist confirming that the Applicant had received a telephone call from the Indonesian consulate telling him that they had sent a letter to the Canada Border Services Agency (CBSA) and that they would call him once they heard back from the CBSA.

[24] The affidavit of the Applicant's therapist asserts that following the ruling of this Court on the first H&C application, she accompanied the Applicant to the Indonesian consulate on May 27, 2011 to apply for a renewal of his citizenship and passport. They were advised that the consulate would need the Applicant's current passport to process the renewal. When the Applicant indicated that the current passport was in the possession of CBSA, the consular official asked for the name of a person at CBSA to contact in order to obtain the passport.

[25] The Applicant and his therapist spoke with acting CBSA supervisor, Mr. Zavoianu, who agreed to be contacted by the Indonesian consulate in relation to the Applicant's passport. The Applicant provided this information to a consular officer on June 7, 2011 and was advised that Mr. Zavoianu would be contacted, following which the Applicant would be contacted that afternoon.

[26] It is true that the Applicant's therapist sent an email to the Applicant's counsel two days later, on June 9, 2011, advising that the Indonesian consulate called the Applicant and left a message indicating that they had sent a letter to the CBSA contact and would let the Applicant know once they heard back. However, there is nothing in the above-noted evidence to indicate that the Applicant cannot reclaim his Indonesian citizenship as set out in the *Indonesian Nationality Act*. Nor was it unreasonable for the Officer to find that there was insufficient evidence to indicate that the Applicant had exhausted all means to re-acquire his former citizenship, assuming he had lost it. In my opinion, the Officer could properly come to the conclusion that the Applicant was not diligent and could have followed up with the Indonesian consulate or the CBSA after not hearing back with respect to his claim.

Hardship based on religion and ethnic origin

[27] Counsel for the Applicant submits that the Officer erred in excluding relevant documentary evidence showing that there is intense discrimination against Christians and Indonesians of Chinese ethnicity, and in rejecting a report completed by the International Crisis Group (ICG) criticizing the Indonesian government for its failure to prevent or effectively prosecute incitement and intimidation against religious minorities. Relying on the decision of this Court in *Caliskan v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1190 [*Caliskan*], counsel argues that the Officer misinterpreted subsection 25(1.3) of the *IRPA* in failing to consider that the excluded evidence could be relevant both to risk factors in sections 96 and 97 of the *IRPA*, as well as to discrimination as a source of hardship for the purposes of section 25 in the context of an H&C application.

[28] Despite the fact that subsection 25(1.3) of the *IRPA* came into force more than three years ago (on June 29, 2010), there is still very little jurisprudence interpreting this new provision. In *Caliskan*, my colleague Justice Hughes came to the conclusion that the Officer had improperly focused on the risks faced by the applicant and not on the hardship, as required in section 25.

[29] In the case at bar, it cannot be said that the reasons of the Officer improperly focus on risk. Quite to the contrary, the Officer focused her assessment on the hardship that the Applicant might face in Indonesia as a Christian and an ethnic Chinese person. She excluded the reports dealing with specific events involving practising Christians being subjected to violence by Islamic radicals, as well as the ICG report criticizing the government for its failure to address the incitement and intimidation against religious minorities, on the ground that these factors pertain to a fear of persecution and/or risk to life, or of cruel and unusual punishment. She specifically stated that the

assessment of these factors is beyond the scope of a humanitarian and compassionate application, and quoted subsection 25(1.3). She then went on to consider the documentary evidence regarding discrimination on the basis of religion and ethnicity, and concluded:

> I have considered the applicant's noted profile cumulatively. I find that overall, in consideration of the information before me, the applicant has not presented sufficient objective evidence, including details to demonstrate discrimination based on his profile of a Christian and an ethnic Chinese that would constitute unusual and undeserved or disproportionate hardship if he returns to Indonesia.
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> Applicant's Record, p 9

[30] The Officer also accepted that measures of discrimination that do not rise to the level of persecution can nevertheless amount to unusual and undeserved or disproportionate hardship. In that spirit, she considered the documentary evidence and found that there was insufficient evidence to indicate that Christians are being subjected to systematic discrimination in Indonesia in employment, housing or health care, and that legal reform undertaken by the Indonesian government has improved the legal conditions for Indonesian-born ethnic Chinese people, thereby confining the remaining discriminatory practices to corruption or persistent prejudice. In the end, she found that the Applicant had not presented sufficient objective evidence to demonstrate discrimination based on his profile of a Christian and an ethnic Chinese that would constitute unusual and undeserved or disproportionate hardship if he returns to Indonesia.

[31] I am therefore unable to agree with counsel for the Applicant that the Officer erred in her interpretation and application of subsection 25(1.3) of the *IRPA*. What is troubling, however, is the exclusion from consideration by the Officer of a report from the ICG and other unnamed documents in relation to the tension between Christians and Muslims and the failure of the government to

prevent or effectively prosecute incitement and intimidation against religious minorities. The Officer does not explain why that evidence pertains to a fear of persecution and/or risk to life, or of cruel and unusual punishment and must therefore be excluded, while the evidence coming from the U.S. Department of State is relevant to establish that Christians or Indonesians of Chinese ethnicity are not being subjected to systematic discrimination. She does not explain either why the excluded evidence, even if it goes primarily to persecution, cannot also be factored in the determination of whether there are adverse country conditions that have a direct negative impact on the Applicant in the context of an H&C application.

[32] This error of the Officer directly impacts her assessment of the Applicant's H&C submissions regarding the discrimination he would be experiencing as an ethnic Chinese and as a Christian. This is not a case where it can be said, as in *JMSL v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1274, that an officer is entitled to weigh the evidence on the record and need not mention every piece of evidence he or she considers. Here, the Officer explicitly excluded some evidence on no valid grounds. This is not to say that the Officer, had she considered all the evidence, could not have reasonably concluded that the government generally enforced human rights and protected ethnic and religious minorities. The Officer was certainly entitled to disagree with the findings of the ICG and other non-governmental organizations. However, she could not come to that conclusion after excluding from consideration some relevant evidence to the contrary. On this basis alone, I find that this application for judicial review ought to be granted.

Psychological issues

[33] The Applicant claims that the Officer erred when considering various arguments and evidence supporting his psychological state. He argues, first, that the Officer erred in discounting his fear of dying in prison because it is not an objectively verifiable risk. According to the Applicant, it is not relevant that the Officer would not perceive his fear (based on his belief that this is what happened to his brother) in the same way as he does. Second, the Applicant faults the Officer for apparently discounting his challenge on the basis that he successfully functioned socially and was able to concentrate to learn English. Third, it is submitted that the Officer erred in fettering her discretion as to whether treatment was necessary and available in the country of origin. According to the Applicant, it is not relevant whether medical care is available in Indonesia; what is at stake is whether it is humane or compassionate to visit psychological damage upon him by removing him to Indonesia where he claims to have had repeated experiences of physical abuse.

[34] I agree with the Respondent that there is no merit to these allegations. The Officer noted that the Applicant provided evidence indicating a history of depression and feelings of stress due to the uncertainty of his immigration status and the threat of deportation. The Officer also noted the Applicant's statement in his affidavit that his faith prevented him from attempting suicide upon receiving a deportation order in the United States and the social worker's statement that the Applicant refuses to let his depression be a setback and is dedicated to moving forward with his life. The Officer further noted that the letters of recommendation from friends and co-workers describe the Applicant as outgoing, enthusiastic and eager to help others with little worry for himself. The Officer found insufficient evidence to demonstrate the Applicant's mental state had caused any impairment in his social functioning.

[35] The Applicant's case must be distinguished from cases such as *Davis v Canada (Minister of Citizenship and Immigration)*, 2011 FC 97, *Shah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1269 and *Martinez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1295, where this Court found that it was not sufficient for an officer to simply look at the availability of mental health care in the target country. Here, the Officer did review the availability of health care in Indonesia, using section 5.16 of the *IP-05 Guidelines*, but she also considered other elements (including the fact that he is functioning normally socially, that he is working to move forward with his life, that he was able to build his life without family and friends in both Canada and the United States) that helped her assess whether returning the Applicant to Indonesia would result in undue hardship. On the basis of these other elements, she concluded that there was insufficient evidence to indicate that the Applicant's mental functioning has been compromised or that his medical condition has caused some impairment in social functioning. It is "notwithstanding the above" that she then found there was insufficient evidence to show that the Applicant would be unable to access or receive assistance or treatment if he required such in his native country.

[36] On the basis of the record that was before her, and in light of the fact that the Applicant was found not credible by the RPD, the Officer could reasonably come to the conclusion that removing the Applicant to his country of origin would not be unusual and undeserved or disproportionate, despite his mental issues and his history of depression.

[37] In light of my finding that the Officer erred in excluding some documentary evidence, there is no need to certify a question as to the proper interpretation to be given to subsection 25(1.3) of the *IRPA*. Even if the Officer was correct in excluding factors of risk in assessing an H&C application,

which is not disputed in the case at bar, she could not disregard some human rights reports that could impact her analysis of hardship merely by stating that they only relate to sections 96 and 97 factors without any further explanation.

[38] For all of the foregoing reasons, this application for judicial review is granted. No question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is granted. No question is certified.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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