Federal Court  Cour fédérale

Date: 20161128

Docket: IMM-5593-15

Citation: 2016 FC 1308

Ottawa, Ontario, November 28, 2016

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

SAIED ROSHAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] On November 19, 2015 a Senior Immigration Officer [the Officer] refused the Applicant's (Mr. Roshan) request that he be permitted to make an application for permanent resident status from inside Canada, pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA] for humanitarian and compassionate [H&C] reasons.

The Officer concluded Mr. Roshan would not face unusual, undeserved or disproportionate hardship in being required to make his application for permanent residency from outside Canada.

[2] On September 13, 2016, I allowed the application for judicial review and ordered the matter be remitted to another officer for re-determination. I indicated that reasons would follow; these are my reasons.

II. Background

[3] Mr. Roshan, an atheist, is a thirty-four year-old citizen of the Islamic Republic of Iran. On May 4, 2012, he arrived in Canada where he made a refugee claim at the Lester B. Pearson International Airport. His claim was rejected on January 8, 2014. His application for leave and judicial review of the rejection of his refugee claim was denied on May 28, 2014. Following dismissal of a pre-removal risk assessment [PRRA] on November 19, 2015, Mr. Roshan sought leave to bring an application for judicial review of the PRRA decision. This Court has not yet pronounced on that matter. In the meantime, Mr. Roshan filed an application for permanent resident status from within Canada, pursuant to section 25(1) of the IRPA. It is the rejection of Mr. Roshan's application for permanent resident status that is presently before the Court.

III. Impugned Decision

[4] The Officer found that Mr. Roshan would not face unusual, undeserved or disproportionate hardship if he were required to apply for permanent resident status from outside Canada. Mr. Roshan contends the Officer's decision is flawed because she did not correctly

apply the legal test set out in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 [*Kanthasamy*]. Specifically, Mr. Roshan contends the Officer unlawfully fettered the broad discretion granted by Parliament to consider humanitarian and compassionate factors in rejecting his claim.

IV. Issues

[5] Mr. Roshan contends that (i) the Officer failed to apply the correct legal test in her analysis of the humanitarian and compassionate considerations, which underpinned her subsection 25(1) analysis; and (ii) the application of the test must be measured against a correctness standard. By applying the wrong legal test, he contends that the correctness standard is not met and judicial review should be granted. In the alternative, if the Officer did in fact apply the correct legal test, he contends the decision does not meet the test of reasonableness as articulated in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*].

V. Analysis

A. *Standard of Review*

[6] Mr. Roshan relies on *Taylor v Canada (Citizenship and Immigration)*, 2016 FC 21 at para 18, [2016] FCJ No. 23 [*Taylor*] in support of his contention that the choice of the legal test attracts a standard of correctness. With respect, I disagree. In *Kanthasamy*, although the Court concluded the decision maker had inappropriately fettered her discretion by applying an incorrect legal test, both the majority and the minority applied the reasonableness standard of review. The

Court in *Kanthasamy* never departed from its opinion in *Dunsmuir* that the reasonableness standard of review applies to questions of law related to the interpretation of a tribunal's home statute. In this case, the Officer was called upon to interpret subsection 25(1) of the IRPA, her home statute. With respect to those who hold a contrary view, the appropriate standard of review is that of reasonableness.

[7] With respect to the soundness of the decision as a whole, Mr. Roshan acknowledges that the standard of review is reasonableness. That is, does the impugned decision "fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" and is there "transparency and intelligibility within the decision-making process" (*Dunsmuir*, above, at para 47).

B. *Was the Officer's decision reasonable with respect to the application of the legal test?*

[8] Mr. Roshan contends the Officer unlawfully failed to take into consideration humanitarian and compassionate considerations when assessing his application for permanent resident status from within Canada. Mr. Roshan relies on *Kanthasamy*, in which Abella J. provides direction on the correct interpretation of subsection 25(1):

> The words "unusual and undeserved or disproportionate hardship" should therefore be treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). […] The three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision.

[9] Mr. Roshan relies heavily upon the majority's reference in *Kanthasamy* to *Chirwa v Canada (Minister of Citizenship and Immigration)* 1970, 4 IAC 338 [*Chirwa*], in which the

Immigration Appeal Board employed a rather subjective test as the standard for intervention on humanitarian and compassionate grounds (*Kanthasamy,* above, at para 13). According to its test the facts would need to "excite in a reasonable man [sic] in a civilized community a desire to relieve the misfortunes of another - so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the Immigration Act". Mr. Roshan contends the majority in *Kanthasamy* holds *Chirwa* up as the foundation for the legal test under the subsection 25(1) humanitarian and compassionate exception set out the IRPA. I do not share Mr. Roshan's liberal application of the *Chirwa* tribunal decision.

[10] While the majority in *Kanthasamy* discussed the *Chirwa* test when analyzing the legislative and jurisprudential history of the subsection 25(1) exception, it distanced itself from that very same test in its determination of the case before it. The majority specifically rejected a 'stand-alone' *Chirwa* approach preferring one which "[treats] Chirwa less categorically, using the language in Chirwa as co-extensive with the Guidelines […]" This 'second' approach finds favour in para 31 of *Kanthasamy*, where the majority confirms that this approach is "more consistent with the goals of s. 25(1)". While the *Chirwa* test may influence the application of the *Guidelines on International Protection No. 8* [the Guidelines], other factors may also do so. Those other factors may, in my view, include a fulsome analysis of the exceptional nature of relief based upon H&C grounds, as outlined by the minority in *Kanthasamy*. Therefore, although the majority and minority do not agree upon the 'legal test' to apply when assessing a subsection 25(1) exception, practically speaking, they agree that the determinative issue is whether the factors taken into consideration result in a reasonable decision. They ultimately both seek to

ensure that officers do not fetter their discretion with a strict application of the Guidelines. I will attempt to follow that approach.

[11] The Respondent contends that the Officer's interpretation of the subsection 25(1) exception respects the principles set out in Kanthasamy, and is consequently reasonable. I agree. While the Officer evaluated certain factors through the lens of the unusual, undeserved or disproportionate hardship threshold, she also took into consideration other factors such as Mr. Roshan's establishment in Canada, his ability to speak Farsi, the fact he would face some degree of hardship upon a return to Iran, and his good civil record. In my view, the Officer's application of the legal test is consistent with the view expressed by Abella, J. in *Kanthasamy*, when she states at para 25:

> What *does* warrant relief will clearly vary depending on the facts and context of the case, but officers making humanitarian and compassionate determinations must substantively consider and weigh *all* the relevant facts and factors before them.
>
> [My emphasis.]

[12] Finally, I would note that the facts and law presently before the Court are distinguishable from those addressed in *Kanthasamy*. In that decision, the Supreme Court placed particular emphasis upon the failure of the tribunal to adequately address the "best interests of the child" factor, as set out in subsection 25(1) of the IRPA.

[13] I find the Officer's interpretation of subsection 25(1) of the IRPA and the factors used in her assessment of the humanitarian and compassionate exception to be reasonable. As set out below, it is the application of that reasonable legal interpretation which I find problematic.

C. *Was the Officer's Decision Reasonable?*

[14] As already indicated, Mr. Roshan is an atheist, and led evidence to this effect. He led un-contradicted evidence from Robert David Onley [Mr. Onley] a lawyer with the then Office of Religious Freedom in the Department of Foreign Affairs (now Global Affairs Canada), that the Iranian government executes, tortures, imprisons and punishes people who identify as atheists. The letter provided by Mr. Onley also states that the Iranian government does not hesitate to kill people who identify as having apostate beliefs. Atheism is considered an apostate belief. The Officer also referred to a United States Department of State *International Religious Freedom Report for 2013: Iran* [USDS Report], which states:

> The constitution does not provide for the rights of Muslim citizens to choose, change or renounce their religious beliefs. The government automatically considers a child born to a Muslim father to be a Muslim and deems conversion from Islam to be apostasy, which is punishable by death.

[15] In the course of rejecting the claim for humanitarian and compassionate relief, the Officer briefly referred to the fact that atheists are becoming more accepted "among some Iranians". This fact, along with her observations that Mr. Roshan did not offer evidence that he is a religious leader or activist, led the Officer to conclude there were insufficient humanitarian and compassionate grounds to justify granting the subsection 25(1) exception.

[16] While I have already expressed my view that the Officer's formulation of the test for the application of humanitarian and compassionate relief is reasonable, I am of the view that in the circumstances, the application of the test, and, hence, the conclusion, are both unreasonable. When I consider the goals of subsection 25(1) through the 'exceptional nature of H&C relief'

lens advocated by the minority in *Kanthasamy*, I am left with many unanswered questions. For example, why did the Officer conclude that Mr. Roshan had lived in Iran for 30 years with no problems related to his atheism, when Mr. Roshan's evidence was that his atheism is of recent genesis, having developed in the last 10 years? How could the Officer accept as credible the evidence from Mr. Onley and the USDS Report regarding the treatment of atheists by the government of Iran, but discount it completely by observing that atheism is becoming more accepted in Iran? I can see no link between the State's actions towards atheists and the fact that atheism is becoming more accepted by some citizens of Iran. Finally, what is the relevance of concluding that Mr. Roshan is not a leader in the atheist movement? The evidence from Mr. Onley and the USDS Report do not suggest that persecution of atheists is limited to leaders in the atheist community. These unanswered questions lead me to conclude that, while the decision may be within a range of possible, acceptable outcomes, it is not defensible in respect of the facts and law. Furthermore, in my view, while there may be some degree of transparency in the Officer's approach, I find the reasons neither justifiable, nor transparent (Dunsmuir, above, at para 47).

[17] In reaching this conclusion, I am mindful of the fact that this Court should not unnecessarily parse the Officer's decision (*Kanthasamy*, above, at para 11) and that I should consider whether there is, in the record, evidence upon which the Officer could have reasonably reached the conclusion she did: see *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 18, [2011] 3 SCR 708. Because of my unanswered questions and my inability to divine how the Officer chose to disregard key evidence

from Mr. Onley and the Department of State, I am unable to apply *Newfoundland Nurses* to save the impugned decision.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed without costs. I do not consider there to be a question certifiable for consideration by the Federal Court of Appeal and none is therefore certified.

"B. Richard Bell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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