Federal Court  Cour fédérale

Date: 20161214

Docket: IMM-2374-16

Citation: 2016 FC 1372

Ottawa, Ontario, December 14, 2016

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

UDAYA NISHAN ARUNA KUMARA WATTORUTHANRIGE FERNANDO AND SULAKSHANA LAKSHANI JAYARATHNA HEWAGE AND MANETH LOSATH FERNANDO WHATTORUTHY ANRIGE AND NELITH LOHITH W. FERNANDO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Fernando, his spouse and their oldest child [the applicants] are citizens of Sri Lanka. Their youngest child is a Canadian citizen. Mr. Fernando arrived in Canada in May 2013. Mr.

Fernando's spouse arrived in Canada in December 2014. Both were issued work permits which expired in January 2016.

[2] On the basis of Humanitarian and Compassionate [H&C] considerations - their establishment in Canada and the best interests of their children [BIOC] - the applicants submitted a request, pursuant to section 25 of the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27) [IRPA] seeking an exemption that would allow them to apply for permanent residence from within Canada.

[3] A Senior Immigration Officer [Officer] considered the application and concluded that the factors and circumstances advanced by the applicants did not justify the granting of an exemption on the basis of H&C considerations. The application was refused.

[4] The applicants now seek judicial review of that decision and submit that the Officer's decision as it relates to the BIOC was unreasonable. The applicants also submit that the Officer failed to adequately address their establishment in Canada.

[5] The sole issue raised in this application is whether the decision of the Officer was reasonable.

[6] I am of the opinion that the Officer's decision addressed the factors identified in the application as well as the children's best interests in light of the submissions made and the

evidence presented. The decision rendered is reasonable. The application is dismissed for the reasons that follow.

II. Standard of Review

[7] The applicants make reference to the correctness standard in their submissions however they argue that the decision is unreasonable. It is well-established in the jurisprudence that a reasonableness standard of review is to be applied when considering the overall reasonableness of a discretionary decision (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 50, *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 at para 44).

III. Extrinsic Evidence

[8] The respondent notes that the evidence contained at pages 118 through 136 of the Applicants' Record were not before the decision-maker. In oral submissions, applicants' counsel conceded that the evidence was not before the decision-maker but advised that some of the material was contained in the National Documentation Package [NDP] for Sri Lanka.

[9] The respondent further notes that Exhibit "B" of Mr. Fernando's affidavit sworn on July 5, 2016, was not before the Officer, nor were any of the exhibits attached to Mr. Fernando's further affidavit sworn on October 11, 2016. This evidence relates to the sale of a home in Sri Lanka and to the transfer of funds from Canada to the applicants' family in Sri Lanka. The respondent submits that this evidence should either be struck, or otherwise not considered by the Court.

[10] Subject to limited exceptions, none of which apply here, only material that was before the original decision-maker may be considered on judicial review *(Rafieyan v Canada (Minister of Citizenship and Immigration)*, 2007 FC 727 at para 20). While the applicants submitted that some of the evidence contained at pages 118 through 136 of the Applicants' Record was taken from the NDP, the applicants failed to identify which pages this applied to.

[11] I have reviewed pages 118 to 136 of the Applicants' Record which contain a number of articles relating to dengue fever in Sri Lanka, extracts from a 2015 Trafficking in Persons Report from the United States Department of State, extracts from a 2015 Human Rights Watch country report and an unidentified two-page document addressing risks to children in Sri Lanka. The evidence is generic in nature. The applicants have provided no explanation as to why this evidence was not placed before the Officer, nor were any submissions made as to why the Court should now consider this evidence on judicial review. I have not considered the evidence contained at pages 118 to 136 of the Applicants' Record, Exhibit "B" of Mr. Fernando's affidavit sworn on July 5, 2016, nor any of the exhibits contained in Mr. Fernanado's further affidavit sworn October 11, 2016.

IV. Analysis

A. *Was the Officer's decision reasonable?*

[12] The applicants argue that the Officer failed to consider and weigh the best interests of the children. Specifically, the applicants submit the Officer failed to consider the risks of physical and sexual abuse the children would face in Sri Lanka including that the children in Sri Lanka

run the risk of being recruited by armed groups. The Officer unreasonably concluded that there was insufficient evidence of hardship. The applicants argue that many examples of the hardship the children will face, should they have to return to Sri Lanka, were provided. The applicants further submitted that they are established in Canada, have minimal connections to Sri Lanka, will be unable to find employment and will live in poverty. The applicants submit the Officer erred in concluding that the evidence did not demonstrate sufficient hardship to warrant an H&C exemption. I disagree.

[13] For the purpose of subsection 25(1) of the IRPA, as was stated by Justice John Maxwell Evans, speaking on behalf of a unanimous Federal Court of Appeal, "… an applicant has the burden of adducing proof of any claim on which the H & C application relies." *(Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 5). The Supreme Court decision in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] does not conflict with this principle (*D'Aguiar-Juman v Canada (Citizenship and Immigration)*, 2016 FC 6 at para 9).

[14] A decision-maker must be alert, alive and sensitive to a child's best interests and give those interests substantial weight. However, those interests will not, as a matter of course, always outweigh other considerations *(Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75). As noted by Justice Rosalie Abella "[t]he "best interests" principle is "highly contextual" because of the "multitude of factors that may impinge on the child's best interest". … It must therefore be applied in a manner responsive to each child's

particular age, capacity, needs and maturity. … The child's level of development will guide its precise application in the context of a particular case." (*Kanthasamy* at para 35).

[15] In this case the Officer addressed the circumstances of the children involved by: (1) identifying their age; (2) addressing the degree of establishment in Canada; (3) addressing links to Sri Lanka; (4) considering conditions in Sri Lanka including the potential impact of those conditions on the children; (5) any medical issues or special needs; and (6) the impact of a return to Sri Lanka on their education.

[16] The Officer acknowledged that education standards may be higher in Canada than Sri Lanka but noted that at their present age, the children would not receive any significant benefit from the Canadian education system. The Officer also noted that there was little if any evidence to support the contention that access to education in Sri Lanka may be a challenge. With respect to health care, again the Officer noted that Canada may have a superior health care system than Sri Lanka but also noted that there was little evidence to point to health concerns pertaining to either child and there was little evidence to support the conclusion that they could be adversely affected if they were to accompany their parents to Sri Lanka. The Officer also considered the impact of leaving friends and neighbours but noted the children's age and the presence of their parents and extended family in Sri Lanka. Concerns relating to human rights conditions and the impact on the children were found to be "brief, abstract and lacking details". Upon consideration of these elements, the Officer concluded that the applicants had failed to satisfy their onus.

[17] The Officer also considered the applicants' evidence of establishment in Canada noting their ownership of a car, payment of taxes, volunteer activities, and their employment record including Mr. Fernando's unemployed status. The Officer noted that there was insufficient evidence to suggest the applicants' skills and experience could not be utilized in Sri Lanka. The Officer also noted continued connections with family in Sri Lanka and little evidence to support the conclusion that the family would not support their reintegration in Sri Lanka. Again, in this regard the Officer concluded that there was simply insufficient evidence to justify a positive H&C determination.

[18] In this case, the applicants disagree with the decision reached by the Officer; however disagreement with an outcome does not render the outcome unreasonable. The Officer actively considered the evidence and the factors advanced in support of the application. The Officer addressed the children's best interests and the establishment of the applicants and reasonably concluded the applicants had failed in their onus to demonstrate hardship.

[19] The decision satisfies the requirements of justification, transparency and intelligibility and falls within a 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).

V. Conclusion

[20] The application is dismissed. The parties have not identified a question of general importance, and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2374-16
STYLE OF CAUSE:	UDAYA NISHAN ARUNA KUMARA WATTORUTHANRIGE FERNANDO AND SULAKSHANA LAKSHANI JAYARATHNA HEWAGE AND MANETH LOSATH FERNANDO WHATTORUTHY ANRIGE AND NELITH LOHITH W. FERNANDO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	DECEMBER 8, 2016
JUDGMENT AND REASONS:	GLEESON J.
DATED:	DECEMBER 14, 2016

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Galina Bining	FOR THE RESPONDENT

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