Federal Court  Cour fédérale

Date: 20170222

Docket: IMM-3327-16

Citation: 2017 FC 211

Ottawa, Ontario, February 22, 2017

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

NUWAN DILUSHA JAYAMAHA MUDELIGE DON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant asks this Court to set aside the decision rendered on July 15, 2016, by the Immigration Officer [officer], which denied his application for permanent residence based on humanitarian and compassionate [H&C] considerations. The applicant wishes that the matter be redetermined by another officer. This application for judicial review is opposed by the defendant.

[2] Essentially, the officer found that the H&C considerations raised by the applicant, as well as the evidence on record – which did not support his allegations of hardship – were insufficient to grant an exemption under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Since the discretionary decision made by the officer is essentially fact driven, the reasonableness standard applies (*Taylor v Canada (Citizenship and Immigration)*, 2016 FC 21, [2016] FCJ No 23 at paras 16-18; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 at para 44).

[3] The applicant submits that the officer erred both in his assessment of his hardship and in his degree of establishment. These arguments are unfounded in fact and law. The Court basically endorses the defendant's reasoning for dismissing the present application. While not treated in this order by the parties, the issue of establishment will first be examined.

Did the officer made any reviewable error in his assessment of the applicant's establishment?

The applicant, a citizen of Sri Lanka, arrived in Canada in December 2011, by deserting a foreign vessel. As a result, an exclusion order was issued against him. His asylum claim was ultimately rejected (due to the pending exclusion order). The exclusion order was set aside by Justice Tremblay-Lamer (*Mudalige Don v Canada (Citizenship and Immigration)*, 2013 FC 1, [2013] FCJ No 174), but was subsequently restored by the Federal Court of Appeal (*Canada (Citizenship and Immigration) v Jayamaha Mudalige Don*, 2014 FCA 4, [2014] FCJ No 19). The applicant's application for Pre-removal Risk Assessment [PRRA] was also denied and his application for judicial review was eventually dismissed (*Don v Canada (Citizenship and Immigration)*, 2015 FC 829, [2015] FCJ No 821). In the meantime, the applicant – who was able to obtain a stay of his removal to Sri Lanka – made an H&C application.

[4] The officer did not make a reviewable error in his assessment of the applicant's establishment. The applicant does not have a wife or children in Canada, while his parents and three sisters live in Sri Lanka. The officer notes that the applicant had been in Canada for 4.5 years and he had been unemployed until September 2014, when he began employment as a cook. He also notes that he attends Church regularly and has friends in his community. Although the applicant has achieved a level of establishment – through employment, volunteering and friendships in his community – and that those elements favored a positive consideration and the applicant's efforts were commendable, they were not above what would be expected after almost 5 years in Canada.

[5] The reasoning of the officer is clear and transparent. Be that as it may, the applicant nevertheless submits that the officer erred by not specifying the degree of establishment in Canada. According to him, the officer also implicitly inferred that his establishment in Canada was due to the fact that he exhausted all his legal channels. Consequently, the applicant argues that he cannot be so penalized. In turn, the defendant retorts that, although the reasons are short, the officer did consider the degree of establishment and did not penalize the applicant for his actions through the legal system, nor even drew negative inference from the other administrative or legal proceedings taken by the applicant.

[6] Despite the alleged insufficiency of the reasons, I doubt here that the general remark made by the officer that the efforts made by the applicant were not above what it is expected for someone who lived almost 5 years in Canada, is sufficient to set aside the impugned decision. The latter has to be read as a whole and considered with the rest of the evidence on record which

clearly supports the conclusion of the officer. In passing, the issue of establishment is certainly not a determinative factor in this particular case. Moreover, it is clear from the decision that the officer never considered, as a negative factor, the multiple recourses undertaken by the applicant. As such, there is no reviewable error.

Did the officer make any reviewable error in his assessment of the applicant's hardship?

[7] The main issue with respect to hardship in this case was the risk factor. The applicant alleged that he participated, on May 30, 2011, in a rally organized by trade unions to protest against a bill concerning the pension benefit fund of certain employee. During the demonstration, the police authorities opened fire on the crowd and the applicant's cousin was shot and eventually died from his wounds. Indeed, the applicant stated in his first written statement in support of his H&C application:

> Suddenly, at one point the police started to shoot and I saw my cousin brother being shot and he fell on the ground. I rushed to him and arranged an ambulance to take him to hospital but it was too late. He died of gun shot [sic] wounds.
>
> [Emphasis added]

[8] The applicant further states that, after witnessing the death of his cousin, he decided to actively protest against the Sri Lankan police by signing a petition and by collaborating with the trade union lawyers in a lawsuit against them. On June 28, 2011, the applicant was arrested, abducted and beaten by the police due to his participation in the lawsuit, which prompted the applicant to flee his homeland.

[9] When the impugned decision is read as a whole, it is apparent that the officer did not believe that the applicant was present at the incident on May 30, 2011 – whether it is framed as a credibility issue or as a weight issue – given the various inconsistencies mentioned in the reasons. According to the articles on record, the applicant's cousin was left untreated and bled for two hours while being held in police custody, before being taken to the hospital. A witness also testified before the Sri Lankan Court that he and other coworkers took the cousin to the factory, before the police came and took him by force. The officer also noted that the applicant has failed to provide any documentary evidence of his testimony even though he allegedly filed a complaint against the police authorities.

[10] The officer's reasons are clear and transparent. Be that as it may, the applicant nevertheless submits that the officer made a critical mistake by finding a contradiction between his statement and the evidence reported in the newspaper articles. Indeed, the applicant never stated that he was the only one eyes witness of his cousin's demise, as many other coworkers found him on the ground injured, but said that he was the only one who saw him shot by the authorities. The applicant admits that his written statement might be uncompleted and not as detailed as he would have wanted to, but it does not contradict the documentary evidence relating to this incident.

[11] Overall, there is no reason to disturb the officer's finding or to intervene in this case. A significant measure of deference is owed to the decision-maker, especially in his assessment of the evidence and the applicant's credibility. I agree with the defendant that the statement made by the applicant is contradictory and that he cannot rearrange it in his affidavit by bringing new

elements. The credibility issue is not whether the applicant was the only eyewitness or one many of the May 30, 2011 incident, but rather whether the negative finding of the officer is based on the evidence. Indeed, the new explanations given by the applicant in his affidavit are now contradicting his previous statement, as he is now alleging that the shooting did occur, but that he took shelter and called an ambulance; however when he returned to the scene, his cousin was already gone. Moreover, there is simply no evidence on record supporting the fact that the applicant was ever involved in the lawsuits following the police attack on the public during the demonstration. Indeed, the officer rightfully noted that there was no evidence regarding his declaration to trade union lawyers, nor was there any evidence that he filed a police complaint after the incident. While the evidence clearly shows that a judicial enquiry was initiated and that many witnesses came to testify about the incident, there was simply no indication that the applicant was one of them. Given those significant discrepancies and the lack of supporting evidence, it was reasonable for the officer to have serious doubts about the veracity of the applicant's testimony. In view of these findings, the officer did not need to assess the fact that individuals who witnessed human right violations are at great risk in Sri Lanka.

[12] Finally, the officer also considered the evidence regarding the personal difficulties the applicant would face in his search for employment, as a young individual with no family or political connections. As such, the officer noted that the applicant was educated and had established work experience in Sri Lanka as a cook (2001 to 2005) and as an Oiler aboard sea vessels (2006 to 2011). Moreover, there was no documentation to support any kind of direct discrimination whatsoever against him as a result of being young or without family or political connection. It was also noted that the general socio-economic condition in Sri Lanka affected the

general population. Although it was foreseeable that the applicant would experience some difficulties in re-establishing himself upon his return to Sri Lanka, the officer found that it would also be reasonable for him to find some support and assistance from friends and family. There is no reason to intervene in this finding which is also supported by the evidence and is reasonable in the circumstances.

[13] The application for judicial review is dismissed. No question of general importance has been raised by the parties.

JUDGMENT

THIS COURT'S JUDGMENT is that the present judicial review application be dismissed. No question is certified.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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