Federal Court  Cour fédérale

Date: 20171204

Docket: IMM-1981-17

Citation: 2017 FC 1098

Ottawa, Ontario, December 4, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

EMILIA LOBJANIDZE

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] of the decision of a representative of the Minister of Immigration, Refugees and Citizenship [the Minister's representative] dated April 11, 2017, which refused the Applicant's application for permanent residence which had been requested on humanitarian and compassionate [H&C] grounds under section 25(1) of *IRPA* [the Decision].

[2] For the reasons that follow, the application for judicial review is granted.

II. Facts

[3] The Applicant, an 81-year-old citizen of Georgia, entered Canada in 2003. She submitted a refugee claim in December 2006, on the date that a removal order was issued against her. Her refugee claim was refused in April 2009. Her pre-removal risk assessment application was refused in November 2011. The Applicant's H&C application was submitted in July 2016.

[4] The Applicant resides with her son, Vaja, who is her only living immediate family member, and her exclusive source of help and support. Vaja provides for the Applicant in all aspects of her life; he provides financial assistance, accommodations, meals, medical care, emotional support and all other essentials of her daily living. Vaja gave a detailed undertaking to continue to provide for the Applicant in language, that the Applicant's counsel stated was used by the Respondent at the time such undertakings were requested as part of the *IRPA* system.

[5] The Applicant claims she was reliably informed by relatives in Georgia that her ex-husband continues to utter threats against her should she return to Georgia. Further, the Applicant argues that in Georgia, there is a serious and widespread problem of domestic violence, for which the government has proven unable and unwilling to protect victims. Moreover, the Applicant argues that as woman of Russian ethnicity in Georgia, she will be mistreated and face a "distinct risk" given the ongoing tensions between Russia and Georgia, since their conflict in 2008.

[6] The Applicant suffers from numerous medical ailments including hypertension, cardiac angina pain upon exertion, depression, chronic fatigue and weakness. She also has severe varicose veins in her legs, for which she may require surgery in the future. She experiences problems with her memory and often gets disoriented when on her own.

III. Issue

[7] At issue is whether the Minister's representative's refusal of the Applicant's application for permanent residence on H&C grounds was reasonable.

IV. Decision

A. *Standard of review*

[8] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." The Supreme Court of Canada has determined that standard of review for an H&C immigration officer's decision is reasonableness: *Kanthasamy v. Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*]. Noël J held that considerable deference should be given to those exercising the Minister's H&C powers in: *Ogunyinka v Canada (Minister of Citizenship and Immigration)*, 2015 FC 595 at para 19.

[9] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[10] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

V. Analysis

[11] The Decision was made at a time when it appears the Respondent was still transitioning into fuller acceptance of the Supreme Court of Canada's decision in *Kanthasamy*. *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 [*Marshall*], sets out my understanding of some changes made by *Kanthasamy* at paras 29-33:

> [29] In my respectful opinion, the Supreme Court of Canada in *Kanthasamy* changed the legal tests representatives of the Minister must use to assess H&C applications. Undoubtedly, prior to *Kanthasamy*, hardship was the general test although the courts had acknowledged that it was not the only test.
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> [30] *Kanthasamy* reviewed the history of the Minister's humanitarian and compassionate discretionary power enacted set out in section 25 of *IRPA*. The Supreme Court of Canada re-

established that *Chirwa v Canada (Minister of Citizenship and Immigration),* [1970] IABD No 1 [*Chirwa*] provided important governing principles for H&C assessments, principles that are to be applied along with the older "hardship" analysis required by the Guidelines:

> [13] The meaning of the phrase "humanitarian and compassionate considerations" was first discussed by the Immigration Appeal Board in the case of *Chirwa v. Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338. The first Chair of the Board, Janet Scott, held that humanitarian and compassionate considerations refer to "those facts, established by the evidence, which would 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": p. 350. This definition was inspired by the dictionary definition of the term "compassion", which covers "sorrow or pity excited by the distress or misfortunes of another, sympathy": *Chirwa*, at p. 350. The Board acknowledged that "this definition implies an element of subjectivity", but said there also had to be objective evidence upon which special relief ought to be granted: *Chirwa*, at p. 350.

[31] The Supreme Court of Canada then stated as follows:

> [21] But as the legislative history suggests, the successive series of broadly worded "humanitarian and compassionate" provisions in various immigration statutes had a common purpose, namely, to offer equitable relief in circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another": *Chirwa*, at p. 350.

[32] As to hardship the Supreme Court of Canada said that the hardship tests continue to apply, but added:

> [33] 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). As a result, what

> officers should not do, is look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds, and use the language of "unusual and undeserved or disproportionate hardship" in a way that limits their ability to consider and give weight to *all* relevant humanitarian and compassionate considerations in a particular case. 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.
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> [Emphasis in original]
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> [33] In reviewing the reasons of the Officer, I am unable to detect any appreciation of the *Chirwa* approach. In my respectful opinion, H&C Officers should not only consider the traditional hardship factors, but in addition, they must consider the *Chirwa* approach. I do not say that they must recite *Chirwa* chapter and verse, nor that there are any magic formulae or special words these Officers must use. But the reviewing courts should have some reason to believe that the Officers have done their job, that is, that H&C Officers have considered not just hardship but humanitarian and compassionate factors in the broader sense.
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> [Emphasis added]

[12] The reason why judicial review is granted in this case is essentially the same as that in *Marshall*. In the matter at hand, as in *Marshall*, the Minister's representative was under a duty not only to consider the traditional hardship factors, but in addition, to have in mind the *Chirwa* considerations. I am obliged to say, again, that I am unable to detect the required appreciation of the *Chirwa* approach in the Decision. I note that the Minister's representative draws several conclusions based on the pre-*Kanthasamy* hardship test, but I do not see consideration of factors that would excite, in a reasonable person, in a civilized community, a desire to relieve the misfortunes of another. Again, I do not say that any particular form of words is required. But because the Decision does not appear to be sufficiently reflective of the Supreme Court of

Canada's decision in *Kanthasamy*, it is not defensible on the law, as it must be to meet *Dunsmuir's* reasonableness test.

[13] There are other specific issues with the Decision. The Minister's representative says that "the applicant is in a situation that does not differ from that of other elderly persons in the Georgia who are living alone." That is an unreasonable finding because it mistakenly describes the Applicant as simply an "elderly person": while it is true that she was elderly, in addition, she was grieving the loss of her first son, she was vulnerable, and she was in poor health. Therefore, it was not reasonable to compare her simply to other "elderly persons". That is not defensible on the facts.

[14] In addition, the Minister's representative noted that the Applicant resides with her son, Vaja. Vaja demonstrated his commitment to support the Applicant in Canada with a detailed written undertaking to support her. The Minister's representative acknowledged the Applicant's reliance on Vaja for her emotional support, financial assistance, accommodations, meals, medical care and other essentials of daily living. However, the Minister's representative dismissed Vaja's undertaking and promise of support – without giving the son a shred of credit for being the Applicant's source of help and support over the previous 13 years. This, in my mind was unreasonable.

[15] In terms of factors in Georgia, the country of origin, I am driven to conclude that the reasons of the Minister's representative are hardship-focussed. Hardship is referred to at the

beginning of the analysis as part of the analysis undertaken. Hardship is twice again relied upon in the country of origin conclusions where the Minister's representative states:

> [T]here will inevitably be some hardship associated with being required to leave Canada. However, taking into account the adverse country conditions cited by the applicant, I am not satisfied that having to depart Canada in order to apply for permanent residence from abroad would result in hardship for the applicant this is sufficient to warrant relief on humanitarian and compassionate grounds.
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> [Emphasis added]

[16] In my view this transition decision's analysis does not reflect the expanded approach called for by *Kanthasamy*.

[17] The Respondent argued that the *Kanthasamy* principles were applied and noted that the concerns raised by the Applicant were addressed in the reasons of the Minister's representative. Upon review and reflection, I am unable to agree. Reviewing the matter as an organic whole, and not as a treasure hunt for errors, I have come to the conclusion that the Decision is unreasonable because it is not defensible on the law or the facts. It thus does not fall within a range of possible, acceptable outcomes that are defensible in respect of the facts and law Therefore, judicial review must be granted and the Decision set aside.

[18] Neither party proposed a question of general importance to certify, and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the Decision of the Minister's representative is set aside, the matter is remitted to a different decision maker for redetermination, no question is certified and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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