Federal Court  Cour fédérale

Date: 20120515

Docket: IMM-7883-11

Citation: 2012 FC 583

Ottawa, Ontario, May 15, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

KAM FAH NG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) and paragraph 72(2)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of a senior immigration officer (the officer), dated October 6, 2011, wherein the applicant's permanent residence application was refused (the decision). This decision was based on the officer's finding that there were insufficient humanitarian and compassionate (H&C) grounds to warrant an exemption from the requirement to apply for permanent residence from abroad.

[2] The applicant requests that the officer's decision be set aside and the application be referred back to Citizenship and Immigration Canada (CIC) for redetermination by a different officer.

Background

[3] The applicant, Kam Fah Ng, is a citizen of Malaysia who currently lives in Canada. As a homosexual and HIV positive man, the applicant submits that he belongs to a social group targeted for persecution in Malaysia.

[4] The applicant grew up in Malaysia. In 1993, he visited Thailand with a group of friends. The morning after an evening of celebration, the applicant awoke next to a woman prostitute. He later discovered that his friends had hired her as a birthday gift for him. This was his first sexual experience. He was traumatized by this experience and started spending more time drinking at gay bars to overcome the emotional pain.

[5] In 1996, the applicant travelled to Singapore in search of a better job. One job that he applied for required a medical examination, which included HIV testing. Through this testing, he discovered that he was HIV positive. He attributed his illness to the night he spent with the prostitute in 1993. Fearing deportation from Singapore, the applicant returned to Malaysia and to his job there. However, as HIV testing was becoming increasingly common at workplaces in Malaysia and in light of the discrimination faced by HIV positive people there, the applicant quit his job in June 1998.

[6] In December 1998, the applicant travelled to Canada to escape his fears of being targeted in Malaysia as an HIV positive person. After his visitor's status expired, the applicant remained in Canada in fear of being questioned on his return to Malaysia. He was unaware of the possibility of making a refugee claim based on his HIV status.

[7] In 2007, the applicant became ill and was hospitalized. He was not able to work and became homeless. He was referred to the Hamilton AIDS Network for services and support. The support worker there encouraged him to seek legal advice about his immigration status. Due to language barriers, the applicant was referred to the Asian Community AIDS Services (ACAS). There, he was connected with an immigration lawyer, who agreed to represent him in his refugee claim. He was later referred to the HIV & AIDS Legal Clinic Ontario (HALCO) where his current counsel assisted him with filing an H&C application on April 7, 2009. In his initial contact with the immigration lawyer and his current counsel, the applicant felt shame and therefore did not disclose his sexual orientation.

[8] On January 18, 2010, CIC requested that the applicant file any other evidence he wished to have considered in his H&C application. Applicant's counsel filed written submissions and supporting evidence on February 15, 2010. However, as the applicant was still struggling with his sexual orientation, no evidence was filed on the issue of homophobia.

[9] The applicant's refugee hearing was held on April 6, 2010. Immediately before the hearing, the applicant disclosed his sexual orientation to his lawyer.

[10] The applicant's H&C application was denied on September 1, 2010. He filed an application for leave and judicial review of that decision. The respondent consented to the application and agreed to redetermine the application.

[11] In May 2011, the applicant filed additional evidence to support the redetermination of his H&C application. This included evidence of homophobia in Malaysia.

Officer's Decision

[12] The officer issued the decision on October 6, 2011. The officer decided that an H&C exemption was not warranted in the applicant's case.

[13] The reasons for the officer's decision are outlined in the H&C grounds reasons for decision form. The officer first summarized the applicant's background including the events that led to his departure from Malaysia and that transpired since his arrival in Canada.

[14] The officer then noted relevant facts pertaining to the applicant's establishment in Canada. The officer observed that during most of the applicant's stay in Canada (13 years), he had not held valid immigration status. The officer also noted that the applicant did not work in occupations where his skills were unique to Canada or that he had special skills or training that would be lost, thereby causing him undue hardship if returned to Malaysia.

[15] The officer observed that the applicant was aware of his HIV status when he arrived in Canada. However, he did not seek medical help until he became seriously ill in 2007. Although he had the option of returning to Malaysia to obtain free HIV medication, he did not do so. Thus, the officer concluded that the applicant's lengthy stay in Canada was not beyond his control. In so doing, the officer also noted that there are many NGOs in Malaysia willing to provide support to the applicant.

[16] On risk and adverse country conditions, the officer acknowledged the applicant's submissions that should he return to Malaysia, he would be unable to pay for his medications, his personal medical information would be disclosed to potential employers, family and others and he would be persecuted and possibly incarcerated for his sexual orientation. Collectively, this would cause him undue and undeserved hardship. The officer also acknowledged the letters from Dr. Kamarulzaman of the Malaysian AIDS Council in Malaysia and from the Hamilton Health Services that supported the applicant's submissions.

[17] The officer then summarized the information in some of the documentary evidence on HIV/AIDS in developing countries. The officer cited one article in which the author explained that developing countries generally levy custom duties or import tariffs on essential medicines and other pharmaceutical products. However, the officer found that the 0% levy on antiretroviral treatment drugs in Malaysia demonstrated that it was serious in its battle to control HIV/AIDS.

[18] The officer also noted that another article indicated programs were in place to reduce HIV transmission, provide therapy for drug users, offer free and anonymous HIV testing and distribute

condoms. However, stigma, discrimination and punitive laws were barriers to the effective implementation of these programs. The officer concluded that HIV/AIDS is prevalent in Malaysia and the country is struggling to control the disease. Although challenges continue, the officer found that Malaysia is taking action on HIV/AIDS.

[19] On the issue of sexual orientation, the officer first cited documentary evidence indicating that certain laws were sporadically enforced and religious and cultural taboos were widespread. The officer then noted the applicant's submissions on his sexual orientation: he contracted HIV in a heterosexual act; in his initial refugee claim, he said he was heterosexual; at the refugee hearing, he said he was bisexual and had no intention of having a relationship with anyone in the future; and in his H&C application, he said he was homosexual and hoped to have a committed relationship with a man in the future. Although the Refugee Board Division had concluded that the applicant was not homosexual, the officer accepted that he is homosexual and HIV positive.

[20] The officer then acknowledged that stigma and discrimination exist for those who have HIV/AIDS and who are homosexual. However, the officer found that this type of prejudice also exists in Canada. Although the treatment of homosexual and HIV positive persons is better in Canada than in Malaysia, the officer found that it remains a worldwide problem. Therefore, although the applicant would likely face challenges if returned to Malaysia, the officer concluded that his personal circumstances were such that the hardship he would experience would not be unusual and undeserved or disproportionate. The officer therefore refused the applicant's permanent residence application.

Issues

[21] The applicant submits the following point at issue:

Was the officer's decision unreasonable?

[22] I would phrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the officer err in denying the applicant's H&C application?

Applicant's Written Submissions

[23] The applicant submits that the appropriate standard of review of the officer's decision is reasonableness. In this case, the officer's decision was unreasonable for two reasons:

1. In assessing hardship on the basis of sexual orientation, the officer erred by ignoring almost all the evidence on homophobia in Malaysia; and
2. In assessing hardship on the basis of HIV status, the officer erred by preferring general evidence of Malaysia's efforts to fight HIV/AIDS over specific evidence on the applicant's situation.

[24] On the first point, the applicant submits that although the officer accepted that he is homosexual, the officer erred by finding that homophobia in Malaysia does not amount to unusual and undeserved or disproportionate hardship. The officer did not address documentary evidence from the University of Toronto that highlighted the discrimination against homosexual people in

Malaysia. As the human rights violations faced by lesbian, gay, bisexual, transgender (LGBT) people in Malaysia was a central ground of the hardship claimed by the applicant, the officer was required to explain why he did not believe that these human rights violations did not rise to the level of unusual and undeserved or disproportionate hardship.

[25] The applicant also notes the officer's comparison of the situation in Malaysia with that in Canada. However, the applicant asks this Court to take judicial notice of the fact that police raids, extortion and harassment of the LGBT community are a thing of the past in Canada and that Canadian media is not subject to censorship of LGBT issues. Thus, the officer's comparison between the situation in Canada and that in Malaysia suggests that the officer did not properly understand the oppression of LGBT people in Malaysia.

[26] On the second point, the applicant submits that the officer erred by relying on country evidence, without adequately taking into account his specific situation as outlined in the letter from Dr. Kamarulzaman. This included the costs of his medication, without which his illness would risk advancing to AIDS as well as the applicant's psychosocial issues, lack of formal education and lack of family support. Rather than focusing on the applicant's specific situation, the officer focused almost entirely on the Malaysian government's general attempts to fight HIV. The officer erred by finding that the general efforts adopted by Malaysia were sufficient to contradict Dr. Kamarulzaman's opinion. Similarly, the officer ignored the evidence that echoed Dr. Kamarulzaman's concerns on the hardships in employment and health care faced by HIV positive persons in Malaysia.

Respondent's Written Submissions

[27] The respondent submits that the appropriate standard of review of the officer's H&C decision is reasonableness. Reasonableness is a deferential standard that recognizes that certain questions coming before administrative tribunals do not lend themselves to a specific, particular result. A decision is reasonable where it falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law. In H&C decisions, the respondent submits that there is a highly discretionary element warranting significant deference, thus the scope of reasonable outcomes is wider.

[28] The respondent submits that recent Supreme Court of Canada jurisprudence has clarified that reasons do not have to be comprehensive or perfect and a reviewing court should first seek to supplement a tribunal's reasons before it subverts them. In addition, adequacy of reasons is not an independent basis for quashing a decision. Thus, a decision is reasonable if the reasons are sufficiently clear on why the decision maker reached its conclusion and that conclusion is within the range of acceptable outcomes.

[29] The respondent submits that the officer clearly took into account the applicant's submissions on the difficulties that the applicant would face on return to Malaysia as an HIV positive homosexual man. On review of the record as a whole, the respondent submits that the officer's decision falls within a range of possible acceptable outcomes.

[30] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[31] It is well established that assessments of an officer's decision on H&C applications for permanent residence from within Canada is reviewable on a standard of reasonableness (see *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2009] FCJ No 713 at paragraph 18; *Adams v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1193, [2009] FCJ No 1489 at paragraph 14; and *De Leiva v Canada (Minister of Citizenship and Immigration)*, 2010 FC 717, [2010] FCJ No 868 at paragraph 13).

[32] In reviewing the officer's decision on the standard of reasonableness, the Court should not intervene unless the officer came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] SCJ No 12 at paragraph 59). It is not up to a reviewing Court to substitute its own view of a preferable outcome, nor is it the function of the reviewing Court to reweigh the evidence (see *Khosa* above, at paragraphs 59 and 61).

[33] **Issue 2**

Did the officer err in denying the applicant's H&C application?

In this application, the applicant's submissions focus primarily on the officer's treatment of the evidence on homophobia in Malaysia and on its preference of evidence on Malaysia's efforts to combat HIV/AIDS over evidence specifically addressing the applicant's situation. Conversely, in arguing that the officer's decision was reasonable, the respondent relies predominantly on the significant deference owed to H&C decisions on judicial review and on recent pronouncements by the Supreme Court of Canada on the adequacy of reasons.

[34] In the decision, the officer first addressed the applicant's establishment in Canada. The officer noted that as the applicant had knowledge of his HIV status when he arrived in Canada, he had many options available to him, "including the option of returning to Malaysia and obtaining free of charge HIV medication". The letter from Dr. Kamarulzaman clearly states that highly active anti retroviral treatment, a first-line treatment, is available free of charge in Malaysia. However, the applicant is currently on second-line treatment (Kivexa and Kaltra), which is not available free of charge in Malaysia. Thus, the officer's statement suggests that the applicant would only have needed first-line treatment had he returned earlier to Malaysia. There was no evidence in the record to support this finding; the sole evidence was that he needed second-line treatment, which is only available for a fee in Malaysia. Thus, the officer erred by discounting the hardship that the applicant would face if returned to Malaysia and required to pay for his HIV medication.

[35] Turning to the risk that the applicant would face if returned to Malaysia, the officer acknowledged that the country is struggling to control HIV/AIDS and existing stigma,

discrimination and punitive laws on homosexuality act as barriers to the effective implementation of HIV programs. However, the officer then recited the progression of the applicant's submissions on his sexual orientation in his immigration applications. Although the officer ultimately found that the applicant was a homosexual, this review of his previous submissions appears to have influenced the officer's finding. Before finally denying the applicant's application, the officer also cited some evidence of stigma and discrimination towards HIV in Canada. Recognizing that the situation was a great deal better in Canada, the officer nonetheless found that this was a worldwide problem and therefore the hardship that the applicant would experience if returned to Malaysia would not be unusual and underserved or disproportionate.

[36] This assessment is problematic for several reasons. As mentioned by the applicant, the officer relied predominantly on select evidence of country conditions without considering in detail the specific situation of the applicant. This included the submissions made by Dr. Kamarulzaman that highlighted the challenges associated with paying for his medical treatment due to his lack of formal education and marketable work experience as well as the psychological issues associated with his lengthy time abroad, his lack of family support and the stigma and discrimination of homosexual men in Malaysia.

[37] It is well recognized that in considering an application under subsection 25(1) of the Act, officers must assess and weigh the relevant factors in the personal circumstances of the particular applicant (see *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] FCJ No 457 at paragraphs 11 and 15 to 17; *Suresh v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3 at paragraph 34; and *Castillo v Canada (Minister of Citizenship and*

Immigration), 2009 FC 409, [2009] FCJ No 543 at paragraph 11). In this case, the officer clearly failed to do so, relying predominantly on country evidence without adequately considering the applicant's personal circumstances as outlined in the evidence before it.

[38] Finally, I also find that the officer erred in comparing the situation in Malaysia to that in Canada. This comparison seemed to focus on general societal stigma and discrimination. In so doing, the officer failed to adequately take into account the evidence on the record of state action against homosexuals in Malaysia, including the use of morality laws, police raids and police harassment. This raises the level of hardship that the applicant would face on return to a much higher level than that here in Canada; arguably rendering the situations in the two countries incomparable.

[39] In summary, it is well recognized that it is not this Court's responsibility to reweigh relevant factors and evidence that are duly considered by officers making highly discretionary decisions. However, in this case, the officer came to conclusions that were not supported by the evidence as a whole. The officer failed to adequately consider the particular circumstances of the applicant. The officer also came to conclusions on the availability of HIV medicine in Malaysia and similarities in the stigma and discrimination faced by homosexual and HIV positive people in Canada and Malaysia that were not supported by the evidence before it. As such, the officer failed to properly evaluate the hardship that the applicant would face in Malaysia as an HIV positive homosexual man. I would therefore allow this application and refer the decision back for redetermination by a differently constituted panel.

[40] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision of the officer is set aside and the matter is referred to a different officer for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, SC 2001, c 27

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.
25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, 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 relating to the foreign national, taking into account the best interests of a child directly affected.	25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada, 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 l'enfant directement touché.
72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
(2) The following provisions govern an application under subsection (1):	(2) Les dispositions suivantes s'appliquent à la demande d'autorisation :
. . .	. . .
(b) subject to paragraph 169(f), notice of the application shall be served on the other party and the application shall be filed in the	b) elle doit être signifiée à l'autre partie puis déposée au greffe de la Cour fédérale — la Cour — dans les quinze ou soixante jours,

Registry of the Federal Court ("the Court") within 15 days, in the case of a matter arising in Canada, or within 60 days, in the case of a matter arising outside Canada, after the day on which the applicant is notified of or otherwise becomes aware of the matter;

selon que la mesure attaquée a été rendue au Canada ou non, suivant, sous réserve de l'alinéa 169f), la date où le demandeur en est avisé ou en a eu connaissance;

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	KAM FAH NG - and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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