Federal Court Cour fédérale

Date: 20120723

Docket: IMM-8514-11

Citation: 2012 FC 928

Ottawa, Ontario, July 23, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

JAYATHILAKA BANDA YAPA MUDIYANSELE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

<u>REASONS FOR JUDGMENT AND JUDGMENT</u>

I. Introduction

[1] This is an application for judicial review filed pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], from a decision of the immigration Officer (the Officer), refusing to grant Mr. Jayathilaka Banda Yapa Mudiyansele (Mr. Mudiyansele)

an exemption to apply for permanent resident status on humanitarian and compassionate considerations [H&C] under subsection 25(1) of the *IRPA* from outside Canada.

[2] For the following reasons, this application for judicial review is dismissed.

II. Facts

[3] Mr. Mudiyansele is a citizen of Sri Lanka. He belongs to the Singhalese majority and was a Buddhist monk prior to his arrival in Canada.

[4] Mr. Mudiyansele arrived in Canada in October 2007 and claimed refugee status. His claim was dismissed by the Refugee Protection Division [RPD] of the Immigration and Refugee Board. This Court subsequently refused Mr. Mudiyansele's application for leave and judicial review of the RPD's decision.

[5] Mr. Mudiyansele then applied for a Pre-Removal Risk Assessment [PRRA]. He also submitted his H&C application. Both applications were respectively rejected on August 25, 2011 and October 12, 2011.

[6] On February 6, 2012, Mr. Justice Shore refused Mr. Mudiyansele's application for a stay of removal pending his application for judicial review of the decision of the Officer. Justice Shore wrote the following:

> « La jurisprudence a clairement stipulé que l'existence d'une demande pour des motifs humanitaires ne constitue pas un motif de surseoir au renvoi (*Baron c Canada (Ministre de la Sécurité publique et de la Protection civile)*, 2009 CAF 81, [2010] 2 RCF 311, au paragraphe 50).
>
> a. Sachant que la discrétion de l'agent de renvoi est limitée, la demande d'autorisation et de contrôle judiciaire dans ce cas ne soulève pas une question sérieuse.
>
> b. Suite aux risques allégués déjà considérés devant la SPR et la décision de la SPR qui a été confirmée par cette Cour, le demandeur n'a pas établi qu'il subirait un préjudice irréparable s'il était renvoyé du Canada avant que sa demande d'autorisation soit tranchée.
>
> c. Compte tenu des circonstances, la balance des inconvénients penche en faveur du défendeur qui doit procéder au renvoi » (see *Yapa Mudiyansele c Canada (Ministre de la sécurité publique et de la protection civile)*, 2012 CF 155).

[7] Mr. Mudiyansele filed an application for leave and judicial review of the Officer's decision on November 23, 2011.

III. Legislation

[8] Subsection 25(1) of the *IRPA* provides as follows:

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	**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

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.	d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

IV. Issue and standard of review

A. Issue

- ***Did the Officer err by finding that Mr. Mudiyansele would not experience any unusual, undeserved or disproportionate hardship if he were required to file his application for permanent residence for humanitarian and compassionate considerations abroad?***

B. Standard of review

[9] In *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9 [*Dunsmuir*], the Supreme Court of Canada found that, in paragraph 62 of its decision, when determining the appropriate standard of review, the first step is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question".

[10] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 62, the Supreme Court explained that the appropriate standard of review for decisions related to applications on humanitarian and compassionate considerations is the standard of reasonableness (see also *Paz v Canada (Minister of Citizenship and Immigration)*, 2009 FC 412, [2009] FCJ No 497 at paras 22-25).

[11] The Court must consider "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" (*Dunsmuir*, at para 47).

V. Parties' positions

A. Mr. Mudiyansele's position

[12] Mr. Mudiyansele submits the Officer did not apply the appropriate criteria to evaluate his application. He relies on *Ramsawak v Canada (Minister of Citizenship and Immigration)*, 2009 FC 636 at para 27, where the Court dealt with this very issue and determined that "the mere fact that the officer stated the proper test at the outset of his reasons does not indicate, of course, that the officer properly assessed the evidence. To come to the contrary would be to privilege form over substance".

[13] The jurisprudence of this Court also states that an erroneous application of the criteria is sufficient to overturn the decision. Mr. Mudiyansele adds that an H&C decision warrants a separate analysis from a risk assessment and must be conducted by applying the proper test.

[14] Furthermore, Mr. Mudiyansele argues that the RPD found his story credible.

[15] Mr. Mudiyansele filed a letter from Reverend Dodampahala Wipulasiri in support of his application (see Mr. Mudiyansele's Application Record at pages 47 and 48) and alleges that the Officer's assessment of that letter is flawed since it did not contradict his testimony but rather confirmed that his fear of persecution upon return to Sri Lanka to be plausible.

[16] Mr. Mudiyansele wrote, in his Personal Information Form [PIF], that he worked with the Tamil population in Sri Lanka, after the Tsunami, and had demonstrated his discontent with the authorities and was arrested. According to Mr. Mudiyansele, his testimony having been found credible by the Board, his past involvement with the Tamil population exposes him to harm upon his return to Sri Lanka.

[17] Mr. Mudiyansele submits that the Officer's decision is arbitrary. The IP 5 manual referred to by the Officer states that certain questions must be raised to determine an Applicant's degree of establishment.

[18] Finally, Mr. Mudiyansele claims the Officer used a template from another decision, which demonstrates the arbitrariness of his decision.

B. Respondent's position

[19] The Respondent underlines that the Officer reviewed the evidence adduced by Mr. Mudiyansele and concluded that he did not demonstrate the existence of any risk. Though Mr. Mudiyansele wants to be exempted from the requirements of the *IRPA*, he was never a permanent resident of Canada. According to the Respondent, Mr. Mudiyansele bears the onus of demonstrating that he would face unusual, undeserved or disproportionate hardship if he had to file his application for permanent residence from abroad.

[20] The Officer clearly applied the appropriate test in assessing Mr. Mudiyansele's H&C application, according to the Respondent.

[21] Mr. Mudiyansele did not allege that his situation as a former monk would expose him to any hardship. In light of the evidence adduced, the Officer determined that Mr. Mudiyansele would not be exposed to unusual, undeserved or disproportionate hardship should he return to Sri Lanka.

[22] Mr. Mudiyansele, according to the Respondent, reargues his refugee claim before the Officer, which is contrary to the law since an H&C application is not an appeal of the RPD's decision (*Hussain v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 751 [*Hussain*]).

[23] Mr. Mudiyansele argues that the RPD found that he was credible. The Respondent underlines that this is contrary to the RPD's decision. Mr. Mudiyansele's assumption that he is suspected by the army of being a Liberation Tigers of Tamil Eelam sympathizer, released only because he was a Buddhist monk was never accepted by the RPD.

[24] More importantly, the Respondent affirms that Mr. Mudiyansele did not adduce any evidence which allowed the Officer to reach a different conclusion from that of the RPD on whether the risk alleged existed.

[25] The Officer acknowledged the fact that Mr. Mudiyansele made reasonable efforts to establish himself in Canada. Nonetheless, the Officer also considered that Mr. Mudiyansele had no close relatives in Canada and that his mother and five brothers are still in Sri Lanka. The Officer found that he would obviously face some difficulties if he had to return to Sri Lanka but these did not warrant the granting of the exemption sought. The degree of establishment is not a decisive criterion. Similarly, the hardship inherent in being required to leave Canada is not sufficient to warrant an exception under subsection 25(1) of the *IRPA*, according to the Respondent.

[26] Finally, Mr. Mudiyansele identified clerical errors in the Officer's decision. While certain sentences were imported from a different template, it does not justify in itself quashing the decision. As was recently stated by the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62:

> [12] It is important to emphasize the Court's endorsement of Professor Dyzenhaus' observation that the notion of deference to administrative tribunal decision-making requires "a respectful attention to the reasons offered or which could be offered in support

> of a decision". In his cited article, Professor Dyzenhaus explains how reasonableness applies to reasons as follows:
>
> > "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective." [Emphasis added]

[27] The Respondent submits that the Officer's decision is reasonable.

VI. Analysis

[28] "The H&C decision-making process is a highly discretionary one that considers whether a special grant of an exemption is warranted ..." (*Doumbouya v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1186 at para 7; *Kawtharani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 162, at para 15 [*Kawtharani*]). Mr. Mudiyansele failed to discharge his burden of clearly establishing that he would face unusual, undeserved or disproportionate hardship if required to file his application for permanent residence from outside the country (*Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 23 [*Legault*]).

[29] Furthermore, "the degree of establishment of an applicant is not determinative of an H&C application (Klais). It is only one of the factors that must be considered" (*Kawtharani* cited above at para 32).

[30] It is also trite law that an H&C application is not an appeal of the RPD's decision (*Hussain* cited above at para 12).

[31] The IP 5 Guidelines - *Immigrant Applications in Canada made on Humanitarian or Compassionate grounds*, provide assistance to immigration officers. While these Guidelines are not binding in any way (*Legault* cited above), the Court finds it important to reproduce sections 5.10 and 5.11 of the IP 5 Guidelines concerning the Officer's assessment of hardship:

> **5.10. The assessment of hardship**
>
> The assessment of hardship in an H&C application is a means by which CIC decisionmakers determine whether there are sufficient H&C grounds to justify granting the requested exemption(s).
>
> The criterion of "unusual, undeserved or disproportionate hardship" has been adopted by the Federal Court in its decisions on Subsection 25(1), which means that these terms are more than mere guidelines.
>
> See *Singh v. Canada (Minister of Citizenship & Immigration)*; 2009 Carswell Nat 452; 2009 CF 11, 2009 FC 11.
>
> In many cases the hardship test will revolve around the requirement in A11 to apply for a permanent residence visa before entering Canada. In other words, would it be a hardship for the applicant to leave Canada in order to apply abroad.
>
> Applicants may, however, request exemptions from other requirements of the *Act* and *Regulations*. In such cases, the test is whether it would be a hardship for the applicant if the requested exemption is not granted.
>
> Individual H&C factors put forward by the applicant should not be considered in isolation in a determination of the hardship that an applicant would face; rather, hardship is determined as a result of a global assessment of H&C considerations put forth by the applicant. In other words,

hardship is assessed by weighing together all of the H&C considerations submitted by the applicant. Hardship must be unusal and undeserved or disproportionate as described below:

Hardship

Unusual and undeserved hardship	**Disproportionate hardship**
• The hardship faced by the applicant (if they were not granted the requested exemption) must be, in most cases, unusual. In other words, a hardship not anticipated or addressed by the *Act* or *Regulations*; **and** • The hardship faced by the applicant (if they were not granted the requested exemption) must be undeserved so in most cases, the result of circumstances beyond the person's control.	• Sufficient humanitarian and compassionate grounds may also exist in cases that do not meet the “unusual and undeserved” criteria but where the hardship of not being granted the requested exemption(s) would have an unreasonable impact on the applicant due to their personal circumstances.

5.11. Factors to consider in assessment of hardship

Subsection A25(1) provides the flexibility to grant exemptions to overcome the requirement of obtaining a permanent residence visa from abroad, to overcome class eligibility requirements and/or inadmissibilities, on humanitarian and compassionate grounds.

Officers must assess the hardship that would befall the applicant should the requested exemption not be granted.

Applicants may base their requests for H&C consideration on any number of factors including, but not limited to:

- establishment in Canada;

- ties to Canada;
- the best interests of any children affected by their application;
- factors in their country of origin (this includes but is not limited to: Medical inadequacies, discrimination that does not amount to persecution, harassment or other hardships that are not described in A96 and A97);
- health considerations;
- family violence considerations;
- consequences of the separation of relatives;
- inability to leave Canada has led to establishment; and/or
- any other relevant factor they wish to have considered not related to A96 and A97.

[32] Mr. Mudiyansele contends the Officer applied the wrong criteria for H&C decisions. As the Court reviews the decision, it is apparent that the Officer assessed all of the evidence adduced by Mr. Mudiyansele. Hence, no such error was committed.

[33] Mr. Mudiyansele further submits that the RPD found his story credible. However, the RPD refused his refugee application on the basis of credibility. This decision was found to be reasonable by the Court and reiterated again in its Order of February 6, 2012. The Officer mentioned in the decision that "[i]t is not my role to reverse the findings of the RPD as I do not sit in appeal or review of the decision of the tribunal" (see Tribunal Record at page 14). The Officer also mentions the following:

> "In the applicant's PRRA application, I assessed the risks of return under sections 96 and 97 of the IRPA. As explained in the IP05 Manual, the test in an H&C application is clearly different; thus, I evaluated the alleged risks to determine whether they amounted to unusual and undeserved of disproportionate hardship. In this application for a visa exemption, he has reiterated the same risk allegations… Under the circumstances, I find that the applicant would not, in regard to the first ground, face unusual and undeserved of disproportionate hardships if he returned to Sri Lanka to file an

> application for permanent residence" (see Tribunal Record at page 14).

[34] The Court endorses this finding as reasonable. An immigration officer does not sit in appeal of a RPD's decision. In addition, Mr. Mudiyansele reiterated the same risk allegations that were before the RPD.

[35] Mr. Mudiyansele alleges that he provided evidence of his establishment in Canada. The Officer underlines that Mr. Mudiyansele's "efforts demonstrate a desire to put down roots. The question is whether such efforts are sufficient to justify an exceptional measure, i.e., the visa exemption under IP05" (see Tribunal Record at page 15).

[36] The Officer determined that Mr. Mudiyansele did not adduce any evidence to demonstrate his knowledge of Canada's both official languages.

[37] In addition, Mr. Mudiyansele provided a letter from a Montreal city councillor, letters from two Members of Parliament and two petitions with more than100 signatures in support of his application. He took, amongst other things, 105 hours of nursing courses and helped a 68 years old man suffering from disability. All these positive factors were acknowledged and weighed by the Officer.

[38] The Court finds the Officer's conclusion on Mr. Mudiyansele's establishment to be an acceptable outcome as defined by the Supreme Court.

[39] Mr. Mudiyansele finally contends that the Officer made clerical errors in using a template to make his decision. The Respondent acknowledged these mistakes in his memorandum "[t]he Applicant identified clerical errors in the decision. Firstly, there is an error as to the date of the H&C application was received and secondly, two sentences in the reasons were wrongly imported from another file. While this is unfortunate, this does not justify in itself the quashing of the decision" (see Respondent's Memorandum at page 13).

[40] The Court notes that the Officer mistakenly stated that Mr. Mudiyansele had filed his H&C application on January 19, 2004. Furthermore, the Officer imported two sentences from what appears to be part of another decision and wrongfully added information that was not in Mr. Mudiyansele's file. These errors are not determinative of the decision. However, if these errors would have been at the heart of Mr. Mudiyansele's claim, the Court would not have hesitated to quash the Officer's decision. This kind of error can seriously undermine the H&C process and is not taken lightly by this Court though it is not determinative in this instance.

VII. Conclusion

[41] This application for judicial review is dismissed as the Officer's decision is reasonable as a whole.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is dismissed; and

2. There is no question of general importance to certify.

"André F.J. Scott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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