Federal Court  Cour fédérale

Date: 20150204

Docket: IMM-5133-13

Citation: 2015 FC 140

Ottawa, Ontario, February 4, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

FELADELFO ANQUILERO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter and Background

[1] Pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], the Applicant requested an exemption from the requirement to apply for permanent residence from outside Canada on humanitarian and compassionate [H&C] grounds. This request was refused, so the Applicant now seeks judicial review under subsection 72(1) of the *IRPA*,

asking the Court to set aside the negative decision and return the matter to another officer for re-consideration. He also asked for costs.

[2] The Applicant is now a 59 year-old citizen of the Philippines. He first came to Canada in August, 1990, and about a year later applied for refugee protection, claiming to have experienced seven years of torture and harassment from government intelligence and political guerrillas in the Philippines. The Applicant's application for refugee protection was granted and he was declared a Convention refugee on February 6, 1992.

[3] However, the Applicant returned to the Philippines to pay his last respects to his father, who died on January 24, 1992. While there, the Applicant was in an accident and suffered a spinal injury. He was rendered paraplegic, and to this day remains confined to a wheelchair. He stayed in the Philippines for many years after the accident for surgery and rehabilitation, and while there he was allegedly kept in hiding.

[4] The Applicant eventually returned to Canada on December 29, 2001. On March 17, 2003, he applied for permanent residence as a Convention refugee, but his application was refused some six months later. On September 27, 2005, the Refugee Protection Division of the Immigration and Refugee Board determined that the Applicant was no longer a Convention refugee. Subsequent to that loss of status, the Applicant requested a pre-removal risk assessment, but that application was refused on May 5, 2008.

[5] On April 26, 2011, the Applicant made the H&C application presently under review in this Court. The Applicant was soon thereafter scheduled to be removed from Canada, but that removal was deferred on or about July 7, 2011 (see: Court File No. IMM-4320-11).

II. Decision under Review

[6] More than two years after making the H&C application, a senior immigration officer [Officer] denied the Applicant's request for an H&C exemption on June 28, 2013.

[7] Although the Applicant was found to be a Convention refugee at one time, the Officer did not think the Applicant truly feared for his life since he voluntarily returned to the Philippines to pay his last respects to his father. Further, the Officer observed that there was no evidence that the Applicant was targeted by his former persecutors during the nine years that he was in the Philippines afterwards. Although the Applicant stated that he was concealing his presence, the Officer noted that he became president of his church and was the Chairman of the Marijobojoc Consolidated Multi-purpose Cooperative.

[8] The Applicant had claimed that he would be unable to re-integrate into the labour market in the Philippines because he was too old. While the Officer accepted that it might be difficult for a man his age to find a job, the Applicant was educated and certified as an auto mechanic. He also spoke both Visayan and English, and the Officer was satisfied that, when seeking employment, the Applicant could rely on those skills and others he had acquired through his volunteer work in Canada. Furthermore, in the Officer's view, the Applicant would not be returning to an unfamiliar place since he has a social network in the Philippines and two of his

sons live there. Although the Officer accepted that the Applicant's sons could not offer financial assistance, the Applicant had not proven that they would withhold their emotional support.

[9] The Applicant was also worried about the situation of persons with disabilities in the Philippines, as the documentary evidence showed that they face challenges including poverty and limited access to basic social services. However, the Officer found that the government was making some efforts to improve the situation, and that the Applicant had received medical treatment and rehabilitation during the nine years after his accident. As there was no indication that he had been denied services during this period, the Officer decided that the Applicant had not shown that he would be personally and directly affected by the problems generally faced by people with disabilities in the Philippines.

[10] The Applicant also stated that he suffers from advanced stages of heart disease, and he claimed that he would be unable to see cardiologists in the Philippines since the closest ones to his hometown are in Manila and he is too ill to travel there. The Officer did not agree; the Applicant had relocated thousands of miles to Canada, and there was no proof that he could not travel the more modest distance between Manila and his hometown. In any event, the Applicant could simply choose to live in Manila, thus resolving any problem in that regard and also improving his employment prospects and his access to social services.

[11] Although the Applicant had been in a Canadian research trial for cardiovascular disease and asked to stay until its findings were known, the outcome of this research was expected in 2012, well before the Officer decided the application, so no weight was assigned to that factor.

[12] The Officer next recognized that the Applicant had been integrating into Canadian society. He was volunteering and participating in the community, and has never relied on social assistance despite his disability. He has also built strong friendships. However, despite these positive factors, the Officer noted that separation and its associated hardships can be expected any time that a person is removed from Canada in order to comply with the ordinary requirements of the *IRPA*. The Officer did not consider it unusual and undeserved or disproportionate in the circumstances of the Applicant. Also, there was not enough evidence to convince the Officer that the Applicant would be unable to re-establish himself in the Philippines, especially as he still has friends there as well as his two sons.

[13] Finally, the Officer considered the best interests of the two young children of the family hosting the Applicant in Canada. The Officer accepted that the Applicant had formed a close relationship with them and that they have benefited from his presence. However, the Officer decided that the children's parents could take care of them, and that the Applicant could maintain contact with them through other means such as the telephone, email, letters and video chat. Ultimately, the best interests of these children were not enough to justify an exemption from the requirement for the Applicant to apply for permanent residence from outside Canada.

[14] The Officer concluded by observing that "[t]he H&C process is not designed to eliminate hardship; it is designed to provide relief from unusual, undeserved or disproportionate hardship" (citing *Irimie v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1906 (QL) at paragraph 26, 10 Imm LR (3d) 206). In the Officer's view, the Applicant's circumstances did not rise to that level, so the application was denied.

III. The Parties' Submissions

A. *The Applicant's Arguments*

[15] The Applicant acknowledges that the standard of review is reasonableness, but submits that the decision does not meet that standard for three reasons: first, the Officer failed to apply the proper test in assessing the Applicant's application; second, the Officer ignored material evidence; and third, the Officer's reasons are inadequate.

[16] The Applicant points out that officers are required to consider the particular circumstances of an applicant and assess those circumstances in light of the *IRPA* and the relevant guidelines (citing *White v Canada (Citizenship and Immigration)*, 2008 FC 896 at paragraph 12, 74 Imm LR (3d) 153). Here, the Applicant asserts that the Officer did not globally assess the Applicant's application in accordance with chapter IP 5 of the *Inland Processing Manual*, "Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds" [Manual]. All the relevant criteria outlined in the Manual favoured the Applicant, and he argues that the Officer erred by assessing them in isolation. Had the Officer properly assessed the total hardship that the Applicant would suffer if he were required to apply for status from outside of Canada, the Applicant says the Officer could not have concluded there was insufficient evidence to demonstrate unusual and undeserved or disproportionate hardship.

[17] The Applicant also relies upon the decision in *El Thaher v Canada (Citizenship and Immigration)*, 2012 FC 1439 [*El Thaher*], to argue that the Officer failed to properly assess the degree of the Applicant's establishment in Canada. The Applicant submits that the Officer did

not conduct any personalized assessment of the Applicant's circumstances as someone with a physical disability, and that the Officer made contradictory findings about the availability of medical care or services should the Applicant return to the Philippines.

[18] Furthermore, the Applicant states that the Officer ignored relevant evidence. Relying upon the decision in *Ranji v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 521, at paragraphs 26 and 28, the Applicant says that officers are expected to describe and discuss significant facts, even though they may not be obliged to recite every piece of evidence. The Applicant argues that the more important the evidence that is not mentioned specifically and analysed in the reasons, the more willing a court may be to infer from the silence that the decision-maker made an erroneous finding of fact without regard to the evidence (citing *Chandidas v Minister of Citizenship and Immigration*, 2013 FC 258 at paragraphs 17 and 71, 429 FTR 55).

[19] Here, the Applicant takes issue with the Officer's assessment of the availability of medical services and accommodations for persons with disabilities in the Philippines. The Applicant claims that the Officer selectively relied only on the United States' Department of State Report on conditions in the Philippines [USDOS Report], and either ignored or failed to properly assess the additional documentation from the Asian Development Bank with respect to disabled persons and the services available to them in the Philippines [Asian Development Bank Report]. According to the Applicant, the evidence presented in the Asian Development Bank Report contradicts the Officer's conclusion on availability of services and accommodation for persons with disabilities in the Philippines.

[20] In addition, the Applicant says that the Officer clearly knew about the Applicant's proposed removal from Canada but did not mention how the deferral of such removal resulted in the Applicant becoming even more established in Canada. The Applicant argues that this was unreasonable, citing *Bailey v Canada (Citizenship and Immigration)*, 2014 FC 315 at paragraphs 56-61 and 68, 24 Imm LR (4th) 298; and *Lozano Vasquez v Canada*, 2012 FC 1255 at paragraphs 39-43, 14 Imm LR (4th) 110.

[21] The Applicant lastly submits that the Officer's reasons are inadequate as they are neither transparent nor justifiable (citing *Adu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 565 at paragraph 14 [*Adu*]).

[22] In conclusion, the Applicant says that he is not a burden to Canadian society. If the Court were to accept the Respondent's arguments, the Court would be diminishing the good community service, conduct and establishment of the Applicant in Canada. The Applicant says that this is "insulting" to him, especially since he has met all the factors outlined in the Manual. The Applicant has been in Canada for 13 years, and he argues that the H&C provisions of the *IRPA* are intended to cover the exceptional and unique circumstances of individuals like him.

B. *The Respondent's Arguments*

[23] The Respondent says that H&C relief is exceptional; it is not just a question of whether the Applicant's circumstances are sympathetic. In the Respondent's submission, the Officer's decision was reasonable in view of the evidence that was submitted.

[24] In that regard, the Respondent takes issue with certain "facts" that were contained in the Applicant's affidavit requesting leave of this Court for judicial review but for which there was no evidence before the Officer. In particular, the Respondent says there was no evidence that the Applicant self-catheterized, was unfit to fly, relied on benefactors for his expenses, or was unable to pay his living expenses in the Philippines. Rather, the evidence before the Officer was such that the Applicant is a fully independent person with good mechanical skills, and the Officer cannot be expected to account for evidence that was never submitted.

[25] The Respondent states that the Officer here applied the correct test of unusual and undeserved or disproportionate hardship. The Manual is only a guideline and the list of factors is not determinative (citing *Doumbouya v Canada (Citizenship and Immigration)*, 2007 FC 1186, 325 FTR 186).

[26] Furthermore, the Respondent argues that the Applicant did not personalize whether he would be deprived of medical and other services and accommodations in the Philippines. The Respondent states that the Officer cited the DOS Report, and should be presumed to have considered the Asian Development Bank Report as well. According to the Respondent, the Officer properly considered the Applicant's medical condition and needs, but the Applicant failed to provide sufficient evidence that he could not get appropriate treatment or accommodations in the Philippines.

[27] The Respondent says that the decision in *El Thaher* is distinguishable since that case only determines that an officer needs to consider an applicant's establishment in Canada. A high

degree of establishment does not mean that an H&C application must be granted. Furthermore, the cases cited by the Applicant for persons with significant medical requirements or disabilities are distinguishable, since the applicants in those cases were highly dependent on other people.

[28] As to the sufficiency of the Officer's reasons, the Respondent says that this is not a stand alone basis for granting the application for judicial review (citing *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 18, [2011] 3 SCR 708 [*Newfoundland Nurses*]). Here, the Officer's reasons can be understood. According to the Respondent, the Officer properly assessed the Applicant's employability and, in addition, the Respondent notes that the Applicant was able to access care in the Philippines during the nine years before he re-entered Canada.

[29] The Respondent also says that the decision in *Adu* is distinguishable, since it has been overtaken by *Newfoundland Nurses* and, in any event, the Officer's reasoning is clear and does not merely state conclusions after summarizing the evidence.

IV. Issues and Analysis

A. *Is the evidence challenged by the Respondent admissible?*

[30] At the hearing of this matter, the Respondent argued that the Applicant had improperly supplemented the record for judicial review by relying on evidence which was not before the Officer.

[31] The general rule is that the evidentiary record for a judicial review application is restricted to that which was before the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paragraph 19, 428 NR 297 [*Association of Universities*]). Although there are exceptions to that rule (*Association of Universities* at paragraph 20), none apply in this case.

[32] Thus, the additional evidence adduced by the Applicant subsequent to the date of the Officer's decision will not be considered when assessing the Officer's decision. The Applicant cannot now produce new evidence which was not before the Officer in an effort to buttress his arguments that the Officer made factual errors.

B. *Standard of Review*

[33] The appropriate standard of review for an H&C decision is that of reasonableness since it involves questions of mixed fact and law: see, e.g., *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at paragraph 18. That standard was recently confirmed in *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at paragraphs 30, 32 and 37, 372 DLR (4th) 539 [*Kanthasamy*], where the Federal Court of Appeal stated that an H&C decision is analogous to the type of decision that attracted a reasonableness standard of review in *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559.

[34] The Court should therefore not interfere if the Officer's decision is intelligible, transparent, justifiable, and falls within the range of possible, acceptable outcomes that are

defensible in respect of the facts and the law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] 1 SCR 190. A reviewing Court can neither reweigh the evidence that was before the Officer, nor substitute its own view of a preferable outcome: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraphs 59 and 61, [2009] 1 SCR 339. Furthermore, the Court does not have "carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result" (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paragraph 54, [2011] 3 SCR 654).

C. *Was the Officer's Decision Reasonable?*

[35] Upon review of the Officer's decision as a whole, it is clear that the Applicant's establishment in Canada was not appropriately or fully considered. In just three paragraphs, the Officer had this to say about the Applicant's degree of establishment:

> I recognize that since being in Canada, the applicant has made efforts to integrating [*sic*] into Canadian society. He has been involved in the community through volunteer work, as well as participating in community activities. The applicant has provided letters regarding his volunteer work as well as letters of support. I note the applicant is also involved in the Filipino community. I have also considered that the applicant has not relied on social assistance despite his physical disability and medical condition.
>
> I have also considered that the applicant has strong personal ties to Canada. It is understandable that he would want to remain in Canada with his friends. I note that separation is a general result when friends become residents of different countries and note the associated hardships, such as emotional and financial support [*sic*] are not in isolation to the hardships faced by others who have been similarly separated from family members. There is insufficient evidence before me to suggest that the applicant could not maintain his relationship with his Canadian friends to some extent from abroad through other means. I note the applicant would not be without family ties in the Philippines, he has two adult children

> currently residing in the Philippines. While I accept that the applicant's preference is to remain in Canada, in consideration of the evidence before me, I am not satisfied that requiring the applicant to apply for permanent residence in the normal manner constitutes unusual and undeserved or disproportionate hardship.
>
> I accept that the applicant has several positive elements towards his establishment. However, I am not satisfied that his level of establishment in Canada is exceptional or more than would be expected of similarly situated individuals. There is insufficient evidence before me to establish that the applicant's situation in the Philippines is such that the hardships associated with seeking permanent residence in the normal manner constitute unusual and undeserved or disproportionate hardships. There is insufficient evidence before me that the applicant would not be able to re-establish himself in his country of origin or that in doing so, it would amount to hardship that is unusual and undeserved or disproportionate. While I accept that applicant will face some hardship in having to return and resettle, I am not satisfied he has established that the hardships associated with him severing his personal and community ties to Canada would amount to unusual and underserved [*sic*] or disproportionate hardship.

[36] While the Officer may have considered the evidence, he or she did not appreciate the significant, indeed unusual, degree of establishment that the material submitted by the Applicant tended to show. There are no obvious defects in the evidence, and it was not reasonable for the Officer to repeatedly say "there is insufficient evidence before me" without explaining why the evidence was insufficient. As Mr. Justice Donald Rennie observed in *Velazquez Sanchez v Canada (Citizenship and Immigration)*, 2012 FC 1009 at paragraph 19, this kind of "boilerplate approach is contrary to the purpose of providing reasons as it obscures, rather than reveals, the rationale for the officer's decision." The Officer thus unreasonably minimized the significant hardship that would be suffered by the Applicant if he is required to leave Canada after having lived here continuously for more than 13 years and having first arrived here as a Convention refugee more than 24 years ago.

[37] The degree of the Applicant's establishment here in Canada is, of course, only one of the various factors that must be considered and weighed to arrive at an assessment of the hardship in an H&C application. The assessment of the evidence is also an integral part of an officer's expertise and discretion and the Court should be hesitant to interfere with an officer's discretionary decision. However, the Applicant's establishment was clearly an extremely significant aspect of his H&C application and, therefore, it required an appropriate analysis which was sensitive to the unusual length of time which the Applicant has resided in Canada and the degree to which the Applicant established himself here despite his disability.

[38] In this regard, I agree with the following passage from Mr. Justice James Russell's decision in *El Thaher*:

> [56] What is missing is an analysis of the degree of establishment in this case. The Applicant believes it is exceptional and would lead to exceptional hardship if he is removed. This was a highly significant aspect of the H&C application. The Officer did not have to agree with the Applicant but, on these facts, I think he did have to explain why he disagreed.
>
> [57] The same problem arose in *Sebbe v Canada (Minister of Citizenship and Immigration)*, 2012 FC 813, where the officer failed to appreciate the degree and extent of establishment, and did not properly consider the hardship related to that establishment. Justice Zinn warned in *Sebbe* at paragraph 21, that "what is required is an analysis and assessment of the degree of establishment… and how it weighs in favour of granting an exemption." I do not think this really occurs in the Decision before me. …

[39] Although the purpose of subsection 25(1) of the *IRPA* and the public policy embodied in such section is not to ameliorate all hardship, but, rather, to mitigate unusual and undeserved or disproportionate hardship, the Officer was obliged to fully assess the Applicant's personal

evidence of establishment and not blandly conclude that his level of establishment was "not … more than would be expected of similarly situated individuals."

V. Conclusion

[40] In the result, therefore, I find that the Officer's failure to fully consider the extent of the Applicant's establishment on a personalized basis and the degree of hardship he would likely face if returned to the Philippines was not transparently justified by the reasons. The decision is beyond the range of possible, acceptable outcomes that are defensible in respect of the facts and the law, and it must therefore be set aside.

[41] This application for judicial review is allowed and the H&C application is remitted to a different immigration officer for re-determination. Neither party raised a question of general importance for certification, so none is certified.

[42] The Applicant originally asked for costs in his application, but has not repeated that request. Regardless, there are no special reasons that take this case outside of the "no costs" regime established by section 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22: *Ndungu v Canada (Citizenship and Immigration)*, 2011 FCA 208 at paragraphs 5-7, 423 NR 228.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the H&C application is to be remitted to a different immigration officer for re-determination.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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