Federal Court  Cour fédérale

Date: 20190214

Docket: IMM-649-18

Citation: 2019 FC 190

Ottawa, Ontario, February 14, 2019

PRESENT: The Honourable Madam Justice Walker

BETWEEN:

KENSLEY MAGLEN MITCHELL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mr. Kensley Maglen Mitchell, seeks judicial review of a decision (Decision) of a senior immigration officer (Officer) refusing his application for permanent residence on humanitarian and compassionate grounds pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA). The application for judicial review is brought pursuant to subsection 72(1) of the IRPA.

[2] For the reasons that follow, the application will be allowed. In my view, the Officer did not reasonably consider Mr. Mitchell's request for humanitarian and compassionate (H&C) relief in accordance with the principles set out by the Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 (*Kanthasamy*). Therefore, the Decision is unreasonable and will be set aside.

I. Background

[3] The Applicant was brought to Canada from St. Lucia by an aunt in 2002. He was 8 years old. The Applicant arrived as a visitor and remained in Canada past the expiry of his temporary visa in the care of his mother.

[4] The Applicant is now 24 years old. He began primary school in Toronto in grade 3 and continued through the Toronto education system until he completed high school. The Applicant maintained good academic standing and played basketball throughout his years at school. Since the completion of his studies, the Applicant has worked in Canada without authorization. He submits that he is self-sufficient. The Applicant states that he is active in his north Toronto community, where he plays sports, volunteers and engages with his faith-based community. The Applicant also states that he has close ties to family members in the Toronto area, including his mother, aunts and cousins, and that he is estranged from his family in St. Lucia.

[5] The Applicant first submitted an H&C application for permanent residence on September 11, 2015. The application was rejected on July 21, 2016.

[6] On January 5, 2017, the Applicant submitted a second H&C application. The Officer's refusal of the Applicant's second application is the subject of this application for judicial review.

II. Decision under Review

[7] The Decision is dated January 30, 2018.

[8] In setting the framework for analysis of the Applicant's case, the Officer first listed the factors for consideration under two headings: Establishment in Canada and Risk and adverse country conditions. The Officer summarized the Applicant's establishment in Canada as follows:

- the Applicant has been in Canada for more than 15 years;
- the Applicant came to Canada when he was 8 years old and has attended primary, middle and high school in Canada;
- the Applicant submits that he has a stable history of employment in Canada but cannot substantiate his current employment as he is working without authorization;
- the Applicant has not received social assistance in Canada;
- the Applicant actively participates in community activities and attends church in his community;
- the Applicant submits that he has a good civil record;
- the Applicant provided letters of support from relatives, friends, a teacher and community members;
- the Applicant submits that he is of an age where he can continue to benefit the Canadian economy.

[9] The risk and adverse country conditions in St. Lucia were listed as poverty, unemployment, and water and food shortages. The Officer also noted the Applicant's statement

that he has no family ties or social network in St. Lucia to assist with his reintegration and has only been employed in Canada.

[10] The Officer began her analysis of the Applicant's case by reviewing his establishment in Canada. The Officer acknowledged that the Applicant has been in Canada for 15 years and came to Canada as a child. His arrival and continued presence in Canada without status was outside of his control and was given some positive consideration. However, the fact that, as an adult, the Applicant had not regularized his status for over five years was a negative factor in the Officer's evaluation. The Officer noted that the Applicant's mother had had a refugee application in progress since 2013. Therefore, it was likely that the Applicant knew he was out of status. The fact that the Applicant was close to his mother was not given great weight as she was then a refugee claimant and her continued presence in Canada was not certain.

[11] The Applicant had provided no proof of his work history in Canada which led the Officer to give his submissions in this regard little weight. In addition, any work undertaken by the Applicant was not authorized and was a negative consideration.

[12] In summary, although the Applicant had lived and attended school in Canada for 15 years, was a volunteer in his community and had letters of support from extended family and friends in Canada, the Officer gave his establishment in Canada minimal weight.

[13] With respect to the hardships the Applicant would experience if he returned to St. Lucia, the Officer acknowledged that there would be inherent hardship upon such a return as he has

been away from St. Lucia for more than 15 years. The Applicant would have to find housing and employment. The Officer accepted that there are higher levels of poverty in St. Lucia than in Canada and that the country suffers some water and food shortages. In mitigation of some of the hardships the Applicant may experience, the Officer noted that the Applicant is a single, young male with a successful school background. When added to his work experience in Canada, his situation may lend itself to him finding a job and slowly establishing himself in St. Lucia. The Officer stated that it was likely that the Applicant's family and supporters in Canada would help him financially if able to do so and would extend him their emotional support from Canada. The Officer also noted the possibility of his family in St. Lucia reforming a relationship with the Applicant. Overall, the Officer placed some weight on the hardships the Applicant would experience upon a return to St. Lucia after his extended absence.

[14] The Officer concluded the Decision as follows:

> I have placed minimal weight on the applicant's establishment in Canada. Based on the information provided, I have place[d] some weight on the hardships likely to be experienced if the applicant returns to St. Lucia. I note that the section 25(1) is not put in place to alleviate all hardships. Having globally considered the circumstances of the applicant and having examined all of the submitted documentation, I am not satisfied that the humanitarian and compassionate considerations before me justify an exemption under section 25(1) of the Act.

III. Issues

[15] The sole issue before me is whether the Decision is reasonable.

IV. Standard of Review

[16] It is well established that a denial of H&C relief pursuant to subsection 25(1) of the IRPA is reviewed on the reasonableness standard (*Kanthasamy* at para 44; *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 18; *Marshall v Canada (Minister of Citizenship and Immigration)*, 2017 FC 72 at para 27 (*Marshall*)). Subsection 25(1) provides the Minister a mechanism to deal with exceptional circumstances. As a result, H&C decisions are highly discretionary and must be reviewed with considerable deference (*Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4). It is not the role of this Court to reweigh the evidence or to substitute its own appreciation of the appropriate outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59). My role is to determine whether the Decision is justified, transparent and intelligible and falls within the range of possible, acceptable outcomes which are defensible on the particular facts of the Applicant's case and in law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

V. Analysis

[17] Subsection 25(1) of the IRPA permits the Minister to provide relief from the requirements of the statute to a foreign national in Canada who applies for permanent resident status if the Minister is satisfied that "it is justified by humanitarian and compassionate considerations relating to the foreign national". The Supreme Court of Canada (SCC) comprehensively considered the purpose and proper application of subsection 25(1) in *Kanthasamy*. The SCC's guidance was recently summarized by my colleague Justice Norris as follows:

> [25] In *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61[*Kanthasamy*]), the Supreme Court of Canada endorsed an approach to s 25(1) that is grounded in its equitable underlying purpose. The humanitarian and compassionate discretion enacted in the provision is meant to provide flexibility to mitigate the effects of a rigid application of the law in appropriate cases (*Kanthasamy* at para 19). Justice Abella, writing for the majority, approved of the approach taken in *Chirwa v Canada (Minister of Citizenship and Immigration)*, (1970), 4 IAC 338, where it was held that humanitarian and compassionate considerations refer to "those facts, established by the evidence, which would excite in a reasonable [person] 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*" (*Kanthasamy* at para 13).
>
> (*Mursalim v Canada (Citizenship and Immigration)*, 2018 FC 596 at para 25 (*Mursalim*))

[18] My role in this application is to assess whether the Decision is reasonable against the principles set out in *Kanthasamy*.

[19] The Applicant submits that the Decision is unreasonable because the Officer failed to adequately consider his evidence of establishment in Canada and engaged in speculation regarding the circumstances awaiting him upon a return to St. Lucia. The Applicant argues that the Officer did not apply the principles set out in *Kanthasamy*, specifically the approach encapsulated in *Chirwa v Canada (Minister of Citizenship and Immigration)*, (1970), 4 IAC 338, which focuses on empathy and compassion. In the Applicant's view, the Officer showed little consideration of the factors which would excite, in a reasonable person, a desire to relieve the misfortunes of another. Rather, the Officer focused on the Applicant's unauthorized immigration history to minimize his positive establishment in Canada.

[20] In terms of specific errors, the Applicant submits that the Officer failed to meaningfully consider the duration of his residence in Canada, his educational history and his work experience. The Officer dismissed without discussion the documentary evidence relating to the Applicant's school attendance and the letters written in support of his commitment to his community. With regards to the Officer's examination of the hardship the Applicant would experience in returning to St. Lucia as an adult, the Applicant argues that the Officer engaged in speculation as there was no evidence that his Canadian education and work experience would lend themselves to him finding a job in St. Lucia or that his family and supporters in Canada would be in any position to assist him financially. There was also no basis for the Officer to point to an opportunity for the Applicant's extended family to reconnect with him in St. Lucia, mitigating any hardship occasioned by his return.

[21] The Respondent emphasizes that H&C relief pursuant to subsection 25(1) of the IRPA is exceptional and discretionary. The Respondent submits that the Decision is reasonable and reflects a thorough and specific assessment of the Applicant's circumstances. The Officer considered each aspect of the Applicant's establishment in Canada and indicated the weight she gave to each factor. The weighing of H&C factors was clearly within the discretion of the Officer and the Respondent submits that the Applicant's arguments amount to a request for this Court to reweigh the evidence.

[22] The Respondent also submits that the Officer's decision to afford little weight to the Applicant's establishment in Canada is fully supported by the jurisprudence of this Court and the principle that applicants should not benefit from establishment resulting from their unauthorized

presence in Canada. With regards to the Officer's conclusions regarding hardship, the Respondent argues that there is always a degree of speculation as to the circumstances an individual will experience if returned to their country of origin. However, it was reasonable for the Officer to conclude that the Applicant may be in a better position than others in St. Lucia due to his Canadian education and work experience.

[23] As stated above, the granting of relief pursuant to subsection 25(1) of the IRPA is reserved for exceptional situations. The H&C circumstances of the individual applicant must justify his or her exemption from the otherwise applicable provisions of Canada's immigration laws. The words "humanitarian and compassionate" were chosen by Parliament purposefully. A decision-maker engaged in an H&C assessment must apply these equitable concepts to the factual circumstances of the particular applicant. Also, as the Applicant notes, the subsection presupposes that an applicant has failed to comply with one or more of the provisions of the IRPA. Therefore, a decision-maker must assess the nature of the non-compliance and its relevance and weight against the applicant's H&C factors in each case.

[24] I find that the Officer did not reasonably assess the Applicant's history and evidence with empathy bearing in mind the equitable foundation of subsection 25(1). Although this application does not involve the review of an H&C decision in which the decision-maker applied the wrong test (see *Mursalim* at paras 34-39; *Marshall* at paras 33-38), it is difficult to ascertain what test or principles the Officer applied in reaching her conclusion. The Officer recited the words of subsection 25(1) but did not appear to relate her factual conclusions to the assessment required

by the subsection: were the Applicant's circumstances, when considered with humanity and compassion, sufficient to warrant extraordinary relief?

[25] The Officer addressed each aspect of the Applicant's establishment in Canada factually. The Officer acknowledged that the Applicant had been in Canada for 15 years and that he came to Canada as a child. The Officer stated only that she gave this factor some positive consideration. The Officer then downplayed the duration of the Applicant's presence in Canada by stating that he had been an adult for over five years and had not regularized his status. The Officer omitted reference to the Applicant's first H&C application in September 2015 which reflects an initial attempt to correct his status once he became an adult. More importantly, the Officer did not consider the human implications of the establishment factors she discussed. There is no consideration in the Decision of the fact that the 15 years the Applicant has spent in Canada represent his formative years. He grew up here. He has been fully educated in Canada with, apparently, a strong academic record. The Applicant was fully integrated into his schools. He was a student athlete and has very likely forged important social and community ties. In my view, on the facts of the present case, this is the nature of the analysis required of the Officer in light of *Kanthasamy*. Once the Officer had turned her mind to such considerations, she would be in a position to properly exercise her discretion and determine whether subsection 25(1) relief should be extended to the Applicant.

[26] The Officer reasonably accorded the Applicant's work history in Canada little weight as he submitted no evidence in support of his employment. However, the Officer then ascribed negative weight to the work because it was undertaken without authorization. The Respondent

has referred me to jurisprudence of this Court stating that self-sufficiency gained by working illegally may be discounted (see, for example, *Serda v Canada (Citizenship and Immigration)*, 2006 FC 356 at para 21; *Nguyen v Canada (Citizenship and Immigration)*, 2017 FC 27 at paras 31-33).

[27] The issue with the Officer's treatment of the Applicant's Canadian employment is that she first discounted his work history because he provided no documentation and then stated that any work done in Canada would have been without authorization "and I give this some negative consideration". If the Officer cannot give the Applicant's alleged work history any weight because it has not been established, it is unreasonable for her to then ascribe negative weight to any work he may have undertaken. I would also qualify the application of cases such as *Nguyen*, in which the unauthorized presence of the applicant in Canada was a result of her intentional misrepresentation, to the Applicant's case, where he had no control over his arrival in Canada and continued unauthorized presence here. He has made no attempt to mislead Canadian immigration authorities and, since he became an adult, has taken action to regularize his presence. An H&C application invariably involves non-compliance with the IRPA. The nature and severity of the Applicant's non-compliance was a relevant consideration in this case.

[28] The Officer's conclusion regarding the Applicant's establishment in Canada is perfunctory. She undertook no substantive consideration of the Applicant's life in Canada against a humanitarian or compassionate standard. Having briefly related 15 years of the Applicant's life in Canada, the Officer concludes that "[o]verall, based on the documentation

provided, I give the Applicant's establishment in Canada minimal weight". In my opinion, the Officer provided insufficient justification for her conclusion.

[29] In addition, the Officer's consideration of the hardships the Applicant will experience in returning to St. Lucia are unduly speculative having regard to the fact that he left the island when he was 8 years old. There is no evidence in the record that the Applicant's Canadian family and friends will be able to extend financial support to him in his attempts at reestablishment in St. Lucia, nor is there any evidence supporting the Officer's aspiration that the Applicant's return to St. Lucia may provide his extended family an opportunity to reconnect with him.

VI. Conclusion

[30] The Officer's reasons reflect little appreciation of the humanitarian and compassionate basis of the Applicant's subsection 25(1) application. I find that the Officer did not reasonably consider the Applicant's "humanitarian and compassionate factors in the broader sense" (*Marshall* at para 33) and will allow the application. The matter will be remitted for reconsideration by another officer. Whether the assessment of the Applicant's H&C request in a manner consistent with the SCC's decision in *Kanthasamy* will result in a favourable conclusion for the Applicant is for the officer to determine and I make no findings in this regard.

[31] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT in IMM-649-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The decision of the senior immigration officer is set aside and the matter is remitted for redetermination by a different officer.

3. No question of general importance is certified.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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