Federal Court  Cour fédérale

Date: 20220527

Docket: IMM-290-21

Citation: 2022 FC 769

Ottawa, Ontario, May 27, 2022

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

THEEPAN KULANAYGAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] Theepan Kulanaygam [Applicant] seeks judicial review of a January 4, 2021 decision of an immigration officer [Officer] refusing his request for permanent residency on humanitarian and compassionate [H&C] grounds pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The application for judicial review is allowed.

II. Background

[3] The Applicant is a 39-year-old citizen of Sri Lanka of Tamil ethnicity. He entered Canada on July 20, 2011 and immediately claimed asylum. The Refugee Protection Division [RPD] refused his refugee claim in February 2012. In October 2012, this Court dismissed his application for judicial review of the RPD's decision.

[4] In 2013, the Applicant submitted his first H&C application and pre-removal risk assessment [PRRA] application, which were both refused. The Applicant sought judicial review of both refusals. In February 2014, this Court stayed the Applicant's removal pending the outcome of the judicial review of the PRRA decision. This Court dismissed both applications for judicial review in December 2013 and January 2015.

[5] Following the refusal of a pair of deferral of removal requests in December 2016 and January 2017, the Applicant failed to appear for bond reporting and removal arrangements with the Canada Border Services Agency [CBSA]. A warrant was subsequently issued for his arrest on January 10, 2017.

[6] The Applicant submitted another H&C application on December 13, 2018, which forms the basis of this judicial review. In his application, the Applicant claimed that if he returned to Sri Lanka, he would face hardship at the hands of Sri Lankan security forces, particularly since they had previously contacted his family regarding his suspected affiliation with the former

Liberation Tigers of Tamil Eelam [LTTE]. The Applicant also claimed that his establishment in Canada warranted an H&C exemption in light of his family ties in Canada, his contributions to his community, and his financial viability and independence.

[7] The Applicant submitted country condition evidence on Sri Lanka that was published after he submitted his original H&C and PRRA applications. The country conditions evidence indicates that:

- persons returning to Sri Lanka with temporary travel documents are systematically detained and interrogated by authorities;
- those returning after failed asylum claims are harshly questioned;
- Tamils are regularly detained for long periods in grievous conditions;
- torture is engrained within, and disproportionately employed by, Sri Lankan authorities against the Tamil community; and
- there are dozens of accounts of sexual assault and torture being routinely employed against Tamil men by the police and the military.

[8] The Applicant appeared in order to execute his outstanding warrant on October 5, 2020.

III. The Decision

[9] The Officer refused the Applicant's H&C application. The Officer considered the Applicant's establishment in Canada, giving positive weight to his employment history; financial independence; letters from friends, family, and community members; and his dedication to family and volunteerism. The Officer also positively considered the fact that the Applicant had

no criminal record and that he made efforts to resolve the warrant for his arrest issued by CBSA. However, the Officer noted that the Applicant also evaded CBSA for nearly four years, which demonstrated a disregard for provisions of the *IRPA*.

[10] The Officer considered the country conditions in Sri Lanka. They acknowledged that an H&C application is distinct from a refugee claim or a PRRA application and that their role was to assess the hardship the Applicant would face upon a return to Sri Lanka. The Officer also acknowledged that the Applicant's past experiences in Sri Lanka, in addition to his ethnic profile and the circumstances of his return from Canada, could attract the attention of state officials. The Officer held that this would add to the Applicant's emotional hardship. However, the Officer also noted that the Applicant's employment history in Sri Lanka, in addition to his lack of involvement in "organizations or associations in the country" did not suggest he would suffer harsh treatment upon his return, beyond routine questioning. The Officer found that this lessened the emotional hardship the Applicant would encounter.

[11] The Officer also noted that the Applicant's parents currently reside in Sri Lanka and that the father's 2014 affidavit suggested that past incidents in Sri Lanka would add to the Applicant's hardship if returned. The Officer determined that there was little evidence to suggest the situation remained as dangerous for him now. The Officer also noted the various refusals that this Court upheld on judicial review. The Officer found that these previous assessments of the Applicant's circumstances did not justify granting him protection.

[12] Finally, the Officer concluded that, given the country conditions in Sri Lanka, it would be a measurable hardship for the Applicant to return to Sri Lanka. The Applicant was born in Sri Lanka, he grew up there, he still had family members living there and he had deep-rooted cultural and personal ties in the country. In the Officer's opinion, these considerations softened the hardship of returning. The Officer also positively weighed the establishment of the Applicant in Canada, but found his positive factors could not be reconciled with his "record of defiance of immigration requirements." As a result, the Officer refused the Applicant's H&C application.

IV. Issue and Standard of Review

[13] The parties agree that the central issue in this judicial review is whether the Decision was reasonable. They also agree that reasonableness is the appropriate standard of review that applies to the officers' decisions on whether to grant exemptions to permanent residency requirements based on H&C grounds. The sub-issues for consideration are whether the Officer's reliance on the Applicant's previous immigration decisions was unreasonable and whether the Officer properly assessed the country condition evidence.

[14] A court conducting reasonableness review scrutinizes the decision-maker's decision in search of the hallmarks of reasonableness – justification, transparency and intelligibility – to determine whether it is "justified in relation to the relevant factual and legal constraints that bear on the decision" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 99). Both the outcome and the reasoning process must be reasonable (*Vavilov*, at para 83).

V. Analysis

[15] H&C relief is an exceptional and discretionary remedy and it is not an alternative immigration stream or an appeal mechanism for failed permanent resident applications (*Bakal v Canada (Citizenship and Immigration)*, 2019 FC 417 at para 13). An officer balancing H&C factors must "substantively consider and weigh *all* the relevant facts and factors before them" (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 25. Emphasis in original).

[16] The Decision is unreasonable because the Officer relied on the negative decisions related to the Applicant's immigration history and did not sufficiently assess the country condition evidence. I analyze both of these errors below.

A. *Did the Officer unreasonably rely on previous decisions?*

[17] The Applicant concedes that an officer can consider previous negative decisions but submits that this must involve a careful consideration of those decisions and the contents of the applications that were before each decision-maker. The Applicant submits that in this case, the Officer relied on and was influenced by the previous negative decisions without a deeper analysis (*Liyanage v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1045 at para 41; *Melchor v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1327 at paras 19-21).

[18] The Respondent submits that it was reasonable for the Officer to find that the Applicant's negative RPD and PRRA decisions are an important consideration with respect to the

Applicant's fears and that they serve to minimize the emotional difficulties upon return to Sri Lanka. The Respondent states that in this case, the evidence before the Officer was substantially the same as what was before the RPD and PRRA officers, leaving it open to the Officer to reach the same conclusion (*Bhatia v Canada (Citizenship and Immigration)*, 2017 FC 1000 at para 46). In addition, the Respondent states that the Officer clearly distinguished the H&C process from the previous RPD hearing and PRRA application and noted that the role of the H&C Officer is to assess hardship. As such, the Officer did not err.

[19] I find that the Officer's reliance on the previous decisions in this particular case was unreasonable. The Officer referred only to the legal outcomes of the decisions and did not consider the factual differences between the circumstances in those cases and the present matter. The Officer states the following:

> Both decisions were upheld upon judicial review. In addition, the applicant's two subsequent requests for a deferral of removal based on new risk developments were denied respectively in 2016 and 2017. I recognize these determinations are distinct from an H&C assessment. Nonetheless, the decision makers assessed the applicant's circumstances and concluded they did not justify granting refugee protection or a deferral of removal arrangements. This is an important consideration with regard to [the Applicant's] fears in Sri Lanka. As such, they serve to minimize the applicant's emotional difficulties upon a return to Sri Lanka.
>
> [Emphasis added.]

[20] This is all the Officer noted about the circumstances of this case and the decisions relating to the Applicant's previous immigration history. Absent any indication that the Officer engaged at all with the findings or the records before the previous decision-makers, it was

unreasonable to treat the mere outcomes of those decisions as an “important” consideration with regard to the Applicant’s fears in Sri Lanka.

B. *Was the Officer’s consideration of the country conditions in Sri Lanka unreasonable?*

[21] The Applicant submits that the record before the Officer clearly suggested that anyone returning to Sri Lanka with temporary travel documents would be detained and interrogated and that failed refugee claimants, and Tamil men especially, could expect to face particularly harsh treatment. The Applicant submits that he provided evidence contradicting the Officer’s findings regarding the treatment he could expect to receive from security officials upon his return.

[22] The Respondent submits that the Officer considered the general country conditions but reasonably concluded that “generalized adversity must be tied in some way back to the Applicant” (*Trach v Canada (Citizenship and Immigration)*, 2019 FC 747 at para 21 [*Trach*]).

[23] While the Applicant framed this issue as an unreasonable plausibility finding, I find that it is more appropriate to consider his submissions in relation to the assessment of the country condition evidence. While the Officer acknowledged that the Applicant’s ethnic profile and the circumstances surrounding his return from Canada could attract the interest of state officials, I agree with the Applicant that the Officer failed to engage with the country condition evidence before them. The country condition evidence indicated that someone like the Applicant (a Tamil man and failed refugee claimant) could expect to undergo particularly harsh treatment when they return to Sri Lanka. Such treatment ranges from detention and interrogation, to torture, lengthy arbitrary detention, and sexual abuse by the authorities.

[24] In spite of this, and without explaining or reconciling the inherent contradiction in his rationale, the Officer drew unsupported inferences from the Applicant's previous employment history and the fact that he did not indicate "involvement in organizations or associations in the country." The Officer subsequently concluded that "[t]hese details of his personal profile do little to suggest state officials would likely subject the applicant to unjustly harsh treatment upon his return beyond routine questioning for returnees to the country." In my view, this conclusion is not justified by the evidence and is completely at odds with the factual constraints that bear upon the decision.

[25] Respectfully, the Respondent's reliance on *Trach* is misplaced. In *Trach*, the evidence of the applicant's personal hardship was insufficient to satisfy the officer and there was no persuasive evidence related to family hardship before or after the applicant came to Canada (at para 23). The Applicant in this case has demonstrated that, as a Tamil man returning as a failed refugee claimant, he would face hardship. This is exactly the sort of tie between the general adverse country conditions evidence and the adverse impact those conditions could have on an applicant that the Court had in mind in *Trach*.

[26] The Officer provided no intelligible explanation for how the "routine" questioning would be anything but unjustly harsh, particularly in light of the chilling evidence explaining what "routine" questioning may entail in Sri Lanka for someone with the Applicant's profile. The Officer similarly failed to reconcile his conclusion with the statement made by the Applicant's father. The Applicant's father attests that authorities previously sought the Applicant for suspected involvement with the LTTE. In the face of an evidentiary record suggesting that the

Applicant's profile and circumstances would attract the interest of authorities in Sri Lanka, which could put him in the unfortunate position of being subjected to the widely documented use of arbitrary detention and torture, I do not find that the Officer's rationale or his hardship assessment is intelligible or justified.

VI. Conclusion

[27] The Decision is unreasonable. The parties do not propose a question for certification and none arises.

JUDGMENT in IMM-290-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed. The matter is remitted for re-determination by a different officer.
2. There is no question for certification.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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