Federal Court  Cour fédérale

Date: 20220718

Docket: IMM-2448-20

Citation: 2022 FC 1055

Ottawa, Ontario, July 18, 2022

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

KIRITHARAN KUMARAKULASOORIYAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Mr. Kiritharan Kumarakulasooriyan (the "Applicant") brings an application for judicial review pursuant to s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ["*IRPA*"] of a decision rendered on April 30, 2020 by a Senior Immigration Officer (the "Officer"). The Officer refused his request for permanent residence based upon Humanitarian and Compassionate grounds ("H&C") pursuant to s. 25(1) of *IRPA.*

[2] For the reasons set out below I grant the application for judicial review.

II. Relevant Facts

[3] Given that I have decided the within application for judicial review should be granted based upon the Officer's failure to hold an oral hearing, I will limit my outline of the facts to matters related to that issue, with some additional facts included for contextual purposes.

[4] The Applicant is a 31-year-old Tamil male from northern Sri Lanka.

[5] Following various incidents in Sri Lanka which occurred when the Applicant was approximately 20 years of age, he fled his native country. After traveling through several countries, he eventually arrived in Canada in 2011 where he made a refugee claim. In May 2012, the claim was denied. This Court dismissed his subsequent application for leave and judicial review of the decision.

[6] The Applicant applied for permanent residency based on humanitarian and compassionate ("H&C") considerations in 2014. That application was also refused. In 2015, the Applicant requested a Pre-removal Risk Assessment ("PRRA"), which also resulted in a negative decision. Later that same year, this Court granted the Applicant's application for leave and judicial review of the PRRA decision and referred the matter back for re-determination. Re-determination of his PRRA application resulted in another negative decision.

[7] In 2017, while still in Canada, the Applicant was diagnosed with a central atypical neurocytoma, WHO grade 2. He required four major surgeries to remove a tumour in his brain. He also required radiation treatments following recurrence of the tumour. The Applicant attends a Toronto hospital every six months for checkups. He remains at high risk for recurrence of the original tumour, or, for the development of a new one.

[8] In 2018, for the second time, the Applicant applied for permanent residency based upon H&C considerations. The Applicant submits that he faces hardship upon return to Sri Lanka for, among others, the following reasons:

- Risks of persecution based on his ethnicity as a Tamil, his perceived affiliations, and the fact that he witnessed a crime by government-allied paramilitaries;
- Difficulties in accessing follow-up care for his brain tumour.

III. Decision under review

[9] In rejecting the H&C claim, the Officer concluded that the Applicant failed to provide sufficient corroborative evidence to establish his alleged hardship upon his eventual return to Sri Lanka.

[10] The Officer concluded, among others, that the evidence does not demonstrate the Applicant would be unable to obtain the required cancer treatment and follow-up care in Sri Lanka.

IV. Relevant Provisions

[11] The relevant statutory provision is s. 25 of *IRPA*:

***Immigration and Refugee Protection Act*, SC 2001, c 27**	***Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27**
Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, 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)** Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, 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.
[…]	[…]

(1.3) In examining the request of a foreign national in Canada, the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national.	**(1.3)** Le ministre, dans l'étude de la demande faite au titre du paragraphe (1) d'un étranger se trouvant au Canada, ne tient compte d'aucun des facteurs servant à établir la qualité de réfugié — au sens de la Convention — aux termes de l'article 96 ou de personne à protéger au titre du paragraphe 97(1); il tient compte, toutefois, des difficultés auxquelles l'étranger fait face.
[…]	[…]

V. Issues and Standard of Review

[12] The only issue I intend to address is whether the Officer breached procedural fairness by failing to hold an oral hearing.

[13] Neither party provided submissions on the standard of review applicable to procedural fairness. I am of the opinion that the standard of correctness applies (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para 43). By correctness, I simply observe that procedural fairness, in the circumstances, was either met or it was not (*Canadian Pacific Railway Company v Canada (Attorney General*), 2018 FCA 69, [2019] 1 FCR 121 at para 49).

VI. Submissions of the Parties and Analysis

Did the Officer breach procedural fairness by not conducting an oral hearing?

[14] The Applicant contends that fundamental justice requires an oral hearing be held when an H&C decision is based on serious issues of credibility, especially so if the life or security of a person is at risk. (*Singh v Canada (Minister of Employment and Immigration*), [1985] 1 S.C.R. 177, 17 DLR (4th) 422 at para 59; *Duka v Canada (Citizenship and Immigration*), 2010 FC 1071 at para 13; *A.B. v Canada (Citizenship and Immigration*), 2020 FC 498 ["*A.B.*"] at para 94).

[15] The Applicant says that he suffers from a serious medical condition and that he faces a serious risk to his life if his brain tumor re-emerges. He notes that Canadian medical experts indicate there is a high risk of recurrence.

[16] The Applicant contends that while the Officer accepted the evidence of his medical history, she made an implicit negative credibility finding regarding his assertion that he would face hardship in obtaining qualified care and treatment in Sri Lanka. According to the Applicant, that implicit credibility finding occurred when she gave greater weight to sources obtained through a Google search and on-line promotional material than to his personal evidence, medical evidence and evidence from a similarly situated person in Sri Lanka. All of this evidence related to the cost of obtaining treatment, or the quality of treatment, for brain cancer in that country. The Applicant's evidence included letters from doctors in Canada, a letter from a family friend whose son experienced brain tumor treatment in Sri Lanka, letters from Sri Lankan family and friends who experienced the healthcare system first hand; and, documentary evidence on the limitations of the Sri Lankan healthcare system.

[17] It is trite law that an oral hearing is not a general requirement for H&C determinations (*Baker v Canada (Minister of Citizenship and Immigration*), [1999] 2 SCR 817, 174 DLR (4th)

193 at para 34). However, the Applicant is correct when he contends that fundamental justice requires an oral hearing be held when an H&C decision is based on a negative credibility finding. Unlike in the context of a Pre-Removal Risk Assessment context, in an H&C review, it is not necessary that the credibility finding(s) relate only to the credibility of the Applicant. Here, the credibility finding(s) may relate to evidence which emanates from third parties (see: s. 167 of *the Immigration and Refugee Protection Regulations*, SOR/2002-227; *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at para 47; *Duka v Canada* (Citizenship and Immigration), 2010 FC 1071 at para 13; *Ibabu v Canada (Citizenship and Immigration*), 2015 FC 1068 at paras 33-34; *Devadawson v Canada (Citizenship and Immigration*), 2015 FC 80 at para 40).

[18] In *A.B.*, this Court summarized the analysis that must be undertaken to determine whether an oral hearing is required:

> [95] Determining whether veiled credibility findings are present in a decision requires going beyond the actual words used by an officer; it is necessary to determine the basis for the decision even if the officer expressly declares he or she is not making a finding on credibility. The Court must first determine whether a credibility finding was made, explicitly or implicitly. If so, the Court must determine if the issue of credibility was central to or determinative of the decision (*Majali v Canada (MCI*), 2017 FC 275 at paras 30 and 31).

[19] In the circumstances, the Officer does not make an explicit credibility finding regarding the Applicant's evidence of healthcare limitations in Sri Lanka. I therefore must first determine whether an implicit credibility finding was made. I am aware that it is sometimes difficult to distinguish between a finding of insufficient evidence and a finding of credibility (*Gao v Canada (Citizenship and Immigration*), 2014 FC 59 at para 32).

[20] The Officer had before her, a letter from a family friend who lives in Sri Lanka. The author recounts that her son was diagnosed with a brain tumor and that the lack of specialized treatment for such a condition in Sri Lanka led to her son's death. The author of the letter raised concerns that the same thing could happen to the Applicant. The author of the letter recounted how her son was transferred from hospital to hospital in Sri Lanka during the year leading to his death, without being able to receive specialized care. The letter also indicated that she had to disburse significant amounts of money – approximately 1 200 000 Sri Lankan Rupees or 4 400 CAD - for her son to be treated in Sri Lanka. It appears from the decision that the Officer affords little or no weight to the letter. The Officer states that the author of the letter provided "contradictory" information about the treatment her son received and noted the absence of medical receipts to corroborate the statements regarding medical expenses incurred.

[21] The type of brain cancer suffered by the author's son is not the same as that with which the Applicant was diagnosed. It follows that the outcomes of the two diagnoses may be far removed from one another. However, it is the Officer's observations regarding the costs incurred by the author for treatment of her son, which give me pause. It appears the Officer made a finding of a lack of credibility regarding those costs, which is based in part, upon the Officer's independent research. It would appear the officer made a negative credibility finding with respect to this letter based upon her independent research.

[22] The Officer also had before her, letters from doctors in Canada. One letter, authored by the Deputy Chief of the Department of Radiation Oncology at the Sunnybrook Cancer Centre in Toronto, states that the access to the care required by the Applicant's medical situation is

"questionable" in Sri Lanka. Another letter, authored by a Family physician located in Scarborough, indicates that the Applicant "will not be able to obtain the necessary care and follow-up while in Sri Lanka". The Applicant moreover provided letters from Sri Lankan family and friends who experience the healthcare system first hand. These all discussed the numerous limitations of the healthcare system in Sri Lanka.

[23] The Officer gives little to no weight the doctors' evidence or the evidence of the Applicant's family and friends regarding the Sri Lankan healthcare system. The Officer prefers the "objective evidence obtained using standard search terms in Google". According to the Officer, this latter evidence confirms that Sri Lanka has several medical facilities able to treat cancer and brain tumors. In addition, she concludes, contrary to at least part of the written record, that Sri Lankans have access to free healthcare. The Officer does not explain why she prefers evidence obtained from Google over the evidence submitted by the Applicant. The Officer's rejection of the Canadian medical evidence and the evidence regarding cost of care in Sri Lanka, can only be seen as a negative credibility finding with respect to the sources of that evidence. (*Magonza v Canada (Citizenship and Immigration*), 2019 FC 14 at para 42; *Abdillahi v Canada (Citizenship and Immigration*), 2020 FC 422 at para 31).

VII. Conclusion

[24] I am of the opinion that the Officer's rejection of the Sri Lankan nationals' experience with their health care system and the rejection of the Canadian medical evidence played a central role in the decision making process. I am also of the view that that evidence was rejected based upon credibility findings, and not based upon sufficiency of the evidence. The Applicant's

evidence and supporting documents were simply not believed. Perhaps they were incorrect and unreliable. Perhaps they were lacking credibility on all fronts. However, that is not the issue. The issue is that credibility findings were made, which were central to the issue decided, and those findings did not flow from an oral hearing. Only after such fulsome debate could the Officer have made the decision regarding the credibility of the Applicant's evidence, including reports and letters from Canadian doctors and Sri Lankan nationals.

[25] For these reasons, I am of the opinion that an oral hearing should have been held. Since my conclusion in this regard resolves this matter, I need not address the other bases upon which the Applicant challenges the decision under review.

JUDGMENT in IMM-2448-20

IT IS THIS COURT'S JUDGMENT that the within application for judicial review is granted, without costs. The matter is remitted to another officer for redetermination. No question is certified for consideration by the Federal Court of Appeal.

"B. Richard Bell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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