Date: 20091014

Docket: IMM-228-09

Citation: 2009 FC 999

Ottawa, Ontario, October 14, 2009

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

THOMAS VINCENT CRUZE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision (the Decision) of a Pre-Removal Risk Assessment Officer (the Officer) dated December 3, 2008 wherein the Officer determined that there were insufficient Humanitarian and Compassionate (H & C) grounds for the processing of the Applicant's application for permanent residence from within Canada.

I. Background

[2] The Applicant is a 37 year old citizen of Sri Lanka. The Applicant entered Canada in September 2005 and made a refugee claim. His refugee claim was denied in September 2006 and this Court dismissed his judicial review of that claim in November 2007. He submitted an application for permanent residence on H & C grounds on January 17, 2008 and the application was rejected on December 3, 2008. He also made a Pre-Removal Risk Assessment (PRRA) application, which was denied, and is the subject of a separate judicial review proceeding before this Court.

[3] The Applicant's H & C application was based on his establishment in Canada, the undue hardship he would face as a homosexual man returning to Sri Lanka, and alleged threats made against him by the family of his former partner. The Officer found that the Applicant would not face unusual and undeserved or disproportionate hardship if he were required to return to Sri Lanka to apply for permanent residence. The Officer was not satisfied that there were sufficient H & C grounds to approve the exemption request.

[4] The Applicant states that he is a homosexual who was in a long-term secret relationship with a friend from College, Milroy. When their families found out about the relationship, Milroy's family locked him in the house and Milroy later committed suicide in a car crash. According to the Applicant, Milroy's family blamed him for the death of their son and has threatened his life. The Applicant fled first to Japan and then to Canada. The Applicant states there is no safe place for him

in Sri Lanka as hatred for homosexuals is prevalent all over the country and that his hometown is close to Colombo and Kandy, two urban centers identified as possible internal flight alternatives.

[5] At his H & C, the Applicant presented documents from Sri Lanka confirming Milroy's accident and death and letters of support from a Priest, Member of Provincial Council and his friend, Sujeewa.

II. Standard of Review

[6] Prior to the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, a PRRA Officer's decision was assessed on a standard of reasonableness simpliciter (*Figurado v. Canada (Solicitor General)*, 2005 FC 347, [2005] 4 F.C.R. 387 and *Demirovic v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1284, [2005] F.C.J. No. 1560, 142 A.C.W.S. (3d) 831). It was also held that questions of fact were to be reviewed on a standard of patent unreasonableness, questions of mixed fact and law on a standard of reasonableness, and questions of law on a standard of correctness (*Kim v. Canada (Minister of Citizenship and Immigration*), 2005 FC 437, 272 F.T.R. 62 at paragraph 19).

[7] Following *Dunsmuir*, above, the review of PRRA Officer decisions should continue to be subject to deference by the Court and are reviewable on the newly articulated standard of reasonableness. As a result, this Court will only intervene to review a PRRA Officer's decision if it does not fall "within a range of possible, acceptable outcomes which are defensible in respect of the

facts and law" (*Dunsmuir*, above, at paragraph 47). For a decision to be reasonable there must be justification, transparency and intelligibility within the decision making process.

III. Issues

[8] The application raises four issues, namely:

(a) Did the Officer err in law in finding that the Applicant was not homosexual and was not threatened by his ex-lover's family by failing to properly consider the Applicant's supporting documentation?

(b) Did the Officer err in law in assessing the Applicant's hardship if removed to Sri Lanka by failing to apply the appropriate standard when assessing the risk factors within the H & C application?

(c) Did the Officer err in law in her finding that the Applicant could live safely in Colombo and that homosexuals did not face persecution and a risk of violence by ignoring and/or misunderstanding the objective documentary evidence before her?

(d) Did the Officer err in law in her assessment of the Applicant's establishment and integration into Canadian Society?

A. *Did the Officer Err in Law in Finding that the Applicant Was Not Homosexual and Was Not Threatened by His Ex-Lover's Family by Failing to Properly Consider the Applicant's Supporting Documentation?*

[9] At his refugee hearing, the Refugee Protection Division (RPD) stated they did not believe that the Applicant was homosexual, that he had been in a relationship with Milroy or that Milroy committed suicide, as there was no corroborative evidence. In addition, the RPD found that the Applicant's evidence was not consistent and was at times embellished and implausible. Subsequently, the Applicant obtained evidence that purports to adequately address the RPD's credibility and other concerns. This evidence was the post-mortem report of Milroy's death and letters from a Priest, Member of Provincial Council and his close friend Sujeewa, all of which allegedly corroborated the fact that the Applicant was a homosexual man who had a same sex relationship with Milroy and the fact that Milroy died in a car accident.

[10] After reviewing the evidence, the Officer stated that the post-mortem material was reliable evidence that Milroy died of a car accident, but the suggestion that the accident was suicide was speculative. The Officer continued, stating that while he considered the two letters and the affidavit, he gave them little weight. The Officer noted that Sujeewa is the Applicant's "best friend" and therefore not disinterested in the outcome, the letter from the Councillor was written at the Applicant's brother's request and restated much of the Applicant's claim, as did the letter from the Priest. The Officer stated that this evidence was not sufficient to address the RPD's credibility findings.

[11] The Applicant argues that the Officer's rejection of the supporting evidence was unreasonable. He cites *Elezi v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 422, [2008] F.C.J. No. 562 for the position that it is an error of law to discount evidence solely because it contradicts prior conclusions. In *Elezi v. Canada* (*Minister of Citizenship and Immigration)*, above, Justice Daniele Tremblay-Lamer found that it had been unreasonable for the PRRA Officer in that case to accord little probative value to the "new evidence" declarations because they discussed facts that the Board had already rejected for lacking credibility.

[12] In this matter, the Officer reviewed the three statements and found that the letter from his best friend Sujeewa provided no new evidence with respect to what was before the RPD. It is also clear that the Officer determined that his friend had a personal interest in the matter and as such accorded this evidence little weight, which the Officer was entitled to do under the circumstances (see *Ferguson v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067, [2008] F.C.J. No. 1308 at paragraph 27).

[13] In addition, the Officer reviewed the letter from the provincial councillor and notes that the letter was produced at the request of the Applicant's brother to enable the Applicant to obtain his document to live in Canada. It is also clear from a review of the letter that the councillor did not have first hand knowledge of the Applicant nor does the letter refer directly to the sexual orientation of the Applicant.

[14] Finally, the Officer reviewed the letter from the Priest and considered the statements contained therein. Again, the letter is not a first hand account with respect to this issue and relies upon statements made to the Priest by family members.

[15] The Officer accorded these statements little weight and concluded that there was insufficient new evidence to overcome the finding of lack of credibility on the part of the Applicant by the Board.

[16] I find that the Officer did not reject this evidence solely as a result of the Board's prior determination (see *Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1336, [2008] F.C.J. No. 1673). Rather, the Officer assessed whether the evidence was credible and concluded that it was not. In *Ferguson*, above, Justice Russel Zinn stated at paragraph 25:

> Documentary evidence may also be found to be unreliable because its author is not credible. Self-serving reports may fall into this category. In either case, the trier of fact may assign little or no weight to the evidence offered based on its reliability, and hold that the legal standard has not been met.

[17] When, as here, the fact asserted is critical to the H & C application, it was open to the Officer to require more evidence to satisfy the legal burden, especially in light of the findings of the Board. As Justice Simon Noël noted in *Zamanibakhsh v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1137, [2002] F.C.J. No. 1525 at paragraph 16:

> Homosexuality is an integral part of a human being. In order to prove such a state, the applicant must present factual evidence that demonstrates such a way of being. The Applicant bears the onus of proof, and the CRDD found that he did not satisfy them.

[18] I find that the conclusion reached by the Officer falls within the range of reasonableness and that no error was made.

[19] Given my conclusion with respect to issue (a), there is no need to address issue (c) as it is premised upon a determination that the Officer's conclusion with respect to the Applicant's sexual orientation was unreasonable.

B. *Did the Officer Err in Law in Assessing the Applicant's Hardship if Removed to Sri Lanka by Failing to Apply the Appropriate Standard When Assessing the Risk Factors Within the H & C Application?*

[20] The Applicant argues that the Officer erred in not applying the appropriate standard when assessing the risk factors within the H & C application. The Applicant relies on the decisions of Chief Justice Allan Lutfy in *Pinter v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 296, 44 Imm. L.R. (3d) 118 and Justice Yves de Montigny in *Ramirez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1404, 60 Imm. L.R. (3d) 27 for three primary positions. First, that the concept of "hardship" in an H & C application and the "risk" contemplated in a PRRA are not equivalent and must be assessed according to a different standard. Second, that when assessing risk factors within an H & C application, the Officer should ask themselves whether the risk factors amounted to unusual, undeserved or disproportionate hardship. Third, that the Officer cannot merely adopt the assessment of risk made by the IRB or the PRRA without further analysis of the purpose of the H & C application.

[21] I note that in *Ramirez*, above, Justice de Montigny stated at paragraph 43 that "it is perfectly legitimate for an officer to rely on the same set of factual findings in assessing an H & C and a PRRA application, provided that these facts are analyzed through the right analytical prism."

[22] I find that the Officer did use the proper standard to assess the Applicant's H & C and did not rely only on the PRRA assessment of risk. At page 9 of the Decision, the Officer wrote:

> […] I am not satisfied that the applicant will suffer unusual, undeserved or disproportionate hardship due to risk in Sri Lanka as a gay male. And while I accept that the presence of an IFA is not determinative in an H & C application as it is in a risk assessment, I find that it, and the presence of the applicant's family, significantly mitigates the hardship the applicant is likely to face. I find that Colombo will offer the applicant safety from those he feels may harm him. Additionally I am satisfied the applicant will be able to obtain support from an increasingly visible gay and lesbian community in that city.

D. Did the Officer Err in Law in Her Assessment of the Applicant's Establishment and Integration into Canadian Society?

[23] The Applicant argues that the reasons given and analysis on the issue of establishment were inadequate because the reasons did not indicate how the Officer reached her conclusion.

[24] The Applicant argues the reasons need to be sufficiently clear, precise and intelligible so that a claimant may know why his or her claim has failed and be able to decide whether to seek leave for a judicial review (see *Ogunfowora v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 471, 63 Imm. L.R. (3d) 157; *Via Rail Canada Inc. v. National Transportation Agency (C.A.)*, [2001]

2 F.C. 25, 193 D.L.R. (4th) 357 (F.C.A.)). The Applicant relied on the decision of Justice Eleanor Dawson in *Raudales v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 385, [2003] F.C.J. No. 532 for the position that establishment is a relevant factor to consider when assessing an H & C application. I note that in *Raudales*, above, Justice Dawson determined that the Officer made an unreasonable finding of fact but limited the finding to that case.

[25] Given that many factors are considered and balanced on an H & C there is no reason for the Officer to explain why the consideration of one factor alone did not lead to a positive decision (see *Dhillon v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1067, [2005] F.C.J. No. 1336). The Officer needed to demonstrate by her reasons that she had taken into account all of the evidence before her and had not taken into account irrelevant factors.

[26] The Officer considered the fact that the Applicant was employed and attended school while in Canada and viewed this favorably. The Officer also noted that the Applicant had been away from Sri Lanka since 1997, but noted that he had studied and worked in Japan until he came to Canada in 2005; that his establishment in Canada was as a result of a refugee claim, and that his family was in Sri Lanka and he had listed no friends or relationships in Canada that may lead to hardship if severed. The Officer found that, while it may be difficult to return to Sri Lanka, this did not amount to unusual, undeserved or disproportionate hardship.

[27] In this case the Officer did not make any mistakes as to her findings of fact. The reasons provided balanced the Officer's findings and were sufficiently clear that the Applicant could know why his claims had failed. The reasons were adequate.

[28] Neither party proposed a certified question and no question will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review be dismissed.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Krassina Kostadinov (416) 482-6501	FOR THE APPLICANT
Sharon Stewart Guthrie (416) 954-6402	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General Canada	FOR THE RESPONDENT