Federal Court Cour fédérale

Date: 20140620

Docket: IMM-5400-13

Citation: 2014 FC 595

Ottawa, Ontario, June 20, 2014

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

CLOTHILDE NICAYENZI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review application of the decision of a delegate of the Minister of Citizenship and Immigration, refusing the applicant's application for permanent residence based on humanitarian and compassionate considerations pursuant to s 25 of the *Immigration and Refugee Protection Act*, SC 2001, c-27(the Act).

I. Background

[2] The applicant is a citizen of Burundi. She arrived in Canada in 2008 on a temporary visa. Shortly thereafter, she claimed protection under s 96 and 97(1) of the Act on the basis that she was kidnapped, detained and raped in Burundi. The Refugee Protection Division of the Immigration and Refugee Board denied her application. It basically found the applicant's story not believable. The applicant did not seek judicial review of that decision.

[3] In January of 2012, the applicant sought to be exempted, on humanitarian and compassionate grounds, as contemplated by ss 25(1) of the Act, from the normal requirement of applying for permanent resident status from outside Canada (the "H and C application"). She alleged that she would suffer unusual and undeserved, or disproportionate hardship from the application of the normal rule both by leaving Canada, given her degree of establishment in this country, and by being removed to Burundi given her widowhood and her medical condition as HIV positive. In this regard, she expressed fears that once in Burundi, she would be subjected to further sexual violence given her widowhood status without a male protector, and would not be able to access adequate medical treatment.

[4] The applicant also claimed that being exempted from applying for permanent resident status from outside Canada would be in the best interests of her two young female cousins residing in Burundi. She said she was worried about their well-being given the violence they may face in that country and would therefore ultimately like to adopt them in order to bring them to Canada.

[5] On July 25, 2013, a Senior Immigration Officer, acting on behalf of the Minister of Citizenship and Immigration (the "officer"), dismissed the applicant's H and C application. In particular, the officer found that the applicant's establishment in Canada was insufficient to justify an exemption on humanitarian and compassionate grounds and that her claim based on the best interests of her two young cousins was not open to her as these two cousins were no longer minors at the time the application was made.

[6] With respect to the humanitarian and compassionate ground associated with being removed to Burundi, the officer gave no weight to the applicant's allegations that she would face hardship as a widow without a male protector, given the various discrepancies in the evidence as to her widowhood status. The officer also concluded that given her training and social status, it was reasonable to assume that the applicant did have the profile of the relatively small portion of the Burundian population who has access to proper medical treatment.

[7] The applicant is seeking judicial review of that decision. She claims that the officer's decision is flawed in three ways: first, by ignoring evidence as to her widowhood status; then by speculating as to her ability to access proper medical treatment; and finally, by not providing her with an oral hearing or an opportunity to respond to the officer's concerns given the nature of those findings, one based on credibility, the other on pure conjecture.

[8] The applicant is not challenging the officer's findings regarding her claims based on her establishment in Canada and the best interests of her two young female cousins.

II. Issues and standard of review

[9] This case basically raises two issues, one that goes to the officer's treatment of the evidence before her, the other to the fairness of the process that leads to the officer's decision.

[10] It is settled law that the applicable standard to the analysis of the evidence performed by a Minister's delegate in the context of an application made under s 25(1) of the Act is reasonableness (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] SCJ No 39 (QL) [*Baker*]; *Walker v Canada (Citizenship and Immigration)*, 2012 FC 447 at para 31, [2012] FCJ No 479 (QL); *De Leiva v Canada (Minister of Citizenship and Immigration)*, 2010 FC 717 at para 13, [2010] FCJ No 868 (QL); *Adams v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1193 at para 14, [2009] FCJ No 1489 (QL); *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 18, [2009] FCJ No 713 (QL)). This means that considerable deference is to be accorded to the outcome reached by the delegate on the record of evidence before him or her. As a result, if the delegate's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law, the Court is not allowed to intervene even if its assessment of the evidence that was before the delegate might have lead it to a different outcome (*Dunsmuir v New Brunswick,* 2008 SCC 9 at para 47, [2008] 1 SCR 190; *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113, at paras 81 to 84, [2014] FCJ No 472 (QL)).

[11] On issues of procedural fairness, the standard of review is stricter; it is that of correctness. This means that when such issues arise, the Court must determine whether the

process followed by the Minister's delegate satisfies the level of fairness required in all the circumstances (*Canada (Citizenship and Immigration) v Khosa,* 2009 SCC 12 at para 43, [2009] 1 SCR 339; *Eshete v Canada (Minister of Citizenship and Immigration)*, 2012 FC 701 at para 9, [2012] FCJ No 697 (QL); *Prieto v Canada (Minister of Citizenship and Immigration)*, 2010 FC 253 at para 24, [2010] FCJ No 307 (QL)).

III. Analysis

[12] The purpose of applications made under ss 25 of the Act is to seek an exemption from Canadian immigration laws that are otherwise universally applied. The Minister may grant this relief if, as per the wording of ss 25(1), "[he] is of the opinion that the exemption is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected".

[13] This Court has consistently held that humanitarian and compassionate applications were designed not to eliminate the hardship inherent in being ask to leave the country after one has been in Canada for a certain period of time, but rather to provide relief from "unusual and undeserved or disproportionate hardship" that would ensue should the applicant be required to leave Canada and apply to immigrate through normal channels (*Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 at paras 40 to 42, [2014] FCJ No 472 (QL); *Monteiro v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1322 at para 20, [2006[FCJ No 1662 (QL); *Irimie v Canada (Minister of Citizenship and Immigration),* 2000 CanLII 16640 (FC), at para 26, [2000] FCJ No 1906 (QL)).

[14] As the Federal Court of Appeal has recently held, ss 25(1), when examined in the context of the Act as a whole, is an exceptional provision which is not to be understood as an alternative immigration stream or an appeal mechanism for failed asylum claimants (*Kanthasamy*, above at para 40).

[15] As a result, humanitarian and compassionate applications have been held to be highly discretionary (*Monteiro*, above at para 18). The onus is squarely on applicants to satisfy the decision-maker that their personal circumstances are such that the hardship of having to obtain immigrant status from outside Canada in the normal manner would be either unusual and undeserved or disproportionate (*Kisana v Canada (Minister of Citizenship and Immigration),* 2009 FCA 189 at para 45, [2009] FCJ No 713 (QL); *Irimie*, above at para 10).

[16] That onus is a demanding one. Lack of evidence or omission of relevant information in support of a humanitarian and compassionate application is at the peril of the applicant (*Owusu v Canada (Minister of Citizenship and Immigration),* 2004 FCA 38 at para 5, [2004[FCJ No 158 (QL)). This means that the decision-maker is under no duty to assist applicants in discharging the burden of making their case or to highlight the cases' weaknesses and request further submissions to allow applicants to overcome them. In other words, the decision-maker is under no duty to make further inquiries so as to discover evidence that might be favourable to the case put forward by an applicant (*Kisana*, above at paras 43 to 45).

[17] In terms of process, it is now well established that applicants to an application brought under ss 25(1) of the Act have no right or legitimate expectations that they will be interviewed

by the Minister's delegate (*Owusu*, above at para 5; *Eshete*, above at para 12; *Leonce v Canada (Minister of Citizenship and Immigration),* 2011 FC 831, at para 6, [2011] FCJ No 1033 (QL)).

[18] However, the rules of natural justice are capable of flexibility when the circumstances warrant it and the case law recognizes that in cases where the decision-maker's decision is clearly based on a credibility finding or on concerns that could not have reasonably been predicted by the applicant, he or she has a duty to share these concerns with the applicant so as to allow him or her to respond in a meaningful way. On credibility issues, the manner to respond in a meaningful way will normally take the form of an interview (*Leonce*, above at para 6; *Duka v Canada (Minister of Citizenship and Immigration),* 2010 FC 1071 at paras 11 and 12, [2010] FCJ No 1334 (QL)).

[19] How do these principles apply to this case?

[20] There are two main issues in this respect. The first is the officer's finding that the applicant is not actually a widow and that, as a result, her allegations of potential hardship as a widow without a male protector are unfounded. The second is the officer's conclusion that given the applicant's employment history, she would likely have access to HIV treatments if she were to return to Burundi.

[21] For the reasons that follow, the applicant fails on the first issue but not on the second.

[22] On the first issue, the applicant claims that the officer ignored evidence as to the correct date of the alleged death of her husband. She says this evidence made it clear that the contradictions the officer saw as a problem in assessing her H and C application were not real and should therefore not have been a factor in the officer's decision.

[23] In her written submissions, the applicant says that the husband's date of death correctness issue represented «at least 50%» of the officer's conclusion that she was not a widow. Even assuming that the officer was clearly wrong on that point, the applicant does not discuss the other factors that were considered by the officer. In other words, she does not address the other part of the officer's reasons on that particular point.

[24] That other part has to do with the conflicting information the applicant supplied in her visa application of 2008, where she stated being married, and her H and C application, where she reported being a widow.

[25] The onus was on the applicant to establish she was a widow without a male protector, as claimed in her H and C application. As indicated previously, this onus, given the exceptional nature of H and C applications, is a demanding one. Here, the applicant was aware, or ought to have been aware, of this clear contradiction in her Canadian immigration record and had therefore to be prepared to provide a reasonable explanation for this state of affairs. She did not.

[26] As the respondent points out in its written submissions, nowhere in her H and C application did the applicant explain these contradictory statements, not even by invoking, as she

did in the context of her refugee claim, that it is not her, but the person who arranged her way out of Burundi, who completed her Canadian visa documents. Maybe the reason for this is that this explanation was dismissed by the Refugee Protection Division of the Immigration and Refugee Board as not being credible. This discussion before the Board occurred in the context of conflicting information in the applicant's visa documents and refugee claim as to the nature of her employment in Burundi at the time she left that country.

[27] The net result is that this conflicting piece of evidence as to the applicant's alleged widowhood status was not addressed in any way, shape or form in the H and C application material. As the officer also noted in her decision, the applicant did not provide any details as to who was taking care of her two young female cousins who were 14 and 18 years of age when she left Burundi, a piece of information that could have been relevant in assessing whether she could count on some sort of protection upon her return to Burundi.

[28] In such circumstances, where the onus was clearly on the applicant, I agree with the respondent that it was reasonable for the officer to refuse to give weight to this allegation in light of the contradictory evidence submitted by the applicant, the negative credibility finding of the Refugee Protection Division of the Immigration and Refugee Board and the absence of any corroborative evidence. There were holes in the applicant's story that she knew, or ought to have known, about. It was her duty to fill them up. She failed.

[29] This is a matter of sufficiency of evidence, not of pure credibility. The officer was under no duty here to assist the applicant in discharging the burden of making her case or to highlight

the case's weaknesses and request further submissions to allow her to overcome these weaknesses (*Owusu*, above, *Kisana,* above at paras 43 to 45).

[30] This is certainly not a situation that could not have reasonably been predicted by the applicant as, again, she was or had to be aware of these contradictory statements in her Canadian immigration record. Therefore, there was no obligation on the part of the officer to share these concerns with the applicant so as to allow her to respond to them (*Leonce*, above at para 6; *Duka*, above at paras 11 and 12).

[31] There is an additional hurdle to this particular humanitarian and compassionate ground advanced by the applicant. As the Federal Court of Appeal stated in *Kanthasamy* above, in order for an applicant to be successful on an humanitarian and compassionate application, there has to be evidence that the unusual and undeserved or disproportionate hardship that forms the basis of the application in any given case will affect the applicant "personally and directly" (*Kanthasamy*, above at para 48). As the respondent puts it, and I agree with it, the applicant's widowhood argument amounts to stating that all widows from Burundi shall be granted permanent residence in Canada based on humanitarian and compassionate factors. This is not enough to meet the test set out in ss 25(1) of the Act.

[32] In sum, the applicant has not shown that the officer's findings regarding her alleged widowhood was either unreasonable or procedurally unfair.

[33] The same cannot be said of the second issue which concerns the inference the officer drew in regards to the applicant's access to medical treatment based on her former employment. The applicant contends that this inference on the part of the officer was pure speculation. The Court agrees with her.

[34] It is well established that findings of fact based on mere speculation are inherently unreasonable as such findings are generally characterized as mere guesses and devoid, therefore, of any legal value (*Ukleina v Canada (Citizenship and Immigration)*, 2009 FC 1292 at paras 8 and 14, [2009] FCJ No 1651 (QL)). An inference is valid, on the other hand, when it is grounded in some proven fact and established to be probable in the circumstances (*Zhang v Canada (Citizenship and Immigration)* 2008 FC 533 at para 3, [2008] FCJ No 678 (QL); *Newfoundland (Workers' Compensation Commission) v Miller*, 2001 NFCA 20, (2001), 199 NFLD & PEIR 186 at para 11; *Weng v Canada (Citizenship and Immigration)*, 2011 FC 1483 at para 30, [2011] FCJ No 1811 (QL); *Matthews v Canada (Citizenship and Immigration)*, 2012 FC 535 at para 37, [2012] FCJ No 563 (QL)).

[35] It is therefore improper for an immigration officer to draw inferences that are not based on established fact or evidence. In the present case, the officer accepted the applicant's documentary evidence that only 23% of HIV positive Burundians at an advanced stage of the virus have access to the necessary medical treatment. She concluded that the applicant's profile as a lecturer and *chargée de mission* for the *Laboratoire Nationale de l'Industrie Pharmaceutique* meant that it was reasonable to conclude that the applicant would probably be among the 23% of Burundians who would benefit from medical treatment.

[36] The Court finds that the officer's conclusion that the applicant would have access to medical treatment was purely speculative and unfounded on any documentary evidence. Indeed, the applicant, in the Court's view, had established that her access to treatment was unlikely or in serious doubt, given her evidence that only 23% of HIV patients at an advanced stage of the virus in Burundi have such an access. There was an inference here that the applicant, whose HIV condition and need for treatment are well documented, could face unusual and undeserved or disproportionate hardship that would affect her personally and directly, if she were to return to Burundi.

[37] I agree with the applicant that in order to displace that inference, the officer needed more evidence than that she had before her, such as the salary of a lecturer, evidence as to whether the applicant would or could go back to her former position, who has access to HIV treatment in Burundi and on what basis and the costs of her HIV medication.

[38] The officer's finding that the applicant would be part of the minority of Burundians who receive medical treatment for HIV was not grounded in some proven facts. There was simply no evidence to support this conclusion. The officer made an inference leap she was not entitled to do. Her finding in that regard was unreasonable.

[39] The applicant's HIV condition is a new feature in her story. That is something that was discovered after she came to Canada. The risks of unusual and undeserved or disproportionate hardship are real and individualized. The concerns the officer had on her ability to access medical treatment could hardly have been predicted by the applicant who had established that in

Burundi, access to HIV treatment is seriously limited. In these circumstances, the applicant was at least entitled to be made aware of the officer's concerns and to be allowed an opportunity to respond in a meaningful way. This was not done.

[40] For these reasons, this judicial review application is granted.

[41] Neither party proposed a question of general importance, and none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The present application for judicial review is granted and the matter is referred back to the same immigration officer for re-determination in accordance with the present reasons for judgment;
2. No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5400-13
STYLE OF CAUSE:	CLOTHILDE NICAYENZI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	MAY 21, 2014
JUDGMENT AND REASONS:	LEBLANC J.
DATED:	JUNE 20, 2014

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