Federal Court  Cour fédérale

Date: 20161101

Docket: IMM-1513-16

Citation: 2016 FC 1212

Ottawa, Ontario, November 1st, 2016

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

HETTY SUTHERLAND
CORNEISHA SUTHERLAND
CORNEICE SUTHERLAND
MICHAEL SUTHERLAND

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Ms. Hetty Sutherland and her three minor children Corneisha, Corneice and Michael Sutherland, are citizens of Grenada and St. Vincent & the Grenadines [St. Vincent]. Ms. Sutherland is the mother of seven children, four of whom are living with her in Canada,

including the three minor applicants in this case and her youngest child Jaydon, who was born in Canada and has a Canadian father.

[2] In 2009 and 2010, Ms. Sutherland and her children filed refugee claims in Canada. In support of their request, Ms. Sutherland alleged domestic abuse and sexual assault by the two fathers of her children born in St. Vincent. The Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada rejected the claims, and the applications for leave and judicial review of the negative RPD decisions were denied by this Court. Negative pre-removal risk assessments [PRRA] of Ms. Sutherland and her children were then issued by Citizenship and Immigration Canada [CIC] in October 2013 and in May 2015, and the judicial review of the second PRRA was also dismissed by this Court in January 2016.

[3] In May 2015, Ms. Sutherland and her children filed an application under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], stating that their personal circumstances justified the granting of permanent resident status on humanitarian and compassionate [H&C] grounds. Ms. Sutherland based her application for permanent residence on several factors, including the hardship that she and her children would face if returned to Grenada or St. Vincent, because of her psychological state. In March 2016, an immigration officer of CIC [the Officer] dismissed their H&C application. The Officer was not satisfied that the country conditions in Grenada and St. Vincent, the limited establishment of Ms. Sutherland and her children in Canada, the best interests of Ms. Sutherland's children and her mental health condition were such that an H&C exemption should be granted.

[4] Ms. Sutherland and her children have applied to this Court for judicial review of the Officer's decision. They argue that the decision is unreasonable because the Officer erred in her assessment of the expert reports regarding Ms. Sutherland's mental health and in her analysis of the best interests of Ms. Sutherland's children. They ask this Court to quash the Officer's decision and to order another immigration officer to reconsider their H&C application.

[5] I agree that the Officer's decision was unreasonable as it failed to analyze and weigh the impact that the removal from Canada would have on Ms. Sutherland's mental health. This suffices to put the Officer's decision outside the limits of possible, acceptable outcomes and to justify this Court's intervention. I must, therefore, allow this application for judicial review and send the matter back for redetermination.

[6] While Ms. Sutherland and her children presented other issues, the Officer's treatment of the expert psychological evidence regarding Ms. Sutherland's mental health is determinative and is the sole issue that I need to address in considering this application.

II. Background

A. *The Officer's Decision*

[7] In her decision, the Officer retained "adverse country conditions" in Grenada and St. Vincent, "establishment", "best interests of the children" and "other issues" related to Ms. Sutherland's medical condition as the factors to consider in her analysis. The Officer also reiterated that a positive H&C application is exceptional, and that the onus is on the applicants to

prove that their personal circumstances are such that they justify the granting of the application. The Officer's reasons in support of her decision are extensive and detailed.

[8] In her analysis of "other issues", the Officer considered two reports, one from a psychotherapist (Ms. Riback) and another from a psychologist (Dr. Devins), both indicating that Ms. Sutherland had some mental health issues caused by the domestic violence and sexual assaults she encountered while in Grenada and St. Vincent. The psychotherapist's report mentioned that "[i]f Ms. Sutherland and the children were to remain in Canada, a plan of medical and therapeutic care could be implemented". While the Officer acknowledged the clinical opinion of Ms. Riback, she noted that no evidence was provided indicating that a medical or therapeutic care plan had been implemented as recommended. Turning to Dr. Devins' psychological evidence, the Officer noted that this report confirmed the diagnosis of major depressive disorder of moderate severity and stress-related disorder with prolonged duration requiring mental health treatment. This psychologist's report further mentioned that "[i]f refused permission to remain in Canada, [Ms. Sutherland's] condition will deteriorate". Again, the Officer acknowledged the medical opinion of Dr. Devins but concluded that, similar to Ms. Riback's report, no evidence was adduced to the effect that Ms. Sutherland could not receive the medical or therapeutic care she needed in either Grenada or St. Vincent, should she choose to seek it.

[9] The Officer then analyzed the status of mental health care in Grenada and St. Vincent and determined that Ms. Sutherland would be able to obtain treatment for her psychological condition in those two countries should she need it.

[10] The Officer concluded that the return of Ms. Sutherland and her children to Grenada or St. Vincent was feasible. The Officer found that "[a]lthough there will inevitably be difficulties associated with a requirement to leave Canada, the fact that the applicants find Canada to be a more desirable place to live than their country of return is not determinative of an H&C application". The Officer added that the test in H&C applications "is not whether the applicants would be, or are, a welcome addition to the Canadian community", and that it is "not designed to eliminate all difficulties" that a person might encounter. As a result, the H&C application was denied.

B. ***The Standard of Review***

[11] It is well settled that the purpose of H&C applications made under section 25 of IRPA is to seek an exemption from Canadian immigration laws that are otherwise universally applied (*Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 at para 57; *Paramanayagam v Canada (Citizenship and Immigration)*, 2015 FC 1417 at para 12). This relief sits outside the normal immigration classes or refugee protection streams by which foreign nationals can come to Canada permanently, and it is thus only available for exceptional cases.

[12] Decisions taken on H&C applications made under subsection 25(1) of IRPA are highly discretionary and the standard of review applicable to such decisions is reasonableness (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61[*Kanthasamy*] at para 44; *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 15). More specifically, the analysis of clinical opinions and psychological reports in H&C applications

needs to be assessed under the reasonableness standard (*Sitnikova v Canada (Citizenship and Immigration)*, 2016 FC 464 [*Sitnikova*] at paras 17 and 37).

[13] This means that deference should therefore be shown by this Court unless the Officer's decision is not justifiable, transparent and intelligible within the decision-making process. The Officer's decision should not be disturbed as long as the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 47). In conducting a reasonableness review of factual findings, it is not the role of the Court to reweigh the evidence or the relative importance given by the decision-maker to any relevant factor (*Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 at para 99).

III. Analysis: Was the Officer's Assessment of the Evidence regarding Ms. Sutherland's Mental Health Unreasonable?

[14] Ms. Sutherland submits that the Officer erred in her assessment of the expert reports regarding her mental condition, as she failed to properly consider the impact that her removal from Canada would have on her mental health, as required by the Supreme Court in *Kanthasamy*.

[15] Ms. Sutherland claims that the issue before the Officer was not whether she had sought treatment in Canada or whether she could receive one in her country of origin, but whether her mental condition would deteriorate if she was removed to Grenada or St. Vincent. Ms. Sutherland pleads that the reports from both Ms. Riback and Dr. Devins affirmed that her mental

health would worsen if she was removed, and that this factor was wrongfully ignored by the Officer. Ms. Sutherland complains that, while the issue was mentioned, the Officer did not engage with these statements, nor did she provide her own analysis of the consequences of a potential removal on Ms. Sutherland's mental health.

[16] I agree with Ms. Sutherland, and I find that the failure of the Officer to properly address this issue suffices to render the decision unreasonable. The two psychological reports expressly stated that Ms. Sutherland needed mental health treatment and warned about the adverse effect the removal would have on Ms. Sutherland's mental health condition, and on her children. This is an obvious component of any hardship analysis in an H&C application, and the Officer overlooked it.

[17] I acknowledge that the Officer did not err in finding that Ms. Sutherland had not sought treatment in Canada and in determining that the treatments she needed could be available in Grenada or St. Vincent. However, that was not enough. When psychological reports are available, indicating that the mental health of applicants would worsen if they were to be removed from Canada, an officer must analyze the hardship that applicants would face if they were to return to their country of origin. An officer cannot limit the analysis to a determination of whether mental health care is available in the country of removal (*Kanthasamy* at para 48; *Ashraf v Canada (Citizenship and Immigration)*, 2013 FC 1160 at para 5; *Davis v Canada (Citizenship and Immigration)*, 2011 FC 97 [*Davis*] at para 19).

[18] The approach taken by the Officer in this case squarely contradicts the teachings of the Supreme Court in *Kanthasamy*. It is worth reproducing paragraphs 47 and 48 of that decision. They read as follows:

> [47] Having accepted the psychological diagnosis, it is unclear why the Officer would nonetheless have required Jeyakannan Kanthasamy to adduce *additional* evidence about whether he did or did not seek treatment, whether any was even available, or what treatment was or was not available in Sri Lanka. Once she accepted that he had post-traumatic stress disorder, adjustment disorder, and depression based on his experiences in Sri Lanka, requiring further evidence of the availability of treatment, either in Canada or in Sri Lanka, undermined the diagnosis and had the problematic effect of making it a conditional rather than a significant factor.
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> [48] Moreover, in her exclusive focus on whether treatment was available in Sri Lanka, the Officer ignored what the effect of removal from Canada would be on his mental health. As the Guidelines indicate, health considerations *in addition* to medical inadequacies in the country of origin, may be relevant: *Inland Processing*, s. 5.11. As a result, the very fact that Jeyakannan Kanthasamy's mental health would likely worsen if he were to be removed to Sri Lanka is a relevant consideration that must be identified and weighed regardless of whether there is treatment available in Sri Lanka to help treat his condition: *Davis v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 97 (CanLII), 96 Imm. L.R. (3rd) 267 (F.C.); *Martinez v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1295 (CanLII), 14 Imm. L.R. (4th) 66 (F.C.). As previously noted, Jeyakannan Kanthasamy was arrested, detained and beaten by the Sri Lankan police which left psychological scars. Yet despite the clear and uncontradicted evidence of such harm in the psychological report, in applying the "unusual and undeserved or disproportionate hardship" standard to the individual factor of the availability of medical care in Sri Lanka — and finding that seeking such care would not meet that threshold — the Officer discounted Jeyakannan Kanthasamy's health problems in her analysis.
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> (Emphasis added)

[19] *Kanthasamy* involved a young Sri Lankan Tamil who suffered from post-traumatic stress disorder and depression as a result of his experiences in Sri Lanka, the country where he had been detained and tortured. In assessing Mr. Kanthasamy's H&C application, an immigration officer accepted the doctors' diagnosis, but nevertheless concluded that Mr. Kanthasamy had provided insufficient evidence to show that he would be unable to obtain medical care in Sri Lanka. However, the immigration officer gave no consideration to medical evidence indicating that Mr. Kanthasamy's condition would deteriorate if he were forced to return to Sri Lanka, the location of his mistreatment. As the Supreme Court expressly stated, the very fact that Mr. Kanthasamy's mental health would likely worsen if he were to be removed to Sri Lanka was a relevant consideration that had to be identified and weighed regardless of whether there was treatment available in his country of origin. Furthermore, CIC's administrative guidelines governing the treatment of H&C applications provide that both health considerations *in addition* to medical inadequacies in the country of origin may be relevant to an H&C determination (*Kanthasamy* at para 48).

[20] In the present case, the uncontradicted psychological evidence before the Officer showed that, similarly to the *Kanthasamy* case, returning Ms. Sutherland to Grenada or St. Vincent would exacerbate her mental health problems and that her mental health condition would suffer if she were removed from Canada. The reports expressly discussed why Ms. Sutherland's condition would deteriorate if she was to be removed, and the Officer acknowledged the two medical diagnoses. In such circumstances, it was not enough for the Officer to simply look at the availability of mental health care in Grenada or St. Vincent. The Officer needed to expressly take

into consideration “the effect of removal from Canada would be [on her] mental health” (*Kanthasamy* at para 48).

[21] Counsel for the Minister ably tried to argue that this case is distinguishable in that, unlike the officer in *Kanthasamy*, the Officer in the case at bar did not “accept” the psychological diagnosis on Ms. Sutherland. The Officer instead indicated that she “acknowledge[s] Dr. Devins’ medical opinion” with regard to Ms. Sutherland’s mental health issues. She also stated, after reviewing the report of Ms. Riback, that she is “[a]cknowledging this clinical opinion”. When questioned on this point, counsel for the Minister argued at the hearing before this Court that there is a difference between *accepting* a diagnosis, and simply *acknowledging* it. I do not agree.

[22] I instead conclude that “acknowledging” and “accepting” an expert report have the same meaning in the present context, and that this case undoubtedly triggers the application of *Kanthasamy*. In *The Oxford English Dictionary*, 2d ed, the verb “acknowledge” is notably defined as follows: “[t]o own the knowledge of; to confess, to recognize or admit as true”, and “[t]o own as genuine, or of legal force or validity; to own, avow, or assent, in legal form, to (an act, document, etc.) so as to give it validity”. In the *Oxford’s Compact Thesaurus*, the following synonyms were provided for the verb “acknowledge” in the context of the example “*the government acknowledged the need to begin talks*”: admit, accept, grant, allow, concede, confess, own, recognize.

[23] I therefore fail to see how “acknowledging” a medical or clinical opinion, as the Officer did in this case, can be materially different from “accepting” it, and not as equally supportive of

such opinion. This is not a situation where the Officer criticized or did not accept the psychological reports and diagnoses before her. The Supreme Court's reasoning from *Kanthasamy* must therefore apply.

[24] Of course, an immigration officer does not need to agree with psychological reports submitted with an H&C application and can decide to give them little weight, as long as the officer provides clear and well-founded explanations. For example, in *Sitnikova*, a post-*Kanthasamy* decision, the Court found that case to be distinguishable as the officer did not appear to have accepted the psychological diagnosis (*Sitnikova* at paras 35-37). This is clearly not the case here.

[25] It is also true that the *Kanthasamy* decision concerned a minor child. However, I am of the view that its prescriptions on the treatment of health issues in H&C applications do also extend to situations where the applicant is not a child but an adult. Recent decisions of this Court have in fact applied *Kanthasamy* without making a distinction based on the age of the applicant (*Sitnikova* at para 1; *Tabatadze v Canada (Citizenship and Immigration)*, 2016 FC 24 at para 10). Indeed, in *Kanthasamy*, in the part of the decision discussing mental health problems and the assessment of psychological reports, the Supreme Court referred to prior decisions of this Court involving adult applicants, such as *Davis* and *Lara Martinez v Canada (Citizenship and Immigration)*, 2012 FC 1295.

[26] Counsel for the Minister also made a valiant effort to find a passage in the Officer's decision suggesting that the effect of Ms. Sutherland's removal was obliquely considered by the

Officer in her "Conclusion", even though the words "mental health" or "mental condition" appear nowhere in this section. In these conclusions where she summarized her weighing exercise of the various H&C factors at stake, the Officer underlined that her exercise of discretion on H&C grounds "should be something other than that which is inherent in removal after a person has been in a place for a period of time" (emphasis added). Counsel for the Minister asks me to see in this passage an expression of the Officer's consideration and assessment of the impact of removal on Ms. Sutherland's mental health issues.

[27] I do not share the Minister's interpretation and I do not accept counsel's invitation to adopt such a creative reading of the Officer's decision. I cannot find even a remote relation to Ms. Sutherland's mental health in this statement of the Officer. Indeed, in the very next sentence, the Officer mentions that the fact that "a person would be leaving behind friends, perhaps family, employment or a residence is not necessarily enough to justify the exercise of discretion". This, in my view, is the something "inherent in removal" to which the Officer meant to refer to in the sentence singled out by the Minister. The passage identified by the Minister clearly does not encompass the mental health issues of Ms. Sutherland.

[28] In fact, there is no mention whatsoever in the "Conclusion" section of the Officer's decision, whether directly or indirectly, of the mental health condition of Ms. Sutherland.

[29] Finally, I do not subscribe to the Minister's suggestion that the Officer's error changes only one aspect of the numerous factors she weighed in her H&C assessment and that, looking at the decision as a whole, this single factor would not change the ultimate outcome.

[30] It is true that, pursuant to subsection 18.1(3) of the *Federal Courts Act*, RSC 1985, c F-7, this Court is exercising a discretionary power on judicial reviews such as this one, and "may" "(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal".

[31] The Supreme Court has stated in *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2 [*MiningWatch*] that "the fact that an appellant would otherwise be entitled to a remedy does not alter the fact that the court has the power to exercise its discretion not to grant such a remedy, or at least not the entire remedy sought", when the error would not have changed the result (*MiningWatch* at para 52). Even when a material error is found, if the error could have made no difference in a decision, the Court can decide to refuse to set it aside (*Canada (Minister of Citizenship and Immigration) v Patel*, 2002 FCA 55 at para 13). However, the Court's discretion must be "exercised with the greatest care", and "balance of convenience considerations" must be taken into account in the exercise of such discretion (*MiningWatch* at para 52).

[32] I do not find that this is a situation where I should exercise my discretion to refuse to send the matter back for redetermination by a different immigration officer. In the present case, the Officer analyzed various factors in Ms. Sutherland's H&C application, namely the adverse country conditions in Grenada and St. Vincent, her establishment, the best interests of her

children, and her mental health. There was an error with regard to one of those four factors, the analysis of Ms. Sutherland's mental health, and I observe that, in the weighing of the factors in her "Conclusion", the Officer was completely silent on the impact of this element.

[33] It is therefore impossible for me to determine whether, when the impact of the removal on Ms. Sutherland's mental health will be properly considered by CIC, the balancing and weighing exercise will lead to a different conclusion on the H&C application submitted by Ms. Sutherland and her children. I am aware that by sending the case back to CIC, the result may be the same after a new review is conducted in light of my decision. However, this is an assessment that CIC, not this Court, must conduct and to which Ms. Sutherland and her children are entitled in the treatment of their application for permanent residence on H&C grounds. It is possible that, informed by these reasons of the error committed by the Officer and of the assessment that should have been made in considering the hardship to Ms. Sutherland and her children, another immigration officer might nevertheless come to a similar conclusion. However, this other officer might also come to a different conclusion. I cannot say that the case leans so heavily against granting Ms. Sutherland's request for permanent residence on H&C grounds that sending the case back to CIC would serve no useful purpose (*Lemus v Canada (Citizenship and Immigration*), 2014 FCA 114 at para 38).

IV. Conclusion

[34] The Officer improperly discounted the psychological evidence put forward by Ms. Sutherland and failed to consider it in accordance with the *Kanthasamy* decision. Accordingly, the Officer's conclusion did not represent a defensible outcome based on the facts and the law. I

must therefore allow this application for judicial review and order another officer to reconsider the H&C application of Ms. Sutherland and her children.

[35] Neither party has proposed a question of general importance for me to certify. I agree there is none.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted, without costs.

2. The decision rendered on March 22, 2016 by the immigration officer L. Zucarelli is quashed.

3. The case is returned to Citizenship and Immigration Canada for a new review by another immigration officer.

4. No question of general importance is certified.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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