Federal Court Cour fédérale

Date: 20170504

Docket: IMM-4008-16

Citation: 2017 FC 445

Ottawa, Ontario, May 4, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

LEONARD MULLA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] The Applicant challenges the refusal of an application for permanent residence based on humanitarian and compassionate [H&C] grounds made under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act or IRPA], by a Senior Immigration Officer [the Officer]. For the reasons explained below, the matter will be returned for redetermination.

[2] The Applicant is an Albanian citizen, who entered Canada in October 2010, and had his refugee claim rejected two years later. He ultimately had his second H&C refusal on September 19, 2016 [Decision], after the first refusal had been sent back for redetermination on consent.

[1] In his H&C submissions, which included (i) written representations and accompanying evidence filed by a consultant in the first application, and then (ii) present counsel's additional submissions and evidence in the second, the Applicant raised various factors speaking to the hardship of applying from abroad. The only point arguably raised about the risk in Albania was included in the initial application, when the consultant stated "the circumstances surrounding his immigration history warrant a positive recommendation for an exemption to be granted for his application from within Canada without going back to his country to apply".

[2] Nothing with respect to his personal fear, or risks raised in his refugee claim, was included by the Applicant's present counsel in the supplementary submissions and documentation filed for the redetermination. Counsel only stated that he was enclosing "further documents and submissions pertaining to the reconsideration". In other words, no representations were made as to the personal fear of returning to Albania, or risks therein (certainly, other hardships in returning were raised including the issues that his daughter would face given education, social and other realities in that country). The arguments pertaining to risk, which in large part related to fear-based concerns with respect to an alleged blood-feud declared upon the Applicant's family, were submitted before the RPD, but not before the Officer as part of the H&C application. Notwithstanding this fact, a significant portion of the resulting Decision

addresses the Applicant's fear. The Officer reviews his refugee claim, quoting extensively from the RPD decision, and then concludes:

> I do not find that the fears raised by the applicant has [sic] been sufficiently substantiated or corroborated. I have been provided insufficient objective evidence that the applicant would be at risk upon his return to Albania because of the alleged blood feud. I acknowledge that the applicant may have problems with another family however the applicant does not explain how his life is in danger and does not indicate what sort of problems, if any, he had when he was living in Albania. I find there is insufficient objective evidence before me that due to a blood feud between the applicant and the Seferi family that they are of interest to the Seferi family or to the authorities in Albania. I have insufficient objective evidence that he is a person who is actively being sought after either by the Seferi family or the authorities. The applicant has not provided evidence to support his allegations that he is at risk from the Seferi family in Albania. I have insufficient documentary evidence before me that the applicant would be targeted upon his return to Albania. Furthermore, he has provided no explanation as to why he would be compelled to return to the place of Albania where he states that he is at risk. Moreover, I do not have any statement from the applicant that he cannot seek police protection for any reason or was ever denied such. He does not make any reference that he sought protection from any other available avenues of recourse in Albania before his departure. After careful examination of all the information before me, I am not satisfied that the applicant is at risk in Albania [emphasis added].

II. Issues and Analysis

[3] The Applicant contends first, that the Officer had no basis to conduct a risk analysis given (i) the legislation and (ii) the submissions before her and second, that the Officer was biased given her rationale. I agree with the first issue, but not the second.

[4] The applicable standard of review with respect to the Officer's analysis on sufficiency of evidence as it relates to risk, as accepted by both parties, is reasonableness (*Semana v Canada*

(Citizenship and Immigration), 2016 FC 1082 at paras 18-19). The bias argument will be addressed on a correctness standard: *A B, C D and E F v Canada (Citizenship and Immigration)*, 2016 FC 1385 at para 39 [*AB*].

[5] Regarding the Officer's risk analysis, the Applicant argues that he never raised any evidence of hardship relating to risks in Albania, and therefore none should be raised against him. Rather, the Applicant contends that he raised various other elements of hardship, some of which were not adequately or reasonably addressed, including the hardship of returning to Albania based on his Canadian children's well-being and his wife's mental state. He notes that on the basis of the latter, this Court already granted a stay of removal. Given the evidence he did submit, however, the Applicant contends that the Officer had no right to supplement the record with the Applicant's negative RPD decision and country documentation on the subject of risk (relating to blood feud).

[6] The Applicant further argues that if this Court finds that the Officer's conduct was acceptable, others would be under an obligation to do precisely what the case law resists for H&C decision – namely adding a duty for officers to supplement the record by going beyond the evidence submitted by applicants. This would impose a significant burden on officers, who are only obligated to assess the sufficiency of evidence placed before them: the evidentiary onus lies squarely with the Applicant.

[7] The Respondent counters that the Applicant's original immigration consultant invoked his immigration history in the first H&C application. Therefore, the Officer had every right to

retrieve the RPD decision, conduct her own research on related country documentation, and consider those elements.

[8] To analyse the issue raised, one must look at the legislation. Subs. 25(1.3) of IRPA reads as follows:

25 (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.	25 (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.

[9] This section was added to the Act in 2010 to avoid duplication of the refugee determination (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 24 [*Kanthasamy*]). The underlined portions of the Decision above do precisely the opposite, re-examining the risk raised at the refugee hearing, which is one of the central factors of the Officer's reasons, as is made evident by her conclusion:

> Based on a cumulative assessment of the evidence submitted, I have considered the applicants personal circumstances, his establishment, risk, employment, hardship, best interest of the child and after conducting a global assessment of all the relevant factors put forth by the applicant, it is determined that his cited factors do not support that relief from the requirement to apply for permanent residence from abroad is justified in this case [emphasis added].

[10] Relying on *Kanthasamy* at paras 24 and 51, Justice Strickland in *Liang v Canada (Citizenship and Immigration)*, 2017 FC 287 at para 31 held that "pursuant to s 25(1.3) of the

IRPA when examining an H&C request, an officer may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under s 96 or a person in need of protection under s 97(1), but must consider elements related to the hardships that affect the foreign national […]".

[11] Therefore, based on subs. 25(1.3) and the case law cited above, relying on risk as one of the key factors in rejecting the application was unreasonable. In addition, the unreasonable conclusion is compounded by the fact that the Applicant put forward no documentary evidence regarding risk in Albania, which is not surprising given subs. 25(1.3). However, the Officer went to lengths to point out the insufficiency or lack of documentary evidence on risk in Albania.

[12] At paragraph 51 of *Kanthasamy*, Justice Abella stated:

> As the Federal Court of Appeal concluded in this case, s. 25(1.3) does not prevent the admission into evidence of facts adduced in proceedings under ss. 96 and 97. The role of the officer making a determination under s. 25(1) is to ask whether this evidence, along with any other evidence an applicant wishes to raise, though insufficient to support a s. 96 or s. 97 claim, nonetheless suggests that "humanitarian and compassionate considerations" warrant an exemption from the normal application of the *Immigration and Refugee Protection Act*. In other words, the officer does not determine whether a well-founded fear of persecution, risk to life, and risk of cruel and unusual treatment or punishment has been established — those determinations are made under ss. 96 and 97 — but he or she can take the underlying facts into account in determining whether the applicant's circumstances warrant humanitarian and compassionate relief.

[13] Clearly, to "warrant humanitarian and compassionate relief" means establishing hardship. Hardship, in the context of applying for the permanent residency from Canada as opposed to

abroad, is thus at the very heart of the H&C process. Indeed, it was at the core of the Court's analysis in *Kanthasamy* (see also paras 26-33).

[14] Meeting the basic hardship requirement relief requires providing the Officer with a factual basis so that the Minister, in the words of the IRPA, can "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" (subs. 25(1)). As the Supreme Court further explained in *Kanthasamy* at para 25:

> What *does* warrant relief will clearly vary depending on the facts and context of the case, but officers making humanitarian and compassionate determinations must substantively consider and weigh *all* the relevant facts and factors before them: *Baker*, at paras 74-75.

[15] There is nothing preventing an officer from pulling those relevant facts and factors from documentary evidence on country conditions submitted by a claimant. Indeed, this was position recently adopted by Justice Strickland in *Ordonez v Canada (Minister of Citizenship and Immigration)*, 2017 FC 135 at para 29, where she held that, to the extent documentary evidence on country conditions is provided to an H&C Officer, the relevant elements stemming from the evidence may be considered within the context of a hardship analysis, but not for the purposes of reassessing risk or otherwise making findings usually reserved for a s. 96 or subs. 97(1) analysis. However, the risk analysis was clearly done in this case.

[16] As for the second (bias) issue, while I need not address it, I will reiterate my comments made at the hearing for the sake of these written reasons and given the gravity of argument made.

The Officer did not display bias, per the high threshold required by the case law (see, for instance, *AB* at para 141). As noted by Justice Strickland in *AB*, allegations of bias are a serious matter, as they put into question the integrity of the decision-maker, and must be clearly supported by the evidence. The Reasons and the record in the present case do not come close to meeting this high threshold.

III. Conclusion

[17] In short, the consideration of risk as a stand-alone factor – outside of the context of hardship – within an H&C analysis, is simply wrong on the law, given the 2010 amendment to IRPA, i.e., the addition of subs. 25(1.3) to the Act. With this addition, the law no longer permits a risk analysis. That is the domain first of the refugee determination process, and failing that, the pre-removal risk assessment process.

[18] For the reasons explained above, this application is granted and shall be sent back for redetermination by another officer. No certified questions were raised and none arise.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted and will be sent back for redetermination by a different officer.

2. There are no questions for certification, and none arise.

3. No costs will be ordered.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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