Federal Court  Cour fédérale

Date: 20180220

Docket: IMM-2959-17

Citation: 2018 FC 194

Ottawa, Ontario, February 20, 2018

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

TAMLYN STUURMAN
STEVE STUURMAN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Tamlyn Stuurman and her husband, Steve Stuurman, are citizens of South Africa who, shortly after their arrival in Canada on August 15, 2015, sought refugee protection. The Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] rejected their claims for Canada's protection in a decision dated December 7, 2015, finding that the Applicants could relocate to a viable internal flight alternative [IFA] in Johannesburg. The Applicants'

appeal to the Refugee Appeal Division [RAD] of the IRB was dismissed on March 22, 2016, and this Court denied leave for judicial review of the RAD's decision on July 29, 2016.

[2] In April 2017, the Applicants applied for a pre-removal risk assessment [PRRA], but a Senior Immigration Officer [the Officer] rejected their PRRA application in a decision dated May 18, 2017; this Court dismissed their application for judicial review of the negative PRRA decision in *Stuurman v Canada (Citizenship and Immigration)*, 2018 FC 193. The Applicants also applied in April 2017 for a permanent residence visa from within Canada on humanitarian and compassionate [H&C] grounds, but in a decision dated May 24, 2017, the same Officer who had rejected the Applicants' PRRA application decided that an exemption would not be granted for the Applicants' application for permanent residence from within Canada. The Applicants have now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [*IRPA*], for judicial review of the Officer's decision.

I. Background

[3] Tamlyn Stuurman, age 29, and her husband, Steve Stuurman, age 36, arrived in Canada on August 15 2015. Ms. Stuurman says she has experienced bullying and sexual assaults from a young age because she is mixed race and a "big built person." In 2007, after graduating from high school, she began attending a church in Factreton, South Africa, where she met Mr. Stuurman, a pastor who worked with youth through his church to dissuade them from becoming gang members. Mr. Stuurman's work caused the local Americans gang to target the Applicants. In September 2012, Ms. Stuurman was sexually assaulted by four gang members who had broken into her home. A month or so after this assault, the Applicants moved to Botrivier, South

Africa, but soon after moving an individual broke into the Applicants' home, knocked Mr. Stuurman unconscious, and sexually assaulted Ms. Stuurman. This individual left a note stating "we know who you are and we will be back." After this incident, the Applicants returned to Factreton until they had accumulated sufficient funds to leave the country. Following both incidents in which Ms. Stuurman was assaulted the Applicants spoke to the police, but to no avail, and they received no assistance even after speaking with higher authorities. The Applicants arrived in Canada on August 15, 2015.

II. The H&C Decision

[4] In their H&C submissions, the Applicants raised as factors for consideration their successful establishment in Canada, hardship on return to South Africa, and Ms. Stuurman's post-traumatic stress disorder [PTSD] diagnosed in the psychological report of Dr. Simone Levey.

[5] The Officer considered the Applicants' establishment in Canada, including Ms. Stuurman's temporary employment with the Friends of the Greenbelt Foundation and Mr. Stuurman's employment with the Warden Full Gospel Assembly and with TDS Personnel. The Officer also referred to the Applicants' volunteer activities, continuing education, and friends made in Canada. In this regard, the Officer tersely found that:

> …the applicants have achieved a level of establishment through employment, volunteering and friendships in their community. I find these to be positive factors, however, while the efforts are commendable, they are not above what would be expected after almost 2 years in Canada.
>
> I accept the applicant [*sic*] have developed many friendships in Canada; however, insufficient evidence has been put forth to

> support that the aforementioned relationships are characterized by a degree of interdependency and reliance. Moreover, I am not satisfied that separation from friends in Canada would sever the bonds that have been established. There is little evidence before me that applicants could not maintain their friendships via social media, internet, letters and telephone contact.

[6] With respect to risk and adverse country conditions, the Officer considered a psychological report dated November 23, 2015. The Officer noted the report's conclusion that: "With support, time and continued and continued [*sic*] adjustment to living in Toronto, it is likely that Ms. Stuurman will heal from her posttraumatic stress symptoms. It is possible that she may experience an increase in these symptoms if she were sent back to South Africa." The Officer acknowledged that Ms. Stuurman had been diagnosed with PTSD following her sexual assaults in South Africa, and then continued by stating that:

> …the applicant has presented little submissions with respect to follow-up appointments with this psychologist or any further counselling with respect to her PTSD. The report was dated November 23, 2015 and the signature on this application was April 19, 2017. Therefore, I must conclude the applicant has not sought further counselling or treatment for her PTSD while in Canada. While I acknowledge the psychologist stated the applicant may experience an increase in her symptoms if she were sent back to South Africa, the applicant has presented little documentary evidence demonstrating that she would be unable to receive further counselling in South Africa, or that treatment for her PTSD would be unavailable should she seek it upon her return in order to continue the healing process.

[7] As to the crime and violence in South Africa, the Officer reiterated the finding from the Officer's PRRA decision that, while crime and violence were serious problems in South Africa, these undesirable general country conditions apply to all residents and were not unique to the Applicants, and that these problems have been acknowledged and are being addressed by the

government. In response to the Applicants' claim they have experienced discrimination because they are visible minorities who are not accepted by the whites and are targeted by the blacks, the Officer gave this little weight, noting that they had lived their entire lives in South Africa and had presented little evidence of being targeted based on race beyond a description of generalized racism in the Applicants' affidavit. The Officer also gave little weight to the Applicants' submission that they would face poverty and lack adequate healthcare in South Africa, noting not only that both Applicants were highly educated and were employed up to the time they left South Africa, but also that there was no evidence that they had ever been denied or unable to find adequate healthcare in South Africa. The Officer concluded by remarking that, while Canada is a more desirable place than South Africa for the Applicants to live, this is not determinative of an H&C application. Thus, the Officer found there were insufficient H&C considerations to justify granting an exemption under subsection 25(1) of the *IRPA*.

III. Issues

[8] Although the Applicants raise several discrete issues with respect to the Officer's decision, in my view the primary issue is whether the Officer's decision is reasonable.

IV. Analysis

A. *Standard of Review*

[9] An immigration officer's decision to deny relief under subsection 25(1) of the *IRPA* involves the exercise of discretion and is reviewed on the reasonableness standard (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44, [2015] 3 SCR 909

[*Kanthasamy*]). An officer's decision under subsection 25(1) is highly discretionary, since this provision "provides a mechanism to deal with exceptional circumstances," and the officer "must be accorded a considerable degree of deference" by the Court (*Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4, [2016] FCJ No 1305; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 15, [2002] 4 FC 358).

[10] The reasonableness standard tasks the Court with reviewing an administrative decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determining "whether 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 at para 47, [2008] 1 SCR 190. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708 [*Newfoundland Nurses*].

[11] Additionally, provided "the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome"; nor is it "the function of the reviewing court to reweigh the evidence": *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61, [2009] 1 SCR 339. The decision under review must be considered as "an organic whole" and the Court should not embark upon "a line-by-line treasure hunt for error" (*Communications, Energy*

and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd., 2013 SCC 34 at para 54, [2013] 2 SCR 458).

B. *Was the Officer's Decision reasonable?*

[12] The Applicants argue that the Officer improperly and unreasonably assessed Ms. Stuurman's mental health evidence, their level of establishment in Canada, the country conditions evidence, and also conducted a fragmented analysis contrary to *Kanthasamy*.

[13] According to the Applicants, the Officer in this case, like the officer in *Kanthasamy*, unreasonably ignored the effect of removal on Ms. Stuurman's mental health and made it a "conditional rather than a significant factor" by requiring her to adduce evidence to show she would be unable to find treatment or further counselling in South Africa. In the Applicants' view, the Officer appears to discount the psychological report by noting that Dr. Levey had merely reiterated what she had been told by Ms. Stuurman, thus ignoring the reality (as noted by the Supreme Court in *Kanthasamy*) that nearly all psychological evaluations are based to some degree on hearsay.

[14] The Respondent contends that *Kanthasamy* is primarily about the best interests of the child, arguing that the analysis in that case cannot be applied in this case since no minors are involved. According to the Respondent, the Officer reasonably considered Ms. Stuurman's mental health evidence and found it insufficient to justify H&C relief and, the Respondent adds, it is not the role of this Court to interfere with the Officer's weighing of the evidence. In the Respondent's view, the psychological report does not provide clear evidence that Ms. Stuurman

would be negatively affected by removal; an applicant's PTSD does not, without more, provide justification for the extraordinary remedy of H&C relief.

[15] The Respondent's argument that *Kanthasamy* deals only with the "best interests of the child" principle is without merit. A similar argument was considered and rejected by Mr. Justice Gascon in *Sutherland v Canada (Citizenship and Immigration)*, 2016 FC 1212, 273 ACWS (3d) 383:

> [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.

[16] In *Kanthasamy*, the Supreme Court of Canada found that an H&C officer had unreasonably assessed a psychologist's report about the applicant's mental health, stating that:

> [46] In discussing the effect removal would have on Jeyakannan Kanthasamy's mental health, for example, the Officer said she "[did] not dispute the psychological report" and "accept[ed] the diagnosis". The report concluded that he suffered from post-traumatic stress disorder and adjustment disorder with mixed anxiety and depressed mood resulting from his experiences in Sri Lanka, and that his condition would deteriorate if he was removed from Canada….
>
> [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.
>
> [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:…
>
> [Emphasis in original]

[17] In my view, the Officer in this case, like the officer in *Kanthasamy*, ignored what the effect of removal from Canada might be on Ms. Stuurman's mental health. It is evident from the psychologist's report that Ms. Stuurman's mental health has improved while in Canada and it could possibly worsen if she returns to South Africa. The Officer did not reasonably consider or adequately identify, assess and weigh the fact that returning to South Africa might trigger or cause further psychological harm to Ms. Stuurman. The Officer did not consider whether this hardship was such that it warranted H&C relief. The Officer's treatment of the medical evidence concerning Ms. Stuurman's mental health, in view of the prescriptions on the treatment of health issues in H&C applications emanating from *Kanthasamy*, was unreasonable.

[18] Although I find the Officer's treatment of the psychological evidence to be unreasonable, I nonetheless agree with the Respondent's submission that an H&C applicant suffering with

PTSD does not, without more, provide justification for granting H&C relief. But, in this case, there is more, notably the Officer's unreasonable assessment of the Applicants' establishment in Canada.

[19] The Applicants argue that the Officer's conclusion concerning their level of establishment was unreasonable in light of the evidence, noting that they had provided 25 individualized letters of support from close friends, as well as evidence of work, education, and volunteerism. The Applicants refer in particular to a number of letters in which friends discuss their close bonds with the Applicants, as well as a letter from the family of a man whom Ms. Stuurman had convinced to accept medical treatment despite his unwillingness to do so. According to the Applicants, their level of establishment is particularly significant considering Ms. Stuurman's PTSD. In the Applicants' view, the Officer's perfunctory assessment of their level of establishment is insufficient, unreasonable and improperly assessed through the lens of hardship and not, as *Kanthasamy* dictates, more broadly through the lens of H&C relief.

[20] According to the Respondent, immigration officers have expertise in assessing the level of establishment expected of newcomers to Canada, and the Court should defer to their findings in this regard. In this case, the Respondent maintains that the Officer's conclusion about the Applicants' level of establishment was reasonable inasmuch as modern communication methods would allow the Applicants to maintain their friendships in Canada from South Africa. Even if the Applicants had established the requisite degree of establishment, the Respondent points out that this is only one factor to be weighed in assessing whether H&C relief is warranted.

[21] The Court's comments in *Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813, 414 FTR 268 [*Sebbe*], are instructive in this case. In *Sebbe*, Justice Zinn stated:

> [21] The second area that I find troublesome has to do with comments the officer made when analyzing establishment. The officer writes: "I acknowledge that the applicant has taken positive steps in establishing himself in Canada, however, I note that he has received due process through the refugee programs and was accordingly afforded the tools and opportunity to obtain a degree of establishment into Canadian society." Frankly, I fail to see how it can be said that the due process Canada offers claimants provides them with the "tools and opportunity" to establish themselves in Canada. I suspect that what the Officer means is that because the process has taken some time, the applicants had time to establish themselves <u>to some degree</u>. That is a statement with which one can agree. However, what is required is an analysis and assessment of the degree of establishment of these applicants and how it weighs in favour of granting an exemption. The Officer must not merely discount what they have done by crediting the Canadian immigration and refugee system for having given them the time to do these things without giving credit for the initiatives they undertook. The Officer must also examine whether the disruption of that establishment weighs in favour of granting the exemption. [Emphasis in original]

[22] Similarly, in *Chandidas v Canada (Citizenship and Immigration)*, 2013 FC 258, [2014] 3 FCR 639 [*Chandidas*], Justice Kane remarked that:

> [80] …in the present case, the officer fails to provide any explanation as to *why* the establishment evidence is insufficient. The officer reviewed the family's degree of establishment in detail, and referred to their work, income, family ties, courses taken, schools attended, and community involvement in various passages of the decision. The officer does not indicate what he would consider to be extraordinary or exceptional establishment; he simply states that this is what he would expect and that it would not cause unusual and undeserved or disproportionate hardship if the family were forced to apply for a visa from outside Canada. While this could be argued to be a reason, it is barely informative. [Emphasis in original]

[23] The degree of an applicant's establishment in Canada is, of course, only one of the various factors that must be considered and weighed to arrive at an assessment of the hardship arising in an H&C application. The assessment of the evidence is also, of course, an integral part of an officer's expertise and discretion, and the Court ought to be hesitant to interfere with an officer's discretionary decision. However, the Officer in this case followed the same objectionable and troublesome path as in *Chandidas* and in *Sebbe*. It was unreasonable for the Officer to discount the Applicants' degree of establishment merely because it was, in the Officer's view, "not above what would be expected after almost 2 years in Canada."

[24] The Officer in this case unreasonably assessed the Applicants' length of time or establishment in Canada because, in my view, the Officer focused on the "expected" level of establishment and, consequently, failed to provide any explanation as to what would be an acceptable or adequate level of establishment. The Officer's assessment of the Applicants' level of establishment is perfunctory at best and, thus, unreasonable because it was considered through the lens of "unusual and undeserved or disproportionate hardship" and not, as *Kanthasamy* dictates, more broadly through the lens of an humanitarian and compassionate perspective that considers and gives weight "to all relevant humanitarian and compassionate considerations". Moreover, the Officer in this case, like the officer in *Sebbe*, failed to consider or assess whether disruption of the Applicants' establishment in Canada to return to South Africa to apply for permanent residence weighed in favour of granting an exemption under subsection 25(1) of the *IRPA*. The Officer's decision in this regard is unreasonable.

[25] The Officer's unreasonable assessments of the psychological evidence and the Applicants' level of establishment in Canada are such that the decision must be set aside and the matter returned to another officer for redetermination. In view of this determination, I find it unnecessary to address the parties' submissions as to whether the Officer reasonably considered the country conditions evidence or unreasonably conducted a fragmented analysis contrary to *Kanthasamy*.

V. Conclusion

[26] The Applicants' application for judicial review is allowed because the Officer unreasonably assessed not only the Applicants' establishment in Canada but also the psychological evidence as to Ms. Stuurman's mental health.

[27] Neither party proposed a serious question of general importance to be certified under paragraph 74(d) of the *IRPA*; so, no such question is certified.

JUDGMENT in IMM-2959-17

THIS COURT'S JUDGMENT is that: the application for judicial review is granted; the decision of the Senior Immigration Officer dated May 24, 2017, is set aside; the matter is returned for redetermination by a different immigration officer in accordance with the reasons for this judgment; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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