Federal Court  Cour fédérale

Date: 20190207

Docket: IMM-3957-18

Citation: 2019 FC 161

Ottawa, Ontario, February 7, 2019

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

LEN VAN HEEST

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Life handed Len Van Heest a tough hand. He has spent just about all of his life in Canada. In fact, his parents immigrated to Canada when he was seven months old, from their country of birth, the Netherlands. When he was ultimately removed from Canada in March 2017, he was 59 years old and had known of Canada as his only country of residence. He has spent his whole life in Canada. He is a Canadian except for the fact that, for a reason unknown, his parents never obtained Canadian citizenship for him in spite of the fact that they themselves became

Canadian citizens. This case is concerned with his request to come back to Canada. He invokes humanitarian and compassionate considerations.

I. Facts

[2] When he was 16 years of age, the applicant was diagnosed as being bipolar. Followed a life during which the applicant was found guilty of more than 40 offences. They do not appear to be insignificant, but they surely are not the most serious as he does not seem to have served time in prison of an extended nature. It can certainly be said that he has been somewhat of a nuisance and people have been frightened by his behavior at times. As a result, he was found inadmissible for serious criminality based on an assault with a weapon conviction. The report was made in October 2007.

[3] On January 2, 2008, the Immigration Division issued a removal order, which was stayed by the Immigration Appeal Division on October 7, 2008, based on humanitarian and compassionate grounds. In fact, there have been many stays over the years that followed. Following a conviction for uttering threats on February 12, 2009, the Minister applied to the Immigration Appeal Division in order to reconsider its decision of granting a stay. The Immigration Appeal Division granted instead a further stay of the deportation order on November 30, 2009, the said stay expiring on December 3, 2012. The conditions of the stay included not committing more crimes and making reasonable efforts to maintain his bipolar condition in such a way as not to conduct himself in a manner dangerous to himself or others.

[4] He committed other offenses of which he was found guilty (uttering threats; mischief and possession of a weapon). The stay of removal was cancelled by operation of law (subsection 68(4) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA]).

[5] On April 26, 2013, the applicant was notified that he could apply for a pre-removal risk assessment (PRRA). He waived his right to such a process.

[6] Followed attempts by the authorities to execute the removal order. On August 20, 2014, the Canada Border Services Agency (CBSA) deferred his removal until October 20, 2014. A few days prior to October 20, the applicant tried unsuccessfully to defer his removal pending the filing of his human and compassionate application (H&C Application). The removals officer denied his request. Thus, on October 15, 2014, the applicant filed an application for leave and a judicial review of the removals' officer decision. In support of that judicial review application, he also filed a motion to stay the execution of the removal order pending the outcome of the underlying judicial review. Such motion was granted by Justice Manson, of this Court, on November 18, 2014. The judicial review application was dismissed for mootness on April 21, 2015.

[7] On October 29, 2014, the applicant submitted an application for permanent residency on H&C grounds. Shortly thereafter, on February 10, 2015, the application was refused by an Immigration Officer. An application for leave and judicial review for the denied H&C Application followed 15 days later. While this latest judicial review application was still pending, an attempt was made to have the applicant removed from Canada on May 21, 2015.

The applicant filed a motion for a stay of the deportation order pending the outcome of what was then an application for judicial review based on H&C considerations. The day before the scheduled removal, on May 20, 2015, Justice O'Reilly, of this Court, granted the stay. Eventually, the judicial review application was dismissed and the stay of removal was lifted (December 3, 2015, per Locke J., 2015 FC 1337).

[8] Shortly thereafter arrangements by CBSA to have the applicant removed on December 19, 2015 were undertaken. On December 17, 2015, the applicant's request to defer the removal until arrangements could be completed was refused. Another application for leave and for judicial review of the administrative refusal was immediately filed, together with another stay application for the deferral of the execution of the deportation order. The stay motion was granted by Justice Fothergill, of this Court, on December 24, 2015. The stay stood until the decision of this Court, on January 12, 2017, wherein the latest judicial review application was dismissed (2017 FC 42). The Court found that "(t)he officer's discretion to defer removal is limited to special or compelling circumstances" (2017 FC 42, at para 9).

[9] Arrangements were made for Mr. Van Heest to depart Canada on March 6, 2017. His further request for another administrative deferral of the execution of the deportation order was rejected on February 20, 2017. Another application was filed for leave and for judicial review of the refusal to defer and a motion to stay the execution of the removal order pending the disposition of that judicial review application was dismissed by the Chief Justice of this Court, on March 3, 2017 (2017 FC 263). Mr. Van Heest was deported from Canada to the Netherlands on March 6, 2017.

II. The current applications

[10] In spite of being outside of Canada, a second application for permanent residence on H&C grounds, which had been filed with the Minister of Immigration and Citizenship on June 13, 2016, continued and was never withdrawn. Indeed, on April 15, 2017, the applicant requested a temporary resident permit in order to allow him to return to Canada on a temporary basis. These two applications were considered and were made the subject of decisions on July 24, 2018 as a Senior Immigration Officer refused the second H&C Application as well as the request for temporary resident permit. It is from these decisions that judicial review is sought pursuant to section 72 of the IRPA and this judgment is in reference to these two applications.

III. Decisions under review

[11] The two decisions submitted for judicial review are the decision to refuse the applicant's H&C Application and the decision to refuse the applicant's temporary resident permit. Although Rule 302 of the *Federal Courts Rules* (SOR/98-106) appears to discourage judicial review applications of more than one decision, I have exercised the discretion to entertain the review of both refusals, given that they are based on the same evidence.

A. *H&C Application*

[12] The decision fairly summarises the various episodes in this sad story.

[13] With respect to the original June 10, 2016 submissions, the decision maker notes the hardship that the applicant endured in anticipation of his deportation on March 6, 2017; the deterioration in his mental health; the subjective fear and anxiety; and a separation from his mother and treating professionals. Finally, he notes the applicant's request to consider that the source of his criminality could be his mental illness. I stop to note that at the hearing of the judicial review application, I indicated that the absence of an adequate medical record linking the criminality with the applicant's known mental illness meant that the applicant had to rely on an inference to be drawn. There are indications on this record that such inference was made at times, including when the Immigration Appeal Division made it an express condition of a stay of the removal order that the applicant continue to deal with his bipolar situation. Further such evidence was offered in submissions made as part of the H&C Application.

[14] With respect to the April 15, 2017 submissions, the decision maker notes the impact the deportation had on the applicant, including anxiety and remorse at being separated from his support system, but also the hardship caused by the separation from his mother and brother. Further submissions were offered on behalf of the applicant on December 8, 2017 and on March 21, 2018. As for the December 8, 2017 submissions, the decision maker notes the applicant's filing of documents that were released concerning the evidence that led to the finding of inadmissibility for serious criminality in 2009. In particular, the decision maker makes note of the report of the applicant's probation officer which indicates that "the criminal act was due to the applicant's mental health" and further that "the applicant's criminal acts were often committed because of the state of his health". Indeed, the decision maker notes that even the trial judge recognised that the applicant's significant criminal record was "due to the difficulties that

he has with mental health issues". The decision maker summarises information he has received about the Salvation Army shelter where Mr. Van Heest was currently residing:

> The applicant lives with poor people and people suffering from addiction. [The applicant's cousin] mentions that those people do not speak English, so he cannot speak to anyone. [The applicant's cousin] points out that he lives alone, unable to share his concerns in an environment where he cannot speak to anyone because of the language barrier. [The applicant's cousin] has visited him only once in six months and mentions that he is anxious when he thinks about the longer term and wonders whether he will be able to return to Canada.
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> [Portions in square brackets modified.]

[15] As for the submissions of May 21, 2018, there is reference to two letters from prominent Canadians which were sent to the Minister of Citizenship and Immigration and which tend to illustrate that the applicant's situation has drawn national attention. It appears that as of that date in May 2018, the applicant was still living in a Salvation Army shelter; he is still living alone and in poverty but counsel reports that the mental condition remains stable and he continues to receive support from his mother via telephone.

[16] The decision maker claims that his assessment is in compliance with the pronouncement on H&C considerations made by the Supreme Court in the case of *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 [*Kanthasamy*]. It seems to me that the analysis made by the decision maker is adequately encapsulated in the following paragraph taken from the decision dated July 24, 2018:

> So, given the applicant's moderate degree of establishment, lessened because of his criminality, and taking into consideration the current state of his health, which seems stable, and his living conditions in the Netherlands, I am not convinced that the problems related to the separation from his loved ones, including

> his sadness, even if there are signs that the state of his health has stabilized, reducing his risk to re-offend, are sufficient with respect to humanitarian and compassionate considerations to warrant an exemption from his inadmissibility for serious criminality.

[17] The decision maker comes to that conclusion because he considers establishment factors to be seriously affected by the applicant's significant criminality. The decision maker does not seem to discount by much the fact, which he seems to recognise, that the applicant's criminal record speaks to his mental problems. In other words, the connection between criminality and mental illness does not seem to count for much. He says that the applicant "cannot be absolved from all responsibility on that basis, as evidenced by his numerous criminal convictions". The decision maker does not seem to consider the criminality as the most serious, but some crimes are of a violent nature. It is not possible on the basis of the discussion in the decision to understand where the decision maker lands on that account.

[18] The decision maker then considers the living conditions of the applicant in the Netherlands. He seems to conclude that the applicant is not worse off in the Netherlands than in Canada. He writes that, "as recognised by the representative, the services offered in the Netherlands are similar in quality and accessibility as those offered in Canada, and I have no information that the life, freedom or security of the applicant have been compromised in any way in his country of nationality". The reference to the "country of nationality" must be based on the fact that the applicant was born in the Netherlands and spent the first seven months of his life in his country of birth.

[19] In a sense, the decision discounts the social network established in Canada by the applicant to conclude that someone who has lived in Canada for 59 of his 60 years does not appear to have a strong establishment. Furthermore, the quality of establishment is affected by the criminality in spite of the fact that such criminality appears to be due to a large extent to the mental instability of someone who was diagnosed as being bipolar at the age of 16. Given that he lives in a shelter in the Netherlands that has a social security net as adequate as that of Canada, the decision concludes that there are not sufficient humanitarian and compassionate considerations in view of the "serious criminality" of the applicant.

[20] Concerning the assessment of the application for a temporary resident permit, the decision maker notes that the application does not provide specific arguments and that "(t)he information provided in the application for permanent residence was therefore assessed on that basis and following that assessment, I conclude that that application must also be rejected".

IV. Analysis

[21] The parties agree that the standard of review applicable in this case is that of reasonableness. I concur. As put by my colleague Justice Locke in his 2015 decision involving the applicant (2015 FC 1337), "these issues turn on the officer's understanding and application of the relevant facts", at para 14. The case law of this Court is replete with cases where H&C Applications are reviewed on a standard of reasonableness.

[22] However, in my view, in spite of the matter being reviewed on a standard of reasonableness, it has to be returned to a different decision maker for the purpose of conducting a

redetermination because, as I read the decision, it lacks in intelligibility in view of the test that must be applied.

[23] The discretion to be exercised by the Minister in application of the IRPA requires that the humanitarian and compassionate considerations be at the heart of the examination of the circumstances of a case. It is worth remembering the words of the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817:

> 66 The wording of s. 114(2) and of Regulation 2.1 requires that a decision-maker exercise the power based upon "compassionate or humanitarian considerations" (emphasis added). These words and their meaning must be central in determining whether an individual H & C decision was a reasonable exercise of the power conferred by Parliament. The legislation and regulations direct the Minister to determine whether the person's admission should be facilitated owing to the existence of such considerations. They show Parliament's intention that those exercising the discretion conferred by the statute act in a humanitarian and compassionate manner. This Court has found that it is necessary for the Minister to consider an H & C request when an application is made: *Jiminez-Perez, supra*. Similarly, when considering it, the request must be evaluated in a manner that is respectful of humanitarian and compassionate considerations.
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> [Emphasis in original.]

It must be stressed that an approach to humanitarian and compassionate considerations that would in fact focus on the "unusual and undeserved or disproportionate hardship" is now inappropriate. In *Kanthasamy* (*supra*) the majority found:

> [33] The words "unusual and undeserved or disproportionate hardship" should therefore be treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). As a result, what officers should not do, is look at s. 25(1) through the lens of the three adjectives as

> discrete and high thresholds, and use the language of "unusual and undeserved or disproportionate hardship" in a way that limits their ability to consider and give weight to *all* relevant humanitarian and compassionate considerations in a particular case. The three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision.

To be sure, the decision maker in this case did not use the three adjectives. But, from my reading of his decision, he measured the hardship on the applicant against his criminality in Canada, without even considering fully the particular circumstances of this applicant. A formula, applied mechanically with hardship at the center, is not sufficient where other H&C considerations are at play. Hardship is one element in the analysis.

[24] What is dearly missing is an application of the test now found by the Supreme Court of Canada to be that which governs: offer equitable release in circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another", at para 21. The formulation of the test adopted by the majority in *Kanthasamy* comes from the case of *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338. I reproduce in their entirety paragraphs 13 and 14 of *Kanthasamy* which are instructive:

> [13] The meaning of the phrase "humanitarian and compassionate considerations" was first discussed by the Immigration Appeal Board in the case of *Chirwa v. Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 338. The first Chair of the Board, Janet Scott, held that humanitarian and compassionate considerations refer to "those facts, established by the evidence, which would excite in a reasonable man [*sic*] in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the Immigration Act": p. 350. This definition was inspired by the dictionary definition of the term "compassion", which covers "sorrow or pity excited by the distress or misfortunes of another, sympathy": *Chirwa*, at p. 350.

> The Board acknowledged that "this definition implies an element of subjectivity", but said there also had to be objective evidence upon which special relief ought to be granted: *Chirwa*, at p. 350.
>
> [14] The *Chirwa* test was crafted not only to ensure the availability of compassionate relief, but also to prevent its undue overbreadth. As the Board said:
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> It is clear that in enacting s. 15 (1) (*b*) (ii) Parliament intended to give this Court the power to mitigate the rigidity of the law in an appropriate case, but it is equally clear that Parliament did not intend s. 15 (1) (*b*) (ii) of the Immigration Appeal Board Act to be applied so widely as to destroy the essentially exclusionary nature of the Immigration Act and Regulations. [p. 350].

[25] For a decision to be reasonable, it must have those elements of justification, transparency, and intelligibility within the decision making process (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, para 47). In a case like this, one would expect the decision maker to put himself in the shoes of the reasonable person who considers carefully the situation of a fellow human being with a view to relieving the misfortune of another.

[26] In this case, Mr. Van Heest spent for all intents and purposes his whole life in Canada; he is afflicted with a mental illness and we are told that much of his criminality is the result of such mental illness. He finds himself in a foreign country where he doesn't speak the language and he is housed unfortunately in a shelter.

[27] Instead of having a mechanical examination of the hardship he now suffers in the Netherlands, what the decision maker has called with reduced sensitivity his "country of nationality", one would expect a more careful and nuanced examination of the extremely peculiar circumstances of this case. With great respect, the analysis looks more like the

application of the old “unusual and undeserved or disproportionate hardship test” than what is required since the decision in *Kanthasamy*. It is in that sense that the decision lacks the intelligibility that is required for a decision to be reasonable. The lens through which humanitarian and compassionate considerations are to be looked at is not limited to the hardship, whether it be unusual and undeserved or disproportionate. I am less than persuaded that it is the lens that was used in this case. Indeed, my reading of the reasons takes me in the other direction.

[28] This is not to say that every case raising some H&C considerations must be successful. As a matter of fact, this is not the conclusion this Court reaches in this case. Parliament has chosen for someone else, the Minister through his delegates, to make a determination on the merits. As is well known, the role of the reviewing court is merely to review decisions for their legality, not to substitute the view of the reviewing court under the guise of reasonableness. However, hardship is not the test anymore. It is rather whether a reasonable person in a civilized community would be excited by a desire to relieve the misfortune of another. It will be for a different decision maker to make a determination considering the matter through the appropriate lens which must include the desire to relieve the misfortune of someone in appropriate circumstances. These circumstances must be carefully considered in this case. Accordingly, this judicial review application is granted concerning the two decisions issued on July 24, 2018, one concerning the refusal to grant a temporary resident permit and the other with respect to the application for permanent residence.

[29] The parties agree that this case turns on its peculiar facts. The Court shares their view that there is no question to be certified pursuant to section 74 of the IRPA.

JUDGMENT in IMM-3957-18

THIS COURT'S JUDGMENT is that:

1. The judicial review application is granted. There is no question to be certified.

2. The matter is returned to a different decision maker for a new determination to be effected.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3957-18
STYLE OF CAUSE:	LEN VAN HEEST v THE MINISTER OF CITIZENSHIP AND IMMIGRAITON
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JANUARY 23, 2019
JUDGMENT AND REASONS:	ROY J.
DATED:	FEBRUARY 7, 2019

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