Federal Court  Cour fédérale

Date: 20190417

Docket: IMM-3681-18

Citation: 2019 FC 469

Ottawa, Ontario, April 17, 2019

PRESENT: The Honourable Madam Justice Walker

BETWEEN:

LARRY KUNLE DANIELS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mr. Larry Kunle Daniels, seeks judicial review of a decision of an IRCC immigration officer (Officer) refusing his application for permanent residence under the Spouse and Common Law Partner class on humanitarian and compassionate (H&C) grounds pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA). The Officer was not satisfied that there were sufficient H&C grounds to overcome the Applicant's inadmissibility for serious criminality (paragraph 36(1)(b) of the IRPA).

[2] The application for judicial review is brought pursuant to subsection 72(1) of the IRPA.

[3] For the reasons that follow, the application will be dismissed.

I. Background

[4] The Applicant is a citizen of Nigeria. In 2007, he travelled to the United Kingdom (UK) and made a refugee claim which was refused. The Applicant has two children in England: a 14 year-old son and a seven year-old daughter.

[5] On March 19, 2014, the Applicant was convicted of four offences in the UK spanning a number of years: one count of Possession False/Improperly Obtained/Another's Identity Documents; three counts of Make False Representation to make gain for self or another or cause loss to other/expose other to risk. The Applicant was sentenced to 22 months in prison. He was released from detention in September 2014 and an order for his deportation was issued.

[6] On January 2, 2016, the Applicant entered Canada using an improperly obtained passport. On February 17, 2016, he was examined and found inadmissible to Canada pursuant to subsection 41(a) of the IRPA. The Applicant was again examined on April 15, 2016 and was found inadmissible pursuant to paragraph 36(1)(b) of the IRPA. He was referred to the Immigration Division (ID) of the Immigration and Refugee Board of Canada for an admissibility hearing.

[7] Shortly after arriving in Canada, the Applicant met his current spouse, Tatiana Trinita King, and they married on July 2, 2016.

[8] On February 17, 2016, the Applicant applied for refugee protection. The claim was refused as he was not eligible to make a refugee claim at that time.

[9] On November 16, 2016, the ID found the Applicant to be inadmissible and issued a deportation order. Leave for this Court to review the negative admissibility decision was dismissed on August 29, 2017.

[10] In November 2016, the Applicant applied for permanent residence as a member of the Spouse or Common Law Partner in Canada class. He sought an exemption on H&C grounds pursuant to subsection 25(1) of the IRPA from inadmissibility for serious criminality. The Decision refusing his application is the decision under review.

[11] On April 19, 2017, the Applicant submitted an application for a Pre-removal risk assessment (PRRA). The PRRA was refused on October 6, 2017 and leave to have the refusal decision judicially reviewed by this Court was dismissed on March 25, 2018.

[12] The Applicant states that he fears returning to Nigeria because he had renounced his membership in a secret university campus cult, Supreme Eiye Confraternity, and had reported their activities to local authorities. He claims that his mother and father were both killed as a result of his activities (in 1998 and 2007, respectively).

II. Decision under review

[13] The Decision is dated July 17, 2018. The Officer refused the Applicant's request for relief from inadmissibility based on H&C grounds. Subsequently, his spousal application for permanent residence was also refused.

[14] The Officer conducted a brief review of the report (Subsection 44(1) Report) prepared pursuant to subsection 44(1) of the IRPA that detailed the Applicant's UK convictions and equated them to offences under subsections 380(1) and 368(1) of the *Criminal Code*, RSC 1985, c C-46 (*Criminal Code*). The Officer was satisfied that the Applicant was criminally inadmissible to Canada pursuant to paragraph 36(1)(b) of the IRPA. The Officer noted that the Applicant did not dispute the ID's finding of inadmissibility.

[15] The Officer acknowledged the Applicant's marriage in July 2016.

[16] With respect to the Applicant's fears regarding a return to Nigeria, the Officer stated that the events in question happened several years previously and that the Applicant had provided very limited documentary evidence to support his past involvement with the campus cult. The Officer referred to the Applicant's negative PRRA decision and the fact that his risk factors were assessed as part of that application. Based on the information and documentation provided, the Officer placed limited weight on the risk factors cited by the Applicant.

[17] The Officer then reviewed the Applicant's numerous health problems, including the fact that he had reported a partial stroke while in prison in the UK. There was also reference in the

Certified Tribunal Record (CTR) to a motor vehicle accident in Canada involving the Applicant that left him with symptoms consistent with post-traumatic stress disorder (PTSD). The Officer acknowledged that medical services in Canada are more favourable than those available in Nigeria but was not satisfied that the medications and care the Applicant required would not be available to him in Nigeria, particularly in major urban centres.

[18] Finally, the Officer stated that the Applicant was convicted outside of Canada of multiple counts of serious crimes that appear to have occurred over an extended period of time. The convictions did not centre on a single, isolated event.

[19] The Officer concluded:

> After a careful review of the file as a whole, I am not satisfied that sufficient H/C grounds exist to justify exempting the client from the criminal admissibility.

III. Issues

[20] The issue in this application is whether the Decision was reasonable. The Applicant raises two specific issues:

1. Whether the Officer erred by failing to properly conduct an equivalency assessment with regards to the Applicant's paragraph 36(1)(b) inadmissibility?
2. Whether the Officer's H&C analysis was unreasonable (and inconsistent with the principles set out in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 (*Kanthasamy*))?

IV. Standard of review

[21] It is well established that a denial of H&C relief pursuant to subsection 25(1) of the IRPA is reviewed on the reasonableness standard (*Kanthasamy* at para 44; *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 18; *Marshall v Canada (Minister of Citizenship and Immigration)*, 2017 FC 72 at para 27 (*Marshall*)). Subsection 25(1) provides the Minister a mechanism to deal with exceptional circumstances. As a result, H&C decisions are highly discretionary and must be reviewed with considerable deference (*Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4). It is not the role of this Court to reweigh the evidence or to substitute its own appreciation of the appropriate outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59). My role is to determine whether the Decision is justified, transparent and intelligible and falls within the range of possible, acceptable outcomes which are defensible on the particular facts of the Applicant's case and in law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

V. Analysis

1. Whether the Officer erred by failing to properly conduct an equivalency assessment with regards to the Applicant's paragraph 36(1)(b) inadmissibility?

[22] The Applicant submits that, having reviewed the UK convictions and in making an independent inadmissibility finding, the Officer was required to conduct a full equivalency assessment of the Applicant's criminal inadmissibility for foreign convictions. He states that the Officer reviewed the Subsection 44(1) Report and concluded that the Applicant's UK offences would equate to the Canadian criminal offences set forth in subsections 380(1) and 368(1) of the

Criminal Code without any assessment of the constituent elements of the offences or the facts upon which the Officer relied. The Applicant argues that the Officer's failure to carry out an equivalency assessment is a reviewable error.

[23] The Respondent submits that the Officer was not required to conduct an equivalency assessment of the Applicant's foreign convictions as the Applicant had already been found inadmissible by the ID. The ID would have conducted the required equivalency assessment prior to issuing its admissibility decision and deportation order. The Applicant sought to challenge the ID's decision before this Court but leave was dismissed on August 29, 2017. Therefore, the ID's admissibility findings are final and cannot now be relitigated by the Applicant.

[24] I find that the Officer did not err in failing to conduct an equivalency assessment of the Applicant's UK convictions against the relevant provisions of the *Criminal Code*. The Officer did not embark on a partial and flawed equivalency assessment as argued by the Applicant. Rather, the Officer reviewed the Section 44(1) Report, listed its conclusions regarding the UK offences and equivalent Canadian offences, and was satisfied that the Applicant was inadmissible. The Officer did not make an independent admissibility finding in the Decision. The Officer's comments regarding the ID inadmissibility process established the framework for the H&C analysis.

[25] The Applicant relies on the Federal Court of Appeal's decision in *Hill v Canada (Minister of Employment and Immigration)*, [1987] FCJ No 47 (*Hill*), for the principle that equivalency between foreign and Canadian offences can only be determined by a comparison of

the precise wording in each statute to determine the essential elements of each offence or by assessing the evidence adduced before the adjudicator to ascertain whether or not that evidence was sufficient to establish the essential ingredients of the offence in Canada, or by a combination of the two. However, the decision before the Court in *Hill* was a deportation order and the Court's concern centred on the adjudicator's finding of admissibility. The Decision before me is not the ID's negative admissibility decision or the Applicant's deportation order. The Officer was not required to apply the principles regarding equivalency assessments set out in *Hill* to a consideration of the Applicant's spousal application for permanent residence and request for relief on H&C grounds.

[26] The Applicant's inadmissibility was not in issue before the Officer. The Applicant did not make submissions challenging the ID's finding. In fact, his counsel's letter submitting the spousal application acknowledged the Applicant's inadmissibility as the reason for the H&C request. The Officer reasonably stated at the outset of his analysis that "[t]he client/counsel do not dispute the finding of inadmissibility".

[27] The Respondent relies on the decision of Justice de Montigny, as he then was, in *Sabadao v Canada (Citizenship and Immigration)*, 2014 FC 815 (*Sabadao*), a case involving an application for permanent residence on H&C grounds. In considering the issue of *res judicata* and whether the applicant could reopen a prior decision regarding his admissibility, Justice de Montigny stated (*Sabadao* at para 22):

> [22] I agree with counsel for the Applicant that *res judicata* cannot be a bar in the context of an H&C application. The CRDD and the AD decisions are binding on the precise issue at stake in those proceedings, i.e. admissibility. In that particular respect, those

> decisions are final and could not be revisited by the Officer, especially since this Court dismissed the Applicant's application for judicial review against the AD decision. That being said, an officer ought to consider recent jurisprudential developments, not for the purpose of indirectly or implicitly overturning a final decision, but for the purpose of balancing that factor with other H&C grounds. Indeed, counsel for the Respondent conceded as much at the hearing and this is precisely what the Officer did in his reasons. If, as a result of a new jurisprudential interpretation of an inadmissibility provision, the Applicant's refugee claim might have turned out differently, it is obviously a factor that the Officer should have taken into consideration in assessing his H&C claim.

[28] In the present case, the Applicant has made no submissions regarding jurisprudential developments that would require a balancing of the ID's decision against other H&C factors. He has neither argued nor provided evidence of new facts or circumstances that the Officer should have considered in assessing the ID's prior determination of inadmissibility. I adopt the reasoning of Justice Barnes in *Varela v Canada (Citizenship and Immigration)*, 2017 FC 1157 (*Varela*), and his statement that an application for judicial review of an H&C decision must focus on the reasonableness of the H&C determination. It is not an opportunity to relitigate (*Varela* at para 3):

> [3] It is essential from the outset to appreciate that this application concerns the reasonableness of the H&C Decision. It is decidedly not about the outcomes of any of the earlier proceedings and, most notably, this is not an opportunity to challenge the merits of the inadmissibility findings made against [the applicant].

[29] In summary, the Officer was under no obligation to conduct an equivalency assessment of the Applicant's UK convictions in his H&C analysis. The Officer was not required or permitted to make a new admissibility finding as the ID's decision was binding. Further, in the absence of jurisprudential or factual developments affecting the prior inadmissibility decision,

the Officer was not required to balance the ID's decision against the H&C factors put forth by the Applicant.

2. Whether the Officer's H&C analysis was unreasonable (and inconsistent with the principles set out in Kanthasamy)?

[30] In *Kanthasamy*, Justice Abella stated that subsection 25(1) of the IRPA does not create a parallel immigration system and that, inevitably, there will be some hardship associated with being required to leave Canada (*Kanthasamy* at para 23):

> [23] There will inevitably be some hardship associated with being required to leave Canada. This alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under s. 25(1): see *Rizvi v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 463, at para. 13 (CanLII); *Irimie v. Canada (Minister of Citizenship and Immigration)* (2000), 10 Imm. L.R. 206 (F.C.T.D), at para. 12. Nor was s. 25(1) intended to be an alternative immigration scheme: House of Commons, Standing Committee on Citizenship and Immigration, *Evidence*, No. 19, 3rd Sess., 40th Parl., May 27, 2010, at 15:40 (Peter MacDougall); see also *Evidence*, No. 3, 1st Sess., 37th Parl., March 13, 2001, at 9:55 to 10:00 (Joan Atkinson).

[31] In *Huang v Canada (Citizenship and Immigration)*, 2019 FC 265 (*Huang*), the Chief Justice emphasized that H&C relief is exceptional in nature and that applicants must establish more than the existence or likely existence of misfortunes relative to Canadian citizens or permanent residents (*Huang* at paras 18-20).

[32] The Officer's H&C analysis in the Decision is admittedly sparse. However, it is reflective of the absence of submissions and evidence from the Applicant regarding the factors he now relies on in arguing that the Decision was unreasonable. It is important to recall that the

Applicant was required to put forward the factors he wanted the Officer to consider (*Owusu v Canada (Citizenship and Immigration)*, 2004 FCA 38 at paras 5, 8; *Suleiman v Canada (Citizenship and Immigration)*, 2017 FC 395 at para 81).

[33] While the Applicant states that the Officer applied an incorrect hardship test in the Decision, I disagree. The Decision contains none of the impugned language addressed by Justice Abella in *Kanthasamy*. Rather, the Officer dealt with each of the H&C factors that could be gleaned from the Applicant's spousal application and request for relief. The Applicant also submits that the Decision lacked compassion but the Officer was not presented with evidence of exceptional circumstances that could incite compassion in the context of a subsection 25(1) application.

[34] The Applicant submits that the Officer made no mention of his desire to remain in Canada with his spouse or of the impact on them if his H&C request were refused and the Applicant returned to Nigeria. However, other than describing the nature of his relationship with Ms. King, which is not questioned or impugned by the Officer, the Applicant provided no submissions regarding particular, adverse consequences to his spouse or to himself should he not remain in Canada. The Applicant argues that such consequences are inherent in his separation from Ms. King but the inherent consequences of spousal separation are not sufficient to support an H&C claim.

[35] The Applicant also submits that the Officer ignored his rehabilitation from criminality and the length of time since the commission of his offences in the UK. The Applicant did not

discuss rehabilitation in his H&C request. He provided no evidence that he has undertaken any rehabilitative measures. The Applicant relies on the passage of time to argue that the Officer committed a reviewable error in overlooking his rehabilitation. The Applicant cites a number of cases in support of his position but, in each of the cases, the length of time since the commission of the offences in question was significantly longer than in the present case. The Officer addressed the nature of the Applicant's criminality in the Decision, noting that his convictions did not derive from a single, isolated event. The Officer did not overlook or mischaracterize the Applicant's underlying criminality and had no submissions or evidence on which to consider rehabilitation. I find that the Officer made no error in this regard.

[36] The Applicant argues that the Officer ignored the evidence regarding his medical conditions and committed the same error addressed in *Kanthasamy* at paragraphs 46 and 47. The Respondent argues that the present case can be distinguished from *Kanthasamy* as (1) the Officer made no findings regarding any diagnosis, and (2) the Applicant's health concerns are not related to experiences in his home country and he has not provided evidence that his health would deteriorate if he were removed.

[37] I first note that the Applicant submitted no medical report with his spousal application and request for H&C relief. In his counsel's submissions accompanying the application, there was an undated excerpt from a letter from a doctor in Toronto that stated that the Applicant has a history of hypertension, dyslipimedia, diabetes and coronary artery disease and referred to the various medications prescribed for the Applicant. The doctor also referred to a work-related motor vehicle accident and the Applicant's PTSD symptoms.

[38] The Applicant provided no evidence regarding the availability of medical services in Nigeria, whether generally or in respect to his particular conditions. I find that the Officer made no error in concluding that he or she was not satisfied that the Applicant could not access the medical services he required in Nigeria.

[39] In *Kanthasamy*, Justice Abella stated (at para 47):

> [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.

[40] The Applicant relies on this paragraph to state that the Officer erred in focusing on the availability of health care services in Nigeria. However, the Applicant's circumstances are not similar to those of the applicant in *Kanthasamy*. In the present case, there is no link between the Applicant's medical conditions and events in Nigeria. The excerpt from the doctor's letter indicates that the Applicant's PTSD resulted from a motor vehicle accident in Canada. In *Kanthasamy*, the medical condition of the minor applicant was a direct result of his experiences in Sri Lanka and medical evidence had been submitted that his health would worsen if he was removed. There is no such evidence in this case.

[41] In summary, while the H&C analysis in the Decision is short, it does not employ an incorrect test nor does it fail to consider evidence submitted by the Applicant. The Applicant

simply failed to establish sufficient H&C factors in support of his request for subsection 25(1) relief. Accordingly, I find that the Officer's Decision was reasonable. The denial of the Applicant's request for H&C relief was within the possible and acceptable outcomes on the particular facts of the Applicant's case and the evidence before the Officer.

VI. Certified Question

[42] The Applicant did not propose a question for certification. The Respondent requested that I certify a question only if I conclude that the Officer was required to carry out an equivalency assessment of the Applicant's inadmissibility to Canada notwithstanding the prior determination by the ID. The Respondent proposed the following question:

> Is an officer required to make a new inadmissibility determination for the same offence(s) where the Immigration Division has already found that an applicant was inadmissible under s. 36 of the *Immigration and Refugee Protection Act*, if no new facts/evidence or change of circumstances arise or are raised by the applicant?

[43] I have found that the Officer was not required to conduct an equivalency assessment and make a new admissibility determination based on the same offences. In addition, in my view, there is no disagreement in this regard in the jurisprudence and the issue is not one of broad significance or general concern (*Lunyamila v Canada (Public Safety and Emergency Preparedness*), 2018 FCA 22 at para 46). Therefore, I will not certify the Respondent's question.

VII. Conclusion

[44] The application will be dismissed.

JUDGMENT in IMM-3681-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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