Federal Court  Cour fédérale

Date: 20191126

Docket: IMM-6380-18

Citation: 2019 FC 1510

Ottawa, Ontario, November 26, 2019

PRESENT: Mr. Justice McHaffie

BETWEEN:

SHARON CEZAIR

Applicant

and

THE MINISTER CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Where an applicant for permanent residence based on humanitarian and compassionate [H&C] grounds raises fears of widespread violence, gender-based violence and gender-based discrimination in their home country, it is unreasonable for an immigration officer to discount those concerns based on a lack of evidence that their family members have themselves experienced such violence and discrimination.

[2] Fears of violence, gender-based violence and discrimination are relevant factors for consideration on an H&C application where an applicant shows that they would likely be personally affected by them. Where an applicant relies on general country condition information regarding these issues, the link with the applicant's personal circumstances may be based on membership in a group adversely affected, and/or may involve consideration of others in a similar situation to the applicant. However, unless the fear is based on the applicant's particular family circumstances or the evidence is such as to make the applicant's family circumstances relevant, the country condition evidence cannot be discounted based on family members not having been personally subjected to violence or discrimination.

[3] Sharon Cezair's application for permanent residence based on H&C grounds raised concerns about violent crime, gender-based violence and gender-based discrimination in Trinidad and Tobago. The officer deciding the application unreasonably gave these fears nominal weight since there was no evidence that Ms. Cezair's siblings and father in Trinidad had experienced violence themselves, and no evidence that her sisters and sisters-in-law in Trinidad were affected by discrimination or gender-based violence.

[4] The officer raised other grounds for giving the adverse country conditions nominal weight. However, the unreasonable grounds were sufficiently important to render the conclusion regarding adverse country conditions unreasonable. This in turn undermined the decision as a whole, given how central country conditions were as a factor in Ms. Cezair's application. I therefore find the decision unreasonable and allow this application for judicial review, even though I do not accept the other grounds raised by Ms. Cezair.

II. Refusal of Ms. Cezair's Application for Humanitarian and Compassionate Relief

[5] Ms. Cezair has been in Canada for slightly over 20 years since overstaying a visitor's visa in 1998. In 2017, Ms. Cezair sought to regularize her status by filing an application under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for permanent residence based on H&C grounds.

[6] In her application, Ms. Cezair described her establishment in Canada—notably her employment history, her personal connections and her involvement in the community including her Catholic church—and the hardship that she would suffer if she were to return to Trinidad and Tobago. In particular, Ms. Cezair raised concerns about discrimination against women and gender-based violence in Trinidad and Tobago.

[7] Ms. Cezair's H&C application was first refused on January 26, 2018. However, that decision was quashed by this Court as being unreasonable since the officer did not give consideration to the concerns raised regarding gender-based violence: *Cezair v Canada (Citizenship and Immigration)*, 2018 FC 886 at paras 25-27 [*Cezair (2018)*].

[8] Ms. Cezair filed updated submissions and documentation for consideration on the redetermination of her application. Those submissions again focused on hardship in Trinidad and Tobago, and on Ms. Cezair's establishment in and ties to Canada. On the former, Ms. Cezair repeated the concerns about discrimination and gender-based violence that she highlighted in the original application, and also raised broader concerns about widespread crime and violence.

[9] The officer reviewing Ms. Cezair's application was not satisfied that there were sufficient H&C considerations to warrant an exemption in her case. The officer gave weight in Ms. Cezair's favour to her community involvement and her relationships in Canada, but noted that her "complete disregard" for immigration laws did not weigh in her favour. The officer also gave "minimal weight" to her lack of connections in Trinidad and "nominal weight" to the adverse country conditions regarding violence, discrimination and gender-based violence.

III. Issues

[10] Ms. Cezair raises the following issues in her challenge to the officer's decision:

A. Did the officer apply the right legal test to the H&C analysis?

B. Did the officer act unfairly in raising information regarding Catholic churches in Trinidad and Tobago without giving Ms. Cezair an opportunity to respond?

C. Was the officer's decision unreasonable by virtue of having:

1) ignored contradictory evidence;

2) failed to weigh the different H&C factors against one another; and/or

3) discounted country condition evidence of violence, discrimination and gender-based violence on the basis that there was no evidence that family members had been affected?

IV. Analysis

A. *Did the Officer Apply the Correct Legal Test?*

(1) Standard of review

[11] As Justice Diner has observed, there is inconsistency in decisions of this Court as to whether the standard of review applicable to assessing whether an officer has applied the correct legal test on an H&C application is that of correctness or reasonableness: *Zlotosz v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 724 at paras 14-15. Justice Fuhrer recently noted in *Dayal* that a number of decisions since *Zlotosz*, including the first judicial review brought by Ms. Cezair, have adopted a correctness approach: *Dayal v Canada (Citizenship and Immigration)*, 2019 FC 1188 at paras 16-18; *Cezair (2018)* at para 14; *Mursalim v Canada (Citizenship and Immigration)*, 2018 FC 596 at paras 30-33.

[12] Given this disagreement, Ms. Cezair asks this Court to "resolve the question" as to the applicable standard of review for the officer's choice of legal test. The Minister suggests this is unnecessary, as *Cezair (2018)* was unequivocal in applying the correctness standard. I question my ability to fully "resolve" the issue, but I will briefly address the issue, as I must apply the appropriate standard of review regardless of the parties' agreement.

[13] Recent decisions of the Supreme Court of Canada indicate that applying the "correct" legal test is to be treated as an element of reasonableness review: *Németh v Canada (Justice)*, 2010 SCC 56 at para 10; *Lake v Canada (Minister of Justice)*, 2008 SCC 23 at para 41;

Saskatchewan (Human Rights Commission) v Whatcott, 2013 SCC 11 at para 194; *Halifax (Regional Municipality) v Canada (Public Works and Government Services)*, 2012 SCC 29 at para 43; see discussion in *Newland v Canada (Citizenship and Immigration)*, 2019 FC 1418 at paras 18-21. Thus, where a legal test is established in the case law, the decision-maker must apply the correct test (an assessment that implies correctness review) in order to be reasonable.

[14] This appears to be the approach the Supreme Court of Canada took with respect to an H&C application in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61. The majority expressly adopted the reasonableness standard with respect to the H&C decision. However, the decision was held to be unreasonable since the officer applied the wrong approach to the hardship aspects of the H&C analysis, *i.e.*, did not apply the correct legal test: *Kanthasamy* at paras 44-45, 58-60. Notably, the majority's analysis of the legal test to be applied under section 25 showed no deference to the decision-maker and, indeed, preceded the discussion of the standard of review: *Kanthasamy* at paras 9-45.

[15] The legal test for H&C assessments is established by the case law, notably *Kanthasamy*. It is clear that an immigration officer must apply that test, and their decision cannot stand if they fail to do so. Whether such a failure makes the decision "incorrect" on a correctness standard, or "unreasonable" on a reasonableness standard, is of little practical import. To follow the terminology of the Supreme Court of Canada in *Németh*, *Lake* and, I believe, *Kanthasamy*, I will adopt the approach that the reasonableness standard applies to the officer's decision, but that the decision will be considered unreasonable if the officer did not apply the correct legal test.

(2) The legal test in humanitarian and compassionate applications

[16] The Supreme Court of Canada in *Kanthasamy* clarified the appropriate approach to H&C applications under section 25 of the *IRPA*: an officer is to substantively consider and weigh all of the relevant facts and factors, and assess whether those circumstances, viewed globally, would excite in a reasonable person in a civilized community a desire to relieve the misfortunes of another, so long as those misfortunes justify the granting of relief: *Kanthasamy* at paras 13-21, 25, 28-33; *IRPA* at s 25(1). As part of this assessment, *Kanthasamy* clarified that hardship associated with being required to leave Canada is a relevant consideration, but that there is no requirement that an applicant show unusual, undeserved or disproportionate hardship for relief to be granted: *Kanthasamy* at paras 26-33.

[17] Applying *Kanthasamy*, this Court has found that H&C assessments must not be done through an inappropriate "hardship lens" by focusing on hardship to the exclusion of a more global assessment of relevant factors, or requiring unusual, undeserved or disproportionate hardship before relief is granted: *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at paras 33-34; *Cezair (2018)* at para 18; *Kanthasamy* at para 33. Ms. Cezair contends that the officer fell into this error by unduly applying a hardship lens in assessing her application.

(3) The legal test applied by the officer

[18] The officer did not expressly state the test or approach that she would be applying to either Ms. Cezair's application as a whole, or to issues of hardship in particular. The Court must therefore assess whether the correct legal test was applied based on the substance of the officer's

analysis. In doing so, the burden is on Ms. Cezair to demonstrate that the wrong test was applied. In other words, I will presume that the correct test was applied unless shown otherwise (by analogy, see *F.H. v McDougall*, 2008 SCC 53 at para 54, presuming that the correct standard of proof was applied).

[19] Ms. Cezair argues that the officer incorrectly applied a "lens of hardship" in analyzing Ms. Cezair's establishment in Canada. In particular, Ms. Cezair points to the analysis of her community volunteer work, her church membership, her relationships, and her employment, claiming that in each case, the officer inappropriately assessed establishment through a filter of hardship. Reviewing these elements in context, I disagree that the officer applied the wrong legal test.

[20] With respect to Ms. Cezair's community volunteer work and her church membership, the officer assessed this as part of Ms. Cezair's establishment in Canada and gave it positive weight. As a separate part of the analysis, the officer gave little weight to the challenges facing Ms. Cezair in returning to Trinidad, in light of the presence of her family in Trinidad, and the presence of social organizations and churches that might ease the resettlement. This assessment neither minimized Ms. Cezair's establishment nor viewed it through a hardship lens. Rather, it directly addressed the allegations of hardship of return that Ms. Cezair had raised in her application. Notably, Ms. Cezair's submission letter to the officer referred to the lack of support available to her in Trinidad as part of her submissions on establishment. Having done so, Ms. Cezair cannot criticize the officer for having addressed those submissions.

[21] The same can be said with respect to the question of employment, where again Ms. Cezair tries to juxtapose statements from different parts of the officer's analysis. In assessing establishment, the officer found that Ms. Cezair had provided insufficient documentation regarding the financial aspects of her employment, and noted that the employment was without authorization. Later, in assessing Ms. Cezair's arguments regarding hardship of return to Trinidad and Tobago, the officer noted her education and employment experience as factors that might lessen that hardship. The two analyses are separate in the decision, and the attempt to bring them together to suggest that the establishment analysis was tainted by a hardship lens is unconvincing.

[22] With respect to personal relationships, the officer noted that "[w]hile I give weight to the relationships the applicant has established, I am not satisfied that sufficient evidence has been presented that the level of interdependency is such that the parties will face a hardship." This might be read as inappropriately applying a hardship requirement to the assessment of Ms. Cezair's relationships. However, it can also be read as appropriately giving weight to the relationships as an element of establishment, while at the same time concluding that the relationships were not such that their severance should be considered part of the hardship analysis. I adopt this latter reading, particularly given the context of Ms. Cezair's submissions on those relationships from her initial application, which remained before the officer:

> …she has immersed herself fully in her community to create an interdependent network of friends and peers. If Ms. Cezair were made to leave Canada, it would cause both her and her community considerable hardship. The former because it would be removing her from her long-time home and the latter because it would be taking away a valued community member. [Emphasis added.]

[23] Again, having cast her submissions in this way, Ms. Cezair cannot criticize the officer for having assessed whether her relationships were so interdependent that hardship would result from her removal from Canada.

[24] Ms. Cezair made extensive submissions regarding the difficulties and hardships that she would face if required to return to Trinidad and Tobago. It is not an error for the officer to have assessed these submissions. To the contrary, it would have been unreasonable for the officer not to do so. The fact that this assessment touched on some of the same issues that were part of the establishment analysis does not mean that the establishment analysis was inappropriately viewed through a lens of hardship.

[25] I therefore conclude that the officer did not apply the incorrect legal test by inappropriately applying a hardship lens in the manner criticized in *Kanthasamy* and *Marshall*.

B. *Was Relying on Catholic Churches in Trinidad and Tobago Without Notice Unfair?*

[26] The officer gave minimal weight to Ms. Cezair's lack of connections and support in Trinidad, since she still had family there, and they, as well as social organizations and the Catholic Church community, could help support her reintegration. On the last of these issues, the officer said the following:

> The applicant also states that she is devout Roman Catholic, who attends church regularly and is a long standing active member of the Catholic Women's League in Toronto. <u>According to the Catholic Directory.com, there are 51 Catholic churches in Trinidad and Tobago</u> and reasonably her church community in Canada could provide assistance in helping the applicant connect with the

> T&T Catholic community who could provide support as the applicant resettles after such a long absence. [Emphasis added.]

[27] The officer researched the online "CatholicDirectory.com" herself, and Ms. Cezair did not have the opportunity to respond to or address this information. Ms. Cezair asserts that this breached the duty of fairness, claiming that the officer placed "substantial reliance on the specific number of churches in Trinidad and Tobago" and that the presence of 51 Catholic churches was "crucial" to the determination that Ms. Cezair could receive settlement support from them.

[28] Fairness may require that notice be given to an applicant of evidence obtained independently and relied on by an immigration officer. However, not every reference to such extrinsic evidence triggers the obligation. Justice Mosley described the question as being "whether meaningful facts essential or potentially crucial to the decision had been used to support a decision without providing an opportunity to the affected party to respond to or comment upon these facts": *Yang v Canada (Citizenship and Immigration)*, 2013 FC 20 at para 17.

[29] In the context of the officer's analysis, I do not take her reference to the specific number of Catholic churches in Trinidad and Tobago or the citation of "CatholicDirectory.com" as being particularly essential or crucial to the reasons. Nor do I find that the officer placed substantial reliance on the figure. Rather, the point being made by the officer was that the Catholic Church of which Ms. Cezair was a devout member could provide support in resettlement. This is not an unreasonable or unduly speculative inference, and while the officer reasonably verified that there

was in fact a Catholic Church presence in Trinidad and Tobago before making the inference, the specific number of churches was neither the point nor the source of the analysis.

[30] As Ms. Cezair concedes, the presence of Catholic churches in Trinidad and Tobago is accessible public information. Ms. Cezair's faith was a significant aspect of her H&C submissions, and I do not find that the duty of fairness required the officer to give notice to Ms. Cezair before considering whether support from the church could ease the difficulties of resettlement, or before relying on a public source to confirm the presence of Catholic churches in Trinidad and Tobago.

C. *Was the Humanitarian and Compassionate Analysis Reasonable?*

(1) Did the officer unreasonably ignore contradictory evidence?

[31] Ms. Cezair argues that the officer's treatment of the country condition evidence regarding gender-based violence ignored key contradictory evidence. In particular, she points to the following statement, which the officer gave as one of the reasons for giving the country conditions nominal weight:

> With respect to violence against women the objective evidence indicates that much of the violence against women is a domestic setting. Nine hundred and forty (940) reports of domestic violence were made to the Police in 2010, 68.2% of which were for "Assault by Beating. Domestic violence is defined as violent or aggressive behavior within the home, typically involving the violent abuse of a spouse or partner. In the applicant's circumstances I note she is single, and there is insufficient evidence as to how the issue of domestic violence relates to her personal circumstances.

[32] The statistics cited by the officer come from a 2015 report about Trinidad and Tobago from the UN Committee on the Elimination of Discrimination Against Women (CEDAW). Ms. Cezair criticizes the officer for failing to mention other passages from the CEDAW report, including statements that the "Government of Trinidad and Tobago is very concerned about the high incidence of violence against women and gender-based violence" and that "violence against women remains a serious reality." Relying on *Cepeda-Gutierrez* and *Awolope*, Ms. Cezair asserts that it was unreasonable for the officer to have selectively focused on aspects of the report while ignoring other contradictory passages: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC), 157 FTR 35 at para 17 and *Awolope v Canada (Citizenship and Immigration)*, 2010 FC 540 at para 71.

[33] As set out in *Cepeda-Gutierrez*, ignoring or failing to comment on sufficiently important contradictory evidence can indicate that a decision was made without regard to the evidence. At the same time, there is no obligation to refer to every piece of evidence that is contrary to a finding: *Cepeda-Gutierrez* at paras 15-17.

[34] In the present case, the officer expressly acknowledged that "T&T also suffers from gender based violence and discrimination." She also made specific reference to a US Department of State report that cited an NGO's assertion that "rape and sexual abuse against women and children remained a serious and pervasive problem." Having acknowledged these concerns and cited evidence to the same effect, the officer was not obliged to specifically refer to the similar evidence found in the CEDAW report. In these circumstances, I cannot conclude that the officer

overlooked contradictory evidence or failed to reasonably consider the risk of gender-based violence based on not having expressly discussed other passages in the CEDAW report.

(2) Did the officer fail to weigh the different H&C factors against one another?

[35] Ms. Cezair argues that having assessed the various H&C factors, the officer failed to weigh them against one another as a whole. This, she argues, is contrary to the approach required by *Kanthasamy* and results in an unintelligible and non-transparent decision: *Kanthasamy* at para 60, in which the majority refers to a failure to consider the evidence as a whole as an undue fettering of discretion leading to its unreasonable exercise.

[36] During the course of her decision, the officer considered each of the grounds put forward by Ms. Cezair, and gave her assessment of them based on the evidence and the weight that she gave to each. The officer then concluded with the following language:

> In conclusion I have considered all the factors presented and weighed them accordingly. I have considered the applicant's length of residence in Canada, her ties in Canada as well as T&T, the country conditions and how they relate to her personal circumstances. I am not satisfied there are sufficient H&C considerations to warrant an exemption. The applicant's request is refused.

[37] Having set out during the course of her reasons the weight given to the various factors, including the reasons for giving less weight to Ms. Cezair's employment history, and her concerns about returning to Trinidad and Tobago, the officer's conclusion demonstrates that she also considered the factors together in reaching her final determination on the H&C application. It must be recognized that the weighing of factors in an H&C application is a discretionary

matter, and that there is no specific calculus or "rigid algorithm" for reaching a particular conclusion: *Hsu v Canada (Citizenship and Immigration)*, 2017 FC 1168 at para 5.

[38] I am satisfied that the officer conducted a global assessment of the factors and that the reasons for the decision allow the reader to understand why the decision was reached. I do not agree with Ms. Cezair's submissions that the officer's reasons are like those described in *Lozano Vasquez v Canada (Citizenship and Immigration)*, 2012 FC 1255 at paragraphs 52-55, where a recital of facts was followed by a bare conclusion. Nor are they similar to *Williams v Canada (Citizenship and Immigration)*, 2017 FC 1027 at paragraphs 23-24, where an officer considered one factor to outweigh all others without giving reasons why this would be so.

(3) Did the officer unreasonably discount country condition evidence?

[39] Ms. Cezair's application pointed to evidence of widespread violence, gender-based discrimination and gender-based violence in Trinidad and Tobago, and submitted that she would face hardship if required to return there, particularly as a 59-year-old woman returning after more than 20 years away. The officer noted these concerns, and acknowledged that Trinidad and Tobago has challenges on these issues. However, despite these challenges, the officer gave the country conditions and Ms. Cezair's associated fear "nominal weight" for a series of reasons that began with the following two bullet points:

> - The applicant has five siblings and a parent who have lived in Trinidad for a significant period of time. There is insufficient evidence as to how the country conditions in particular the violent crime and murder rates have affected their safety and wellbeing. In light of counsel's statement that T&T is among the top 20 most dangerous countries in the world, it would be

> reasonable to presume that one or some of her several family members have experienced the violence themselves.
>
> - I further note the applicant has sisters and sister in laws and again there is insufficient evidence as to how the discrimination against women and the gender based violence as highlighted by counsel, have affected their ability to access employment, education, housing and protection from police when needed.
>
> [Emphasis added.]

[40] I agree with Ms. Cezair that these passages show an unreasonable approach to assessing the adverse conditions in Trinidad and Tobago. General risks of violence cannot be discounted because there is no evidence that the applicant's own family members have experienced violence. Indeed, the officer's reasons go so far as to apparently doubt counsel's statement regarding the dangers in Trinidad and Tobago—a statement supported by evidence on the record—on the basis of a presumption that family members would experience violence if the information were correct. This is not a rational basis on which to ignore or minimize evidence of widespread violence.

[41] Even more troubling is the officer's dismissal of evidence of discrimination and gender-based violence because of a lack of evidence regarding how they have affected Ms. Cezair's sisters and sisters-in-law. The assessment that the officer was required to make was the extent to which the evidence showed risks of hardship to Ms. Cezair, and the extent to which that contributed as a factor to her H&C application. Whether Ms. Cezair's sisters and sisters-in-law have experienced gender-based violence or discrimination is not relevant to that determination. I agree with Ms. Cezair's submission that "[w]here an applicant or applicant's immediate family group has not presented evidence that they have been discriminated against, it cannot be inferred

that discrimination does not exist." Effectively creating a requirement that family members have been subjected to discrimination or gender-based violence before evidence of pervasive discrimination and violence are given weight is unreasonable.

[42] This is not to say that a lack of evidence that family members have suffered from adverse country conditions will invariably be irrelevant. Much will depend on the nature of hardship identified and the risks asserted by an applicant. For example, Justice Mactavish of this Court accepted that where evidence showed that the treatment of widows in Nigeria varied depending on matters such as tribe, sub-clan, geographical location and socio-economic status, it was reasonable to consider whether a family member living in the same geographical location and of the same tribe and sub-clan had encountered difficulties: *Amadin-Iroro v Canada (Citizenship and Immigration)*, 2019 FC 577 at paras 11-13.

[43] The evidence in this case was not of such a nature. Where the evidence put forward is of broader concerns such as gender-based violence in a country, it is sufficient to show membership in the group that is subject to that treatment: *Kanthasamy* at paras 53, 56. Discounting the concern on the basis that some members of the group (whether family members or others) have not experienced such violence shows a significant misunderstanding of the nature of such evidence.

[44] The Attorney General argues that being a woman returning to Trinidad and Tobago is not alone sufficient to ground an H&C application, and that an applicant must show that they are likely to be personally affected by adverse country conditions. This is clearly so, but does not

justify the officer's reasoning. Recognizing that Ms. Cezair may be at risk of discrimination and gender-based violence in Trinidad and Tobago is simply one factor in the H&C assessment that must be considered by the officer on a global basis. It does not pre-determine a particular outcome or require that H&C relief be granted. But such hardship concerns cannot be discounted based on improper reasoning derived from the experience of family members.

[45] While the officer put forward other reasons for giving the adverse country conditions nominal weight, I find that the nature and prominence of the officer's reliance on the experiences of family members renders the assessment of this factor unreasonable.

V. Conclusion

[46] The hardship resulting from conditions in Trinidad and Tobago was a significant part of Ms. Cezair's H&C application. The unreasonable assessment of this factor in turn renders the decision as a whole unsustainable. I will therefore allow the application for judicial review, quash the decision of the immigration officer, and again send Ms. Cezair's H&C application back for redetermination.

[47] Neither party suggested that a question be certified. I agree that no certifiable question arises in the matter. Finally, in the interests of consistency and in accordance with section 4(1) of the *IRPA* and section 5(2) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, the style of cause is amended to name the respondent as the Minister of Citizenship and Immigration.

JUDGMENT IN IMM-6380-18

THIS COURT'S JUDGMENT is that

1. The style of cause is amended to name the respondent as the Minister of Citizenship and Immigration.
2. The application for judicial review is allowed and Ms. Cezair's application pursuant to section 25 of the *Immigration and Refugee Protection Act* is sent back for redetermination by a different officer.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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