

Federal Court



Cour fédérale

Date: 20170719

Docket: IMM-5192-16

Citation: 2017 FC 701

Ottawa, Ontario, July 19, 2017

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

AMALAN THIRUCHELVAM

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant applies for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] of a decision of a Senior Immigration Officer [Officer] to deny his application for permanent residence on humanitarian and compassionate grounds [H&C Application] pursuant to subsection 25(1) of the *IRPA* as it read between June 29, 2010, and June 27, 2012.

[2] Much of the Applicant's history in Canada was described by Mr. Justice Brown in *Thiruchelvam v Canada (Citizenship and Immigration)*, 2015 FC 585, and need not be repeated here, but I will add the following: the Applicant originally submitted his H&C Application on October 15, 2010, with written submissions by his previous counsel. At some point thereafter he changed counsel to his current counsel, who provided additional evidence and submissions on multiple occasions between the submission of the H&C Application and when the decision was made.

[3] The Officer rejected the H&C Application on November 4, 2016. The Officer's notes do not contain any analysis of hardship the Applicant would experience in Sri Lanka or the best interests of his son. It solely weighed the Applicant's establishment in Canada against his involvement with the Tamil Eelam Liberation Organization, and concluded that an exemption to the *IRPA* was not warranted.

[4] At the hearing, the Applicant's position was that the Officer's decision was unreasonable because of the failure to provide any analysis of the hardships he would face in Sri Lanka or the best interests of his son. The Respondent countered that the Officer was not required to analyze factors not raised by the Applicant, relying on the Court of Appeal's decision in *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 8 [*Owusu*]. The Applicant therefore omitted submissions on hardship and the best interests of the child at his own peril. In response, the Applicant argued that the mention of both his ongoing pre-removal risk assessment proceedings and the birth of his son was sufficient to put the Officer on notice and meet the requirements in *Owusu*.

[5] After the end of the oral hearing, the Court requested additional written submissions addressing approximately forty pages in the Certified Tribunal Record not referred to by the parties. These pages contained the original submissions on the H&C Application submitted by the Applicant's previous counsel on October 15, 2010. These submissions expressly referred to hardship the Applicant would face if returned to Sri Lanka. The Applicant's previous counsel also attached eight country condition documents in support of the allegation of hardship. As far as the Court is aware, the Applicant has never withdrawn or replaced these submissions, or resiled from the allegation of hardship.

[6] In his post-hearing submissions, counsel for the Respondent admitted that if the 2010 submissions caused the Applicant to meet his onus in accordance with *Owusu*, then that could go to the reasonableness of the Officer's decision. In my view, the Applicant clearly met the onus of putting hardship before the Officer. As a result, the Officer's failure to address the question of whether the Applicant would face hardship on return to Sri Lanka, and the effect this would have on whether he should be granted an exemption from the *IRPA*, causes the decision to lack the requisite justification, intelligibility and transparency required for me to determine whether the result is defensible on the facts and the law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Kanhasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 43-44.

[7] This application for judicial review is therefore granted. The decision will be set aside and the matter remitted to a different officer for redetermination.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted.

The Officer's decision is set aside and the matter is remitted to a different officer for redetermination.

“E. Susan Elliott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5192-16

STYLE OF CAUSE: AMALAN THIRUCHELVAM v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JUNE 13, 2017

JUDGMENT AND REASONS: ELLIOTT J.

DATED: JULY 19, 2017

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