Federal Court  Cour fédérale

Date: 20150327

Docket: IMM-6076-14

Citation: 2015 FC 394

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, March 27, 2015

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

AMER BAKER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), of the decision rendered on March 5, 2014, by the representative of the Minister of Citizenship and Immigration (the officer), refusing the applicant's application for permanent residence on humanitarian and compassionate (H&C) grounds under subsection 25(1) of the IRPA.

II. Facts

[2] The applicant is an Iraqi citizen who arrived in Canada on November 9, 1999, on which date he made a claim for refugee protection based on a fear of persecution for reasons of his political opinions and his Shi'ite faith. The applicant alleges that he was apprehended and tortured in Bagdad following his involvement in the popular uprisings in Iraq in 1991. He alleges that he was released in 1994 after a general amnesty.

[3] The applicant is the father of three children (one born in Canada and the other two born in Iraq). On the date of the decision concerned by this application for judicial review, the children were 22, 17 and 9 years of age.

[4] On July 4, 2001, the Convention Refugee Determination Division (CRDD) of the Immigration and Refugee Board (IRB) refused the applicant's claim for refugee protection because of a lack of credibility and because there were serious reasons to believe that the applicant had been complicit in crimes against humanity in the course of his intermittent employment from 1976 to 1990 with the Census Branch of the Iraqi government. The CRDD determined that the applicant, by means of two censuses, had knowingly participated in the forced removal of Kurds and Shi'ites referred to as Iranians and considered to be non-Arab by the Iraqi government. On August 30, 2002, this Court affirmed the decision.

[5] On August 27, 2001, the applicant made an application for permanent residence that was refused on September 19, 2001.

[6] On May 5, 2004, the applicant's wife and two children who were born in Iraq were granted protection as Convention refugees.

[7] On December 4, 2004, the applicant made an application for permanent residence in Canada on humanitarian and compassionate grounds.

[8] The applicant submitted additional information several times to update his application on humanitarian and compassionate grounds.

[9] As mentioned, this application on humanitarian and compassionate grounds was refused on March 5, 2014.

III. Officer's decision

[10] To begin with, the officer reviewed the applicant's eligibility again under Article 1F(a) of the *Convention relating to the Status of Refugees* (the Convention) in light of the criteria established by the Supreme Court of Canada in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 (*Ezokola*). The applicant does not dispute this aspect of the officer's review.

[11] The most important aspect of the officer's decision for the purposes of this application for judicial review concerns the humanitarian and compassionate grounds related to the applicant's case. In this regard, the officer noted that the most important factor to consider was the best interests of the applicant's minor children.

[12] The officer noted that the applicant is the father of three children and that he alleges to be his family's primary breadwinner; she mentioned, however, that the applicant was unable to work on arriving in Canada due to depression and that his income in recent years had been low. More specifically, the officer indicated that the applicant's income had climbed from $6,756 to $9,910 between 2002 and 2006, that his income was $17,227 in 2005, that he worked for $8 an

hour in 2007, that a notice of assessment indicated a total income of $1,481 in 2009 and that his 2010 T4 indicated an income of $10,827.

[13] The officer seriously doubted the fact that the applicant's income was sufficient to support his family, and she assumed that they had received social assistance in the past. The officer pointed out that if the applicant were required to leave Canada, his family could apply for social assistance and his wife could find work while her son attended school. The officer also underscored that the Canadian public school system would ensure that the applicant's youngest son could carry on with his education. Based on the resources available to the applicant's family following his departure, the officer determined that the applicant's removal would not cause unusual and undeserved or disproportionate hardship.

[14] The officer emphasized the importance of maintaining family ties and protecting the best interests of the applicant's children, but nevertheless determined that these factors in the current case constituted insufficient grounds for granting the H&C application, primarily because there were serious grounds to believe that the applicant had been complicit in crimes against humanity.

IV. Issues

[15] There are two issues:

1. Did the officer breach his duty of procedural fairness?

2. Did the officer err in weighing the humanitarian and compassionate grounds raised by the applicant?

V. Analysis

A. *Respondent's motion*

[16] At the start of the hearing, the respondent presented a motion to remove from the Certified Tribunal Record (CTR) certain pages that should not have been included.

[17] Given that the applicant had no objection to the request and given that the pages in question (page 23 to 29) should not have been included in the CTR in the first place, I allowed the respondent's motion.

B. *Applicable standard of review*

[18] Correctness is the standard of review applicable to issues of natural justice and procedural fairness: *Agnaou c Canada (Procureur général)*, 2015 CAF 30 at para 36.

[19] The reasonableness standard applies to decisions on H&C applications, which involve the exercise of discretion and an analysis of questions of mixed fact and law: *Okoloubu v Canada (Citizenship and Immigration)*, 2008 FCA 326 at para 30.

C. *Breach of procedural fairness*

[20] The applicant argues that the following excerpt from the officer's reasons reflects a breach of procedural fairness:

> Even if Mr. Baker is the sole breadwinner of the family, I seriously doubt that his income is sufficient to support his family financially. Therefore, I suppose that they have access to social benefit to assist the family financially. If Mr. Baker was removed from Canada, the loss of income for his wife and children would not in my opinion constitute unusual, underserved and disproportionate hardship as Mr. Baker's wife would continue to have access to social assistance to support her children.

[21] According to the applicant, the officer erred by not allowing him an opportunity to submit evidence showing that this aspect of the officer's decision is incorrect. In particular, the applicant points out that he has never sought social assistance for his family since he started working in Canada in 2004, and that the officer had erred by assuming otherwise. The applicant also contended that the officer's procedural fairness duty was all the more onerous in this case given the length of time between submission of his H&C application (in 2004) and the decision (in 2014). For this reason, the applicant contends that the officer breached her procedural fairness duty by failing to give him an opportunity to submit full documentation concerning all aspects of his application.

[22] As pointed out by Justice L'Heureux-Dubé in *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817 at para 21 (*Baker*), procedural fairness "is eminently variable and its content is to be decided in the specific context of each case". Considering the factors set out in *Baker*, I note that the decision in the applicant's case is of great importance to him, but that the procedures that should have been followed were followed, and that any legitimate expectations he may have had in relation to procedural fairness and natural justice were met.

[23] First of all, the applicant had the opportunity to update the evidence submitted given that he did so several times. There is no indication that the officer refused to consider additional evidence. The applicant did not specify which evidence was not submitted by reason of the alleged breach of the principles of procedural fairness. He argues that he could have provided proof of his higher income after 2010, but there is no indication of this in his file. I therefore have no reason to find that the officer's decision would have been different had she provided the applicant with a chance to update his file.

[24] Furthermore, I concur with the respondent's arguments that the case law clearly establishes that the onus is on the applicant to submit sufficient evidence in the case of an H&C application and that the officer is in principle under no obligation to ask the applicant for updated evidence: *Cao v Canada (Citizenship and Immigration)*, 2013 FC 559 at paras 28 to 30; *Adams v Canada (Citizenship and Immigration)*, 2009 FC 1193 at para 21.

[25] Finally, I believe that the officer's assumption concerning the fact that the applicant's family had used social assistance had no significant impact on her decision. More to the point, it was the fact that the applicant's family would have access to social assistance if the applicant had to return to Iraq that constituted an important aspect of the officer's analysis.

[26] Therefore, in my opinion, the case does not suggest any breach of the principles of procedural fairness.

D. *Did the officer err in weighing the decisive factors of the H&C application?*

[27] Although I believe that the applicant had the opportunity to show that he or his wife did not receive social assistance, it seems that this factor did not play a decisive role in the current dispute. However, the applicant's limited income proved to be a factor of relative importance. It seems that the officer simply noted that access to social assistance was one of the options available to the applicant's family if they had not used it already. The officer's review was reasonable; the documents on file provide convincing confirmation that the applicant's income is low.

[28] Furthermore, it is important to show deference to the weight that the officer set on the best interests of the child: *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at

para 23. The officer reasonably considered that the applicant's children are no longer of pre-school age, that one of them has reached the age of majority, that another will soon reach the age of majority, and that the youngest will be able to continue his education, thus allowing his mother to enter the workforce. There was no evidence to the contrary. The officer also considered the emotional difficulty resulting from the possible separation between father and children. In fact, the officer mentioned that "the most compelling humanitarian and compassionate considerations in this case are the best interest of the child". However, the officer weighed these factors against the limited financial support that the applicant contributed to his family and inadmissibility under paragraph 35(1)(*a*) of the IRPA and Article 1F(a) of the *Convention*.

[29] According to Justice Annis in *Hamida v Canada (Citizenship and Immigration)*, 2014 FC 998 at para 76, it is important "to weigh the implications of inadmissibility against the other relevant factors, namely, the humanitarian and compassionate considerations." In my opinion, the officer performed this task.

VI. Findings

[30] In my view, this application for judicial review should be dismissed.

[31] Furthermore, pages 23 to 39 of the CTR must be removed from the copies sent to the Court and the parties.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed.

2. No general question of importance is certified.

3. Pages 23 to 39 of the Certified Tribunal Record shall be removed from the copies sent to the Court and the parties.

"George R. Locke"
Judge

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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