Federal Court Cour fédérale

Date: 20180828

Docket: IMM-3465-17

Citation: 2018 FC 862

[ENGLISH TRANSLATION]

Ottawa, Ontario, August 28, 2018

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

YANNICK NKOUKA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by an immigration officer who found that Yannick Nkouka is a danger to the public in Canada within the meaning of paragraph 115(2)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [IRPA].

[2] The applicant claims that the officer made errors in his analysis of the facts and that the decision is unreasonable. For the reasons that follow, I do not agree with the applicant's claims and consequently dismiss the application for judicial review.

I. Background

[3] The applicant was born in the Republic of the Congo. He arrived in Canada in 1997 and was granted refugee status in Canada in 1998. In 1999, he became a permanent resident of Canada. However, since then, he has accumulated an impressive criminal record, including the following convictions: possession of property obtained by crime under $5,000 (August 2001); theft under $5,000 (April 2002); assaulting a police officer and uttering threats against a police officer (February 2004); extortion—he threatened a minor in relation to drugs (January 2010); possession of property obtained by crime exceeding $5,000 (November 2010); use, trafficking and/or possession of a forged document (April 2017); and several convictions for failing to comply with a probation order and with an undertaking.

[4] The applicant has a spouse who is a Canadian citizen and two children who are also Canadian citizens—one daughter born in 2006 and another born in 2015.

[5] On October 5, 2010, the Immigration Division issued a removal order against the applicant, since the panel found that the applicant was inadmissible on grounds of serious criminality under paragraph 36(1)(a) of the IRPA. The applicant appealed that decision before the Immigration Appeal Division and, on December 4, 2013, that appeal was dismissed. On October 13, 2015, the Canada Border Services Agency advised the applicant of their intention to

seek a danger opinion from the Minister of Citizenship and Immigration. The applicant made representations to the Minister on three occasions, in August and September 2016 and in June 2017. The decision was rendered on June 29, 2017. That decision is the subject of this application for judicial review.

II. Issues

[6] There are two issues in dispute in this case:

A. Did the officer err in his assessment of the evidence?

B. Was the officer alert, alive and sensitive to the best interests of the children?

III. Analysis

[7] The officer's decision under paragraph 115(2)(a) of the IRPA raises questions of fact and questions of mixed fact and law and is therefore subject to review on the standard of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 47 [*Dunsmuir*]). The reasonableness standard of review also applies to issues of assessment of the evidence. Lastly, the application of the reasonableness standard of review is concerned with "justification, transparency and intelligibility within the decision-making process." But it is also concerned with whether the decision falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at paragraph 47).

A. *Did the officer err in his assessment of the evidence?*

[8] The applicant argues that the officer committed a number of errors in his assessment of the applicant's convictions, risk of recidivism, periods of incarceration, personal relationships and level of rehabilitation.

[9] With regard to the convictions, the officer stated that the risk of recidivism is high and that the applicant received a two-year conditional sentence in 2017. That conviction, the first since 2011, is related to events that occurred in 2013. The applicant also argues that the prison sentence was a suspended sentence rather than a two-year conditional sentence.

[10] With regard to the applicant's personal relationships, the officer stated that the period of separation between the applicant and his children had already started at the time of his incarceration; however, the applicant was incarcerated for only a relatively brief period between November 2010 and February 2011. The applicant states that a period of six years elapsed between the 2011 incarceration and the 2017 decision, during which time he was not incarcerated. His first child experienced only a brief period of separation (three months) as a result of her father's incarceration in 2011, and his second child, born in 2015, was never separated from him for such a reason.

[11] The applicant also argues that the officer made errors about certain facts concerning the applicant's relationships, by stating that the applicant has a wife (they are not married, but rather common-law spouses), indicating the wrong date of birth for his first child and the wrong date for when his spouse learned that she was pregnant. The officer also stated that there was a lack of

evidence of the applicant’s rehabilitation, but the file contained letters from his spouse and proof of employment and training. Lastly, the documentary evidence submitted on the situation in the Congo describes acts of violence, human rights violations, extortion of the population by government agents, arbitrary arrests, kidnappings, torture, rape and other mistreatment: it is an error to say that the situation is [TRANSLATION] “not so positive”.

[12] The respondent argues that the applicant is inadmissible on grounds of serious criminality and that the conclusion that the applicant presents a potential risk of recidivism is reasonable. The applicant has been a repeat offender since 2000. This finding is supported by a presentence report in 2016, which the applicant did not dispute, stating that the applicant presents a high risk of recidivism, was not taking responsibility and was not adhering to social boundaries. His efforts to rehabilitate and his spouse’s support did not help him leave his criminal life behind. More specifically, he continued his criminal activities after the removal order was issued against him in June 2010. The errors in certain facts are immaterial to the risk of recidivism.

[13] The respondent states that the officer considered the general situation in the Republic of the Congo but noted that people targeted by such abuses are members of political parties and union leaders. The applicant is not in one of the target categories in the Congo. The officer concluded that the evidence does not show that Congolese people are at risk of mistreatment upon their return to the country, and the applicant does not dispute this part of the reasons. On all of these points, the analysis of the evidence is reasonable.

[14] It is clear that the officer made some errors in his decision, and the respondent disputes only certain details about the applicant's criminal past. Nevertheless, the fact that the officer committed errors in the summary of the facts is not a sufficient ground in itself to set aside the decision. According to the reasonableness standard of review, the primary question is the justification of the decision and the transparency and intelligibility in the decision-making process. I find that the decision overall is reasonable, despite the incidental errors.

[15] The decision contains a detailed summary of the applicant's criminal history, noting the continuity, severity and violence of certain offences he committed, as well as the many violations of conditions on his criminal record. Even if there are certain formal errors in the factual description in the officer's decision, that does not indicate that the officer ignored the material facts or did not properly review the file. The main question is whether the decision on the risk is valid, in light of the facts and the applicable legislation. I find that the officer addressed the most relevant facts about the applicant's criminal history, as well as the consequences of his offences. I also find that the officer followed the steps of the analysis set out in *Ragupathy v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 151 [*Ragupathy*].

[16] I agree with the applicant that the officer made some reporting errors, such as in the date of birth of his first child, and the fact that the applicant is not married to a Canadian citizen, but rather that they are common-law spouses. I find that these errors, considered together and as part of the decision as a whole, did not have a significant effect on the outcome. Therefore, I consider these errors to be insufficient to determine that the decision is unreasonable.

[17] The applicant argues that the officer made a major error in the decision by stating that there is a [TRANSLATION] "lack of evidence demonstrating rehabilitation" in the applicant's case. The applicant submitted documents and arguments on this subject, but the officer made no reference to them. The applicant therefore argues that the officer ignored key evidence and that it is clear that there is not a [TRANSLATION] "lack of evidence" in this regard.

[18] I do not accept the argument that the officer made such an error. From the key paragraphs of the decision, it is clear that the officer considered the applicant's criminal history and its impact on the victims and on Canadian society. The officer also considered the evidence related to the applicant's rehabilitation; however, the officer did not consider the evidence the applicant submitted on this to be sufficient or convincing. That does not indicate that the officer ignored the evidence submitted. On the contrary, it is clear in the decision that the officer analyzed the evidence in the context of the applicant's background:

> [TRANSLATION] According to the documentation submitted, the subject has his spouse's support, but that does not seem to be enough to make him accountable. I am also taking into consideration that he continued his criminal activities after the removal order was issued against him in June 2010. The order being issued could have reasonably served as a serious warning for the subject, but his criminal behaviour continued. He expresses remorse, but the fact that he continues to reoffend indicates that he has not begun a readjustment process and that the risk of recidivism is high.

[19] I find that the officer's conclusions are based on the facts (see, for example, the presentence report dated November 10, 2016), which indicates that the officer did not ignore the evidence. When the officer refers to a [TRANSLATION] "lack of evidence", that is simply an

indication that the officer was not satisfied with the evidence the applicant submitted regarding his rehabilitation. That is a reasonable conclusion, considering all of the evidence.

[20] For these reasons, I find that the officer's decision is reasonable with regard to his assessment of the applicant's risk of recidivism.

B. *Was the officer alert, alive and sensitive to the best interests of the children?*

[21] The applicant also claims that the officer erred in stating that the period of separation had already started. The officer explained that the applicant's separation will not be permanent because he could obtain a pardon or the family could move to the Congo. The officer also noted that there are means of communicating over distance, such as Skype, without specifying how the slim possibility of a pardon or communication methods like Skype might mitigate the consequences of a separation. This brief discussion does not demonstrate that the officer was alert, alive and sensitive to the best interests of the children. Moreover, "[t]he mere mention of the children is not sufficient. The interests of the children is a factor that must be examined with care and weighed with other factors. To mention is not to examine and weigh" (*Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at paragraph 13).

[22] The respondent agrees that the applicant's incarceration was brief and dates back to 2011, but the applicant's involvement in his children's lives, particularly between the birth of his first child in 2006 and the birth of his second in 2015, has not been established. Moreover, in general, the separation of a family is not a ground for not executing a removal order, since separation is not an extraordinary consequence (*Tran v. Canada (Solicitor General)*, 2006 FC 1240). In this

case, the applicant's removal would not shock the conscience of Canadians (*Ragupathy*). In allowing that the applicant cannot return to Canada, this represents the consequence of his own actions.

[23] The analysis of the best interests of a child criterion in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 and *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61 does not fully apply to the context of an analysis of humanitarian and compassionate grounds in assessing the danger to the public under paragraph 115(2)(a) of the IRPA. The Federal Court of Appeal established this principle in *Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at paragraph 74 [*Lewis*]:

> In light of the foregoing, I disagree with Mr. Lewis and the intervener that *Kanthasamy* requires that a full-blown best interests of the child analysis be undertaken before a child's parent(s) may be removed from Canada or that such children's best interests must outweigh other considerations in the analysis. In my view, the holding in *Kanthasamy* applies only to H&C decisions made under section 25 of the IRPA and, even there, does not mandate that the affected children's best interests must necessarily be the priority consideration.

[24] This principle was confirmed in other decisions, affirming that the officer is not obligated to substantially review the best interests of a child, but rather to consider the short-term interests, which is at the low end of the spectrum of the officer's overall responsibilities under section 48 of the IRPA: see, for example, *Crawford v. Canada (Public Safety and Emergency Preparedness)*, 2017 FC 743 at paragraph 31; *Bruce v. Canada (Public Safety and Emergency Protection)*, 2017 FC 721 at paragraph 5.

[25] In his decision, the officer considered the circumstances of the applicant, his spouse and his children. The analysis of the best interests of the children is not very detailed, but that is not a reason to set aside the decision. I find that the officer considered the interests of the children, as well as the possibilities to reduce the impact of the separation on the family. The Act requires no more than this from an officer with regard to analyzing humanitarian and compassionate grounds in the evaluation of the danger to the public under paragraph 115(2)(a) of the IRPA.

[26] For these reasons, I find that the officer's decision is reasonable with regard to the best interests of the children.

IV. Conclusion

[27] For all of these reasons, this application for judicial review is dismissed.

[28] At the hearing, the applicant submitted one question for certification:

> Should the criterion of the best interests of a child directly affected by the removal order the Supreme Court of Canada described in *Baker* apply to the assessment of humanitarian and compassionate grounds in the evaluation of the danger to the public under paragraph 115(2)(a) of the IRPA?

[29] The respondent is opposed to this question being certified, because the decision in *Lewis* applies. I agree with the respondent—I find that this question was already addressed by the Federal Court of Appeal decision in *Lewis*.

JUDGMENT in IMM-3465-17

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

There is no serious question of general importance to be certified.

"William F. Pentney"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Stéphane Handfield	FOR THE APPLICANT
Daniel Latulippe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Handfield & Associés Barristers and Solicitors Montréal, Quebec	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT