Date: 20061220

Docket: IMM-1460-06

Citation: 2006 FC 1515

BETWEEN:

BALLA DAVID DIARRA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

Pinard J.

[1] This is an application for judicial review of a decision of an officer of Citizenship and Immigration Canada (CIC), dated March 3, 2006, who rejected the application for permanent residence in Canada based on humanitarian and compassionate considerations filed by the applicant on August 18, 2003.

[2] The applicant, Balla David Diarra, 22 years of age, was born in the district of Kati, near Bamako, Mali. He was born out of wedlock. The applicant lived with his mother until the age of

seven and then with his uncle and aunt. He alleges that his aunt abused him physically and psychologically.

[3] The applicant arrived in Canada on September 5, 2001, and claimed refugee protection because of his membership in a particular social group, namely, illegitimate children in Mali. The claim was rejected on September 12, 2002 (when he was 17 years old), because of the reasonable possibility of an internal flight alternative in the cities of Mopti or Segou in Mali.

[4] On August 18, 2003, the applicant made an application for permanent residence in Canada based on humanitarian and compassionate considerations.

[5] On March 3, 2006, the immigration officer rejected this application. That decision is the subject of the present application for judicial review.

I. Standard of review

[6] It is well established that such a request for an exemption for special relief is purely discretionary. Thus, the applicable standard of review is reasonableness *simpliciter*. This standard was expounded by Mr. Justice Iacobucci in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, as follows, at pages 776 and 777:

> . . . An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it . . . .

[7] Using a pragmatic and functional approach, the Supreme Court ruled in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, that the discretionary power granted to the immigration officer must be considered with a certain degree of deference:

> [51] As stated earlier, the legislation and Regulations delegate considerable discretion to the Minister in deciding whether an exemption should be granted based upon humanitarian and compassionate considerations. The Regulations state that "[t]he Minister is . . . authorized to" grant an exemption or otherwise facilitate the admission to Canada of any person "where the Minister is satisfied that" this should be done "owing to the existence of compassionate or humanitarian considerations". This language signals an intention to leave considerable choice to the Minister on the question of whether to grant an H & C application.
>
> . . .
>
> [59] The second factor is the expertise of the decision-maker. The decision- maker here is the Minister of Citizenship and Immigration or his or her delegate. The fact that the formal decision-maker is the Minister is a factor militating in favour of deference. The Minister has some expertise relative to courts in immigration matters, particularly with respect to when exemptions should be given from the requirements that normally apply.
>
> . . .
>
> [62] These factors must be balanced to arrive at the appropriate standard of review. I conclude that considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language. Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court – Trial Division and the Federal Court of Appeal in certain circumstances, and the individual rather than polycentric nature of the decision, also suggest that the standard should not be as deferential as "patent unreasonableness". I conclude, weighing all these factors, that the appropriate standard of review is reasonableness *simpliciter*.

II. Legislative context

[8] The decision that the applicant is seeking to have set aside was rendered under subsection 25(1) of the *Immigration and Refugee Protection Act*, S.C. (2001), c. 27 (the Act), formerly subsection 114(2).

[9] However, this provision is a discretionary exception. As noted by Mr. Justice Iacobucci in *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84:

> [64] . . . an application to the Minister under s. 114(2) is essentially a plea to the executive branch for special consideration which is not even explicitly envisioned by the Act. . . .

[10] Applying for an immigrant visa from outside of Canada is a requirement under subsection 11(1) of the Act, and the granting of an exemption under section 25 of the Act is an exceptional process. Subsection 25(1) of the Act specifies that the Minister may grant permanent resident status or an exemption from an obligation under the Act if he is satisfied there are humanitarian and compassionate considerations or public policy considerations warranting such a decision:

25. (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	**25.** 1) Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger – compte tenu de l'intérêt supérieur de l'enfant directement touché – ou l'intérêt public le justifient.

[11] In my opinion, the decision made by the CIC immigration officer is not unreasonable. She relied on the evidence submitted by the applicant as at the time she rendered her decision. In addition, this decision is not based strictly on the lack of a passport and other required documents. The officer also made a detailed analysis of the file and determined that there were no humanitarian and compassionate considerations which would justify exempting the applicant from the statutory obligation of applying for an immigrant visa before coming to Canada.

III. The applicant's identity documents

A. *New evidence*

[12] It appears that the applicant intended to update his file by submitting identity documents before this Court, such as his passport, which were not before the immigration officer when the decision was rendered. It is trite law that in an application for judicial review, this Court can only consider the evidence which was before the immigration officer at the time the application was made (*Herrada v. Minister of Citizenship and Immigration)*, 2006 FC 1003, at paragraphs 27 and 28). Therefore, these documents cannot be considered for the purposes of this application for judicial review.

B. *The passport application*

[13] In my opinion, in this case, the immigration officer was entitled to require the applicant's passport as proof of identity. First of all, as specified in paragraphs 50(1)(*a*) and (*b*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations), a foreign national seeking permanent residence in Canada must hold a passport or a travel document issued by the country of which he or she is a citizen or a national. In this case, the respondent notes that the

immigration officer had explained to the applicant that she could not accept a copy of a birth certificate and a school identity book because of the requirements set out in subsection 50(1) of the Regulations. In addition, the immigration officer advised the applicant on several occasions of the importance of submitting identity documents for the processing of his file.

[14] In *Vairamuthu v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1557 (T.D.) (QL), the Court ruled that evidence of identity is an essential element to be considered in deciding an application for permanent residence on humanitarian and compassionate considerations, as specified in the Act and Regulations, and the immigration officer cannot waive this requirement. Therefore, the immigration officer did not err in invoking the lack of evidence of the applicant's identity in rejecting his application, and considering the warnings given to the applicant, she did not in any way infringe the principles of natural justice or procedural fairness.

[15] Finally, it is important to note that an immigration officer is not bound by the previous decisions of the Refugee Protection Division. It is up to that officer to assess and dispose of an application by relying on the evidence submitted to him or her and by taking into consideration the requirements specified in the Act and Regulations. This Court must uphold the immigration officer's decision unless it is unreasonable, which is not the case here.

IV. Assessment of the relevant factors by the officer

[16] As stated at paragraphs 29 and 30 in *Herrada, supra*, the examination of an application under subsection 25(1) of the Act involves two distinct assessments. For the purposes of the first assessment, the decision-maker must determine if the applicant has satisfied him or her that an

exemption from the requirement to apply for permanent residence from abroad is justified. An exemption is justified when an applicant shows that personal circumstances are such that he or she would sustain unusual and undeserved or disproportionate hardship if he or she were required to apply for permanent residence from outside of Canada.

[17] The second assessment involves determining whether the applicant is eligible for permanent residence in Canada.

[18] In the case at bar, the applicant alleges that the immigration officer erred in not considering certain factors when studying his application for residence, such as (1) sponsorship by Mamadou L. Sow, (2) his educational and professional background; (3) the fact that his half-sister and nephews are in Canada; and (4) letters of support from community organizations and from his employer in Canada. However, I am of the opinion that the grounds invoked by the applicant do not constitute in themselves unusual and undeserved or disproportionate hardship requiring an exception under the general scheme obliging every foreigner to apply for permanent residence in Canada from abroad.

[19] Furthermore, in this case, the applicant did not show that he would sustain unusual and undeserved or disproportionate hardship if he were to make his application from outside of Canada. It is up to the applicant to raise and establish humanitarian and compassionate considerations in support of his application, as has been decided by the Federal Court of Appeal in *Owusu v. Canada (Minister of Citizenship and Immigration)*, [2004] 2 F.C.R. 635, at paragraph 8:

> . . . And, since applicants have the onus of establishing the facts on which their claim rests, they omit pertinent information from their written submissions at their peril. In our view, Mr. Owusu's H & C application did not adequately raise the impact of his potential

> deportation on the best interests of his children so as to require the officer to consider them.

[20] In my opinion, the immigration officer weighed all the factors relevant to the applicant's application, including those invoked by him.

[21] In addition, the officer considered the following points in her decision:

> - the applicant's alleged stutter is a minor handicap and would improve as a result of treatment. In addition, the evidence does not show that the applicant is still being treated and that interrupting these treatments would cause significant harm to his physical and mental health;
>
> - the applicant's fear of being sold as a child-slave was not accepted by the Refugee Protection Division. Instead, the panel concluded that the applicant feared mistreatment at the hands of his aunt, Jacqueline. Moreover, now that the applicant is 22 years old, he cannot invoke this fear if he were to return to his country of origin.

[22] Finally, the applicant's criticism of the assessment of the evidence made by the CIC immigration officer is not valid. It is important to note that it is not up to the Court to substitute itself for the CIC officer on this point (see for example *Mann v. Minister of Citizenship and Immigration*, 2002 FCT 567):

> [11] I wish to note the able submissions of counsel for the applicant and the sympathy that, in my view, the applicant's case attracts. The sympathy evoked flows particularly from the length of time that the applicant has been in Canada, the difficulties that he has encountered and, it would appear, overcome while in Canada, his new relationship in Canada and the Canadian born child of that relationship, and, what I conclude must be an obvious reality, that the applicant is now closer to his relatives and friends in Canada than he is likely to be to his family members in India, particularly having regard to the length of time he has been absent from India and the divorce proceedings that he has instituted in India. That being said, I cannot conclude that the Immigration Officer ignored or misinterpreted evidence before her, took into account irrelevant matters or failed to consider the best interests of the applicant's Canadian born child. I am satisfied that the Immigration Officer's notes, quoted earlier in these reasons, reflect consideration of all of the factors placed before her by the

applicant and that she was bound to consider. That I might have weighed those factors differently is not a basis on which I might grant this application for judicial review.

[23] Considering the preceding, I am of the opinion that the conclusions of the CIC immigration officer are not unreasonable; accordingly, this application for judicial review is dismissed.

"Yvon Pinard"

Judge

Ottawa, Ontario
December 20, 2006

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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Date: 20061220

Docket: IMM-1460-06

Ottawa, Ontario, the 20th day of December 2006

Present: The Honourable Mr. Justice Pinard

BETWEEN :

BALLA DAVID DIARRA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER

The application for judicial review of a decision of an officer of Citizenship and Immigration Canada, dated March 3, 2006, rejecting application for permanent residence in Canada for humanitarian and compassionate considerations submitted by the applicant on August 18, 2003, is dismissed.

"Yvon Pinard"

Judge

Certified true translation
Michael Palles