Date: 20070501

Docket: IMM-5456-06

Citation: 2007 FC 456

Ottawa, Ontario, the 1st day of May 2007

Present: The Honourable Mr. Justice Maurice E. Lagacé

BETWEEN:

GHISLAIN MULOP MBAU MPULA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision dated September 13, 2006, of an immigration officer (the officer) in which she rejected the application for permanent residence based on humanitarian and compassionate considerations (H&C) made by Ghislain Mulop Mbau Mpula.

FACTS

[2] The applicant, a citizen of the Democratic Republic of the Congo (DRC), arrived in Canada on April 23, 1992.

[3] The day after his arrival, he claimed refugee protection by alleging in his Personal Information Form (PIF) that he had been a member of an opposition party in the DRC, the Parti démocratique socio-chrétien (PDSC).

[4] On February 16, 2002, during a peaceful march organized by Christians associated with the PDSC, the applicant was allegedly arrested and interrogated for 48 hours by Congolese authorities and subsequently detained for nearly a month.

[5] On October 19, 1992, the former Convention Refugee Determination Division (CRDD) rejected the applicant's claim for refugee protection for the first time.

[6] On June 4, 1993, the Federal Court set aside the CRDD decision dated October 19, 1992, and referred the case back to a differently constituted panel of the CRRD for rehearing and redetermination.

[7] On February 14, 1994, the CRDD once again rejected the applicant's claim, concluding that his narrative lacked credibility.

[8] On November 1, 1994, the Federal Court dismissed the applicant's application for judicial review of the latest decision of the CRRD.

[9] On February 19, 1996, the applicant's risk-of-return application as a member of the "Post-Determination Refugee Claimants in Canada" (PDRCC) class was rejected.

[10] On October 9, 1996, a warrant of arrest was issued against the applicant because he failed to attend an interview scheduled for May 21, 1996, to make arrangements for his departure from Canada.

[11] On March 3, 1997, the applicant was arrested, detained and then released on June 3, 1997, after a temporary moratorium on removals to the DRC was decreed.

[12] On October 29, 1999, a second warrant of arrest was issued against the applicant following his declaration that he had received a social insurance number and card as a permanent resident. He was arrested on December 1, 1999, and released that same day.

[13] On January 25, 2000, the applicant made an H&C application for permanent residence based on humanitarian and compassionate grounds. He updated his application twice, that is, on June 30, 2006, and July 26, 2006.

[14] On September 13, 2006, the officer rejected the H&C application. In her decision, the officer concluded that the applicant had not established the existence of a personalized risk which would cause him unusual and undeserved or disproportionate hardship if he had to apply for permanent residence from outside Canada.

[15] In his challenge of the decision regarding the H&C application, the applicant criticizes the officer for not having adequately assessed his personal situation, arguing that he would still be in danger if he returned to the DRC.

[16] The respondent submits that the decision in question contained no error of fact or of law and that the applicant's application should be dismissed.

[17] **ISSUES**

(1) What is the standard of review applicable to H&C decisions?

(2) Did the officer breach procedural fairness in her assessment of the H&C application because the applicable assessment criteria are not well defined?

(3) Did the officer err in her appreciation of the applicant's personal situation?

(4) Did the officer err in assessing the situation in the DRC?

(5) Does the officer's decision infringe sections 7 and 12 of the *Canadian Charter of Rights and Freedoms*?

ANALYSIS

[18] **What is the standard of review applicable to decisions concerning humanitarian and compassionate considerations?**

[19] In *Baker v. Canada (Minister of Citizenship and Immigration)*, 2 S.C.R. 817 at pages 857-858, the Supreme Court of Canada determined that on judicial review of a decision of an officer of the Minister rejecting an H&C application, the applicable standard of review is reasonableness *simpliciter*. Although *Baker* was decided under the former *Immigration Act*, R.S.C., c. I-2, there is nothing that would warrant applying a different standard of review. Moreover, recent case law of this Court confirms that the standard of review applicable to a decision rejecting an H&C application is reasonableness *simpliciter* (*Kaur v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1192 at paragraph 13; *Liang v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 967 at paragraph 7; *Dharamraj v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 674).

[20] However, the Federal Court of Appeal has determined that the standard of review applicable to questions of procedural fairness is always correctness (*Sketchley v. Canada (Attorney General)*, 2005 FCA 404 at paragraph 46). Therefore, this standard of review will apply to the second issue.

[21] Did the officer breach procedural fairness in her assessment of the H&C application because the applicable assessment criteria were not well defined?

[22] The applicant submits that the assessment criteria for H&C applications are not well defined and may vary from one officer to another. According to him, an officer is therefore free to assess an H&C application as he or she wishes, and it is difficult for legal counsel to know what criteria will be used and how much weight will be attached to each criterion.

[23] In answer to this argument, it is useful to underline the fact that section 25 of the IRPA grants discretionary authority to the Minister to grant an H&C application where humanitarian and compassionate considerations warrant it. This provision reads as follows:

> **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.
>
> [Emphasis added]

> **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.
> [Je souligne]

[24] In addition, *Manual IP-5–Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds* establishes certain guidelines for Minister's delegates, who are tasked with assessing H&C applications. One of these guidelines provides that an H&C application will be

granted only in situations in which an applicant establishes that he or she would face unusual and undeserved or disproportionate hardship if he or she were to be removed to his or her country of origin. This guideline is now recognized in decisions of this Court (*Liniewska v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 591 at paragraph 16; *Ruiz v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 465 at paragraph 35; *Kawtharani v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 162 at paragraph 16).

[25] Accordingly, while Manual IP-5 remains an important tool for Minister's delegates called upon to assess H&C applications, it is not binding on them as such. Case law has clearly established that guidelines are only administrative documents which do not create any substantive right or expectation (*Oberlander v. Canada (Attorney General)*, 2004 FCA 213 at paragraph 30; *Byer v. Canada*, 2002 FC 518, affd 2002 FCA 430).

[26] It should be noted that the Supreme Court has ruled that a Minister's delegate must assess an H&C application in light of all relevant factors and that a court called upon to review the decision of a delegate must uphold it even if the assessment of relevant factors could have been done differently (see *Baker v. (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraphs 54-56, 68, 73-75; *Suresh v. (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paragraphs 34-38, *Legault v. (Minister of Citizenship and Immigration*), [2002] 4 F.C. 358, 369 (F.C.A.).

[27] In the case at bar, the officer tasked with assessing the exemption request considered and analyzed all humanitarian and compassionate considerations invoked by the applicant before

concluding that none of them warranted an exemption from application of the IRPA. Insofar as section 25 of the IRPA grants a discretionary power to the Minister, the Court does not see how a breach of procedural fairness could result from the mere fact that the assessment criteria for an H&C application may vary from one application to another.

[28] Did the officer err in her appreciation of the applicant's situation?

[29] The applicant submits that the officer did not take adequate account of his personal situation, particularly the fact that he is well integrated into Canadian society, when she concluded that there were no humanitarian or compassionate considerations which would warrant an exemption from the application of the IRPA. The applicant submits that the fact that he has been in Canada for nearly 15 years and that his sister is also a refugee in Canada proves his integration into Canadian society.

[30] As far as the officer's assessment of the duration of the applicant's stay in Canada is concerned, the case law is clear: this criterion is not in itself sufficient to warrant issuing a permanent resident visa on humanitarian and compassionate grounds (*Klais v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 785 at paragraph 11; *Lee v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 413 at paragraph 9).

[31] Furthermore, in cases where an applicant has been in Canada for a long time because of circumstances beyond his or her control—such as in this case, as a result of the moratorium on removals to the DRC—the Court's case law acknowledges the necessity of proving a significant

degree of integration to be entitled to a favourable H&C decision. "[A] moratorium on removals to Congo does not in and of itself prevent the H&C application from being denied" (*Mathewa v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 914, at paragraphs 7-9; *Nkitabungi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 331).

[32] The officer does not appear to have erred in determining that the applicant did not meet the establishment criterion even though he has been in Canada for nearly 15 years. In her decision, she referred to the fact that most of the applicant's family members are still in the DRC and that he has no family in Canada except for his sister and her spouse. In addition, she underlined the fact that he does not have any savings or property in Canada and has not found stable employment. These are all negative factors in the assessment of the H&C application. Considering the evidence submitted by the applicant, the officer's conclusions about his establishment in Canada seem reasonable and certainly do not warrant intervention by this Court.

[33] Did the officer err in assessing the situation in the DRC?

[34] The applicant submits that the officer did not adequately assess the situation in the DRC.

[35] It is important to note that in her decision the officer acknowledged that the situation in the DRC is difficult and involves risks. However, she concluded that the applicant did not show that he would be subject to a personalized risk if he were to be removed to the DRC. A study of the file and the submissions made does not show that it was unreasonable to conclude, as the officer did, that

there was no personalized risk. The file and the applicant's submissions only mention a generalized danger and a difficult situation in the DRC.

[36] However, it must not be forgotten that there is still a temporary suspension of removals to the DRC, which the officer could not ignore. Accordingly, even if she were to reject the applicant's H&C application, she was aware that the applicant would not be removed to the DRC until the moratorium on removals to this country ended.

[37] Did the officer's decision infringe sections 7 and 12 of the *Canadian Charter of Rights and Freedoms?*

[38] Case law clearly shows that the removal of a person from Canada is not contrary to the principles of fundamental justice and that the enforcement of a removal order is not contrary to sections 7 and 12 of the Charter (*Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711, pages 733-735; see also *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539 at paragraph 46). Therefore, the applicant's argument to the effect that officer's decision infringes the Charter is unfounded.

Conclusion

[39] In light of the preceding reasons, the Court does not see any serious ground for intervening in this case. Accordingly, the application for judicial review must be dismissed.

[40] The applicant submits the following questions for certification:

> [TRANSLATION]
> (1) Given the IP-5 guidelines, should the fact that a person has been residing for more than five years in Canada without having a criminal record, having a criminal record [*sic*], holding employment and demonstrating economic establishment, not create an unequivocal or very serious favourable presumption in the case of an application based on humanitarian and compassionate considerations?
>
> (2) Does the fact that there has been a moratorium on removals to the DRC for 10 years and that this country suffers from massive and systematic abuse of human rights not constitute unusual and undeserved or disproportionate hardship within the meaning of the IP-5 guidelines when considering an application based on humanitarian and compassionate considerations made by a Congolese person affected by the moratorium?

[41] The Court is satisfied that the questions proposed by the applicant for certification do not meet the criteria for certification for the reasons submitted by the respondent in his letter dated April 27, 2007.

[42] The Court must not certify these questions for the purposes of an appeal without justification. As the respondent has rightly noted in his letter, the applicant's letter dated April 25, 2007 does not establish how the questions proposed for certification meet the criteria established by the Federal Court of Appeal and constitute serious questions of general importance within the meaning of paragraph 7(*d*) of the IRPA. This reason is in and of itself sufficient to refuse the requested certification without the Court's having to speculate about or respond to reasons which the applicant did not think worth mentioning in his application for certification

[43] Nevertheless, it may be worth noting that while in his first question the applicant is suggesting that the Court create for the purposes of section 25 of the IRPA an automatic presumption contrary to the objective of this section as specified by Parliament, the Court does not see how such a proposal could succeed.

[44] With regard to the second question, which concerns a temporary suspension of removals to the DRC, *Mathea* and *Nkitabungi* already hold that a temporary suspension of removals does not in itself prevent an application on humanitarian and compassionate considerations from being rejected. To decide otherwise would mean that each time a country is the subject of a temporary suspension of removals, an application made by a citizen of that country would automatically be accepted, no matter what the applicant's degree of establishment. This is a question of fact which, according to the Act, is within the decision-maker's discretion.

[45] For these reasons, the Court refuses to certify the questions submitted.

JUDGMENT

THE COURT ORDERS THAT the application for judicial review is dismissed, and no question is certified.

"Maurice E. Lagacé"
Deputy Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Stewart Istvanffy	FOR THE APPLICANT
Thi My Dung Tran	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Istvanffy, Vallières et Associés Montréal, Quebec	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT