Date: 20070710

Docket: IMM-4800-06

Citation: 2007 FC 731

Ottawa, Ontario, the 10th day of July 2007

PRESENT: THE HONOURABLE MR. JUSTICE BLANCHARD

BETWEEN:

DOMINIQUE MUTOMBO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

1. Introduction

[1] This is an application for judicial review of a decision dated August 8, 2006, by a Pre-Removal Risk Assessment Officer (PRRA Officer), rejecting the applicant's request for an exemption from the requirement to submit an application for permanent residence from outside Canada (H&C application).

2. Facts

[2] The applicant, Mr. Dominique Mutombo, is a citizen of the Democratic Republic of the Congo (DRC). He arrived in Canada on October 23, 2002, and made a claim for refugee protection because he feared persecution in his country of origin by reason of his real or perceived political opinions.

[3] In November 2003, the Immigration and Refugee Board (IRB) rejected this claim. An application for judicial review of this decision was dismissed by this Court.

[4] On May 26, 2005, the applicant filed an H&C application, based principally on his integration into Canada and the risk that he would face were he to be removed to DRC.

[5] In this context, the applicant emphasized the facts that he had earned a diploma after four years of study at the University of Kinshasa (1995–1999) and a diploma after three years of study at the Institut supérieur de commerce de Kinshasa (1999–2002). He also claimed to be well established in Canada, where he has many friends and has had regular employment since 2003.

[6] The applicant also claimed to be a member of the Union for Democracy and Social Progress (UDPS) since April 2003 and to have been a member of the Original National Progress Party (PNPO) from May 1995 to April 2003. The applicant also maintained that he was arrested in 1997 following a march organized by the UDPS and the Unified Lumumbist Party (PALU) and that he was tortured while detained and was accused of being a Mobutu supporter and of

being involved in planning a coup d'état. The applicant added that he was friend of a nephew of former president Mobutu. He also claimed that he was arrested by soldiers in 2002 while attempting to cross into the Republic of the Congo, the new Zaire, with a large amount of money intended for the rebels. He claimed that, following his arrest, he was interrogated, tortured and charged with high treason before escaping from prison.

[7] It should be noted that a temporary stay on removals to DRC is currently in force. Consequently, the applicant is not required to leave Canada despite the existence of a removal order against him.

3. Impugned decision

[8] The PRRA Officer found that the applicant had not restored his credibility since the IRB's decision. More specifically, the Officer stated that he was in agreement with the IRB on the issue of identity documents. He noted that, since the IRB hearing, the applicant had submitted academic documents from DRC showing that the applicant was born on May 30, 1974 in Kinshasa. However, the Officer found that these documents had no probative value because it was not sufficiently clear that any documents that were [TRANSLATION] "reliable…[and] of probative value were submitted to academic officials as proof of the applicant's date and place of birth".

[9] The Officer drew attention to the fact that a number of the documents submitted by the applicant in his H&C application were deemed not credible by the IRB. These documents are as follows: the applicant's story, appended to his Personal Information Form (PIF); a letter from his

father, with the date removed; a copy of the by-laws of the Original National Progress Party (PNPO) in Canada from 1992; a letter from the PNPO in Canada dated September 16, 2003, and a letter from the UDPS dated October 14, 2003.

[10] Although the documentary evidence reveals acts of repression and political violence in DRC, the Officer found that the applicant had not proven that he would be personally exposed to a risk of serious ill treatment or of persecution were he to be removed to DRC. The Officer also noted that, although conditions in DRC have improved, the applicant will not be removed to DRC because of the temporary stay on removals.

[11] The Officer concluded that the applicant had not shown that leaving Canada would cause disproportionate, unusual or undeserved hardship [TRANSLATION] “if he continued to take advantage of the temporary stay on removals to DRC, without being exempted from the rule so that he can apply for permanent residence from within Canada”.

4. Issues

[12] The present application for judicial review raises the following issues:

A. Did the Officer properly assess the documentary evidence?

B. Did the Officer properly apply the guidelines for assessing H&C applications?

C. Did the Officer take into account the risk to the applicant if he were returned to his country of origin?

5. Standard of Review

[13] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, Madam Justice Claire L'Heureux-Dubé noted that a request for an exemption from the requirement to apply for permanent residence from outside Canada is special relief that is purely discretionary. Therefore, L'Heureux-Dubé J. found that the appropriate standard of review for requests for an exemption is reasonableness *simpliciter*.

[14] For issues dealing with the assessment of facts and the determination of credibility, the standard of review is patent unreasonableness (*Aguebor v. Canada (Minister of Employment and Immigration)*, 1993 F.C.J. No. 732 (QL)).

6. Analysis

A. *Did the Officer properly assess the documentary evidence?*

[15] The applicant claims that the Officer erred in rejecting the student identity card as proof of identity. With regard to this issue, the PRRA Officer wrote that it [TRANSLATION] "is not sufficiently clear whether reliable documents of probative value were submitted to academic officials as proof of the applicant's date and place of birth". More specifically, the PRRA Officer found that the applicant had not provided sufficient information to restore his credibility concerning key incidents and the allegations of persecution on which his claim for protection was based, that he had not provided any persuasive documents to prove his nationality or citizenship, and that he had made no effort to obtain a passport.

[16] To support his claims, the applicant cites *Ramalingam v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 10 (QL), a judgment supporting the principle that identity documents issued by a foreign government are presumed to be valid unless evidence is produced to prove otherwise. In this case, the applicant maintains that the Officer did not rely on any expertise or outside evidence to reject the identity card issued by the educational institution, and that the Officer, himself, did not have the necessary expertise on this subject.

[17] The respondent argues that it was reasonable for the Immigration Officer to find that simple school documents, provided by the applicant after his hearing before the IRB, were not sufficient to set aside the IRB's findings concerning his identity. With regard to this issue, the IRB had found that the applicant's testimony about his situation in DRC was implausible and inconsistent and contained significant omissions. The IRB had therefore dismissed the applicant's testimony relating to the alleged risks to himself, namely, persecution and serious ill treatment due to his perceived political opinions. The IRB had also rejected the proofs of identity submitted by the applicant, namely, a birth certificate issued in 1999 and an identity card issued in 1998.

[18] I have carefully reviewed the *Ramalingam* decision, to which the applicant referred, without, however, finding that the presumption of validity applies. In fact, I doubt that this presumption would apply in this case, because the evidence does not show that this student identity card was an identity document issued by a foreign government.

[19] I am, however, of the opinion that the PRRA Officer's decision to exclude the proof of identity, issued by an educational institution and submitted by the applicant after his hearing before the IRB, was patently unreasonable. In fact, I believe that this finding was based on purely speculative reasoning, in that it was not in any way supported by the evidence in the file.

[20] In this case, the PRRA Officer excluded the new evidence submitted by the applicant without having investigated the authenticity of the document in any way, for the sole reason that he doubted the reliability of the sources to which the academic officials had referred in issuing the document in question. There is no evidence in the file showing that the academic officials referred to non-reliable documents in issuing the above-mentioned document. Consequently, I have no choice but to find that the PRRA Officer's decision to reject the academic document was perverse and capricious.

[21] The Officer gave a lot of weight to the IRB decision and the issue of the applicant's identity. Moreover, he emphasized in his reasons that the IRB had noted the applicant's failure to provide an academic document that could confirm that the applicant had attended university courses. The identity card from the educational institution is *prima facie* evidence of the applicant's attendance at an academic institution in DRC and of his date and place of birth. It is difficult for this Court, in the context of an application for judicial review, to determine to what extent this evidence, had it been accepted, would have helped the applicant to "restore" his credibility in the eyes of the PRRA Officer. However, insofar as this evidence relates to the fundamental issue of the applicant's identity, a significant factor in the IRB's and the PRRA

Officer's credibility findings, I am of the opinion that the absence of any reasons justifying the decision not to grant probative value to the identity card constitutes a reviewable error.

[22] For these reasons, the application for judicial review is allowed, the PRRA Officer's decision is set aside, and the matter will be referred for reconsideration by a different PRRA officer in accordance with the present reasons.

B. *Did the Officer properly apply the guidelines for assessing H&C applications?*

[23] Given the preceding reasons, it is not necessary to consider the other two issues raised by the applicant. However, with regard to the second issue, I would like to make the following comments.

[24] The applicant claims that the Officer confused his duties, carrying out a risk assessment rather than a review of humanitarian and compassionate grounds. More specifically, the applicant claims that the Officer carried out an analysis of his credibility and assessed the probative value of the identity documents, but that he paid very little attention to the applicant's involvement in Canadian society. The applicant also maintains that the Officer noted the existence of a number of letters of support, the applicant's involvement in the community, the soundness of his financial position and his self-sufficiency, only to conclude that he had [TRANSLATION] "not sufficiently shown that leaving Canada would cause disproportionate, unusual or undeserved hardship for him or anyone else in Canada or DRC". The applicant claims that the Officer should have explained why all of the applicant's professional experience and his public support were not sufficient evidence of his involvement in Canadian society. Moreover,

he argues that the criteria for reviewing applications outlined in the IP 5 Guidelines create a legitimate expectation among applicants that their applications will be reviewed accordingly.

[25] The respondent is not challenging the applicability of the criteria in the IP 5. Rather, he argues that the PRRA Officer adhered to the criteria in question. The respondent also submits that the applicant focussed on the danger to himself in his written submissions. For example, counsel for the applicant, in a letter accompanying his submissions, stated the following:

> [TRANSLATION]
>
> Mr. Mutombo is well established in Canada. He has many friends and a secure job. If he returns to DRC, he will once again be arrested and tortured and be at risk of an extrajudicial execution. We maintain that Mr. Mutombo's return to his country of origin would put his life at risk. It is for his safety that we request that he please be granted permanent residence on humanitarian and compassionate grounds.

[26] A decision concerning an application made on humanitarian or compassionate grounds must be based on an analysis of the facts and the balancing of a number of factors. In this case, the PRRA Officer claimed to have considered the letters of support submitted by the applicant, his involvement in the community, his presence in Canada for more than three years, his certificates of employment, the soundness of his financial position and the fact that he is able to support himself. The PRRA Officer simply listed these facts before finding that the applicant had not shown that leaving Canada would cause him disproportionate, unusual or undeserved hardship, without explaining why this evidence had not demonstrated the applicant's establishment in and integration into Canada.

7. Certified question

[27] The applicant submitted the following question to be certified:

> [TRANSLATION]
>
> - Do the moratorium on removals to DRC, in force for ten years, and the systematic and widespread human rights abuses perpetrated there together constitute disproportionate, unusual or undeserved hardship, within the meaning of the IP 5, in the context of an application for permanent residence on humanitarian and compassionate grounds made by a Congolese affected by the moratorium?

[28] The Federal Court of Appeal stated in *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89 at paragraph 11, that a question will be certified if it is of general importance and would be dispositive of an appeal.

[29] I am of the opinion that this question should not be certified because it would not be dispositive of an appeal.

[30] Furthermore, I note that a similar question was posed recently in *Nkitabungi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 331; in that decision, at paragraphs 16 and 17, Mr. Justice Luc Martineau refused to certify the question for the following reasons:

> At the close of the hearing, counsel for the applicant submitted the following question for certification:
>
> [TRANSLATION]
>
> Is it not possible to find that the requirement to apply for a permanent resident visa on humanitarian and compassionate grounds from an applicant's country of origin constitutes "disproportionate hardship" when the applicant has lived in Canada for more than five years

> without having any problems with the law and is a citizen of a country for which a stay on removals has been ordered by Canadian authorities, and that, consequently, all officers must justify rejection of this favourable presumption?

The Officer's finding concerning insufficient evidence of a significant degree of establishment in Canada is, above all, a finding of fact. In this case, this finding is determinative, notwithstanding the above question. In passing, I note that the decision to impose a temporary stay on removals to a country is under the Minister of Public Safety's jurisdiction while the decision made by the Officer regarding an application on humanitarian and compassionate grounds falls within the Minister of Citizenship and Immigration's powers. These two decisions are the concern of two completely different Ministers. In addition, as I made clear earlier, the caselaw shows that a temporary stay on removals does not in and of itself prevent an application made on humanitarian and compassionate grounds from being denied (*Mathewa*, *supra*, para. 9).

ORDER

THE COURT ORDERS:

1. The application for judicial review be allowed.

2. The PRRA Officer's decision be set aside and the matter be referred for reconsideration by a different PRRA officer in accordance with these reasons.

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

"Edmond P. Blanchard"
Judge

Certified true translation
Gwendolyn May, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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