Date: 20071018

Docket: IMM-290-07

Citation: 2007 FC 1062

Ottawa, Ontario, the 18th day of October 2007

Present: the Honourable Mr. Justice Shore

BETWEEN:

ABDRAMANE DIALLO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

PRELIMINARY

[1] The burden is on the applicant to show that he would encounter disproportionate, unusual or undeserved hardship if he had to return to Guinea to make a permanent residence application there.

[2] [12] It is also a well-recognized principle that it is insufficient simply to refer to country conditions in general without linking such conditions to the personal situation of an applicant (see, for example, *Dreta v. Canada* (*Minister of Citizenship and Immigration)*, 2005 FC 1239, and *Nazaire v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 416).

This was specified by J. François Lemieux J. in *Hussain v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 719, [2006] F.C.J. No. 916 (QL).

[3] The case law on this point is clear. In *Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] F.C.J. No. 158:

> [5] . . . an applicant has the burden of adducing proof of any claim on which the H&C application relies. Hence, if an applicant provides no evidence to support the claim, the officer may conclude that it is baseless.

INTRODUCTION

[4] This is an application for leave from a decision by the decision-maker, C. Rebaza, on November 29, 2006 denying the applicant Abdramane Diallo his application for permanent residence on humanitarian and compassionate grounds (H&C).

[5] Mr. Diallo is seeking an exemption from the requirement that he submit his application for permanent residence from outside Canada, as he alleges he is not safe in Guinea.

FACTS

[6] Mr. Diallo is 29 years old and single. He lived in Mali from the age of nine onwards and returned to Guinea in 1999. He has two brothers who it appears are in Guinea with his mother.

[7] Mr. Diallo lived at N'Zérékoré, in Guinea, and had a grain business with his father and his older brother Modibo.

[8] In September 2000 threats by the rebels of the Front Uni Révolutionnaire allegedly caused the inhabitants of Mr. Diallo's village to flee. In February 2001 he said he was able to leave the area with his mother and younger brother and go to Conakry. Mr. Diallo said he then left for abroad alone, as his mother and brother did not have the means to accompany him. He said that at that time they went to Mali, while his father and older brother remained in Guinea.

[9] He said he left his country on account of [TRANSLATION] "the opposition of the rebels to the existing government, and in particular to the power conferred on the current President Lassane Conte". He arrived in Canada on April 6, 2001 and claimed refugee status on April 23, 2001.

[10] The hearing before the Refugee Protection Division (RPD) took place on August 29, 2002. Mr. Diallo alleged a fear of persecution on account of his membership in a particular social group, a risk of torture and danger to his life and a risk of being subjected to cruel and unusual treatment or punishment. He explained he feared being recruited by the rebels against his will and alleged he also feared the army.

[11] On September 23, 2002 the RPD dismissed Mr. Diallo's refugee status application on account of a lack of credibility in his testimony. The panel considered that Mr. Diallo's inability to

prove his identity had a direct effect on the credibility of the application and concluded that he was not a Convention refugee nor a person in need of protection.

[12] Mr. Diallo alleged persecution [TRANSLATION] "on account of the deterioration in the existing situation in Guinea and forced recruitment". He also said he feared [TRANSLATION] "threats to his life and safety due to the risk of attack and situations of distress and destitution and other disproportionate hardships". He also said he feared the poverty which was everywhere in the country and being a victim of attacks as he would be seen as a foreigner when he arrived.

Establishment in Canada

[13] Mr. Diallo began working in December 2001 shortly after his arrival, and is still employed by the same employer. His annual employment income rose from $17,939 in 2003 to $18,223 in 2005, according to his notices of assessment. He did not send the copies for earlier years, but according to the immigration consultant's observations, he received last resort assistance benefits.

[14] According to Mr. Diallo's affidavit, he provided financial help to his mother and two brothers, who were in Guinea. The invoices indicated that he had sent money to Mali regularly at least since July 2002 and since July of this year he had made remittances to Guinea. However, the names of the addressees are always different and do not correspond to the names of the members of his family indicated on his Personal Information Form (PIF). Additionally, Mr. Diallo already stated on his PIF in June 2001 and in the update of his permanent residence application (PRA) in March

2006 that he did not know where his parents and brothers were. On account of these ambiguities, even if Mr. Diallo is supporting his family in Guinea financially, this has not been the case for very long as up to March of this year he did not know where they were.

IMPUGNED DECISION

[15] The pre-removal risk assessment officer (PRRA) assessed the humanitarian grounds to determine whether Mr. Diallo should be exempted from the statutory requirement that he apply for an immigrant visa before coming to Canada (subs. 11(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 – the Act).

[16] The officer concluded that the information submitted in support of the H&C application did not establish that Mr. Diallo would encounter unusual, undeserved or disproportionate hardship in filing his permanent residence application in the usual way, that is from outside Canada.

ANALYSIS

<u>Standard of review applicable to H&C applications</u>

[17] The standard of review applicable to H&C applications is reasonableness *simpliciter.* This standard was formulated by Frank Iacobucci J. in *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748:

> [56] . . . 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.
>
> [Emphasis added.]

(See also *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247.)

[18] In order to benefit from the exceptional treatment referred to in section 25 of the Act, an applicant must persuade an officer who has to make a decision on the H&C application that he would encounter unusual, undeserved or disproportionate hardship if he had to leave Canada and make his visa application from abroad.

[19] According to the Supreme Court of Canada, what is important for an officer making a decision on an H&C application is to take all the relevant factors into account and assess them in accordance with the Act. When he acts in keeping with these precepts, the review panel must uphold his decision, even if its assessment of the factors might have been different (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] S.C.J. No. 3 (QL)).

[20] On the burden which an H&C applicant must discharge, Lemieux J. repeated the following in *Hussain, supra*:

> [10] It is clear the applicants have the onus of establishing the facts on which their H&C claim rests. As pointed out by Justice Evans, on behalf of the Federal Court of Appeal in *Owusu* v. *Canada (Minister of Citizenship and Immigration)*, [2004]

> F.C.J. No. 158, “they omit pertinent information from their written submissions at their peril.” Justice Evans stated that an immigration officer in considering H&C applications must be “alert, alive and sensitive” to and must not “minimize” the best interests of children who may be adversely affected by a parent's deportation. He added, “however, this duty only arises when it is sufficiently clear from the material submitted to the decision-maker that an applicant relies on this factor, at least in part. Moreover, an applicant has the burden of adducing proof of any claim on which the H&C application relies. Hence, if an applicant provides no evidence to support the claim, the officer may conclude that it is baseless.”

[21] In the case at bar, the PRRA officer assessing Mr. Diallo’s application for an exemption considered all the reasons alleged by him, made a complete analysis of them and concluded that there was no humanitarian ground to justify an exemption from enforcement of the Act.

[22] The criteria for assessing the degree of establishment are set out in section 11.2 of Guide IP5 of Citizenship and Immigration Canada, titled “Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds” (Guide IP5 – Appendix A):

- Does the applicant have a history of stable employment?
- Is there a pattern of sound financial management?
- Has the applicant integrated into the community through involvement in community organizations, voluntary services or other activities?
- Has the applicant undertaken any professional, linguistic or other study that show integration into Canadian society?
- Do the applicant and family members have a good civil record in Canada?

[23] In the case at bar, it is clear that the officer considered the relevant factors in assessing the H&C application. His decision was based on the following:

- the officer referred to the time the applicant has spent in Canada, namely five and a half years;
- the officer noted that the applicant had worked for the same employer since 2001 and appeared to be self-supporting;
- the officer noted that the applicant claimed to be sending money to his family: however, he observed that the remittances did not correspond to the names of the members of his family entered on his PIF; further, the applicant had indicated he did not know where the members of his family were; as a result of these inconsistencies, the officer found that this point was not conclusive;
- the applicant had no family in Canada: however, he had put down roots and had made friends; he was part of a soccer team.

[24] In view of the foregoing, the officer concluded that Mr. Diallo had made efforts to support himself, had put down roots, but these factors were not extraordinary; they were not conclusive as to the granting of an exemption; and making a visa application would not cause him unusual, disproportionate or undeserved hardship.

[25] In using the adjective [TRANSLATION] “extraordinary”, the officer did not require that the degree of establishment be “extraordinary”. He simply indicated that the degree of establishment would not cause him unusual, disproportionate or undeserved hardship.

[26] Mr. Diallo considered that the officer had made an error in assessing the various factors concerned in the degree of establishment. He maintained that he met all the criteria, namely he was in a sound financial position, he paid his taxes, he was part of a soccer team, he spoke French well and so on. In his submission, the officer should have recognized that he had a sufficient degree of establishment.

[27] In fact, Mr. Diallo is essentially asking this Court to reassess all the evidence and to make a different decision.

[28] However, it is not the Court's function to reassess facts which were put before the officer (*Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] F.C.J. No. 457 (QL), para. 11; *Lim v. Canada (Minister of Citizenship and Immigration)*, 2002 FCTD 956, [2002] F.C.J. No. 1250 (QL), para. 20).

[29] It appeared from the H&C decision that the PRRA officer reviewed all the evidence submitted by Mr. Diallo in support of his H&C application.

[30] It was entirely a matter for the officer, not the applicant, to decide on the weight to be given to each of the various points submitted by the applicant, based on the evidence before him. Mere disagreement as to the weight given to the various points submitted is not sufficient to warrant this Court's intervention.

[31] The officer's conclusions were reasonable and were based on the evidence. Assessment of the evidence is within the discretion of the officer, who is a person with expertise.

[32] In *Uddin v. Canada (Minister of Citizenship and Immigration)*, 2002 FCTD 937, [2002] F.C.J. No. 1222 (QL), Edmond Blanchard J. explained that H&C applications cannot be based on the fact that the applicants have become model figures in Canadian society. Instead, the test is to consider whether making a permanent residence application from abroad would cause them disproportionate or undeserved hardship:

> [21] The applicant further contends that the officer did not examine the totality of the evidence regarding establishment. **The applicant argues that the officer had sufficient evidence before her to conclude that the applicant was established in Canada. In this regard, the officer determined that the applicant had some level of establishment but she was not satisfied that this level of establishment outweighed other factors respecting hardship**.
>
> [22] The applicant has the onus of proving that the requirement to apply for a visa from outside of Canada would amount to unusual, undue or disproportionate hardship. **The applicant assumed the risk of establishing himself in Canada while his immigration status was uncertain and knowing that he could be required to leave. Now that he may be required to leave and apply for landing from outside of Canada, given that he did assume this risk, the applicant cannot now contend, on the facts of this case, that the hardship is unusual, undeserved or disproportionate**. The words of Mr. Justice Pelletier in *Irmie v. M.C.I.* (2000), 10 Imm. L.R. (3d) 206 (F.C.T.D.), are applicable to this case:
>
>> **I return to my observation that the evidence suggests that the applicants would be a welcome addition to the Canadian community. Unfortunately, that is not the test. To make it the test** is to make the H&C process an *ex post facto* screening device which supplants the screening process contained in the *Immigration*

> *Act* and Regulations. This would encourage gambling on refugee claims in the belief that if someone can stay in Canada long enough to demonstrate that they are the kind of persons Canada wants, they will be allowed to stay. **The H&C process is not designed to eliminate hardship; it is designed to provide relief from unusual, undeserved or disproportionate hardship**. **There is no doubt that the refusal of the applicants' H&C application will cause hardship but, given the circumstances of the applicants' presence in Canada and the state of the record, it is not unusual, undeserved or disproportionate hardship**.
>
> [Emphasis added.]

[33] As indicated in paragraph 13 of that judgment: "The process is one which is highly discretionary, and as such, the onus is on the applicant to satisfy the immigration officer that there are sufficient humanitarian and compassionate grounds to warrant a favourable recommendation".

Officer applied correct test in assessing H&C application

[34] Mr. Diallo argued that the officer misapplied the PRRA test, that is, the applicant should present evidence of a personalized risk.

[35] The officer properly assessed Mr. Diallo's H&C application by applying the tests developed by the courts in this connection and the guidelines set out in Guide IP-5.

[36] It appears from the officer's reasons that the test applied was determining whether making his permanent residence application from abroad would cause Mr. Diallo unusual, undeserved or disproportionate hardship. The officer did not ignore the evidence before him and did not apply the wrong test.

[37] In *Legault*, *supra*, the Federal Court of Appeal reviewed section 6.1 of Guide IP-5 under the old *Immigration Act*, R.S.C. 1985, c. I-2 (corresponding to sections 6.5 to 6.7 of the present Guide) to determine the meaning that should be given to the term "humanitarian and compassionate grounds" and how this should be established:

> [23] Paragraph 6.1 defines what is meant by "humanitarian and compassionate grounds":
>
>> Applicants making an application under R2.1 are requesting processing in Canada due to compassionate or humanitarian considerations. Subsection R2.1 provides the flexibility to approve deserving cases for processing within Canada, the circumstances of which were not anticipated in the legislation.
>>
>> Applicants bear the onus of satisfying the decision-maker that their personal circumstances are such that the hardship of having to obtain an immigrant visa from outside of Canada in the normal manner would be (i) unusual and undeserved or (ii) disproportionate. Applicants may present whatever facts they feel are relevant.
>>
>> The following definitions are not meant as "hard and fast" rules; rather, they are an attempt to provide guidance to decision makers when they exercise their discretion in determining whether sufficient H&C considerations exist to warrant the requested exemption from A9(1).
>>
>> Unusual and undeserved hardship
>>
>> The hardship (of having to apply for an immigrant visa from outside of Canada) that the applicant would face should be, in most cases, unusual. In other words, a hardship not anticipated by the Act or Regulations, and
>>
>> The hardship (of having to apply for an immigrant visa from outside of Canada) that the applicant would face should be, in most cases, the result of circumstances beyond the person's control.

[38] In *Monemi v. Canada (Solicitor General)*, 2004 FC 1648, [2004] F.C.J. No. 2004 (QL), Johanne Gauthier J. said the following regarding the test to be used in assessing risk in connection with an H&C application:

> [39] The main issue on this H&C application is also quite different from the one to be determined on a PRRA application under section 112. With respect to the H&C application, the decision-maker had to determine if Mr. Monemi would experience unusual and undeserved, or disproportionate hardship if he were to return to Iran to apply for a permanent resident visa. This concept encompasses much more than the narrow requirements relevant to a PRRA application [See Note 4 below], namely, those set out in sections 96 and 97 of IRPA. **Not only does unusual, undeserved, or disproportionate hardship include non-risk elements but it also includes risk elements that may not qualify under sections 96 and 97, such as for example, discrimination that may not amount to persecution.**
>
> [Emphasis added.]

[39] In view of the foregoing, when an applicant makes an H&C application with allegations of risk, there must be an analysis of that risk to determine whether making his H&C application from outside of Canada would cause him undue, unusual or disproportionate hardship. This is precisely the analysis which the PRRA officer made in assessing Mr. Diallo's H&C application (*Jeon v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 87, [2006] F.C.J. No. 105 (QL), para. 28).

[40] Contrary to what was argued by Mr. Diallo, the officer took into account all the personal circumstances relating to allegations of risk and disproportionate hardship made by him in his application pursuant to the principles set forth in *Legault, supra*. The officer's reasons contain the following:

> [TRANSLATION]
>
> Mr. Diallo alleged risks involved in a return as a result of deterioration of the present situation in Guinea, and in particular he feared forced recruitment, attacks and situations of distress . . .
>
> . . . . .
>
> . . . the alleged fears resulted from the present situation in Guinea and are shared by all its people. Moreover, the documentary evidence presented did not support the existence of any risk to the applicant. It did not relate to his particular situation and did not show that he was part of a group that was targeted or at risk in his country. Accordingly, I consider that these documents do not have any evidentiary force in supporting Mr. Diallo's allegations.
>
> . . . . .
>
> . . . **I consider that the applicant has not shown that leaving Canada to file a visa application abroad would cause him unusual, undeserved or disproportionate hardship.**
>
> [Emphasis added.]

[41] The burden is on the applicant to show that he would encounter disproportionate, unusual or undeserved hardship if he had to return to Guinea to make a permanent residence application there.

[42] The case law on this point is clear. In *Owusu, supra*, John Maxwell Evans J. said the following in this regard:

> [5] . . . an applicant has the burden of adducing proof of any claim on which the H&C application relies. Hence, if an applicant provides no evidence to support the claim, the officer may conclude that it is baseless.

[43] Weighing the relevant factors is not a matter for a court which has to review the exercise of ministerial discretion (*Suresh*, *supra*; *Legault*, *supra*).

[44] In *Owusu*, *supra*, the Federal Court of Appeal said the following:

> [12] In the absence of a reviewable error by the immigration officer in rejecting Mr. Owusu's H&C application, the Court cannot intervene. **It is not the function of the Court in judicial review proceedings to substitute its view of the merits of an H&C application for that of the statutory decision-maker**, even though, on the record, Mr. Owusu's in-country claim to be granted permanent resident status on H&C grounds might well have merit.
>
> [Emphasis added.]

(See also *Anaschenko v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1328, [2004] F.C.J. No. 1602 (QL), para. 18.)

[45] As this Court noted in *Lee v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 413, [2005] F.C.J. No. 507 (QL): "… this Court cannot lightly interfere with the discretion given to the immigration officers. The H&C decision was a fact-driven analysis, requiring the weighing of many factors."

[46] Accordingly, in so far as the officer took into account all the evidence before him and assessed all the relevant factors concerning humanitarian and compassionate grounds, there is nothing to justify this Court's intervention in the officer's decision.

CONCLUSION

[47] There is nothing to indicate that the PRRA officer's conclusions were unreasonable.

[48] In view of the foregoing, Mr. Diallo's arguments are not such as to persuade this Court that there are good grounds for granting the relief sought by him.

JUDGMENT

THE COURT ORDERS that

1. the application for judicial review is dismissed;

2. no serious question of general importance is certified.

"Michel M.J. Shore"
Judge

Certified true translation

Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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