Date: 20071025

Docket: IMM-894-07

Citation: 2007 FC 1106

Ottawa, Ontario, the 25th day of October 2007

Present: the Honourable Mr. Justice Blais

BETWEEN:

PEPINE LUCIE ROSE MACKIOZY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review from a decision by Linda Parker (the immigration officer) on January 24, 2007 by which the application for an immigrant visa exemption on humanitarian and compassionate grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), was denied.

FACTS

[2] The applicant is a citizen of the Republic of the Congo (Congo-Brazzaville) who arrived in Canada from Paris on February 19, 2003. She was travelling with a French passport in the name of

Anabelle Gladys Foxy M'VOUAMA-MACAMPA. She was found inadmissible and agreed to return to France.

[3] On February 20, 2003, the day on which she was to return to France, she claimed refugee status, and this was denied on February 19, 2004.

[4] On August 17, 2004 she gave birth to a child who is accordingly a Canadian citizen by birth.

[5] The applicant's family settled in Canada consists of this child and a sister who has not obtained refugee status.

[6] The applicant's family remaining in the Republic of the Congo consists of four brothers, three sisters, their parents and two other children.

IMPUGNED DECISION

[7] By this application the applicant is challenging the decision of the immigration officer which found that the humanitarian grounds relied on were insufficient for an exemption to be granted. The officer was not satisfied that the applicant and her child would encounter unusual, undeserved or disproportionate hardship if they had to apply for permanent residence from outside Canada.

ISSUES

1. Did the officer err in assessing the risks of return?

2. Did the applicant have an opportunity to put forward her exemption application and comment on the evidence?

3. Did the officer err in assessing the evidence?

APPLICABLE LEGISLATION

[8] The Act requires that a foreign national wishing to settle in Canada permanently apply for and obtain a permanent residence visa before coming into Canada. However, it is possible to obtain an exemption under subsection 25(1) of the Act, which provides:

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.

STANDARD OF REVIEW

[9] The standard of review applicable in the case at bar is that of reasonableness *simpliciter* (*Baker v. Canada (Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 817, at paragraph 62). Where procedural fairness and points of law are concerned, the standard of correctness will be applicable.

ANALYSIS

1. *Did the officer err in assessing the risks of return?*

[10] The standard of review for the question of whether the officer applied the proper test is that of correctness, since in connection with an application for an exemption on humanitarian and compassionate grounds (H&C) the question is one of law (*Mooker v. Minister of Citizenship and Immigration*, 2007 FC 779, at paragraph 16).

[11] The applicant alleged that the officer assessed the application for an exemption on the basis of the risks of return, when she should have confined herself to analysing unusual, undeserved or disproportionate hardship.

[12] In *Mooker, supra*, Max M. Teitelbaum J. noted the following at paragraphs 18 and 19:

[18] The respondent for its part submits that if the Officer's decision is read in its totality it is clear that the Officer applied the correct standard. The respondent submits that the Officer referred to "risk to life" because the applicants submitted that they faced risk to life in their H&C application. The respondent relies on the Court's decision in *Doukhi v. Minister of Citizenship and Immigration*, 2006 FC 1464, where the Court held that:

> [24] As evidence that the Officer applied the higher threshold applicable in PRRAs instead of the lower threshold applicable in the H&C context, the Applicant points to page 3 of the H&C Applications - Notes to File where the Officer writes (Tribunal Record, H&C Applications - Notes to File, p.16):
>
> > . . . the objective documentary evidence does not support the applicant's conclusions that the nature and severity of the situation amounts to persecution, or that Lebanese State policies or practices amount to persecution against the Palestinians.
>
> . . . . .
>
> [25] Before addressing whether this evidence is proof that the Officer applied the higher threshold applicable in PRRAs instead of the one applicable in the H&C context, it is essential to note that the Applicant raised the issue of persecution in his submissions in support of it's H&C Application as indicators that he would face 'unusual and underserved or disproportionate hardship'.
>
> . . . . .
>
> [26] Taking into account the Applicant's own submissions as to his risk of persecution, in my view it is logical that the Officer would undertake an analysis as to whether the Applicant would face persecution if returned to Lebanon. Furthermore, the Officer was justified in using the term "persecution" in his decision, even though he was dealing with an H&C application. Having read the Officer's decision, I can note that the Officer does not use the term "persecution" or conduct an analysis as to whether persecution exists other than to respond to the Applicant's

> suggestion that he would face persecution as a Palestinian refugee living in a refugee camp in Lebanon.
>
> [19] In the present case, the Officer did not simply use the language of risk to life only to respond to the applicants' submission but also explicitly stated that this was the test on an H&C application. The Officer held that "In the context of this H&C application, the issue is whether there are reasonable grounds to believe that the applicant would be at risk for loss of life or a risk to the security of his person, should he return to Kenya." Later the Officer concluded that "the applicants have failed to establish that they face personalized risk to their life or risk to the security of their person if they are returned to Kenya." The Officer clearly applied the PRRA standard. As *Pinter* and *Ramirez* make clear it is a reviewable error to apply the PRRA standard in an assessment of an H&C application.

[13] It can be seen from reading the decision as a whole that the officer did not apply the wrong standard. Although the officer analyzed the risk of persecution, it has to be borne in mind that the applicant had herself alleged this risk of persecution in her application for an exemption. In the case at bar, the risk was assessed among other factors and the officer's conclusion shows that she did in fact use the right test:

> The applicant has raised a number of personal circumstances in support of her application for an exemption. The factors include personalized risk, establishment within Québec/Canadian society, and the best interest of the child directly affected by this decision. After considering all the evidence submitted and all the information in the applicant's file, I am not satisfied that the applicant and her child would face unusual, undeserved, or disproportionate hardship if required to apply for a permanent resident visa from outside Canada.

2. ***Did the applicant have an opportunity to put forward her exemption application and comment on the evidence?***

Update

[14] As the question is one of procedural fairness, the applicable standard of review is that of correctness.

[15] It appears from the record that the applicant did not update her address, on several occasions.

[16] It further appears from the record that despite the fact that the letter informing the applicant she had the right to update her exemption application was never claimed by her, the attorney representing her at the time, Luc Desmarais, had received a copy of the application by fax.

[17] She accordingly had an opportunity to update her application through her counsel.

Right to comment on evidence

[18] The applicant submitted that the officer made an error justifying this Court's intervention because she relied on documents on which she was unable to comment.

[19] The test applicable in the case at bar was defined by the Federal Court of Appeal *per* Robert Décary J.A. in *Mancia v. Canada (Minister of Citizenship and Immigration)*, [1998] 3 F.C. 461, at paragraphs 26 and 27:

> [26] The documents are in the public domain. They are general by their nature and neutral in the sense that they do not refer expressly to an applicant and are not prepared or sought by the Department for the purposes of the proceeding. They are not part of a "case" against an applicant. They are available and accessible, absent evidence to the contrary, through the files, indexes and records found at documentation centres. They are generally prepared by reliable sources. They can be repetitive. The fact that a document becomes available after the filing of an applicant's submissions does not signify that it contains new information or that such information is relevant and will affect the decision. It is only when an immigration officer relies on a significant post-submission document which evidences changes in the general country conditions that may affect the decision, that the document must be communicated to that applicant.
>
> [27] The certified question was answered as follows: it being understood that each case must be decided according to its own circumstances, and assuming that the documents are of a nature described above: with respect to documents relied upon from public sources in relation to general country conditions which are available and accessible (a) when an applicant files a submission, fairness does not require disclosure in advance of a determination; (b) after an applicant files a submission, fairness requires disclosure where they are novel, significant and evidence changes in the general country conditions that may affect the decision.

[20] In *Hassaballa v. Canada (Citizenship and Immigration)*, 2007 FC 489, I analyzed this question and said the following at paragraphs 33 to 35:

> [33] First of all, it is important to emphasize that the PRRA officer has not only the right but the duty to examine the most recent sources of information in conducting the risk assessment; the PRRA officer cannot be limited to the material filed by the applicant.

> [34] In this case, the applicant is concerned by the use of updated versions of the U.S. Department of States Human Rights Report (U.S. DOS report) and the U.S. Department of States International Religious Freedom Report (Religious Freedom report). In his own submissions, the applicant relied on the 2003 U.S. DOS report and on the 2004 Religious Freedom report. The PRRA officer, for her part, relied on the 2004 and 2005 U.S. DOS reports and on the 2004 and 2005 Religious Freedom reports.
>
> [35] There is no question that these updated reports are in the public domain, that they originate from well-known sources, that they are general in nature, and that they are frequently quoted by counsel involved in immigration cases on both sides. In fact, they are part of the standard country documentation packages relied on by immigration officers when considering various applications under the Act.

[21] In the case at bar, there was also a question of documents in the public domain originating with a known and reliable source, general in nature and frequently cited by legal representatives in immigration matters, since they were the *2005 Country Reports on Human Rights Practices, U.S. Department of State (U.S. DOS Report), Republic of Congo.* Further, although they were published after the applicant's initial application, they essentially follow the same wording as those in 2003.

3. Did the officer err in assessing the evidence?

[22] As mentioned at the start of the decision, the applicable standard of review is that of reasonableness *simpliciter* (*Baker, supra*).

Documents filed in support of PRRA application

[23] The applicant argued that the officer did not take the documents filed in support of her PRRA application into account.

[24] The documents set out at pages 28 to 34 of the applicant's record are not in the record of documents certified in this Court and the officer's affidavit indicates that she did not have these documents when she rendered her decision.

[25] At paragraph 11 of her affidavit the officer, after repeating that she had never received the documents, wrote: "furthermore, I could find with the Applicant's PRRA . . . the documents found at pages 28 to 40". The part "however . . . had sent the documentary evidence found at pages 35 to 40" in the following sentence appears to indicate that the word "not" is missing before the words "I could find".

[26] In the absence of opposing evidence or cross-examination of the officer on the affidavit, I cannot be persuaded that these documents were available to the officer.

Risk of persecution and Pool area

[27] The applicant further argued that the officer erred in not realizing that Brazzaville was included in the Pool area.

[28] It is worth mentioning here that the Pool area is south of the capital Brazzaville, according to the information received by the officer and cited in her decision at the footnotes on pages 8 and 9. Although the applicant submitted documents maintaining that Brazzaville is in the Pool area, the discretion the officer is allowed when dealing with contradictory evidence seems to have been reasonably exercised in the case at bar.

[29] The officer properly concluded that the fact the applicant was born and lived in the capital Brazzaville did not in any way establish that she would be returned specifically to the south of the capital, to an area considered to be dangerous.

[30] As the documentary evidence showing there was persecution of the Larie tribe also concerned only the Pool area, it was reasonable for the officer, after concluding that the applicant had not proven she would be returning to the Pool area, to find that the applicant had not shown either by objective documentary evidence or by subjective evidence that she would be at risk if she had to return to the country.

Involvement of applicant in her community

[31] It appears from the decision that the officer assessed the applicant's participation in her parish and the fact she had a child in Canada. However, she reasonably concluded that these were not facts justifying an exemption, since the applicant's degree of establishment did not exceed what it was reasonable to expect from a person in the same situation (*Mooker, supra*, at paragraph 15).

Child's interest

[32] As noted by the respondent, the applicant objected that the officer did not take into account arguments which were never alleged.

[33] First, the separation of the child from its father was not alleged and in view of the fact that the birth certificate indicates that the father is [TRANSLATION] "unknown", the officer did not have to analyze this aspect.

[34] Second, the applicant did not consider the possibility of obtaining legal representation for her child before this application for judicial review. At this stage she cannot allege that her interest and those of the child are separate. As the child was less than four years old when the decision was rendered, its mother is the only one with parental authority over it and she never took any steps before that date to establish some other legal representative, I see no error here that would warrant this Court's intervention.

[35] Third, the officer allegedly failed to consider that the 2005 U.S. DOS report indicated "that children were trafficked for labor" (note this is the same document which was apparently not brought to the applicant's attention before the final decision). In actual fact, the text reads as follows: "There were a few unconfirmed reports that children were trafficked for labor".

[36] It is clear from reading the decision that the officer was careful to consider the aspect of the child's interest, and that even if the only argument raised by the applicant concerned the serious

hardship the child would suffer if it had to live in an environment completely different from Canada, the officer was careful to check the access the child would have to education, schooling costs, the fact that it had a family – including grandparents – in the Republic of the Congo and general protection for the rights and well-being of children provided by the Government of the Republic.

[37] In conclusion, in so far as the officer considered the applicable relevant factors, it is not this Court's function to reassess them, even if the Court might have given them a different weight (*Hamzai v. Canada (M.C.I.)*, 2006 FC 1108, at paragraph 24).

[38] For all these reasons, I consider that the officer made no error that would require this Court's intervention.

[39] The parties submitted no serious question for certification.

JUDGMENT

- The application for judicial review is dismissed.
- No question will be certified.

"Pierre Blais"
Judge

Certified true translation

Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-894-07**
STYLE OF CAUSE:	**PEPINE LUCIE ROSE MACKIOZY** **v.** **MCI**
PLACE OF HEARING:	**Montréal, Quebec**
DATE OF HEARING:	**October 17, 2007**
REASONS FOR JUDGMENT AND JUDGMENT BY:	**the Honourable Mr. Justice Blais**
DATED:	**October 25, 2007**

APPEARANCES:

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Michèle Joubert	**FOR THE RESPONDENT**

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