Federal Court  Cour fédérale

Date: 20100903

Docket: IMM-6383-09
IMM-6384-09

Citation: 2010 FC 871

Ottawa, Ontario, September 3, 2010

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

PEDRO DAVID VENTURA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] These are two different applications for judicial review made by the same Applicant against two decisions made by immigration officer J. Gullickson dated October 23, 2009. In the first decision, the officer rejected the Applicant's application for Pre-Removal Risk Assessment ("PRRA"). In the second decision, the officer denied the Applicant's request to have his application for permanent residence processed from within Canada on humanitarian and compassionate grounds ("H&C").

[2] Having carefully reviewed the Applicant's records and the Respondent's written submissions, and considered the oral arguments made by counsel at the hearing, I have come to the conclusion that the Application for judicial review of the PRRA decision must be dismissed, but that the Application for judicial review of the H&C decision must be granted.

I. Facts

[3] The Applicant is a 22 year-old male and citizen of Angola. In January 2004, at the age of 15, he came to Canada, where he claimed refugee status.

[4] Before the Refugee Protection Division of the Immigration and Refugee Board ("RPD"), the Applicant alleged that he fears persecution by reason of political opinion and membership in a particular social group, namely family. Indeed, he testified that his father was an active member of an opposition group, the Front for the Liberation of the Enclave of Cabinda-Armed Forces of Cabinda (FLEC-FAC), and that his father was murdered in 2000 by government agents because of his well-known membership in this group. The Applicant also alleged that he participated in the meetings of an anti-government group connected to his school.

[5] On January 24, 2005, the RPD rejected the Applicant's claim on the basis of lack of credibility and because of the absence of any corroborative or documentary evidence. The only piece of evidence before the RPD was a death certificate for the Applicant's father, dating his death to December 8, 1993, and not in 2000.

[6] The Applicant made his H&C application on November 2, 2006 and his PRRA request on May 26, 2008. Subsequent submissions and evidence for the PRRA were received on June 12, 2008, while subsequent submissions and evidence for the H&C request were received on October 26, 2006, June 12, 2009 and September 29, 2009.

[7] The Applicant submitted to the Officer that he had been in Canada since 2004, that he is currently a college student and an accomplished cadet, that he takes part in judo classes and that he is well-integrated in Canada. The Applicant also submitted various letters of support, including letters from his foster parents, school officials, an Army Cadets instructor, a judo instructor and a judo colleague.

[8] In his PRRA and H&C Applications, the Applicant submitted that he was forced to leave Angola because of his political beliefs and that, as a result, his life was in danger. The Applicant's counsel also stated in his written PRRA submissions to the Officer that there were new developments following the RPD hearing. Mr. Ventura had apparently been informed that he has been falsely accused of being a FLEC-FAC member by some members of the community, as a result of which the Angolan police have been looking to arrest him for anti-government activities. Mr. Ventura had also been informed that members of the FLEC-FAC have been seeking his whereabouts so that they can recruit him; his refusal to join the group would indicate that he supports the government, in which case these members said they would kill him.

II. The impugned decisions

A. *The PRRA decision*

[9] In regard to the Applicant's claim that he was at risk because of his activities in Angola, the Officer determined that the Applicant had not produced new evidence that would recuperate his lack of credibility on the claim already determined by the RPD and that these allegations remained unsupported.

[10] With respect to the Applicant's submissions that he had learnt that he had been accused of being an FLEC-FAC member, that the government was looking for him because of this accusation, and that the FLEC-FAC wanted him to either become a member or to kill him if he would not, the Officer found a lack of sufficiently probative evidence. Neither the Applicant nor his counsel said how they received this information or from what source, and there was no other evidence supporting the claim beyond the submission.

[11] Finally, the Officer acknowledged that there is political violence, corruption and poverty in Angola, but found that there is no probative evidence linking the Applicant to the threats of political violence or mistreatment by authorities.

B. *The H & C decision*

[12] The Officer first considered the political violence to which the Applicant claimed he would be subjected, and repeated word for word the analysis found in his PRRA decision. He then considered, under the heading "Other Personal Risks", the fact that the Applicant had been in

Canada for one quarter of his life, and that he would face difficulties returning to Angola as a young person having lived in Canada for so many years. Nevertheless, the Officer found the Applicant had not presented sufficiently probative evidence to show that he would suffer a disproportionate hardship if he were required to return to Angola, once the alleged and insufficiently substantiated personal risks of arrest or abuse by authorities of forced recruitment or attack by armed political opposition groups are set aside.

[13] Under the headings “Family Relations”, “Community Involvement” and “Establishment-Work and Studies”, the Officer recognized that information submitted by the Applicant from his foster parents and the Children’s Aid Society illustrate their great appreciation and support for him. He also found that various letters of support from school and church staff, a Major in the Army Cadets, and his judo instructor all recommend, support and emphasize the Applicant’s positive qualities. Finally, he accepted that evidence of past studies and past employment demonstrates that he is a serious and respectful student and probably capable of supporting himself financially. Yet in the Officer’s view, none of this shows that the departure of the Applicant from Canada would cause a disproportionate hardship for him or other persons in Canada.

III. Issues

[14] Counsel for the Applicant raised a number of issues in his written submissions, which can be subsumed under the following questions as a result of his oral representations:

- Did the officer err in law by not granting the Applicant an oral interview with respect to his PRRA application?

- Did the officer fail to consider important evidence that favours the Applicant's claim, thereby misapplying the proper test in assessing risk for the purpose of an H&C application?
- Did the officer fail to provide adequate reasons for his H&C decision?

IV. Analysis

[15] The appropriateness of not conducting an oral hearing in the context of a PRRA application and the adequacy of the officer's reasons are clearly issues of procedural fairness. As such, they are reviewable under the correctness standard: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 34; *Bavili v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 945, [2009] F.C.J. No. 1259 at paras. 22 and 26; *Yousef v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 864, [2006] F.C.J. No. 1101 at para. 18; *Sketchley v. Canada (Attorney Genera)*, 2005 FCA 404, [2005] F.C.J. No. 2056 at paras. 53-54.

[16] As for the factual issue regarding the assessment of the evidence in order to make a determination with respect to the H&C or the PRRA application, jurisprudence has recognized the expertise of officers and established that their decisions deserve deference. These issues are therefore reviewable under the reasonableness standard: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9 at para. 53; *Jong v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 678, [2009] F.C.J. No. 845 at para. 19; *Da Mota v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 386, [2008] F.C.J. No. 509 at para. 15.

A. *Did the officer err in law by not granting the Applicant an oral interview with respect to his PRRA application?*

[17] The Applicant submitted that issues of credibility were central to his claim for protection, and that the officer erred in not convoking him to an interview as required by section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations"). The officer gave little weight to or rejected the new risks submitted by counsel for the purpose of the PRRA application because he believed they were not corroborated by other evidence. According to the Applicant, this rejection of the evidence was nothing more than the officer's disbelief of the Applicant's story. Furthermore, the Applicant submitted that the rejection of the new evidence was the result of the unexplained importation of the negative credibility findings of the RPD regarding the rest of the evidence. In the Applicant's view, the officer could not dismiss the new risks that he had put forward without conducting an oral hearing and giving him the opportunity to explain why they were not corroborated.

[18] This Court has held that the language of subsection 113(b) of the *Immigration and Refugee Protection Act* ("*IRPA*") makes it clear that the availability of an oral hearing in the PRRA context lies solely in the discretion of the Officer, having regard to the "prescribed factors" that are identified in section 167 of the *Immigration and Refugee Protection Regulations*. The conditions set out in section 167 are cumulative and the applicant must satisfy all factors: *Tran* v. *Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 175, [2010] F.C.J. No. 207 at para. 29.

[19] An essential component of the Applicant's claim to the PRRA officer is that he would be targeted based on his father's political activities in Angola, just as, according to the Applicant, his father was murdered as a result of these political activities. The RPD had already rejected that aspect of the Applicant's claim. The Applicant did not put forward any new evidence that would overcome the credibility finding of the RPD. The Applicant reiterated that which had already been determined to be lacking in credibility without further corroborating evidence or explanation.

[20] Given the Applicant's submission, in order for the Applicant to receive a positive PRRA decision, he would have to respond to the totality of the RPD's findings. The granting of an oral hearing in these circumstances without further evidence being presented would amount to a re-determination of the RPD's findings. That is not the proper role of a PRRA officer: see *Selduz v. Canada (Minister of Citizenship and Immigration),* 2010 FC 583, [2010] F.C.J. No. 689 at para. 31.

[21] With respect to the recent submissions made by the Applicant regarding the alleged false accusations against him and its ensuing risks of harm by police or FLEC-FAC members, the officer rejected them as they were not supported by sufficiently probative evidence to be reasonable. The officer was certainly entitled to ascribe a low probative value and place little weight on the Applicant's statement, in light of its vagueness and lack of particulars. The Applicant's "new risks", it must be recalled, were not supported by an affidavit or sworn evidence; the rumours were not corroborated, they were lacking in specifics and their sources were not identified. In those circumstances, the officer was entitled to give little probative weight to the Applicant's allegations.

[22] As the Officer found that the evidence provided was not sufficient probative evidence of a risk, the Applicant was not entitled to an interview. The new evidence was not rejected because of a lack of credibility, as would have been the case if the officer had relied on inconsistencies or implausibilities in the Applicant's story. It was rejected because of a lack of sufficient probative value. This Court has made a distinction between a PRRA officer weighing the evidence and making a determination of credibility:

> When the trier of fact assesses the evidence in this manner he or she is not making a determination based on the credibility of the person providing the evidence; rather, the trier of fact is simply saying the evidence that has been tendered does not have sufficient probative value, either on its own or coupled with the other tendered evidence, to establish on the balance of probability, the fact for which it has been tendered.
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> F*erguson v. Canada (M.C.I.)*, 2008 FC 1067, at para. 27. See also: *Clarke v. Canada (M.C.I.)*, 2009 FC 357, at para. 10.

[23] The Officer did not make a credibility finding. The officer weighed the evidence presented to him and found that the Applicant's statement was not sufficient to overcome the RPD's credibility finding nor to establish, on a balance of probabilities, that the Applicant was at risk. In other words, he found that an uncorroborated statement with no supporting affidavit was incapable of substantiating a rumour. Such a decision fell within the range of "possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, para. 47). In those circumstances, the Applicant was not entitled to an interview.

B. *Did the officer fail to consider important evidence that favours the Applicant's claim, thereby misapplying the proper test in assessing risk for the purpose of an H&C application?*

[24] Counsel for the Applicant submitted that the PRRA officer completely ignored the corroborative evidence before him in the form of country reports that speak to the government's poor human rights record, as well as to prevalent extra judicial killings and impunity on the part of government security forces.

[25] Contrary to the Applicant's argument that the officer ignored country conditions, the officer did in fact note the presence of political violence, corruption and armed fighting between political factions in Angola. However, the Applicant cannot rely on country conditions alone to support his claim of risk. This Court determined, in a number of cases, that the evidence of risk requires independent and credible objective evidence that provides a link between the claimant's personal circumstances and the country conditions. In the absence of evidence showing personalized risk, country conditions alone are not sufficient for a positive PRRA determination: see, for ex., *Alakozai v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 266, at paras. 35-37; *Prophète v. Minister of Citizenship and Immigration*, 2008 FC 331, [2009] F.C.J. No. 374 at paras. 16-17; *Jarada v. Canada (Minster of Citizenship and Immigration)*, 2005 FC 409, [2005] F.C.J. No. 506, at para. 28.

[26] At the hearing, counsel for the Applicant also argued that the officer erred in not applying the proper test when assessing risk for the purposes of the H&C application. It was argued that the officer imported his risk finding from the PRRA decision without considering the broader context of an H&C application. Moreover, counsel also contended that the officer only turned his mind to the

absence of risk for the Applicant if he were to go back to Angola, instead of focussing on the hardship he would suffer were he forced to re-apply for a visa or for H&C from abroad.

[27] Having carefully considered the impugned decision of the Officer, I am unable to agree with the Applicant. The Officer correctly states the test, as being whether the Applicant would suffer disproportionate hardship if returned to Angola, on a number of occasions in his reasons. He was clearly aware and sensitive to the fact that the applicant has been in Canada for five years, and that returning to Angola may present difficulties for him. He was also mindful of the support the Applicant receives from his foster parents in Canada. The Officer nevertheless found that the Applicant would not suffer a disproportionate hardship if required to return to Angola; such an assessment was open to him, particularly in light of the fact that his counsel had only emphasized the risks to the Applicant's safety in connection to the hardship of living in Angola.

C. *Did the officer fail to provide adequate reasons for his H&C decision?*

[28] Finally, counsel for the Applicant submitted that the officer did not provide adequate reasons for finding that the departure of the Applicant from Canada would not cause him or other persons in Canada a disproportionate hardship, despite documentary evidence showing that his foster parents show appreciation and support for him, that he is respected and capable of adapting to Canadian society, and that he is a serious and respectful student and that he is probably capable of supporting himself financially if allowed to work. This would leave the Applicant in no better position if he were to submit a new H&C application, not knowing the defects that he has to remedy in order to succeed.

[29] I agree with the Respondent that the onus is on the Applicant to satisfy the officer that, in the Applicant's personal circumstances, the requirement to obtain a visa from outside Canada in the standard manner would cause unusual and undeserved or disproportionate hardship. That being said, once an applicant has put forward the positive factors militating in favour of granting his H&C application, the officer must explain why he does not find these factors sufficient to grant the application. An applicant is entitled to know why he failed to convince the officer of the cogency of his case, especially when there is so much at stake as his future in this country.

[30] In the case at bar, the officer did not meet this standard. He merely recited the allegations of the Applicant, only to dismiss them without any kind of explanation or analysis. Counsel for the Respondent countered that the Applicant, through his counsel, had not elaborated as to how and why the factors submitted would constitute undue hardship in the first place. I do not find this argument convincing. The implications of severing the Applicant's establishment in Canada, as evidenced by his family relations, his community involvement, his work and his studies are obvious without the necessity of stating how and why, from his point of view, his return to Angola would constitute undue hardship. On the basis of the record before him, the officer had more than sufficient evidence not only to determine whether unusual and undeserved or disproportionate hardship had been made out, but as importantly to give his reasons as to why he came to his conclusion.

[31] All things considered, I am of the view that this case is very similar to the H&C decision that was challenged in *Adu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 565, [2005] F.C.J. No. 693. Accordingly, I would therefore adopt and make mine the following comments made by my colleague Justice Anne MacTavish:

> [14] In my view, these 'reasons' are not really reasons at all, essentially consisting of a review of the facts and the statement of a conclusion, without any analysis to back it up. That is, the officer simply reviewed the positive factors militating in favour of granting the application, concluding that, in her view, these factors were not sufficient to justify the granting of an exemption, without any explanation as to why that is. This is not sufficient, as it leaves the applicants in the unenviable position of not knowing why their application was rejected.

[32] For all of the foregoing reasons, the application for judicial review of the PRRA decision is dismissed, and the application for judicial review of the H&C decision is allowed. Neither party has suggested a question for certification, and none arises here.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review of the PRRA decision (IMM-6383-09) is dismissed;
2. The application for judicial review of the H&C decision (IMM-6384-09) is allowed, and the matter is remitted to a different immigration officer for redetermination;
3. No serious question of general importance is certified.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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