Federal Court  Cour fédérale

Date: 20131129

Docket: IMM-1232-13

Citation: 2013 FC 1200

Ottawa, Ontario, this 29th day of November 2013

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MARIE EDITHE BERTHOUMIEUX

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "Act"). The applicant is arguing that the decision-maker who rejected her request on humanitarian and compassionate [H&C] grounds to be exempted

from having to return to Haiti to apply for permanent residence failed to assess properly the hardship which she would face if returned to Haiti.

[2] Although the decision made is certainly not perfect, an intervention of this Court is not warranted when the decision is read in context, together with the facts of this case.

Facts

[3] The applicant is a Haitian national. It appears that she left Haiti in February 2002 in order to live in the United States. However, she never acquired any status in that country. Instead, she came to Canada on October 18, 2007 and sought refugee status. Her claim was denied on April 2, 2009.

[4] It is only in April 2010 that she made her request pursuant to section 25 of the Act in order to be exempted on H&C grounds. To my surprise, her request was the subject of a decision only in January 2013. It is unclear why it took close to three years for the matter to be addressed by a senior immigration officer. Such appears to be the backlog. Be that as it may, I do not believe that anything turns on such a delay in dealing with the applicant's request. Evidently, the applicant was not complaining about the delay it took to have her request considered. It is from that decision of a senior immigration officer (the "officer") that judicial review is sought.

[5] Originally, the applicant complained about the decision on two fronts. First, she claimed that the officer unreasonably disregarded the risk of sexual violence the applicant would face if she were to return to Haiti and, more generally, the officer disregarded evidence of generalized hardship in

view of the humanitarian crisis in Haiti. The second argument dealt with the establishment of the applicant in Canada. That ground has since been abandoned.

[6] In essence, the applicant presented documentary evidence tending to show that the situation in Haiti is such that a single woman, which is the situation in which the applicant finds herself, would face hardship if she were to return to Haiti and she would be at risk of falling victim to the sexual violence that appears to be prevalent in the country in the wake of the national catastrophe that struck Haiti in 2010. We know very little of the circumstances of this applicant.

Argument

[7] The applicant contends that once that evidence of the conditions of the country to which she would be returned is led, it is incumbent on the officer to conduct an analysis in order to conclude whether or not H&C grounds are present and are sufficient for section 25 of the Act to be engaged. As is well known, section 25 of the Act is a discretionary remedy that must be exercised by the Minister in a reasonable fashion. Absolute discretion does not exist, but decisions made pursuant to section 25 benefit from a significant measure of deference on judicial review. Subsection 25(1) reads:

25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible or does not meet the requirements of this Act, and may, on request of a foreign national outside Canada who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified	**25.** (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à

by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

[8] In effect, the applicant argues that it is incumbent on the respondent to assess the risk faced if returned to Haiti on the basis of the documentary evidence. That risk is relative to sexual violence against women.

[9] Similarly, the applicant would want that the general conditions in Haiti are such that, in and of themselves, they should have been assessed to conclude that they constitute undue hardship.

[10] The parties agree that the standard of review is that of the reasonable decision which, as indicated before, implies a significant measure of deference with respect to the officer's decision.

Analysis

[11] The difficulty with the argument made by the applicant is that she shifts the burden on the decision-maker without offering any evidence that would tend to personalize the hardship that is alleged. To put it another way, the applicant describes, through documentary evidence, the difficult circumstances that existed in Haiti in 2010 and, to a lesser extent, since 2010. However, we know very little about her personal circumstances and what she would face if she were to return to Haiti.

[12] The recent case law emanating from this Court stresses that the hardship must be personalized in order to satisfy section 25 applications. I find myself in agreement with my

colleague Justice Richard Boivin who wrote, in *Villa v Minister of Citizenship and Immigration*, IMM-10125-12 (June 11, 2013) [*Villa*]:

> Although the focus should be on the hardship, not on the risk itself (*Sahota v Canada* (*Minister of Citizenship and Immigration*), 2007 FC 651, [2007] FCJ No 882 (QL)), the Court recalls that the personalized element must still be reflected in the consideration of risk as having potential to cause unusual and undeserved or disproportionate hardship in the analysis of an H&C application (*Lalane v Canada* (*Minister of Citizenship and Immigration*), 2009 FC 6, at para 1, 338 FTR 224 (*Lalane*)). Risk is one of the factors to consider in such an application and although it is true that an applicant does not have to satisfy the test requirement applicable to the PRRA application and section 97 of the Act, there must still be a connection between this alleged risk and the applicants' personal situation, without which the risk cannot be the source of unusual, undeserved or disproportionate hardship:
>
> [1] The allegation of risks made in an application for permanent residence on humanitarian and compassionate grounds (H&C) must relate to a particular risk that is personal to the applicant. The applicant has the burden of establishing a link between that evidence and his personal situation. Otherwise, every H&C application made by a national of a country with problems would have to be assessed positively, regardless of the individual's personal situation, and this is not the aim and objective of an H&C application. That conclusion would be an error in the exercise of the discretion provided for in section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) which is delegated to, *inter alia*, the Pre-removal Risk Assessment (PRRA) officer by the Minister … .
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> (*Lalane*, above, at para 1. Emphasis added.)
>
> Given that an application for exemption for humanitarian and compassionate considerations is an exceptional remedy, the factors considered within it must be adapted to the specific situation of each applicant. The officer's finding on the question of risk relies mainly on the fact that it was established by general documents that are not connected to the applicants' personal situation.

[13] Earlier this year, Justice Boivin had to consider an argument quite similar to the one presented in the case at bar and concerning Haiti. In *Piard v The Minister of Citizenship and*

Immigration, 2013 FC 170, the applicants contended there had to be a purely objective evaluation of hardship. In disposing of this argument, the Court wrote at paragraph 19:

> [19] Therefore, individuals seeking an exemption from a requirement of the Act may not simply present the general situation prevailing in their country of origin, but must also demonstrate how this would lead to unusual and undeserved or disproportionate hardship for them personally. With respect to the issue of the temporary stay of removals in effect for Haiti, it was found that a moratorium on removals does not in and of itself prevent an application made on H&C grounds from being denied (*Nkitabungi v Canada (Minister of Citizenship and Immigration)*, 2007 FC 331, 74 Imm LR (3d) 159).

[14] That view of the law is not new. Already in 2009, my colleague Justice Michel Shore made the same observations in the case of *Lalane v The Minister of Citizenship and Immigration*, 2009 FC 6, to which reference was made by Justice Boivin in *Villa, supra*. Justice Shore reiterated just a month ago the same view, this time in the context of an H&C application with respect to a return to Haiti. At paragraphs 36 and 37 of *Dorlean c Le ministre de la Citoyenneté et de l'Immigration*, 2013 CF 1024, the Court states:

> [36] Il doit nécessairement y avoir un lien entre les preuves corroborant le risque généralisé et celles concernant le risque devenu personnalisé. Il revient donc au demandeur de démontrer un lien entre le risque et sa situation personnelle. Même si un risque généralisé pouvait être prouvé dans le présent cas, cela ne serait pas assez pour obtenir une réponse favorable à la demande CH (voir *Paul c Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2009 CF 1300; *Ramotar c Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2009 CF 362, [2010] 1 RCF 232; *Chand c Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2009 CF 964).
>
> [37] La Cour estime qu'il y avait une preuve mince, voire inexistante, concernant les risques personnels de la demanderesse en Haïti. La demande CH était concentrée uniquement sur les conditions socio-économiques en Haïti auxquelles la population générale doit faire face quotidiennement. L'agent a donc conclu de manière

> raisonnable que la demanderesse n'avait pas réussi à prouver que sa situation comportait un risque personnalisé.

I find the reasoning of Justices Boivin and Shore to be persuasive.

[15] In our case, there was no evidence presented on behalf of the applicant about the particular circumstances she would face if she were to return to Haiti. There is general evidence of sexual violence and of a humanitarian crisis in Haiti. On the other hand, we know that the applicant has three sons who live in Haiti. That is the extent of our knowledge about her circumstances. Counsel for the applicant valiantly tried to convince the Court that once the country conditions and risks are established, the burden, so to speak, shifts onto the shoulders of the officer to conduct an analysis the purpose of which would be to decide if the hardship is sufficient in order to justify the application of section 25.

[16] She contended, successfully in my view, that it is not because there are generalized poor conditions that an applicant should be denied any H&C application because her circumstances would not be any different than anyone else in the country. To put it another way, I would certainly have entertained an argument to the effect that the fact that the general population suffers in dire circumstances does not prevent an H&C application on the basis that the applicant would be returned to the generalized conditions in the country. But such is not the case here. The applicant carries the burden of showing that she will suffer disproportionate hardship, not merely that the country situation is difficult. There is a gap between the evidence of the general country situation and disproportionate hardship that must be filled by the evidence presented by an applicant about his or her particular circumstances.

[17] It is one thing to argue that an H&C application ought not to be denied because the particularized circumstances of the applicant would not be any worse than those of the rest of the population. It is quite another to argue generally that it is enough to lead evidence of the country's general situation and then require that the Minister, for all intents and purposes, prove that the general situation will not apply to this applicant. Not only is that a burden that is just about impossible to discharge, but this whole approach does not account for the requirement that the H&C considerations be those relating to the foreign national who is the one who makes the request (section 25 of the Act).

[18] I reckon that the officer's decision is not a model of clarity and contains sentences that could leave someone with the general impression that the generalized situation in the country cannot be the basis of an H&C application. Thus, one can read the following two sentences at page 6 of the officer's decision:

> D'autre part, cette situation difficile qui prévaut en Haïti touche l'ensemble de la population. Je note que la requérante n'a pas démontré comment sa situation serait différente de celle de ses concitoyens et concitoyennes.

If these sentences are not read in context, they may lead one to suggest that an applicant cannot succeed if she is to be returned to the conditions experienced by the whole population. In my view such is not the test and that would constitute a reviewable error. The simple fact that the whole population suffers disproportionate hardship cannot prevent a successful application.

[19] In my view, however, the sentences have to be read in the context of the decision as a whole and what is effectively decided by the officer. When read in context, it seems to me clear that the

negative decision is based on the fact that the applicant has not particularized her circumstances. The following two sentences are, in fact, what was decided by the officer:

> La requérante n'allègue pas et ne démontre pas comment les membres de sa famille ont été affectés par le séisme de janvier 2010, les inondations qui ont suivi et les conditions existantes en Haïti et n'explique pas en quoi celles-ci auraient un impact particulier sur elle. Il n'y a pas au dossier de documents nous permettant de déterminer qu'en raison de circonstances particulières, il en résulterait pour elle des difficultés inhabituelles et injustifiées ou démesurées.

[20] As can be plainly seen, the officer is concluding that although there was a catastrophe that hit Haiti in 2010, that cannot suffice in order to be successful. There was still a requirement that the applicant show how she would have been impacted had she had to return to Haiti. That is the test applicable in section 25 cases, as found by this Court.

[21] The same can be said of the argument that the applicant would be at risk because she is a single woman. One can read at page 6 of the decision:

> … La documentation soumise et consultée indique que les femmes déplacées dans des camps temporaires suite au séisme, surtout les jeunes filles et les enfants, sont particulièrement vulnérables à l'abus et la violence sexuelle. Je note que la requérante n'élabore pas sur la nature des atteintes à sa sécurité personnelle qu'elle craint et ne démontre pas en quoi elle serait personnellement ciblée. Je note aussi qu'elle déclare avoir de la famille proche en Haïti, incluant trois fils, dont deux adultes, ainsi que son père.

[22] The officer denied the H&C application because the applicant did not particularize the hardship she would suffer if returned to Haiti. Thus, there is no way to make a reasonable determination that hardship would be disproportionate in her case. As the decision is read in

context, the officer does not conclude that the application fails because the applicant would be returned to her country of origin to face the same circumstances as the rest of the population. As I have indicated before, this would in my view open the door to an intervention by this Court. On the contrary, the officer, having noted, awkwardly perhaps, that the situation in Haiti following the catastrophe of 2010 was difficult for the population as a whole was not satisfied that the applicant had personalized her situation. Similarly it does not suffice that there be sexual violence, especially in refugee camps. Evidence must be led, and it would have to be believed, that the disproportionate hardship would be suffered by the applicant. In this case, there was simply no such evidence.

[23] As a result, the judicial review application is dismissed. The parties agreed that the matter was reviewable on a reasonability standard and I agree. As put in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 47 "the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". Furthermore, the parties agreed that there is no question of general importance that ought to be certified in the circumstances. That is a view that I share.

JUDGMENT

THIS COURT ADJUDGES that:

1. The application for judicial review of the decision rendered on January 29, 2013 by a senior immigration officer denying the applicant's application for permanent residence on humanitarian and compassionate grounds is dismissed.
2. No question of general importance is certified.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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