Date: 20061102

Docket: IMM-1070-06

Citation: 2006 FC 1322

Ottawa, Ontario, the 2nd day of November 2006

Present: The Honourable Mr. Justice Simon Noël

BETWEEN:

LUZOLO SABASTIA MONTEIRO

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review filed under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), against a decision of the Minister's officer (officer) dated January 10, 2006, rejecting the application of Luzolo Sebastia Monteiro (applicant) based on humanitarian and compassionate considerations.

I. Facts

[2] The applicant is a citizen of Angola. He was a member of an Angolan gospel music group called VuVu. On June 29, 2003, Mr. Monteiro and 15 other Angolans belonging to the VuVu group arrived in Canada to participate in “Festival 500: Sharing the Voices” in Saint John’s, Newfoundland, which took place in the summer of 2003.

[3] In July 2003, the applicant and 12 other members of the group claimed refugee protection in Canada because of a fear of persecution if they returned to Angola, given the political opinions they expressed as a group. On February 26, 2004, the Refugee Protection Division (RPD) dismissed the claims for refugee protection made by the group, including the applicant’s claim, because the group members were found not to be credible.

[4] On August 26, 2004, Mr. Monteiro applied for an exemption from the requirement to obtain a permanent resident visa before coming to Canada, on humanitarian and compassionate grounds (H&C application). Subsequently, on June 30, 2005, Mr. Monteiro applied for a pre-removal risk assessment (PRRA).

[5] On January 10, 2006, the Minister’s officer determined that an exemption from the requirement to obtain a permanent resident visa before coming to Canada would not be granted. In addition, the same officer determined that the applicant would not be subjected to any risk of torture, persecution or cruel and unusual treatment if he were removed to Angola. Accordingly, on

January 10, 2006, the officer rejected the H&C application, as well as the applicant's PRRA application.

[6] I note that only the H&C application is the subject of this judicial review. The applicant's application for leave and for judicial review of the negative PRRA decision was dismissed by this Court on June 7, 2006.

II. Issues

(1) Does the fact that the applicant does not have "clean hands" affect his right to apply to this Court for judicial review?

(2) What is the standard of review applicable to decisions regarding humanitarian and compassionate considerations?

(3) Did the officer err in endorsing the conclusion of the RPD to the effect that the applicant was found not to be credible?

(4) Did the officer err in determining that the applicant would not be subject to unusual and undeserved or disproportionate hardship if he were removed to Angola?

(5) Does the officer's decision infringe sections 7 and 12 of the *Canadian Charter of Rights and Freedoms*?

III. Analysis

(1) Does the fact that the applicant does not have “clean hands” affect his right to apply to this Court for judicial review?

[7] The applicant did not report for his removal from Canada on March 14, 2006, and therefore a warrant for his arrest was issued on March15, 2006. It was submitted that he does not have clean hands as far as his application for judicial review is concerned. The respondent submits that this Court’s case law is to the effect that an application for judicial review brought by a person who does not have “clean hands” must be dismissed. A file update shows that the applicant was arrested and subsequently left the country for Angola.

[8] In *Thanabalasingham v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 14 at paragraphs 9 to 10, the Federal Court of Appeal recently determined that an application for judicial review brought by a person who does not have “clean hands” should not necessarily be dismissed. In such a situation, the Court has discretion to determine whether judicial review should be allowed or dismissed. Evans J.A. explained the Court’s discretion as follows:

> In my view, the jurisprudence cited by the Minister does not support the proposition advanced in paragraph 23 of counsel's memorandum of fact and law that, "where it appears that an applicant has not come to the Court with clean hands, the Court must initially determine whether in fact the party has unclean hands, and if that is proven, the Court must refuse to hear or grant the application on its merits." Rather, the case law suggests that, if satisfied that an applicant has lied, or is otherwise guilty of misconduct, a reviewing court may dismiss the application without proceeding to determine the merits or, even though having found reviewable error, decline to grant relief.
>
> In exercising its discretion, the Court should attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and, on the other, the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights. The factors to be taken into account in this exercise include: the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in

> question, the need to deter others from similar conduct, the nature of the alleged administrative unlawfulness and the apparent strength of the case, the importance of the individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand.

[9] Accordingly, I will exercise my discretion to hear the application for judicial review for the sole purpose of confirming the validity of the decision, taking into consideration the individual rights concerned.

(2) What is the standard of review applicable to decisions regarding humanitarian and compassionate considerations?

[10] In *Baker v. Canada (Minister of Citizenship and Immigration)*, 2 S.C.R. 817 at pages 857-858, the Supreme Court of Canada determined that the standard applicable to the judicial review of a decision of the Minister's officer dismissing an application based on humanitarian and compassionate considerations is reasonableness *simpliciter*. Although *Baker* was decided under the former *Immigration Act*, R.S.C., c. I-2, there is nothing to indicate that the standard of review applicable to such decisions has changed. In addition, recent case law of this Court confirms that the standard of review applicable to a decision rejecting an application based on humanitarian and compassionate considerations is reasonableness *simpliciter* (*Kaur v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1192 at paragraph 13; *Liang v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 967 at paragraph 7; *Dharamraj v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 674).

(3) Did the officer err in endorsing the conclusion of the RPD to the effect that the applicant was found not to be credible?

[11] In this case, the applicant submits that the officer did not consider his H&C application in an objective and independent manner, because the officer relied on the RPD's decision dated February 26, 2004, to determine that the applicant was not credible.

[12] It is important to note that H&C applications are not appeals from previous decisions of the Immigration and Refugee Board (IRB). The Minister's officers are not bound by the conclusions of the IRB. When the evidence before the officer is substantially the same as that which was before the IRB, it is reasonably open to the officer to reach the same conclusions (*Klais v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 783 at paragraph 11).

[13] In its decision dated February 26, 2004, the RPD rejected Mr. Monteiro's claim for refugee protection because he was found not to be credible. Accordingly, in his H&C application, the applicant sought to establish that he is credible. In his submissions, the applicant explained that the claims for refugee protection made by the 13 members of the vocal group VuVu were dealt with together; consequently, it was normal for there to be discrepancies between their versions of the facts, and these discrepancies were insufficient for the RPD to determine that the applicant was not credible. In addition, the applicant submitted new evidence in his H&C and PRRA applications, including a letter from his brother dated June 8, 2005, stating that the Angolan police were searching for the wives of some of the members of the VuVu group, and the death certificate of Joao Maviluka, a former president of VuVu who, according to the applicant, had been killed by the Angolan national police in 1995.

[14] In his reasons, the officer accepted the applicant's argument to the effect that the discrepancies between the testimonies of 13 different persons do not necessarily taint the general credibility of the testimonies as a whole. However, the officer stated that the applicant did not sufficiently show that the discrepancies in the testimonies of the 13 members of VuVu were minor, nor did he demonstrate that the RPD's finding him not to be credible was unreasonable. Taking into consideration the fact that before the RPD the group of 13, as claimant, had agreed that the hearing should deal with them collectively, not individually, the RPD found the group not to be credible. It was not unreasonable for the officer to reach the same conclusion.

[15] As regards the new documentary evidence submitted by the applicant, the officer explained in minute detail the reason why the applicant did not restore his credibility. For example, the officer stated that the new evidence was not sufficiently detailed. The letter from the applicant's brother did not mention why the Angolan authorities were searching for the wives of group members, nor did it state whether the wives had been threatened by the Angolan authorities. As far as the death certificate of the former president of VuVu is concerned, the credibility and authenticity of this document are disputed, because it does not mention any medical or physiological causes of death and does not give any details regarding the circumstances of his death (the death certificate simply states [TRANSLATION] "killed by the national police"). On this last point, it appears that even if the officer had accepted the death certificate, this document could not enhance the applicant's credibility, because it does not give any explanation allowing the officer to understand the reason why this document had not been submitted at the hearing before the RPD.

[16] For the reasons mentioned above, the officer determined that the applicant did not adequately rebut the RPD's determination to the effect that he was not credible. Having read the officer's decision and taken into consideration the new evidence, I am of the opinion that the officer did not err in accepting the RPD's conclusion to the effect that the applicant was not credible. The officer properly assessed the new evidence submitted and reached the same conclusion as the RPD about the applicant's credibility. Therefore, the officer's decision is not unreasonable.

[17] Before dealing with the next issue, I would add that, although this was not raised at the hearing but was dealt with instead in the written memorandum, I would like to note for greater clarity that, contrary to what was alleged by the applicant, a hearing is not required simply because the officer found the applicant not to be credible. (*Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at paragraph 8). On this point, Mactavish J. wrote the following in *Nguyen v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 236, at paragraph 4:

> H & C applicants have the onus of establishing the facts on which their claim for an exemption rests. Applicants have no right or legitimate expectation that they will be afforded a hearing in order to advance their claims. As a consequence, applicants omit pertinent information from their applications at their peril.

(4) Did the officer err in determining that the applicant would not be subject to unusual and undeserved or disproportionate hardship if he were removed to Angola?

[18] An application under subsection 25(1) of the IRPA is an exceptional measure which allows an officer, upon request of a foreign national, to grant an exemption from the applicable laws and regulations concerning immigration to Canada where it is justified by humanitarian and compassionate considerations.

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.

These decisions are discretionary, and it is up to the applicant to convince the officer concerned that sufficient humanitarian and compassionate considerations warrant a favourable decision. On this point, Russell J. wrote the following in *Jasim v. Canada (Minister of Citizenship and Immigration),* 2003 FC 1017 at paragraph 11:

> The existence of a humanitarian or compassionate review offers an individual special and additional consideration from an exemption from Canadian immigration laws that are otherwise universally applied. The process is highly discretionary and, as such, the onus is on the Applicant to satisfy the Officer that there are sufficient humanitarian and compassionate grounds to warrant a favourable decision. Furthermore, the decision of an Officer not to grant an exemption under ss. 25(1) takes no right away from an applicant, who may still apply for landing from outside of Canada, which is the usual requirement under Canadian Immigration legislation.

[19] In the present case, the applicant is seeking an exemption on humanitarian and compassionate grounds from the application of subsection 11(1) of the IRPA, which requires every person to obtain a permanent resident visa before coming to Canada.

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document shall be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement, lesquels sont délivrés sur preuve, à la suite d'un contrôle, qu'il n'est pas interdit de territoire et se conforme à la présente loi.

The applicant submits that he would be subjected to unusual and undeserved or disproportionate hardship if he were sent back to Angola to obtain a permanent resident visa, for the following reasons: the general situation in Angola, the fact that he is targeted by the government of Angola because of his membership in the vocal group VuVu, and the fact that he has made a claim for refugee protection in Canada.

[20] In *Pashulya v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1527 at paragraph 43, Russell J. explained the test an applicant must meet to be exempted from the application of subsection 11(1) of the IRPA:

> An applicant has a high threshold to meet when requesting an exemption from the application of s. 11(1) of *IRPA*. This Court has repeatedly held that the H & C process is designed not to eliminate the hardship inherent in being asked to leave after one has been in place for a period of time, but to provide relief from "unusual, undeserved and disproportionate hardship" caused if an applicant is required to leave Canada and apply from abroad in the normal fashion. That the Applicant must sell a house or car or leave a job or family is not necessarily undue or disproportionate hardship; rather it is a consequence of the risk the Applicant took by staying in Canada without landing (*Irimie v. Canada (Minister of Citizenship and Immigration)* (2000), 10 Imm. LR. (3d) 206 at paras. 12, 17, 26 (F.C.T.D.); *Mayburov v. Canada (Minister of Citizenship and Immigration)* (2000), 183 F.T.R. 280 at para. 7; *Lee v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 7 at para. 14).

[21] In the present case, the officer acknowledged that the applicant had integrated and established himself in Canada. However, the officer concluded that there was insufficient evidence showing that his having to leave Canada to submit his application for permanent residence from abroad would cause him unusual and undeserved or disproportionate hardship. The applicant submits that this decision was unreasonable, because the situation in Angola is characterized by violence, human rights violations and persecution of the regime’s opponents.

[22] Following a study of the documentation, the officer determined that the situation in Angola since the general amnesty in 2002 was more permissive with respect to political opposition, and that violence in the country had diminished. In addition, even if the Court were to accept the applicant's allegations that the situation in Angola is characterized by violence, human rights violations and persecution of opponents of the regime, the applicant did not submit convincing evidence to the effect that he is viewed as an opponent of the regime, or that he would be targeted if he returned to Angola.

[23] In my opinion, it was reasonable for the officer to determine that there was insufficient evidence to warrant an exemption from subsection 11(1) of the IRPA on humanitarian and compassionate grounds under subsection 25(1) of this Act, because the officer considered all the evidence submitted by the applicant in support of his application and explained the shortcomings in this evidence.

(5) Does the officer's decision infringe sections 7 and 12 of the *Canadian Charter of Rights and Freedoms?*

[24] Although this argument was not dealt with at the hearing, but rather in the written memorandum, I would add that it is clearly established in case law that the removal of a person from Canada is not contrary to the principles of fundamental justice and that the enforcement of a deportation order is not contrary to sections 7 and 12 of the Charter (*Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711, pages 733-735, see also

Medovarski v. Canada (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 539 at paragraph 46).

[25] In conclusion, the applicant's arguments to the effect that the officer's decision infringed the Charter are unfounded.

[26] The parties were invited to submit a question for certification but declined to do so.

JUDGMENT

THE COURT ORDERS THAT:

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

"Simon Noël"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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