Federal Court  Cour fédérale

Date: 20090409

Docket: IMM-3642-08

Citation: 2009 FC 363

Montréal, Quebec, April 9, 2009

PRESENT: The Honourable Mr. Justice Maurice E. Lagacé

BETWEEN:

VICTOR AIMÉ KOUKA

Applicant

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001 c. 27 (the Act) of a PRRA officer's decision dated June 13, 2008, refusing the applicant's application for permanent residence on humanitarian and compassionate grounds (H&C application) as set out in subsection 25(1) of the Act

I. The facts

[2] The applicant is a citizen of the Republic of the Congo (RC). He arrived in Canada in March 2003 and claimed refugee protection. The Refugee Protection Division (RPD) rejected his claim in December 2003. His application for judicial review of that decision was dismissed on October 1, 2004.

[3] In the meantime, namely, on May 5, 2004, the applicant filed his first H&C application, which was refused on October 18, 2004. His application for leave and judicial review of that decision was also dismissed a little later by this Court's judgment dated October 1, 2004 (*Kouka v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1358).

[4] On April 13, 2007, the applicant applied for a Pre-Removal Risk Assessment (PRRA), which was reviewed at the same time as his second H&C application filed on May 16, 2007.

[5] On February 4, 2008, the officer wrote to the applicant to inform him that his H&C application would be considered in the near future and to invite him to update it by March 4, 2008. The applicant did so.

[6] Both applications were heard by the same officer, who refused them both on June 13, 2008. The applicant applied for judicial review of both decisions, which were communicated to him on July 31, 2008.

[7] The hearing for the applicant's motion to stay the deportation order issued against him was scheduled for November 3, 2008, and the motion was dismissed on that day.

[8] These proceedings apply solely to the refusal of the second H&C application.

II. The H&C decision

[9] After conducting an exhaustive analysis of the reasons stated in the applicant's second H&C application, the officer found that the applicant made essentially the same claims as in his previous applications, that it was not up to her to sit in appeal on the RPD decision and that the evidence on the record did not establish sufficient humanitarian and compassionate grounds to exempt the applicant from the requirement to apply for his permanent resident visa outside Canada. She also found that, since the RPD decision, the applicant had not added to the record a single piece of new evidence that would demonstrate that his return to RC in order to file his application in accordance with the Act would entail risks constituting disproportionate and undeserved or unusual hardship.

III. Issues

[10] Is the officer's adverse decision unreasonable in respect of the facts and law?

IV. Analysis

Standard of review for H&C applications

[11] The standard of review applicable to H&C applications rejected by a Minister's officer is reasonableness, and it has not changed since *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

The Act

[12] Under subsection 11(1) of the Act, a foreign national must normally apply for his or her visa and for permanent residence before entering Canada.

[13] The Minister may exercise his discretion, pursuant to subsection 25(1), and allow a foreign national to apply for permanent residence from within Canada only in exceptional cases (*Baker*, *supra*; *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, at paragraphs 16 and 17). Since the applicant has no status in Canada, he is still a foreign national under the Act.

[14] The burden is on the foreign national who is requesting to apply from within Canada to satisfy the officer that the hardship of having to apply from outside Canada would be disproportionate and undeserved or unusual (*Legault*, *supra*, at paragraph 23).

Did the applicant discharge his burden of proof?

[15] The applicant is basically claiming that the officer erred in finding that his allegations were not sufficiently supported by the evidence. He maintains that the officer should have given him an opportunity to update his H&C application so that he could submit other information or corroborating evidence or granted him an interview in order to do so. The applicant is forgetting that the officer had invited him to update his application before reviewing it, and that the applicant did

so on March 5, 2008. The applicant had every opportunity to adduce any evidence he wanted in support of his allegations, and if he did not do so, he has only himself to blame.

[16] It was incumbent on the applicant to present the evidence supporting his claims to the officer and to discharge his burden of proof by providing all relevant information in a timely manner, especially since this was his second H&C application. In this case, the officer correctly determined that the applicant is essentially raising the same allegations as in his previous applications. The officer was under no obligation to require additional evidence from the applicant.

[17] The applicant cannot fault the officer for not granting him an interview and allowing him to be heard before deciding as she did. Moreover, it was up to the applicant to produce all of the evidence supporting his allegations. In *Baker, supra*, the Supreme Court of Canada ruled that a hearing is not always necessary to ensure that an applicant has a meaningful opportunity to present the various types of evidence relevant to his case and have it fully and fairly considered. The opportunity for the applicant to update his application with new written documentation concerning all aspects of his application satisfied the requirements of participatory rights contained within the duty of fairness (*Buio v. Canada (Citizenship and Immigration)*, 2007 FC 157, at paragraph 22), especially since this was the applicant's second H&C application.

Best interests of the children

[18] The applicant is claiming that the officer did not adequately consider the interests of his children. He is alleging that his application is essentially based on *family reunification* and that the officer's analysis of the children's best interests is obviously botched and does not take the children's interests into account.

[19] The Court does not see the merits of such claims because it is clear from the reasons for the impugned decision that the officer considered the best interests of the children, who are all of age, in the context of the evidence to which the applicant confined himself.

[20] Since the applicant indicated in his application that he took care of his children's everyday needs with respect to both their studies and their daily lives, he should have demonstrated the support he was providing by means of sufficiently convincing evidence. He cannot be unaware of the importance of such evidence, especially since the adverse decision in his first H&C application mentioned such deficiencies

[21] Unfortunately for the applicant, the evidence does not enable the Court to find differently from the officer concerning the fact that the applicant's children have developed such a dependency that a separation from their father would cause them disproportionate and undeserved or unusual hardship, if the applicant were to return to RC in accordance with the Act.

[22] In addition, the applicant's two children, who were 25 and 30 years of age at the time of the officer's decision, had been in Canada for over five and a half years before the arrival of their father. The evidence does not make it possible to assess, even approximately, the extent of the support provided to them by their father during that period.

[23] Although the children are alleging to be in their father's care, the evidence does not make it possible to conclude to what extent he has contributed and continues to contribute to their tuition fees and their daily expenses, especially since the income declared by the applicant is barely

sufficient to provide for his own personal needs. It is important to remember that by applying for an exemption under subsection 25(1) of the Act for the second time the applicant is seeking a privilege that has already been denied.

[24] The applicant had to put his best foot forward and to explain, with supporting evidence, in what way his personal situation and the risks he was facing were different from the facts in evidence at the time of his first H&C application and his refugee protection claim. The fact that the applicant renewed his H&C application before a different officer, supporting it with the same evidence, does not give him more rights than at the time of his first H&C application and justifies the officer's refusal to use her discretion to grant the applicant an exemption from the Act's provisions.

[25] The Court fails to see why family reunification or the best interests of the children are more important now than they were at the time of the first H&C application. The analysis of the file shows that the officer has been receptive, attentive and sensitive to the children's best interests, and unfortunately for the applicant, he still did not discharge his burden to satisfy the officer. He also failed to satisfy the Court of the existence of a sufficient number of errors in the impugned H&C decision to warrant the Court's intervention on the grounds that it was unreasonable.

The applicant's establishment

[26] The applicant remained in Canada without status from December 23, 2003, until the dismissal of his stay application on November 3, 2008, not because of circumstances beyond his control, but because he had chosen to undertake multiple proceedings in order to obtain a status. He cannot refer to the length of his stay in Canada for the purposes of finding that he is established here.

[27] The evidence submitted to the officer did not enable her to accurately assess the applicant's financial situation. That evidence would even make one wonder whether the applicant was financially independent. The officer did, however, consider as a positive factor the applicant's involvement in his church as well as in two other organizations, but she correctly noted that the applicant presented no evidence on the disproportionate and undeserved or unusual hardship that he could suffer as part of these activities to justify the exemption requested. The Court notes no errors in the officer's analysis and findings with respect to the applicant's insufficient establishment.

Risk in the Republic of the Congo

[28] The officer is correct in stating that a second H&C application should not serve to appeal an adverse refugee protection decision (*Hussain v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 751, para. 12 (QL); *Kouka v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1236, paras. 26 to 28). She could, however, refer to the RPD's findings.

[29] As the officer correctly noted in her decision, the risks stated by the applicant in the H&C application on appeal are largely the same as those alleged in the adverse RPD decision and the refused first H&C application. In order to justify his second H&C application, the applicant has now added that he needed Canada's protection because he was involved in some events that happened long ago in RC. However, he did not think it advisable to mention these long-ago events before the RPD or before the first H&C officer. These are not new facts that have happened since the previous applications; therefore, the Court can hardly blame the officer for attributing little weight to a last-minute piece of evidence submitted late without a valid reason.

[30] In addition, the applicant is not challenging the officer's finding that his Lari ethnicity does not put him at risk. The RPD and the first H&C officer came to the same conclusion.

[31] Upon reading the officer's decision, it becomes clear that she did not simply adopt the RPD's assessment of the refugee protection claim and the other officer's assessment of the first H&C application. She made her own assessment and conducted an independent analysis of the applicant's situation in light of the documentary evidence submitted. Based on this, the applicant's claims against the officer in this regard are obviously unfounded.

[32] The officer concluded that the applicant had not demonstrated that he would personally be exposed to a risk likely to cause him disproportionate and undeserved or unusual hardship were he to return to RC in order to file his application for permanent residence from there. The applicant was unable to prove to the Court that that finding was erroneous with respect to the facts in evidence and the law.

V. Conclusion

[33] The applicant is basically requesting that this Court reassess all of the evidence and render a different decision, yet he is failing to demonstrate that the officer had erred. The officer's findings are reasonable and supported by the evidence. As a result, this Court's intervention is not warranted. The application will therefore be dismissed. Since no serious question of general importance has been proposed and this Court sees none, no question will be certified.

JUDGMENT

FOR THESE REASONS, THE COURT DISMISSES the application for judicial review.

"Maurice E. Lagacé"
Deputy Judge

Certified true translation
Margarita Gorbounova, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET:	IMM-3642-08
STYLE OF CAUSE:	VICTOR AIMÉ KOUKA v. MCI
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	March 25, 2009
REASONS FOR JUDGMENT AND JUDGMENT BY:	LAGACÉ D.J.
DATED:	April 9, 2009

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