Date: 20091117

Docket: IMM-5573-08

Citation: 2009 FC 1169

Montréal, Quebec, November 17, 2009

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

HATEM ASHOUR ISSA ABOUDAIA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001 c. 27 (the Act), for judicial review of a decision by a pre-removal risk assessment officer (the officer). In a decision dated October 30, 2008, the officer rejected the application by Hatem Ashour Issa Aboudaia (the applicant) for exemption from the requirement to submit a permanent resident visa application from outside Canada, based on humanitarian and compassionate grounds (the H&C application).

FACTS

[2] The applicant is a Libyan citizen of Amazigh origin.

[3] Travelling on a student visa, he arrived in Canada on May 12, 2000, and claimed refugee status. The Immigration and Refugee Board (the IRB) rejected his claim.

[4] In 2003, the applicant submitted the H&C application that is the basis of this dispute.

[5] The applicant stated that he had had a series of jobs and managed his own business in Canada, but he never declared income of more than $5,000. He does not appear to have taken any language or vocational training courses and did not otherwise integrate into Canadian society (for example, through volunteer work).

[6] The officer rejected the applicant's application, concluding that he would not face unusual, undeserved or disproportionate hardship should he return to Libya. After setting out the above-noted facts, she determined that the applicant's ties to Canada and his degree of establishment here were insufficient to justify the exemption sought.

[7] With respect to the risks the applicant would face on his return to Libya, the officer reviewed the IRB's findings that the applicant's allegations of persecution were not plausible. She examined the documentary evidence on Libya, which was to the same effect: Libya monitors the

movements of its citizens, in particular, dissidents, and the applicant would not have been able to travel as he did if he really were wanted. The officer also noted that the applicant did not appear to have a criminal record in Libya in 2004, and that it was not clear exactly why he would be wanted by the authorities there.

[8] Despite the lack of evidence on this point, the officer recognized that the applicant was a member of the Amazigh minority, which has historically been discriminated against. However, she also took into account that conditions for this minority have recently improved, as reported in the 2007 "U.S. Country Report" on Libya. The officer [TRANSLATION] "determined . . .that any risk the applicant would face to his physical or psychological integrity based on his ethnicity could not be characterized as an extreme hardship justifying an exemption."

[9] The applicant disputes this finding and contends that the officer applied the wrong test in reviewing his application.

ANALYSIS

[10] The question of the test to be applied to an exemption application based on humanitarian and compassionate considerations is a question of law, and the appropriate standard of review is correctness. (See *Singh v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1263, at para. 16.)

[11] The applicant submits that the officer applied the wrong test in law by finding "that any risk the applicant would face to his physical or psychological integrity based on his ethnicity could not be characterized as an extreme hardship justifying an exemption." [Emphasis added].

[12] Indeed, the test, taken from the "Immigration Manual: Inland Processing", and set out in the jurisprudence, is "unusual and undeserved or disproportionate hardship" not extreme (see, in particular, *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 F.C. 358 at paras. 20 to 28 ; see also *Rafieyan v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 727, [2007] F.C.J. No. 974 (QL) at para. 40).

[13] The applicant acknowledges that the officer cited the appropriate test at the beginning and the very end of her reasons. However, he considers the passage in which the officer used the word "extreme" to be crucial to the decision since, unlike the introduction and conclusion, it applied the test to his particular case. The officer recognized that the applicant could face hardship based on his ethnicity, and it is in the same passage of her reasons that she set out the wrong test of "extreme" hardship. He relies on Mr. Justice Pinard's decision in *Rebaï v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 24, which held that a decision in which the officer had twice referred to an incorrect test was wrong in law and had to be set aside.

[14] For his part, the Minister maintains that, in speaking about [TRANSLATION] "extreme hardship", the officer was not trying to articulate the test that she used in analyzing the applicant's H&C application. In any event, in the Minister's view, the officer found that the applicant

[TRANSLATION] “does not face any hardship [related to his ethnicity], whether it be unusual, undeserved, disproportionate or extreme. The choice of the last word is of no consequence.”

[15] In the alternative, the Minister maintains that the use of the term “extreme hardship” is, at the most, [TRANSLATION] “a case of awkward language”. It has no real consequence because it is clear from the decision as a whole that the officer applied the appropriate test. I concur.

[16] The officer’s use of the word “extreme” is more a case of awkward language than the imposition of too high a burden. According to the *Petit Robert de la langue française*, one of the meanings of “extreme” is [TRANSLATION] “reaching the highest point . . . or a very high degree”. “Intense” and “extraordinary” are synonyms. “Disproportionate” means [TRANSLATION] “of very great importance, intensity” and its synonyms include “enormous”, “excessive”, “extraordinary” and even “infinite”. Thus, the meaning of the word used by the officer and of the word that is part of the test set out in the jurisprudence is very close, if not completely identical.

[17] It is true, of course, that applying a truly incorrect test vitiates the administrative decision. That is what happened in *Rebaï, supra*, on which the applicant relies. The officer in that case found that “[t]he applicant has not demonstrated a personal risk to his life or safety if he were to return to Algeria” [emphasis added] (para. 9). Mr. Justice Pinard concluded that “[c]learly, the PRRA Officer specifically stated and applied a higher standard than appropriate for H&C decisions.” Since the test of risk causing unusual, undeserved or disproportionate hardship is not limited to risks to an applicant’s life or safety, the officer made a serious error caused by importing the test that applies to

a separate procedure (a pre-removal risk assessment). This is a far cry from using a synonym, as in this case.

[18] My decision in *Sha'er v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 231, where the officer had also applied the test for a PRRA procedure to an H&C application, and Mr. Justice Sean Harrington's decision in *Sahota v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 651, [2007] F.C.J. No. 882 (QL), where the officer had not examined any factor relevant to the H&C application in question other than risk, are also of no assistance to the applicant.

[19] In my view, the fact that the officer reformulated the test, while remaining close to its literal meaning, before and after quoting it verbatim, suggests that she understood it. Accepting the applicant's argument would force officers to mechanically recite the established test, which would only result in masking the degree of real understanding that each agent has of the test to be applied. A careful reading of the reasons for decision satisfies the Court that the officer knew and applied the appropriate test.

[20] According to the applicant, beyond the words used, the analysis of the officer's reasons for decision shows that she imposed too high a burden, thus committing a determinative error of law. With respect, I am not persuaded of this. It is clear from the reasons for her decision that the officer reviewed the evidence and did not find that the applicant would face unusual or disproportionate hardship should he return to Libya, particularly because he was not a dissident nor was he wanted

by the authorities. Moreover, the officer found that discrimination against the Amazighs was not such that the applicant would face “extreme” hardship based on his ethnicity. The applicant did not explain how, in what way, the officer’s finding would have been different had she spoken about “disproportionate” hardship rather than “extreme”.

[21] For these reasons, this application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS that the application for judicial review is dismissed.

"Danièle Tremblay-Lamer"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Marie-Josée Houle	FOR THE APPLICANT
Martine Valois	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Marie-Josée Houle Montréal, Quebec	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT