Federal Court  Cour fédérale

Date: 20101216

Docket: IMM-2142-10

Citation: 2010 FC 1291

Ottawa, Ontario, December 16, 2010

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

SERGE NZEZA NSONGI

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Serge Nzeza Nsongi, is a citizen of the Democratic Republic of Congo ("DRC"). On March 8, 2010, he was denied a humanitarian and compassionate ("H&C") exemption from the requirement to apply for permanent residence from overseas by N. Gagné, the Pre-Removal Risk Assessment Officer. Leave for judicial review was granted on September 8, 2010 by Justice Shore.

[2] Previously, his application for refugee protection was refused by the Immigration Refugee Board on April 11, 2003. Leave to the Federal Court was denied. He then applied for the H&C exemption in 2005. Due to delays in processing the H&C application, the applicant was sent a request for updated information in early 2010 and filed additional information in February 2010, prior to consideration of his application by the Officer. A spousal sponsorship application was filed in February 2010, but was returned due to lack of information. It was thus not considered as a sponsored application by the Officer.

[3] The Officer rejected the applicant's H&C application filed under section 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA") after considering several factors. In the decision, establishment, family-related factors, the child's best interest and the risk were not deemed sufficient to allow for an H&C exemption.

Position of the Parties

[4] The applicant submits that the Officer improperly assessed the factors of his H&C application. More precisely, the applicant contends that:

a. While the Officer conceded that the applicant had shown good integration, this factor was not duly considered, especially in light of his mastery of both official languages. The Officer erred in stating that he had received no further education, as mastering English required furtherance of his education. This is said to be contrary to the objectives of the IRPA.

b. He married Laurice Homis in June 2009. This marriage was not given full credit because the earlier documents filed did not relate to this marriage, not because of any material inconsistency. His marriage resulted in an *in loco parentis* relationship with his wife's daughter. It appears that the Officer had issues with the *bona fides* of the relationships.

c. He faces risk in the RDC, due to his political opinion and affiliations. In this respect, he was detained, arrested and tortured. His aunt was forced to flee in 2008 because of the pressure and interrogations exerted by the police. The reasons given by the Officer do not adequately justify the absence of risk.

d. Hence, the Officer erred in assessing the hardship that would follow should the applicant be returned to the RDC. The Officer misconstrued the evidence, which is a reviewable error in law.

e. The Officer should assess if the hardship that the applicant would suffer would be "unusual, underserved or disproportionate", which is confirmed by the relevant program Manual ("IP-5 Manual").

f. Furthermore, the Officer should have sent a procedural fairness letter to the applicant in order for him to respond to the Officer's concerns with the application.

[5] The Minister's position is that the applicant failed to establish that an exemption was warranted. More particularly, it was asserted that:

a. Establishment is but one of the factors to be assessed, it is not determinative.

b. The Court's role at the stage of judicial review is not to interfere with the weight given to the evidence, but rather to assess if all the relevant factors to the H&C application were considered.

c. The Officer did consider the fact that the applicant spoke both official languages. Furthermore, the establishment findings were reasonable, but were to be expected in light of the long duration of stay in Canada (nine (9) years).

d. Insufficient information was provided by the applicant, despite the opportunity that was given to adduce more information. The Officer is not required to make further inquiries in this respect.

e. No information was given in regards to the child's best interest.

f. The information regarding his marriage did not confirm any relationship prior to 2008. Also, his spousal sponsorship application was filed after Citizenship and Immigration's request for further information was sent.

The Applicable Law and Standard of Review

[6] The IRPA states, at subsection 11(1), that a foreign national must make his application for permanent residence from outside Canada. As set out in section 25, the Minister of Citizenship and Immigration, or its delegate, may exempt a foreign national from this requirement should this be "justified by humanitarian and compassionate considerations (…), taking into account the best interests of a child directly affected, or by public policy considerations".

[7] It is well established that the decision made by a ministerial delegate to accept an H&C application is an exceptional and discretionary decision (*Baker v. Canada (Citizenship and*

Immigration), [1999] 2 S.C.R. 817 ("*Baker*"); *Legault v. Canada (Citizenship and Immigration)*, 2002 FCA 125; *Garcia De Leiva v. Canada (Citizenship and Immigration)*, 2010 FC 717; *Herrera Rivera v. Canada (Citizenship and Immigration)*, 2010 FC 570). Furthermore, the ministerial delegate deciding the H&C application has the responsibility of assessing the evidence and assigning it the proper weight: this is not the reviewing Court's role (*Suresh v. Canada (Citizenship and Immigration)*, 2002 SCC 1; *Legault v. Canada (Citizenship and Immigration)*, *supra*). What the Officer must consider and the role of the reviewing Court was aptly summarized by Justice Shore in *Diallo v. Canada (Citizenship and Immigration)*, 2007 FC 1062, at para. 19:

> According to the Supreme Court of Canada, what is important for an officer making a decision on an H&C application is to take all the relevant factors into account and assess them in accordance with the Act. When he acts in keeping with these precepts, the review panel must uphold his decision, even if its assessment of the factors might have been different (*Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.), [1999] 2 S.C.R. 817; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), 2002 SCC 1, [2002] S.C.J. No. 3 (QL))

[8] The applicable standard of review in evaluating the Officer's decision to grant an H&C exemption is that of reasonableness (*Baker*; *Garcia De Leiva v. Canada (Citizenship and Immigration*), 2010 FC 717 ; *Osegueda Garcia v. Canada (Citizenship and Immigration)*, 2010 FC 677). The procedural fairness of the H&C application is to be reviewed on the standard of correctness (*Karimi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1010; *Kandasamy v. Canada (Citizenship and Immigration)*, 2010 FC 1090; *Herman v. Canada (Citizenship and Immigration)*, 2010 FC 629).

[9] It is well settled by case law that the applicant has the burden of providing the necessary evidence for the determination of his H&C claim (*Barrak v. Canada (Citizenship and Immigration)*, 2008 FC 962 ("*Barrak*"); *Jakhu v. Canada (Citizenship and Immigration)*, 2009 FC 159; *Sharma v.*

Canada (Citizenship and Immigration), 2009 FC 1006). As noted by Justice de Montigny in *Barrak*, at para 28:

> An applicant has the burden of adducing proof of any claim on which the H&C application relies and makes a scant application at his or her own peril. An officer is not obliged to gather evidence or make further inquiries but is required to consider and decide on the evidence adduced before him: see *Owusu v. Canada (MCI)*, 2004 FCA 38 (CanLII), 2004 FCA 38, [2004] 2 F.C.R. 635 at para. 5; *Selliah v. Canada (MCI)*, 2004 FC 872 (CanLII), 2004 FC 872, 256 F.T.R. 53 at paras. 21-22, affm'd 2005 FCA 160 (CanLII), 2005 FCA 160.

[10] As indicated in the IP-5 Manual, at Point 5 of Appendix A, "the right to be heard does not require an absolute right to a personal interview or hearing". Procedural fairness is inherently variable and contingent to the specifics of a case (*Knight v. Indian Head School Division no. 19*, [1990] 1 S.C.R. 653; *Mina v. Canada (Citizenship and Immigration)*, 2010 FC 1182). As it was noted in *Étienne v. Canada (Citizenship and Immigration)*, 2003 FC 1314, at para. 7, "for the purpose of assessing an H&C application, the applicant's written submissions may contain the information an officer needs to make a decision".

Analysis

The Fairness of the H&C application

[11] As noted above, the Officer evaluating an H&C application must consider all the relevant factors to establish if the applicant would suffer undue and disproportionate hardship should he not be exempted from the requirement of making his permanent residence application from abroad. The Officer must rely on the evidence put forth by the applicant, and has no duty to make further inquiries or to forewarn the applicant of his or her concerns about the H&C application.

[12] Procedural fairness is inherently variable: the facts of each case are particularly illustrative of the fairness, as are the Officer's reasons. In the case at bar, there was indeed a long delay in processing the applicant's H&C application. To remedy this delay, a request for further information was sent to the applicant in February 2010, prior to the determination of the application by the Officer. The applicant was given a timely opportunity to provide further information. In fact, he did indeed provide further information. As noted by Justice de Montigny in *Barrak* and cited above, an applicant makes a scant application at his or her own risk.

[13] It is thus apparent that the applicant did not suffer a breach of procedural fairness. The Officer's decision indicates no reasonable apprehension of bias; is justified in fact and in law and is not indicative of an inherent unfairness. The applicant's contention that a procedural fairness letter should have been sent is thus rejected: ample opportunity to provide information was given to the applicant.

The Officer's Decision

[14] As noted above, the review of the Officer's decision not to grant an H&C exemption is to be reviewed on the standard of reasonableness. Consequently, the Court is to consider reasonableness in light of the "existence of justification, transparency and intelligibility within the decision-making process". The Court must assess if "the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 47).

[15] The Officer's decision did evaluate the grounds for an H&C application: establishment, family-related factors, the best interests of the child and risk.

[16] On the establishment criterion, the Officer assessed the evidence that was presented, such as the applicant's work history, mastery of official languages and education in Canada. The Officer considered that the applicant had shown good integration, but this was to be expected in light of the long duration of stay in Canada (nine (9) years). However, establishment is not assessed on a pass/fail basis nor is it the only factor to be assessed (*Kawtharani v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 162, at para. 21). It was thus reasonable for the Officer to consider this factor and weigh it with the other relevant facts of the case.

[17] The family-related factors were analyzed more particularly by the Officer. Indeed, the Officer analyzed the timeline of the applicant's relationship with his wife. While the applicant had submitted, pursuant to the request for additional information, that he had known his wife and her daughter since 2004, the Officer noted that there was no mention of this relationship in his initial H&C application in 2005. The Officer considered that the evidence that was submitted only established an engagement in 2008 and marriage in 2009. The Officer assessed this evidence and noted that "marriage is indeed an element to be considered, but given that there is insufficient information except for the certificate, I find that this is not a determining factor in the application". This view is supported by the IP-5 Manual, at Paragraph 5.13, where it is noted that marriage is not grounds for an automatic approval of an H&C application. Again, the Officer analyzed and weighed the evidence within the realm of the discretion provided by the law in such circumstance.

[18] While the best interests of the child are specifically mentioned in subsection 25(1) of the IRPA, these interests were not determinative in this case. The Officer noted that the child's name was not mentioned nor were there any details of the child's relationship with the applicant. The Officer noted that "this aspect of the application has not been sufficiently demonstrated, and I attach little weight to it. The applicant had the opportunity to submit any information that he deemed relevant at the time of his update, but apart from some documents concerning employment, few details have been submitted overall, such as information pertaining to this child in Canada". Again, the Officer decided the H&C application with the information provided. As an opportunity to give additional information was given to the applicant, it is apparent that insufficient information was given in regards to his relationship with the child, and how it relates to the alleged H&C grounds.

[19] The Officer stated in regards to risk that the applicant had not demonstrated a personalized risk. It is not believed that the applicant surmounted the negative credibility findings of his refugee claim in this respect. In any event, as the DRC is currently under a Temporary Suspension of Removal ("TSR"), a generalized risk is faced by the populations of countries under a TSR.

[20] For an H&C application to succeed, the test to be met is whether applying for permanent residence from abroad would cause unusual, undeserved or disproportionate hardship (see, for example, *Jakhu v. Canada (Citizenship and Immigration)*, 2009 FC 159 ; *Kandasamy v. Canada (Citizenship and Immigration)*, 2010 FC 1090). The Officer in this case was presented with evidence establishing some degree of establishment and family-related factors. These were not presented in their particulars and were not presented accordingly to the "unusual, undeserved or disproportionate" criteria set out by case law.

[21] Upon analyzing the applicant's memorandum, it is clear that he would like the Court to consider the additional information he is now providing and to re-weigh the evidence. He also seeks to have the Court infer that the Officer had misconstrued the evidence and questioned the *bona fides* of his relationships. Such is not the role of the Court at the stage of judicial review of the Officer's decision. The Officer's decision does fall within the range of justifiable outcomes and is reasonable. No adverse finding in regards to procedural fairness can be made, as the applicant was awarded an opportunity to provide additional information.

[22] Consequently, the Officer's decision refusing the H&C application is maintained and this application for judicial review is dismissed.

[23] No question of general importance for certification was proposed by the Parties.

JUDGMENT

THE COURT'S JUDGMENT is:

- this application for judicial review is dismissed and no question is certified.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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