Federal Court  Cour fédérale

Date: 20120607

Docket: IMM-8571-11

Citation: 2012 FC 711

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, June 7, 2012

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

YOURI BOB ARMEL TCHICAYA-LOEMBET

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for review of the decision of a Citizenship and Immigration Canada officer (the officer) dated August 19, 2011, in which she refused the application for permanent residence for humanitarian and compassionate considerations (H&C application) made by Youri

Bob Armel Tchicaya-Loembet (the applicant). For the following reasons, I dismiss the application for judicial review.

I. Background

[2] The applicant is a originally from the Democratic Republic of Congo (DRC). He arrived in Canada on May 25, 2007, and claimed refugee protection. On December 11, 2009, his claim was rejected. The Refugee Protection Division of the Immigration and Refugee Board (the Board) found that the applicant was not credible with respect to the essential elements of his claim. An application for leave to apply for judicial review of that decision was dismissed on April 16, 2010. On November 3, 2010, the applicant filed a pre-removal risk assessment (PRRA) application, which was also rejected.

[3] On January 28, 2010, the applicant submitted an H&C application. On November 20, 2010, the applicant married a Canadian citizen. In December 2010, the applicant's wife submitted an application to sponsor the applicant, which was attached to the H&C application. When the H&C application was processed, the applicant's wife was pregnant, with a due date of November 1, 2011.

II. Decision for which Judicial Review is Sought

[4] The applicant based his H&C application on the risk he would be subject to from the Congolese authorities if he had to return to the DRC and on his establishment and ties in Canada.

[5] The officer noted that in processing the H&C application, she had to assess whether the applicant's circumstances were such that he would suffer unusual and undeserved or

disproportionate hardship if he were required to make an application for permanent residence from outside Canada.

[6] The officer listed all the documents submitted by the applicant in support of his application. She then analyzed the various factors.

[7] With respect to the risks alleged by the applicant, the officer noted that the hardship alleged by the applicant arose from the same risks as he had alleged in support of his refugee protection claim and his PRRA application, which had been found not to be credible. She therefore did not accept that factor. She also consulted the recent documentation on the general situation in the DRC and noted that there are still problems involving human rights violations. However, she concluded that the applicant would not be targeted specifically if he were to return to his country. She therefore decided that the applicant had not established that he might be exposed to risk that would cause him unusual and undeserved or disproportionate hardship if he had to make his application for permanent residence from the DRC. The applicant did not in fact revisit that factor at the hearing.

[8] The officer then analyzed the factor relating to the applicant's establishment and ties in Canada.

[9] She considered that the applicant had been in Canada for four years and that he was married to a Canadian citizen. The officer did not question the marriage, and felt that it was a positive factor. She also found that the applicant had not submitted sufficient evidence to show that his relationship with his wife was such that a separation would amount to an unusual and undeserved or

disproportionate hardship. The officer felt that the relationship was relatively recent and that there was no evidence of the relationship before August 2010, although the applicant stated that they had been seeing each other since he arrived in Canada. She also stated that it was reasonable to think that the couple's separation would be temporary, in view of the sponsorship application submitted by the applicant's wife, which would continue to be processed even if the applicant were no longer in Canada. The officer acknowledged that being physically separated might be difficult for the couple, but noted that the relationship was relatively recent and the applicant had chosen to marry in spite of his precarious status in Canada.

[10] The officer noted the applicant's allegations regarding the best interests of the child they were expecting. The applicant stated in his application that protecting, rearing and educating the child called for both parents to be present, and he had a responsibility to provide his family with moral, financial and psychological support. The officer stated that she was sensitive to the fact that the applicant's wife was pregnant, but noted that it had not been shown that she could not get assistance from her family or friends and that she would be left with so few resources that the impact of the separation would amount to unusual and undeserved or disproportionate hardship.

[11] The officer also considered the fact that the applicant had entered the labour market quickly, that he was valued by his employer and coworkers, that he had done volunteer work and that he had participated in his parish activities. She also considered the fact that the applicant had savings, had a good civil record and had no criminal record.

[12] Although the officer considered these to be positive factors, she concluded that the evidence did not show that the applicant would be facing unusual or disproportionate hardship if he had to make his application for permanent residence from outside Canada. In short, she was of the opinion that there were insufficient humanitarian and compassionate grounds to justify granting an exemption.

III. Issue

[13] The only issue is whether the officer's decision was reasonable.

IV. Standard of Review

[14] It is settled law that the standard that applies in reviewing decisions relating to H&C applications is reasonableness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 46, [2009] 1 SCR 339; *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at paragraph 18, [2010] FCR 360) (*Kisana*).

[15] The role of the Court in reviewing a decision for reasonableness is explained in *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] 1 SCR 190:

> . . . A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

V. Analysis

[16] The applicant submits that the officer did not give sufficient reasons for her decision and erred in assessing the evidence and the factors relied on by the applicant.

[17] The applicant submits that the officer did not adequately explain how and why she concluded that the applicant's establishment was not sufficient to mean that leaving while his application for permanent residence was processed would result in unusual and undeserved or disproportionate hardship.

[18] The applicant stressed the fact that the officer did not explain the basis of her determination that it was reasonable to believe that the separation of the applicant and his wife would be temporary because the sponsorship application would continue to be processed. The applicant submits that this conclusion is purely speculative, and that on the contrary it is unlikely that he would be able to return to Canada quickly. He submits that the sponsorship application will have to be attached to an application for authorization to return under section 52 of the Act, which will be processed by the visa officer at the Canadian Embassy in the DRC. The applicant alleged that this provision grants visa officers broad discretion and that the complex administrative process makes it difficult to predict when he will be able to return and the couple will be reunited.

[19] The applicant also contends that the officer did not assign sufficient weight to the extent of his establishment and the effect that his removal will have on his marriage and family.

[20] The applicant further submits that the discretion granted to immigration officers who process H&C applications is not absolute and that the officer assessed the situation of the applicant and his wife arbitrarily and unreasonably. The officer should have exhibited compassion and put herself in the applicant's shoes. The applicant also alleged that it was unreasonable for the officer to consider the fact that the applicant had chosen to marry in spite of his precarious status.

[21] Granting an exemption on humanitarian and compassionate grounds under section 25 of the Act is an exception to the principle that a foreign national who wishes to obtain permanent residence status must make their application from outside Canada. In addition, that power is largely discretionary (*Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at paragraph 15, [2002] 4 FC 358) (*Legault*)).

[22] The analytical framework for H&C applications is set out in the administrative guidelines of Citizenship and Immigration Canada that provide guidance for officers, and it is undisputedly acknowledged in the case law (*Legault*, supra at paragraphs 20-23). The applicant must show that if he had to apply for permanent residence from outside Canada, he would suffer unusual and undeserved or disproportionate hardship (*Williams v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1474 at paragraph 8 (available on CanLII); (*Rachewiski v Canada (Minister of Citizenship and Immigration)*, 2010 FC 244 at paragraph 26, 365 FTR 1; *Sharma v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1006 at paragraph 9 (available on CanLII); *Pashulya v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1275 at paragraph 43, 257 FTR 143; *Monteiro v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1322 at paragraph 20, 166 ACWS (3d) 556).

[23] When we read the officer's decision, we see that she considered and analyzed the relevant factors and that she understood and considered all of the applicant's allegations, including the impact of his departure on his family. I also find that her assessment of the evidence and the applicant's circumstances is reasonable and does not warrant intervention by the Court. In *Kisana*, above, at paragraph 24, the Court noted that "[i]t is not for the courts to reweigh the factors considered by an H&C officer".

[24] Contrary to what the applicant argues, it was not unreasonable, having regard to the evidence as a whole, to conclude that the relationship between the applicant and his wife was recent, nor was it unreasonable to believe, having regard to the pending sponsorship application, that the separation of the applicant and his family would be temporary, notwithstanding the need for him to obtain authorization to return. In addition, the fact that the applicant has to leave his family is not sufficient to justify an exemption. In *Irimie v Canada (Minister of Citizenship and Immigration)* (2000), 101 ACWS (3d) 995, 10 Imm LR (3d) 206 (FC), Justice Pelletier discussed the meaning to be applied to the concept of unusual and undeserved hardship as follows:

> **12** If one then turns to the comments about unusual or undeserved which appear in the Manual, one concludes that unusual and undeserved is in relation to others who are being asked to leave Canada. It would seem to follow that the hardship which would trigger the exercise of discretion on humanitarian and compassionate grounds should be something other than that which is inherent in being asked to leave after one has been in place for a period of time. Thus, the fact that one would be leaving behind friends, perhaps family, employment or a residence would not necessarily be enough to justify the exercise of discretion.

[25] In addition, although the interests of a child are an important element to be considered, they do not outweigh other considerations (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraph 75, 174 DLR (4th) 193; *Legault*, above, at paragraphs 11, 12 and *Kisana*, above, at paragraph 24).

[26] The applicant also submits that the officer did not give sufficient reasons for her decision. With respect, I am not of that opinion. The officer's reasons are succinct, but it can be understood from them that she considered the evidence as a whole and examined the relevant factors. In addition, her reasons are sufficient for understanding the basis of her decision.

[27] The principles recently stated by the Supreme Court in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 apply in this case:

> **15** In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.
>
> **16** Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

> **17** The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.

[28] For all these reasons, the Court dismisses the application for judicial review. No question is proposed for certification and there is no question to be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed. No question is certified.

"Marie-Josée Bédard"
Judge

Certified true translation
Monica F. Chamberlain

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Serge Silawo	FOR THE APPLICANT
Denisa Chrastinova	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Serge Silawo Montréal, Québec	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT