Federal Court  Cour fédérale

Date: 20150113

Docket: IMM-7378-13

Citation: 2015 FC 43

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, January 13, 2015

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

JANVIER MALE LIKALE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), for judicial review of a decision by L. Ly (officer) dated October 24, 2013, refusing the applicant's application for permanent residence made on humanitarian and compassionate grounds under subsection 25(1) of the IRPA.

[2] For the following reasons, I am of the opinion that this application must be dismissed.

II. Facts

[3] The applicant is a citizen of the Democratic Republic of the Congo (DRC). On August 2, 2006, the applicant entered Canada and filed a claim for refugee protection, which was rejected on November 26, 2008. On April 27, 2009, the application for judicial review of that decision was also dismissed by Justice Teitelbaum.

[4] His first humanitarian and compassionate application was refused on April 29, 2011.

[5] His second application made on humanitarian and compassionate grounds was received on October 24, 2011, and refused on October 24, 2013. As stated above, it is that decision that is the subject of this judicial review.

III. Decision

[6] At the outset of her decision, the officer specified that the application was based on two factors, that is, the establishment and integration of the applicant in Canada as well as the impact of the applicant's prospective return to his country of origin. Citing *Willson v Canada (Citizenship and Immigration)*, 2007 FC 488, at para 12, the officer noted, in particular, that: "a second H&C application should be based on new evidence, and not simply on a re-assessment of the same evidence."

[7] The officer found that since the refusal of his first humanitarian and compassionate application, the applicant has had a job and has made an effort to be financially self-sufficient. The officer noted, however, that there has been little change in respect of the applicant's job and income since his first application, besides the fact that the applicant has continued to work. The applicant's income for the years 2006 to 2010 was $2,880, $9,984, $13,770, $10,243 and $6,391 respectively. The officer thus found that the applicant did not demonstrate that he is financially self-sufficient.

[8] Furthermore, the officer noted that the applicant worked as a mechanic in the DRC from 1986 to 2006 and that he would therefore be able to find a job in his field upon return to his country. The officer also found that the applicant did not demonstrate that the severance of his current employment relationship would cause him hardship that is unusual and undeserved or disproportionate if he had to apply for a permanent resident visa from abroad.

[9] The officer noted that the applicant volunteers, attends church, has no criminal record and is valued in his community, but submitted that he did not demonstrate how a severing of those ties would constitute hardship that is unusual and undeserved or disproportionate if he had to file his application from abroad.

[10] The officer pointed out that even though the applicant maintains that he would have no house or financial assistance upon returning to his country, he demonstrated his adaptability by getting by in Canadian society and he could work as a mechanic upon return to his country.

[11] The officer also noted that the humanitarian and compassionate application before her was not equivalent to a mechanism for appealing the first application. The officer found that the evidence before her still did not support a finding that an exemption based on humanitarian and compassionate grounds was justified.

[12] The officer found the temporary suspension of removal (TSR) to the DRC to be justified by the difficult country conditions, which, she stated, are circumstances beyond the applicant's control. Although the TSR does not prevent the applicant from leaving Canada voluntarily, the officer stated that she took the period of inability to leave Canada due to circumstances beyond the applicant's control into account. However, the officer found that the applicant's establishment is not a sufficient justification for an exemption, despite the fact that the applicant has been in Canada since 2006 and has made significant efforts to integrate into Canadian society.

[13] The officer considered the applicant's argument that it is likely that he will remain in Canada without status indefinitely because of the TSR. However, she submitted that the applicant did not demonstrate that he would face unusual and undeserved or disproportionate hardship if he had to file his permanent resident visa application from outside Canada once the TSR is lifted. Furthermore, the applicant did not demonstrate that his lack of status has prevented him from working or being involved in the Canadian community.

[14] The officer noted that the applicant claims that he has a 28-year old daughter in the DRC, but that the issue of a child's best interests can only be raised, where necessary, in cases where a refugee claimant has a child under the age of 18.

[15] The officer found that the hardship the applicant would face upon his return to the Congo is no different from what is faced by the general population of that country.

[16] She pointed out that, in his first refugee claim, the applicant failed to establish his identity in a satisfactory manner and that despite that, the applicant submitted documents that were presented in his first refugee claim in support of his second application made on humanitarian and compassionate grounds, even though he knew that the determination of his identity was still at issue. The officer therefore reiterated that the second application made on humanitarian and compassionate grounds by the applicant was not equivalent to an appeal.

[17] The officer stated that the applicant submitted considerable evidence attesting to the fact that many crimes and rapes are still committed in the DRC and that the armed forces have been guilty of fundamental rights violations (torture, sexual violence, arbitrary arrests, etc.), in certain cases for political reasons. However, the officer argued that the applicant did not explain in his application how that situation affects him or how the filing of an application from abroad would cause him hardship.

[18] The officer noted that a TSR is a process associated with a generalized risk to the civilian population when a country is facing a catastrophic event and that the applicant can therefore

continue to avail himself of the TSR by staying in Canada. However, the officer maintained, citing case law, that despite the TSR-related risks, the applicant had to demonstrate that the particular facts of his personal situation mean that filing his application from abroad would cause him unusual and undeserved or disproportionate hardship (*Lalane v Canada (Citizenship and Immigration)*, 2009 FC 6, at para 38, 41 (*Lalane*)).

[19] The officer therefore found that the applicant failed to demonstrate that an exemption based on humanitarian and compassionate considerations must be granted.

IV. Issue

[20] One issue arises:

1. Is the officer's decision reasonable?

V. Relevant provisions

Immigration and Refugee Protection Act SC 2001, c 27	***Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27***
3 (3) This Act is to be construed and applied in a manner that:	3 (3) L'interprétation et la mise en œuvre de la présente loi doivent avoir pour effet :
(*f*) complies with international human rights instruments to which Canada is signatory.	*f*) de se conformer aux instruments internationaux portant sur les droits de l'homme dont le Canada est signataire.
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 may be issued if, following an	11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger

examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

n'est pas interdit de territoire et se conforme à la présente loi.

25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

25. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

International Covenant on Civil and Political Rights

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against

Pacte international relatif aux droits civils et politiques

Article 17

1. Nul ne sera l'objet d'immixtions arbitraires ou illégales dans sa vie privée, sa famille, son domicile ou sa correspondance, ni d'atteintes illégales à son honneur et à sa réputation.

2. Toute personne a droit à la protection de la loi contre de

such interference or attacks.	telles immixtions ou de telles atteintes.
The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11	***Loi constitutionnelle de 1982, Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11***
12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.	12. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

VI. Submissions of the parties

A. *Applicant's submissions*

[21] Citing *Dunsmuir v New Brunswick*, 2008 SCC 9, the applicant started his arguments with a general statement that questions of fact, discretion and policy and questions of mixed fact and law are reviewable on a standard of reasonableness. The applicant also stated that certain questions of law are reviewable on a standard of correctness.

[22] First, the applicant argues that the officer erred in law and in fact by failing to address the substance of the international human rights instruments to which Canada is signatory. The applicant argues that the officer erred by not bearing in mind the humanitarian and compassionate values enshrined in the *Canadian Charter of Rights and Freedoms* (Charter) and the *International Covenant on Civil and Political Rights* (ICCPR), a binding legal instrument for Canada, in conducting an analysis pursuant to section 25 of the IRPA (*Canada (Citizenship and Immigration) v Okoloubu*, 2008 FCA 326, at para 36 (*Okoloubu*)).

[23] The applicant points out that the documentary evidence shows that the values enshrined in the ICCPR are violated in the DRC. The applicant contends that Article 17 of the ICCPR, which guarantees that everyone has the right to the protection of the law against arbitrary or unlawful interference with his privacy, family, home or correspondence, or unlawful attacks on his honour and reputation, applies in this case. The applicant therefore submits that the officer erred by not addressing the substance of the international instruments to which Canada is signatory because the objective evidence shows that the DRC does not offer any protection against infringements of the rights set out in Article 17 of the ICCPR.

[24] The applicant contends that the officer's failure to integrate the ICCPR into her analysis violates section 12 of the Charter (protection from any cruel and unusual treatment or punishment).

[25] Second, the applicant argues that the officer did not exercise her discretion under subsection 25(1) of the IRPA appropriately. The applicant submits in this regard that the officer did not comply with Operational Manual IP 5, namely by considering the factors in isolation instead of globally (as set out in the manual).

B. *Respondent's submissions*

[26] The respondent argues that the applicable standard is reasonableness.

[27] The respondent also contends that an application for permanent residence on humanitarian and compassionate grounds is discretionary and exceptional. The onus is on the

applicant to establish that he would face unusual and undeserved or disproportionate hardship if he had to apply for permanent residence from outside Canada.

[28] The respondent argues that *Lalane* should be applied to the case at hand. In that case, Justice Shore stated that the fact that an applicant had "made progress in adapting to Canadian society, that he was working and that he had become financially self-sufficient could not have been a basis for the immigration officer to conclude automatically that there were humanitarian and compassionate grounds" (*Lalane*, at para 27).

[29] Moreover, the respondent argues that generalized risks are not sufficient to justify a finding under section 25 of the IRPA and that it is important that the applicant demonstrate a link between the evidence and his personal situation.

[30] The respondent submits that this Court has already determined that a TSR to the Congo does not prevent an application made on humanitarian and compassionate grounds from being denied (*Lalane*, at para 41; *Mathewa v Canada (Citizenship and Immigration)*, 2005 FC 914 (*Mathewa*); *Nkitabungi v Canada (Citizenship and Immigration)*, 2007 FC 331, at para 12 (*Nkitabungi*)).

[31] Furthermore, the respondent argues that the officer bore in mind the basic human values enshrined in the Charter and the ICCPR because the officer specifically noted that the applicant can continue to remain in Canada as a result of the TSR.

[32] The respondent maintains that there was no indication that the officer failed to address the substance of the international instruments. The respondent points out that the case law has established that officers in charge of reviewing humanitarian and compassionate applications are not required to specifically refer to the international human rights instruments (*Okoloubu*, at para 50).

[33] Furthermore, the respondent points out that the enforcement of the removal order that the applicant is subject to and the decision rendered by the officer on humanitarian and compassionate grounds are two separate proceedings.

[34] Finally, the respondent notes that the applicant's argument that the decision violates section 12 of the Charter is without merit because: (i) the decision made on humanitarian and compassionate grounds is neither a treatment nor a punishment, (ii) the applicant did not submit any case law in support of his argument, and (iii) the applicant did not demonstrate how the decision would meet the threshold of cruel and unusual treatment or punishment.

VII. Analysis

A. *Applicable standard of review*

[35] In this case, the issue raised is whether the officer erred in applying her discretion under section 25 of the IRPA, and the applicable standard is reasonableness (*Okoloubu*, at para 30).

B. *Is the officer's decision reasonable?*

[36] The officer did not err by finding that the applicant failed to demonstrate that he would face unusual and undeserved or disproportionate hardship in the event his application for permanent residence were filed from outside Canada. As pointed out by the respondent, the fact that an individual works in Canada, is financially self-sufficient (which is not the case for the applicant) or is forced to leave his family members and/or his job cannot be the basis for automatically concluding that a favourable decision under section 25 of the IRPA must be rendered (*Lalane*, at para 27 and para 31). In this case, the applicant demonstrated that he became accustomed to living conditions in Canada, namely because of his volunteering activities and his job. However, the applicant did not submit any evidence that his return to the DRC, once the TSR is lifted, would cause him hardship that would be unusual and undeserved or disproportionate. Moreover, the applicant worked as a mechanic in the DRC for many years (1986-2006) and he, in all likelihood, has the necessary resources to readjust to life in the Congo.

[37] The officer considered all of the evidence and all of the relevant factors that she was required to consider. In my opinion, her decision was completely reasonable.

[38] It seems that the officer applied section 25 of the IRPA in accordance with paragraph 3(3)(*f*) of the IRPA. First, as stated by the parties, the case law has established that paragraph 3(3)(*f*) of the IRPA does not require an officer to "specifically refer to and analyse the international human rights instruments to which Canada is a signatory" (*Thiara v Canada (Citizenship and Immigration)*, 2008 FCA 151, at para 9) when the officer is conducting an

examination under section 25 of the IRPA. Second, as argued by the respondent, the officer adequately addressed the substance of those instruments and of the humanitarian and compassionate values associated with the Charter and the ICCPR. After evaluating the documentary evidence submitted, the officer found that significant risks for the civilian population arise from the general socio-political situation in the DRC; violations of the population's fundamental rights are common in that country. However, the officer noted that [TRANSLATION] "the applicant can continue to avail himself of the TSR and remain in Canada". That analysis is in line with the humanitarian values.

[39] In fact, it seems that the applicant contends that simply being a citizen of the DRC would allow him to automatically obtain permanent resident status in Canada. Justice Shore stated the following in *Lalane*, at para 1:

> The applicant has the burden of establishing a link between that evidence and his personal situation. Otherwise, every H&C application made by a national of a country with problems would have to be assessed positively, regardless of the individual's personal situation, and this is not the aim and objective of an H&C application.
>
> [Emphasis added.]

In fact, the applicant cannot simply make the general argument that [TRANSLATION] "the objective documentation submitted . . . demonstrates that the risks he would face in the DRC are acts that could lead to fundamental rights violations". Thus, it was reasonable for the officer to find that the applicant did not demonstrate that he would personally be at risk of unusual and undeserved or disproportionate hardship if he were to return to the DRC to apply for permanent residence.

[40] Moreover, the case law has clearly established that the mere presence of a TSR does not mean that an application made on humanitarian and compassionate grounds will automatically be allowed (*Lalane*, at para 41; *Nkitabungi*, at para 12). In *Nkitabungi*, Justice Martineau stated the following:

> Moreover, the fact that the relevant authorities have decided not to return to DRC all Congolese citizens in Canada without legal status does not create a presumption of undue or disproportionate hardship as learned counsel for the applicant argues. In fact, every H&C application case is a specific case. With regard to this, I note that in *Mathewa v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 914, it was found that a moratorium on removals to DRC does not in and of itself prevent an application made on humanitarian and compassionate grounds from being denied.
>
> [Emphasis added.]

This passage applies especially to this case.

[41] Finally, I am of the view that the applicant's argument that the decision violates section 12 of the Charter is without merit. The officer's decision does not involve any cruel and unusual treatment or punishment.

VIII. Conclusion

[42] I am of the opinion that the application for judicial review must be dismissed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. The application for judicial review is dismissed.

2. There is no serious question of general importance to be certified.

"George R. Locke"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7378-13
STYLE OF CAUSE:	JANVIER MALE LIKALE v MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 16, 2014
JUDGMENT AND REASONS:	LOCKE J.
DATED:	JANUARY 13, 2015

APPEARANCES:

Alain Tayeye	FOR THE APPLICANT
Andrew Gibbs	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Tayeye Law Office Counsel Ottawa, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT