

Federal Court



Cour fédérale

Date: 20190219

Docket: IMM-3740-18

Citation: 2019 FC 201

[CERTIFIED ENGLISH TRANSLATION REVISED BY THE AUTHOR]

Toronto, Ontario, February 19, 2019

PRESENT: Mr. Justice Grammond

BETWEEN:

GASTON ZINGOULA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Mr. Zingoula seeks judicial review of the dismissal of his application for an exemption based on humanitarian and compassionate considerations. I am dismissing his application, since the decision challenged is reasonable. Contrary to Mr. Zingoula's submissions, I find that the officer considered all relevant factors, including conditions in the Congo, Mr. Zingoula's country

of origin. The officer could also rely on the decisions of the RPD and the RAD to find that Mr. Zingoula's allegations about his status as an opponent of the regime were not credible.

I. The facts and the decision under review

[2] Mr. Zingoula, a citizen of the Republic of the Congo, came to Canada in May 2015 and sought refugee protection, fearing persecution because of his opposition to President Sassou-Nguesso.

[3] His claim was rejected on October 6, 2015, by the Refugee Protection Division [RPD] of the Immigration and Refugee Board. The RPD found that Mr. Zingoula was not credible, as his testimony was replete with contradictions and inconsistencies. On August 15, 2016, the Refugee Appeal Division [RAD] confirmed the RPD's decision. The RAD confirmed the RPD's findings regarding Mr. Zingoula's credibility.

[4] Mr. Zingoula then filed an application for an exemption on humanitarian and compassionate [H&C] considerations. Apart from lengthy quotations from the legislation, operational guides, and case law, the substantive reasons for this application are extremely brief. Mr. Zingoula's counsel at the time simply stated the following:

[TRANSLATION]

He is fleeing tribalism, torture, prison and death for his political opinions against the dictatorship in Congo-Brazzaville.

...

Mr. ZINGOULA has no criminal record. He is not a danger to Canada. A compelling reason is the fact that the Lari are persecuted in the Congo due to tribalism.

[5] In addition, the emphasis on certain quotations from the Act or operational guides could suggest that Mr. Zingoula was also referring to his establishment in Canada and the best interests of his children.

[6] A senior immigration officer [H&C officer] rejected Mr. Zingoula's application on January 15, 2018. She noted that Mr. Zingoula was essentially referring to the same facts used to support his refugee protection claim. She also carefully reviewed additional evidence that Mr. Zingoula filed to show that his wife and cousin had been arrested. She concluded that this evidence was not sufficiently credible or conclusive and did not demonstrate that Mr. Zingoula, his wife or his cousin were wanted because of their opposition to the regime. She noted that various publicly available documents describe Mr. Zingoula's cousin as an adviser to President Sassou-Nguesso's party. She reviewed the evidence relating to the conflict in the Pool region, but concluded that members of the Lari ethnic group, of which Mr. Zingoula claims to be a member, were not particularly targeted. Finally, she assessed Mr. Zingoula's establishment in Canada and the best interests of his children remaining in the Congo, but did not give significant weight to these factors.

[7] Mr. Zingoula is now seeking judicial review of the decision.

II. The applicable legal framework

[8] Section 25 of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [the Act], provides that the Minister may grant an exemption from certain provisions of the Act “if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national”. Such a decision is discretionary. The decision-maker must weigh several factors, but there is no rigid algorithm for determining the outcome.

[9] H&C applications are often filed following the rejection of a refugee protection claim. The two types of applications are not subject to the same legal criteria. However, the facts that can be invoked in support of the two types of applications may overlap: *Kanthisamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paragraph 51, [2015] 3 SCR 909 [*Kanthisamy*].

[10] For example, living conditions in the country of origin can be invoked in both types of applications. Under section 97 of the Act, such conditions are not legally relevant if they constitute a “generalized” risk, which is a risk faced by the entire population of the country. However, in the context of an H&C application, such conditions, even if generalized, may help to establish the hardship that the applicant would face upon removal: *Miyir v Canada (Citizenship and Immigration)*, 2018 FC 73 at paragraph 21 [*Miyir*]; *Marafa v Canada (Citizenship and Immigration)*, 2018 FC 571 at paragraph 4.

[11] It is therefore possible to invoke, in support of an H&C application, facts that had previously been invoked in support of a failed refugee protection claim. However, the RPD or the RAD must have found the evidence of these facts credible. It is well established that an H&C officer may reject evidence that has been found not to be credible by the RPD or the RAD:

Nwafidelie v Canada (Citizenship and Immigration), 2017 FC 144 at paragraph 22; *Jang v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 996 at paragraph 19. Obviously, if an applicant seeks to present essentially the same story that had been found not to be credible as a whole by the RPD or RAD, the H&C officer is entitled to reject it: *Miyir* at para 25.

[12] On judicial review, this Court reviews H&C decisions according to the standard of reasonableness: *Kanhasamy* at para 44. In this context, my role is not to assess the relevant factors or to exercise the decision-maker's discretion anew, but to verify that the decision-maker turned his or her mind to the relevant factors and gave them due consideration. I must also ensure that the decision under review is based on a defensible interpretation of the applicable legal principles and a reasonable assessment of the evidence.

[13] Judicial review is an examination of the legality of the decision under review based on the record and the arguments presented to the decision-maker. A decision is not unreasonable because the decision-maker has not considered an argument that was not been presented to him or her. In other words, it is not possible to present a new argument at the judicial review stage.

III. Analysis

[14] Mr. Zingoula submitted three arguments that, according to him, make the H&C officer's decision unreasonable.

A. *Ethnic violence in the Pool region*

[15] Before this Court, Mr. Zingoula argues that the H&C officer should have taken into account the attacks carried out by the Congolese State against the civilian population in his native region of Pool. The record before the H&C officer contains various documents that describe this violence.

[16] However, this was not how the case was presented to the H&C officer. In a very brief passage of his application, Mr. Zingoula had argued that he was exposed to persecution because he was a member of the Lari minority ethnic group. It is in this context that the following passages from the H&C decision should be understood:

[TRANSLATION]

[T]he evidence does not establish that the people living in Pool are targeted because of their ethnic origin. . . . I could not find any evidence that the Congolese authorities were carrying out ethnic cleansing against the Lari ethnic group, nor did the applicant submit any evidence. Therefore, I am not satisfied that the applicant is being targeted on the basis of ethnic origin.

[17] In his application, Mr. Zingoula had not claimed that the entire civilian population of the Pool region was the target of attacks. The officer cannot therefore be faulted for not addressing the situation from this perspective.

[18] Nor can the H&C officer be held accountable for confusing the test for refugee status with the test for an H&C application. If the officer considered the possibility that members of the Lari ethnic group may be exposed to violence, it is not so much because she applied a risk analysis or required evidence of personalized risk, but rather because she was responding to Mr. Zingoula's submissions.

[19] In short, I note that the officer took into account, as she had to, the situation Mr. Zingoula would face upon his return to the Congo. She was simply not convinced that this situation, combined with the other factors raised by Mr. Zingoula, justified relief under section 25 of the Act.

B. *Mr. Zingoula's status as a political opponent*

[20] Mr. Zingoula also argues that the H&C officer should have considered all the evidence, which would have led her to conclude that he was exposed to persecution because of his political opinions. However, this argument is based on the story that Mr. Zingoula had presented to the RPD and the RAD, which was not considered credible.

[21] Mr. Zingoula nevertheless filed several additional pieces of evidence to support his claims. The H&C officer could have ruled that this was simply an attempt to improve the same story. Nevertheless, the H&C officer conducted a detailed analysis of this evidence and gave it a low probative value. On the whole, I find that the reasons given by the officer are reasonable.

[22] Before this Court, Mr. Zingoula impugns the H&C officer's reliance on the RPD and RAD's findings on credibility, when other evidence had been put before her. However, the H&C officer carefully reviewed this evidence. She found nothing in it that would overcome the credibility determinations of the RPD and RAD. It should not be forgotten that, as my colleague Justice Alan Diner said in *Miyir*, at paragraph 25, the respondent who wishes to overcome the RPD and RAD's determinations faces a "difficult task".

[23] Mr. Zingoula also claims that the H&C officer fettered her discretion by fully accepting the RPD and RAD's credibility determinations. I disagree. The case law of this Court recognizes that an H&C officer may reject evidence that the RPD and RAD have found not to be credible.

C. *Cultural insensitivity in reviewing the evidence*

[24] Lastly, Mr. Zingoula challenges the following passage of the decision, which, in his opinion, shows that the officer analyzed the situation from a Canadian perspective and without sensitivity to Congolese realities:

[TRANSLATION]

The applicant claims that his wife and children live hidden in fear in the Congo. However, I note that they all have valid passports obtained from authorities despite the applicant's proven problems. Although they have passports allowing them to travel and leave the country, they have not only chosen to stay but they also chosen to stay in Brazzaville. Their behaviour is not consistent with that of people fearing for their lives.

[25] Indeed, it may not be possible to conclude from the evidence that the fact that Mr. Zingoula's family remained in the Congo is the result of a genuine choice. However, I do not believe that this affects the reasonableness of the decision, considered as a whole.

[26] In short, as Mr. Zingoula failed to demonstrate that the officer's decision was unreasonable, the application for judicial review will be dismissed.

JUDGMENT in IMM-3740-18

THE COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;
2. No question of general importance is certified.

“Sébastien Grammond”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3740-18

STYLE OF CAUSE: GASTON ZINGOULA v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: FEBRUARY 13, 2019

JUDGMENT AND REASONS: GRAMMOND J.

DATED: FEBRUARY 19, 2019

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