

Federal Court



Cour fédérale

Date: 20191122

Docket: IMM-2082-19

Citation: 2019 FC 1486

Ottawa, Ontario, November 22, 2019

PRESENT: Madam Justice McDonald

BETWEEN:

COUMBA BATHILY

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Coumba Bathily, is a citizen of France who applied for permanent residence on humanitarian and compassionate grounds. On this judicial review of the Immigration Officer's decision, the Applicant argues that her procedural fairness rights were breached when the Officer relied on an unsubstantiated claim that Ms. Bathily avoided CBSA officials for five months without giving her an opportunity to respond to the accusation.

[2] For the reasons that follow, this judicial review is granted. The Officer breached the Applicant's right to procedural fairness when she relied on an unsubstantiated allegation that was not in the record.

Background

[3] Ms. Bathily is the mother of a 10-year-old son, Mady, who is a French citizen, and a 3-year-old son, Idriss, who is a Canadian citizen. The grounds for her H&C application were establishment in Canada, the best interests of her children, and the harm she would face at the hands of her family in France.

[4] Ms. Bathily fears her family because of their extreme Islamic religious beliefs and practices. When she was a teenager, her family forced her to marry an uncle and attempted to force her to undergo female genital mutilation. As a young adult, the Applicant's family forced her to marry a second uncle. Ms. Bathily says her non-adherence to Islam and having a child out of wedlock would anger her family and she is afraid her family will harm her and take her children if she returns to France. Additionally, Ms. Bathily fears for the safety of her older son, Mady, as his father has threatened to kidnap him and take him to Mali.

[5] After the denial of her refugee claim, Ms. Bathily submitted an H&C application on December 5, 2018.

Decision Under Review

[6] Ms. Bathily's application for permanent residence on humanitarian and compassionate grounds was denied.

[7] In her decision, the Officer stated that although Mady would be affected by a negative finding in the application, it would not be detrimental to his best interests. The Officer noted that his mother's "difficulties with immigration adversely affect Mady's emotional and developmental well-being" and that greater stability would be in his best interest (Humanitarian and Compassion Grounds Reasons and Decision at p. 4 [H&C RD]). She also noted that Mady's father was granted visitation rights by the French Courts and that his father could be part of his life in France, but not in Victoria. Additionally, the Officer found that there is little in the file to suggest that Mady's father made threats to kidnap him or that kidnapping was an ongoing concern. She listed reunion with his father, French citizenship, and his French language proficiency as factors tempering the negative effects of returning to France. She also noted that Mady lived in France for six years and is "likely still familiar with life there" (H&C RD at p. 4).

[8] Similarly, the Officer found that it would be in Idriss's best interests to remain with his mother and older brother and that the "continued uncertainty around [his] family's immigration status in Canada has a negative emotional effect" on him (H&C RD at p. 5). The Officer noted that he would benefit from a positive decision in the application, as he has never lived in France. She also commented that he goes to daycare and "participates in programming" in Victoria. The Officer further suggested that as "a Canadian citizen, Idriss is not at risk of leaving Canada or being separated from [sic] her parents, if this application was refused" because his mother has

not stated any intention to leave him behind in Canada if her application is refused (H&C RD at p. 5).

[9] The Officer found that while there would be a “measurable impact on Ms. Bathily’s mental well-being” if she were returned to France, she had not demonstrated that she could not gain access to adequate treatment there. Similarly, the Officer found that while Ms. Bathily has some degree of establishment in Canada, it was modest due to her inability to find “durable” employment and her alleged evasion of CBSA officials. The Officer noted that even if Ms. Bathily and her children were victims of a crime or discrimination in France, she had not demonstrated that they would not be able to seek redress. Finally, the Officer found that Ms. Bathily’s alleged evasion of CBSA officials for five months “minimizes the positive consideration I accord to the Applicant’s level of establishment in Canada” (H&C RD at p 6).

Issue and Standard of Review

[10] The Applicant raised a number of issues with the Officer’s decision; however, the procedural fairness issue relating to the Officer’s finding that Ms. Bathily evaded CBSA officials for five months is dispositive of this judicial review. I therefore decline to address the other issues.

[11] The standard of review for breach of procedural fairness issues is correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 43).

Analysis

[12] Ms. Bathily asserts that the Officer's accusation that she evaded CBSA officials for five months from October 2018 to March 2019 is unfounded. Ms. Bathily submits there is no evidence that she evaded CBSA officials for five months. She argues that the Officer relied on this allegation to discount her establishment in Canada and it affected the Officer's assessment of the best interests of the children. Ms. Bathily was not afforded an opportunity to respond to this allegation.

[13] This case is similar to *Begum v Canada (Citizenship and Immigration)*, 2013 FC 824 [*Begum*], in which the Officer relied on extrinsic evidence and did not provide the Applicant an opportunity to respond. The Court defined extrinsic evidence, in the context of an H&C decision, as evidence that does not form part of the Applicant's submissions, the Respondent's submissions, or the disclosed tribunal record (*Begum* at para 37). When extrinsic information is "used to reach an inference that may have been material to the outcome of the H&C application," the Officer should put that information to the Applicant for their response (*Begum* at para 46). In *Begum*, the Court held that reliance on such evidence without giving the Applicant an opportunity to respond was a breach of procedural fairness (*Begum* at para 44).

[14] A review of the Officer's decision here demonstrates that the Officer did use the alleged evasion of CBSA officials as grounds to minimize the positive consideration of Ms. Bathily's establishment in Canada. The Officer commented that the finding Ms. Bathily evaded CBSA officials "...further minimizes the positive consideration I accord to the Applicant's level of establishment in Canada" (H&C RD at p. 6). Similarly, the Officer makes comments in the

context of the best interests of the children analysis such as “difficulties with immigration” and “continued uncertainty around [his] family’s immigration difficulties” which suggests that in the Officer’s mind, Ms. Bathily’s alleged evasion of CBSA officials had adversely affected the children (H&C RD at pp. 4-5).

[15] The only evidence on the record of the alleged evasion of CBSA officials appears in the Officer’s decision. If the Officer had evidence that Ms. Bathily evaded CBSA officials that was not disclosed, then this situation is similar to Begum and Ms. Bathily should have been given a chance to respond. If there was no evidence, and the Officer was mistaken about the facts, Ms. Bathily still should have been provided with an opportunity to respond. Regardless, the information relied upon by the Officer is not in the record, and the information was clearly material to the outcome of the H&C application. Like in Begum, the Officer’s reliance on extrinsic information without giving Ms. Bathily an opportunity to respond is a breach of procedural fairness.

[16] The judicial review is granted.

[17] There is no question for certification.

JUDGMENT IN T-2082-19

THIS COURT'S JUDGMENT is that the judicial review is granted, the decision of the Officer is quashed and the matter is remitted for redetermination before another officer. There is no question for certification.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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