Date: 20070503

Docket: IMM-5121-06

Citation: 2007 FC 479

Ottawa, Ontario, May 3, 2007

Present: The Honourable Mr. Justice Blais

BETWEEN:

OUMOU TOURE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application for judicial review, filed pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), against a decision dated August 4, 2006, by a pre-removal risk assessment officer (the PRRA officer), determining that in this matter there was not any humanitarian and compassionate consideration justifying an exemption from the obligation to obtain a permanent residence application prior to coming to Canada (the HC application).

RELEVANT FACTS

[2] Oumou Touré (the applicant) is a citizen of Guinea who arrived in Canada on November 23, 2003, and immediately claimed refugee status, alleging that she feared her mother-in-law, who wanted her to marry an older man, threatening to kill her if she refused.

[3] On December 15, 2004, her refugee claim had been refused by the Refugee Protection Division of the Immigration and Refugee Board (the Board), which determined that the applicant was not credible.

[4] On December 28, 2004, the applicant gave birth to a daughter, Fanta Touré, in Montréal.

[5] On August 8, 2005, she applied for an exemption from the requirement to obtain a permanent resident visa before coming to Canada, based on humanitarian and compassionate considerations.

[6] On October 31, 2005, she filed a PRRA application. The decision made regarding that application is the subject of an application for judicial review in docket IMM-5123-06.

[7] On August 4, 2006, the application for exemption was refused, as the PRRA officer determined that the applicant's obligation to leave Canada to follow the procedure for obtaining permanent residence status in Canada would not cause unusual and undeserved or disproportionate hardship in the circumstances.

[8] On August 7, 2006, the applicant gave birth to a son, John-Fodé Touré, in Montréal.

ISSUES

[9] The following issues were raised by the parties in the context of the judicial review:

1. Did the officer adequately examine the best interests of the child, specifically the interests of the applicant's daughter in the context of the risk of circumcision?

2. Did the officer make an unreasonable determination in regard to the differences in living conditions between Canada and Guinea?

RELEVANT LEGISLATIVE EXCERPT

[10] The application for visa exemption based on humanitarian and compassionate considerations falls under subsection 25(1) of the Act. This provision reads as follows:

25. (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	**25.** (1) Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

STANDARD OF JUDICIAL REVIEW

[11] The Supreme Court of Canada established in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, that the standard of review that applies to decisions made by immigration officers on applications based on humanitarian and compassionate considerations is that of reasonableness.

[12] When the appropriate standard of review is that of reasonableness, this Court cannot substitute its own assessment of the facts for that of the decision-maker. The Court must rather determine “whether the reasons, taken as a whole, are tenable as support for the decision” (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at paragraph 56).

[13] The standard of reasonableness is also the appropriate standard of review for the question of whether an immigration officer adequately considered the best interests of the child. In *Hawthorne v. Canada (M.C.I.)*, 2002 FCA 475, [2002] F.C.J. No. 1687 (QL), Mr. Justice John M. Evans states the following:

> Counsel agreed that, under the legal test established by *Baker* and *Legault* for reviewing officers' exercise of discretion, the refusal to grant Ms. Hawthorne's H & C application could be set aside as unreasonable if the officer had been "dismissive" of Suzette's best interests. On the other hand, if the decision maker had been "alert, alive and sensitive" to them (*Baker*, at paragraph 75), the decision could not be characterized as unreasonable.

ANALYSIS

1. Did the officer adequately examine the best interests of the child, specifically the interests of the applicant's daughter in the context of the risk of circumcision?

[14] The applicant submitted that it was unreasonable for the officer to determine that the question of circumcision was not at issue since in the written letter that she filed she had expressly raised her fear that her daughter would be circumcised.

[15] In this letter, the applicant wrote:

> [TRANSLATION]
>
> With regard to my daughter, she is also at risk of being circumcised because, despite the ban and international awareness campaigns, forcible circumcisions are still performed in Africa's Guinean society and as I was unable to protect myself from my family's wishes how can I protect my daughter? I do not think so since they can take my daughter without my consent or behind my back to do so if I return to Guinea.
>
> . . .
>
> Forced marriage and circumcision are very routine in my family. My aunt said that my mother was forced to marry when she was 15 years old and she had her first child two years later and I was circumcised and forced to marry like her.

[16] Although the issue of circumcision was clearly raised by the applicant, the PRRA officer determined that the risk of circumcision was not a determinative factor in this application for exemption. The officer writes:

> [TRANSLATION]
>
> Regarding the allegations specific to her daughter, the applicant also failed to submit credible or trustworthy evidence other than the general documentary evidence on Guinea reporting that circumcision takes place. As stated earlier, the practice of circumcision in Guinea and its significance are not considered issues in this application.
>
> . . .

> In this application for exemption, the applicant filed general evidence regarding the situation of women in Guinea and the substantial presence of circumcision in that country despite it being illegal. The existence of this practice does not in itself support a finding that it would apply personally to her daughter, Fanta. The many contradictions and implausibilities identified following the interview of July 27, led me to find that the applicant is not credible and that her story was invented for the purpose of remaining in Canada for reasons other than those stated.

[17] The respondent argued that it was reasonable for the officer to find that the application could not be allowed absent evidence of personal risk. The respondent relied on *Kaba v. Canada (M.C.I.)*, 2006 FC 1113, [2006] F.C.J. No. 1420 (QL), where Mr. Justice Yvon Pinard determined that the fact that circumcision is still routinely practised in Guinea is not sufficient in itself for a favourable decision, and that applicants must establish a connection between the current situation in their country and their personal situation.

[18] Although *Kaba, supra*, dealt with a PRRA decision and not an HC application, in my opinion that decision applies to this matter. Accordingly, in my opinion the PRRA officer adequately considered the risk of circumcision.

[19] In fact, the PRRA officer examined the risk for the applicant's daughter based on the material evidence filed, which had already been found to lack credibility by the Board as well as by the Federal Court. The officer nonetheless recognized that the practice of circumcision in Guinea is significant and is not disputed in the circumstances. However, the fact that circumcision is routinely practised in Guinea does not necessary mean that it would be the case for the applicant's daughter, since the applicant is firmly opposed to it and the very existence of the persecuting agent (her mother-in-law) had been dismissed by the officer and by the Board as lacking credibility.

[20] As for the best interests of the children, the officer also took into account the submissions of many specialists in the health field who expressed their reservations about an anticipated return to Guinea. However, bear in mind that these specialists based their findings on the applicant's allegations, which were found to lack credibility, greatly reducing the value of these findings. As Madam Justice Barbara Reed stated in *Danailov v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 1019 (QL):

> … to find that that opinion evidence is only as valid as the truth of the facts on which it is based, is always a valid way of evaluating opinion evidence. If the panel does not believe the underlying facts it is entirely open to it to assess the opinion evidence as it did.

[21] The officer also considered that the children, who are Canadian citizens, did not have contact with their respective fathers and would therefore not be separated from them if their mother decided to bring them to Guinea.

[22] Accordingly, I am satisfied that the PRRA officer was receptive, attentive and sensitive to the best interests of the applicant's children, as required by the Supreme Court of Canada in *Baker*, *supra*.

2. Did the officer make an unreasonable determination in regard to the differences in living conditions between Canada and Guinea?

[23] That the situation is better in Canada than in Guinea is a euphemism. That said, the officer examined the consequences of a return to Guinea for the applicant and her children, and determined that to date the applicant has adequately cared for her children. Indeed, she could not determine

based on the evidence that the applicant would be left alone and without means if she were to return to Guinea.

[24] It is evident that the applicant's adaptation and the ties she developed in Canada are not sufficient to justify an exemption, i.e. to establish that her departure from Canada to apply for a visa from abroad would cause unusual and undeserved or disproportionate hardship in the circumstances (*Irimie v. Canada (M.C.I.)*, [2000] F.C.J. No. 1906 (QL)).

[25] Further, the Federal Court of Appeal in *Legault v. Canada (M.C.I.)*, 2002 FCA 125, [2002] F.C.J. 457 (QL), at paragraph 12, stated that the presence of children in Canada is not an obstacle to the removal of a parent who is in Canada illegally:

> The presence of children, contrary to the conclusion of Justice Nadon, does not call for a certain result. It is not because the interests of the children favour the fact that a parent residing illegally in Canada should remain in Canada (which, as justly stated by Justice Nadon, will generally be the case), that the Minister must exercise his discretion in favour of said parent. Parliament has not decided, as of yet, that the presence of children in Canada constitutes in itself an impediment to any "refoulement" of a parent illegally residing in Canada (see *Langner v. Minister of Employment and Immigration* (1995), 184 N.R. 230 (F.C.A.), leave to appeal refused, [1995] S.C.C.A. No. 241, SCC 24740, August 17, 1995).

[26] The respondent pointed out that the Court cannot reassess the weight assigned by the PRRA officer to different factors considered in her decision to refuse the application for visa exemption. On this point, we need only refer to the comments of this Court in *Mann v. Canada (M.C.I.)*, 2002 FCT 567, [2002] F.C.J. No. 738 (QL), at paragraph 11*:*

> I wish to note the able submissions of counsel for the applicant and the sympathy that, in my view, the applicant's case attracts. The sympathy evoked flows particularly from the length of time that the applicant has been in Canada, the difficulties that he has encountered and, it would appear, overcome while in Canada, his new relationship in Canada and the Canadian born child of that relationship, and, what I conclude must be an obvious reality, that the applicant is now closer to his relatives and friends in Canada than he is likely to be to his family

> members in India, particularly having regard to the length of time he has been absent from India and the divorce proceedings that he has instituted in India. That being said, I cannot conclude that the Immigration Officer ignored or misinterpreted evidence before her, took into account irrelevant matters or failed to consider the best interests of the applicant's Canadian born child. I am satisfied that the Immigration Officer's notes, quoted earlier in these reasons, reflect consideration of all of the factors placed before her by the applicant and that she was bound to consider. That I might have weighed those factors differently is not a basis on which I might grant this application for judicial review.

[27] The PRRA officer had the duty to consider the evidence and to determine the weight to be assigned to those various pieces of evidence. In my opinion, this is exactly what she did and the applicant did not establish that the officer made an error that could justify the intervention of this Court.

[28] The application for judicial review will therefore be dismissed.

[29] The parties did not submit any question for certification.

JUDGMENT

1. The application for judicial review is dismissed;

2. No question will be certified.

"Pierre Blais"

Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	OUMOU TOURE v. MINISTER OF CITIZENSHIP AND IMMIGRATION
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APPEARANCES:

Marie-Andrée Fogg	FOR THE APPLICANT
Michel Pépin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Bureau d'aide juridique de Montréal Montréal, Quebec	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT