Date: 20071001

Docket: IMM-424-07

Citation: 2007 FC 981

Ottawa, Ontario, October 1st, 2007

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

BOUALEM DJERROUD

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72 of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 (the Act) of the decision of a Pre-Removal Risk Assessment Officer (the Officer) dated January 11, 2007, refusing the applicant's application for permanent residence on humanitarian and compassionate (H&C) grounds pursuant to subsection 25(1) of the Act.

ISSUES

[2] The issues are as follows:

1. Did the Officer breach the duty of fairness owed to the applicant when assessing his H&C application?
2. Did the Officer commit a reviewable error in determining that there were insufficient H&C grounds to approve the applicant's application?

[3] Both of these questions are answered in the negative. Therefore, the present application for judicial review shall be dismissed.

BACKGROUND

[4] The applicant is a citizen of Algeria, born on July 7, 1973. He arrived in Canada on or about August 31, 1994, after transiting through several European countries. He was travelling under a different name and with a French passport. On September 21, 1994, he applied for refugee status at the Citizenship and Immigration Canada (CIC) office in Montreal.

[5] Between 1994 and 1996, the applicant had some legal difficulties. He had two proceedings initiated against him for sexual assault, although one was later withdrawn completely. He was also convicted of fraud under $5,000 and received a six-month suspended sentence and two years probation.

[6] On August 1, 1996, the Convention Refugee Determination Division of the Immigration and Refugee Board determined that he was not a Convention refugee.

[7] On July 27, 1997, the applicant got married to a Canadian citizen. He and his wife filed a sponsorship application on September 8, 1997 for his permanent residence. This application was refused on July 28, 1997 as the officials assessing the application were not convinced that the marriage was genuine. The applicant was divorced in 2002.

[8] Between 1998 and 1999, CIC attempted several times to deport the applicant to Algeria. At the time, there was a suspension on removals to Algeria, but CIC received permission from the Case Review/Case Management Branch to deport the applicant. The removal attempts were unsuccessful. The initial attempt failed because the applicant did not submit his passport. He also failed to submit the appropriate identity documents to the Algerian Consulate in order to be granted new travel documentation.

[9] On January 20, 2003, the applicant filed an application for permanent residence on H&C grounds. This application was refused on May 1, 2003.

[10] CIC again attempted to remove the applicant. This time, he submitted copies of his passport; however, the passport had expired in the year 2000. On September 18, 2003, CIC signed an application for travel documents for the applicant. However, the Algerian Consulate refused to issue these documents as their regulations had changed.

[11] On December 23, 2004, the applicant was issued a pardon by the National Parole Board.

[12] Another application was submitted by the applicant for permanent residence on H&C grounds on April 16, 2005. This application began to be assessed in October 2006 and additional information was requested from the applicant and an updated application was received in November 2006.

[13] On December 20, 2006, a different immigration officer phoned the applicant and asked the applicant whether he was in a relationship and what his plans were for the future.

[14] On January 11, 2007, the Officer P. Passaglia sent a letter to the applicant refusing his application.

DECISION UNDER REVIEW

[15] The Officer reviewed the applicant's situation and assessed the H&C considerations in his case. The reasons set out by the Officer first detailed the applicant's history in Canada. This contained a summary of the information that was in the applicant's file and was similar, although more detailed, to the facts as stated above. They were listed separately from the factors that the Officer relied on in coming to a negative determination. The following reasons were given for concluding that there were insufficient H&C considerations in the applicant's case:

- the applicant submitted that circumstances beyond his control had prevented him from making his application for permanent residence outside of Canada and had led to his

establishment in Canada. However, the Officer found that the applicant's inability to leave Canada was largely due to his own actions because:

a) the applicant had not been forced to remain in Canada because of a lack of travel documents as he had a passport that was valid until the year 2000. He had refused to present it to CIC when they tried to deport him in 1999. There was no evidence that he submitted even photocopies of the passport, with which he would have been able to obtain travel documents, yet he presented copies of the passport to CIC in 2003 at which point it had already expired;

b) far from cooperating with the authorities, the applicant's file showed a pattern of not complying with the requests to produce documentation that would enable him to leave Canada;

c) it was also the applicant's choice to come to Canada and try to establish himself here in the first place, as he had travelled to several other countries signatories to the Convention on route to Canada after leaving Algeria;

d) he had control of other factors that delayed his removal from Canada, such as the necessity of dealing with his sentence for fraud and the submission of his application for spousal sponsorship;

- despite having lived in Canada since 1994, having many friends and a long time girlfriend, the applicant did not have significant ties to Canada. Although he was married in 1997, he was now divorced and had no immediate family in Canada. Most of his family remained in Algeria with the exceptions of one brother in the United States and one in France;

- although the applicant should receive credit for his good conduct that resulted in him receiving a pardon as well as the fact that he has been at a stable address for some time and participated in volunteer work, there was no evidence that he tried to upgrade his skills or had researched opportunities to better his employment prospects;
- the psychological report that was submitted showed that the applicant suffered distress over the refusal of the authorities to grant him status in Canada, however this was not given much weight because this situation was no different than that faced by other people in his immigration situation;
- the risks for the applicant being returned to Algeria were not extreme. The information that the applicant provided was the same as had been assessed by the Immigration and Refugee Board as lacking credibility. One of the major claims was that he was at risk going back to Algeria because both he and his father had worked for the police. In addition to submitting no new evidence to support this claim, the applicant's father had now retired and remained living in Algeria with several members of the applicant's family;
- since the last time that CIC attempted to deport the applicant, Amnesty International Reports showed that the situation in Algeria was improving and the suspension on removals to Algeria by CIC had been lifted.

[16] The Officer concluded that due to these factors, the applicant's establishment was not solely due to circumstances beyond his control and that in any case, these ties were not significant. Additionally, there was no personalized risk for the applicant should he be returned to Algeria. Therefore, the Officer was not satisfied that he would suffer, undue, undeserved or disproportionate

hardships if he was forced to go through the normal channels to obtain permanent residence status by applying outside of Canada.

RELEVANT LEGISLATION

[17] The H&C provisions for immigration to Canada are set out in subsection 25(1) of the Act. This section states as follows:

Humanitarian and compassionate considerations 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.	**Séjour pour motif d'ordre humanitaire** 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.

[18] The provisions that were used by the Officer when considering the applicant's application is contained in the Immigration Manual, Chapter IP-05. This manual sets out the factors that an Officer may consider when evaluating the degree of an applicant's establishment in Canada.

5.1. Humanitarian and compassionate grounds

Applicants bear the onus of satisfying the decision-maker that their personal circumstances are such that the hardship of having to obtain a permanent resident visa from outside of Canada would be

(i) unusual and undeserved or

(ii) disproportionate.

Applicants may present whatever facts they believe are relevant.

5.1 Motifs d’ordre humanitaire

Il incombe au demandeur de prouver au décideur que son case particulier est tel que la difficulté de devoir obtenir un visa de résident permanent de l’extérieur du Canada serait

(i) soit inhabituelle et injustifiée;

(ii) soit excessive.

Le demandeur peut exposer les faits qu’il juge pertinents, quels qu’ils soient.

11.2 Assessing the applicant’s degree of establishment in Canada

The applicant's degree of establishment in Canada may be a factor to consider in certain situations, particularly when evaluating some case types such as:

• parents/grandparents not sponsored;

• separation of parents and children (outside the family class);

• *de facto* family members;

• prolonged inability to leave Canada has led to establishment;

• family violence;

• former Canadian citizens; and

11.2 Évaluation du degré d’établissement au Canada

Le degré d’établissement du demandeur au Canada peut être un facteur à considérer dans certains cas, particulièrement si l’on évalue certains types de cas comme les suivants :

• parents/grands-parents non parrainés;

• séparation des parents et des enfants (hors de la catégorie du regroupement familial);

• membres de la famille de fait;

• incapacité prolongée à quitter le Canada aboutissant à l’établissement;

• violence familiale;

• anciens citoyens canadiens;

• other cases.	et • autre cas.
[…]	[…]

[19] Although these instruction manuals are not legally binding, courts have recognized that they are publicly available and that they can be of great assistance to the Court (*Legault v. Canada (Minister of Citizenship and Immigration),* 2002 FCA 125, [2002] 4 F.C. 358 (C.A.) *(Legault)).*

ANALYSIS

Standard of Review

[20] It is well established that when allegations of the denial of natural justice or procedural fairness are at issue, it is not necessary for the Court to undertake a pragmatic and functional analysis, as the appropriate standard of review is that of correctness. A decision maker will be accorded no deference by the Court if it is found that the duty of fairness has been breached. However, what the duty of fairness will consist of will vary depending on the circumstance of the case and the type of decision being made (*Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour),* [2003] 1. S.C.R. 539; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, (*Baker*) at para. 32-34; *Ren v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 766, [2006] F.C.J. No. 994, at para. 8).

[21] This Court has followed the holding in *Baker,* above at para. 57-62, which held that the standard of review that should be used when assessing H&C decisions is that of reasonableness *simpliciter*. This has been confirmed in recent decisions, and this Court held that it is not its

responsibility to reweigh relevant factors in an exercise of ministerial discretion (*Agot v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 436, [2003] F.C.J. No 607 (F.C.) at para. 8 (*Agot)*; *Sandrasegara v. Canada (Minister of Citizenship and Immigration),* 2007 FC 498, [2007] F.C.J. No. 671 (F.C.) at para. 11).

[22] The applicant advances several arguments related to procedural fairness and the reasonableness of the Officer's decisions. These will be discussed under the following subheadings.

Duty of Fairness

[23] The applicant submits that the Officer's decision raised a reasonable apprehension of bias as the Officer held the applicant's past criminal record against him, despite the fact that he had received a pardon for these crimes. The applicant further submits that the Officer should have questioned him about the criminal incidents if they were going to be used in making the decision and given him the opportunity to respond to them. He claims that the fact that these issues were not raised in the phone call that was made to him violated his right to fair notice.

[24] To assess whether there is a reasonable apprehension of bias, the Officer's decision must be looked at as a whole, keeping in mind the well established test put forward by Justice de Grandpre in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at para. 394 and accepted in many cases since then (*Baker,* above at para. 46):

> […] the apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information […] that test is "what would an informed person, viewing the matter realistically

> and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[25] Reading the reasons of the Officer reveals that there is no foundation to the applicant's arguments. As is pointed out by the respondent, the reasons do not suggest that the Officer put any weight on the fact that the applicant previously had a criminal record. Although the criminal incidents were mentioned by the Officer, they were mainly mentioned in the "Resumé" section of the Officer's decision, which simply outlined the history contained in the applicant's file and were not relied on in the "Décisions et Raisons" that the Officer gave. When this portion of the applicant's history was mentioned outside of the "Resumé" section, it was not talked about as a negative factor on its own; rather, it was mentioned as one of several factors that had the effect of delaying the applicant's removal from Canada.

[26] Further evidence that the Officer did not view the applicant's criminal history as a negative factor is that the Officer specifically mentions the fact that the applicant received a pardon. This is mentioned as a factor in the applicant's favour on page 3 of the Officer's reasons:

> Bien, qu'il soit tout à son crédit d'avoir observé une bonne conduite et d'avoir obtenu le pardon, […]

[27] The way that the criminal record is mentioned by the Officer does not show that they tainted the Officer's decision, nor were they relied on as a negative factor in coming to the conclusion that there were insufficient H&C considerations in the applicant's case. Instead it was one of several points mentioned that led the Officer to conclude that his establishment in Canada was not because

of circumstances beyond his control. Looking at the applicant's file, there are many documents contained in it relating to the criminal history of the applicant. It would be strange if the Officer did not mention them in the summation of the file.

[28] The applicant also contends that there was a breach of fairness because the officer who rendered the decision was not the one who interviewed him by phone on December 12, 2006. The case law cited by the applicant on this is based mostly on the existence of conflicting evidence. Such is not the case here. The notes in the Tribunal's record at page 12 taken by another officer are not in contradiction with what was written by the deciding Officer. The only reference to this telephone conversation simply states : « Lors d'une entrevue téléphonique, il mentionné (sic) avoir une liaison de longue date mais il n'a soumis aucune preuve. » (Tribunal's record, page 4, para. 3).

[29] The finding that the applicant's criminal record was not used by the Officer in reaching the decision also answers the claim that the Officer breached the duty of fairness by failing to accord the applicant fair notice. Both *Baker* and the IP Manual for making H&C decisions require that an Officer notify the applicant of any factors that could lead to a negative decision and allow the applicant to respond. However, since the applicant's past criminal activities were not counted as a negative factor on their own, there was no reason for the Officer to specifically mention these factors to the applicant.

[30] Therefore, the Court is of the opinion that a reasonable person looking at this matter would not come to a conclusion of an apprehension of bias.

Reasonableness of Officer's Decision

[31] The applicant's remaining challenges relating to the H&C decisions are based on contentions that the Officer relied on irrelevant evidence and made incorrect finding of fact that were material and significant to the decision, therefore reaching a decision that was unreasonable.

[32] It is important to remember when assessing these claims that, in order for an H&C claim to be successful, the onus is on the applicant to demonstrate that there are sufficient H&C considerations in his case (*Owusu v. Canada (Minister of Citizenship and Immigration*), 2003 FCT 94, [2003] 3 F.C. 172 at para. 11). According to the IP-05 Manual, he must demonstrate that he would suffer unusual, undeserved or disproportionate hardship if forced to make his application from outside of Canada. Keeping this in mind, it is obvious that the applicant's claims are directed at the way in which the Officer balanced and interpreted the evidence. There is no indication that the Officer overlooked material evidence or drew unreasonable inferences. Rather, the Officer simply did not find enough H&C considerations to warrant a positive decision in the applicant's case.

[33] The first error mentioned by the applicant is that the Officer states that the applicant was obliged to serve a prison sentence of six months, when in reality the sentence was suspended. It is true that this is incorrect; however as noted above, the Officer did not use the applicant's criminal history as part of the reasons for denying his H&C application. Therefore, the error is not determinative and had no impact on the resulting decision.

[34] The applicant also argues that the Officer erred in writing that the applicant was in possession of a valid passport until the year 2000. The applicant states in his affidavit that he did not have this passport in his possession until recently when his brother sent it to him.

[35] Whether the applicant did or did not have access to his passport was one of the factors that the Officer looked at in order to conclude that the applicant's continued presence in Canada was not one beyond his control. It also led the Officer to make an inference that the applicant's cooperation with authorities that were trying to remove him from Canada was not genuine and that he did not respect the laws in Canada.

[36] This inference was not based solely on whether the applicant had the original passport in his possession during the attempts to remove him in 1999. If he had provided copies of the passport, this would have enabled him to be removed from Canada. Yet, he did not provide these copies until after the passport had expired in 2000. It is clear from the applicant's records that the applicant was in possession of copies of his passport in 2003 even if, as he claims, he did not have the original until his brother sent it to him. This can be seen from an examination of his file, since copies were submitted in 2003 during his H&C application of that year. Furthermore, even if his passport had been sent to Algeria while he was in detention, as he mentioned to an officer on December 15, 1998 (Tribunal's record, page 196), he could have provided copies of his passport to the authorities before the year 2000. Therefore, it was not unreasonable for the Officer to conclude that the applicant would have been able to obtain and supply copies of this passport in 1999 when the authorities were trying to remove him.

[37] Another argument raised by the applicant is that the Officer should not have made mention of the reasons that he came to Canada in the first place. He alleges that this was only relevant to his refugee claim and therefore should not have been referenced in the decision.

[38] The Officer was simply making use of this information to assess whether the applicant had been forced to remain in Canada due to circumstances beyond his control. It was not a determining factor. Rather, the Officer simply pointed out that he had not been forced to settle in Canada. *Legault,* above at para. 29 says that an officer making an H&C determination is entitled to look at an applicant's entire history and take into account both the past and present actions of the applicant when assessing the case. Therefore, the way that the Officer used this statement in the Decision was reasonable.

[39] At the end of the day, the Officer found that the applicant's H&C considerations were insufficient to justify the applicant landing in Canada outside of the regular immigration channels. The Officer clearly knew the legal test that the applicant had to meet and carefully applied this test by assessing the applicant's history in Canada and the circumstances surrounding his application. The conclusion that there were insufficient H&C considerations was a reasonable conclusion to draw from the evidence and the Court's intervention is not warranted here.

[40] The applicant submits the following question for certification:

> In the context of an application under section 25 of IRPA, under what circumstances, if any, would it be a violation of the principle that "he who hears must decide" for an applicant to be interviewed by an officer other than the officer making the final decision on the application?"

[41] The applicant argues that there is conflicting jurisprudence on this point and says that it would be beneficial for immigration officers to have clear guidance on this issue from the Federal Court of Appeal.

[42] The respondent opposes such a question. The Court agrees with the respondent that this question is not determinative of the present judicial review application. It is more in the nature of a reference question and for that reason, it will not be certified.

JUDGMENT

THIS COURT ORDERS that:

1. The application for judicial review is dismissed.

2. No question is certified.

"Michel Beaudry"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Diane N. Doray	FOR APPLICANT
Evan Liosis	FOR RESPONDENT

SOLICITORS OF RECORD:

Diane N. Doray Montreal, Quebec	FOR APPLICANT
John Sims, Q.C. Deputy Attorney General of Canada Montreal, Quebec	FOR RESPONDENT