Federal Court  Cour fédérale

Date: 20120314

Docket: IMM-6236-11

Citation: 2012 FC 307

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, March 14, 2012

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

THIERNO AMADOU BALDE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is a Guinean citizen of Peul ethnicity. He has filed an application for judicial review of a decision by an immigration officer (officer) dated June 20, 2011, rejecting his application for permanent residence, from within Canada, based on humanitarian and compassionate considerations (H&C application) pursuant to section 25 de la *Immigration and Refugee Protection Act*, SC 2001, c. 27 (Act).

[2] For the following reasons, the application for judicial review is allowed.

I. Background

[3] The applicant arrived in Canada on July 18, 2007, through the United States and claimed refugee protection upon his arrival. His claim was based on events that apparently occurred between June 2006 and January 2007. His claim was rejected by the Refugee Protection Division of the Immigration and Refugee Board (Board) because it found that his narrative was not credible. An application for judicial review of that decision was dismissed on August 11, 2010.

[4] On January 16, 2011, the applicant filed his H&C application, which he based on his establishment in Canada, the best interests of a child, his niece, and his fears of return. The impugned decision is dated June 20, 2011.

[5] The applicant also filed a pre-removal risk assessment (PRRA) application, which was the subject of a negative decision on July 4, 2011, by the same immigration officer who handled his H&C application.

II. Impugned decision

[6] The officer stated that the burden of proof rests with the H&C applicant to demonstrate that [TRANSLATION] "his or her particular case is such that the hardship of having to obtain a permanent resident visa from outside Canada would be either unusual and undeserved or disproportionate."

[7] She then analyzed the three considerations raised. Regarding establishment, she noted some positive elements, but found that they were not determinative in granting an exemption from filing a permanent residence application from outside Canada. Regarding the best interests of the applicant's niece, the officer believes that that was not demonstrated with satisfaction and did not justify granting an exemption.

[8] It is important to spend some more time looking at the officer's analysis of the applicant's alleged fears of return.

[9] The officer noted that, in the context of an H&C application involving fears of return, the risk factor is assessed as a whole and the test to apply is to define whether the risks experienced by the applicant are such that they are equivalent to unusual and undeserved or disproportionate hardship justifying an application for permanent residence from within Canada.

[10] The officer first noted that the applicant was making, among other things, the same allegations that the Board had deemed not credible in the refugee claim and she did not accept those risks, even if the applicant claimed that the Board's decision was not [TRANSLATION] "reliable".

[11] The officer also addressed new events that were raised by the applicant and that allegedly occurred after his refugee claim was rejected.

[12] She noted that the applicant advanced that, since August 2009, his father has been an active member of a political party called Union of Guinea's Democratic Forces (UFDG) and that by

reason of his membership in that party, the applicant was the subject of abuse by security forces, in particular during events in September 2009. The officer attached [TRANSLATION] "minimal value" to that allegation. She noted that those events purportedly occurred before the refugee hearing that took place on December 8, 2009, but that the applicant did not amend his Personal Information Form or report those new allegations of risk during the hearing. The officer also attached little probative value to the letter bearing UFDG letterhead attesting to his father's membership because it was not accompanied by the envelope in which it was mailed or a copy of his father's membership card. The officer also noted that even if she had given credence to the letter, it proved that the applicant's father was a member of the UFDG political party, but not that his father's safety, and, in turn, his safety, was at risk. The officer noted that despite the alleged problems, the applicant's parents and younger brother still live in Guinea and have obtained many visas, namely for the United States, Canada and the Schengen States.

[13] The officer also addressed the prevailing general conditions in Guinea. She noted the election of Alpha Condé as President of the country on November 15, 2010, and indicated that ethnic tensions were observed during the second round of elections between the Peuls and the Malinkes. She also noted that there have been improvements with respect to freedoms in some areas since the election of President Condé, but that there is still progress to be made. She believes that the risk advanced by the applicant is no different from that of the population as a whole. She stated the following:

> [TRANSLATION]
>
> The risk advanced by the applicant should he return to Guinea would be no different from that of the entire Guinean population, which is

> generally facing difficult circumstances in a country that is constantly struggling with living conditions ridden by poverty and a politically unstable situation. Overall, since the last elections, there has been a slight improvement to the general situation in Guinea.
>
> . . .
>
> In light of the foregoing, I am not satisfied that the risks advanced by the applicant should he return to Guinea are such that an exemption on humanitarian and compassionate grounds is warranted.

III. Issues

[14] The applicant challenged the officer's decision in several respects, but only one issue seems determinative to me in this case:

Did the officer fail to consider the applicant's profile as a young male Peul in her assessment of the risk factors upon return to Guinea?

IV. Standard of review

[15] It is well established that an exemption from filing an application for permanent residence from outside Canada is an exceptional measure and that decisions involving H&C applications are subject to broad discretion by the Minister (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (available on CanLII); *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, 212 DLR (4th) 139; *Daniel v Canada (Minister of Citizenship and Immigration)*, 2011 FC 797 at paragraph 11 (available on CanLII) (*Daniel*); *Mirza v Canada (Minister of Citizenship and Immigration)*, 2011 FC 50 at paragraph 1, 382 FTR 211. The Court must show deference to those decisions, which are reviewable on the standard of reasonableness (*Daniel*, above, at paragraphs 11-12; *Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356, 146 ACWS (3d) 1057).

V. Analysis

[16] I find that the H&C officer stated and applied the correct criteria with respect to the applicant's H&C application, but that she failed to address one of the important elements of the risk component of his application.

[17] In his H&C application, the applicant raised various risks, including that related to him a Peul and his connection to his father, namely based on his father's membership in the UFDG. In that regard, the applicant maintained that ethnic Peul people and/or supporters of the UFDG are still targeted and have been the subject of abuse and violence since the November 2010 elections.

[18] The officer limited her risk assessment to the risks related to the abuse that the applicant's father was purportedly the victim of in 2009. In her decision, she addressed the allegation of risk based on the specific events allegedly experienced by the applicant's father, but not on his father's mere membership in the UFDG and on the applicant's ethnic profile as a Peul.

[19] Those elements were important in the applicant's H&C application and the officer's decision does not support a finding that she considered that specific aspect of the application.

[20] The respondent raises that those specific risks were the subject of a decision by the same officer regarding a PRRA application filed by the applicant that was not the subject of an application for judicial review. In fact, a negative PRRA decision was rendered by the officer on July 4, 2011. In that decision, the PRRA officer did specifically address the allegation of risk based

on the applicant's Peul ethnicity. The officer analyzed the situation during the November 2010 election and how it has evolved since the election. She found, based on the documentation, that conditions have improved since the election of President Alpha Condé and that she did not believe that the applicant's life is at risk by reason of his ethnicity. She also found that the applicant did not establish a connection between the documentary evidence and his personal situation.

[21] The PRRA officer's decision cannot, however, impact this application.

[22] First, the officer in the PRRA application analyzed the risks of return from the perspective of section 97 of the Act and not in terms of the scale of the hardship that would arise from those risks, as required in processing an H&C application. Second, and this element is crucial, the PRRA decision is subsequent to the decision rendered with respect to the H&C application and the officer's findings of fact could not be considered in the context of the H&C application, no more than they can be in the context of the application for judicial review of the decision that decided that application. In the PRRA decision, the officer did address the specific risk raised by the applicant related to his ethnicity, but did not analyze that risk factor in her decision with respect to the applicant's H&C application.

[23] I therefore find that by failing to address one of the primary risk factors raised by the applicant in support of his H&C application, the officer rendered an unreasonable decision (to the same effect, see *Ariyaratnam v Canada (Minister of Citizenship and Immigration)*, 2010 FC 608 at paragraphs 21 and 22 (available on CanLII); *Kaur v Canada (Minister of Citizenship and Immigration)*, 2010 FC 805, at paragraphs 12-18, 92 Imm. L.R. (3d) 48).

[24] The application for judicial review is therefore allowed. The parties did not propose a question for certification and there is none in this matter.

JUDGMENT

THE COURT ORDER AND ADJUDGES that the application for judicial review is allowed. The immigration officer's decision is set aside and the applicant's file is returned to the Minister for reconsideration of his application for permanent residence from within Canada on humanitarian and compassionate grounds by another immigration officer. No question is certified.

"Marie-Josée Bédard"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6236-11
STYLE OF CAUSE:	THIERNO AMADOU BALDE v MINISTER OF CITIZENSHIP AND IMMIGRATION
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