Federal Court  Cour fédérale

Date: 20130514

Docket: IMM-10111-12

Citation: 2013 FC 499

[REVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, May 14, 2013

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ABSA ZABSONRE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Preamble

Without knowing a person's history, origins or that which has become of a person, can a decision base itself only on the present of the person, and, thus, attempt to establish its premise on speculation?

Prior to making a decision, if a decision-maker is without an awareness of the person's past and without a perception of the future of the person by which to clarify the present, the decision-maker remains at a loss. Thus, without past history, the evidence, for a decision-maker, is without links, neither does it have a past nor is it connected to future within any understandable space and time sequence, and, therefore, such a decision would be baseless as it would be made in a void.

Without knowing a person's roots, the potential future lacks a connection to a present reality through which the future could link itself to potential outcomes, and, thus, greater clarity in a decision. When the evidence is scant, a case cannot be resolved and remains a paradox without an identifiable outcome, other than rejection due to ambiguity at the core.

I. Introduction

[1] This is an application for judicial review against a decision, dated June 18, 2012, by which an immigration officer refused to grant the applicant an exemption, for humanitarian and compassionate (H&C) considerations, of the obligation to apply for permanent residence from outside Canada, in accordance with subsection 25(1) de la *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*).

[2] This decision was sent to the applicant at the same time as a negative pre-removal risk assessment (PRRA) decision, which was the subject of a separate application for leave and for judicial review in docket IMM-10112-12. According to the respondent, the applicant seems to have abandoned her application for judicial review against the PRRA decision.

[3] Further, at paragraph 33 of her affidavit, the applicant stated that her husband Maxis Labissière filed a sponsorship application in Canada on her behalf under the spouse or common-law partner category.

II. Facts

[4] The applicant, Absa Zabsonre, is a citizen of Burkina Faso. She is 37 years old.

[5] On June 12, 2008, the applicant obtained a student visa for Canada using an altered Ivoirian passport.

[6] On December 14, 2008, the applicant alleged that she arrived in Canada, passing through the Ivory Coast and France, still using her fake passport and a false identity. On January 8, 2009, the applicant filed a refugee claim in Canada for political reasons. The Immigration and Refugee Board's Refugee Protection Division (RPD) rejected this refugee claim on September 13, 2011, as it was not satisfied with the identity of the applicant or her credibility because of a lack of a credible basis. The applicant [TRANSLATION] "invented an entire history to justify her refugee claim" (RPD's decision at para 15). The application for leave and judicial review filed against the RPD's decision was also dismissed on January 31, 2012.

[7] On September 22, 2010, the applicant gave birth to a child in Canada. It was the applicant's second child. She has another son who is 12 years old, born on November 16, 1999, who has lived in Burkina Faso with the applicant's mother since the applicant has been in Canada.

[8] On March 5, 2012, the applicant filed an H&C application, followed by a PRRA application filed on April 27, 2012. Both applications were respectively rejected on June 18 and 19, 2012.

[9] In support of his H&C application, the applicant submitted evidence relating to her establishment in Canada since 2009, including evidence of this employment and volunteering since June 2009, the best interest of his two children, one of which is a Canadian citizen, the hardships or risks to which she may be exposed on returning to Burkina Faso and the financial support that she provides to her family and son in Burkina Faso by sending money regularly because of the salary from employment in Canada.

IV. Decision under judicial review

[10] The officer recognized that the applicant has had jobs since June 2009 and that she made the necessary effort to support herself although she did not submit official evidence of income, notices of assessments or pay stubs from previous employers. The officer also noted that the applicant took and completed courses to become a security guard and another course for private-home daycare, that she volunteered for the MAAH foundation and that, according to the evidence, she participated in a benefit evening to give assistance to persons in distress. However, the officer specified that, without substantial details, the letter from the MAAH foundation was not very determinative.

[11] Other positive factors that the officer acknowledged in his reasons include the fact that the applicant has a good command of both official languages, the letter from PRAIDA (Programme régional d'accueil et d'intégration des demandeurs d'asile), a program that the applicant has been

involved in since arriving in Canada, the fact that the applicant provides for her family's financial needs in Burkina Faso, specifically her son's.

[12] However, the officer noted that the applicant would not suffer unusual or disproportionate hardship, since she has had equivalent jobs in Burkina Faso although the work conditions and salaries were better in Canada. The officer's finding gave more weight to the applicant's return to her son and her family, considering that she does not have family connections or support in Canada, except her two-year-old son.

[13] With respect to the best interests of the applicant's children, the officer stated that the applicant's return is more beneficial to the eldest son who has not seen her for three years. The officer noted that no information was submitted with respect to the conditions in the country informing him about the well-being of the children of the applicant, who would in no way harm their development. With respect to the youngest son, the officer noted that, according to the applicant's testimony, the child's biological father accepted no responsibility for their son and he only sees him a few times a year. Therefore, the officer noted that, given his very young age and the fact that he will keep his Canadian citizenship, the best interests of the applicant's child was not truly affected by the applicant's removal to Burkina Faso.

[14] Finally, the officer noted that the applicant did not bring any evidence establishing that she would likely face discrimination or other adverse conditions outlined in the documentary evidence upon her return to Burkina Faso.

[15] Consequently, the officer found that the applicant could not benefit from the exemption under subsection 25(1) of the IRPA.

III. Issues

[16] (1) Did the officer commit an error in his assessment of the evidence that is relevant and favourable to the applicant and in particular in his assessment of the best interests of her children?

(2) Do the reasons given by the officer give rise to a reasonable apprehension of bias or even of a lack of objectivity and open-mindedness?

IV. Standard of review

[17] The standard of review applicable to a decision relating to an H&C application is that of reasonableness (*Ramirez v Canada* (*Minister of Citizenship and Immigration*), 2006 FC 1404, 304 FTR 136, at para 30). As justice Leonard Mandamin stated in *Hamam v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1296, referring to *Mikhno v Canada (Minister of Citizenship and Immigration)*, 2010 FC 386: " [g]iven the discretion an Immigration Officer has in a H&C application, a heavy burden rests on the Applicants to satisfy the Court that the decision under section 25 requires the intervention of the Court" (at para 27).

[18] However, as the Federal Court of Appeal stated in *Sketchley v Canada (Attorney General)*, 2005 FCA 404: "[t]his procedural fairness element is reviewed as a question of law. No deference is due. The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty" (at para 53). Thus, the breaches to the rules

of natural justice and procedural fairness such as impartiality, objectivity and the open-mindedness of the decision-maker must be reviewed on a standard of correctness (*Dunsmuir v Nouveau-Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 47-50 and *Hamam*, above, at para 28).

V. Analysis

Preliminary question – admissibility of new evidence

[19] In her affidavit dated October 30, 2012, the applicant states that she registered for French language courses to then take training, which gave her the opportunity to obtain a permit to operate a private-home daycare. In it, she also states that she acquired a private-home daycare that she runs alone, which allows her to earn income up to $43,000 per year. In support of this new allegation, the applicant produced a certificate for his training and several contracts that she had allegedly signed with parents of children that she taken into her establishment.

[20] The respondent challenges the admissibility of this evidence at the stage of judicial review since these documents in question were never submitted to the officer who made his decision on June 18, 2012 (affidavit of Francine Lauzé and tribunal record). This is entirely new evidence.

[21] In fact, given that this evidence does not aim to show that there was a violation of procedural fairness or jurisdictional error, it does not meet the specific requirements established by this Court's jurisprudence on the exceptional nature of the admissibility of new evidence in the evaluation of an application for judicial review. Although the Court cannot decide on the probative value that the officer gave to this evidence, the applicant did not submit anything that could support the new evidence (nothing was said with respect to the commitments of parents who allegedly

wanted to register their children in a daycare run by the applicant). The documents relating to her daycare are not relevant given that the trial decision-maker had not received any evidence that the applicant allegedly wanted to start a daycare herself. However, the Court's case law is clear on this issue. As Justice Pierre Blais explained in *Kim v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1357: "[a] judicial review is not the appropriate venue for adducing such information to bolster a failed application…" (at para 5), or to support her evidence to decide on issues that have already been reviewed by the decision-maker (see also *Zolotareva v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1274, 241 FTR 289, at para 36).

[22] Therefore, the Court will hold to the evidence included in the tribunal record for the purposes of this application for judicial review.

(1) Did the officer commit an error in his assessment of the evidence that is relevant and favourable to the applicant and in particular in his assessment of the best interests of her children?

[23] The applicant submits that the officer did not give the appropriate weight to all the relevant evidence and information that were submitted before him and that he failed in his duty to be sensitive to the best interests of the applicant's children.

[24] On reading the written submissions, the Court is of the view that the applicant disagrees with the weight given to the various factors concerned that were possibly more favorable to her application, such as the evidence of her jobs, her establishment in Canada and her financial self-sufficiency. It is not up to the Court to re-weigh these factors, none of which were ignored or

overlooked by the officer (*Nkitabungi v Canada (Minister of Citizenship and Immigration)*, 2007 FC 331).

[25] The applicant alleges that the officer was not sensitive to the best interests of the children directly affected by his decision. The officer's findings with respect to the applicant's children seem reasonable since they took into account all the circumstances alleged by the applicant and did not ignore any specific reason within the meaning of *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2003] 2 FC 555, at paragraph 5.

[26] The officer determined that the interests of the applicant's eldest son would not be affected by the removal of his mother, given that the applicant is able to find herself a job in Burkina Faso and support her child like she does now by regularly sending him money. As for the applicant's youngest son, the officer took into account the age and particular circumstances of the child and the fact that the child's biological father only meets with him a few times per year. The officer's findings that, since he is very young, the applicant's child would have no trouble integrating in Burkina Faso and that he could obtain citizenship in this country through his mother's descent and keep his Canadian nationality, is reasonable. In any event, the applicant did not raise to the officer or this Court any particular circumstance that would adversely affect the interests of her children in one way or another by her removal. This is the sole responsibility of the applicant (*Liniewska v Canada (Minister of Citizenship and Immigration)*, 2006 FC 591, at para 20-21). As the Federal Court of Appeal explained in *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 FCR 635: "…since applicants have the onus of establishing the facts on which

their claim rests, they omit pertinent information from their written submissions at their peril" (au para 8).

[27] Therefore, since the weighing of relevant factors is not up to the court reviewing the exercise of ministerial discretion, it is sufficient to say that, given all of the evidence on the record, the officer's findings fall with a range of possible acceptable outcomes defensible in respect of the facts and the law (*Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 FC 358, at para 9; *Dunsmuir*, above, at para 47).

(2) Do the reasons given by the officer give rise to a reasonable apprehension of bias or even of a lack of objectivity and open-mindedness?

[28] Generally and without any details of the facts in this case or the officer's reasons, the applicant claims that the impugned decision was not made without bias and that the officer did not show the objectivity and open-mindedness required by the Citizenship and Immigration Canada manual on inland processing of applications, IP 5 - *Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds* (IP 5 Guide).

[29] As for the allegation that the decision does not respect the principle of impartiality and procedural fairness, the applicant did not at all specify how the officer allegedly violated these principles or how the officer allegedly lacked objectivity and open-mindedness or how the applicant was unable to make her case. Such vague and general allegations without any supporting facts in evidence would not succeed in satisfying the legal test of a reasonable apprehension of bias within the meaning of *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369:

> ... [T]he 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. ...
>
> ... In the words of the Court of Appeal, 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 Mr. Crowe, whether consciously or unconsciously, would not decide fairly."

[30] In *R v R.D.S.*, [1997] 3 SCR 484, the Supreme Court explained that:

> 114. The onus of demonstrating bias lies with the person who is alleging its existence. ... Further, whether a reasonable apprehension of bias arises will depend entirely on the facts of the case.

[31] There must be very convincing elements for establishing a bias or an apprehension of bias. After a careful reading of the officer's reasons as a whole and the relevant excerpts of the IP 5 Guide, the reasons in no way suggest that the officer was closed-minded toward the applicant's allegations or showed any kind of bias.

VI. Conclusion

[32] For all of the reasons below, the applicant's application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS that the applicant's application for judicial review be dismissed with no question of general importance to certify.

"Michel M.J. Shore"
Judge

Certified true translation
Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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