Date: 20061017

Docket: IMM-1823-06

Citation: 2006 FC 1236

Toronto, Ontario, the 17th day of October 2006

Present: The Honourable Mr. Justice Harrington

BETWEEN:

SERGE KOUKA and
PATRICIA LOUPANGOU KOUKA

Applicants

and

MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This application for judicial review is based on the second application made by the applicants to Citizenship and Immigration Canada on humanitarian and compassionate grounds with risks claimed. The Koukas, Serge and Patricia, who are husband and wife, arrived in Canada in March 2000 from their native country, the Republic of Congo (RC), and both claimed refugee status on account of their membership in the Lari ethnic group and their political involvement in the Congolese Movement for Democracy and Integral Development (MCDDI).

[2] Later that year, the Refugee Division refused the claim. Following this refusal, the Koukas did not file an application for leave and application for judicial review of that decision. However, the legal steps taken by the applicants in the hope of being granted status under Canadian law did not stop there. Mr. and Mrs. Kouka both filed a pre-removal risk assessment application – PRRA application – and an immigrant visa exemption application – H&C application – with a view to obtaining permanent resident status in Canada.

[3] While the applicants were busy completing the administrative formalities regarding their request to remain in Canada, a child was born of their union in December 2001.

[4] In March and April 2003, the Canadian authorities refused the two applications by Mr. and Mrs. Kouka, namely, the PRRA application and the H&C application.

[5] In January 2004, the Koukas persevered in their effort to be granted legal status in Canada by filing a second PRRA application and a second H&C application. The second H&C application was based on the following grounds: settling in Canada, the best interests of the child and a real fear of returning to the United States, the place of their point of entry to Canada, and to the RC.

[6] Once again, in June 2004, the applicants were met with a rejection by Canadian authorities. Their second PRRA application was denied, and in August 2004 the applicants had to leave Canada for the United States. Since then, the applicants have lived in Buffalo, New York, and have another member of their family following the birth of a new child on American soil in the fall of 2004.

[7] The second H&C application, which is the subject of this application for judicial review, was denied by the immigration officer in March 2006.

ISSUES

[8] The issues are:

(a) the applicable standard of review;

(b) did the immigration officer breach the rules of procedural fairness and natural justice in ruling on the disputed decision? and

(c) did the immigration officer exercise his discretion reasonably in making the disputed decision?

APPLICABLE STANDARD OF REVIEW

[9] As set out in subsection 11(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), with regard to the issue of permanent resident status in Canada, the state of the law is that a foreign national must obtain a Canadian visa before coming to Canada. As a general rule, foreign nationals must submit their visa applications at the Canadian immigration office in their country of nationality, as indicated in paragraph 11(1)(*b*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[10] In view of the facts in the record, the applicants should ordinarily have filed a visa application in the RC. However, as stated in subsection 25(1) of the IRPA, the Minister may

disregard the legal requirement if he or she believes that humanitarian and compassionate considerations concerning the foreign national require it, or if it is justified by public policy. In short, it is a case-by-case assessment, which must be made on a discretionary basis. However, this discretion is not unlimited. As the Supreme Court held in the leading case of *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, it must be exercised reasonably by the decision-maker. Consequently, in view of the nature of the matter here, the applicable standard of review is reasonableness *simpliciter*.

RULES OF PROCEDURAL FAIRNESS AND NATURAL JUSTICE

[11] The applicants argue that in light of the decision, there is reason to doubt the impartiality of the immigration officer in this matter. Firstly, this fear of bias results from the fact that the immigration officer considered and ruled on all the applications regarding the claim by the applicants for legal status in Canada, namely, the PRRA applications and the H&C applications. Secondly, they contend that the immigration officer did not properly perform his duties when he assessed the second H&C application since, contrary to the requirement that he assess the matter in view of all the evidence before him at that time, the applicants maintain that the officer only dealt with the correctness of the decisions he had already made.

[12] Looking at the record as a whole, I do not share that view. Before reaching a negative conclusion on the second H&C application by Mr. and Mrs. Kouka, the immigration officer was careful to review all aspects of the applicants' situation since their arrival in Canada and inevitably referred to the decisions previously made. It is true that the officer restated the decisions rendered

earlier in full in his text. On the other hand, it would be wrong to say that his analysis of the second H&C application was based on past inferences. The disputed decision was analyzed by the immigration officer, who fully considered the new evidence put forward.

[13] Furthermore, in his reasons, the immigration officer referred to a comment he had made in an earlier decision regarding the applicants, which unfortunately later proved to be false. Despite this mistake, the officer was careful to make it clear in the decision at issue here that this error had been corrected in a subsequent decision involving the applicants. Consequently, it cannot be suggested that the officer sought to justify himself when he made the decision on the second H&C application, and that accordingly it breached the rules of procedural fairness and natural justice, vitiating the decision that was rendered.

[14] Although foreign nationals are entitled to submit more than one H&C application and more than one PRRA application in Canada, the most recent application must be based on new facts; otherwise, what would be the point of submitting it? In short, how would a new application be relevant? Such a procedure would undermine the Canadian justice system, thereby breaching the spirit of the *res judicata* rule, which prevails in judicial matters. In this case, the immigration officer did not contravene any rule or principle when he restated findings already made in an earlier decision or limited his assessment of the evidence to new material before him. In that respect, the decision was correct, and the Court should not intervene. It should be noted that in matters of natural justice and procedural fairness, review of a disputed decision must be in accordance with the correctness standard, as the Supreme Court held in *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539.

[15] There is also nothing wrong with the fact that it was the same immigration officer who adjudicated at each stage of the applicants' claim for legal status in this country. In this regard, Mr. Justice Blais wrote the following at paragraph 16 of *Nazaire v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 416, [2006] F.C.J. No. 596 (QL): "In principle, the officer responsible for the first PRRA application could be responsible for the second, but there are rules to follow so that the officer does not fail to observe the principles of natural justice and impartiality." There is nothing in the record to indicate that the immigration officer failed to comply with these rules. It should be noted that the applicants did not establish that an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that it was more likely than not that the decision-maker would not decide fairly (*Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369).

[16] After reviewing the record, I find that the immigration officer did not deviate from his duty to act with complete impartiality.

[17] As regards the issue of the best interests of the child, when an immigration officer reviews a case based on humanitarian and compassionate grounds, he or she must consider the interests of the child directly affected, if any, as stated in subsection 25(1) of the IRPA:

> 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 and compassionate

> considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.

[18] In their second H&C application, the applicants alleged that the risks threatening the family, and in particular the lives of the children, had to do with health, on account of the Ebola virus currently raging in the RC, and the inability of the Congolese school system to offer suitable education for its nationals. Further, they pointed to the high level of violence existing in their country of origin. The region from which the applicants came, Pool in the RC, is known as a particularly dangerous one.

[19] Considering the record, the immigration officer concluded that the Ebola virus and inadequate educational services were not a situation unique to the applicants, but a generalized one affecting the Congolese population at large. Furthermore, the immigration officer ruled that it was possible for the applicants to find an internal flight refuge in the RC and that, in the circumstances, this alternative should be taken. It is worth noting here the exceptional nature of the steps taken by Canada when it reviews the cases of foreign nationals claiming permanent resident status on humanitarian and compassionate grounds.

[20] As the immigration officer indicated, the applicants appeared to have an alternative: [TRANSLATION] ". . . it seems to me that the applicants and their family are not obliged to live in the [Pool] area – the applicants already lived in Pointe Noire, which, according to recent information on the RC, is much less affected by violence." In this case, the possible protection offered to the applicants by their country of origin should therefore be preferred.

[21] As to the violence raging in the RC, the immigration officer considered in his analysis new documents submitted by the applicants on the socio-political situation in their country of origin and sought to explain the weight which he gave them. The immigration officer based his decision on a sound footing. Moreover, it is worth noting that it appears from the disputed decision that the situation in the RC is more peaceful since the last negative protection decision regarding the applicants.

[22] Consequently, it is much more difficult for Mr. and Mrs. Kouka to claim the benefit of exceptions available in Canada.

[23] *Baker, supra*, does not hold that the presence of a Canadian child in a foreign family can, by itself, justify admitting all the family members to Canada. On the contrary, as Mr. Justice Décary wrote for the Federal Court of Appeal in *Legault v. Canada (Minister of Citizenship and Immigration)* (C.A.), 2002 FCA 125, [2002] 4 F.C. 358, [2002] F.C.J. No. 457 (QL):

> [11] In *Suresh*, the Supreme Court clearly indicates that *Baker* did not depart from the traditional view that the weighing of relevant factors is the responsibility of the Minister or his delegate. It is certain, with *Baker*, that the interests of the children are one factor that an immigration officer must examine with a great deal of attention. It is equally certain, with *Suresh*, that it is up to the immigration officer to determine the appropriate weight to be accorded to this factor in the circumstances of the case. It is not the role of the courts [page 369] to reexamine the weight given to the different factors by the officers.
>
> [12] In short, the immigration officer must be "alert, alive and sensitive" (*Baker*, para. 75) to the interests of the children, but once she has well identified and defined this factor, it is up to her to determine what weight, in her view, it must be given in the circumstances. 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), 29 C.R.R. (2d) 184 (F.C.A.), leave to appeal refused, [1995] 3 S.C.R. vii).

[24] It appears from the disputed decision that the immigration officer was alert, alive and sensitive to the interests of the child when he reviewed the new evidence in the record, taking the applicants' arguments into account. Considering the case law that the child's interests are not conclusive in deciding an H&C application, after weighing all the evidence in the record, the immigration officer concluded that neither the children nor the parents in question would encounter disproportionate hardship if they were to return to their country of origin and file an application for a Canadian visa. Neither the *Canadian Charter of Rights and Freedoms* nor the *Convention on the Rights of the Child* were infringed.

[25] There is nothing in the applicants' submissions or the documents filed with this Court to indicate that there was any breach of the rules of procedural fairness or natural justice in this case.

REASONABLENESS OF EXERCISE OF DISCRETION BY IMMIGRATION OFFICER

[26] First, it is important to emphasize the following. It is well settled that before making a decision, an immigration officer has a duty to review all the evidence in the record. Nevertheless, that does not in any way mean that the officer must reconsider evidence that was the subject of an earlier decision, as was discussed somewhat earlier in this judgment.

[27] When dealing with a new H&C application, an immigration officer naturally takes into account comments made in an earlier decision. On this point, Mr. Justice Nadon wrote the following in *Hussain v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 751 (QL):

> [12] I should note that before Mr. St. Vincent on their H&C application, the Applicants proceeded on the basis that Mr. Hussain was a member of the MQM, notwithstanding the clear findings made by the Refugee Board and by the PDRCC Officer to the contrary. The Applicants seem to be of the view that if they continue to add documents to the record, the credibility findings of the Refugee Board are somehow going to be "reversed" or "forgotten". In my view, that is a mistaken view because the officer who hears an H&C application does not sit in appeal or review of either the Refugee Board or the PDRCC Officer's decision. Thus, on the H&C application, Mr. St. Vincent could not proceed on the basis that Mr. Hussain was an MQM member, given the Refugee Board's findings in that respect. In short, the purpose of the H&C application is not to re-argue the facts which were originally before the Refugee Board, or to do indirectly what cannot be done directly – i.e., contest the findings of the Refugee Board.

[28] The issue that arises is whether the immigration officer reasonably assessed the new evidence submitted by the applicants at the time of their second H&C application. It should be pointed out that the immigration officer observed in his notes that [TRANSLATION] "the representations made by the applicants and their representative essentially set out the same basic facts as the applicants put forward in their previous protection applications."

[29] The applicants submit that the immigration officer made an error in determining the probative value to be given to the specific arrest certificate involving Mr. Kouka. In short, they

allege that it should have been given more weight. However, it should be noted that the immigration officer concluded that the certificate had very little probative value in view of the following:

> [TRANSLATION]
>
> The document, alleged to be an official document of the Congolese government, contains several spelling errors. . . . The document asks each "citizen" to arrest the applicant, which is unlikely since this type of document is ordinarily intended for peace officers or law enforcement officers. It is unlikely that such a document would be intended for ordinary citizens. . . . The applicant did not properly explain how he obtained this document, and without any explanation of the many spelling errors, I find that the document is unreliable and has very little probative value.

Consequently, contrary to the applicants' allegations, the officer reached the conclusion he did for reasons other than simply the spelling errors it contained. It should be borne in mind that an immigration officer enjoys a measure of discretion. Accordingly, it is up to the officer to determine the probative value to be given to material submitted in evidence.

[30] As appears from the record in this case, I cannot conclude, as the applicants allege, that the second H&C decision was unreasonable. The Court must show deference, allowing the immigration officer the necessary latitude to assess the evidence. Moreover, in the circumstances, there is no indication that the decision dismissing the applicants' application for an immigrant visa exemption is unreasonable.

[31] Mr. Justice Joyal took this approach in a pertinent comment in *Miranda v. Canada (Minister of Employment and Immigration)*, (1993) 63 F.T.R. 81, [1993] F.C.J. No. 437 (QL), which is

reproduced at paragraph 18 of *Carrillo v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 548, [2004] F.C.J. No. 673 (QL):

> [A]lthough one may isolate one comment from the Board's decision and find some error therein, the error must nevertheless be material to the decision reached. . . . It is true that artful pleaders can find any number of errors when dealing with decisions of administrative tribunals.

However, this does not ensure that an application for judicial review will be granted and that the challenged decision will be set aside.

[32] Accordingly, for all these reasons, the application for judicial review must be dismissed.

[33] No serious question of general importance was submitted to the Court for certification.

ORDER

THE COURT ORDERS that the application for judicial review be dismissed. There is no question for certification.

"Sean Harrington"

Judge

Certified true translation
M.J.Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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