Date: 20071001

Docket: IMM-539-07

Citation: 2007 FC 989

Ottawa, Ontario, October 1st, 2007

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

MARGARET THENYA GAYA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] In this application for judicial review, Mrs. Margaret Thenya Gaya (the applicant) challenges the negative humanitarian and compassionate consideration (H&C) decision made under section 25 of the *Immigration and Refugee Protection Act,* (the Act), S.C. 2001, c. 27 (IRPA), rendered on January 23, 2007 by a pre-removal risk assessment officer (the "Officer").

I. Issue

[2] The essence of the issues raised in this case may be summarized as follows: Did the Officer err in fact or in law by applying the pre-removal risk assessment (PRRA) test to the material evidence under the H&C application?

[3] For the reasons that follow, the Officer did err in fact or in law by applying the PRRA test rather than the threshold standard for H&C applications; as a result of which this application shall be dismissed. Counsel for the respondent argued that the applicant was seeking a benefit from the exceptional regime put in place by s.25(1) of IRPA while she has constantly avoided to conform to the Act. Considering the particulars of this application, I do not think that the theory of clean hands applies.

II. Facts

[4] Born on March 1, 1960, the applicant is a citizen of Kenya who came to Canada on April 10, 1999 with her then-husband Daniel Odhambo Gaya.

[5] They made joint claims for refugee protection based on Mr. Gaya's political problems in Kenya.

[6] Their refugee claims were denied on October 12, 1999.

[7] In July 2004, they made joint PRRA and H&C applications; however, both were refused on December 7, 2004. A warrant for their arrests was issued in February 2005.

[8] In February 2005, Mr. Daya was arrested in Regina by immigration authorities and deported from Canada on March 22, 2005.

[9] During the applicant's visit to her husband in prison, she learned that he had married another woman named Francine Kabanza in Edmonton on September 20, 2003. Indeed, Mr. Gaya was deported from Canada accompanied by his second wife.

[10] The applicant's world went into a tailspin at the knowledge of this news. She was not unaware of his philandering ways throughout their marriage but to have married another woman while still married and living with her was enough to shake her life. She moved out of their home in Montreal and lived with a friend.

[11] The applicant had no financial resources of her own. She never received a salary while working for the Indaba Canada Expos Inc. and Art Africa Inc., two businesses owned by Mr. Daya.

[12] When the applicant asked her then-husband what he intended to do about her, Mr. Gaya told the applicant that he could not afford to take her back to Kenya with him and in fact, he did not want her to come with him. Before leaving with his new wife, Mr. Gaya threatened to kill the applicant if she ever set foot in Kenya, as he did not want her to be a part of his new life.

[13] It was then in June 2005 that the applicant went to see an immigration consultant and prepared the second H&C application, which was refused on January 23, 2007. The application contained her current address, her home phone number and an alternative one. It is this negative decision which forms the object of the present application.

[14] In support of her second H & C application, the applicant provided four T4 slips for 2001 as follows:

1. AMB international Inc. $1,565.98
2. Alarm Zone Inc. $2,394.60
3. 3096-0876 Le nouvel hotel $20.90
4. Mitchtex international $6,061.26

However, she did not provide T4 slips for her work in Indaba Canada Expos Inc. and Art Africa Inc.

[15] In other supporting documents, the applicant provided a psychological report dated September 9, 2005 prepared by Marta Valenzuela, Ph.D. who met twice with the applicant on September 1st and 6th, 2005 in order to conduct a psychological analysis to determine the applicant's state of mind. Dr. Vlenzuela observed that the applicant showed symptoms of depression and traumatic stress, which were reactivated after the applicant's separation from her husband on whom she was emotionally and financially dependant. His departure from Canada without her but with his new wife exacerbated her psychological profile.

[16] In addition, the applicant provided a report from her social worker, Marie-Eve Bousquet, Centre de santé et de services sociaux de Côte-des-Neiges, Métro et Parc-Extension, and in particular, from the program entitled Service d'aide aux réfugiés et immigrants du Montréal métropolitan (S.A.R.I.M.M.), which provides social services to individuals in Quebec, such as the applicant who need help in regularising their refugee and immigrant status in Canada.

[17] The S.A.R.I.M.M. has known the applicant since 2001 when she first came to them seeking help. At that time, according to the report by Ms. Bousquet, the applicant mentioned to them that she was the victim of psychological and verbal abuse by her husband. The applicant again sought the assistance of the S.A.R.I.M.M. in July 2003 when she disclosed to them that she was aware of her husband's infidelity and discussed at length her worries on the subject. The applicant did not leave her husband at that time because he vowed to change his philandering ways. According to the social worker, the husband did not change and while the applicant attempted to leave him on different occasions, the husband threatened to end her joint application for permanent residence. The applicant finally left him in March 2005 after she learned of his second marriage.

[18] She provided the Officer with photos and love notes to prove the second marriage. The report came to the following conclusion:

> Selon notre evaluation et nos observations, madame Gaya est une femme qui a beaucoup souffert de la violence. Elle en subit encore aujourd'hui les conséquences malgré le facteur temps et la distance qui la sépare de son conjoint. Elle vit également un grand stress et un sentiment d'incertitude liés à l'ensemble des démarches d'immigration. Elle a par contre su aller chercher l'aide professionnelle nécessaire afin de s'adapter à sa situation présente. Elle est capable de verbaliser ses émotions ce qui constitue une force pour elle. Par contre, elle nous apparaît encore vulnérable et devra poursuivre son cheminement dans les mois qui suivront.

[19] Contrary to a prior statement, at no time did the applicant file complaints against her husband with the police either in Montreal or in Regina where they lived.

III. Impugned decision

[20] In rejecting the applicant's H&C application, the Officer came to the following conclusions:

- That the applicant's ex-husband had been unfaithful and got remarried, but that the date and location of the re-marriage were not proven;
- That the re-marriage of her ex-husband does not provide probative evidence of the conjugal violence invoked by the applicant; it establishes only the breakdown of the marriage;
- That the existence of complaints to the police was not demonstrated by submission of the police reports;
- That the reports of the psychologist and the social worker do not prove that the state of stress and depression suffered by the applicant are the result of a situation of conjugal violence;
- That it was not demonstrated that there is more than a simple possibility that the applicant is at risk in Kenya as a woman or because of the threats proffered by her ex-husband, the applicant having failed to meet her burden of proof in this respect;
- That the links of the applicant to the workplace in Canada are not significant and do not demonstrate the existence of an attachment such that deportation would engender unusual, undeserved or disproportionate hardship;
- That, by her behaviour, the applicant has demonstrated that she does not respect Canadian immigration law;
- That there was no information presented regarding the interests of the Applicant's children.

IV. Relevant legislation

[21] According to section 25 of IRPA, a foreign national may apply for permanent resident status from within Canada on H&C grounds. The pertinent passages are 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.

V. Analysis

Standard of review

[22] Where the issue to be determined involves the interpretation of the law, the decision is reviewable on a standard of correctness. In this case, the Officer was called upon to apply the H&C provisions including the test to determine whether there are grounds to grant the application for permanent residence status from within Canada pursuant to section 25 of IRPA. However, the factual findings of the Officer are to be reviewed on a standard of reasonableness *simpliciter*.

Did the Officer err in fact or in law by applying the pre-removal risk assessment (PRRA) test to the material evidence under the H&C considerations?

[23] After a careful review of the Officer's detailed report and the submissions of the parties, I arrive at the conclusion that the Officer confused the task before him and applied the test for determination of a PRRA application rather than the standard required for H&C applications.

[24] The test to be applied to H&C applications is set out in paragraph 17 of *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39, which confirms the standard as set out in the IP-5 Manual. Madame Justice Claire L'Heureux-Dubé wrote among other things:

> 17 [. . .] Guideline 9.07 states that humanitarian and compassionate grounds will exist if "unusual, undeserved or disproportionate hardship would be caused to the person seeking consideration if he or she had to leave Canada". [. . .] [the Court's emphasis]

[25] In application of this standard, this Court has established that while it is appropriate to rely on the risk factors in a prior PRRA report when making an H&C decision, the Officer must nonetheless be mindful to distinguish between the standards of proof specific to each type of application.

[26] The Chief Justice said it best in *Pinter v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 366, 2005 FC 296 at paragraphs 2 to 5:

> 2 In explaining her rationale for her refusal of the Pinters' request for permanent residence within Canada, the immigration officer noted:
>
> > • I have not dealt with the risk factors of the applications since they were reviewed by the Pre-Removal Risk Assessment officer who determined the family would not be at risk if they were returned to Hungary. The risk identified in the Humanitarian and Compassionate application is identical to the risk identified in the PRRA application.
>
> Contrary to the immigration officer's suggestion, there is a difference between the assessment of risk factors in an application for humanitarian and compassionate consideration and one for protection from removal.
>
> 3 In an application for humanitarian and compassionate consideration under section 25 of the Immigration and Refugee Protection Act (IRPA), the applicant's burden is to satisfy the decision-maker that there would be unusual and undeserved or disproportionate hardship to obtain a permanent resident visa from outside Canada.
>
> 4 In a pre-removal risk assessment under sections 97, 112 and 113 of the IRPA, protection may be afforded to a person who, upon removal from Canada to their country of nationality, would be subject to a risk to their life or to a risk of cruel and unusual treatment.
>
> 5 In my view, it was an error in law for the immigration officer to have concluded that she was not required to deal with risk factors in her assessment of the humanitarian and compassionate application. She should not have closed her mind to risk factors even though a valid negative pre-removal risk assessment may have been made. There may well be risk considerations which are relevant to an application for permanent residence from within Canada which fall well below the higher threshold of risk to life or cruel and unusual punishment.

> (See also, the Chief Justice in *Liyanage v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1293, 2005 FC 1045 at paragraph 41. For an excellent analysis see Madam Danièle Tremblay-Lamer in S*ha'er v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 297, 2007 FC 231 at paragraph 7)

[27] In the present circumstances, the Officer accepted that the applicant suffered from psychological stress. However, in discounting the psychological report by Dr. Valenzuela and the letter of social worker, M. E. Bousquet ("Psychological Reports"), the Officer went on to conclude that there was no material link between these symptoms and the alleged risk factors. In this regard, Counsel for the applicant is correct, at paragraphs 59 to 60 of his submissions in that the Officer misdirected his analysis of the psychological reports filed by the applicant. Allow me to quote parts of these paragraphs:

> 59. [. . .]Rather than assessing whether the evidence established that the applicant would be caused unusual, undeserved or disproportionate hardship in being forced to leave Canada, the Officer asked himself only whether the evidence established that she could be killed by her husband if she is returned to Kenya.
>
> 60. The Officer's error of law caused him to fail to analyze the reports in the proper light, and thus to fail to consider whether they established, either independently or in concert with the other evidence, that the applicant would suffer unusual, undeserved or disproportionate hardship.

A close reading of the decision does not indicate that the officer considered whether the evidence shows that the applicant would suffer unusual, undeserved or disproportional hardship.

[28] Consequently, the Court finds that the Officer's assessment of the psychological reports was unreasonable.

[29] As noted, the respondent argues that the applicant does not come to the Court with "clean hands". A warrant for her arrest is outstanding, her address is unknown and she would not have attended a scheduled meeting with Immigration Officers. When such an argument is made, the jurisprudence applicable to such situation is *Thanabalasingham v. Canada (MCI)* [2006] FCA 14 at paragraphs 9 and 10:

> **"9** In my view, the jurisprudence cited by the Minister does not support the proposition advanced in paragraph 23 of counsel's memorandum of fact and law that, "where it appears that an applicant has not come to the Court with clean hands, the Court must initially determine whether in fact the party has unclean hands, and if that is proven, the Court must refuse to hear or grant the application on its merits." Rather, the case law suggests that, if satisfied that an applicant has lied, or is otherwise guilty of misconduct, a reviewing court may dismiss the application without proceeding to determine the merits or, even though having found reviewable error, decline to grant relief.
>
> **10** In exercising its discretion, the Court should attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and, on the other, the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights. The factors to be taken into account in this exercise include: the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question, the need to deter others from similar conduct, the nature of the alleged administrative unlawfulness and the apparent strength of the case, the importance of the individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand."

[30] Applying these factors to the present application and exercising my discretion, I come to the conclusion that the balancing favours the applicant even though she is not exemplifying a perfect position. It is true that a warrant for arrest is outstanding but at the same time she has informed through her second H & C application of her address and her affidavit in support of the present application also gives such information. Furthermore, she has also filed this H & C application as soon as she could after having taken control of herself and she is represented by counsel. To come to this conclusion, I have also considered the fact that leave was granted by my colleague, Martineau J, as well as the incorrectness of the decision, for the reasons explained above.

[31] The application shall therefore be allowed. The Officer's H&C decision shall be quashed and the matter referred back for determination by another Officer.

[32] At hearing, the parties were invited to submit questions for certification and declined.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES THAT:

1. The H&C decision rendered January 23, 2007 is quashed and the matter is referred back for re-determination before a different Officer.
2. No question is certified.

"Simon Noël"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-539-07
STYLE OF CAUSE:	MARGARET THENYA GAYA and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	September 26, 2007
REASONS FOR JUDGMENT AND JUDGMENT:	NOËL J.S.
DATED:	October 1st, 2007

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