Date: 20080114

Docket: IMM-2396-07

Citation: 2008 FC 24

BETWEEN:

FOUAD REBAÏ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

Pinard J.

[1] This is an application for judicial review of the decision of Pre-Removal Risk Assessment Officer Maria Bilucaglia (the "PRRA Officer"), who rejected the applicant's humanitarian and compassionate ("H&C") application for permanent residence from inside Canada.

[2] The applicant is an Algerian citizen who came to Canada in November of 2000. He made a refugee claim, alleging that terrorists had threatened his life and extorted money from him. His

claim was denied in May 2002 on the basis of lack of credibility. Leave to apply for judicial review of this decision was also denied.

[3] The applicant also made a PRRA application, which was denied on the same day as his H&C application, April 23, 2007. The PRRA decision is not in question here.

[4] This matter raises the following questions:

(1) Did the PRRA Officer err by taking account of the applicant's criminal charges, for which he was not convicted?

(2) Did the PRRA Officer err in law by applying the wrong legal test for H&C applications?

[5] With respect to the first question, the PRRA Officer, in her decision, notes that the applicant was charged with theft in 2002 and mischief in 2003, although he received an absolute discharge for the former and was acquitted on the latter charge. However, the PRRA Officer stated: "[a]lthough not found guilty, in my opinion, this behaviour does not denote respect for Canadian laws."

[6] Clearly, the PRRA Officer erred in law by considering as she did the two criminal charges which had been laid against the applicant. It is difficult to assess whether this error really influenced the decision-maker in her evaluation of the applicant's personalized risk. However, having found that there was an error in law, it was incumbent upon the respondent to show that this error was not determinative, which the respondent failed to do.

[7] With respect to the second question, while it is permissible for the same officer to make a decision on an applicant's PRRA and H&C applications, the issues to be determined on the two applications are separate (*Monemi v. Canada (Solicitor General)* (2004), 266 F.T.R. 31). When performing a PRRA analysis, the question to be answered is whether the applicant would personally be subjected to a danger of torture or to a risk to life or to cruel and unusual treatment or punishment (*Sahota v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 651, [2007] F.C.J. No. 882 (T.D.) (QL)). On an H&C application, the underlying question is whether the requirement that the applicant apply for permanent residence from outside of Canada would cause the applicant unusual and undeserved or disproportionate hardship (*Sha'er v. Canada (Minister of Citizenship and Immigration)* (2007), 60 Imm. L.R. (3d) 189, [2007] F.C.J. No. 297 (T.D.) (QL)). The risk to the applicant must be assessed as one factor in that determination (*Sahota*, *supra*). While the officer can adopt the factual findings from the PRRA analysis, the officer must consider these factors in light of the lower threshold of risk applicable to H&C decisions, of "whether the risk factors amount to unusual, undeserved or disproportionate hardship" (*Gallardo v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 554, [2007] F.C.J. No. 749 (T.D.) (QL). See also *Pannu v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1356, [2006] F.C.J. No. 1695 (T.D.) (QL); *Liyanage v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1045, [2005] F.C.J. No. 1293 (T.D.) (QL); *Pinter v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 296, [2005] F.C.J. No. 366 (T.D.) (QL), and *Beluli v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 898, [2005] F.C.J. No. 1112 (T.D.) (QL)).

[8] In this case, it appears clearly from her decision that the PRRA Officer applied the wrong test. Although, in her conclusion, she uses the words of the right test, the PRRA Officer applies the

wrong test twice, at the beginning and at the end of her evaluation of the applicant's personalized risk. In the first paragraph of her analysis of the personalized risk, the PRRA Officer states:

> The IRB refused the applicant's asylum claim in May 2002. The panel concluded that the applicant was not credible due to an unbelievable testimony filled with major contradictions that it determined to be unreliable. The Federal Court denied his Application for Leave to Appeal the IRB decision in August 2002. The applicant submitted an application and submissions in the PDRCC category in May 2002, which was transferred to the PRRA program. That application will be assessed separately. This H&C application is not an appellate of any previous decision or of any tribunal. <u>It is incumbent on the applicant to demonstrate a risk to his life or security if he were to submit his immigration visa application abroad.</u>
>
> (Emphasis is mine.)

[9] In the last paragraph of the same analysis, the PRRA Officer states:

> The applicant has not demonstrated a personal risk to his life or safety if he were to return to Algeria.

[10] Clearly, the PRRA Officer specifically stated and applied a higher standard than appropriate for H&C decisions. The respondent has not been able to convince me that this error is not determinative.

[11] In any event, even if I had found the errors not to be determinative, I would have found, in the present circumstances, that they both are serious enough to taint the entire impugned decision and, therefore, to warrant the intervention of the Court.

[12] For all the above reasons, the application for judicial review is allowed, the decision of the PRRA Officer is set aside and the matter is sent back to a different Pre-Removal Risk Assessment Officer for re-determination.

"Yvon Pinard"

Judge

Ottawa, Ontario
January 14, 2008

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-2396-07
STYLE OF CAUSE:	FOUAD REBAÏ v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	December 5, 2007
REASONS FOR JUDGMENT:	Pinard J.
DATED:	January 14, 2008

APPEARANCES:

Mr. Jared Will	FOR THE APPLICANT
Ms. Lisa Maziade	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jared Will Montréal, Quebec	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT