Date: 20080507

Docket: IMM-3536-07

Citation: 2008 FC 582

Ottawa, Ontario, May 7, 2008

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

EDDY LOPEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Lopez finds himself in a deplorable situation. Canada doesn't want him. Six times it has tried to throw him out; but Cuba won't take him back. This is the judicial review of a PRRA (Pre-removal risk assessment) officer's dismissal of Mr. Lopez's application for permanent residence made from within Canada.

BACKGROUND

[2] Mr. Lopez arrived in Canada in 1982 and sought refugee status. Due to criminal activities while here, his application was not fast tracked and was only heard, and dismissed, in 1993. His application to this Court for leave to apply for judicial review was also dismissed.

[3] In time he was pardoned of the crimes for which he was convicted, and other charges against him were dismissed because of his diminished mental state. The Court ordered him to seek psychiatric help, and he lives in a special residence.

[4] After his pardon, he applied for permanent resident status. Rule 11 of the *Immigration and Refugee Protection Regulations* would require that he make that application from outside Canada, more specifically from Cuba. However, section 25 of the *Immigration and Refugee Protection Act* (IRPA) provides that the Minister may grant a foreign national permanent resident status or an exemption from any applicable criteria or obligation of the Act if justified, in his opinion, by humanitarian and compassionate or by public policy considerations.

[5] Citizenship and Immigration Canada has issued guideline IP5 “Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds”. Although not the law, these guidelines are very useful. The overall policy as set out in section 5.1 is that the applicant’s personal circumstances be such that the “hardship” of having to obtain a permanent residence visa from outside Canada would be unusual, undeserved or disproportionate. Section 6.6 goes on to announce

that section 25 of IRPA "provides the flexibility to approve deserving cases for processing within Canada, the circumstances of which were not anticipated in the legislation".

[6] The PRRA Officer went about his task in the usual way. He considered Mr. Lopez's degree of establishment in Canada and the risk to him upon return to Cuba.

[7] He noted that Cubans who have been outside the country more than eleven months without permission must obtain a re-entry permit. Without same they are considered inadmissible and subject to removal. The Canada Border Services Agency attempted unsuccessfully on six occasions to obtain travel documents from the Cuban authorities. The officer found, quite rightly in my opinion, that it was reasonable to conclude that Mr. Lopez had remained in Canada for a period, at that point, of 24 years due to reasons beyond his control. Nevertheless the officer went on to hold that in order to be granted dispensation "the applicant must still demonstrate a significant degree of establishment in Canada."

[8] The officer found Mr. Lopez lacking in that regard and therefore denied the application.

ANALYSIS

[9] Decisions made on humanitarian and compassionate considerations are reviewed on a reasonableness *simplicitor* basis *(Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817).

[10] On the Canadian side of the equation, the officer noted Mr. Lopez's lack of steady employment, and was not satisfied with the information that was provided him with respect to his mental issues. He did acknowledge that Mr. Lopez speaks both French and English and has developed a network of friends in Montreal. To the extent he did not consider his undertaking at his last criminal proceedings to live at the Institut Louis –Philippe Pinel or afterwards at another place agreed by the Institut, to be sufficient evidence of his inability to hold down a steady job, he should have asked for further information. One cannot anticipate how much evidence is required in order to please a particular officer (*Khwaja v. Canada (Minister of Citizenship and Immigration)*, 2006 F.C. 522, [2006] F.C.J. 703; *Guo v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 626, [2006] F.C.J. 795).

[11] On the Cuban side, it may well be that there are facilities available to care for the mentally challenged. However, these facilities are not available to Mr. Lopez! In a Response to Information Request issued last year, the Research Directorate of the Immigration and Refugee Board noted that a Cuban who stays abroad for over eleven months requires a special permit in order to return:

> "Persons who have been outside Cuba for over eleven months and do not have a re-entry permit, or an open permit to reside abroad, should never attempt to travel back to Cuba. They will not be allowed to enter, and will be subject to swift removal."

[12] If they somehow manage to enter Cuba without completing the legal formalities or immigration requirements they risk one to three years of imprisonment.

[13] The PRRA officer concluded, in essence, that Mr. Lopez would not face an unusual, underserved or disproportionate hardship if he had to apply for a permanent resident visa from Cuba. The fact of the matter is that he cannot apply from Cuba at all. It is not a question of hardship: it is a question of impossibility.

[14] Departmental policy provides that positive consideration may be warranted when the applicant has been in Canada for a significant period due to circumstances beyond his control. These include general country conditions which are considered so unsafe due to war or civil unrest that Citizenship and Immigration Canada has suspended removals to that country. It bears noting that in such circumstances the applicant could nevertheless return to his country of nationality, but it would be foolhardy to do so. In this case, Mr. Lopez simply cannot return to Cuba. The circumstances enumerated in the guidelines do not cover the situation where a country refuses to accept one of its own citizens. If for no other reason, the case of *Mpula v. Canada (Minister of Citizenship and Immigration*, 2007 FC 456, 2007 F.C.J. No. 618, is distinguishable.

[15] The officer failed to take into account that section 25 of IRPA is driven either on Humanitarian and Compassionate Considerations or Public Policy Considerations. Put another way, is it Canada's public policy that a person who is not inadmissible in terms of the United Nations Convention relating to the Status of Refugees and whose record of criminality in Canada cannot be considered because of the pardon granted to him (s. 36 (3) IRPA) should nevertheless have to busker in the Montreal Metro for the rest of his life without legal status? Although

Madam Justice L'Heureux-Dubé was speaking of the former *Immigration Act* in *Baker* above, her remarks at paragraphs 15 to 17 are very *à propos*. The decision of the PRRA officer was an important one which affects Mr. Lopez's life in a fundamental way. In this case, the officer failed to assure himself that there was a public policy consideration present. The question is not whether there would be an unusual, underserved or disproportionate hardship if Mr. Lopez had to leave Canada. The truth of the matter is that he cannot leave Canada, and the authorities know it. Why has Mr. Lopez not applied for permanent residence status from abroad? The answer is because he cannot.

[16] For these reasons the application for judicial review shall be granted and the matter referred back to another officer for redetermination. That redetermination is *de novo*. Mr. Lopez is on notice that he may have to bring forth more information relating to his mental state.

CERTIFIED QUESTION

[17] A draft of these reasons was circulated to the parties in order to give them the opportunity of certifying a serious question of general importance which could support an appeal to the Federal Court of Appeal. However, the Minister poses no question, and none shall be certified.

ORDER

THIS COURT ORDERS that:

1. The judicial review is granted.

2. The matter is referred back to another officer for redetermination.

3. There is no serious question of general importance to certify.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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