Date: 20081104

Docket: IMM-790-08

Citation: 2008 FC 1213

Montréal, Quebec, November 4, 2008

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

LAMINE YANSANE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The applicant is seeking the judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), of a decision of a pre-removal risk assessment officer (PRRA officer) dated November 26, 2007, refusing his permanent residence application based on humanitarian and compassionate considerations (HC application) under section 25 of the Act.

II. The facts

[2] The applicant is a young Muslim of Soussou ethnicity, 36 years old, married and the father of three children. His wife, his three children, his parents and his siblings still live in Guinea.

[3] He alleges that his parents are very pious and traditional. Apart from working as a teacher at the Koranic school in Bagota, the applicant's father is also an Imam with the Kasapo mosque.

[4] In February 1994, the applicant was secretly dating Mariama Kalabane, a young Catholic girl in his neighbourhood. Planning to marry her, he decided to introduce her to his family, who reacted very badly to the news, particularly the applicant's father who categorically opposed his son's marriage to a woman of the Catholic faith. Following his uncle's intervention, the applicant's father resigned himself to this marriage after his son promised him that after his marriage, his son would ensure that his wife converted to Islam. The young couple therefore married on October 2, 1994, with the consent of the applicant's father.

[5] The applicant claims however that there was still a great deal of tension between him, his father and the rest of his family, based on the fact that his wife remained a Catholic after their marriage. The applicant claims that he and his wife are regularly the subject of moral and sometimes physical persecution, to the point that his father would go so far as to pressure him to leave his wife

to marry a cousin, which he opposed. In October 2004, the applicant's situation became unbearable to the point that he decided to move to another city with his wife and children.

[6] The applicant gradually became familiar with Catholicism and in the end determined that this religion was less restrictive than Islam. He therefore decided to abandon Islam and embrace the Catholic religion, despite his fear of his family's reaction and specifically the reaction of his father who in his opinion would stop at nothing to make him pay for such humiliation.

[7] On September 15, 2005, the father and uncle went to the applicant's house while the applicant was there with his wife and children to investigate the rumour to the effect that for some time the applicant had been regularly attending a Catholic church. The applicant confirmed the rumour, attempted to make his father understand his reasons and told him that he was seriously intending to convert to Christianity. His father reacted in such a violent rage that he shouted abuse and cursed his son, promising him that he would pay with his life for such humiliation and for betraying Islam. He also reminded his son of an Islamic principle to the effect that death was the fate of traitors.

[8] Worried about the danger which he believed was lying in wait, the applicant hid at the home of his wife's older brother, where his wife came to tell him that during the night his father had come to their house looking for him with five members of the Kasapo mosque.

[9] After sheltering his family in the home of one of his wife's grandmothers, the applicant left Guinea on October 15, 2005, with false documents provided by his brother-in-law and arrived in Canada the next day seeking asylum.

[10] On August 16, 2006, the Refugee Protection Division (RPD) of the Immigration and Refugee Board dismissed the refugee claim, finding that:

> . . . the claimant did not discharge his burden of establishing that there is a "serious possibility" that he would be persecuted on one of the Convention grounds. Nor has he succeeded in demonstrating, on a balance of probabilities, that, should he return to Guinea, he would be personally subjected to a danger of torture, to a risk to his life, or to a risk of cruel and unusual treatment or punishment.

[11] The applicant disputed the RPD decision but, on January 16, 2007, the Court refused him leave to file an application for judicial review of that decision.

[12] On April 2, 2007, the applicant filed an HC application and he then added to his record a pre-removal risk assessment application. Both of these applications were heard by the same PRRA officer who dismissed them the same day, i.e. on November 26, 2007, finding as follows:

> [TRANSLATION]
>
> *HC decision*
> "After considering the evidence and exhibits provided by the applicant, consulting public sources and applying the criteria set out in the IP-5 ministerial guidelines, I find that the filing of the visa application abroad does not amount to unusual, undeserved or disproportionate hardship."
>
> *PRRA decision*
> "Considering the applicant's file, including the PRRA application, the PIF, the decision and the reasons of the decision of the IRB, the observations of the HC application, while consulting various public source reference documents on the current situation in Guinea,

> I am of the opinion that there is no more than a mere possibility of persecution in his country as described at section 96 of the IRPA.
> The pre-removal risk assessment does not establish that there are reasonable grounds to believe that he would be subject to a danger of torture within the meaning of article 1 of the Convention against Torture or to a risk to their life or to a risk of cruel and unusual treatment or punishment, as described at section 97 of the IRPA, in the event of his removal to Guinea."

[13] This application contemplates only the HC decision.

[14] Finally, on March 3, 2008, the Court ordered that the applicant's motion to stay his removal be dismissed and in its order, the Court was careful to state that the new evidence filed before it could not be used to establish the existence of a serious question to debate at the level of this application for judicial review.

III. Issue

[15] The only issue in this case is whether considering the circumstances in evidence the PRRA officer made a reviewable error in his decision which resulted in the refusal of the HC application.

IV. Analysis

Standard of judicial review

[16] The courts must give deference to the decisions of specialized administrative tribunals with expertise in the matters in which they exercise their jurisdiction. The deference to give to a tribunal depends on the following factors: the existence of a privative clause; whether the decision-maker

has special expertise in a discrete and special administrative regime; and the nature of the issue (*Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*), at paragraph 55).

[17] The current case law can be applied to determine which issues require the application of the reasonableness standard (see *Dunsmuir* at paragraph 54). The Supreme Court of Canada determined in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39 **(**QL**)**, at paragraphs 57-62, that the appropriate standard of review for applications based on humanitarian and compassionate considerations is that of reasonableness *simpliciter*, which since *Dunsmuir*, *supra*, is the standard of reasonableness.

[18] In this matter, there is no privative clause in the Act. While it does provide the option of recourse to judicial review, this cannot be done without leave from the Federal Court. In regard to the decision-maker's expertise, in this case the decision-maker is the Minister of Citizenship and Immigration or his representative. The Minister has some expertise in regard to immigration tribunals, particularly in regard to exemptions from the application of the normal requirements. This militates in favour of deference. Finally, in regard to the nature of the issue, the decision to grant an exemption based on humanitarian and compassionate considerations mainly requires the assessment of the facts relating to a person's case and has no bearing on the application or the interpretation of specific rules of law. The fact that this decision is highly discretionary and factual militates in favour of deference (*Barzegaran v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 681).

[19] For these reasons, the Court will therefore apply the standard of *reasonableness* to this case. As such, to justify its intervention, the Court must ask whether the impugned decision is reasonable, considering its *justification* and its *whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law* (*Dunsmuir*, *supra*, paragraph 47).

Did the PRRA officer make a reviewable error in refusing Lamine Yansane's HC application?

[20] Subsection 25(1) of the Act provides that the Minister can grant permanent residence or an exemption from an obligation under the Act where the Minister is of the opinion that it is justified by humanitarian and compassionate considerations.

[21] The examination of such an application is comprised of two separate assessments. To justify this exemption, the applicant must establish that his personal situation is such that he would face unusual, undeserved or disproportionate hardship if he had to apply for permanent residence from outside Canada. The decision-maker must therefore first determine whether the applicant provided convincing evidence justifying an exemption from the obligation to file his permanent residence application from outside Canada. The decision-maker must then determine the applicant's admissibility to Canada (*Herrada v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1003, 157 A.C.W.S. (3d) 412).

[22] The applicant is alleging a risk of persecution by his family: his father allegedly threatened to kill him because he did not accept his marriage or his conversion to Catholicism and the rest of his family has trouble accepting his decision.

[23] However, the RPD responsible for hearing the applicant's refugee claim and analyzing the same risks and the same facts determined in its decision that the applicant was not able to establish that there was a "serious possibility" that he would be persecuted. The RPD further determined that the applicant had not established the probability of a danger of torture or a risk to his life or to a risk of cruel and unusual treatment or punishment if he were to return to his native country. This RPD decision amounts to *res judicata* in regard to the risks alleged by the applicant as a basis for his initial refugee application in Canada.

[24] Further, the officer responsible for the PRRA determined that [TRANSLATION] "the filing of the visa application abroad [by the claimant] does not amount to unusual, undeserved or disproportionate hardship."

The applicant's integration

[25] Although the applicant has lived in Canada since October 16, 2005, his family ties are nonetheless in Guinea, where his wife and three children live.

[26] Indeed, after receiving social assistance benefits for several months (October 2005 to the beginning of 2006), he began working in 2006 and held several jobs: a retractable bridge operator since July 2006, after training, and a part-time salesperson at the Olympic Stadium.

[27] Considering that the applicant worked as a mechanic in his country, that he was able to work in Guinea without difficulty, that all of his family ties were in Guinea and that his efforts to gain a certain economic independence, while laudable, are not sources of excessive hardship, the PRRA officer determined there was no need to grant him an exemption on these grounds.

Applicant's fear

[28] The fear raised by the applicant in the application for exemption is not at all different than the one alleged before the RPD in support of his refugee application as assessed by this Court in January 2007.

[29] Essentially, the applicant fears his father, an Imam, as well as other members of his family, because of his marriage to a Catholic in 1994 and his decision near the end of 2005 to himself convert to Catholicism. Before the PRRA officer he added to this evidence the realization in 2007 of this conversion by his baptism on Canadian soil, as well as his wife's move, after he left Guinea, to place her and his children in the safety of his in-laws.

[30] With the exception of the applicant's baptism in 2007 and the move of his wife and children after his departure, the RPD considered in its decision all of these elements before determining why it could not lend credence to the applicant's story.

[31] The purpose of the PRRA is not to repeat the same exercise or to sit on appeal of an PRD decision which has the effect of *res judicata* after the Court's refusal to grant leave to submit the decision to judicial review (*Ahmed v. Canada (Minister of Citizenship and Immigration)*, [2001] 1 F.C. 483, [2000] F.C.J. No. 1365 (QL), at paragraph 27; *Hussain v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 751 (F.C.T.D.) (QL), at paragraph 12).

[32] The PRRA officer observes that the applicant raised essentially the same risks in his HC application and PRRA as he did in his refugee claim before the RPD. As the RPD found that the applicant lacked credibility, the PRRA officer determined that the applicant had not adduced sufficient evidence to establish that his safety and his life would be in danger in his country.

[33] The applicant reiterates nevertheless that he would be killed by his father if he were to return to Guinea. But such a statement does not reflect the prevailing situation in Guinea from 1994 to 2005, which indeed justifies the RPD in its decision to find him lacking in credibility.

[34] Regarding the fact that the applicant's situation was allegedly [TRANSLATION] "aggravated" following his baptism, the PRRA officer determined, in his decision, that the official realization of

his conversion initiated and publicly unveiled in Guinea does not add anything new to the elements of risk already raised.

[35] With regard to respecting the freedom of religion in Guinea, the evidence establishes the secularity of the state of Guinea, the constitution of which provides for the freedom of religion. The PRRA decision states that the government does tolerate religious abuses in the government or in the private sphere. According to the documentary evidence, discrimination or violence in Guinea does not result from religion. Although the situation is not perfect, the Christians have freedom of religion in Guinea even though they only make up 10% of the population.

[36] Bear in mind that the Court did not deem it appropriate to give leave for judicial review of the RPD's decision. Therefore, the RPD's finding on the applicant's lack of credibility and on the facts predating its decision remain. Accordingly, at the time that it was determined that it would not cause the applicant unusual, undeserved or disproportionate hardship to file his visa application from abroad, the PRRA officer, like the RPD before him, could have had good reason to doubt that the safety and life of the applicant would be at risk if he were to return to Guinea.

Introduction of new evidence

[37] The applicant filed with his supplemental affidavit the additional evidence filed in support of his application to stay his deportation and his application for review of the HC decision. Besides the fact that this additional evidence appears to set out the same risks already submitted before the RPD

and the PRRA officer, but in a different guise, the applicant has filed them after the CH and PRRA decisions and in the context of this judicial review proceeding.

[38] The Court cannot at this stage allow the applicant to proceed as such, by raising evidence that was not before the administrative decision-maker whose decision is the subject of this proceeding, even if this new evidence does not add any new element to the risks already assessed by the RPD and the PRRA officer. The applicant is perhaps not aware, but his counsel cannot disregard it: this is a fundamental principle. Even more so that the applicant's supplemental affidavit, filed and undoubtedly prepared for him by his counsel, does not set out any exceptional circumstances or prior leave which could justify proceeding as such (*Bekker v. Canada*, (2004) 323 NR 195 (FCA), at paragraph 11; *Samsonov v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1158, at paragraph 7; *Asafov v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 713 (FC), at paragraph 2).

[39] That the applicant's counsel would use such a tactic is even more unacceptable for a member of the Bar based on the order signed by a judge of this Court on March 3, 2008, when the application to stay the removal was dismissed, specifying that the new evidence cannot be used to establish the existence of a serious issue.

[40] For these reasons, the Court maintains the respondent's objection to the production of these exhibits at this stage of the proceeding; and since this evidence becomes inadmissible in the context of this judicial review, there is no need to elaborate further, except to say that it is at best a repetition

of the same risks assessed by the RPD and the PRRA officer in finding as they did, in a different guise.

[41] Accordingly, after reviewing the evidence in the record and the HC decision at issue, and having considered the parties' arguments, the Court finds that the PRRA officer could reasonably find that the HC application and the PRRA application should be refused, taking into account that the RPD observed that the applicant was completely lacking in credibility and further relying on its own analysis of the new evidence added since, namely the confirmation of the applicant's adherence to Catholicism by the baptism on Canadian soil as well as the recent move of his wife and children to escape his in-laws.

[42] The HC decision contemplated by this proceeding is justified and falls within the possible and acceptable outcomes in fact and in law, such that this Court cannot qualify it as unreasonable. Quite the contrary. As a result of this finding, this application for judicial review is dismissed.

V. Question for certification

[43] The applicant proposes the following question for certification:

> [TRANSLATION]
>
> Is new evidence obtained after an administrative decision based on humanitarian and compassionate considerations or on the risk of return which is relevant and conclusive on a central issue admissible on judicial review of the decision of the immigration officer pursuant to section 24 of the *Canadian Charter of Rights and Freedoms* when seeking to establish a Charter violation?

[44] The judgment on an application for judicial review may be made to the Federal Court of Appeal only when, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question (paragraph 74(*d*) of the Act).

[45] However, for the Court to agree to certify a question, it is not sufficient to submit that the question has never been decided; the proposed question must also be "determinative of the appeal … [the certification process must not be used] as a tool to obtain from the Court of Appeal declaratory judgments on fine questions which need not be decided in order to dispose of a particular case" [Emphasis added.] *(Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, [1994] F.C.J. No. 1637 (F.C.A.) (QL), at paragraph 4).

[46] The applicant argues that [TRANSLATION] "deportation with substantial risk of torture or risk to his life violates the guarantees under section 12 of the *Canadian Charter of Rights and Freedoms* (Charter)." He alleges that this situation justifies the reconsideration of new evidence in the context of a judicial review in Federal Court.

[47] Bear in mind that the PRRA officer did not find that the applicant was exposed to a risk of torture or risk to life in Guinea and that the Court has already determined that there are no grounds to intervene with respect to this finding, which it deems reasonable. But even if there were grounds for intervention, this Court could have intervened without new evidence or without referring to section 24 of the Charter.

[48] The question to certify cannot be determinative on the appeal since it was never submitted to the PRRA officer, all the more so because the applicant sought to offer this evidence obtained after the HC and PRRA decisions.

[49] Further and contrary to the arguments of the applicant's counsel, the question is not new and has already been decided, need it be repeated, by this Court as well as by the Court of Appeal (see *Bekker*, *Samsonov* , and *Asafov, supra*).

[50] It appears that yes, since the Court is aware that in *Isomi v. M.C.I.* (2006) FC 1394, the same counsel, Mr. Istvanffy, sought to file new evidence and certification of a similar question in the context of the judicial review of a PRRA decision. Yet this Court, per Mr. Justice Simon Noël, told him that the reference to section 24 of the Charter in no way alters the jurisdiction of the Federal Court and the rule in the case law that new evidence cannot be admitted in the context of a judicial review, without changing the role of the judge sitting in a similar matter.

[51] The duties and obligations of Mr. Istvanffy toward his client do not as such dispense him of his duties and obligations to the Court. As an officer of the Court, he could therefore not disregard as he did in this case a well-established rule in the case law which indeed had been explained to him on more than one occasion. Accordingly, we point out to counsel several requirements of the code of ethics of counsel who are members of the Barreau du Québec:

1. An advocate shall uphold respect for the law. He must not utter words or publish writings contrary to laws (article 2.01);
2. The advocate must avoid any procedure of a purely dilatory nature (article 2.05).

Improperly stating before the Court that one of the issues has not been decided, and encouraging a party to file documents which simply present in different packaging the same risk factors already considered by the previous decision-maker does not appear to comply with these requirements.

[52] It is also appropriate to point out to him that there is an alternative to the option chosen in this case, namely to file a new exemption application pursuant to section 25 of the IRPA, to the extent that it truly raises new evidence and not just the same risk factors already considered.

[53] The applicant’s use of the principles arising from the Charter do not as such give rise to an entitlement to have the proposed question certified, since in this case the application for judicial review cannot be assimilated to an appeal and must be assessed solely on the basis of the evidence already submitted to the first decision-maker.

[54] In short, the question is not determinative to the appeal: it does not transcend the interests of the parties, it does not address elements with significant consequences since the applicant is not deprived of recourse, and further the underlying principle is not new since it had already been decided by the Court as well as the Federal Court of Appeal. Accordingly, the Court will refuse to certify the question.

JUDGMENT

FOR THESE REASONS, THE COURT:

DISMISSES the application for judicial review and **REFUSES** to certify the question proposed by the applicant.

"Maurice E. Lagacé"
Deputy Judge

Certified true translation

Kelley Harvey, BA, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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