

Federal Court



Cour fédérale

Date: 20101112

Docket: IMM-6431-09

Citation: 2010 FC 1128

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, November 12, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

DAVID MBAYA KABAMBA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review in accordance with subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), of a decision dated November 17, 2009, by a pre-removal risk assessment officer (officer), rejecting the applicant's request for a visa exemption on humanitarian and compassionate (H&C) grounds.

[2] Before reviewing the merits of the applicant's application, the Court must dispose of the respondent's preliminary objection on the admissibility of certain exhibits attached to the applicant's affidavit that were not before the officer at the time the decision was made. This concerns, more specifically, the documents appearing on the following pages of the applicant's record: 16, 18-22, 30-32, 34-35, 37-39, 75-81, 87-92, 94, 97, 99, 107-149.

[3] These documents refer to, among other things, a certain family relationship with a journalist who was killed, the departure of some of the applicant's children from the Democratic Republic of the Congo (DRC), an explanation of the applicant's financial situation, a death certificate for a 25-year-old child, letters of support for the applicants, etc.

[4] It is settled law in *Lemiecha (Litigation guardian of) v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 1333 (F.C.T.D.) (QL), at paragraphs 3 and 4, that judicial review of a decision by a federal board, commission or other tribunal should proceed on the basis of the evidence that was before the decision-maker.

[5] Given the arguments of the parties, the Court allows the respondent's objection and states that it will not consider these documents.

[6] The application for judicial review will be dismissed for the following reasons.

[7] The applicant, a citizen of the DRC, fears returning to his country because he alleges that he joined the Union pour la Démocratie et le Progrès Social (UDPS), a political party opposing the regime of Joseph Kabila.

[8] He claims that his uncle, Bapuwa Mwamba, a journalist, was killed in 2006 after writing an article further to attending a demonstration for democracy organized by the UDPS with the applicant.

[9] The applicant's refugee claim in Canada was rejected on July 26, 2007, by the Refugee Protection Division (RPD), because it lacked credible evidence of a family relationship with the journalist who was killed and his membership in the UDPS party, and because he did not seek protection in Belgium or the United States before arriving in Canada.

[10] His application for judicial review of the RPD decision was dismissed by the Federal Court.

[11] The assessment and the weighing of evidence by a tribunal such as the RPD are subject to the standard of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190).

[12] In the case under review, the applicant is arguing that the officer erred in assessing his establishment in Canada, his children's best interests and risk in the context of his H&C application.

[13] With respect to the applicant's establishment in Canada, the officer, despite finding positive elements favouring the applicant, was unconvinced that requiring the applicant to file his claim outside Canada would cause him unusual, undeserved or disproportionate hardship.

[14] The reasons behind this finding are not unreasonable. The officer considered the short period of time the applicant had spent in Canada and the reasonable efforts expected of a person in a similar situation.

[15] The applicant argues that the officer was not attentive and sensitive to his children's best interests.

[16] The Court notes that the applicant's children have never been with him in Canada.

[17] The officer took into consideration the departure of his three children from the DRC to Namibia and the possibility of the applicant finding work in his field and being able to support his family members if he returned to the DRC. The Court is not convinced that the reasons indicated in this assessment can be characterized as unreasonable.

[18] Finally, the applicant contests the officer's decision in his risk assessment in the context of the H&C application.

[19] Before finding that there were insufficient humanitarian and compassionate reasons to warrant an exemption, the officer focussed on analyzing the documentary evidence on the DRC, the temporary stay of removal to this country, the UDPS party, the RPD decision and the applicant's personal situation.

[20] The Court is of the opinion that the officer's decision is not unreasonable given the evidence before him.

[21] No question for certification was proposed and this application does not give rise to any.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed. No question is certified.

“Michel Beaudry”

Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6431-09

STYLE OF CAUSE: DAVID MBAYA KABAMBA
v. THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 3, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** Beaudry J.

DATED: November 12, 2010

APPEARANCES:

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