

Federal Court



Cour fédérale

Date: 20120420

Docket: IMM-5233-11

Citation: 2012 FC 468

Ottawa, Ontario, April 20, 2012

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

ROGER AGWAME LEMIKA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Roger Agwame Lemika seeks judicial review of the refusal of his application for permanent residence on humanitarian and compassionate grounds.

[2] An immigration officer determined that Mr. Lemika would not suffer unusual and undeserved or disproportionate hardship if he were required to obtain a permanent resident visa from outside Canada. For the reasons that follow, I am satisfied that the officer erred in assessing

the hardship that Mr. Lemika would face in the Democratic Republic of Congo (DRC) as a result of his major mental illness. As a result, the application for judicial review will be allowed.

Background

[3] Mr. Lemika suffers from schizophrenia. His illness is evidently well controlled with medication. However, when untreated, Mr. Lemika can become agitated, aggressive and psychotic. The record indicates a history of suicide attempts, and makes reference to Mr. Lemika's delusional belief that he is the son of God and has special powers.

[4] Although he was employed for some time after his arrival in Canada, it appears that Mr. Lemika's illness led to him being unemployed and homeless for a number of years. The illness has also brought Mr. Lemika into contact with the criminal justice system.

[5] Mr. Lemika asserted in his H&C application that he would face unusual, undeserved or disproportionate hardship in the DRC as a result of his mental illness. He says that he would be unable to access medical treatment, including medication, in the DRC. This would lead to a deterioration in his mental state and would allow the symptoms of his illness to emerge.

[6] Not only would he be unable to access the necessities of life such as food and shelter if he were to become ill in the DRC, Mr. Lemika says that the manifestation of his symptoms could include bizarre behaviour on his part that could lead to his arrest and detention by state security officers. If arrested, Mr. Lemika says that he would be held in prison conditions that are extreme and potentially life-threatening.

[7] Moreover, Mr. Lemika says that the general population in the DRC does not understand mental illness. The mentally ill are often viewed as victims of spells, and are treated with prayer or sorcery. According to Mr. Lemika, these societal attitudes would also put him at risk if he began to exhibit bizarre behaviour in the DRC. In addition to social ostracism, Mr. Lemika says that he risks ill-treatment at the hands of his compatriots on account of his illness.

[8] Finally, Mr. Lemika asserts that he would face hardship as a result of targeting at the port of entry as a returnee, and as a result of the internal armed conflict in the DRC.

The H&C Decision

[9] The immigration officer concluded that Mr. Lemika would not suffer unusual, undeserved or disproportionate hardship if he were to return to the DRC.

[10] Accepting that he had a degree of establishment in Canada as a result of the 16 years that Mr. Lemika had spent in this country, the officer was not satisfied that his establishment was due to factors beyond his control, or that severing these ties would cause him unusual and undeserved or disproportionate hardship.

[11] The officer reviewed the evidence and submissions relating to possible hardship in the DRC, including those related to Mr. Lemika's schizophrenia. The officer accepted that Mr. Lemika suffers from a chronic and long-term disability, but observed that he had been willing to take prescription medication to control his symptoms in the past.

[12] Most importantly, the officer found that treatment, including medication, would be available to Mr. Lemika in the DRC, particularly in Kinshasa, where his family resides, and where a specialized psychiatric facility exists.

[13] The officer also considered whether Mr. Lemika would face hardship as a result of targeting at the port of entry as a returnee, or due to the internal armed conflict generally, concluding that he would not. While acknowledging the widespread problems in the DRC, the officer found no evidence that Mr. Lemika would be personally affected by these problems.

[14] Accordingly, the officer determined that although Mr. Lemika might face some hardship in re-establishing himself in the DRC, there were insufficient humanitarian or compassionate grounds to warrant a humanitarian and compassionate exemption.

Standard of Review

[15] I agree with the parties that the officer's decision is to be reviewed against the standard of reasonableness: *Kisana v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2010] 1 F.C.R. 360 at para. 18; *Paz v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 412, 176 A.C.W.S. (3d) 1124.

[16] In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the

facts and the law: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 59.

Analysis

[17] While recognizing that deference is to be accorded to decisions such as the one in issue in this case, I am nevertheless satisfied that the officer erred in assessing the hardship that Mr. Lemika would face in the DRC as a result of his mental illness.

[18] In concluding that Mr. Lemika would be able to access medical care in the DRC, the officer noted that “mental health is part of the primary care system in the Democratic Republic of Congo, and that the treatment of severe mental disorders is available at the primary level”. The officer also observed that “[t]here is one mental health care centre and about twenty-two psychiatrists in the capital city [of Kinshasa]” and that “[c]ompetent doctors practice on the spot, with medicines which are normally available”.

[19] All of these statements are borne out by the evidence. What the officer does not consider is whether this treatment would actually be available to Mr. Lemika, were he to return to the DRC.

[20] The documentary evidence before the officer indicates that the few mental health facilities in Kinshasa lack the specialists to treat schizophrenia, and that medication to treat psychiatric patients is often too expensive for the patient. Indeed, the thrust of all the documentary evidence before the officer was that the limited mental health care that is available in the DRC is generally only accessible to those who can pay for it.

[21] There was evidence before the officer to indicate that hospitals may, in some cases, provide an initial consultation, diagnosis and treatment free of charge. After that, however, it appears that the patient will be responsible for the ongoing cost of his or her own treatment.

[22] No disability benefits are available to persons with mental disorders in the DRC, and Mr. Lemika is estranged from his family. There was, moreover, no evidence before the officer that the family would have either an interest in, or the means to assist Mr. Lemika with his medical expenses.

[23] As a result, I am satisfied that the officer's finding with respect to Mr. Lemika's ability to access mental health care was made without regard to the evidence in the record.

[24] This finding then led the officer to conclude that by seeking medical treatment, Mr. Lemika could avoid problems resulting from impunity and poor prison conditions in the DRC.

[25] However, there was evidence before the officer to indicate that the consequences for Mr. Lemika if he is unable to access proper medical care in the DRC are potentially life-threatening and non-speculative.

[26] When untreated, Mr. Lemika's illness has led to aggressive behaviour that has brought him into contact with police and criminal justice system in Canada. There is no reason to believe that this would not happen in the DRC if he was unable to access appropriate medical treatment.

However, the consequences for Mr. Lemika, if he were arrested and detained in the DRC, would be very different.

[27] The evidence before the officer regarding prison conditions in the DRC is horrific. For example, a 2010 United States Department of State Report describes prison conditions in the DRC as “severe and life-threatening”. Food is not provided to detainees, who are dependant on family members for nourishment, and prisoners regularly die of starvation.

[28] The evidence also shows that medical care is often unavailable to prisoners, and infectious diseases are rampant. Cells may have no windows, running or potable water, lights, electricity or toilet facilities. Sexual violence is prevalent, as are sexually transmitted diseases, including HIV/AIDS.

[29] While the immigration officer appears to have been aware of problems with prison conditions in the DRC, the finding with respect to Mr. Lemika’s ability to access medical care meant that the officer did not consider whether the risk of imprisonment resulting from his untreated schizophrenia amounted to unusual, undeserved or disproportionate hardship.

[30] I am thus satisfied that the officer’s decision was unreasonable. Given my conclusion in relation to this issue, it is not necessary to address the other sources of hardship identified by Mr. Lemika.

Conclusion

[31] For these reasons, the application for judicial review is allowed. I agree with the parties that the case does not raise a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, and the matter is remitted to a different immigration officer for re-determination; and
2. No serious question of general importance is certified.

“Anne Mactavish”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5233-11

STYLE OF CAUSE: ROGER AGWAME LEMIKA v.
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: April 17, 2012

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

DATED: April 20, 2012

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