Federal Court Cour fédérale

Date: 20121121

Docket: IMM-8365-11

Citation: 2012 FC 1348

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, November 21, 2012

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

BRAHIM CHABIRA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Brahim Chabira is a citizen of Algeria. The decision that he is challenging by this application for judicial review is that of senior immigration officer Judith Gaumont dated November 2, 2011, refusing his application for permanent residence in Canada on humanitarian and compassionate grounds based particularly on his establishment in Canada between 1989 and 1994

and between 1997 and today, and the risks of returning to Algeria associated with the Chafia family and associated with the Département du renseignement de la sécurité (DRS) [Department of Information and Security] in Algeria.

II. The Facts

[2] The applicant first entered Canada on June 6, 1989, on a visa.

[3] In June 1992, he claimed refugee protection; he feared the Chafia family, who was threatening him because he had a relationship with Samira Chafia. He left Canada in 1995 to live in Algeria after his claim with the Immigration and Refugee Board (IRB) in 1994 failed and his application for leave with the Federal Court was refused on February 28, 1995.

[4] In 1997, Mr. Chabira returned to live in Canada, but without status. He worked illegally in Canada until he obtained a work permit in 2004.

[5] In 2004, he filed an initial application for permanent residence on humanitarian and compassionate grounds (H&C application), which was refused because it was incomplete.

[6] On March 26, 2009, he filed a second H&C application. On November 2, 2011, immigration officer Gaumont refused his second application.

III. The impugned decision

[7] The officer introduced her reasons with the following:

> [TRANSLATION]
>
> The applicant is asking for an exemption from being a member of one of the prescribed classes in order to file his application for permanent residence from inside Canada on humanitarian and compassionate grounds. The applicant has the burden of proving that his personal situation is such that the hardship that would arise from a refusal of that exemption application is unusual and undeserved or disproportionate.
>
> It is important to point out that, as specified in Manual IP5 on applications on humanitarian and compassionate grounds, <u>all favourable humanitarian and compassionate assessments are an exceptional response to a specific set of circumstances.</u>

(a) His establishment

[8] The officer's reasons on the applicant's establishment can be summarized as follows:

1. She recognized that Mr. Chabira has been in Canada for close to 15 years and that he has a good civil record in Canada (no charges pending, no convictions);
2. She noted that Mr. Chabira documented his employment as a restaurateur between 2004 and 2008; his training as a taxi driver in 2006; that he has performed that job ever since; and that he files his tax returns faithfully;
3. She found, however: [TRANSLATION] ". . . that the applicant had low annual employment earnings and that he experienced several periods of unemployment over the last ten years";

4. She acknowledged that employment prospects in Algeria are limited, but added the following: [TRANSLATION] "However, even though Mr. Chabira says that he fears hardship in Algeria, he has not demonstrated in a satisfactory manner that his stay in Canada has enabled him to be immune to such hardship";

5. She attached little weight to Mr. Chabira's argument that he is a member of Canadian society by playing soccer and by showing interest in local activities. According to the officer: [TRANSLATION] "That allegation is not supported by evidence, such as a letter from his soccer association or from acquaintances who attended activities in the community with the applicant";

6. The applicant argues that he has several friends and even family in Canada. The officer noted the letters of support to that end attesting to his qualities as a friend and as a good worker. However, she [TRANSLATION] "found, however, that his father, mother, brothers and sisters are all abroad, and most reside in Algeria. The only family tie that the applicant seems to have in Canada is a cousin. However, the evidence does not satisfactorily establish the said cousin's identity and status in the country, or even her relationship with Mr. Chabira";

7. As for the applicant's argument that he has been gone from Algeria too long to return there, the officer was of the opinion that he did not support that statement with evidence and added the following: [TRANSLATION] "Moreover, since he has spent more than half of his life, including part of his adult life, in his country of origin and since most of his family is still there, I believe that the applicant would not be without resources should he return there"; and

8. She made the following finding on the establishment criterion: [TRANSLATION] "In light of the evidence in the applicant's record, I am not convinced that the hardship associated with Mr. Chabira's establishment in Canada is, in itself, sufficient to justify an exemption on humanitarian and compassionate grounds".

(b) The risks of return

[9] Before assessing the two different risked raised by the applicant, that is, the risks associated with the Chafia family and those associated with the DRS, the officer wrote the following:

> [TRANSLATION]
>
> It is important to point out that humanitarian and compassionate assessments are different from pre-removal risk assessments. They involve assessing all of the elements in the application and determining whether risk factors or factors other than risk could amount to unusual and undeserved or disproportionate hardship.

(i) Risks associated with the Chafia family

[10] According to the officer, the applicant maintains that he is at risk from the Chafia family after dishonouring them by having sexual relations with one of their daughters. She noted, however, that, in 1994, the Refugee Protection Division found that his testimony was [TRANSLATION] "not trustworthy" and that his account was [TRANSLATION] "not credible".

[11] The officer found that the applicant added a new element in support of his fear; the kidnapping of his brother on June 20, 1995, a kidnapping in reprisal against the applicant further to [TRANSLATION] "business between him and a family, two brothers of which are terrorists". For several reasons, the officer was of the opinion that Mr. Chabira did not discharge his burden of proving, in a probative manner, that he would still be in danger of the Chafia family, including the

fact that Mr. Chabira did not mention his brother's kidnapping in the other applications and in his PRRA application and did not state that he experienced problems with the Chafia family even though he lived in Algeria from 1995 to 1997.

(ii) The risks associated with the DRS

[12] The danger from the DRS that is alleged by Mr. Chabira is based on the fact that he witnessed an incriminating conversation between members of the DRS, including his friend Karim, and that he is still wanted for that today.

[13] The officer wrote the following:

> [TRANSLATION]
>
> I carefully read the applicant's affidavit. Even though I attach some weight to the statements made under oath by Mr. Chabira, I am of the opinion that that document is not sufficient, in itself, to demonstrate the alleged facts in a probative manner.
>
> I looked at the letters from his two brothers, Lounas and Messaoud Chabira. I note that the letter dated 2009 from his brother Lounas states that [TRANSLATION] "strange people" were still after the applicant, without, however, more details. The letter is short and few details were provided. It does not specify how long Mr. Chabira has been sought, or the frequency with which individuals made inquiries about him and his family. Furthermore, the applicant submitted a copy, and not the original, of the letter, and did not submit a proof of mailing, such as an envelope, proving that it came from Algeria.
>
> The letter from his brother Messaoud mentions that the applicant [TRANSLATION] "still receives threats from strangers". Like in the other letter, the author does not indicate when the threats started or the content of the threats. The letter states that, in November 2010, two individuals called out to a neighbour to ask him questions. I note that there is no evidence in the record from the said neighbour corroborating those facts.

[14] The officer made the following finding:

> [TRANSLATION]
>
> In light of the foregoing, I can attach only little probative value to the letters from the applicant's brothers given their content, which seems vague and does not demonstrate in a satisfactory manner that the applicant is still actively wanted by the DRS and is still in danger from its members.
>
> The applicant submitted various documents on the questionable practices of the DRS and its non-respect for human rights in Algeria. Certainly, I acknowledge by the documentation that was provided and consulted that DRS members used unorthodox methods to fight terrorism. In wartime, they kidnapped, tortured and killed individuals suspected of terrorism, attributed to Islamist groups serious crimes which were in reality their actions and eliminated those who knew too much. However, it seems today that those methods used by the DRS have been very rare since the end of the civil war, as stated in U.K. Home Office's 2011 *Country of Origin Information Report; Algeria*. It seems that disappearances, secret detention, torture and arbitrary killings by Algerian authorities are uncommon in Algeria today. The documents submitted in evidence by the applicant also refer to events that occurred for the most part during the 1990s, which is why I attach little probative value to them. Those documents also are not related to the applicant's personal history.

[15] The officer added and found the following:

> [TRANSLATION]
>
> Certainly, the DRS continues to hold some political and security powers in Algeria. Today, as discussed in the documentation provided by the applicant, individuals who continue to be at risk of harm, such as the harm stated above, are those suspected of terrorism. However, Mr. Chabira has not demonstrated that he was in such a category of persons. I am therefore of the opinion that Mr. Chabira did not submit satisfactory evidence that he is at risk of the now uncommon practices of the DRS.
>
> Thus, considering the insufficiency of evidence in support of Mr. Chabira's allegations and considering that the current objective evidence does not corroborate them, I am of the opinion that the applicant has not discharged his burden of proving a personalized

> risk that would constitute unusual and undeserved or disproportionate hardship if he were to return to Algeria.

(c) <u>Risks as a failed refugee claimant and risks associated with the country's general insecurity</u>

[16] The applicant alleges that the DRS is suspected of mistreating failed refugee claimants when they enter the country. The officer rejected the applicant's claim. She was of the view that persons suspected of terrorism are at risk and that the applicant did not submit any evidence that he was part of such a group.

[17] Moreover, the officer noted the general insecurity in Algeria, but noted that it has improved for all Algerians and that it is a generalized risk for all Algerians, not just the applicant.

IV. <u>The arguments</u>

(1) <u>Applicant's arguments</u>

[18] The applicant argues that the officer (1) erred in her analysis of the evidence in the record; (2) erred by not calling the applicant to an interview.

[19] The applicant's first argument concerns the 2011 report on Algeria by the UK Home Office. Although the officer recognized that the DRS kidnapped, tortured and killed people who had confidential information and people suspected of terrorism during the war, she determined from the report that those measures have not been used since the end of the war. However, the applicant contends that the officer failed to mention other relevant elements in the report. In particular, while those measures are no longer being used in most cases, according to some sources, <u>that treatment is</u>

still used on people suspected of terrorism. For them, there are still arbitrary arrests and no right to a fair trial. Furthermore, detention centres for those individuals are controlled by the DRS and torture and other cruel treatment are still practiced secretly. Finally, the report indicates that impunity for DRS forces is still a problem.

[20] By disregarding that information in the report, the applicant believes that the officer committed a reviewable error. Furthermore, the applicant believes that the officer erred by criticizing him for failing to submit proof that he would be in danger of retribution from the DRS. The applicant believes that that was an impossible burden to meet because obtaining a confirmation from the DRS that he is wanted by that agency is impossible.

[21] The second argument raised by the applicant is based on section 167 of the IRPA Regulations. In her reasons, the officer stated that the applicant did not mention in his initial H&C application or in his PRRA application that his brother was kidnapped in 1995 and that she had no information as to why that was omitted. The applicant believes that those criticisms cast doubt on his credibility.

[22] According to the applicant, because of her doubts, she should have called him to an interview in order to obtain more information on his brother's kidnapping. The applicant raises section 167 of the *Immigration and Refugee Protection Regulations* (SOR/2002-227) (IRPR) and argues that, according to that section, a hearing is possible if there is doubt as to the applicant's credibility. The applicant believes that it was impossible to submit information to corroborate his story given that he was not made aware of those doubts.

[23] Section 167 of the *Immigration and Refugee Protection Regulations* (SOR/2002-227) (IRPR) reads as follows:

167. For the purpose of determining whether a hearing is required under paragraph 113(*b*) of the Act, the factors are the following:	**167.** Pour l'application de l'alinéa 113*b*) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :
(*a*) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	*a*) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(*b*) whether the evidence is central to the decision with respect to the application for protection; and	*b*) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(*c*) whether the evidence, if accepted, would justify allowing the application for protection.	*c*) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

(2) Respondent's arguments

[24] The respondent cites *Herrada v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1003 at paragraph 49 and *Lee v Canada (Minister of Citizenship and Immigration)*, 2005 FC 413 at paragraph 13:

> 49 It is up to an immigration officer to assess the relevant factors in an application based on humanitarian and compassionate considerations, and when all issues have been properly examined by the decision-maker, this Court must not reassess the evidence. A

> decision rendered on an application based on humanitarian and compassionate considerations is largely discretionary, and Parliament has entrusted this discretion to the Minister or his delegate.
>
> 13 Once again, I want to reiterate the fact that this Court cannot lightly interfere with the discretion given to immigration officers. The H & C decision was a fact driven analysis, requiring the weighing of many factors. I find that the immigration officer considered all of the relevant and appropriate factors from a humanitarian and compassionate perspective, and did not commit any errors which would justify this Court's interference.

[25] The respondent notes that the applicant does not challenge the officer's assessment of the evidence concerning his degree of establishment and does not challenge the officer's assessment of the evidence concerning the risk associated with the Chafia family as well as risks as a failed refugee claimant and risks associated with the country's general insecurity. According to the respondent, the applicant raises only two issues: (1) the officer's analysis of the evidence in the record on the risked associated with the DRS; and (2) the officer's failure to call the applicant to an interview.

[26] The respondent submits that those two arguments are without merit.

[27] According to the respondent, the 2011 report by the UK Home Office mentions that the DRS continues to make arbitrary arrests with complete impunity. However, the report excerpt cited by the respondent in his memorandum specifies that the DRS <u>continues to arrest people suspected of terrorism</u>, a fact that the officer fully acknowledged by finding that the applicant had not demonstrated that he was in such a category.

[28] According to the respondent, the officer was not required to call the applicant to an interview for two reasons: (1) section 167 of the IRPR does not apply to applications under section 25 of the *Immigration and Refugee Protection Act* (SC 2001, c 27) (IRPA); and (2) section 167 of the Regulations explicitly states that it applies only to paragraph 113(*b*) of the Act, which concerns pre-removal risk assessment applications only, which was also confirmed by Justice Shore in *Doumbouya* (*Doumbouya v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1186 (*Doumbouya*)).

[29] Furthermore, the respondent submits that the officer's finding does not concern the applicant's lack of credibility, but the insufficiency of the evidence.

V. Analysis and conclusions

(a) The standard of review

[30] The first issue raised by the applicant concerns the panel's assessment of the evidence before it. The standard of review that applies is reasonableness. The Supreme Court of Canada explained reasonableness at paragraph 47 of *Dunsmuir v New Brunswick*, [2008] 1 SCR 190:

> 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the

> decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [Emphasis added]

[31] Moveover, Justice Binnie, in *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339 at paragraphs 4 and 45, draws our attention to paragraph 18.1(4)(*d*) of the *Federal Courts Act* (RSC 1985, c F-7). According to Justice Binnie, it is clear from that paragraph that Parliament intended administrative fact finding to command a high degree of deference.

[32] The second issue raised by the applicant concerns the interpretation of section 167 of the IRPR. The standard of review is correctness.

(b) Conclusions

[33] The officer was not required to call the applicant to an interview for two reasons: (1) section 167 does not apply to applications under section 25 of the IRPA, it applies only to paragraph 113(*b*) of the Act (see *Doumbouya*, above); (2) the officer did not base her decision on a lack of credibility on the part of the applicant but rather on the insufficiency of the evidence with respect to the risk associated with the Chafia family.

[34] Second, the officer did not err in her assessment of the facts. The risks associated with the DRS are limited to terrorist activities committed in the territory of the state. The applicant does not match that profile.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed. No question of general importance was proposed.

"François Lemieux"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-8365-11**
STYLE OF CAUSE:	**BRAHIM CHABIRA** **v** **THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	**Montréal**
DATE OF HEARING:	**May 17, 2012**
REASONS FOR JUDGMENT AND JUDGMENT:	**Lemieux J.**
DATED:	**November 21, 2012**

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