Federal Court  Cour fédérale

Date: 20170502

Docket: IMM-3613-16

Citation: 2017 FC 432

Toronto, Ontario, May 2, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

CHIMA ESTHER ADEJUWON
DAMILOLA ADEJUWON AND
ADEWOLE SOMTO ADEJUWON

Applicants

And

THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Background

[1] The Applicants challenge an August 19, 2016 decision [the Decision] of a Senior Immigration Officer [Officer], refusing an application for permanent residence based on humanitarian and compassionate [H&C] grounds made under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act or IRPA].

[2] The Principal Applicant [PA] is a Nigerian citizen who identifies herself as bisexual. The two Minor Applicants, aged 13 and 10, are the PA's children and are also Nigerian citizens. The PA's husband (and father of the two Minor Applicants) passed away in June 2008.

[3] After the PA's same-sex relationship was allegedly discovered by her family-in-law and exposed to the community, the Applicants fled Nigeria to Canada and made a claim for refugee protection in November 2014, which was denied by the Refugee Protection Division [RPD] in May 2015. A judicial review of the Refugee Appeal Division [RAD]'s decision was dismissed.

[4] In 2015, the PA says she met a woman in Canada, and entered into a relationship. On January 23, 2016, the Applicants were advised that they would be removed on March 17, 2016. On January 25, 2016, the Applicants filed an application for permanent residence on H&C grounds. On February 9, 2016, the PA married her alleged same-sex partner. The H&C application, which is the subject of this judicial review, was refused on August 19, 2016.

[5] The Officer relied on the RAD's decision, which held that the PA was not credible, failed to claim in the UK and the US, and with respect to the Minor Applicants, that they had an internal flight alternative available to them in Nigeria in any event. The Officer further found that the evidence submitted by the Applicant did not overcome those findings.

[6] In making these findings, the Officer gave little weight to some of the documentary evidence submitted by the Applicants, including a letter from the Black Coalition for Aids Prevention [BCAP]. The Officer found that the evidence did not convince him of the PA's

bisexual orientation. The Officer also found that the removal would not offend the best interests of the children [BIOC], given their short stay in Canada, educational options in Nigeria, possibility to stay in touch with friends, and adaptability. Lastly, the Officer found that the Applicants did not have sufficient establishment in Canada to trigger a section 25 exception.

II. Analysis

[7] The Applicants attack the Decision for being incorrect in its application of (1) the BIOC test, and for being unreasonable in its treatment of (2) sexual orientation, (3) BIOC, and (4) establishment. As I am persuaded by issue (2), which falls under a reasonableness standard of review (*Liang v Canada (Citizenship and Immigration)*, 2017 FC 287 at para 14 [*Liang*]), I will not consider the other issues raised, because issue (2) is central to the outcome.

[8] The PA argues that the Officer's sexual orientation analysis was unreasonable in its treatment of the documentary evidence, including the BCAP letter. The evidence shows that BCAP is a non-for-profit organization providing HIV/AIDS support to Black African and Caribbean communities in Toronto, including the LGBT community. The letter speaks, in a very personal way and with substantial detail, to the PA's sexual orientation and identification as a bisexual refugee claimant. The Officer noted that one need not be bisexual to be part of BCAP.

[9] The totality of the Officer's analysis of the BCAP letter reads as follows:

> With respect to the Black Coalition for Aids Prevention, it is a non-profit organization which provides HIV/AIDS education, prevention, settlement and other support to the culturally diverse Black communities in Toronto "including" the LGBT community. The focus of the Black CCAP LGBT Settlement Program is to

> provide settlement support services to Black African and Caribbean newcomers to Canada. They provide advocacy, counselling, workshops, referrals, support groups, translation and interpretation services for our clients amongst other supports. Again there is no requirement to be either homosexual, lesbian, bisexual or transgender to join and participate in these programs. I will give this letter little weight in support that the claimant is bisexual.
>
> [My emphasis added; I would note that the word "again" in the underlined section refers to the 519 organization, discussed below]

[10] The Respondent counters that the Officer decided on the basis of insufficiency of evidence, such that the evidence provided could not overcome the RAD's findings with respect to the PA's sexual orientation. The Respondent also highlights a number of inconsistencies or omissions in the record relating to the issue of sexual orientation, none of which were addressed by the Officer, namely that the initial H&C application made no mention of the PA's (now) wife.

[11] While the Respondent is correct that the role of an officer when reviewing an H&C application is to determine whether additional or special considerations exist (*Bhalrhu v Canada (Citizenship and Immigration*), 2011 FC 49 at para 15), the decision must nevertheless be reasonable. To that end, I agree with the Applicants that the Officer's assessment of the BCAP letter was unreasonable for the following reasons.

[12] First, to the extent that the Officer did rely on the RAD's findings, it is important to highlight that while the RAD in this case explicitly held that it did not believe that the PA was bisexual, the BCAP letter postdates the RAD decision. Her same sex marriage also post-dated her RAD decision, which should have heightened the Officer's duty to consider the contents of the letter.

[13] Clearly, the Officer may make a finding that the evidence submitted by the Applicants does not overcome the RAD's negative credibility findings; however, in order to come to this conclusion, it logically follows that the Officer should have addressed, in some manner, the contents of key new evidence-- namely evidence that postdates the RAD decision which specifically addresses the issue of sexual orientation -- and weigh that evidence against the RAD's findings. Here, the evidence, coming from an objective source (BCAP), may have led the Officer to come to a different conclusion, when weighed alongside the evidence of the same-sex marriage.

[14] If, as the Respondent argues, the Officer limited the reasons to insufficiency of evidence going towards the issue of sexual orientation, then there was a heightened duty to address the letter given its source and contents. If the Officer then decides to discount its weight, which may be one fully reasonable outcome, the Officer must at minimum provide cogent reasons for doing so.

[15] Of course, the Officer might have theoretically found the letter to be deficient for any number of reasons. However, the fact that BCAP does not deal exclusively with (although specializes in) individuals from the LGBT community, does not suffice as a reasonable basis on which to entirely discount the evidence. In other words, the fact that BCAP welcomes individuals from all walks of life with HIV/AIDS, including or with a focus on LGBT persons, is irrelevant. The Officer completely failed to engage in any way with the contents of the letter as it applies to the PA, and instead unreasonably discounted it solely based on its author's organization.

[16] Indeed, if the Officer's rationale was acceptable, any document authored by an organization in support of a LGBT applicant or claimant could be discounted solely on the grounds that the organization does not exclusively limit its support and services to the LGBT community.

[17] Likewise, this line of reasoning would also stand for the proposition that any evidence provided by an organization or person in support of a claimant could be discounted based on the fact that the organization or person does not exclusively provide services geared to the claimant's individual characteristics or circumstances, be it a battered woman, an abused child or an addict joining a support group. That analysis is not reasonable; it is misguided and lacks the requisite justification, transparency and intelligibility to pass the scrutiny of this Court.

[18] I am cognisant of the fact that in others cases, decision-makers have relied on the non-exclusiveness of services to the LGBT community to discount evidence. For instance, most recently in *Ikeji v Canada (Citizenship and Immigration)*, 2016 FC 1422 [*Ikeji*], the Pre-Removal Risk Assessment officer discounted a letter from the 519 Space for Change [519] organization in Toronto in part because "there was insufficient evidence that membership or active participation in the organizations was restricted to persons who identify themselves as LGBTQ" (at para 48). The officer was not convinced that the letter established the applicant's sexual orientation.

[19] However, in *Ikeji*, Justice Strickland noted that the 519 letter did not speak to the applicant's sexual orientation; it only made mention of volunteering and participating in support

groups and workshops. She accordingly found the officer's weighing of the letter to be reasonable.

[20] Indeed, in the case at bar, there was a membership card from the 519 presented, and the Officer placed no weight on that card, because it did not have the PA's name, date of issue or expiry date, and because the 519's services are not restricted to the LGBT community. Given that the membership card did not speak to the PA's sexual orientation, the Officer's observation regarding the 519, given the contents of the evidence coming from it, was reasonable.

[21] However, the BCAP letter does speak directly to the PA's experience in Canada as a bisexual woman. It provides detail, in its two pages, regarding her experiences with her alleged sexual orientation. This is independent evidence which, given the additional new evidence of the same-sex marriage, makes it difficult for a reviewing court to understand why the Officer would have categorically discounted it on the basis s/he did.

[22] Finally, I will note that although an officer need not address every piece of documentary evidence, the more a piece of evidence is important and not analysed, the more a reviewing court may be willing to intervene: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 at paras 14-17. And while there is a presumption that the decision-maker has considered all the evidence (and its contents), the reasons in the Decision undermine this presumption: the content of the letter should at the very least have been considered, as it is an important piece of evidence regarding sexual orientation, the primary issue

with respect to the PA. At minimum, the Officer should have explained why the contents of the letter failed to overcome the RAD's findings regarding the PA's sexual orientation.

III. Conclusion

[23] While I make no finding on the PA's sexual orientation, the Officer's failure to consider the contents of the letter from BCAP is unreasonable, given the evidence on the marriage, the post-RAD date of the letter, the erroneous and non-transparent reasons discounting the letter, and its significance and relevance to the issues underlying this application. This application for judicial review is accordingly granted.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is granted and will be sent back for redetermination by a different officer.

2. There are no questions for certification, and none arise.

3. No costs will be ordered.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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