Date: 20071017

Docket: IMM-940-07

Citation: 2007 FC 1069

BETWEEN:

IKEJIANI EBELE OKOLOUBU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

HARRINGTON J.

[1] The normal rule is that an application for permanent resident status must be made from outside Canada. However, taking into account humanitarian and compassionate considerations, including the best interests of children, section 25 of the *Immigration and Refugee Protection Act* authorizes the Minister to waive that requirement. The Minister rarely makes such decisions personally. Rather, he delegates others to make the decision in his stead. Mr. Okoloubu sought such an exemption. The factors raised included marriage to a Canadian permanent resident, who had health issues, and a young Canadian-born child. This is a judicial review of a negative decision.

[2] Were it not for a criminal conviction, he would have been entitled to remain in Canada while his application for a permanent resident visa was being considered. However, his conviction disqualified him from being a member of the Spouse or Common-Law Partner in Canada Class. Through counsel he raised our *Charter of Rights and Freedoms*, the *International Covenant on Civil and Political Rights* and the *Organization of American States Declaration on the Rights and Duties of Man*. He argued that protection of the family and the rights of his wife and child had to be properly considered. The decision maker, whose title is that of a pre-removal risk assessment (PRRA) officer, said she did not have jurisdiction to deal with international law and constitutional issues, and that a Request for Exemption from Permanent Resident Visa Requirements was not the proper venue "…for resolving such complex legal issues including questions of constitutional interpretation" and "whether his removal will constitute a breach of international law will not be addressed in this decision."

[3] The PRRA officer acknowledged that the interests of children must be well identified and defined in accordance with the legislation, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39, *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 F.C. 358 (C.A.), 212 D.L.R. (4th) 139, and *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, 222 D.L.R. (4th) 265, [2002] F.C.J. No. 1687. She correctly stated that the best interests of the child are an important factor and must be given significant weight, but that those interests do not outweigh all other factors. They are not conclusive. She also noted that *Baker* referred to article 3 of the *Convention on the Rights of the Child*.

[4] As noted by the Court of Appeal in *Legault* at paragraph 12:

> It is not because the interests of the children favour the fact that a parent residing illegally in Canada should remain in Canada… that the Minister must exercise his discretion in favour of said parent. It is up to the Minister, in this case a PRRA officer, to determine the appropriate weight to be given to the different factors asserted. It is not the role of the courts.

[5] That being said, by refusing to consider some of the arguments advanced, Mr. Okoloubu was not given a fair hearing. It is not that the consideration of those submissions would dictate a particular result, but as stated by the Supreme Court in *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643, [1985] S.C.J. No. 78, denial of a right to a fair hearing renders a decision invalid. "It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing." The decision was discretionary in nature, but was based on the exercise of a wrong principle (*Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2, 44 N.R. 354). This is not a case where there could only have been one result (*Mobil Oil Canada Ltd. v. Canada –Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, [1994] S.C.J. No. 14).

INTERNATIONAL LAW

[6] Articles 17 and 23 of the *International Covenant on Civil and Political Rights*, which Canada has ratified but not legislated upon, provide that the family is a natural and fundamental group unit of society and is entitled to protection by the state. A child has "…the right to such measures of protection as are required by his status as a minor, on the part of his family, society and State." The *American Declaration of the Rights and Duties of Man*, which actually precedes the

Covenant, is not in fact a treaty. It is no broader is scope than the *Covenant* or the *Convention on the Rights of a Child*. Canada is a member of the OAS.

[7] Mr. Okoloubu's submission that "…the expulsion of a father living with a Canadian mother constitutes an arbitrary interference with … family life and is not compatible with the notion of a democratic society…" is wrong in law. However it must be said that Baker and Hawthorne were single mothers and Legault was divorced from his first wife and separated from his second. The PRRA officer has taken the position that she did not have jurisdiction to deal with international law and that a request for exemption from permanent resident visa requirements was not the proper venue for resolving complex legal issues. Yet, by referring to *Baker* she appears to take the position that the Court may take these issues into consideration on judicial review and then refer the matter back to the Minister for reconsideration in accordance with the reasons given.

[8] However, in *Baker* the Court noted that the decision maker was the Minister or his delegate "the Minister has some expertise relative to courts in immigration matters, particularly with respect to when exemptions should be given from the requirements that normally apply" (para. 59)

[9] In my opinion the PRRA officer failed to appreciate the significance of *Baker*. Madam Justice L'Heureux-Dubé, who also spoke for Justices Gonthier, McLachlin, as she then was, Bastarache and Binnie, dealt with international law at paragraphs 69 through 71 of her reasons. She said that an "indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision [was] the ratification by Canada of the *Convention on*

the Rights of the Child which reflects the *Universal Declaration of Human Rights* which recognizes that "childhood is entitled to special care and assistance." Although a convention not implemented by Parliament had no direct application within Canadian law, nevertheless the values reflected there serve as an aid in interpreting domestic law

[10] As with the *Convention on the Rights of the Child*, Canada is also signatory to the *International Convention on Civil and Political Rights*. Section 25 of IRPA is clearly the proper venue for taking that Treaty into consideration.

[11] The current *Immigration and Refugee Protection Act* (IRPA) was enacted post-*Baker*. Subsection 3(3)(f) provides the Act "…is to be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory." This section was considered by the Federal Court of Appeal in *De Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, [2006] 3 F.C.R. 655, leave to appeal to the Supreme Court refused. Speaking for the Court, Mr. Justice Evans held that that section does not give priority to international human rights instruments over inconsistent IRPA provisions. However, at paragraphs 62 and following, he described the evolution of the common law and the expanding role given to international law in the interpretation of domestic law.

[12] What then are the ramifications of the recent decision of the Supreme Court in *R. v. Hape*, 2007 SCC 26, [2007] S.C.J. no. 26, which dealt with the extraterritorial application of the Charter, in the immigration context? Mr. Justice LeBel followed the adoptionist approach to the reception of

customary international law, by which “prohibitive rules of international custom” are incorporated directly into domestic law through the common law, without the need for legislative action.

[13] He said at paragraph 39:

> Despite the Court’s silence in some recent cases, the doctrine of adoption has never been rejected in Canada. Indeed, there is a long line of cases in which the Court has either formally accepted it or at least applied it. In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law.

[14] He also referred to the reasons for judgment given by Lord Denning in *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529 (C.A.). Mr. Justice Lebel said at paragraph 36:

> Lord Denning considered both the doctrine of adoption and the doctrine of transformation, according to which international law rules must be implemented by Parliament before they can be applied by domestic courts. In his opinion, the doctrine of adoption represents the correct approach in English law. Rules of international law are incorporated automatically, as they evolve, unless they conflict with legislation. He wrote, at p. 554:
>
> > It is certain that international law does change. I would use of international law the words which Galileo used of the earth: "But it does move." International law does change and the courts have applied the changes without the aid of any Act of Parliament ... .

> ... Seeing that the rules of international law have changed - and do change - and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of this court - as to what was the ruling of international law 50 or 60 years ago - is not binding on this court today. International law knows no rule of *stare decisis*. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change - and apply the change in our English law - without waiting for the House of Lords to do it.

[15] Must *Baker* be reassessed in the light of *Hape*? Should family integration be reassessed, not withstanding that removal of one family member is nearly always accompanied by disruption and heartbreak? (*Melo v. Canada (Minister of Citizenship and Immigration*), 188 F.T.R. 39, [2000] F.C.J. No. 403).

[16] As Mr. Justice Lebel noted, and as was held in *Baker*, not only is conformity with international law an interpretative principle of our domestic law, but our Courts have looked to international law to assist in interpreting our *Charter of Rights and Freedoms.*

[17] The Minister submits that a PRRA officer does not have jurisdiction to decide complex issues of law. He relies upon *Covarrubias v. Canada (Minister of Citizenship and Immigration),* 2006 FCA 365, 2006 F.C.J. No. 1682 where the Federal Court of Appeal said at paragraph 56:

> This Court recognizes that PRRA officers make extremely important decisions, and for a significant number of people a PRRA assessment may be the final assessment of risk that they receive before being deported. However, based on the above considerations, and on the

> fact that the IRPA explicitly confers jurisdiction on its other decision makers to consider questions of law and constitutional issues, I agree with the applications Judge, and with Russell J. in *Singh*, that a PRRA officer does not have implied jurisdiction to consider questions of law, in particular, the implied jurisdiction to declare inoperative subsections of the IRPA when their operation would result in the violation of a person's rights under the Charter.

[18] That case is clearly distinguishable. The officer in this case was not carrying out a pre-removal risk assessment. She was exercising the Minister's discretion pursuant to section 25 of IRPA. As per *Baker*, the Minister had the obligation to consider questions of law and constitutional issues. So did she.

[19] To summarize, the officer mischaracterized the issue. The question which she should have asked herself was whether Mr. Okoloubu's removal would violate Canadian law, which law, if possible, is to be interpreted in a manner consistent with international law. Following *Hape*, a further question must be asked. Since the preamble of the *International Covenant on Civil and Political Rights,* which entered into force in March 1976, speaks of "considering", "recognizing", and "realizing" so that the States Parties to the Convention "agree" on certain principles, are those principles prohibitive rules of customary international law which have been incorporated into domestic law, without the benefit of legislation?

[20] As discussed during the hearing, the ramifications of *Hape* should be thought through and at a higher level. The Minister has until 27 October 2007 to submit a question or questions of general importance which would support an appeal to the Federal Court of Appeal. The Applicant shall have 7 days to respond. Thereafter, an order shall issue. Nothing said herein shall be taken as an

endorsement or rejection of the other parts of the decision. The referral back for redetermination shall be on a full *de novo* basis and shall include an update of Mr. Okoloubu's wife's health and financial issues.

"Sean Harrington"

Judge

Ottawa, Ontario
October 17, 2007

FEDERAL COURT

SOLICITORS OF RECORD

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