Federal Court  Cour fédérale

Date: 20090921

Docket: IMM-5286-08

Citation: 2009 FC 936

Ottawa, Ontario, September 21, 2009

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

OBIOMA OTUMDI EBEBE

Applicant

and

**THE MINISTER OF CITIZENSHIP,
IMMIGRATION AND MULTICULTURALISM**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is a sympathetic case, but it is also a case involving a history of egregious immigration fraud on the part of Mr. Ebebe. The natural sympathies of the matter rest with Mr. Ebebe's Canadian spouse and their young Canadian child.

[2] At the center of the decision under review is the inherent conflict between maintaining the unity of the family, including respect for the best interests of an affected child, and the important principle of protecting the immigration system from deception and abuse. As with most cases of this sort the choices available to the responsible decision-maker are difficult and, in some measure,

unpalatable. The question facing the Court is whether the decision to refuse humanitarian and compassionate (H & C) relief to Mr. Ebebe under s. 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) was made lawfully and reasonably and in accordance with the principles expressed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

a. Background

[3] Mr. Ebebe came to Canada from Brazil as a ship stowaway and arrived in Montréal on July 6, 2002. Apparently he had made his way from Nigeria to Brazil in 1993 and, during the intervening years, the Brazilian authorities allowed him to work.

[4] Upon arrival Mr. Ebebe told Canadian immigration authorities that he was Peter Gogoh and that he was a citizen of Sierra Leone born there on June 27, 1975.

[5] In fact, Mr. Ebebe was born in Nigeria on June 27, 1967 and his parents and seven siblings still reside in the family home in Aba, Abia State, Nigeria.

[6] Mr. Ebebe met his future Canadian wife, Sonia Arsenault Gogoh, during the summer of 2003. She was a resident of Prince Edward Island and that is where they have lived since their marriage on December 19, 2003. Mr. Ebebe initially misrepresented his identity to his wife and when their son was born on December 8, 2005 he was named Jonah Anderson Ebebe Gogoh.

[7] In July 2002, Mr. Ebebe applied for refugee protection and his claim was heard by the Immigration and Refugee Board (Board) on April 27, 2006. Through that hearing he continued to maintain that he was a citizen of Sierra Leone and he related a detailed, but fraudulent, history of persecution during the period of that country's civil unrest. His claim to protection was rejected by the Board on credibility grounds on June 20, 2006.

[8] Mr. Ebebe continued to misrepresent his identity to immigration authorities and to his wife and her family until March 2008. It was only when he was required to produce a valid passport and police certificate in support of a pending claim to H & C relief that his situation became untenable and he disclosed his true personal history. He then corrected his application for H & C relief and it is from the negative decision on that application that he brings this application for judicial review. It is very clear from the decision under review that the decision-maker (Officer) concluded that the factors that supported the granting of relief were overridden by the significance of Mr. Ebebe's fraudulent conduct.

II. Issues

[9] (a) What is the standard of review?

(b) Did the Officer err by applying wrong principles to Mr. Ebebe's application?

(c) Did the Officer err by overlooking or misconstruing the evidence?

III. Analysis

A. *Standard of Review*

[10] For the purposes of applying an appropriate standard of review, I adopt the following passage from the judgment of Justice Eleanor Dawson in *Ahmad v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 646, 167 A.C.W.S. (3d) 974:

> [10] Since the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9, determining the appropriate standard of review involves two steps. First, the Court must ascertain whether the jurisprudence has already satisfactorily determined the degree of deference to be accorded to the particular type of question at issue. Second, if that initial inquiry proves unsuccessful, the Court must consider the relevant standard of review factors. Those factors include: (i) the presence or absence of a privative clause; (ii) the purpose of the decision-maker in question, as determined by its enabling legislation; (iii) the nature of the question at issue; and (iv) the relative expertise of the decision-maker. See: *Dunsmuir* at paragraphs 57, 62, and 64.
>
> [11] The appropriate standard of review for a humanitarian and compassionate decision as a whole had previously been held to be reasonableness *simpliciter*. See: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraphs 57 to 62. Given the discretionary nature of a humanitarian and compassionate decision and its factual intensity, the deferential standard of reasonableness is appropriate. See: *Dunsmuir* at paragraphs 51 and 53.
>
> [12] As to what review on the reasonableness standard entails, the Supreme Court was express in *Dunsmuir*, at paragraph 48, that the collapse of the patent unreasonableness standard of review and the move toward a single standard of reasonableness was not an invitation to more intrusive scrutiny by the Court. At paragraph 49, the majority cautioned that:
>
> > Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those

> working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.
>
> [13] Review on the reasonableness standard requires the Court to inquire into the qualities that make a decision reasonable, which include both the process and the outcome. Reasonableness is concerned principally with the existence of justification, transparency, and intelligibility in the decision-making process. It is also concerned with whether the decision falls within the range of acceptable outcomes that are defensible in fact and in law. See: *Dunsmuir* at paragraph 47.

B. *Did the Officer Err by Applying Wrong Principles to Mr. Ebebe's Application?*

[11] The principal argument advanced on behalf of Mr. Ebebe is that the Officer misstated the legal test for the grant of relief under s. 25 of the IRPA. It is argued the Officer conflated the relevant criteria for obtaining relief set out in the Inland Processing Manual 5 (IP5) by requiring Mr. Ebebe to establish unusual, undeserved or excessive hardship which was also the result of circumstances beyond his control. This was an error, he says, because IP5 states only that, <u>in most cases</u>, the requisite hardship must result from circumstances beyond one's control. In other words, this is not to be taken as a determinative consideration.

[12] This argument is not persuasive. First, the decision itself does not treat this consideration as a *sine qua non* for relief. It is apparent from the Officer's reasons that she examined the various criteria disjunctively and carried out a proper weighing of the evidence including the evidence bearing on the best interests of Mr. Ebebe's child. She did not deny relief on the sole basis that the situation of hardship was the result of circumstances within Mr. Ebebe's control. This is evident from the Officer's conclusion:

> The evidence gathered in order to come to a fair and balanced decision has lead me to conclude that Mr. Ebebe did not misrepresent himself out of fear of being separated from his son and wife, and therefore being unable to provide for them financially and emotionally. Mr. Ebebe stated on multiple occasions that everything he had done to mislead the Government of Canada, his child, his wife, her family and everyone around him was out of fear and for his family in Nigeria and to ensure their well-being. As outlined above, I am satisfied that the best interests of Mr. Ebebe's child will be ensured by Mrs. Gogoh and her family and he will be allowed to live a safe, health [*sic*] and fulfilling life. I am satisfied that Mr. Ebebe misrepresented himself knowing the potential outcome of his decision on his ability to remain in Canada. After weighing the humanitarian and compassionate factors presented by Mr. Ebebe and his counsel, and giving consideration to the evidence available on Mr. Ebebe's previous application for permanent residence, I am not satisfied that Mr. Ebebe's hardship outweighs his contravention of the *Act*. I am not satisfied that Mr. Ebebe's hardship is usual [*sic*], disproportionate or underserved and meets the test as set out in section 25(1) of the *Immigration and Refugee Protection Act*.

On this point, I rely upon the decisions in *Tameh v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1235, [2008] F.C.J. No. 1563 (QL) and *Pannu v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1356, 153 A.C.W.S. (3d) 195.

[13] I would add that although the IP5 guidelines are helpful and relevant to the assessment of the reasonableness of an H & C decision they should not be construed as though they are equivalent to a statutory instrument. In the absence of a statutory test, an applicant for this type of relief has no right to a particular outcome or to the application of any particular legal test: see *Paz v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 412, [2009] F.C.J. No. 497 (QL) at paragraph 28.

C. *Did the Officer Err by Overlooking or Misconstruing the Evidence?*

[14] Mr. Ebebe also contends that the Officer was fixated on the issue of his misconduct to the exclusion of other relevant considerations and, in particular, the best interests of his child. This decision, it is argued, suffers from the same frailties that were identified in *Sultana v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 533, [2009] F.C.J. No. 653 (QL).

[15] *Sultana*, above, was a case where important evidence was overlooked and where there was not a proper weighing of the competing evidence by the decision-maker. This is evident from Justice Yves de Montigny's finding at paragraph 29:

> […] A careful reading of the CAIPS notes reveals that the Immigration officer, on more than one occasion, considers the failure to disclose as a paramount factor precluding any possibility that H&C factors could overcome the exclusion mandated by s.117(9)(d)…

[16] I am not satisfied that the decision under review contains an error of the sort recognized in *Sultana*, above. Instead, what the Court is being asked to do in this case is to reweigh the evidence

and to effectively reconsider the Officer's decision on its merits. That is not the proper role of the Court on judicial review: see *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 at paragraph 38.

[17] In particular, I am satisfied that the Officer was alert, alive and sensitive to the best interests of Mr. Ebebe's child. Based on Mr. Ebebe's submissions and the follow-up interview with him on July 23, 2008, the Officer drew a number of positive and negative conclusions. First, the Officer indicated that Mr. Ebebe's involvement in his child's life was "obvious and undeniable" and that she was satisfied a significant level of interdependence existed within the family. Second, the Officer noted that Mr. Ebebe contributed financially to the household, but that his wife earned a greater portion of the family income. Nevertheless, she was satisfied that Mr. Ebebe contributed to the child's needs. Third, it was noted that the child had regular contact with his extended maternal family, but little contact with Mr. Ebebe's family in Nigeria.

[18] On matters of gender and race, the Officer agreed with Mr. Ebebe's submission that he and his son shared a close bond. However, the Officer also noted that Mr. Ebebe did not speak of this matter during his interview and failed to address it in his written submissions. When the Officer questioned whether Mr. Ebebe intended to teach his son about their Nigerian heritage, Mr. Ebebe responded that his son was too young. This combined with Mr. Ebebe's hesitation in revealing his identity to his family caused the Officer to conclude that this was not a significant factor.

[19] The Officer concluded the analysis of the best interests of the child by noting that "[t]he above discussion is not aimed at attempting to minimise the effect of a father's removal on his child, but rather to provide a clear picture of Mr. Ebebe's family's circumstances". While recognizing the important H & C considerations that did exist, the Officer was nevertheless satisfied that:

> [...] Mr. Ebebe's son's well-being would be ensured even if Mr. Ebebe were to be removed. Mr. Ebebe and Mrs. Gogoh have provided me with me [*sic*] sufficient evidence to satisfy me Mrs. Gogoh and her family can provide her son the material, financial and emotional support required for him to thrive. It is evident from the submissions on file that Mrs. Gogoh's family care deeply for this child and I am satisfied that they would continue to do so were Mr. Ebebe to be removed.

[20] The Officer went on further to discuss the maternal family's strong emotional relationship with Mr. Ebebe's son. She also noted that Mr. Ebebe's removal would not cause his child to face financial hardship based on the fact Mr. Ebebe's spouse was the main income earner in the family.

[21] All of the above confirms that the Officer carried out a thorough and thoughtful assessment of the best interests of the child. What is essentially being advanced on behalf of Mr. Ebebe is that this decision must be irrational because, in the end, the Officer's concerns about Mr. Ebebe's misconduct overwhelmed the evidence supportive of maintaining family unity. While a different decision could certainly have been reached on this record, it was not an error to give great and, indeed, overriding weight to Mr. Ebebe's misconduct. This was, after all, a case of serious and prolonged misrepresentation of the sort that was of concern to the Court in *Legault v. Canada*

(Minister of Citizenship and Immigration), 2002 FCA 125, [2002] 4 FC 358 at paragraph 19:

> In short, the Immigration Act and the Canadian immigration policy are founded on the idea that whoever comes to Canada with the intention of settling must be of good faith and comply to the letter with the requirements both in form and substance of the Act. Whoever enters Canada illegally contributes to falsifying the immigration plan and policy and gives himself priority over those who do respect the requirements of the Act. The Minister, who is responsible for the application of the policy and the Act, is definitely authorised to refuse the exception requested by a person who has established the existence of humanitarian and compassionate grounds, if he believes, for example, that the circumstances surrounding his entry and stay in Canada discredit him or create a precedent susceptible of encouraging illegal entry in Canada. In this sense, the Minister is at liberty to take into consideration the fact that the humanitarian and compassionate grounds that a person claims are the result of his own actions.

IV. Conclusion

[22] This was a decision that meets the standard set in *Dunsmuir*, above, that is, a decision falling within the range of acceptable outcomes that are defensible in fact and law: see paragraph 47.

[23] This decision does not preclude Mr. Ebebe's return to Canada. The Respondent does not appear to contest the genuineness of Mr. Ebebe's marriage, and the value of his presence in the life of his young son cannot be seriously doubted. In these circumstances, it would behoove the Minister to expedite the processing of Mr. Ebebe's application for permanent residency under the sponsorship of his wife.

[24] Neither party proposed a certified question and no issue of general importance arises on this record.

JUDGMENT

THIS COURT ADJUDGES that this application for judicial review is dismissed.

" R. L. Barnes "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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