Federal Court  Cour fédérale

Date: 20110630

Docket: IMM-5961-10

Citation: 2011 FC 797

Ottawa, Ontario, June 30, 2011

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

TESSY DANIEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The present application addresses the validity of a decision by a visa officer to deny the Applicant's request for relief on humanitarian and compassionate grounds (H&C application) pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27. The application was denied by the officer, and it is this decision that the Court is asked to judicially review.

The Officer's Decisions

[2] After stating the Applicant's arguments for her H&C application and her position in regards to her risk from removal, the officer commented the evidence. Firstly, the Applicant alleges she is a Christian widow, whose husband's family is Muslim. Her late husband's family is supposedly well-connected and has threatened the Applicant and her son in light of these religious motives. However, the Applicant had not been found credible in her initial refugee claim. Also, a first H&C application was denied. Thus, she was not found credible in her refugee claim: she had not established she was really a widow. She has now established her identity and seeks to have the same grounds now recognized (i.e. her husband's family's threats, her situation as a widow in Nigeria, and as a Christian in Nigeria). The Officer found it relevant to use in the assessment of the previous H&C application and her previous PRRA these "valid observations" made by the IRB and her credibility.

[3] The Officer did not believe the Applicant was a widow, and did not accept this as a source of "undue and disproportionate hardship". From these findings, the Officer held that there was no personal risk resulting from her alleged husband's death, as she was not found credible on this basis. Also, the risk stemming from the fact that she married a Muslim was not considered, as she had not established she was married. She did not establish she would be victim to mistreatment resulting from the fact she was a woman, as this was a generalized risk that was not proven to affect her personally.

[4] Two letters submitted by the Applicant from churches in Nigeria and Canada were not considered probative, as they did not show independent knowledge of the events. Furthermore, her

PRRA application stated she gave collateral on her husband's property in order to travel to Canada. This was inconsistent with her allegation that widows were mistreated and have no property rights in Nigeria.

[5] Also, the documentation submitted only established that there were generalized risks of violence in Nigeria, and the Officer found she did not show how this violence would affect her personally.

[6] In the context of her H&C application, the best interests of her Canadian born child were then considered. Her son had surgery on his knee and requires physiotherapy. There is a possibility his other knee would require surgery. The physiotherapy and possibility of future surgery were deemed too speculative to be accepted as H&C grounds. Arguments were also submitted that her child's best interest cannot be found if he is separated from his mother. A Clinic Coordinator submitted a letter whereby the dismal state of schools in Nigeria was discussed. However, the Officer deemed that it was not established that this particular child would not have adequate access to education. The hardship suffered would not be disproportionate.

[7] The Applicant's son also suffers from ADHD, a condition that is medicated today. However, no efforts were made by the Applicant to establish that she made specific efforts to determine which medical and educational services would be available to her and her son in Nigeria. The medication for ADHD in Nigeria was not shown to be expensive or unavailable. The intervention plan that was submitted by the son's school was deemed "vague" and did not establish that the services required were unavailable in Nigeria.

[8] In sum, it is the Applicant's choice to bring her son with her if removed, and this would not cause a disproportionate hardship to her son or her.

[9] The applicant stated she was established, owned property and had a job. She is involved with her church and friends. She has adequate language skills. However, the Officer stated that none of these elements amount to a disproportionate hardship if removal takes place. Thus, the visa exemption was not awarded. The Applicant was not found to be at risk if removed.

Standards of Review

[10] The H&C application is based on section 25 of the *Immigration and Refugee Protection Act*, LC 2001, c 27:

Humanitarian and compassionate considerations — request of foreign national 25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best	*Séjour pour motif d'ordre humanitaire à la demande de l'étranger* 25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

> interests of a child directly affected.

[11] The relief sought by an H&C application is that the Minister waive the habitual requirement that a permanent residency application be submitted from abroad. The starting point of the Court's analysis in reviewing an H&C decision is that the relief sought by the Applicant is exceptional and discretionary (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125). Justice Shore added the following instructive comments in regards to the nature of an H&C application in *Mirza v Canada (Citizenship and Immigration)*, 2011 FC 50, at para 1:

> The humanitarian and compassionate (H&C) decision-making process is a highly discretionary one that considers whether a special grant of an exemption is warranted. It is widely understood that invoking subsection 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) is an exceptional measure, and not simply an alternate means of applying for permanent resident status in Canada (*Barrak v Canada (Minister of Citizenship and Immigration)*, 2008 FC 962 (CanLII), 2008 FC 962, 333 FTR 109, at paras 27, 29; *Doumbouya v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1186 (CanLII), 2007 FC 1186, 325 FTR 186, at para 7; *Pannu v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1356 (CanLII), 2006 FC 1356, 153 ACWS (3d) 195, at para 26).

[12] In this respect, it is clear that an officer's assessment of an H&C application is also to be reviewed on the standard of reasonableness (*Mirza*, above; *Hernandez Malvaez v Canada (Citizenship and Immigration)*, 2011 FC 129).

The Objective Risk

[13] The grounds for persecution alleged by the Applicant are the same as the grounds claimed in her asylum claim. She alleges being a widow from an interfaith marriage. As such, she alleged she

would be the victim of persecution in her native Nigeria. However, her claim for asylum was denied on the grounds that she lacked credibility in her claim. This was further confirmed during the course of her PRRA hearing. The Officer concluded that "in the absence of evidence that corroborates the applicant's allegations of fact related to personal risk of harm against her, the applicant's statements regarding personal risk remain generally not credible". Furthermore, the risk alleged as a single woman in Nigeria was deemed generalized and the Applicant did not adequately personalize it to the Officer's satisfaction.

[14] The burden to prove the elements in support of a PRRA application is upon the Applicant (*Hailu v Canada (Solicitor General),* 2005 FC 229; *Guergour v Canada (Citizenship and Immigration),* 2009 FC 1147). Contrary to what was argued in writing by counsel for the Applicant, a PRRA application is not a forum to re-litigate questions of the Applicant's previously assessed credibility, or lack thereof. The findings of the Immigration and Refugee Board in regards to her credibility in her asylum claim were not subject to judicial review by this Court, nor was her previous H&C application. As such, it is improper for this Court to be asked to reconsider these findings in assessing whether the Applicant faces a personalized risk as a widow and Christian in Nigeria. The question here is not whether the tribulations of widows in Nigeria were properly assessed. Rather, the Applicant is not found to have provided evidence to establish herself as a widow and this, in various *fora*.

[15] The Officer's findings in respect to the objective risk from removal are reasonable. The Court is satisfied they fall within the "acceptable outcomes defensible in fact and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47). The findings made properly fall within the Officer's

mandate as trier of fact and no reviewable error has been committed in this respect. In all clarity, it should be restated that a PRRA application is not the forum to re-litigate a failed asylum claim on the basis of credibility (see *Nation-Eaton v Canada (Citizenship and Immigration)*, 2008 FC 294 for an example).

The H&C Decision

[16] The Officer's decision in regards to an H&C Application is indeed discretionary, but some factors have been recognized as important by the case law, as well as being enshrined in the IP-5 Manual made available to visa officers. The standard which must be met by an applicant is that "undue, underserved or disproportionate hardship" must be proven, which excludes the hardship inherent to being removed from Canada (*Doumbouya v Canada (Citizenship and Immigration)*, 2007 FC 1186; *Serda v Canada (Citizenship and Immigration)*, 2006 FC 356).

[17] The following factors were considered by the Officer in analyzing whether applying for a permanent resident visa from abroad constitutes "undue, undeserved or disproportionate hardship" for the Applicant: her establishment and integration in Canada; her risk in Nigeria; and the best interests of her Canadian-born child.

[18] The Applicant's establishment was considered insofar as the Applicant owns a house jointly with her second husband, to whom she is now separated. She is also active in her community and church and has held a steady job since 2005. The Officer ruled that the information pertaining to establishment, "while positive, does not show that the applicant's departure from Canada would cause a disproportionate hardship for her or anyone else".

[19] As submitted by the Minister, the exceptional nature of an H&C application entails that "the fact that the applicant works full-time, pays her taxes and is well-liked by her friends is therefore not sufficient to warrant granting her permanent residence on that basis" (*Quijano v Canada (Citizenship and Immigration)*, 2009 FC 1232, at1/ para 45). Furthermore, it can be seen that the Applicant's establishment, namely in regards to her real property, is based upon a precarious status, that of being a failed refugee claimant. Her initial refugee claim was denied in 2005 and her mortgage application was accepted in 2008. While arising in the context of a stay of removal, the following comments from Justice Shore in *Duran v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 738, at para 48 are relevant to this case:

> Ultimately, the applicant and her spouse were aware of her precarious status when they took on the financial commitments, which were, moreover, not in evidence before the Court, and they made their decisions with full knowledge of the situation. In the words of Mr. Justice Paul Rouleau, they did so at their peril:
> [16] I see no transgressions in the conduct of the Minister; no expectations granted the applicant; if he chose to marry while still not having his situation favourably determined by Canadian authorities, it is at his peril, not that of the Minister who has a duty to uphold the laws of Canada.
> (*Banwait v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 522 (T.D.) (QL))

[20] Here, the financial commitments were in evidence before the Officer. However, in assessing establishment, the Officer ruled that the Applicant's establishment and integration were not determinative in her H&C applicant. These findings in regards to establishment and integration are reasonable: no important factors were ignored and the Court must not re-weigh the Officer's assessment of these factors (see, *inter alia*, *Adams v Canada (Citizenship and Immigration)*, 2009 FC 1193).

[21] In addition, the best interests of the Applicant's child were also considered. It is well set out that the Officer must be "alert, alive and sensitive" to these issues in the context of an H&C application. In *Baker*, above, at para 75, the Supreme Court rendered its view on the Officer's assessment of these interests:

> […] for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.

[22] As clear as this guidance is, it was necessary for this Court and the Federal Court of Appeal to nuance the Supreme Court's stance on the assessment of the best interests of children in H&C Applications. It is in this perspective that the Federal Court of Appeal decided in *Legault*, above, at paragraph 12 that:

> […] the presence of children, contrary to the conclusion of Justice Nadon, does not call for a certain result. It is not because the interests of the children favour the fact that a parent residing illegally in Canada should remain in Canada (which, as justly stated by Justice Nadon, will generally be the case), that the Minister must exercise his discretion in favour of said parent. Parliament has not decided, as of yet, that the presence of children in Canada constitutes in itself an impediment to any "refoulement" of a parent illegally residing in Canada (see *Langner v. Canada (Minister of Employment and Immigration)* reflex, (1995), 29 C.R.R. (2d) 184 (F.C.A.), leave to appeal refused, [1995] 3 S.C.R. vii).

[23] Thus, the best interests of a child in an H&C application has not been held to be a determinative factor, yet it is an important one which requires serious consideration by the Officer (*Legault*, above; *Garcia v Canada (Citizenship and Immigration)*, 2010 FC 677; *Hussain v Canada*

(Citizenship and Immigration), 2010 FC 334). Furthermore, the onus is on the Applicant to adduce the necessary evidence to establish the grounds of her H&C application (*Sharma v Canada (Citizenship and Immigration)*, 2009 FC 1006; *Barrak v Canada (Citizenship and Immigration)*, 2008 FC 962; *Owusu v Canada (Citizenship and Immigration)*, 2004 FCA 38).

[24] In this respect, it cannot be said that the Officer completely ignored or otherwise did not consider the evidence provided in respect to the Canadian-born child's best interests, not least of which were his medical needs. The question is whether this assessment falls within "the range of acceptable outcomes defensible in fact and law", as there were no breaches of fairness of discounting of relevant evidence.

[25] As such, the Court's analysis is drawn to the Officer's appreciation of the evidence placed in support of the child's medical conditions. The following evidence was submitted in support of the child's medical condition, which the Applicant claims justifies her H&C application:

a. The child suffers from Attention Deficit and Hyperactivity Disorder (ADHD). He is under medication for this condition.
b. The son's ADHD also required an "Intervention Plan" from his school. In this Intervention Plan, the child's needs are specified and include being loved, appreciated, esteemed and befriended.
c. A letter from the Montreal City Mission was submitted, whereby several grounds of the H&C application are discussed. Also, the letter relates the likely consequences of the son being separated from his mother if she is removed. Also, statistics pertaining to healthcare and schooling in Nigeria are given.
d. In support of the alleged dismal state of healthcare and schooling in Nigeria, reports from international organizations were submitted and related statistics regarding the dismal state of education and health services. Later reports speak to a certain improvement in this respect.
e. Letters from two physicians where the son's medical conditions are explained. His heart murmur is stated to be benign. He "could" require surgery on his left knee, and has undergone physiotherapy and surgery on his right knee.

[26] It is understood that the child's recovery period from the surgery on his right knee is all but completed. No updated information is brought forth in regards to ongoing physiotherapy. The most specific evidence adduced to additional healthcare requirements for his knees is that his left knee has begun to hurt, with no diagnostic or prognosis. A letter dated June 8, 2010 from one of the treating physicians indicated that "investigations under way" as to whether the same condition which required surgery on his right knee would affect his left knee. The Officer determined that an operation on the left knee was not established as being probable. Furthermore, the need for physiotherapy is not "specific enough to show that such therapy would be needed after the applicant would depart Canada and even if such therapy is needed after the applicant would return to Nigeria, she has not adequately shown that she would not be able to access those services for her child, if she decided to take Ayomide with her to Nigeria". Also, the Officer deemed that the Applicant had not shown that the required medication for the treatment of ADHD was not available in Nigeria.

[27] In sum, it can be said that the Officer found that the Applicant did not particularize her H&C application with evidence applicable to her situation and her son's needs. It was not shown that the specific care and educational services required were not accessible in Nigeria. The evidence adduced in regards to the ongoing treatment and future treatments were not satisfactory to the Officer, as it was unclear and speculative. Also, the Officer stated that while the removal of the Applicant would be effective, the child was born in Canada and could remain in the country.

[28] This decision is reasonable. Again, the Court cannot re-weigh the evidence as it was before the Officer. Surely, the evidence was considered and analyzed, yet was deemed unclear enough to grant the exceptional remedy provided by an H&C application. The burden is upon the Applicant to

particularize her claim. The Officer's decision was that how the evidence *specifically* relates to her condition and her child's was not provided. Surely, the onus is not upon the Officer to deduce which elements relate to an applicant's case. For example, general statistics pertaining to health care do not overcome the burden of specifying the nature of the care required, something which was not sufficiently accounted for by the Applicant. The same reasoning applies to the son's need for medication and schooling. It is important to note that the child may remain in Canada as of right.

[29] As counsel for the Minister highlighted for the Court, the assessment of an H&C application is not whether an applicant is an ideal candidate for immigration, but whether if the circumstances of a case require that the requirement of applying for a visa from abroad be waived. In fairness to all other applicants abroad and considering the fair administration of the IRPA, it was reasonable for the Officer not to grant the H&C exemption to the Applicant.

Proposal for a Certified Question and Declaratory Relief

[30] Counsel for the Applicant seeks to have certified the following question:

> Do the guarantees of Articles 23 and 24 of the International Covenant on Civil and Political Rights regarding the protection of family life and the protection of children mandate the acceptance of requests for residence based on humanitarian consideration when there are Canadian children or a Canadian spouse who is affected by the decision in the absence of significant countervailing considerations?

[31] Basically, it is argued that the separation of families is a breach of international law, and that, as such, proper emphasis should be placed on the humanitarian consideration that is family life and that Canada's international obligations require such a determination.

[32] Counsel for the Minister points out that the very same question was proposed by *the same counsel* in *Choudhary v Canada (Citizenship and Immigration)*, 2008 FC 412. Justice Lagacé disposed of the question by citing applicable appellate authority on this issue arising from *Legault*, above and *Langner*, above, as well as in *Baker*, above. In all clarity, Justice Lagacé stated that "the presence of Canadian children does not call to a certain result in the context of an application under section 25 of the Act".

[33] The question seeks to uproot well founded principles in immigration law, such as the discretionary and exceptional nature of H&C applications. In this respect, the appellate guidance provided by the above cited cases and the legislative intent are sufficiently clear so as to give proper weight to the best interests of children in the context of H&C applications. The proposed question for certification also seeks to read into IRPA principles which have been refused by the Courts, and more importantly, by Parliament. The same can be said of the declaratory relief sought by the Applicant.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is denied. No question is certified.

"Simon Nöel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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