Federal Court  Cour fédérale

Date: 20120620

Docket: IMM-8638-11

Citation: 2012 FC 793

Toronto, Ontario, June 20, 2012

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

CYNTHIA MOMODU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of an immigration officer, dated October 17, 2011, refusing the applicant's application for permanent residence on humanitarian and compassionate [H&C] grounds under sub-section 25(1) the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act].

[2] The applicant is a citizen of Nigeria. She arrived in Canada in April 2008 and claimed refugee protection, alleging that the police wanted to imprison her because she refused to enter into a marriage with a village chief that had been arranged by her uncle. The Refugee Protection

Division of the Immigration and Refugee Protection Board [RPD] refused her claim on July 28, 2010, finding that her allegations were not credible. An application for leave from that decision was denied by this Court on December 10, 2010. She also had a failed PRRA (dated October 11, 2011), where, according to counsel, leave was denied.

[3] In the decision under review, the officer found that the applicant did not establish that her removal would result in undue hardship for the following reasons. First, her establishment in Canada did not create any unusual, undeserved or disproportionate hardship. Second, the officer rejected the applicant's allegations of risk as they were found not credible by the RPD. Third, the officer found that the applicant had not established that she or her daughter would face discrimination amounting to undue hardship if they were returned to Nigeria.

[4] The applicant argues that the officer applied the wrong test for assessing hardship, alleging that the officer failed to properly evaluate the hardship to both herself and her daughter if she is removed from Canada. She submits more specifically in this regard that the officer did not appropriately consider the best interests of the applicant's three-year-old Canadian-born daughter, who would face either remaining in Canada alone without a caregiver or be subject to the risk of female genital mutilation [FGM] or of being forced into an unwanted marriage in Nigeria if she were to return to Nigeria with her mother.

[5] The respondent, for its part, argues that the H&C exemption is an extraordinary and discretionary remedy reserved for unusual, undeserved or disproportionate hardship and that the applicant did not meet her onus of establishing such hardship. The respondent submits that the

officer applied the correct test, carefully considered the evidence and reached a reasonable conclusion. The respondent argues that the officer specifically addressed the interests of the applicant's daughter, including the risk of FGM, and found this risk to not be substantiated. The respondent argues that the applicant's submissions amount to a request to re-weigh the evidence, which this Court ought not to do in an application for judicial review.

[6] The standard of review applicable in this application for judicial review is that of reasonableness, it being firmly settled that officers' decisions on H&C applications are discretionary and that the exercise of discretion by an H&C officer warrants considerable discretion (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 at para 62; *Prashad v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1286 at para 26, 208 ACWS (3d) 387; *Paz v Canada (Minister of Citizenship and Immigration)*, 2009 FC 412 at paras 22-25, [2009] FCJ No 497).

[7] For the reasons set out below, I have concluded that the officer's decision is reasonable and therefore will be maintained.

[8] The test the officer enunciated contains no error. He held in this regard that the burden of proof was on the applicant to establish that she would suffer undue, undeserved or disproportionate hardship if she were required to apply for permanent residence from outside Canada, as is the normal course. The officer then quoted from Inland Processing Manual 5 of Citizenship and Immigration Canada, entitled, "Immigration Applications in Canada made on Humanitarian and Compassionate Grounds" [IP 5], which sets out guidelines to be applied by immigration officers in

the assessment of H&C permanent residence applications. In summary, the sections quoted from IP 5 state that to be "unusual", hardship is generally not anticipated or addressed by the Act, to be "undeserved", hardship generally is the result of circumstances beyond an applicant's control and that circumstances that are not "unusual" or "undeserved" may nonetheless warrant H&C consideration if requiring that the applicant make a permanent residency application from abroad would have an unreasonable impact on the applicant due to the applicant's personal circumstances. The foregoing has been recognized by the case law as the appropriate guiding principles relevant to the exercise of discretion by an H&C officer (see e.g. *Diallo v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1062 at paras 35-40, 317 FTR 179; *Uberoi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1232 at para 18, 301 FTR 146; *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1041, 2001 [2001] FCJ No 1441 at paras 5 and 9). Thus, contrary to what the applicant asserts, the officer did not apply the wrong test.

[9] As noted, the applicant's contention in this application for judicial review is that the officer's findings on lack of undue hardship were unreasonable as they ignored the evidence regarding the risk of FGM or being forced into marriage that the applicant claims her daughter would face in Nigeria. The only evidence before the officer on these risks, however, was the general country documentation. There was simply nothing to tie the applicant or her daughter specifically to these risks.

[10] In my view, the officer's decision fairly reflects the country documentation that was placed before him. That documentation establishes that Nigeria is a difficult country in which to live: it is poor, there is ongoing violence and crime and there is systemic discrimination against women. In

addition, the risks alleged by the applicant do find some basis in the general documentation regarding Nigeria in that there is evidence of FGM and of girls being forced into marriages at young ages against their will. The officer reviewed the general country documentation, noting correctly that it establishes that forced marriages mainly occur in the north amongst Muslim communities (Certified Tribunal Record [CTR] at pages 100 to 103) and that FGM is most common within certain ethnic communities (CTR at pages 76 and 95). The applicant is Christian, from the South, and has not claimed to be a member of the ethnic communities most at risk for FGM. Thus, there is nothing in the general country documentation which would point to the applicant's daughter being particularly at risk on these points.

[11] More importantly, though, the applicant's contention is that she is the sole caregiver for the child. Thus, once returned to Nigeria, it would be the applicant who would be making decisions regarding her daughter. As the respondent rightly notes, this fact undercuts the applicant's claims of hardship for her daughter. The applicant has provided no evidence to indicate that anyone else would be involved in rearing the child in Nigeria or would in any other way be influential in decisions about the child's welfare. This is dispositive of this application.

[12] It is trite law that the burden is on an applicant in an H&C application to file evidence to support his or her claims (see e.g. *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 35, [2009] FCJ No 713; *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 8, [2004] 2 FCR 635; *Zhou v Canada (Minister of Citizenship and Immigration)*, 2012 FC 638 at para 18). In the absence of any evidence from the applicant establishing any risk to her child, the officer's determinations cannot be said to be unreasonable.

[13] Accordingly, this application for judicial review will be dismissed.

[14] No question for certification under section 74 of IRPA was presented and none arises in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed;

2. No question of general importance is certified; and

3. There is no order as to costs.

"Mary J.L. Gleason"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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