Date: 20081027

Docket: A-560-07

Citation: 2008 FCA 326

CORAM: **NOËL J.A.**
NADON J.A.
TRUDEL J.A.

BETWEEN :

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

IKEJIANI EBELE OKOLOUBU

Respondent

Heard at Montréal, Quebec, on October 20, 2008.

Judgment delivered at Ottawa, Ontario, on October 27, 2008.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: NOËL J.A.
NADON J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

Overview

[1] Subsection 25(1) of the *Immigration and Refugee Protection Act*, 2001, c. 27 (the Act) stated that:

> **25.** (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or
>
> **25.** (1) Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire

obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

[2] This is an appeal from a decision of Harrington J. (2007 FC 1069) (the Applications Judge) sitting in judicial review, whereby he granted the application of the respondent to set aside the decision of an immigration officer (officer) who refused the respondent's application on humanitarian and compassionate grounds under subsection 25(1) of the Act (H&C application).

[3] The Applications Judge referred the matter back to another officer for a *de novo* redetermination of the respondent's H&C application, including an "update of Mr. Okoloubu's wife's health and financial issues" (reasons for order at paragraph 20) since the first officer had, for lack of jurisdiction, declined to consider the respondent's arguments based on international law, more particularly articles 17, 23 and 24 of the *International Covenant on Civil and Political Rights*, December 19, 1966, [1976] Can. T. S. No 47 (ICCPR) that generally deal with arbitrary and unlawful interference with one's family.

[4] For the purposes of section 74 of the Act, the following question of general importance was certified by the Applications Judge:

Does an immigration officer in charge of assessing an application under section 25 of the *Immigration and Refugee*	Est-ce qu'un agent d'immigration chargé de l'évaluation d'une demande présentée en vertu de l'article 25 de la *Loi sur*

Protection Act (for an exemption from the obligation to present an application for an immigrant visa from outside Canada) have jurisdiction to consider whether an applicant's removal would breach the *International Covenant on Civil and Political Rights*, more specifically Articles 17, 23 and 24?	*l'immigration et la protection des réfugiés* (pour une exemption de l'obligation de présenter une demande de visa d'immigrant de l'extérieur du Canada) a compétence pour décider si le renvoi d'un demandeur contrevient au *Pacte international relatif aux droits civils et politiques*, plus particulièrement à ses articles 17, 23 et 24?

The Relevant Facts

[5] Mr. Okoloubu was born in Nigeria on January 22, 1966. He came to Canada on August 25, 1998 where he claimed refugee status. On October 4, 1999, his claim was dismissed by the Refugee Division, as it was then, of the Immigration and Refugee Board (IRB). The respondent did not challenge that decision.

[6] The respondent made three requests for Exemption from Permanent Resident Visa Requirement. The first request was made on April 9, 1999, while his claim with the IRB was pending, and was denied on October 21, 1999. The second request, made on October 27, 2000, was denied on October 7, 2004. Leave for judicial review was sought against the second refusal and denied by the Federal Court on April 15, 2005.

[7] On October 26, 1999, the respondent made a Post-Determination Refugee Claimants in Canada Class (PDRCC) application, within the meaning of the *Immigration Regulations*, 1978, as they were then. As a result of the implementation of the present Act, the PDRCC proceedings were eliminated and the respondent's application was considered as a Pre-Removal Risk Assessment

(PRRA). This application was also refused on October 7, 2004. The respondent did not submit an application for leave of the negative PPRA decision.

[8] The respondent was briefly married to a Canadian citizen with whom he began cohabiting in September 1998. The couple divorced in September 2001. The respondent and his present wife, who was granted a protected person status and is now a Canadian permanent resident, have been married since July 19, 2003. She is employed as a nurse at a hospital. The couple has a child born in October 2005. The respondent's record indicates that his wife had a high-risk pregnancy, and that she suffered from depression following the birth of their child.

[9] On February 1, 2005, an inadmissibility report was issued against the respondent on the grounds of serious criminality under paragraph 36(1)*(a)*of the Act due to the respondent's two convictions for theft from mail and for possession of break-in instruments, entered on November 11, 2004. Both offences are liable for a period of imprisonment of 10 years. The respondent was sentenced to probation and 100 hours of community service, which he completed. Once again, the respondent did not seek leave of the Court to challenge the decision under paragraph 36(1)(*a*) of the Act.

[10] However, inadmissibility disqualified the respondent from making an In Canada Application for Permanent Resident Status, under the spouse or Common-law Partner in Canada Class. As a result, on July 18, 2005, the respondent made his third request for Exemption from

Permanent Resident Visa Requirement under subsection 25(1) of the Act on the basis of humanitarian and compassionate grounds.

[11] In support of that application, the respondent made reference to the ICCPR and argued that his removal from Canada would constitute interference with private family life. He further alleged breaches of his rights under the *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act (1982) (U.K.), 1982, c. 11 (the Charter) (H&C application, page 222; appeal book, vol. 2, pages 343-350).

[12] On January 30, 2007, the officer, whose title was that of a PRRA officer, denied the respondent's request. The officer held that she had no jurisdiction to decide questions of international and constitutional law in an H&C analysis. Having examined the respondent's submissions, she concluded that the respondent's family situation, links within Canadian society, and risk factors upon return to his country did not justify an exemption.

[13] The respondent was successful in having this decision set aside by way of judicial review at the Federal Court. Hence the within appeal by the Minister.

Decision of the Federal Court

[14] Before the Federal Court, the respondent argued that the officer was under an obligation to consider his rights and those of his wife and Canadian child under the Charter and the ICCPR. The

Applications Judge agreed and concluded that the officer's refusal to do so resulted in an unfair hearing for the respondent.

[15] The Applications Judge did not discuss the effect of the Charter on the particular facts of this case. However, he took particular notice of the ICCPR relied upon by the respondent, and "which Canada has ratified but not legislated upon" (reasons for order at paragraph 6). The relevant articles of the ICCPR read as follows:

International Covenant on Civil and Political Rights, December 19, 1966, [1976] Can. T. S. No 47	*Pacte international relatif aux droits civils et politiques*, 19 décembre 1966, [1976] R.T. Can. No 47
Article 17	**Article 17**
1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.	1. Nul ne sera l'objet d'immixtions arbitraires ou illégales dans sa vie privée, sa famille, son domicile ou sa correspondance, ni d'atteintes illégales à son honneur et à sa réputation.
2. Everyone has the right to the protection of the law against such interference or attacks.	2. Toute personne a droit à la protection de la loi contre de telles immixtions ou de telles atteintes.
Article 23	**Article 23**
1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.	1. La famille est l'élément naturel et fondamental de la société et a droit à la protection de la société et de l'Etat.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.	2. Le droit de se marier et de fonder une famille est reconnu à l'homme et à la femme à partir de l'âge nubile.
3. No marriage shall be entered into without the free and full consent of the intending spouses.	3. Nul mariage ne peut être conclu sans le libre et plein consentement des futurs époux.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage	4. Les Etats parties au présent Pacte prendront les mesures appropriées pour assurer l'égalité de droits et de responsabilités des époux au regard du

and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.	mariage, durant le mariage et lors de sa dissolution. En cas de dissolution, des dispositions seront prises afin d'assurer aux enfants la protection nécessaire.
Article 24	**Article 24**
1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.	1. Tout enfant, sans discrimination aucune fondée sur la race, la couleur, le sexe, la langue, la religion, l'origine nationale ou sociale, la fortune ou la naissance, a droit, de la part de sa famille, de la société et de l'Etat, aux mesures de protection qu'exige sa condition de mineur.
2. Every child shall be registered immediately after birth and shall have a name.	2. Tout enfant doit être enregistré immédiatement après sa naissance et avoir un nom.
3. Every child has the right to acquire a nationality.	3. Tout enfant a le droit d'acquérir une nationalité.

[16] According to the Applications Judge, "[s]ection 25 of [the Act] is clearly the proper venue for taking [the ICCPR] into consideration" (reasons for order at paragraph 10). He therefore disagreed with the officer who had taken the position that an H&C application was not a procedure suited "for resolving complex legal issues" (H&C applications, appeal book, Vol. 2, pp. 222-223).

[17] Citing *Baker v.Canada (M.C.I.)*, [1999] 2 S.C.R. 817 [*Baker*] and more recent jurisprudence (*R v. Hape*, 2007 SCC 26 [*Hape*]; *Covarrubias v. Canada*, 2006 FCA 365 [*Covarrubias*]), which I shall discuss later, the Applications Judge ultimately found that "the officer mischaracterized the issue" (reasons for order at paragraph 19) and added:

> "The question which [the officer] 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?" (*Ibid*.) [Emphasis added.]

[18] Having said this, the Applications Judge granted the respondent's application for judicial review without further scrutiny of the officer's decision. Finally, he invited the Minister to submit "a question or questions of general importance which would support an appeal" to our Court (reasons for order at paragraph 20), and that is the certified question stated at paragraph [4] of the present reasons.

Position of the Parties and Issues

[19] The appellant builds his argumentation around six errors of law that the Applications Judge allegedly made and therefore proposes the following six issues found at paragraph 25 of his memorandum of fact and law:

a. The decision of the Application Judge raises the following issues:

   i. First issue: Did the Application Judge err in law in concluding that the Respondent was not given a fair hearing?

   ii. Second issue: Did the Application Judge err in concluding that the officer has jurisdiction to consider international and constitutional law issues?

   iii. Third issue: Did the Application Judge err in law in concluding that the officer has jurisdiction to decide whether the Respondent's removal or expulsion would violate Canadian law?

iv. Fourth issue: Did the Application Judge err in law in concluding that the officer failed to appreciate the significance of *Baker*?

v. Fifth issue: did the Application Judge err in relying on the case of *R. v. Hape* for the proposition that the Minister or his delegate has jurisdiction to deal with international law?

vi. Sixth issue: Removal of an alien parent does not violate the *Charter* nor international law.

[20] For his part, the respondent proposes four issues as follows:

(i) Does the immigration official taking a decision under Section 25 of the Immigration and Refugee Protection Act have the obligation to consider all of the arguments submitted by the humanitarian applicants? When the officer refuses to consider some arguments, is this a violation of *audi alteram partem*?

(ii) What is the proper role of international law under the Immigration and Refugee Protection Act given the clear expression of intention by the legislator in Section 3(3)(*f*) of the Act?

(iii) Is there an obligation under international law to respect Mr. Okoloubu's marriage and the right to the protection of family life in the absence of any other significant countervailing considerations?

(iv) What is the impact of the applicant's marriage and the fact that his wife is pregnant with his child? What is the significance of the *Baker* decision of the Supreme Court? (respondent's memorandum of fact and law at paragraph 18).

[21] The respondent also believes that "a more appropriate question" based on the proper standards to be applied in the assessment of a humanitarian application that raises the subjects of marriage and family life should have been certified (respondent's memorandum of fact and law at paragraph 15).

[22] The question that the respondent proposed for certification was:

> 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 humanitarian consideration when there is a Canadian child or Canadian spouse who is affected by the decision in the absence of significant countervailing considerations? (respondent's memorandum of fact and law at paragraph 15).

[23] Although framed differently, the issues suggested by both parties focus on the examination of the judgment under appeal in light of (1) the place and the role of international law in the immigration context (paragraph 3(3)(*f*) of the Act); (2) the role and duties of the officer dealing with an H&C application including the manner in which, if at all, Canada's international obligations must be considered and weighed by the officer acting in that capacity; and (3) the negative decision of the officer.

[24] I therefore propose to collapse the issues suggested by the parties into those three general headings.

Standard of Review

[25] Pursuant to paragraph 74(*d*) of the Act, the certification of a "question of general importance" triggered the present appeal. However, the object of the appeal is still the judgment itself, that is the decision of a judge sitting in judicial review to which the principles outlined in *Housen v. Nikolaisen*, 2002 SCC 33 apply. Therefore, the selection of the proper standard of review

by the Applications Judge constitutes a question of law and is reviewable on a standard of correctness.

[26] In the case at bar, the Applications Judge did not mention which standard of review he was applying when reviewing the officer's decision to deny the application.

[27] However, it is clear from his reasons that he directed his attention solely toward the jurisdiction of the officer and her refusal "to deal with international law and constitutional issues" (reasons for order at paragraph 2) without reviewing the officer's findings of fact.

[28] I therefore agree with the appellant that this is not a case where the Court owes any degree of deference to the Applications Judge's findings.

[29] While subsection 25(1) of the Act gives a broad discretion to the Minister, the issue of whether the Minister's delegate has jurisdiction to consider questions of international and constitutional law under this provision is a question of law. The Applications Judge's conclusion on this issue is therefore reviewable on the standard of correctness: *Housen v. Nikolaisen, supra* at paragraph 8.

[30] The issue of whether the officer properly exercised her discretion under subsection 25(1) of the Act is reviewable on the standard of reasonableness: *Dunsmuir v. New Brunswick,* 2008 SCC 9 at paragraph 51.

[31] Finally, it is well established that the content of procedural fairness is determined by the courts based on the circumstances of a given case. Therefore, on the question of whether the respondent was granted a fair hearing, our Court would:

> … only intervene if satisfied that the reviewing judge had made a palpable and overriding error in applying the duty of fairness to the particular facts. (…) (John M. Evans, *The Role of Appellate Courts in Administrative Law*, (2007) 20 Can. J. Admin. L. & Prac. 1 at page 25).

[32] This being said, I now turn my attention to paragraph 3(3)(*f*) of the Act.

Analysis

1) Paragraph 3(3)(*f*) of the Act

[33] Paragraph 3(3)(*f*) of the Act can be found under the heading *Objectives and Application*. It reads:

Application	**Interprétation et mise en œuvre**
(3) This Act is to be construed and applied in a manner that	(3) L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet :
…	(…)
(*f*) complies with international human rights instruments to which Canada is signatory.	*f*) de se conformer aux instruments internationaux portant sur les droits de l'homme dont le Canada est signataire.

[34] The scope of this paragraph was examined in *De Guzman v. Canada (M.C.I.)*, 2005 FCA 436, leave to appeal to S.C.C. refused, 31333 (June 22, 2006) [*De Guzman*], cited by the Applications Judge at paragraph 11 of his reasons. In *De Guzman*, one of the issues before our

Court was whether paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations*, which denied the appellant a sponsorship of her sons as members of the family class because she had not declared them when she applied to come to Canada, was inconsistent with "international human rights instruments to which Canada is signatory" under paragraph 3(3)(*f*), which protect children's interests and the right of families to live together. Although *De Guzman* examines compliance of a provision with international instruments, rather than the officer's jurisdiction to consider such instruments, the following propositions are helpful in the present case.

[35] Speaking for the Court, my colleague Evans J.A. stated:

> [87] Paragraph 3(3)(*f*) should be interpreted in light of the modern developments in the courts' use of international human rights law as interpretative aids. Thus, like other statutes, the *Act* must be interpreted and applied in a manner that complies with "international human rights instruments to which Canada is signatory" that are binding because they do not require ratification or because Canada has signed *and* ratified them. These include the two instruments on which counsel for Ms de Guzman relied heavily in this appeal, namely, the *International Covenant on Civil and Political Rights*, and the *Convention on the Rights of the Child*. Thus, a legally binding international human rights instrument to which Canada is signatory is determinative of how [the Act] must be interpreted and applied, in the absence of a contrary legislative intention.

[36] Evans J.A. opined that paragraph 3(3)(*f*) also applies to non-binding instruments to which Canada is signatory (*ibid*. at paragraph 88). However, as in *De Guzman*, it is not necessary here to discuss the effect of paragraph 3(3)(*f*) with respect to non-binding international human rights instruments since the respondent relies on the ICCPR, an international instrument which is legally binding on Canada.

[37] Finally, in *De* Guzman, Evans J.A. agreed with de Montigny J.'s reasons in *Munar v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1180 that "paragraph 3(3)(*f*) does not incorporate into Canadian law "international human rights instruments to which Canada is signatory," but merely directs that [the Act] must be construed and applied in a manner that complies with them" (*De Guzman* at paragraph 73) [Emphasis added.]

[38] In the present context, I find that this principle is sufficient to set the place of the ICCPR in the section 25 application which was in front of the officer. However, before turning to the next heading, I must briefly address one particular question raised by the Applications Judge on his own initiative, a question which, according to him, "should be thought through and at a higher level":

> What (…) are the ramifications of the recent decision of the Supreme Court in *R v. Hape*, 2007 SCC 26 (…) (reasons for order at paragraph 12).

[39] It seems that the Applications Judge was concerned that the leading decision of the Supreme Court in *Baker* and our Court's decision in *De Guzman* might have to be revisited in light of *Hape* because in *Hape*, 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" (reasons for order at paragraph 12).

[40] For the purposes of this appeal, it is not necessary to look at *Hape* and to embark on a long discussion of this otherwise important decision.

[41] Suffice to say that *Hape* deals with a different matter that is the interpretation of section 32 of the Charter and the application of the Charter to extraterritorial searches and seizures conducted by Canadian police officers in a criminal context. However, I note that while discussing the relationship between domestic law and international law, Mr. Justice LeBel, writing for the majority, reminded us that "(i)t is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law" (*Hape*, *supra* at paragraph 53).

[42] Further discussion of *Hape* is of no assistance to the present appeal and I move on to the second question.

2) <u>Role and Duties of the H&C Officer</u>

[43] In the Court below and in their respective memoranda, the parties have debated at length the question of whether or not the officer has jurisdiction to deal with international law. At times, they used the verbs "consider," "deal," "interpret" or "decide" as if those terms were interchangeable.

[44] That discussion has lead to a debate on the applicability of the rationale in *Covarrubias*, *supra*, where our Court concluded that the PRRA officer had no implied jurisdiction to consider constitutional issues: *ibid.* at paragraphs 47-57.

[45] While the Applications Judge found *Covarrubias* to be "clearly distinguishable" (reasons for order at paragraph 18) for the reason that the officer in that case was carrying out a pre-removal risk

assessment, the appellant claims that it applies "with equal force and *a fortiori* to the case at bar" (appellant's memorandum of fact and law at paragraph 52).

[46] The practical considerations at issue in the present case are different from those in a PRRA. While officers carrying out an H&C and a PRRA analysis do not generally possess legal expertise and are not empowered to "hear and determine [connaître de] questions of law, including questions of jurisdiction" as stated in subsection 162(1) of the Act, H&C officers are routinely required to consider the protection of children's interests, a principle found in a number of international instruments, as part of their analysis. The PRRA officer, on the other hand, "has no obligation to consider, in the context of the PRRA, the interests of a Canadian-born child when assessing the risks involved in removing at least one of the parents of that child": *Varga v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394 at paragraph 20.

[47] The respondent suggests that the protection of children's interests and family life mandate he acceptance of H&C requests "in the absence of significant countervailing considerations" (respondent memorandum of fact and law at paragraph 15).

[48] In *Baker*, the Supreme Court affirmed the importance of considering family-related interests in H&C applications. However, *Baker* does not create a *prima facie* presumption that the children's interests should prevail (*Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at paragraph 13) and 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" (*Baker*, *supra* at paragraph 75).

[49] To respect the objectives of the Act in the performance of their duties, H&C officers must bear in mind the "humanitarian and compassionate values" which are enshrined in the Charter and the ICCPR. The principles of non-interference in family life in Article 17, the importance of a family unit and protection thereof by society and the State in Article 23, as well as the child's "right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State" in Article 24 of the ICCPR are all family-related interests and the officer must have those interests in mind when dealing with a section 25 application.

[50] Applied to the H&C officer's work, I read *De Guzman*, *Baker* and *Legault, supra*, as meaning that those values must inform the decision of the H&C officer. However, "paragraph 3(3)(*f*) of the [Act] does not require that an officer exercising discretion under section 25 of the [Act] specifically refer to and analyze the international human rights instruments to which Canada is signatory. It is sufficient if the officer addresses the substance of the issues raised" (*Thiara v. Canada (Citizenship and Immigration)*, 2008 FCA 151 at paragraph 9).

[51] This brings me to the third heading, namely, the negative decision of the officer.

3) <u>The Negative Decision of the Officer</u>

[52] The Applications Judge placed much importance on the words of the officer regarding her jurisdiction, while leaving the officer's decision *per se* without careful scrutiny. When scrutinizing the officer's decision, attention ought to be given to its substance rather than its form as stated in *Thiara, supra*.

[53] A thorough examination of her decision convinces me that she acknowledged the humanitarian grounds and public policy considerations put forward by the respondent. She did factor into her decision the substantive rights set out in the ICCPR on which the respondent based his application. Had the Applications Judge scrutinized the officer's decision, he would have inevitably reached the same conclusion.

[54] More particularly, the officer stated:

> In accordance with the legislation, *Baker*, *Legault*, and *Hawthorne*, the interests of the children must be well identified and defined. The basis of this principle, as started in *Baker*, stems from Article 3 of the *Convention on the Rights of the Child*. The best interests of the child are an important factor and must be given significant weight. However, this does not mean that the interests of the child outweigh all other factors. It is one of many factors to be considered in assessing whether the humanitarian and compassionate factors in the applicant's circumstances are sufficient to warrant an exemption to applying for her permanent residence outside Canada.
>
> In the applicant submission received December 13, 2006 the applicant made reference to the International Covenant on Civil and Political Rights and the Inter-American Declaration and argued that International law considers that the family has to be able to offer special protection to the child and should the applicant be removed from Canada there would be no more family to protect the child. With regard to international law issues, an officer does not have jurisdiction to deal with international law issues and a Request for Exemption from Permanent Resident Visa Requirement is not the proper venue for resolving such complex

> issues. Therefore whether his removal will constitute a breach of international law will not be addressed in this decision.
>
> The applicant has alleged that the mother of the child has depression and that if the applicant leaves she will not be able to take care of his baby. According to the evidence submitted, after the birth of their child in October 2005, the applicant's wife suffered from "Major Depressive Episode/Post Partum Depression", but there is no evidence to support that this condition continued. There is no evidence to support that the mother will be unable to take care and raise the child in a safe and health environment. The applicant's wife is 38 years old. She lived for over 10 years in the USA prior to coming to Canada and worked as a registered nurse in the USA. She is accustomed to living and working in North America. The evidence does not support that the applicant's wife will be unable to support herself or take care of herself and her child financially or otherwise in Canada. Should the applicant apply for his permanent residency from outside Canada the child can remain with his mother in Canada. His mother is a nurse and there is no evidence to show that the mother will be unable to take care of the child. The applicant stated that there will be no more family to protect the child; however, the applicant submitted no evidence to support this statement. The child will be able to remain with his mother in Canada.
>
> The applicant has argued that he will be indefinitely separated from his wife and child because his wife cannot go back to Nigeria. However, according to a letter received from the applicant's lawyer, dated January 16 2007, the applicant's wife, Madame Nwogu, returned to Nigeria to attend the funeral of her father-in-law, since the applicant could not attend, and that she would be returning at the end of January 2007 or at the beginning of February 2007. The evidence does not support that he will not be able to see his child after his removal from Canada, the applicant can maintain a relationship with his son. He will not be the only father separated from his child due to Immigration processing reasons. The applicant and his wife underwent fertility treatment knowing that the applicant had no legal status in Canada and they could anticipate that he might be required to leave Canada, which could affect the applicant's wife and child. If the applicant returns to his country of origin, the applicant's wife may stay in Canada as she is a permanent resident with her child. Family separation is the normal consequence of a removal from Canada. Although the best interest of the child is an important factor, I do not find that the applicant has demonstrated unusual, undeserved, or disproportionate hardship. (Appeal Book, Vol. 2, pp. 222-223).

[55] The officer took into account all relevant factors in her H&C analysis. She considered the present situation of the respondent's spouse in Canada, the interests of his Canadian-born child, the degree of his establishment in Canada, various risk factors faced by the respondent if he were to

return to Nigeria, and other factors such as his conviction followed by completion of community service. Having carefully considered these factors, the officer concluded that the respondent failed to show that he or his family would face unusual, undeserved or disproportionate hardship as a result of his departure from Canada to apply for a permanent resident visa from Nigeria.

[56] The officer was alert and sensitive to the respondent's family situation, including the interests of his Canadian-born child. The interests of the child were "well identified and defined" (*Legault, supra* at paragraph 12) and "examined… with a great deal of attention" (*ibid.* at paragraph 11, *Canada (Minister of Citizenship and Immigration) v. Hawthorne*, 2002 FCA 475 at paragraph 32).

[57] The officer, however, noted that the evidence did not support the proposition that the respondent's wife continued to have health issues, or that she would be unable to care for herself or her child as a result of the respondent's departure from Canada.

[58] In addition, in the absence of sufficient evidence on the record before her, the officer was unable to reach a conclusion with respect to the respondent's establishment in Canada as a business person and the economic consequences of his return to Nigeria.

[59] The officer also considered various relevant risk factors that the respondent would face if he returned to his country of origin, including the respondent's individual circumstances as well as the overall country conditions that have improved in the last few years. She further noted that in

September 2006, the respondent applied for a Temporary Resident Permit so that he could leave Canada in order to attend his father's funeral.

[60] While the officer stated that she did "not have jurisdiction to deal with international law" (Appeal Book at page 222), it is clear that she addressed in substance the different and important interests at stake, giving careful weight to the interests of the child and the importance of the family unit. Therefore, this Court's intervention is not warranted and it becomes unnecessary to address the Applications Judge's finding that the respondent was deprived of a fair hearing.

[61] I must now deal with the certified question.

The Certified Question

[62] For ease of reference, I reproduce again the certified question:

Does an immigration officer in charge of assessing an application under section 25 of the *Immigration and Refugee Protection Act* (for an exemption from the obligation to present an application for an immigrant visa from outside Canada) have jurisdiction to consider whether an applicant's removal would breach the *International Covenant on Civil and Political Rights*, more specifically Articles 17, 23 and 24?	Est-ce qu'un agent d'immigration chargé de l'évaluation d'une demande présentée en vertu de l'article 25 de la *Loi sur l'immigration et la protection des réfugiés* (pour une exemption de l'obligation de présenter une demande de visa d'immigrant de l'extérieur du Canada) a compétence pour décider si le renvoi d'un demandeur contrevient au *Pacte international relatif aux droits civils et politiques*, plus particulièrement à ses articles 17, 23 et 24?

[63] I agree with the appellant that the Applications Judge erred when suggesting that the officer should have asked herself "whether Mr. Okoloubu's removal would violate Canadian law" (reasons

for order at paragraph 19). Pursuant to s. 25 of [the Act], the officer's jurisdiction is limited to decide whether H&C considerations justify exempting the respondent from the strict application of permanent residence requirements, and not to decide the validity of a removal order issued against the respondent.

[64] The certified question, in its formulation, reproduces that error. The outcome of the judicial review did not depend on the answer to the certified question as it was certified by the Applications Judge.

[65] The certified question being irrelevant and not dispositive of this appeal (*Canada (Minister of Citizenship and Immigration) v. Zazai*, 2004 FCA 89 at paragraph 11), it need not be answered.

Conclusion

[66] For the reasons above, I propose to allow the appeal, to set aside the judgment of the Federal Court, and giving the judgment that the Federal Court should have given, to dismiss the respondent's application for judicial review.

« Johanne Trudel »

J.A.

"I agree
Marc Noël J.A."

"I agree
M. Nadon J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-560-07
(APPEAL FROM A DECISION OF HARRINGTON J. (2007 FC 1069) DATED OCTOBER 17, 2007)	
STYLE OF CAUSE:	MCI v. Ikejiani Ebele Okoloubu
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	October 20, 2008
REASONS FOR JUDGMENT BY:	TRUDEL J.A.
CONCURRED IN BY:	NOËL J.A. NADON J.A.
DATED:	October 27, 2008

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