Federal Court  Cour fédérale

Date: 20170208

Docket: IMM-3102-16

Citation: 2017 FC 144

Ottawa, Ontario, February 8, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

EJIMOFOR NWAFIDELIE
CHINONSO SUSIE NWAFIDELIE
CHIOMA ELSIE NWAFIDELIE
CHINONSO FAVOUR NWAFIDELIE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review by Ejimofor Nwafidelie [the Principal Applicant], his spouse [the Female Applicant] and his two children, pursuant to s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*], of a decision made by a Representative of

the Minister of Citizenship and Immigration [Minister's Representative], dated June 30, 2016, denying the Applicant's application for permanent residency [PR] status on humanitarian and compassionate [H&C] grounds, pursuant to subsection 25(1) of the *IRPA* [the Decision]. The two adults have a Canadian-born daughter. Leave was granted November 4, 2016.

[2] At the hearing I was also asked on consent to amend the style of cause to correct the spelling of the name of the fourth Applicant to Chinonso Favour Nwafidelie, which motion is granted.

II. Facts

[3] The Principal Applicant is a 36-year-old citizen of Nigeria. He is married to the Female Applicant and has three children with her. The youngest of these children, his one-year-old daughter, is a Canadian citizen. His two other children are ages 5 and 3; one is currently enrolled in kindergarten and the other is waiting to be accepted into a school. Both adult Applicants' parents and several of their siblings live in Nigeria; they have one relative living in Canada. At the time of the H&C Decision, they had been living in Canada for over a year and a half.

[4] The Applicants arrived in Canada on November 30, 2014. They made their claim for refugee status that same day. On March 25, 2015, the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] determined that the Applicants were neither Convention refugees nor persons in need of protection under sections 96 and 97 of the *IRPA*. The Refugee Appeal Division [RAD] dismissed the Applicants' appeal on June 25, 2015. This Court

dismissed their application for leave to apply for judicial review of the RAD decision on October 5, 2015.

[5] The RPD's finding was based on "serious credibility concerns as it relates to the actions taken by the claimants and issues surrounding their allegations". Specifically, the RPD concluded that: "while the claimants may have been victims of crime in Nigeria, the panel does not, on a balance of probabilities, believe that the claimants were personally targeted or victimized as they are alleging".

[6] The basis of the Applicants' claim is that they were the victims of several armed robberies and an attempted kidnapping while in Nigeria. The Principal Applicant alleged that he was specifically targeted by "bandits" because he was a successful businessman. He alleged that he had been physically injured and robbed on several occasions. He also alleged that, after immediately trying to find another place to which his family could move, he received a call (from an unknown number) during which he was told, "No matter where you go, we have our eyes on you and your family." The Applicants called the police in regards to one of these incidents, specifically, when the "bandits" attempted to gain entry to the Applicants' home in Nigeria, but allege that the police did nothing further to assist them after responding to the call aside from writing a report of the incident. The Applicants applied for and were granted a visa to the United States in August 2014 but were unable to leave Nigeria due the Female Applicant's miscarriage at that time.

[7] The Applicants' allegation of risk before the RPD was based on the same facts now put forward on H&C. The Applicants submitted their H&C application on January 18, 2016, on the grounds of ties to Canada, best interest of the children [BIOC], degree of establishment and risk if returned. Both adult Applicants filed psychotherapist reports written by Dr. Patricia Keith, Ph.D. The clinical interviews of both adult Applicants were conducted on the same day. In her January 26, 2016 report, Dr. Keith diagnosed the Female Applicant with "Major Anxiety Disorder (300.4 in the DSM), which could be the cause of her depressed mood and severe mental health illness of Obsessive-Compulsive Disorder (300.3 in the DSM-IV-TR)" and noted that she is taking Cipralex-10 mg for her Obsessive Compulsive Disorder [OCD]. The psychotherapist opined that such treatment is not readily available in Nigeria. In the Principal Applicant's report, dated February 3, 2016, the psychotherapist likewise diagnosed him with Major Anxiety Disorder.

[8] The Principal Applicant works full-time as a construction worker. Both Applicants are very involved in their church community and have made several friends since their arrival in Canada. In addition to the crime and violence in Nigeria, they allege that lack of medical care and social stigma surrounding mental illness in Nigeria will have a negative effect on them, should they be returned.

III. Decision

[9] On June 30, 2016, the Minister's Representative denied the Applicants' application for PR status on H&C grounds. The Minister's Representative's denial of the Applicants' application is largely couched in the language of insufficiency of objective or corroborating

evidence. The Minister's Representative found that insufficient evidence had been provided to support any of the Applicants' submissions. The Minister's Representative declined to give significant weight to the Applicants' establishment or time in Canada, instead finding it to be a natural and expected result of their involvement in Canada's refugee determination process. The Minister's Representative noted the Applicants' allegations of risk on H&C were the same as that presented at the RPD hearing and concluded that they could safely relocate to the proposed Internal Flight Alternatives [IFA], as determined by the RPD, should they be returned to Nigeria. In response to the psychotherapist's statement regarding the availability of medication in Nigeria, the Minister's Representative noted that Dr. Keith is "not an expert on Nigerian country conditions and has not indicated how she arrived at this conclusion". The Minister's Representative also noted that four months had passed since the assessments were conducted without any updated evidence regarding treatment having been filed; further, insufficient corroborative evidence had been provided regarding whether the Female Applicant required additional medication, whether the adult Applicants had attended further sessions in Canada or whether the Applicants would be able to access or receive treatment or counselling in Nigeria. The Minister's Representative cites from open source information gathered through independent research regarding country conditions in Nigeria.

[10] The Minister's Representative found that the best interests of the children would be met should they continue to "benefit from the personal care and support of their family". Despite acknowledging the crime and violence in Nigeria, the Minister's Representative found the Applicants could seek the assistance of "the police, the judicial system or a non-governmental organization" should they encounter problems. The Minister's Representative also noted that

"the applicants' familial ties to Nigeria are very strong" and that family reunification would take place upon their return. Noting that different educational and social standards do not justify an H&C exemption, the Minister's Representative concluded there was: "insufficient evidence that [the children] would not have their basic needs met in Nigeria."

[11] It is from this Decision that the Applicants seek judicial review.

IV. Issues

[12] This matter raises the following issues:

1. Whether the Minister's Representative unreasonably imported the RPD`s risk analysis under s. 97 of the *IRPA* onto the H&C analysis, instead of separately considering the Applicants' allegations of risk through the lens of hardship?
2. Whether the Officer determination on H&C was otherwise unreasonable in particular with respect to the best interests of the children?

V. Standard of Review

[13] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." A review of an officer's H&C decision is conducted on the reasonableness standard: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44 [*Kanthasamy*]. The decision of whether to grant or deny an exception for

humanitarian and compassionate reasons is "exceptional and highly discretionary; thus deserving of considerable deference by the Court": *Qureshi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 335 at para 30, Zinn J. The highly discretionary nature of H&C assessments results in a "wider scope of possible reasonable outcomes": *Holder v Canada (Minister of Citizenship and Immigration)*, 2012 FC 337 at para 18, Near J; *Inneh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 108 at para 13, Phelan J.

[14] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[15] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

VI. Analysis

[16] The Applicants contend that the Minister's Representative acted unreasonably by focussing on the availability of treatment of the adult Applicants' mental health issues in Nigeria and by failing to reasonably consider how the best interests of the children would be affected by the effect of this possible lack of treatment on the adult Applicants' parenting.

[17] On the first issue, the Applicants noted that the Female Applicant was being treated with a specific drug for her OCD, namely, Cipralex-10 mg. This specific drug was not included on the list of various medications available for mental health conditions in Nigeria that had been produced by the Minister's Representative. The Applicants argued the absence of this specific drug from this list of available medications indicated that the Female Applicant would undergo hardship if returned to Nigeria. I am unable to accept this argument because the Applicants have the onus to show hardship; it therefore fell to them to produce evidence that the drug or its equivalents were not available in Nigeria. The only such evidence was supplied by a psychotherapist in respect of whom no evidence of expertise in this connection was provided; in this respect, the psychotherapist was not qualified. The finding of the Minister's Representative to discount this opinion of the psychotherapist was therefore open on this record.

[18] It was also argued that the finding of the Minister's Representative was contrary to *Kanthasamy* and, in particular, paragraphs 47 and 48, which state:

> [47] Having accepted the psychological diagnosis, it is unclear why the Officer would nonetheless have required Jeyakannan Kanthasamy to adduce *additional* evidence about whether he did or did not seek treatment, whether any was even available, or what

> treatment was or was not available in Sri Lanka. Once she accepted that he had post-traumatic stress disorder, adjustment disorder, and depression based on his experiences in Sri Lanka, requiring further evidence of the availability of treatment, either in Canada or in Sri Lanka, undermined the diagnosis and had the problematic effect of making it a conditional rather than a significant factor.
>
> [48] Moreover, in her exclusive focus on whether treatment was available in Sri Lanka, the Officer ignored what the effect of removal from Canada would be on his mental health. As the Guidelines indicate, health considerations *in addition to* medical inadequacies in the country of origin, may be relevant: *Inland Processing*, s. 5.11. As a result, the very fact that Jeyakannan Kanthasamy's mental health would likely worsen if he were to be removed to Sri Lanka is a relevant consideration that must be identified and weighed regardless of whether there is treatment available in Sri Lanka to help treat his condition: *Davis v. Canada (Minister of Citizenship and Immigration)* (2011), 96 Imm. L.R. (3d) 267 (F.C.); *Martinez v. Canada (Minister of Citizenship and Immigration)* (2012), 14 Imm. L.R. (4th) 66 (F.C.). As previously noted, Jeyakannan Kanthasamy was arrested, detained and beaten by the Sri Lankan police which left psychological scars. Yet despite the clear and uncontradicted evidence of such harm in the psychological report, in applying the "unusual and undeserved or disproportionate hardship" standard to the individual factor of the availability of medical care in Sri Lanka — and finding that seeking such care would not meet that threshold — the Officer discounted Jeyakannan Kanthasamy's health problems in her analysis.

[19] In this case and in my view, treatment options in Nigeria were relevant to the issue of hardship arising from removal from Canada. The Minister's Representative accepted the diagnoses of Major Anxiety Disorder; the treatment options were therefore relevant in the sense of asking whether the adult Applicants would be better or worse off in terms of their mental health conditions if returned to Nigeria. In this case, I am unable to see how, on these facts, these diagnoses were undermined or made conditional, particularly given the markedly different factual matrix from that in *Kanthasamy*, where the country condition risk had changed. Unlike the fact situation in *Kanthasamy*, the risk alleged by the Applicants before the Minister's

Representative was the same risk they had unsuccessfully alleged before the RPD. This is not disputed. The RPD, which had the benefit of hearing directly from the Applicants, faulted these very allegations of risk because of serious credibility concerns and discounted the Applicants' claim by finding an IFA in Nigeria. In addition to considering these factors, which were not present in *Kanthasamy*, the Minister's Representative did in fact review mental health services available and noted the lack of evidence supporting the Applicants' submission that they would be unable to obtain assistance in Nigeria. In addition, the Minister's Representative found the allegation that they would be ostracized due to the Female Applicant's medical condition was unsupported by the evidence. In summary, the Minister's Representative considered more than just treatment availability in determining that the Applicants failed to establish their H&C claim.

[20] Likewise, I am unable to conclude that there was an exclusive focus on treatment in Nigeria such that the Minister's Representative might be said to have "ignored what the effect of removal from Canada would be on their mental health", again unlike the situation in *Kanthasamy*. The two cases are distinguishable.

[21] In terms of the allegation of excessive focus on risk, again I am not persuaded. While I agree that a finding by the RPD or RAD that an applicant has failed to establish the risks outlined in sections 96 and 97 of the *IRPA* does not equate to a finding that there is no hardship in removing the same applicants to the country in question if denied H&C relief, the Minister's Representative made no such finding. Instead, the Court is asked to infer from the reasons that the focus was on the section 96 and 97 risks and not on H&C considerations writ large, as demanded by *Kanthasamy.* In this connection, it is important to keep in mind that there will

inevitably be some hardship associated with being required to leave Canada; in this regard, however, the courts have repeatedly stated that such hardship alone will not generally be sufficient to warrant relief on H&C grounds under subsection 25(1). This is affirmed by in *Kanthasamy* itself, where the Supreme Court of Canada also stated that H&C is not an alternative immigration scheme:

> [23] There will inevitably be some hardship associated with being required to leave Canada. This alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under s. 25(1): see *Rizvi v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 463, at para. 13 (CanLII); *Irimie v. Canada (Minister of Citizenship and Immigration)* (2000), 10 Imm. L.R. 206 (F.C.T.D), at para. 12. Nor was s. 25(1) intended to be an alternative immigration scheme: House of Commons, Standing Committee on Citizenship and Immigration, *Evidence*, No. 19, 3rd Sess., 40th Parl., May 27, 2010, at 15:40 (Peter MacDougall); see also *Evidence*, No. 3, 1st Sess., 37th Parl., March 13, 2001, at 9:55 to 10:00 (Joan Atkinson).

[22] In my respectful opinion, the Applicants have mischaracterized the reasons of the Minister's Representative. Of course hardship was considered, as was the RPD's decision; but while consideration of hardship is mandated by the *Guidelines* and indeed by *Kanthasamy*, above at para 30, the RPD's decision may not simply be ignored, particularly where it speaks to the alleged hardship and has serious credibility concerns with the Applicants' allegations. An applicant whose claims of risk are rejected on credibility concerns by either division of the IRB (or both, as here, in respect of which decisions this Court previously refused leave) cannot turn around and expect those same allegations to be accepted without more when they are repeated to the Minister's Representative on an H&C application.

[23] The Applicant also takes issue with the Decision of the Minister's Representative in terms of the assessment of the BIOC. In my respectful view, there is no merit to this argument. The Minister's Representative was, in my view, "alert, alive and sensitive" to the BIOC. The Applicants' allegations mischaracterize the Minister's Representative's reasons. The Minister's Representative considered the young age of the children, where they were in school, their resilience and adaptability to change, the fact they will be returning with their parents, the support their parents will give, their best interests in remaining together with the personal care and support of their family, the fact that they have extended family in Nigeria consisting of their grandparents, uncles and aunts and the evidence regarding the willingness and ability of the extended family to assist the children. The Officer further considered the best interests of the children as individuals and distinguished between the two younger children who had not yet entered school or established friendships here in Canada and the five year-old daughter, who had. In all and again with respect, the BIOC assessment was reasonable.

[24] Judicial review involves considering the decision as an organic whole. It is not a treasure hunt for errors. In my respectful opinion, the decision falls within the range of permissible outcomes that are defensible on the facts and law in accordance with the Supreme Court's decision in *Dunsmuir*. Therefore, this application must be dismissed.

VII. Certified Question

[25] Neither party proposed a question for certification and none arises.

VIII. Conclusions

[26] The name of the fourth Applicant is hereby amended to read Chinonso Favour Nwafidelie. The application is dismissed and no question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The spelling of the name of the fourth Applicant is amended effective immediately to Chinonso Favour Nwafidelie.
2. The application for judicial review is dismissed.
3. No question is certified.
4. There is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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