Federal Court  Cour fédérale

Date: 20170824

Docket: IMM-642-17

Citation: 2017 FC 785

Montréal, Quebec, August 24, 2017

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ADANNEYA UGA IROHA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This matter demonstrates the need for recognition, acknowledgement and understanding of an entirety of a case, motivated by reasons, even if most brief, rendered in a decision. In any credibility assessment, it is essential, even if reasons are kept to a minimum, that they demonstrate a comprehensive analysis of the case. This was not done adequately in respect of the testimony of the Applicant and pivotal evidence on file.

II. Nature of the Matter

[2] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision by the Immigration Appeal Division [IAD or Board] of the Immigration and Refugee Board of Canada dated January 19, 2017 upholding a visa Officer's [Officer] removal order for failing to comply with the Applicant's residency obligations as permanent resident pursuant to section 28 of the IRPA.

III. Facts

[3] The Applicant, aged 41, is a citizen of Nigeria. She was sponsored in 2006 by her husband, a Canadian citizen, and was granted permanent residency in Canada on June 3, 2008. She stayed in Canada for 42 days until her return to Nigeria on July 15, 2008, where she spent ten and a half months. According to the Applicant's narrative, she was accompanying her husband who worked in Nigeria. She claims that she left her employment at the bank in Nigeria on May 31, 2009, and moved to Canada.

[4] On June 20, 2013, the Applicant arrived in Canada from Nigeria, presented herself at an airport immigration counter and asked to apply for a new permanent resident card, as her card had expired on the same day.

[5] After having been searched and interrogated, the Officer concluded as to the Applicant's failure to comply with section 28 of the IRPA, namely her residency obligations of physical presence in Canada for at least 730 days in a consecutive five-year period. Consequently, the

Applicant was considered inadmissible and a departure order was issued against her on June 20, 2013, pursuant to paragraph 41b) of the IRPA.

[6] The Applicant appealed the Officer's removal order.

[7] On April 18, 2016, the Applicant was asked by the IAD to provide written submissions and evidence in support of her appeal by May 9, 2016. The Applicant was granted a postponement, and said documents were filed on August 1, 2016.

[8] On November 28, 2016, eight days prior to the hearing, the Canada Border Services Agency filed documents into evidence in support of the removal order. On November 30, 2016, the Applicant's counsel, Me Ferdoussi, requested a postponement of the hearing given that documents had been disclosed by the Minister less than 20 days prior to the hearing, and that he was unable to discuss the content of those documents with the Applicant prior to the hearing.

IV. Impugned Decision

[9] On December 6, 2016, the IAD refused to adjourn and a hearing was held, with another counsel, Me Hasa, representing the Applicant.

[10] On January 19, 2017, the IAD determined that, on a balance of probabilities, the Officer's removal order is valid in law and dismissed the Applicant's appeal. The Board determined that the Applicant was inadmissible by reason of her failure to comply with her residency obligation

as set out in section 28 of the IRPA, and refused to grant her special relief based on humanitarian and compassionate [H&C] grounds.

[11] The IAD was not satisfied that the Applicant respected her residency obligation of 730 days in the five-year reference period from June 20, 2008 to June 20, 2013. The Board found the stamps in her passport to be inconclusive evidence of her presence in Canada, and that the Applicant had failed to submit sufficient and satisfactory evidence of her physical presence in Canada. The Applicant had provided her counsel with income tax reports, indicating her annual income as a hairdresser in Canada; however, the documents were not filed in a timely manner before the IAD. The Board also drew a negative inference from the professional identity and business cards which had been found in her possession upon her arrival at the airport on June 20, 2013. These indicated her position as a bank employee in Nigeria.

[12] The IAD also examined the possibility of H&C considerations.

[13] The Board found that the Applicant failed to demonstrate an initial or continuing establishment in Canada. The Board noted that the Applicant was still legally married to her husband although they had separated in late 2012; and found a contradiction in her testimony, stating the separation was due to her husband's lack of fidelity, whereas she had declared on June 20, 2013, that the issues in her marriage were related to the inability to have children. No further evidence supporting family ties in Canada was provided by the Applicant, which was another negative element in the Board's assessment.

[14] The Board also considered the best interests of the Applicant's child, a two-year-old Canadian-born daughter whose father resides in Nigeria. No evidence was filed by the Applicant regarding the child and no arguments were made at the hearing. The IAD found that it was in the child's best interests to remain with both parents and that, as a Canadian citizen, she would always be able to return to Canada in the future. Finally, the IAD was not persuaded of any hardship in Nigeria for the Applicant and her daughter if she was refused admission in Canada. The Applicant presented no oral or documentary evidence to support her assertion and the Board noted that she had lived almost her entire life in Nigeria; had been gainfully employed from 2001 to 2009 and was promoted in 2006, and still had family there.

V. Issues

[15] The parties raise the following issues:

1. Did the IAD member breach procedural fairness by failing to be and appear impartial?
2. Did the IAD err in concluding the removal order was valid in law and in failing to give weight to the Applicant's oral testimony?
3. Did the IAD err in its analysis of H&C considerations?

[16] The matter of procedural fairness is to be reviewed under the correctness standard, whereas the IAD's decision as to the validity of the removal order and the refusal as to special relief based on H&C grounds and the best interests of the child, therein, is to be reviewed under the reasonableness standard (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 43, 59).

VI. Relevant Provisions

[17] Rule 48 of the *Immigration Appeal Division Rules*, SOR/2002-230 provides for changing the date or time of a proceeding:

Application to change the date or time of a proceeding	**Demande de changement de la date ou de l'heure d'une procédure**
48 (1) A party may make an application to the Division to change the date or time of a proceeding.	**48** (1) Toute partie peut demander à la Section de changer la date ou l'heure d'une procédure.
Form and content of application	**Forme et contenu de la demande**
(2) The party must	(2) La partie :
(a) follow rule 43, but is not required to give evidence in an affidavit or statutory declaration; and	a) fait sa demande selon la règle 43, mais n'a pas à y joindre d'affidavit ou de déclaration solennelle;
(b) give at least six dates, within the period specified by the Division, on which the party is available to start or continue the proceeding.	b) indique dans sa demande au moins six dates, comprises dans la période fixée par la Section, auxquelles elle est disponible pour commencer ou poursuivre la procédure.
Application received two days or less before proceeding	**Procédure dans deux jours ouvrables ou moins**
(3) If the party's application is received by the recipients two working days or less before the date of a proceeding, the party must appear at the proceeding and make the request orally.	(3) Dans le cas où les destinataires reçoivent la demande deux jours ouvrables ou moins avant la procédure, la partie doit se présenter à la procédure et faire sa demande oralement.
Factors	**Éléments à considérer**
(4) In deciding the application, the Division must consider any relevant factors, including	(4) Pour statuer sur la demande, la Section prend en considération tout élément pertinent. Elle examine

notamment :

(a) in the case of a date and time that was fixed after the Division consulted or tried to consult the party, any exceptional circumstances for allowing the application;

a) dans le cas où elle a fixé la date et l'heure de la procédure après avoir consulté ou tenté de consulter la partie, toute circonstance exceptionnelle qui justifie le changement;

(b) when the party made the application;

b) le moment auquel la demande a été faite;

(c) the time the party has had to prepare for the proceeding;

c) le temps dont la partie a disposé pour se préparer;

(d) the efforts made by the party to be ready to start or continue the proceeding;

d) les efforts qu'elle a faits pour être prête à commencer ou à poursuivre la procédure;

(e) in the case of a party who wants more time to obtain information in support of the party's arguments, the ability of the Division to proceed in the absence of that information without causing an injustice;

e) dans le cas où la partie a besoin d'un délai supplémentaire pour obtenir des renseignements appuyant ses arguments, la possibilité d'aller de l'avant en l'absence de ces renseignements sans causer une injustice;

(f) the knowledge and experience of any counsel who represents the party;

f) dans le cas où la partie est représentée, les connaissances et l'expérience de son conseil;

(g) any previous delays and the reasons for them;

g) tout report antérieur et sa justification;

(h) whether the time and date fixed for the proceeding were peremptory;

h) si la date et l'heure qui avaient été fixées étaient péremptoires;

(i) whether allowing the application would unreasonably delay the proceedings; and

i) si le fait d'accueillir la demande ralentirait l'affaire de manière déraisonnable;

(j) the nature and complexity of the matter to be heard.

j) la nature et la complexité de l'affaire.

Duty to appear at the proceeding

Obligation de se présenter aux date et heure fixées

(5) Unless a party receives a decision from the Division allowing the application, the

(5) Sauf si elle reçoit une décision accueillant sa demande, la partie doit se

party must appear for the proceeding at the date and time fixed and be ready to start or continue the proceeding.	présenter à la date et à l'heure qui avaient été fixées et être prête à commencer ou à poursuivre la procédure.

[18] Section 28 of the IRPA provides the residency obligations to be met by permanent residents:

Residency obligation	**Obligation de résidence**
28 (1) A permanent resident must comply with a residency obligation with respect to every five-year period.	**28** (1) L'obligation de résidence est applicable à chaque période quinquennale.
Application	**Application**
(2) The following provisions govern the residency obligation under subsection (1):	(2) Les dispositions suivantes régissent l'obligation de résidence :
(a) a permanent resident complies with the residency obligation with respect to a five-year period if, on each of a total of at least 730 days in that five-year period, they are	a) le résident permanent se conforme à l'obligation dès lors que, pour au moins 730 jours pendant une période quinquennale, selon le cas :
(i) physically present in Canada,	(i) il est effectivement présent au Canada,
(ii) outside Canada accompanying a Canadian citizen who is their spouse or common-law partner or, in the case of a child, their parent,	(ii) il accompagne, hors du Canada, un citoyen canadien qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents,
(iii) outside Canada employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province,	(iii) il travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,
(iv) outside Canada accompanying a permanent resident who is their spouse or	(iv) il accompagne, hors du Canada, un résident permanent qui est son époux ou conjoint

common-law partner or, in the case of a child, their parent and who is employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province, or

de fait ou, dans le cas d'un enfant, l'un de ses parents, et qui travaille à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,

(v) referred to in regulations providing for other means of compliance;

(v) il se conforme au mode d'exécution prévu par règlement;

(b) it is sufficient for a permanent resident to demonstrate at examination

b) il suffit au résident permanent de prouver, lors du contrôle, qu'il se conformera à l'obligation pour la période quinquennale suivant l'acquisition de son statut, s'il est résident permanent depuis moins de cinq ans, et, dans le cas contraire, qu'il s'y est conformé pour la période quinquennale précédant le contrôle;

(i) if they have been a permanent resident for less than five years, that they will be able to meet the residency obligation in respect of the five-year period immediately after they became a permanent resident;

(ii) if they have been a permanent resident for five years or more, that they have met the residency obligation in respect of the five-year period immediately before the examination; and

(c) a determination by an officer that humanitarian and compassionate considerations relating to a permanent resident, taking into account the best interests of a child

c) le constat par l'agent que des circonstances d'ordre humanitaire relatives au résident permanent — compte tenu de l'intérêt supérieur de l'enfant directement touché —

directly affected by the determination, justify the retention of permanent resident status overcomes any breach of the residency obligation prior to the determination.	justifient le maintien du statut rend inopposable l'inobservation de l'obligation précédant le contrôle.

[19] Section 41 of the IRPA establishes a foreign national's inadmissibility:

Non-compliance with Act	**Manquement à la loi**
41 A person is inadmissible for failing to comply with this Act	**41** S'agissant de l'étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte ou omission — commis directement ou indirectement en contravention avec la présente loi et, s'agissant du résident permanent, le manquement à l'obligation de résidence et aux conditions imposées.
(a) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of this Act; and	
(b) in the case of a permanent resident, through failing to comply with subsection 27(2) or section 28.	

VII. Analysis

[20] For the reasons that follow, the application for judicial review is granted.

[21] This matter demonstrates the need for recognition, acknowledgement and understanding of an entirety of a case, motivated by reasons, even if most brief, rendered in a decision. In any credibility assessment, it is essential, even if reasons are kept to a minimum, that they demonstrate a comprehensive analysis of the case. This was not done adequately in respect of the testimony of the Applicant and pivotal evidence on file.

A. *Did the IAD member breach procedural fairness by failing to be and appear impartial?*

[22] The Court finds that the IAD was in its right to refuse a postponement. On December 2, 2016, the IAD dismissed the Applicant's request for change of date due to the Minister's late filing of documents (Tribunal's Certified Copy, at pp 70-71). The Panel noted that the appropriate response would be to contest their filing at the hearing on December 6 2016; the Applicant did not. Having sent Me Hasa on December 6, 2016, to obtain a postponement which had been already denied by the Board is questionable, at best.

[23] The Court also finds that the IAD member was neither biased on the substance of the case; nor did she appear to be. It appears that the Board member was attempting to understand the arguments raised by Me Hasa, demonstrating that the IAD member was, in fact, impartial (Tribunal's Certified Copy, at p 237). Me Hasa tried to file income tax documents on the day of the hearing, without any explanation as to why this had not been done in August. Counsel for the Applicant expected the case to be postponed and that did not occur. There was no excuse given as to why the Board member would have granted such an adjournment. Nevertheless, it must not be forgotten that the Minister's representative did file evidence late and the Applicant did not

have adequate preparation time to respond to the late submission of documents by the Respondent; and, the Applicant was not permitted to file any documents late.

B. *Did the IAD err in concluding the removal order was valid in law and in failing to give weight to the Applicant's oral testimony?*

(1) Submissions by the Applicant

[24] The Applicant claims that the IAD erred in rejecting her fluid, coherent, and honest testimony, which was exempt of any contradiction. The issues raised by the officer at the airport were also raised at the hearing, and the Applicant gave plausible responses to all of them. The Applicant explained that she was mistreated at the airport and became the subject of racial profiling. She demonstrated that she had resided in Canada 1,132 days, well over the 730 days minimum requirement, as proven by the stamps in her passports. Consequently, she demonstrated that the officer who issued the removal order did so on wrongful grounds, such as lack of entry stamps to Nigeria when these stamps were, in fact, in another passport as proven before the IAD.

[25] Therefore, the IAD member failed to give the weight deserved to the testimony of the Applicant and the evidence, presented.

(2) Submissions by the Respondent

[26] The Respondent submits that the Applicant attacked the legal validity of the removal order but did not discharge her burden of demonstrating that she has the requisite number of days

during the five-year reference period. The Applicant was not able to substantiate her claims that she had resided in Montréal for 1,132 days with credible evidence, neither at the airport on June 30, 2013, nor at the hearing on December 6, 2016, although she disclosed her Nigerian passports in which entry stamps from Nigeria where missing. The Respondent alleges that the Applicant failed to submit satisfactory evidence of her physical presence in Canada. The Board was unable to ascertain the numbers of days of presence in Canada in light of the evidence submitted by the Applicant, it was open to the IAD to require further consistent evidence to establish the Applicant's presence during the relevant period (*Haddad v Canada (Citizenship and Immigration)*, 2014 FC 976 at paras 24-25).

(3) Analysis

[27] The Officer's assessment of the Applicant's permanent residency obligation is problematic. It appears that Ms. Iroha had many more than 730 days of presence in Canada (Tribunal's Certified Copy, at p 37); however, the business cards found in her luggage are, in themselves, problematic (Tribunal's Certified Copy, at p 26). Why would she travel with such identity cards if she left her employment in Nigeria four years earlier? The Officer may have had valid doubts as to the credibility of significant elements in the case; however, the case had not been examined it its entirety.

[28] The Court, by course, is to be deferential to the credibility assessment made by the IAD, if the credibility assessment is transparent, intelligible and reasonable on its merits.

[29] Minor contradictions in the Applicant's narrative are evident. Whether she had marriage issues due to her husband's infidelity or due to their difficulties in conceiving a child; it is credible that she had raised these issues at the airport in 2013 and at the hearing in 2016.

[30] It is trite law that passport stamps alone are not indicative of a permanent resident's physical presence in Canada; however, what is it that the Applicant did bring forward in evidence: an outdated lease for an apartment where she officially resided in Montréal during 2008-2009, although they both were in Nigeria for work, a letter and medical file stating that her mother is ill in Nigeria. The onus was on the Applicant to prove that she was living in Canada between 2008 and 2013. The documents submitted are simply not enough to refute the Officer's findings.

[31] The Court, consequently, concludes that the IAD did not err in assessing the Applicant's credibility only on this particular issue.

C. *Did the IAD err in its analysis of humanitarian and compassionate considerations?*

(1) Submissions by the Applicant

[32] The Applicant argues that the IAD's analysis of the H&C grounds was made without an evidentiary foundation, and against the unchallenged, fluid, and coherent testimony of the Applicant. The IAD failed to provide reasonable justification as to how the evidence submitted by the Applicant in support of her establishment in Canada – the birth of her Canadian born child, her work as a hairdresser, and the filing of income taxes every year for the past 6 years, in

addition to a fluid and coherent testimony – did not prove continuing establishment in Canada (*Ambat v Canada (Citizenship and Immigration)*, 2011 FC 292).

[33] The Applicant further claims that the IAD's finding that the Applicant lacked ties to Canada when her husband and daughter are Canadian citizens is not based on an evidentiary foundation and is considered unreasonable. The IAD failed to take into account the Applicant's responses to the form entitled "Loss of permanent residency: H&C reasons", in which the Applicant stated that she has an uncle, family, and a husband in Canada.

[34] The Applicant submits that the IAD, had the obligation to consult the Immigration and Refugee Board's National Documentation Package as to Nigeria's country conditions, and had failed to do so, ignoring the treatment of children in Nigeria. Therefore, the IAD failed to make an informed decision by not having consulted and addressed the sources in the National Documentation Package, and had erred in assessing the best interests of the child.

(2) Submissions by the Respondent

[35] The Respondent contends that the IAD conducted a full assessment of the evidence, including the Applicant's testimony and the totality of the documentary evidence on file. The IAD made no material errors of fact; and, the Board did not ignore the evidence. The Respondent submits that the Board took into consideration the principles developed in the case law, suggesting relevant factors to residency obligation appeals, and weighed all relevant factors in light of all the circumstances of the case. According to the Respondent, it was open to the IAD to find that the Applicant's testimony was not credible and that there were contradictions in her

evidence. The Board reasonably assessed the best interests as to the child factor as being a neutral factor, and reasonably found that the Applicant's case lacked evidence with respect to her establishment and family ties in Canada, as well as to hardship. The Respondent claims that the Applicant attempts to justify the deficiencies highlighted by the IAD by offering *ex post facto* explanations that were already dismissed by the Board.

(3) Analysis

[36] On August 1 2016, the Applicant filed submissions before the IAD in support of her appeal. The only H&C factor raised was a reason given for justification for her travel to Nigeria in order to visit her ill mother. Although, the onus of demonstrating H&C considerations is upon the Applicant; however, the H&C considerations should have been at least considered in greater measure by the IAD member (Tribunal's Certified Copy, at pp 93-94), in respect of the testimony heard.

[37] The IAD did not take into consideration the best interests of the Applicant's Canadian born daughter to the extent required by *Kanthasamy v Canada (Citizenship and Immigration)*, [2015] 3 SCR 909, 2015 SCC 61 [*Kanthasamy*] of the Supreme Court (at para 39). It is important to note that *Kanthasamy* has changed the jurisprudential landscape with respect to the best interests of a child. Therefore, the obligation on the part of a decision maker is to take into account the best interests of a child and that requires that the decision maker follow the instructions as clearly and specifically related in the *Kanthasamy* decision:

> [36] Protecting children through the "best interests of the child" principle is widely understood and accepted in Canada's legal system: *A.B. v. Bragg Communications Inc.*, [2012] 2 S.C.R. 567,

at para. 17. It means "[d]eciding what . . . appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention": *MacGyver v. Richards (1995)*, 22 O.R. (3d) 481 (C.A.), at p. 489.

[37] International human rights instruments to which Canada is a signatory, including the *Convention on the Rights of the Child*, also stress the centrality of the best interests of a child: Can. T.S. 1992 No. 3; *Baker*, at para. 71. Article 3(1) of the *Convention* in particular confirms the primacy of the best interests principle:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration*.

[38] Even before it was expressly included in s. 25(1), this Court in *Baker* identified the "best interests" principle as an "important" part of the evaluation of humanitarian and compassionate grounds. As this Court said in *Baker*:

> … attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for [a humanitarian and compassionate] decision to be made in a reasonable manner …
>
> … 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 [a humanitarian and compassionate] 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. [paras. 74-75]

> [39] A decision under s. 25(1) will therefore be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered: *Baker*, at para. 75. This means that decision-makers must do more than simply *state* that the interests of a child have been taken into account: *Hawthorne*, at para. 32. Those interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence: *Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358 (C.A.), at paras. 12 and 31; *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 323 F.T.R. 181, at paras. 9-12.
>
> (*Kanthasamy*, above, at paras 36-39.)

[38] Therefore, the Court concludes that the IAD member's grounds regarding the absence of H&C considerations are not reasonable in light of the best interests of the child.

VIII. Conclusion

[39] The main reason (bearing in mind the analysis above) for the application for judicial review being granted is due to the omission on the part of the IAD member in respect of a need to give greater consideration to the best interests of the child. Even, if most briefly, the issue of a child's best interests must be appropriately and adequately addressed, and concluded upon, in and of itself, not in ambiguous or vague terms, but with specificity as to the child in question and the country of origin to which the child resides or to which the child would have to return. *Kanthasamy* is a benchmark as to an essential requirement that must be met, not as a throwaway line or a cosmetic sentence without adequate, specific, conclusive analysis.

[40] The application for judicial review is granted and the file is remitted to the IAD for assessment anew by a different panel.

JUDGMENT in IMM-642-17

THIS COURT'S JUDGMENT is that the application for judicial review be granted and the file be remitted to the IAD for assessment anew by a different panel. There is no serious question of general importance to be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Laurence Delage	FOR THE APPLICANT
Michel Pépin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waice Ferdoussi Attorneys Montréal, Quebec	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT