Federal Court  Cour fédérale

Date: 20171004

Docket: IMM-805-17

Citation: 2017 FC 878

Ottawa, Ontario, October 4, 2017

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

WILLARD NDLOVU

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Willard Ndlovu, is a 44 year old citizen of Zimbabwe. He arrived in Canada on July 23, 2014, and made a claim for refugee protection on August 5, 2014. The Refugee Protection Division [RPD] of the Immigration and Refugee Board [Board] rejected his claim. The Refugee Appeal Division of the Board granted the Applicant's appeal of the RPD's decision and sent the matter back to the RPD for redetermination. After the RPD denied the Applicant's refugee claim for a second time on June 8, 2016, he applied for permanent residence

from within Canada on humanitarian and compassionate [H&C] grounds. In a letter dated January 19, 2017, a Senior Immigration Officer informed the Applicant that his request for an exemption to allow his permanent residence application to be processed from within Canada was not granted. The Applicant has now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [*IRPA*], for judicial review of the Officer's decision denying his application for permanent residence.

I. The Officer's Decision

[2] The Applicant's written submissions for the H&C application raised three factors: his establishment in Canada; the adverse conditions in Zimbabwe; and the best interests of his three adolescent daughters who remain in Zimbabwe in the care of a family friend.

[3] The Officer accepted the evidence that the Applicant has been employed and financially self-sufficient in Canada since 2015, and gave this factor positive consideration. The Officer also considered the Applicant's community involvement and integration as evidenced by his volunteer activities, but noted that the Applicant had provided very little documentary evidence concerning the nature and extent of his volunteer activities. The Officer concluded that: "having examined the applicant's establishment in Canada as a whole I conclude that his degree of establishment is not greater than what would be expected of other individuals attempting to adjust to a new country."

[4] In assessing the best interests of the Applicant's three daughters, who were aged 16, 12, and 7 at the time of the H&C application, the Officer noted that the Applicant's wife had died in

March 2014 and that he has no other adult family members in Zimbabwe. The Officer accepted that the Applicant had been supporting his children financially since his arrival in Canada. However, the Officer noted that the Applicant had provided no evidence showing that he had been unable to support his children while in Zimbabwe or that he personally had experienced difficulty securing employment in Zimbabwe despite the country's economic conditions. The Officer thus found that: "On a balance of probabilities … the applicant would be able to secure employment and a source of income on return to Zimbabwe so as to provide for his three children." Additionally, the Officer considered that the children were staying with a family friend, Jeanette Laly Mathebula, and further noted that while all of the children's relatives on their father's side were deceased, there was an absence of evidence concerning relatives on their mother's side. The Officer concluded the assessment of the children's best interests by stating: "I find that it is generally in the best interests of most children to have at least one parent present in their lives… [and] it is in the best interest of the three children concerned for the applicant to return to Zimbabwe to apply for permanent residence in the normal fashion."

[5] As to the adverse security, economic, and social conditions in Zimbabwe, the Officer considered the documentation submitted by the Applicant along with publically available sources of information as to country conditions. In particular, the Officer cited a 2016 report from Freedom House which indicated that Zimbabwe had experienced modest gains in civil liberties and judicial independence since 2015. The Officer then noted that, while Zimbabwe continued to experience serious economic instability with high rates of unemployment and underemployment, the Applicant failed to demonstrate how he would be directly and personally affected by current conditions in his country of origin. The Officer found that:

> The applicant has not demonstrated that he has ever struggled to earn sufficient income to provide for himself and his family. The applicant is young, speaks two of Zimbabwe's official languages (Ndebele and English) and has significant and diverse employment experience in his home country and abroad. Given the applicant's particular circumstances, I find that the applicant will be able to re-establish himself on return to Zimbabwe.

[6] Given the Applicant's level of establishment and integration in Canada, the lack of evidence concerning how his particular circumstances would lead to a significant negative impact upon return to Zimbabwe as well as the best interests of his children, the Officer concluded by saying: "I am not satisfied that the humanitarian and compassionate considerations before me justify an exemption under section 25(1) of the Act."

II. Issues

[7] Although the parties have raised several issues in their submissions, only the following issues require consideration:

1. What is the appropriate standard of review?
2. Did the Officer properly consider the degree of the Applicant's establishment in Canada?
3. Did the Officer properly consider the best interests of the Applicant's children?

III. Analysis

A. *Standard of Review*

[8] An immigration officer's decision to deny relief under subsection 25(1) of the *IRPA* involves the exercise of discretion and is reviewed on the reasonableness standard (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 44 and 45, [2015] 3 SCR 909 [*Kanthasamy*]). An officer's decision under subsection 25(1) is highly discretionary, since this provision "provides a mechanism to deal with exceptional circumstances," and the officer "must be accorded a considerable degree of deference" by the Court (*Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4, [2016] FCJ No 1305; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 15, [2002] 4 FC 358).

[9] Under the reasonableness standard, the Court is tasked with reviewing a decision for "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": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708. Additionally, "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome"; and it is also not "the

function of the reviewing court to reweigh the evidence": *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61, [2009] 1 SCR 339.

B. *Did the Officer properly consider the degree of the Applicant's establishment in Canada?*

[10] The Applicant claims the Officer failed to explain why his degree of establishment in Canada was insufficient to warrant relief on H&C grounds, citing *Chandidas v Canada (Citizenship and Immigration)*, 2013 FC 258, [2014] 3 FCR 639 [*Chandidas*]. Because the Officer does not explain what would constitute an extraordinary or exceptional degree of establishment, the Applicant argues that the decision is unreasonable.

[11] The Respondent maintains that the Applicant is attempting to reverse the onus of establishing sufficient grounds to warrant H&C relief and is simply challenging the Officer's weighing of the evidence. According to the Respondent, the Officer considered all relevant evidence and found that it showed little about the nature and extent of the Applicant's level of integration into Canadian society.

[12] The Court's comments in *Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813, 414 FTR 268 [*Sebbe*], are instructive in this case. In *Sebbe*, Justice Zinn stated:

> [21] The second area that I find troublesome has to do with comments the officer made when analyzing establishment. The officer writes: "I acknowledge that the applicant has taken positive steps in establishing himself in Canada, however, I note that he has received due process through the refugee programs and was accordingly afforded the tools and opportunity to obtain a degree of establishment into Canadian society." Frankly, I fail to see how it can be said that the due process Canada offers claimants provides them with the "tools and opportunity" to establish

> themselves in Canada. I suspect that what the Officer means is that because the process has taken some time, the applicants had time to establish themselves to some degree. That is a statement with which one can agree. However, what is required is an analysis and assessment of the degree of establishment of these applicants and how it weighs in favour of granting an exemption. The Officer must not merely discount what they have done by crediting the Canadian immigration and refugee system for having given them the time to do these things without giving credit for the initiatives they undertook. The Officer must also examine whether the disruption of that establishment weighs in favour of granting the exemption. [Emphasis in original]

[13] Similarly, in *Chandidas*, Justice Kane remarked that:

> [80] …in the present case, the officer fails to provide any explanation as to *why* the establishment evidence is insufficient. The officer reviewed the family's degree of establishment in detail, and referred to their work, income, family ties, courses taken, schools attended, and community involvement in various passages of the decision. The officer does not indicate what he would consider to be extraordinary or exceptional establishment; he simply states that this is what he would expect and that it would not cause unusual and undeserved or disproportionate hardship if the family were forced to apply for a visa from outside Canada. While this could be argued to be a reason, it is barely informative. [Emphasis in original]

[14] The degree of an applicant's establishment in Canada is, of course, only one of the various factors that must be considered and weighed to arrive at an assessment of the hardship arising in an H&C application. The assessment of the evidence is also, of course, an integral part of an officer's expertise and discretion, and the Court ought to be hesitant to interfere with an officer's discretionary decision. However, the Officer in this case followed the same objectionable and troublesome path as in *Chandidas* and in *Sebbe*. It was unreasonable for the Officer to discount the Applicant's degree of establishment merely because it was, in the

Officer's view, "not greater than what would be expected of other individuals attempting to adjust to a new country."

[15] The Officer in this case unreasonably assessed the Applicant's length of time or establishment in Canada because, in my view, the Officer focused on the "expected" level of establishment and, consequently, failed to provide any explanation as to what would be an acceptable or adequate level of establishment. Moreover, the Officer, like the officer in *Sebbe*, failed to consider or assess whether disruption of the Applicant's establishment in Canada to return to Zimbabwe to apply for permanent residence weighed in favour of granting the exemption under subsection 25(1).

C. *Did the Officer properly consider the best interests of the Applicant's children?*

[16] The Applicant contends that because of the rampant crime and unemployment in Zimbabwe the only way for him to support his three children is to continue to work in Canada and send remittances. In the Applicant's view, the best interests of the child principle is central to an H&C analysis, and the Officer's analysis in this case does not explain how it would be in the children's best interests for the Applicant to return to Zimbabwe given that country's economic challenges.

[17] The Respondent says the Officer fully considered the Applicant's ability to support his children, noting that he had submitted no evidence that he had personally had any difficulty finding employment in Zimbabwe despite the economic conditions in the country. According to the Respondent, the Officer's conclusion that the Applicant would be able to continue to support

his children if he returned to Zimbabwe was reasonable, as was the Officer's finding that it is generally in the best interest of children to have at least one parent present in their lives.

[18] The Supreme Court in *Kanthasamy* noted that the "best interests" principle is "highly contextual" because of the multitude of factors that may impinge on a child's best interest, and that the principle must be applied "in a manner responsive to each child's particular age, capacity, needs and maturity" (at para 35). The Supreme Court further noted in *Kanthasamy* that:

> [39] A decision under s. 25(1) will…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. [Emphasis in original]

[19] In my view, the best interests of the Applicant's children in this case were not sufficiently identified, defined and examined by the Officer "with a great deal of attention." The Officer's assessment and analysis of the best interests of the children was premised upon an assumption or finding that the Applicant would be able to secure employment and a source of income on return to Zimbabwe so as to provide for his three children. This conclusion, however, is speculative and cannot be justified in view of the significant adverse economic and social conditions in Zimbabwe as evidenced in the objective country conditions documentation before the Officer. If anything, the evidence before the Officer suggested that obtaining employment in Zimbabwe would likely be somewhat uncertain or problematic for the Applicant. There was no evidence before the Officer that the Applicant would in fact become gainfully employed; indeed, the

Central Intelligence Agency-World Factbook for Zimbabwe referenced by the Officer states that the estimated unemployment rate in Zimbabwe was 95 percent.

[20] The Officer's view that the children's best interests would be reunification with their father in Zimbabwe is further unreasonable because it ignored and did not address the possibility that their best interests might be best served by maintaining the status quo (see: *Jimenez v. Canada (Citizenship and Immigration)*, 2015 FC 527 at paras 27 and 28, [2015] FCJ No 488). Moreover, the Officer ignored the fact that the Applicant's remittances from Canada covered not only his children's school fees but also those of the children of Ms. Mathebula. The Officer failed to mention and apparently did not even consider the best interests of Ms. Mathebula's children and their dependence upon the Applicant's remittances from Canada to pay their school fees.

[21] In summary, the Officer's assessment of the best interests of the Applicant's children was unreasonable because it was premised upon an unjustifiable assumption and a speculative conclusion as to the Applicant's employment prospects in Zimbabwe. On this basis alone the Officer's decision must be set aside and the matter returned for redetermination by a different immigration officer.

IV. Conclusion

[22] For the reasons stated above, the Applicant's application for judicial review is allowed because the Officer unreasonably assessed not only the Applicant's establishment in Canada but also the best interests of the children who would be affected if the Applicant's remittances from

Canada ceased and he was unable to secure employment and a source of income following return to Zimbabwe.

[23] Neither party raised a serious question of general importance; so, no such question is certified.

JUDGMENT in IMM-805-17

THIS COURT'S JUDGMENT is that the application for judicial review is granted; the decision of the senior immigration officer dated January 19, 2017, is set aside; the matter is returned for redetermination by a different immigration officer in accordance with the reasons for this judgment; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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