Federal Court  Cour fédérale

Date: 20170925

Docket: IMM-5272-16

Citation: 2017 FC 851

Ottawa, Ontario, September 25, 2017

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

DEMILADE KAYODE OLADELE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review, pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], of a decision made by a delegate of the Minister of Immigration, Refugees and Citizenship (the "Delegate") to deny the Applicant's application for permanent residence on humanitarian and compassionate grounds ("H&C application") pursuant to subsection 25(1) of the *IRPA*.

II. Background

[2] The Applicant, Demilade Kayode Oladele, was born in Nigeria and is a citizen of that country. He is married to a Canadian citizen, Jennifer Oladele. They have four children: Jayden (the Applicant's stepson), Manessah, Ethan and Grace.

[3] In October 2005, the Applicant entered Canada with a fraudulent passport and made a refugee claim. In 2008, section 44 reports were written against the Applicant pursuant to paragraphs 35(1)(a) and 37(1)(a) of the *IRPA*. In August 2010, the Immigration Division ("ID") issued a deportation order based on inadmissibility under those two provisions. The Applicant unsuccessfully sought judicial review of the referral to an inadmissibility hearing and the subsequent determination. In October 2010, the Applicant made a Pre-Removal Risk Assessment ("PRRA") application but this application was denied in December of that year.

[4] The basis of inadmissibility is the Applicant's involvement with the Neo Black Movement of Africa ("NBMA"). The ID found reasonable grounds to believe that the NBMA committed crimes against humanity, and that the Applicant had membership in this organization and was complicit in those crimes.

[5] The Applicant married a Canadian woman after his arrival in Canada, but they eventually separated. That woman applied to sponsor him for permanent residence, but that application was denied when the Applicant formed a common law relationship with his current wife.

[6] The Applicant and his current wife met in 2008, and became romantically involved in 2009. In April 2011, Mrs. Oladele gave birth to their son Manessah. In July 2011, the couple married.

[7] In October 2010, Mrs. Oladele applied to sponsor the Applicant for permanent residence. In January 2011, the Applicant submitted an H&C application, in which he requested a waiver of inadmissibility.

[8] In December 2011, the Applicant was deported to Nigeria. His pregnant wife, Jayden and Manessah visited him shortly thereafter. Conditions in Nigeria made the trip difficult and the Applicant's wife and children returned to Canada without him.

[9] In June 2012, Mrs. Oladele gave birth to Ethan.

[10] In August 2012, Immigration, Refugees and Citizenship Canada ("IRCC") denied the sponsorship application because the Applicant was residing outside of Canada.

[11] In September 2014, the Applicant's wife and children joined him in Uganda, where he was living under a temporary student visa. This caused the family financial and emotional hardship. Mrs. Oladele had resigned from her job in Canada, sold their house and liquidated assets.

[12] The trip to Uganda was difficult. The Applicant and his wife had trouble finding employment. Jayden suffered a medical issue. Mrs. Oladele began to experience trouble with her vision. She returned to Canada for medical testing, where doctors determined that the vision impairment might be caused by her diagnosis of multiple sclerosis. Against her doctor's wishes, Mrs. Oladele returned to Uganda. Mrs. Oladele also suffers from lower back pain associated with a degenerative disc disease.

[13] In December 2015, the Applicant requested an urgent decision on the H&C application.

[14] In April 2016, Mrs. Oladele was pregnant with Grace.

[15] By 2016, the family had exhausted their finances. The Applicant's student visa expired and he returned to Nigeria. His family did not accompany him due to the poor and dangerous conditions in that country. The family returned to Canada without him. They moved into a one-bedroom apartment with Mrs. Oladele's mother. Mrs. Oladele began a job search despite her pregnancy and medical condition. Jayden experienced symptoms of anxiety and paranoia.

[16] In May 2016, the Applicant applied to this court for a writ of mandamus but settled with the Minister of IRCC (the "Minister").

[17] In December 2016, the H&C application was denied.

[18] In January 2017, Mrs. Oladele gave birth to Grace.

[19] In May 2010, an IRCC Officer (the "Officer") referred the H&C application to the Delegate because she found there may be sufficient grounds to grant the application, but did not have delegated authority to waive inadmissibility. Prior to forwarding the application to the Delegate, the Officer removed two files of country-conditions documents from the Applicant's submissions because "…the factors supporting the positive decision were based on establishment, BIOC and reunification in Canada." The Officer found that there "was far more evidence supporting a positive decision than a negative one".

[20] The Delegate's reasons for decision contain extensive quotes from the section 44 reports and the ID's inadmissibility decision. The Delegate notes the severity and seriousness of the activities the Applicant admitted to partaking as a member of the NBMA, including rioting and hijacking government vehicles. She also notes the NBMA's role in aiding the Applicant's travel to Canada.

[21] As well, the Delegate's reasons contain extensive quotes from Mrs. Oladele and her mother's recent letters. These submissions speak to the family's hardships in Uganda, Jayden's medical issue, her pregnancy, unemployment, her medical challenges and the harm the family has suffered.

[22] The Delegate questions the Applicant's decision to marry and have children while under a deportation order, but finds no evidence that the Applicant is a bad parent, or that the children's best interests are not served by his presence in their lives. She acknowledges that growing up without a father is not ideal, but that is a situation children regularly face in this day and age. She

also recognizes the family's financial hardship, but finds this is mitigated by the availability of social assistance, the ability for Mrs. Oladele to seek employment and the capacity of Jayden to babysit his siblings.

[23] The Delegate makes little mention of the documentary evidence regarding conditions in Nigeria, or about the children's capacity to adapt to life there.

[24] The Delegate found that the Applicant had established himself financially and in the community during his time in Canada, that he had no criminal record in Canada and there was no evidence he would partake in any criminal activity should he return to Canada.

[25] The Delegate concluded that the balance of H&C factors was not in the Applicant's favour. She noted that it was in the best interests of the wife and children to not be separated from him; however, she questioned his decision to marry and have children while under a deportation order. Furthermore, she listed the factors against granting the application: his admission to leading riots and hijacking public transportation as a member of the NBMA; his travel to Canada was facilitated by the NBMA; he submitted a fraudulent newspaper clipping to the ID; and he pursued a spousal application under false pretenses.

III. Issues

[26] The issues are:

A. Was there a breach of procedural fairness due to:

    i. the Officer's removal of submissions prior to forwarding the file to the Delegate?

ii. the Delegate's comments regarding the Applicant's family decisions?

B. Was the Delegate's decision unreasonable due to:

i. her failure to particularize the interests of each child and consider country conditions in the BIOC analysis?

ii. her failure to reassess inadmissibility in light of *Ezokola* and *B010*?

iii. her weighing of the factors for and against allowing the H&C application?

IV. Standard of Review

[27] The standard of review for procedural fairness is correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; and *Mission Institution v Khela*, 2014 SCC 24 at para 79).

[28] A standard of reasonableness applies when reviewing the exercise of decision pursuant to subsection 25(1) of the *IRPA* (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at para 44).

V. Analysis

A. *Procedural Fairness*

[29] In his written submissions, the Applicant argues that he was denied procedural fairness because the Officer removed country-conditions evidence from the file before referring the matter to the Delegate, contrary to procedural guidelines, and then the Delegate rendered a decision based on the incomplete record.

[30] In the Respondent's written submissions, the Respondent argues that despite the missing two documents, the Delegate still had sufficient country-conditions evidence before her when the decision was made and the excluded submissions are not highly relevant to the final outcome.

[31] However, during oral arguments the Applicant agreed that all country-conditions submissions were in the Certified Tribunal Record ("CTR"). The Applicant asked the Court to find on a balance of probabilities that these materials were not before the Delegate when she made her decision, on the grounds that the Officer mentioned removing country-conditions documents before forwarding the matter to the Delegate.

[32] In my opinion, there was no breach of procedural fairness. The country-conditions evidence is in the CTR and was likely before the Delegate when she made her decision.

[33] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*], the Supreme Court of Canada ("SCC") held that procedural fairness in H&C applications requires a full and fair consideration of the issues, and a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered (*Baker*, at para 32). As well, a person's legitimate expectations may determine what procedures the duty of fairness requires in given circumstances (*Baker*, at para 26).

[34] Citizenship and Immigration Canada's *Inland Processing Operational Manual*, "Humanitarian and compassionate consideration" [*H&C Guidelines*] provides that if an officer refers a case to a delegated decision-maker, he or she must forward a copy of the entire file

including any submissions related to the case, and the delegate must review all of the applicant's submissions:

> **Referrals to delegated decision-makers - Procedures for officers**
>
> A case should be referred to a delegated decision maker when both of the following apply:
>
> • you do not have the delegated authority to grant a requested exemption and
>
> • you believe that the H&C considerations might justify an exemption.
>
> When referring a case to a delegated decision maker do the following: […]
>
> Review submissions from client to determine if applicant remains inadmissible. If applicant remains inadmissible, ensure all extrinsic evidence and applicant's submissions are included in the package to the delegated decision maker. […]
>
> If the applicant is inadmissible […], prepare a package containing copies of relevant documents for the H&C decision-maker, including all of the following:
>
> •a copy of the entire H&C case file including any submissions related to the case
>
> **Procedures for the delegated decision-maker**
>
> Receive the H&C application package from the referring officer.
>
> Review all material submitted by the applicant […].

[35] The Officer ignored these procedures and did not forward two country-conditions documents to the Delegate. She reasoned that the documents were not related to the factors supporting a positive decision. This was not a reasonable decision to make, given that it could have caused the Delegate to not have the entirety of the Applicant's submissions before her when she made her decision.

[36] That mistake was exacerbated by the Respondent's failure to disclose the Officer's decision to exclude evidence. Only through an access to information request did the Applicant discover that evidence had been removed from the file before it was sent to the Delegate.

[37] In *Agraira,* the SCC stated that the existence of administrative rules of procedure may give rise to a legitimate expectation that such procedures will be followed (*Agraira v Canada (Public Safety and Emergency Preparedness),* 2013 SCC 36 at para 95). As well, this Court has previously applied the doctrine of legitimate expectations where procedural guidelines have not been followed, even though such guidelines are not legal precedents or binding on the Court (*Serhii v Canada (Citizenship and Immigration),* 2016 FC 841).

[38] Furthermore, in *Pramauntanyath v Canada (Minister of Citizenship and Immigration),* 2004 FC 174, this Court held that a decision made on the basis of an incomplete record constitutes a denial of natural justice.

[39] However, as noted above, the Applicant now admits that all of his country-conditions submissions are present in the CTR. Except for the Officer's comment with respect to removing documents from the file, there is nothing to suggest that the entirety of the Applicant's country-condition submissions were not before the Delegate when she made her decision. It is the Delegate's decision that is under review, not the Officer's.

[40] Therefore, the actions of the Officer did not cause a breach of procedural fairness by the Delegate.

(1) The Delegate's Comments on the Applicant's Family Decisions

[41] The Applicant submits that the Delegate's analysis is tainted by speculation and objections with respect to his decision to marry and have children while subject to a deportation order. Furthermore, procedural fairness required the Delegate to give the Applicant a chance to respond to those objections.

[42] The Applicant is referring to several comments made by the Delegate with respect to the Applicant's family decisions. For example, the Delegate refers to the family's decision to relocate to Uganda as a "poor [decision] with respect to the care of their children." She "reads between the lines" of a letter written by Mrs. Oladele's mother, suggesting that the mother disapproved of her daughter and son-in-law's parenting decisions, and that Mrs. Oladele and her mother have a "peculiar sense of entitlement considering Mr. Oladele's immigration history." She also states:

> I note that Mr. and Mrs. Oladele would have been aware that Mr. Oladele did not have legal status and may never have been able to reside legally in Canada at the time they decided to have children together.

[43] As well, when balancing the factors weighing for and against allowing the H&C application, the Delegate speculates that the Applicant entered into marriage and had children because he hoped the family ties would prevent his deportation:

> Immigration decisions leading to his deportation were underway at the time he decided to start a relationship with Mrs. Jennifer Oladele and to have children. He continued to enlarge his family despite being under a deportation order. Whether these decisions were motivated by a hope that family ties would prevent his deportation is possible but regardless, these behaviours are difficult

> to reconcile with someone who had the interests of his own off-spring at heart.
>
> While Mrs. Oladele's current predicament is very unfortunate, in large part it appears to be the result of her and Mr. Oladele's decisions, and when balanced against the negative factors in this case, granting Mr. Oladele's permanent residence on this basis is not, in my opinion, justified.

[44] The Respondent submits that the Delegate was permitted to take into consideration the fact that the grounds of the H&C application were the result of the Applicant's own actions.

[45] The Delegate was entitled to consider factors such as parenting decisions and that the marriage and births occurred while the Applicant was under a deportation order. As the Court stated in *Legault v Canada (Minister of Citizenship and Immigration),* 2002 FCA 125 at para 19:

> In short, the *Immigration Act* and the Canadian immigration policy are founded on the idea that whoever comes to Canada with the intention of settling must be of good faith and comply to the letter with the requirements both in form and substance of the Act. Whoever enters Canada illegally contributes to falsifying the immigration plan and policy and gives himself priority over those who do respect the requirements of the Act. The Minister, who is responsible for the application of the policy and the Act, is definitely authorized to refuse the exception requested by a person who has established the existence of humanitarian and compassionate grounds, if he believes, for example, that the circumstances surrounding his entry and stay in Canada discredit him or create a precedent susceptible of encouraging illegal entry in Canada. In this sense, the Minister is at liberty to take into consideration the fact that the humanitarian and compassionate grounds that a person claims are the result of his own actions.

[46] The Delegate's comments were made in the context of weighing all H&C factors for and against the Applicant. They do not show an animus towards the Applicant, nor do they show that

the Delegate approached the analysis with the outcome already decided. I do not find there was any apprehension of bias.

[47] Here, the Applicant had the opportunity to make submissions to explain the circumstances of his relationship. Furthermore, the Delegate is not reaching a speculative conclusion, but is identifying the fact that the Applicant decided to start a family while under a deportation order. The Delegate was entitled to weigh those factors negatively. There was no procedural unfairness.

B. *Reasonableness of the Decision*

[48] The Applicant makes several arguments regarding the unreasonableness of the Delegate's decision. First, the Delegate's best interests of the child ("BIOC") analysis was flawed because the Delegate failed to consider country conditions and particularize the interests of each child. Second, the Delegate erred by declining to reassess inadmissibility in light of the SCC's decisions in *Ezokola v Canada (Citizenship and Immigration),* 2013 SCC 40 [*Ezokola*] and *B010 v Canada (Citizenship and Immigration),* 2015 SCC 58 [*B010*]. Finally, the weighing of the different H&C factors was unreasonable for various other reasons.

[49] The Respondent submits that the Delegate reasonably assessed the children's interests simultaneously, given their similarities, and that country conditions were sufficiently considered. Furthermore, the ID's prior finding on paragraph 35(1)(a) inadmissibility is *res judicata* and there is no issue with respect to the ID's finding on paragraph 37(1)(a) inadmissibility. Finally, the Court should not re-weigh the different H&C factors.

[50] In my opinion, the Delegate unreasonably failed to particularize the interests of the Applicant's unborn child and failed to consider country conditions with respect to all the children's interests. Furthermore, the Delegate's decision is unintelligible, because the impact of *Ezokola* on her analysis is unclear. For those reasons, it is not necessary to consider whether the Delegate's balancing of the H&C factors was reasonable.

(a) *The Best Interests of the Children*

[51] The Applicant argues that the Delegate failed to particularize the best interests of the four children based on age, capacity, needs, maturity, personal experiences and relationships with the Applicant. As well, the Delegate failed to consider the BIOC with respect to the Applicant's evidence of conditions in Nigeria.

[52] The Respondent argues that if there is no distinguishing factor that makes one child's interest different from that of another, then it is reasonable to consider their interests together. As well, the Delegate sufficiently considered country conditions in her analysis.

[53] In my opinion, the Delegate reasonably singled out the oldest child, who has issues specific to him, while giving similar treatment to the two children who are close in age and experience. However, it was unreasonable for the Delegate to not mention the needs specific to an unborn child. It was also unreasonable for the Delegate to fail to consider country conditions with respect to the BIOC.

[54] A BIOC analysis requires "…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…" (*Baker*, at para 74).

[55] Such an analysis is highly contextual because of the multitude of factors that may impinge on the child's best interest; therefore, it must be done in a manner responsive to each child's particular age, capacity, needs and maturity (*Kanthasamy,* at para 25). The child's level of development will guide its precise application in the context of a particular case (*Kanthasamy*).

[56] The *H&C Guidelines* set out relevant considerations for this inquiry (*Kanthasamy,* at para 40):

- the age of the child;
- the level of dependency between the child and the H&C applicant;
- the degree of the child's establishment in Canada;
- the child's links to the country in relation to which the H&C assessment is being considered;
- the conditions of that country and the potential impact on the child;
- medical issues or special needs the child may have;
- the impact to the child's education; and
- matters related to the child's gender.

[57] However, there is no specific formula or rigid test to be used by immigration officers in a BIOC analysis; form should not be elevated over substance (*Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at para 25).

[58] Here, there are four children affected by the H&C decision. Jayden is the Applicant's stepson and was twelve years old when the decision was made, Manessah was five years old, Ethan was four years old and Grace was not yet born.

[59] The Delegate refers to a psychological assessment of Jayden that showed he suffers from sadness and anxiety due to the absence of the Applicant. As well, she refers to a recent medical situation with Jayden that occurred in Uganda. Furthermore, she notes that Jayden still has ties to his biological father and grandmother within Canada. Finally, she notes that it may be difficult for Jayden to obtain status in Nigeria. The Delegate's consideration of Jayden's particular circumstances was reasonable.

[60] The Delegate made fewer specific references to Manessah and Ethan. The Delegate notes their confusion about having left their home, family and friends behind, but that Jayden seems better able to understand the situation.

[61] I find that it was reasonable for the Delegate to single out Jayden and treat Manessah and Ethan similarly. Jayden is much older and has issues that are specific to him. Manessah and Ethan are about the same age and their experiences are similar to each other in that they have lived most of their lives without their father.

[62] Grace, who Mrs. Oladele was pregnant with at the time of the decision, is rarely mentioned in the Delegate's reasons. The Applicant argues that Grace has interests that are specific to her: she is an infant that requires a great deal of attention and care; she has had no

physical contact with the Applicant; and she is too young to establish a relationship with him via video communication. I agree.

[63] The BIOC analysis applies equally to unborn children (*Hamzai v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1108 at para 33). A failure to take into consideration the best interests of an unborn child may, in and of itself, be unreasonable (*Li v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 451 at para 25; and *Melendez v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1363 at paras 36-37).

[64] However, the Delegate fails to discuss how her decision impacts Grace. The Delegate simply mentions Grace's interests together with those of the other children. For example, the Delegate stated, "[t]here is therefore limited evidence before me that Mr. Oladele is not a good parent and that the best interests of Jayden, Manasseh, Ethan and the unborn child might not best be served by having him present in their lives on a day-to-day basis in Canada."

[65] The Delegate's reasons were not responsive to Grace's "…particular age, capacity, needs and maturity" (*Kanthasamy*, at para 25). Nor were Grace's interests "'…well identified and defined' and examined 'with a great deal of attention' in light of all the evidence" (*Kanthasamy* at para 39). The Delegate did not mention of the needs of an infant child, nor how an infant child might be impacted by moving to Nigeria or her father living in a different country. It was unreasonable to consider the needs of an infant child as if they are the same needs as children who are 4-12 years older.

[66] Furthermore, the Delegate fails to consider country conditions in her BIOC analysis. In the section titled “Best interests of the children”, there is no mention of conditions in Nigeria, except for a reference to Mrs. Oladele’s struggle to adapt culturally and Jayden’s difficulty in obtaining status. In the section titled “Country conditions in Nigeria”, the Delegate does not consider how country conditions might impact the interests of the four children, except for a quote from the Applicant’s own submissions where he stated, “…The United States Department of State reports that education in Nigeria is very poor….Both Mr. and Mrs. Oladele state that it would not be in the children’s best interests to relocate to Nigeria.” The Delegate does not explore this further nor does she mention any of the four children in this part of her decision. Finally, in the section titled “Balancing”, the Delegate fails to mention country conditions entirely.

[67] As noted above, the Delegate was required to be alert, alive and sensitive to the children’s interests and examine those interests in light of all the evidence. The Delegate was not sensitive to the impact of country conditions on the children. Nor was the Delegate sensitive to the particular interests of the Applicant’s unborn child.

[68] Therefore, the Delegate’s BIOC analysis was unreasonable.

(b) *Inadmissibility of the Applicant post*-Ezokola *and* B010

[69] The Applicant argues that the Delegate failed to consider the grounds for inadmissibility in light of the SCC’s recent decisions in *Ezokola* and *B010,* and that there is no clear determination of the Applicant’s inadmissibility with respect to paragraph 35(1)(a) of the *IRPA*.

[70] The Respondent argues that the ID's findings of inadmissibility are *res judicata*, and applicants cannot challenge the validity of lawful decisions simply because of subsequent changes to the case law. Furthermore, the finding of inadmissibility under paragraph 37(1)(a) of the *IRPA* stands unimpeached.

[71] In my opinion, the Delegate's reasons are unintelligible because the impact of *Ezokola* on the Applicant's inadmissibility and the Delegate's H&C analysis are unclear.

[72] Regarding *B010,* it was reasonable for the Delegate to not mention this decision in her reasons. That case dealt with paragraph 37(1)(b) of the *IRPA*. In particular, whether individuals could be found to have engaged in human smuggling merely by aiding others without seeking some financial or other material benefit. That case and provision are dissimilar from paragraph 37(1)(a) of the *IRPA*, which deals with membership in a criminal organization, and do not have a significant bearing on the outcome of the Applicant's H&C application.

[73] In *Ezokola,* the SCC changed the test for complicity with regard to crimes against humanity or war crimes. Complicity requires a knowing and significant contribution to the crime or criminal purpose of a group (*Ezokola,* at para 68). Prior to *Ezokola,* complicity required personal and knowing participation (*Ramirez v Canada (Minister of Employment and Immigration),* [1992] 2 FCR 306 at paras 4-22).

[74] The new test for complicity applies to paragraph 35(1)(a) of the *IRPA* (*Concepcion v Canada (Citizenship and Immigration),* 2016 FC 544 at paras 9-15). However, it does not apply

to “membership in an organization” pursuant to paragraph 37(1)(a) of the *IRPA* (*Chung v Canada (Citizenship and Immigration),* 2014 FC 16 at para 84).

[75] I disagree with the Respondent that the doctrine of issue estoppel precludes a reassessment of the ID’s finding of paragraph 35(1)(a) inadmissibility.

[76] The application of issue estoppel post-*Ezokola* was considered by the Federal Court of Appeal (“FCA”) in *Oberlander v Canada (Attorney General),* 2016 FCA 52 [*Oberlander*]. If the criteria for issue estoppel are met, the Court retains a residual discretion to not apply the doctrine where it could work an injustice (*Oberlander* at para 16, citing *Danyluk v Ainsworth Technologies Inc,* 2001 SCC 44 at para 80). In that case, the Court was satisfied that the application of issue estoppel with respect to *Ezokola* worked an injustice and the applicant was entitled to a re-determination of his citizenship revocation.

[77] In *Hamida v Canada (Citizenship and Immigration),* 2014 FC 98, this Court considered the application of issue estoppel with respect to an H&C application that was refused prior to *Ezokola*. The Court found that the decision needed to be reconsidered in light of the change of law set out in *Ezokola* (*Hamida* at para 40).

[78] Moreover, it is clear that decision-makers on H&C applications have discretion to consider the impact of *Ezokola* on previous findings of inadmissibility. Officers making these decisions must be satisfied that applicants meet the requirements of the *IRPA* and should consider the relevance of an intervening SCC decision (*NK v Canada (Citizenship and*

Immigration), 2015 FC 1040 at paras 19-21). A H&C decision will be unreasonable if it is impossible to ascertain from the decision-maker's reasons whether the applicant's inadmissibility may or may not have been assessed upon the refined test set out in *Ezokola* (*Aazamyar v Canada (Citizenship and Immigration)*, 2015 FC 99 at paras 39-41).

[79] In my opinion, the following statement of the Court's applies here (*Sabadao v Canada (Citizenship and Immigration)*, 2014 FC 815 at para 22 [*Sabadao*]):

> […] *res judicata* cannot be a bar in the context of an H&C application. […] an officer ought to consider recent jurisprudential developments, not for the purpose of indirectly or implicitly overturning a final decision, but for the purpose of balancing that factor with other H&C grounds. […] If, as a result of a new jurisprudential interpretation of an inadmissibility provision, the Applicant's refugee claim might have turned out differently, it is obviously a factor that the Officer should have taken into consideration in assessing his H&C claim.

[80] The Delegate acknowledged *Ezokola* in considering inadmissibility:

> The admissibility hearing revealed that Mr. Oladele's evidence was contradictory. He admitted to membership in the NBMA and his participation in riots and hijackings of public transportation (non-violent according to Mr. Oladele) at the port of entry but when it became clear that his status in Canada was at stake he changed his story in order to minimize his participation in NBMA activities. Therefore the degree of his participation in any activities which could render him complicit in crimes against humanity remain nebulous. What is clear is that Mr. Oladele's testimony on the subject may not be reliable; for example the ID member found that Mr. Oladele had submitted a fraudulent newspaper article in an attempt to exculpate himself.
>
> In terms of whether post-*Ezokola* Mr. Oladele would be found to be inadmissible for complicity in crimes against humanity, in my opinion, this question cannot be answered in the context of this decision. If Mr. Oladele had arrived in Canada in 2013 instead of 2005 it is true that the Immigration Division's analysis may have been slightly different and a more detailed analysis of where and

> when crimes against humanity in Nigeria in relation to where and when Mr. Oladele was a member of the NBMA may have been adduced at the hearing (which sat on 4 separate occasions) and may have been included in the ID's reasons. This is not to say that the information linking Mr. Oladele to crimes against humanity more directly does not exist but it is not obvious from the record before me.
>
> Regardless of the complicity in crimes against humanity argument, in terms of the section 37 analysis there has been no significantly new jurisprudence on membership in a criminal organization which would call the member's finding into question. I therefore accept that Mr. Oladele is inadmissible, at a minimum, pursuant to section 37 of IRPA for his involvement in a cult, namely the NBMA and that he was an active participant in this criminal organization from which he derived significant benefits.
>
> [Emphasis added]

[81] As well, in her list of factors against granting the application, the Delegate mentions the NBMA twice:

- Mr. Oladele admitted to leading riots in Nigeria when he was a member of the NBMA, recognizing that these riots were often violent and to hijacking public transportation.
- Mr. Oladele's travel to Canada was facilitated by using a human smuggling network linked to the NBMA – an organization which committed serious domestic crimes in Nigeria if not crimes against humanity.

[82] In my opinion, these reasons are unintelligible. It is unclear to what the extent paragraph 35(1)(a) inadmissibility played a role in the Delegate's balancing of H&C factors. Clarity on this point is imperative because participation in crimes against humanity is a serious accusation that by itself could determine the outcome of an H&C application. As well, a negative H&C decision would have significant impact on the Applicant's family and children. The Applicant is entitled to know the weight given to *Ezokola* and paragraph 35(1)(a) inadmissibility and how it was balanced against the H&C factors in his favour.

[83] The impact of the change in law should be balanced with other factors (*Sabadao*). However, there is no mention of *Ezokola* in the Delegate's final balancing of factors. The Delegate has merely found that that "at a minimum" the Applicant is inadmissible pursuant to paragraph 37(1)(a).

[84] Furthermore, the Delegate's balancing of factors refers specifically to the Applicant's admission to taking part in riots, but earlier in her reasons she acknowledged that the Applicant no longer admits this. She stated, "the degree of his participation in any activities which could render him complicit in crimes against humanity remain nebulous" and "this question cannot be answered in the context of this decision."

[85] I understand that the Delegate was not in the same position as the ID to conduct a comprehensive review of inadmissibility. However, the Delegate must provide more clarity on how Ezokola impacted her decision. This Court has suggested the following, more nuanced approach (*Figueroa v Canada (Citizenship and Immigration)*, 2014 FC 673 at para 31):

> This requires the Minister's Delegate to do two things: (1) consider a prior inadmissibility finding in light of any submissions to determine whether that finding still stands; and (2) consider the gravity of the inadmissibility in light of the submissions.

[86] Even if the Delegate cannot determine whether or not the previous inadmissibility finding still stands, the Applicant and this Court need clarity with regard to the impact of *Ezokola* on the Delegate's decision. Paragraph 35(1)(a) inadmissibility has a significant impact on this H&C application, and there is no question that the family will suffer substantial hardship if the application is denied.

[87] For those reasons, I find that the Delegate's reasons are unintelligible and therefore unreasonable.

JUDGMENT in IMM-5272-16

THIS COURT'S JUDGMENT is that:

1. The application is granted and the matter is referred to a different Delegate for reconsideration;

2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5272-16
STYLE OF CAUSE:	DEMILADE KAYODE OLADELE v THE OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 20, 2017
JUDGMENT AND REASONS:	MANSON J.
DATED:	SEPTEMBER 20, 2017

APPEARANCES:

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