Federal Court  Cour fédérale

Date: 20171130

Docket: IMM-2248-17

Citation: 2017 FC 1084

Ottawa, Ontario, November 30, 2017

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

FRANK EDO-OSAGIE
CLARA EDIAGBONYA
EREMWON DESTINY EDO-OSAGIE
AISOSA RICHIE EDO-OSAGIE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] 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 made by a Senior Immigration

Officer (the "Officer") refusing the Applicants' application for permanent residence on humanitarian and compassionate grounds ("H&C application").

II. Background

[2] The Applicants are citizens of Nigeria. Frank Edo-Osagie and Clara Ediagbonya are the parents of Destiny, age 13, and Ritchie, age 11. Prior to coming to Canada, they were permanent residents in Italy for eleven years. Few details of their time in Italy have been provided. Destiny and Ritchie were born in Italy but do not have Italian citizenship. Frank and Clara have a third child, Harry, who was born in Canada and is a Canadian citizen.

[3] The Applicants entered Canada in February 2013, and claimed refugee protection. The claim was refused in June, 2013, by the Refugee Protection Division and the Refugee Appeal Division dismissed their appeal on August 15, 2013. A removal order was issued against the Applicants. The following year, the Applicants submitted their first H&C application which was refused on October 20, 2014.

[4] In July 2016, the Applicants submitted a second H&C application. Submissions for this application were based on establishment and the best interests of the children ("BIOC").

[5] Regarding establishment, Frank had been employed since January 2014 and Clara had been employed since September 2016. Clara also pursued English language training and volunteered with the Salvation Army. Both Clara and Frank were active members in a local church and letters of support were provided by community members.

[6] Regarding the BIOC, both children were doing well in school, played sports and had made a network of friends. They looked forward to a life in Canada and the opportunities that would present. In contrast, the education system in Nigeria has been and is in poor condition. Documentary evidence showed underfunding and a severe lack of resources. In some cases, schools lack basic facilities such as water, electricity and toilets. As well, families struggle to pay for their children to attend school.

[7] On April 28, 2017, the Officer refused the Applicants' H&C application.

[8] The Officer gave little weight to the Applicants' establishment in Canada. He acknowledged Frank and Clara's employment history and community involvement and found they were productive and contributing members of Canadian society. However, he found their establishment was not beyond what would normally be expected, given the time it took for their refugee claims to be processed. Furthermore, the Officer stated:

> The applicants have continued to accumulate time in Canada by their own volition without having the legal right to do so. The applicants have been the subject of removal orders and continued to assume their establishment efforts being fully cognizant that their immigration status was uncertain and that removal from Canada could become an eventuality.

[9] The Officer also found the Applicants had not provided sufficient objective evidence to demonstrate that the children would be adversely affected by removal from Canada. He acknowledged their integration into the Canadian school system and that leaving this familiar environment would be difficult. However, given their brief time spent in Canada, they had not developed significant attachments. Furthermore, free education was available in Nigeria.

Considering the intrinsic resiliency accompanying their young age, and their parents' familiarity with Nigerian culture, they would be capable of assimilating after a period of adjustment.

[10] The Officer also found that comparative socio-economic advantages were not a determinative factor in the BIOC analysis. In coming to that conclusion, he acknowledged the documentary evidence and that Canada was a more desirable place to live and offered better opportunities. While this was an important factor, it was not sufficient to accept the H&C application.

[11] On May 18, 2017, the Applicants applied for judicial review of the Officer's decision.

III. Issues

[12] The issues are:

A. Was the Officer's establishment analysis reasonable?

B. Was the Officer's BIOC analysis reasonable?

IV. Standard of Review

[13] The standard of review is reasonableness (*Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at 44).

V. Analysis

A. *Was the Officer's establishment analysis reasonable?*

[14] The Applicants' submit that the Officer did not give them credit for their accomplishments and connections in Canada. Instead, he discounted their establishment by crediting the Canadian immigration and refugee system for providing time to do those things.

[15] The evidence of establishment was not ignored and was clearly considered by the Officer, but he found it did not constitute an unusual degree of establishment. The Officer is entitled to deference on such a finding, given that an exemption under subsection 25(1) of the IRPA is an exceptional and discretionary remedy (*Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 [*Legault*] at para 15; *Adams v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1193 at para 30).

[16] The Applicants were subject to a removal order at least as early as 2013, five months after arrival and prior to any employment history.

[17] It was not unreasonable for the Officer to negatively weigh the circumstances of the Applicants' establishment. This Court has often stated that applicants cannot and should not be rewarded for accumulating time in Canada, when in fact, they have no legal right to do so (*Semana v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1082 [*Semana*] at para 48). Similarly, a decision-maker under subsection 25(1) of the IRPA may consider the fact that the H&C grounds that an applicant claims are the result of his or her own actions (*Legault* at para

19). As this Court stated in *Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356 [*Serda*] at para 23:

> A failed refugee claimant is certainly entitled to use all the legal remedies at his or her disposal, but he or she must do so knowing full well that the removal will be more painful if it eventually comes to it.

[18] The Officer's establishment analysis was reasonable.

B. *Was the Officer's BIOC analysis reasonable?*

[19] The Applicants submit that the Officer was alert, but not alive or sensitive, to the best interests of the children. They cite several failures of the Officer: not first determining what was in the children's best interest; not looking at the situation from the children's perspective; not considering the family's socio-economic situation; and equating basic needs with best interests.

[20] The Respondent submits that a BIOC analysis is holistic: there is no required step-by-step approach and "alert, alive and sensitive" are not discrete categories. As well, it is implied that a child's best interests would be to remain in Canada and this need not be stated by the decision-maker. Finally, the children's best interests do not necessarily trump all other considerations.

[21] Immigration officers must be alert, alive and sensitive to the best interests of a child (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75). Those interests must be well-identified and defined, and examined with a great deal of attention in light of all the evidence and in a manner responsive to each child's particular age, capacity, needs and maturity (*Kanthasamy* at paras 35 and 39).

[22] There is no rigid test required in a BIOC analysis; form should not be elevated over substance (*Semana* at para 25).

[23] The Officer did not find sufficient objective evidence was adduced to demonstrate that accompanying their parents in a return to Nigeria would be detrimental to the children's social, physical and emotional development.

[24] Moreover, the Officer decided that the Applicants did not provided sufficient objective evidence to demonstrate that their removal from Canada would adversely affect the three children.

[25] The Officer did consider the negative impacts that removal might have on the children. He noted their attachments and time spent in Canada but found them too brief to be of significance. He was also aware of the differences between Canada and Nigeria with respect to educational prospects and other socio-economic factors.

[26] While I may not agree with the Officer's appreciation of educational differences between Canada and Nigeria, and the impact on the children, the Officer reasonably found that the educational and socio-economic differences between Nigeria and Canada were not determinative. The mere fact that living in Canada is more desirable for the children is not sufficient, in and of itself, to grant an H&C application (*Serda* at para 31).

[27] The Officer's statements regarding the children's ability to adapt in Nigeria must also be addressed. He stated, "[g]iven the intrinsic resiliency accompanying their young age, I am satisfied they are capable of assimilating to another new scholastic environment after an initial period of adjustment." This Court has found it problematic to rely on the adaptability of children (*Bautista v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1008 at para 28):

> Children are malleable – far more so than adults – and starting with the question of whether they can adapt will almost invariably predetermine the outcome of the script, namely that the child will indeed overcome the normal hardships of departure, and adjust to a new life, including learning a brand new language […]. Undertaking the analysis through this lens renders the requirement to take into account the best interests of a child directly affected, as statutorily required in subsection 25(1) devoid of any meaning.

[28] However, the Officer's analysis did not end with that statement. He went on to consider the children's dependency on their parents and the fact that Nigeria was not culturally unfamiliar to the parents. He was "satisfied that with the support of their parents to guide them through the transitional phase in their lives that resettlement abroad would entail, they would adapt into the new surroundings…"

[29] The Applicants' H&C submissions did not provide evidence to rebut that finding. Applicants have the onus of establishing the facts on which their claim rests and omit pertinent information at their peril (*Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 8). Here, those submissions focused on the family's establishment in Canada and the poor education prospects in Nigeria. The Applicants did not explain what difficulties the children might face in adapting to a new culture. The record contains little information about the family's background, language and cultural skills, knowledge of Nigeria or time spent in Italy.

[30] The best interests of the children will not always outweigh other considerations (*Baker* at para 75). The children's best interests must be weighed along with other factors in favour or against removal of the parents (*Hawthorne* v *Canada (MCI)*, 2002 FCA 475 at para 6).

[31] As noted above, subsection 25(1) of the IRPA is an exceptional remedy. There will inevitably be hardship associated with removal and that alone will not generally be sufficient to warrant relief; H&C applications are not meant to be an alternative immigration stream (*Kanthasamy* at para 23).

[32] Decisions under subsection 25(1) of the IRPA are highly discretionary and immigration decision-makers are entitled to deference. I find the Officer's decision was reasonable.

JUDGMENT in IMM-2248-17

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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