Federal Court  Cour fédérale

Date: 20180205

Docket: IMM-1102-17

Citation: 2018 FC 120

Ottawa, Ontario, February 5, 2018

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

OLUFEMI TIMOTHY ILEMORI
ABIMBOLA ILEMORI
MOJOLAOLU ILEMORI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] At the conclusion of the oral hearing of this application, I indicated that the application would be allowed with reasons to follow. These are my reasons.

[2] The Applicants are a father, a mother, and their son. They made a humanitarian and compassionate [H&C] application asking for an exemption from the requirement to apply for permanent residency from outside of Canada. The principal basis for the request is that they

have been in Canada since 2009, have a handicapped son, and do not have passports or travel documents such that they can leave Canada.

[3] The father, Olefemi Timothy Ilemori [Timothy] says he was born on January 17, 1965, and has the birth name Omatayo Olufemi Owolabi Olutunmilayo Adisa Sunday Salako. It is unclear to me from the record whether he was born in Kensington, London, United Kingdom, or on an airplane while en route to the United Kingdom. As a child he moved with his parents to Nigeria. His parents are Nigerian.

[4] Timothy moved back to the United Kingdom in February 1999, and lived there until he came to Canada in June 2009. On April 26, 2002, Timothy says he changed his name to Olefmei Timothy Ilemori, his current name.

[5] The mother, Abimbola Susan Ilemori [Susan] was born on October 29, 1975, in Hackney, London, United Kingdom. Like Timothy, as a child she moved with her parents to Nigeria.

[6] Timothy and Susan married on April 21, 2001. On the marriage certificate, Timothy's name is shown as Timothy Olufemi Ilemori Salako.

[7] Their son, Mojolaolu Jotham Ilemori [Mojolaolu] was born in the United Kingdom. He suffers from what appears to the Court to be significant learning disabilities.

[8] On April 28, 2009, Timothy arrived at the Coutts border crossing in Canada and was admitted as a temporary resident on visitor visa valid until May 8, 2009. He came to Canada to

enroll in a 2 year program at the Northern Institute of Technology (NAIT) in Edmonton, Alberta. In June 2009, the visa office in London issued him a two year study permit.

[9] The study permit listed Susan and Mojolaolu as accompanying family members. Susan and Mojolaolu arrived at the Calgary International Airport on July 8, 2009, and were also admitted as visitors. The family's temporary resident status was valid until June 30, 2011, being approximately one month after Timothy's expected graduation from NAIT.

[10] Both Timothy and Susan were allowed to work in Canada while here as visitors. On July 8, 2009, Susan was issued an open work permit as the spouse of a student. On April 21, 2010, Timothy obtained an open work permit allowing off-campus employment until June 30, 2011.

[11] Both Timothy and Susan applied for renewals of their work permits prior to the expiry date. Their applications were denied on March 22, 2011, because they did not submit all the required information. Their son's application for a visitor visa was also refused.

[12] On April 21, 2011, the Canada Border Services Agency [CBSA] received information that the UK government had revoked Timothy's passport. Timothy says the allegation, which he disputes, that prompted that action is that he used a birth certificate with a false name to obtain his UK passport. This caused CBSA to file a report alleging Timothy was inadmissible. A warrant was issued on May 19, 2011, for Timothy's arrest to attend an admissibility hearing.

[13] When Timothy graduated on May 3, 2011, he applied for a post-graduation work permit and a renewal of Susan's work permit. However, in this application he did not provide a copy of his passport as required. On November 30, 2011, Immigration and Citizenship Canada [CIC] notified the family of this missing document and requested submission of the passport.

[14] The work permit application and renewal were refused on February 10, 2012. The letter of refusal states the reason was because the passport was not provided.

[15] Mojolaolu's second application for a visitor record was also refused on February 10, 2012. At this time, the CBSA asked the family to leave the country. Timothy and Susan say they received the letter of refusal on March 26, 2012, and they stopped working since they were no longer allowed to work in Canada.

[16] Timothy says he was advised by CIC call centre that he could submit applications for restoration of status within 90 days, and he did so. On April 23, 2012, Timothy attended a police station to obtain a Canadian police clearance necessary for the restoration of status application. While at the police station Timothy was arrested on his warrant.

[17] Timothy was found inadmissible because he had failed to leave Canada after his authorized period had ended and was issued an exclusion order on April 24, 2012. He stayed in detention until released at his second detention review on May 2, 2012.

[18] The CBSA interviewed Timothy on May 16, 2012. Timothy says he tried to apply for a Nigerian passport as instructed by the CBSA, but was refused. He also says Susan tried to apply for a Nigerian passport, but it was denied since "she has no ties to Nigeria."

[19] Timothy appeared before the Immigration Division [ID] for an admissibility hearing on May 25, 2012. It appears that he was represented by counsel for the first time at this hearing, and it is of note that his counsel has continued to act for this family ever since, including on this application. The ID concluded that the allegation of inadmissibility had not been established – in short, because there were no reasonable grounds to believe that Timothy was inadmissible to Canada:

> There's just a complete absence of anything upon which I can conclude or make findings about what the U.K. passport office is alleging Mr. Ilemori actually did. There is no credible evidence at all provided with respect to acts or omissions. There is nothing before me but suspicion, speculation, concerns, questions and conjecture.
>
> [emphasis added]

[20] On July 17, 2012, and November 15, 2012, the CBSA refused work permit applications filed by Timothy on the basis that he did not qualify because he remained under an enforceable removal order. On July 31, 2012, the CBSA refused an application to restore Timothy's temporary resident status and work permits. Timothy then applied for a Pre-Removal Risk Assessment [PRRA], which was also refused.

[21] On March 6, 2013, both Timothy and Susan were issued work permits by CBSA, valid to September 6, 2013. The record indicates that work permits were granted pursuant to paragraph

206(1)(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, which permits a work permit to be issued "to a foreign national in Canada who cannot support themselves without working, if the foreign national … is under an unenforceable removal order [emphasis added]."

[22] The only basis upon which CBSA could have determined that the removal order was unenforceable was because the family were unable to leave Canada because they had no valid travel documents.

[23] The family has submitted three H&C applications. Their first H&C application for permanent residency was made on July 23, 2013, after the determination by CBSA that they could not be removed from Canada. It was refused on February 27, 2014, and the family brought an application to this Court for judicial review. Before the judicial review hearing took place, the open work permits were renewed on May 23, 2014, valid to May 23, 2015.

[24] On February 25, 2015, Justice Gleason, as she then was, held that the H&C decision was unreasonable and inconsistent because the decision stated the family were unable to return to the UK, and yet analysed the H&C factors as if they could return to the UK. Justice Gleason also found that the officer had not determined "whether the applicants would be required to remain in Canada for a prolonged period without status and whether such a requirement amounts to undue, undeserved or disproportionate hardship meriting favourable H&C consideration." The decision was set aside and referred back for redetermination by a different officer.

[25] The family were also allowed "reasonable opportunity to file updated submissions." On May 8, 2015, the family submitted a letter and further submissions in support of their second H&C application. The new material included documents illustrating their establishment in Canada, confirming that Mojolaolu continued to struggle with his learning disabilities, and confirming that they were unable to obtain travel documents to either the U.K. or Nigeria. Further materials were submitted by the family through counsel, including copies of correspondence between their UK lawyers and the UK passport authorities and between a UK politician and UK passport authorities. None of these efforts to obtain a UK passport renewal for Susan and her son were successful.

[26] The second officer denied the family's H&C application on August 4, 2015. Again they applied for judicial review. The Respondent agreed that the H&C application would be sent back to the CIC for redetermination again.

[27] The third review of the family's H&C application took place. The officer refused the application.

[28] In support of the application the family's counsel wrote:

> To reiterate, the Ilemoris cannot return to the UK or Nigeria. They have exhausted all efforts. CBSA has exhausted all efforts and has been unable to secure even one way travel documents after making direct requests to Nigeria and the UK authorities. This in and of itself is quite telling, as CBSA secures travel documents for foreign nationals every day. The Ilemoris have cooperated and done everything CBSA has asked of them in this process. They spent thousands of dollars on a lawyer in the UK fighting the fact Mr. Ilemori's passport has been revoked and that they will not renew Mrs. Ilemori's passport. With respect to Nigeria, the

> Nigerian authorities have flat out refused to issue any travel documents, even after they attended an interview with Nigerian authorities.
>
> There is simply no other conclusion to draw here other than that the Ilemori family is in Canada due to circumstances beyond their control. They had become established here not because they have overstayed or evaded immigration authorities, but because they simply have nowhere to return. It is difficult to imagine a more compelling H&C factors. The circumstances of this family are unique and extenuating.

[29] The officer, reading this submission, had inquiries made of CBSA as to whether it agreed with it. The officer wrote to counsel for the family on February 8, 2017, as follows:

> Please be advised that CBSA was contacted with respect to your submissions that they have exhausted all efforts to obtain travel documents and that your clients have cooperated. The response from CBSA is that they do not agree with the statements.
>
> This letter is to advise you that I'll be referring to this information in my decision.

[30] It is not surprising that counsel reacted with considerable indignation to the response from CBSA. In a very lengthy and detailed email message to the officer dated February 13, 2017, counsel detailed the efforts made by the family to obtain a UK or Nigerian passport or travel document for any member of the family. In all, he recounted 12 steps they had taken with UK authorities and 3 with the Nigerian authorities before CBSA asked that they leave it to deal with the Nigerians. He concludes:

> I would respectfully suggest at this stage and after all these years, it is not enough to simply say CBSA does not agree with those statements. Just because CBSA says so does not make it the case without further details. We would again request some specifics about what is allegedly not being done by the Ilemori's in their efforts to obtain a travel document that they could do if this information is being relied upon in a decision and they be given the

> opportunity to respond. The principles of natural justice and procedural fairness require an individual to know the case against them so they can answer to your concerns. It is impossible to answer to a general statement that CBSA does not agree they are doing everything they can. Further, if the Ilemori's credibility is being called into question (which it sounds like it is) then an interview should be conducted.

[31] CBSA provided no specifics. The officer convened no hearing but rendered a decision which he stated was based on the three volumes of material before him.

[32] The officer references the Guidelines for H&C applications for applicants, like the Ilemori family, who have no passports:

> I note that the guidelines for Humanitarian and Compassionate applicants who do not have a passport state that if an applicant does not have a valid passport the officer may consider waiving the passport requirement on humanitarian and compassionate grounds provided the officer is satisfied as to the identity of the individual. Examples of situations in which a waiver of the requirement for a passport may be warranted, include, but are not limited to, when the applicant:
>
> - has had the passport seized by CBSA and there is no mention in FOSS or on file that identity is a concern
> - has presented other identity documents that are sufficient for establishing identity
> - had a valid passport that is now expired.

[33] I note that this guideline is published by the Respondent and deals with an application for permanent residence after a positive stage one determination. Stage one determination is whether there are sufficient H&C considerations such that the person should be permitted to apply for permanent resident status from within Canada. Stage two is the substantive determination on the application on its merits.

[34] After reviewing the evidence, and in particular the circumstances of the child, the officer writes:

> I find that there are missing elements in this case that do not allow me to be satisfied as to the identity of the Applicants.
>
> While the applicants have been living in Canada since 2009 and for much of that time, they have been dealing with the problems arising from their identity, I do not find that this is a situation that warrants relief on humanitarian and compassionate grounds. The Applicants are able to work, participate in their community and make good salaries in Canada. Their son is receiving support and an education. …I find that the evidence before me does not lead me to find that remaining in Canada with an uncertain immigration future is a misfortune that must be solved by the granting of a passport exemption leading to permanent residence in the overall circumstances of these Applicants.

[35] A number of issues were raised by the family, including that the officer made unreasonable findings regarding their efforts to obtain travel documents from the UK and Nigeria, and the failure to provide them with an interview in light of the findings made regarding identity.

[36] In my view, there are a number of aspects of the decision that make it unsafe to permit it to stand.

[37] One of the most problematic aspects of the decision is that the officer treated the H&C application as if he was determining whether the family ought to be granted permanent residence in Canada. As noted above, he writes: “I find that the evidence before me does not lead me to find that remaining in Canada with an uncertain immigration future is a misfortune that must be

solved by the granting of a passport exemption leading to permanent residence in the overall circumstances of these Applicants" [emphasis added].

[38] What was before the officer was step one of a two-step process. His job was to assess whether there were sufficient humanitarian and compassionate circumstances such that the family ought to be permitted to apply for permanent residence from within Canada. The making of such an application does not necessarily lead to the granting of permanent residence, as he suggests. Further, the identity concerns he identified appear to be relevant only at stage two of the process.

[39] The second problematic aspect of the decision is that in making the assessment, the officer failed completely to address the concern of Justice Gleason as to "whether the applicants would be required to remain in Canada for a prolonged period without status and whether such a requirement amounts to undue, undeserved or disproportionate hardship meriting favourable H&C consideration." In this respect his decision suffers from the same error as the first H&C decision that this Court set aside.

[40] The third problematic aspect of the decision is that the officer focused only on the identity of the family. He writes: "I find that there are missing elements in this case that do not allow me to be satisfied as to the identity of the Applicants." What he fails to do, and what he was required to do, was to undertake an assessment of establishment and hardship.

[41] In *Abeleira v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1340, Justice LeBlanc reviewed a decision to refusing an H&C application where the applicant's identity could not be established. Justice LeBlanc held at paragraph 25 that it was not enough for the officer to refuse the applicant on the basis of identity without first considering his establishment and hardship:

> It is clear from reading the Officer's reasons that she did not find the Applicant to be credible in his assertions that he is in fact a stateless person. Despite being unable to confirm the Applicant's identity or nationality, the Officer's duty to assess the Applicant's establishment and hardship remained. [emphasis added]

[42] In this case, there is one short paragraph where the officer states the positive things about the family remaining in Canada despite having no status. For example, they have good jobs, and their son will remain in his school. The only negative mentioned is that the family would have an uncertain immigration future. However, no consideration is given to many of the other hardships they face in being in Canada without status, including not having the protection of subsection 6(2) of the *Charter*, which permits citizens and permanent residents to move to and take up residence and to pursue the gaining of a livelihood in any province, being qualified for public health insurance, and not having to continually reapply for work permits.

[43] The fourth problematic aspect of the decision under review is that the officer finds that the family has not tried every means possible to obtain documents from either the UK or Nigeria. However, as noted by the family in their memorandum, and with respect to the UK, the officer relied upon information he obtained from the CBSA, which gave a blanket statement with no specifics that it did not agree that the family had exhausted all efforts to secure a travel document. No specifics were provided by CBSA as to what actual steps it wanted the family to

take that had not already been taken to obtain travel documents, or specific details as to why their actions did not demonstrate that they had made all possible efforts to obtain travel documents. On the other hand, statements from counsel for the family that applications had been made to the UK supported by all available documentation were dismissed by the officer because counsel's statement was not "supported" by a copy of the refusal or the application. The officer accepted the blanket statement from the CBSA and yet dismissed statements from both Canadian and UK counsel that applications had been made and were rejected. It is perverse that the officer accepts that more could be done absent details of exactly what could have been done while simultaneously rejecting statements made by officers of the Court that applications had been made and were rejected.

[44] It is also perverse that the officer finds that the family had not done all it could to obtain Nigerian travel documents when the record shows that the CBSA directed them to leave dealings with the Nigerians to it. On that instruction, if there is any failure to act, it rests with CBSA, and not with the family.

[45] In my view, a fair and considered review of the file shows, absent some change in circumstances, that CBSA has accepted that this family's removal order is unenforceable because they cannot obtain travel documents from any country. It further shows that the family themselves, and through solicitors in Canada and England and an MP in England, made application for UK travel documents but have been unsuccessful. It further shows that despite cooperating with the CBSA in attempting to obtain travel documents from Nigeria, those efforts have been unsuccessful.

[46] Unless the CBSA can show what steps this family can take that they have not, or show any positive response from either the UK or Nigeria, it can only be reasonably concluded that this family cannot leave Canada. It is on that basis that an officer must decide whether to exercise the discretion given in the Act to permit the family to make an application for permanent residence from within Canada. At present, it is clear to me from the record that they most certainly are unable to do so from outside Canada.

[47] This decision turns on its (hopefully) unique facts and there is no question to be certified.

JUDGMENT in IMM-1102-17

THIS COURT'S JUDGMENT IS that:

1. The application is allowed and the H&C application is returned for a fourth time for a determination by a different officer, in keeping with these Reasons, with the Applicants having the right to supplement the application should they wish; and

2. No question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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