

Federal Court



Cour fédérale

**Date: 20181023**

**Docket: IMM-5331-17**

**Citation: 2018 FC 1059**

**Ottawa, Ontario, October 23, 2018**

**PRESENT: The Honourable Mr. Justice Zinn**

**BETWEEN:**

**SUNDAY OKOYE**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] Mr. Okoye applied for an exemption from the provisions of the *Immigration and Refugee Protection Act*, SC 2001, c 27, based on humanitarian and compassionate [H&C] considerations to permit him to make an application for permanent residence from within Canada. His application was refused.

[2] For the reasons that follow, I find that decision to be unreasonable because the officer failed to adequately assess Mr. Okoye's risk in Nigeria as a bisexual man, and also failed to properly and reasonably assess the best interests of his three Canadian children who would be permanently separated from their father.

### **Background**

[3] Mr. Okoye was born in Nigeria in 1974. In 2002, he arrived in Canada and made a claim for refugee status based on persecution he said he suffered as a result of his sexual orientation as a gay man. Although the Refugee Protection Division found on a balance of probabilities that he was a gay man, his claim was rejected because there were several inconsistencies with his story of persecution. He was ultimately accepted in 2010 as a permanent resident as a result of a successful H&C application.

[4] In 2005, Mr. Okoye began a common law relationship with a Canadian woman. In his affidavit he swears that she was the first woman with whom he has been intimate. As a consequence, he realized he was bisexual. He has been in a relationship with her ever since and they have three children together.

[5] Mr. Okoye worked as a welder from 2002 to 2011. To supplement his income, he worked part-time jobs, including at a nightclub. He was arrested in 2011 on criminal charges for possession of a controlled substance for the purchase of trafficking, and import/exporting a controlled substance. While working in a nightclub he had been approached and offered \$1,000 to transport a package. He was in pre-trial custody from 2011 to 2014, and served a further five

month sentence after pleading guilty in 2014. In his H&C application he pointed out that the judge found his actions to have been relatively inconsequential to the overall transaction and that he was unlikely to ever re-offend. The H&C officer noted that he was sentenced to a term of imprisonment of five years. His permanent residence status was revoked as a result of the conviction.

[6] While in prison, his partner took care of their children. In a report by Dr. Agarwal, a psychiatrist who spoke with Mr. Okoye's partner and their children, the doctor writes that she reported that she struggled financially to care for the children; she used up their savings, and had to go on welfare.

[7] After Mr. Okoye was released he was employed again as a welder but was laid off at the end of 2015. He has been unemployed ever since although he says he has been looking for work. He swears that the family currently is maintained by his employment insurance.

[8] Mr. Okoye has been involved in a Church and says he also mentors younger people to avoid crime. He was in a car accident in 2011 and injured his knee, for which he says he received surgery, and which, he says, will require further surgery to correct.

[9] Mr. Okoye says that his family and others in his village in Nigeria are aware of his sexual orientation and he has been shunned as a result. He says that he would be discriminated against if he were to return.

[10] In his H&C application, he advances his claim based on the best interests of the children, family separation, his establishment in Canada, and the hardship he would suffer in Nigeria. Each of these general areas had many discrete elements described in his lengthy application letter.

[11] The officer addressed each of the H&C factors that were advanced but did not find that sufficient H&C considerations existed to grant the exemption.

### **Issues and Analysis**

[12] Mr. Okoye submits that there are two issues relating to the merits of the decision. The first is whether the decision under review is reasonable, and the second is whether there was a breach of procedural fairness. He submits that the officer breached his right to procedural fairness in failing to consider the submissions made that a decision not to grant him permanent residence would engage his section 7 and 12 *Charter* rights.

[13] Mr. Okoye accepts that decisions made on H&C applications are subject to review on the reasonableness standard: *Kanhasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 [*Kanhasamy*], *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189. He submits that procedural fairness questions are subject to a correctness review.

[14] In the present application I need not consider the procedural fairness question he raises because I find that the decision on the merits of his application is unreasonable. On that basis alone, the application must be remitted back for a new determination.

[15] Mr. Okoye submits that the impugned decision is unreasonable in the officer's analysis of (i) the best interests of the children, (ii) his risk as a Christian, (iii) hardship due to a lack of medical assistance, (iv) establishment, and (v) risk due to sexual orientation.

[16] In my assessment, the officer's analysis of Mr. Okoye's risk in Nigeria as a Christian, his hardship due to a lack of medical assistance, and his establishment in Canada are all reasonable within the meaning ascribed to that term by the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9; namely they exhibit "the existence of justification, transparency and intelligibility within the decision-making process" and "the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law." This is not to say, nor should it be interpreted as implying, that another decision-maker could not reach a contrary conclusion than this officer did on these three factors.

[17] I find this officer's analysis of the sexuality of Mr. Okoye and the best interests of his children to be deficient and the overall decision based on that analysis to be unreasonable.

### **Sexuality**

[18] The officer notes that Mr. Okoye states: "I am afraid that if I were to return to Nigeria, I would be discriminated against on the grounds of my sexual orientation, my existing attraction to men and my past homosexual relationships."

[19] The officer's entire analysis of the risk to gay and bisexual men in Nigeria is that "the documentary evidence ... is reflective of the challenges encountered by individuals in same sex

relationships in Nigeria [emphasis added].” The “challenges” referenced in the record include documented evidence of discrimination in employment, the provision of health-care, and housing, as well as verbal and physical assault and family rejection. In addition, there is the fact that Nigerian law prohibits same sex acts and provides for an extreme sanction if convicted.

[20] The H&C application noted that the RPD in the refugee claim found that Mr. Okoye is a homosexual. The officer writes: “the board found that he had established his homosexual orientation. However, the board also found that the applicant could relocate to another area in Nigeria and rejected his claim for protection.” It is to be noted that the RPD did not reject his claim for protection because Mr. Okoye had an internal flight alternative [IFA] in Nigeria.

[21] With this statement the officer is suggesting that Mr. Okoye’s sexual orientation creates no hardship for Mr. Okoye in Nigeria because there are locations within the country where he can live without exposing himself to risk. The officer provides no independent analysis of the supposed IFA and I infer that the officer adopted the decision of the RPD in this regard.

[22] A risk analysis in a claim for protection and refugee status addresses whether a claimant’s life or safety would be jeopardized and because refugee protection is a matter of last resort, an IFA finding obviates the need for protective status. Unlike that scenario, an H&C application examines and weights the hardship an applicant will suffer if he or she is removed from Canada. In *Akponah v Canada (Minister of Citizenship and Immigration)*, 2017 FC 1103, at paragraph 33, this Court stated: “The Officer cannot rely on the RAD’s IFA conclusion because it was never intended to reflect H&C issues [emphasis in the original].” That is what the officer did in

this case. Moreover, while the RPD in this case did find in 2005 that an IFA existed in Nigeria, in adopting that finding the officer gave no consideration to whether the locations examined by the RPD continued to have any application to Mr. Okoye more than 10 years later, whether they continued to provide places where he could freely express his sexuality, and whether he would experience hardship and the degree of hardship he would experience if he were to relocate there.

[23] The officer does not really examine the risk to Mr. Okoye based on his sexual orientation and current and continuing attraction to men. Firstly, the officer focuses on Mr. Okoye's risk based on his past experiences in Nigeria:

Whist I give deference to the findings of the board, I have assessed this H&C application based on the information presented by the applicant. In this regard I find insufficient evidence to indicate that the applicant could be subjected to challenges on account of his previously noted sexual relationships in Nigeria. I base the aforementioned on the passage of time and insufficient details, statements from other individuals or documentary evidence to elaborate on this cited fear and associated challenges. [emphasis added]

[24] Secondly, when it comes to the examination of Mr. Okoye's sexual orientation and stated existing attraction to men, the officer makes what appears to me to be an adverse credibility finding in the following passage, the last sentence of which makes no sense at all to me:

With respect to the applicant's reference to his existing attraction to men, I observe a scarcity of information to elaborate on such attraction during his sojourn in Canada. The information before me informs that the applicant has been residing with his common-law partner for over eleven years and they have three children. I find insufficient details of the applicant's sexual orientation or to indicate that he could be perceived as a bisexual in Nigeria if he returned today, based on his existing attraction to men.

[25] The evidence before the officer was that prior to meeting his current female partner, he had only been in same sex relationships. His homosexual orientation was accepted by the Refugee Protection Division and the first officer who granted him an H&C exemption to apply for permanent residence from within Canada. There was also evidence that since meeting his partner, Mr. Okoye now considers himself to be bisexual. This is because of his past homosexual relationships and his continuing attraction to men. To suggest, as this officer does, that Mr. Okoye will not be seen as gay or bisexual in Nigeria because of his current heterosexual relationship with his Canadian partner rests on faulty reasoning and improper or unsupported assumptions. It rests on an assumption that Mr. Okoye will not be engaging in actions or conduct that will reveal his true sexual orientation, and further assumes that this will not be a hardship for Mr. Okoye because of his past heterosexual relationship. It fails to address the real question. Mr. Okoye is and sees himself as bisexual. He is not required to hide who he is or conduct himself in a manner such that his sexual orientation is not known. The question the officer was required to address is this: “Will Mr. Okoye, as a bisexual man, experience hardship in Nigeria?” The officer does not engage with this question.

### **Best Interests of the Children**

[26] Mr. Okoye submitted that the best interests of his children support him staying in Canada with them. Dr. Agarwal, a psychiatrist with a sub-speciality certification in Child and Adolescent Psychiatry provided a report about the children and their behaviours during their father’s incarceration and the likely consequences of a future separation [the Agarwal Report]. The officer gave little weight to this report, largely because “the assessment appears to be based



on an interview conducted with the applicant's partner and children and on the facts presented by the interviewees."

[27] I agree with Mr. Okoye that this basis for assigning little weight to the report is directly contrary to the teaching of the Supreme Court of Canada in *Kanthisamy* at paragraph 49, where it stated that "[t]o suggest that applicants for relief on humanitarian and compassionate grounds may only file expert reports from professionals who have witnessed the facts or events underlying their findings, is unrealistic and results in the absence of significant evidence."

[28] This is particularly the case of a psychiatric report as it is my understanding that most of the practice of psychiatry involves listening to and questioning patients. If the hearsay nature of that evidence leads to a report being given little weight, then no psychiatric evidence would ever be accepted as probative.

[29] The respondent submits that the officer did not actually discount this report for being based on hearsay; rather, the officer was calling attention to the fact that at the time of the previous separation, Mr. Okoye's partner did not bring her children in for treatment. It is suggested that one can infer from this that the harm to the children must have been "insufficiently serious." I am not persuaded counsel's view of the officer's reasoning is correct. First, that interpretation goes against the officer's plain words in the reasons in which the officer takes issue with it because it is based on the "facts presented by the interviewees." Second, this submission misses the point of the Dr. Agarwal's report. Dr. Agarwal was gathering information to comment on the children's vulnerability to future mental health conditions. Whether or not

the children had been diagnosed with mental health conditions in their past was not required for Dr. Agarwal to determine whether they could develop them in the future. As explained by *Kanthasamy*, a psychiatrist or psychologist is entitled to use hearsay to form a medical opinion.

[30] I further find it disingenuous and unreasonable for the officer to assign little weight to the article written on the effect on children of being separated from their parents because, as the officer writes, he or she has “insufficient evidence to indicate that this information relates to the present circumstances.” Admittedly the article concerned children separated as a result of divorce and not deportation, but it is difficult not to see that these are parallel situations. The application is quite clear in stating that the children and their mother will not be following their father to Nigeria. With that background, it is my view that this article is directly relevant to the children’s circumstances. Although this article did not speak precisely to the specific circumstances of deportation, even the officer admitted that some of the aftereffects, such as economic factors, could be applicable. Yet despite this finding, this article was given little weight.

[31] Additionally, Mr. Okoye submitted an article directly relevant to this matter regarding the mental toll on children who remain after a parent is deported. The officer offered no explanation why this article was not accepted except for the observation that “I have also considered that there are many successful children who are raised by single parents.” Such a consideration is irrelevant in the face of the Agarwal Report and the literature presented, and is an insult to these particular children. The issue of their present interests is not addressed by an observation that they may be successful adults in the future.

[32] It was also submitted that the absence of Mr. Okoye would have adverse financial consequences for his partner and their children. The officer commented that the partner had been able to manage while Mr. Okoye was in prison and had even begun her university studies during this time. The officer found insufficient evidence she would not be able to balance her responsibilities again. This ignores the evidence that she suffered stress during this time, being alone to care for the children and manage their finances. The officer appears to conclude that she managed financially while Mr. Okoye was in prison. This is contrary to the evidence in the record that in that period she was not able to work as the children were young, she used their savings and was on welfare. Moreover, the evidence in the record is that she has student loans that enable her to attend school.

[33] In summary, the officer's analysis fails to be alert, alive, and sensitive to the impact the father's permanent removal from his children's lives would have, both emotionally and financially.

### **Weighing the H&C Consideration**

[34] Once the H&C considerations are properly examined, the officer is to weight them against the applicant's criminal past. The respondent submits: "The jurisprudence of this Court has re-affirmed that it is reasonable for the immigration officer to place considerable weight on the applicant's criminality, when that is the ground of inadmissibility that he asks to be exempt from [emphasis added]."

[35] The reference to placing “considerable weight” on a criminal record is not an accurate reflection of the authorities cited in its support. The jurisprudence is accurately summarized by Justice McDonald in *Chaudhary v Canada (Minister of Citizenship and Immigration)*, 2018 FC 128 [*Chaudhary*] at paragraph 25 where she writes: “the Officer is entitled to focus on the Applicant’s criminal history and to find that the history outweighs any H&C considerations, especially where the exemption sought on H&C grounds pertains to criminal inadmissibility.”

[36] Here, Mr. Okoye had committed one offence, drug trafficking, for which he received a five-year sentence. While a serious offence, it is not of the same nature as a conviction for first degree murder of a child, as was the case in *Chaudhary*.

[37] The officer, in the conclusion to the decision, states: “I acknowledge the applicant’s love for his partner and children and the level of involvement with his children and find this to be a positive factor. However, I have weighed against this the applicant’s unlawful behaviour which I find does not provide a positive endorsement of his character and from which I draw a negative inference.” In my view, this type of weighing is impermissible.

[38] The officer is to weigh the fact of the applicant’s criminal record against the H&C considerations. One of those H&C considerations is the best interests of the children who will be affected by the applicant’s removal. Children are most likely to be more greatly impacted by a separation where the applicant has a close and significant bond with them, as is the case here. To then say that an applicant’s positive character as evidenced by this bond is to be discounted because of his criminal character, is to improperly discount the impact on the children and thus

fail to properly consider their best interests. There are many fathers with a criminal record who have just as much love and a close bond with their children as fathers with no record do with their children. The best interests of both groups of children are the same. To say that the interests of the former group of children are lessened because of their father's criminal character is an improper assessment of their best interests.

[39] Given the basis for this decision, there is no question that meets the test for certification.

**JUDGMENT IN IMM-5331-17**

**THIS COURT'S JUDGMENT is that** this application is allowed, the H&C application is to be determined by a different officer, and no question is certified.

"Russel W. Zinn"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-5331-17

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