Federal Court  Cour fédérale

Date: 20190206

Docket: IMM-2887-17

Citation: 2019 FC 151

Ottawa, Ontario, February 6, 2019

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

OGUNDEKO OLUGBENGA BABAFUNMI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review by Ogundeko Olugbenga Babafunmi [the Applicant] pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], of a decision made by Senior Immigration Officer K. Poon [the Officer]. On June 9, 2017, the Officer refused to grant the Applicant's application for permanent residency on humanitarian and compassionate [H&C] grounds [the Decision].

II. **Preliminary Matters**

A. *Style of Cause*

[2] The style of cause lists the Respondent as the Minister of Public Safety and Emergency Preparedness. The Applicant states this was an inadvertent mistake and both parties confirm that the proper respondent is the Minister of Citizenship and Immigration. The Court agrees and the style of cause will be amended as part of this judgment.

B. *Temporary Residency Permit*

[3] The Applicant as part of his H&C application requested the Officer also consider issuing to him a Temporary Residency Permit [TRP]. The Decision is silent on the TRP request other than noting an application for criminal rehabilitation and TRP which was refused in October 2015.

[4] The Respondent originally opposed this argument stating the TRP request was made as part of the 2013 update of the H&C application and as such the notation in the Decision that a TRP was dealt with in the October 2015 criminal rehabilitation refusal was sufficient.

[5] The Applicant in reply clarified that the October 2015 TRP refusal was a result of an earlier 2012 TRP request and that no decision had been reached in regard to the contents of the 2013 TRP request, which—because of the date of submission— had different and updated materials.

[6] The Respondent has since consented to the TRP request being remitted for determination by another officer according to the recent jurisprudence of this Court rendered by Mr. Justice

O'Reilly in *Mohammad v Minister of Citizenship and Immigration Canada*, 2017 FC 750 at paragraphs 2, 16, Docket IMM-3624-16.

[7] Given the positions of the parties, I agree that the issue of the TRP is to be remitted for determination by another officer. Such an order will be made as part of this judgment.

[8] For the reasons that follow, I have determined that the Decision is not reasonable and the application is allowed.

III. **Factual Background**

A. *Historic Background*

[9] The Applicant is a 61 year old citizen of Nigeria. He and a former common-law partner have two adult sons living in Nigeria with whom he is not in touch. He and another woman also had a son, Olaitan, who was born in October 1994. Olaitan lives in Nigeria with the Applicant's mother and sister.

[10] The Applicant attended school in Nigeria and became a junior accountant. He was accepted to attend college, and then university, in the United States of America [USA]. He started his studies in the USA in 1984 and received his Bachelor's Degree in Accounting in 1989.

[11] In 1985, during his academic pursuits in the USA, the Applicant and the woman with whom he had two sons ended their relationship. The Applicant went on to date an American woman who attended his school and whom he married in August of that year. As a result of their

marriage, the Applicant applied for spousal sponsored permanent residence in the USA which was granted on April 15, 1988.

[12] In 1990 the Applicant was convicted in the USA of possessing document making implements with intent to use in the production of false identity documents. The Applicant pleaded guilty and served three months of imprisonment.

[13] In 1991 the Applicant was convicted of a fourth degree sexual offence, touching the breast of his wife's niece. The Applicant pleaded guilty but states now that duty counsel told him to do so as the charge would not result in jail. Although he pleaded guilty, the Applicant denies the assault ever occurred and states it was made up by the niece as she was angry with him for tipping off her mother when she was trying to run away. The charge also resulted in a breach of the Applicant's probation, so he was convicted of this breach and served three months in prison.

[14] In 1994 the Applicant completed a Master's in Management and began work as an accountant in Maryland until 2000. During this period he travelled to Nigeria on occasion and Olaitan was born as a result of one of these trips.

[15] Returning from a trip to Nigeria in January 2000, the Applicant was refused entry to the USA due to his criminal convictions. He spent six months in immigration detention. His American wife was unable to bail him out and he was deported to Nigeria in June 2000.

[16] As a result of his removal, the Applicant went to live with his sister and his son Olaitan in Nigeria. His relationship with his American wife became more of a friendship although they

never formally divorced. The Applicant's American wife unfortunately fell ill shortly after the Applicant's removal and she died in 2010.

B. *Arrival in Canada*

[17] While in Nigeria the Applicant had issues with the police: they accused him of being an Odua People's Congress [OPC] member. The Applicant states that in July 2000 he was held for three weeks until his family paid a bribe for his release. In October 2000 the Applicant states he was again detained by police for concerns of "fake money" and OPC membership. The Applicant's family and friends were able to pay a bribe in December 2000 for his release.

[18] The Applicant then immediately travelled via Antigua to Canada on December 16, 2000. He states that no visa was required to travel from Antigua to Canada.

[19] After arriving in Canada, the Applicant made a refugee claim under a false name because he was concerned he might be sent back to Nigeria if Canadian authorities learned of his immigration and criminal history in the USA. The Applicant states that, other than the false name and lie about using a false passport to enter Canada, everything else he said in his refugee claim was true.

[20] While waiting to have his refugee claim heard, the Applicant lived in Toronto and subsequently moved to Nova Scotia, marrying a Canadian woman on June 8, 2002. After this marriage, the Applicant applied for spousal sponsored permanent residency in Canada. This was rejected in January 2003. The Applicant and this Canadian wife divorced in April 2005.

[21] The Applicant's refugee claim was heard by the Refugee Protection Division [RPD] in October 2004 with the RPD finding that he was a refugee. However in April 2006, a hearing was held to determine if his refugee status should be revoked due to his use of false identity and his non-disclosure of his criminal convictions.

[22] The Applicant's refugee status was revoked June 6, 2006. The Applicant then requested a pre-removal risk assessment which was refused and was followed by an unsuccessful judicial review.

[23] After divorcing his Canadian wife, the Applicant in 2006 started a relationship with a woman from Montreal. In July 2007, she moved in order to live with him. In December 2008, the Applicant again applied for Canadian spousal sponsored permanent residency as a common-law spouse. This relationship broke down in March 2010 when the common-law spouse returned to Montreal after injuring her leg. She notified the Respondent of the relationship breakdown in May 2010.

[24] The Applicant made an H&C application in June 2010. It was refused on August 22, 2012.

[25] The Applicant also submitted a criminal rehabilitation application which was refused in September 2012. Another rehabilitation application was submitted in December 2012 which was refused in October 2015 despite the recommendation of a reviewing officer to the Minister's delegate that it be approved.

[26] The H&C application that is presently before the Court was received by the Respondent on November 16, 2012, with additional updates provided by the Applicant in February and August of 2013 and in May 2016. The factors raised in the H&C application included:

- the Applicant's establishment in Canada (having lived for over a decade in Dartmouth, being involved with the community, the businesses he has created, and the friendships he has made);
- the best interest of his youngest son Olaitan (who relies on his father's income for post-secondary schooling), his two Canadian godchildren (to whom he provides some child care and assistance), and the children in the community (who benefit from the Applicant's community involvement);
- the hardship he would face if returned to Nigeria which he says is both emotional (as he is accustomed to North America from all the years he has lived in Canada and the USA and both he, and his friends, will be affected by his departure) and physical (he is concerned about hardship as he is a Christian). He also fears his perceived ties to the OPC are still a personal risk and he has concerns about inadequate medical services and unemployment causing harm to himself, his son, mother and sister.

IV. **Issues**

[27] Summarising the issues put forward by the parties it is my view that the overall issue is whether the decision is reasonable. Within that, there are 4 sub-issues of whether the Officer's consideration of each of the following was reasonable:

1) the Applicant's prior criminality;
2) the best interests of the children [BIOC];
3) the Applicant's risks if he is returned to Nigeria; and
4) the Applicant's establishment in Canada.

V. **Standard of Review**

[28] On an H&C application the applicable standard of review is reasonableness: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 42-44 [*Kanthasamy*]. In conducting a reasonableness review, the Court should concern itself with whether the decision

was justified, transparent, intelligible, and within the range of possible acceptable outcomes defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*].

[29] If the reasons, when read as a whole, "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16 [*Nfld Nurses*].

[30] In addition, the Officer sitting as an administrative tribunal is not required to consider and comment in their reasons upon every issue raised by the parties. The issue for the reviewing court is whether the decision, when viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc.*, 2012 SCC 65 at para 3.

VI. **The Decision under Review**

A. *Overview of the Decision*

[31] The Officer began by summarising the factors put forward by the Applicant: (1) his establishment in Canada; (2) the BIOC; (3) risk and discrimination if he is returned to Nigeria; and (4) adverse country conditions in Nigeria.

[32] Although the Applicant's Nigerian son, Olaitan, turned eighteen just before the H&C application was filed, the Officer determined that he should be considered under the BIOC because he still resided at home and was attending school full-time. The Applicant's two godchildren in Nova Scotia were also considered with respect to the BIOC.

[33] The Officer determined that the best interests of the three children would be best served by having them remain with their primary caregivers; there was little evidence to show the Applicant was a primary caregiver for any of them. The Officer also found it would be beneficial for Olaitan to be re-united with the Applicant in Nigeria.

[34] The Officer found there was little evidence that the Applicant would be perceived to be a member of the OPC or that the police would be interested in him over 16 years later. It was also found that while Christians do face some discrimination, such occurrences generally happen in the northern part of Nigeria. The Applicant would not be residing there, so it was not a risk that he faced.

[35] Regarding the Applicant's past convictions in the USA, his immigration history, his concealing of his identity to hide his prior convictions, and his two refused criminal rehabilitation applications, the Officer considered the convictions and misrepresentations to be a significant negative factor.

[36] Overall, the Officer found the Applicant had shown significant integration through volunteerism and active participation in his church and community over 16 years and had developed many close friends. He had impacted many families and children in the community in a positive way and the Officer gave that factor considerable weight.

[37] However, after considering the documents submitted and the Applicant's circumstances, the Officer was not satisfied that the H&C considerations justified an exemption from ss 25(1) of the *IRPA.*

B. *Best Interests of the Children*

[38] On the BIOC of the Applicant's youngest son, Olaitan, the Officer found that it was in his best interests to remain in school with the same caregivers in his current setting. The Officer did not accept that Olaitan will be forced to quit school should the Applicant be returned to Nigeria as the Officer found that the Applicant should be able to find work given his education and experience. It is reasonable to expect him to use his savings in the interim period.

[39] The Officer also considered it reasonable for Olaitan to work part-time should he need to assist in the cost of his education and that the Applicant's sister could do the same. Based on all of these considerations, the Officer found that on a balance of probabilities the Applicant returning to Nigeria will benefit Olaitan as he will be reunited with the Applicant.

[40] For the Applicant's two godchildren, the Officer finds their best interests are in remaining in the care of their parents and that the Applicant's removal will not be a significant negative impact as he could maintain contact through other modes of communication.

[41] Generally, for the children in the community, the Officer accepted that the Applicant had positively affected many of these children and their families. The Officer then went on to state that the Applicant's return to Nigeria will not cause a direct negative impact on their best interests as they will still be cared for by their primary caregivers and will continue their education and upbringing in the community.

[42] The Officer concluded that although the Applicant benefitted the community by his charity event and contributions to the community, the best interests of the children in the

community will not be severely compromised upon his removal given there was little evidence that there are not similar events already assisting the children in the community.

C. *Risks*

[43] The Officer found that there is insufficient evidence of risk to the Applicant from his perceived OPC membership, noting his failed PRRA and the overall passage of time of seventeen years since his original claim of police persecution on the basis that he was a member of the OPC.

[44] The Applicant also alleged that he would face personal risk as a Christian in Nigeria. The Officer gave this ground little weight as documents show the situation for Christians is normal in Lagos with relatively few incidents of religious violence and country condition documents show that 50% of the population of Nigeria is Christian.

[45] Regarding other conditions in Nigeria, the Officer found that although there are issues of unemployment, poverty and corruption, there was little evidence to show that the Applicant would face these issues on a balance of probabilities. The Officer supported this finding by noting that the Applicant's skills and extensive work experience would help him with employment and his savings in Canada could act as a safeguard against extreme poverty while he locates employment.

[46] Stating that there is little evidence to show the Applicant will be personally affected by corruption, the Officer also stated that if this is incorrect the state authorities would be able to assist as the documents do not show a complete or serious breakdown of state apparatus.

[47] Finally, concerning possible emotional hardship due to adjustment to Nigeria, the Officer stated that the Applicant will have the assistance of his family in Nigeria and that reunification will benefit him and his family.

D. *Establishment*

[48] On establishment, the Officer outlined and accepted the Applicant's multitude of community involvement and his "many close relationships and friendships of substance and [gave them] positive weight in this regard." The Officer then noted that although it would not be the same, such relationships could continue through other modes of communication. It was added that the Applicant does not have any family in Canada while having his sister, mother, and son in Nigeria.

[49] The Officer found that return to Nigeria may result in a certain level of hardship due to the Applicant's long period of absence but, on a balance of probabilities, the Applicant's work history will assist him in starting a business or finding employment upon his return. The Officer also noted that his family in Nigeria could assist the Applicant in his transition back to Nigeria, observing that little evidence to the contrary was provided.

E. *The Officer's Conclusion*

[50] In conducting an overall assessment, the Officer gave positive weight to establishment. The Officer found that the BIOC will not be impacted in a significantly negative manner for the godchildren and children in the community, while the BIOC of Olaitan was to have his father return to Nigeria to permit reunification.

[51] Hardships as a Christian and perceived OPC membership were given minimal weight due to the evidence, and the Officer found that there is insufficient evidence that the Applicant will personally be affected by the other alleged issues in Nigeria or suffer hardship from them.

[52] The Officer then restated that the past convictions and misrepresentations were significant negative factors. All of this resulted in the Officer concluding they are "not satisfied that the humanitarian and compassionate considerations before [them] justify an exemption under section 25(1) of the *IRPA*."

VII. **Analysis**

[53] I find that the Officer erred in the analysis of the Applicant's criminality and in the BIOC analysis of the Applicant's godchildren and the children in the community. I will limit my analysis to those two areas as each is sufficient to dispose of the application in favour of the Applicant.

A. *The Applicant's Prior Criminality*

[54] The Applicant argues that the Officer looked at his 25-year old criminal history, his 15-year-old immigration offences and his two failed rehabilitation applications but did not assess or determine the likelihood of his reoffending.

[55] The Applicant also argues that he has been reporting regularly to CBSA and has made his best efforts to comply with the legislation since he came clean. He submits that his civil record is clean and that he is genuinely remorseful for his past actions. He has turned his life around and has been a productive member of his community and his church for over 16 years.

[56] The Respondent submits that the Applicant's record is not clean as he worked without authorization from 2006 to 2015 which was half the time he has been in Canada.

[57] The Respondent also submits that judicial review of an H&C application is not the place to consider rehabilitation factors and notes that judicial review was refused for his second rehabilitation application.

[58] I agree that an H&C application is not at all the same as a rehabilitation application. Nonetheless, the Officer did engage in an analysis of the Applicant's criminality and his rehabilitation determining that they were "significant negative factors" in the Officer's assessment of the H&C application. It is therefore necessary to determine whether the Decision, including the criminality and rehabilitation findings, is justified, transparent and intelligible and that the outcome falls within the range of possible acceptable outcomes defensible on the facts and law in light of the record before the Officer.

[59] The Applicant's submissions on rehabilitation were extensive and were supported by a great many letters of support from the community and his church. There was also financial documentation such as bank statements and tax returns in support of him being a good member of the community.

[60] The main arguments made to the Officer in favour of the Applicant's rehabilitation were that the Applicant:

- had lived in Canada for over 16 years, the last 14 years in Dartmouth;
- obtainment of an open work permit in 2015 and regularly reported to the authorities;
- opened, maintained and continued two profitable businesses in Dartmouth;

- was an active member of the Redeem Christian Church in both Nova Scotia and Toronto;
- was also active in the larger community in which he lived by supporting various community events with his time and money including those for under-privileged children and cancer as well as individuals who had experienced misfortune; and
- had expressed contrition and genuine remorse for his past actions.

[61] The Officer's analysis of prior criminality and rehabilitation was very brief. It was based solely on the Applicant's prior convictions and refugee misrepresentations. Importantly, there was no discussion at all of the Applicant's likelihood of re-offending which this Court has found to be the most important factor in considering a rehabilitation application: *Lau v Canada (Citizenship and Immigration)*, 2016 FC 1184 at para 24.

[62] While the Applicant's rehabilitation may not be the most important factor to consider in an H&C application, particularly in light of the two negative rehabilitation decisions, there is no doubt that it was significant to the Officer in this instance. The Officer stated twice that "the applicant's prior convictions in the USA and the RPD's finding of misrepresentation relating to his US immigration history and identity which led up to the vacation of his refugee claim, to be significant negative factors in this assessment."

[63] There is no forward looking analysis by the Officer concerning whether the Applicant's past criminal convictions and his use of a false name to enter the country gave concern that the Applicant is at risk of criminally re-offending. Presumably the Officer relied to some extent on the two negative rehabilitation decisions. But that is not clear as there is no discussion of them other than listing them as part of the Applicant's immigration history.

[64] The same evidence was considered by the Officer in determining the Applicant's establishment in Canada. The Officer specifically accepted that the Applicant had shown:

> . . . [E]xtensive volunteerism, integration into society through active participation in his church community and has made numerous close friendships in his 16.5 years in Canada. . . . has actively coordinated events in his community for under-privileged families and children, and many individuals have benefited from his generosity, as evidenced by letters and thank you cards. I accept that the authors in the letters of support find the Applicant to be of good character and many indicate their great appreciation for the assistance that the Applicant has given them. The Applicant has, undoubtedly, made many close relationships and friendships of substance and I give positive weight in this regard.

[65] In the concluding analysis, the Officer repeated that this evidence was given "considerable positive weight". The Officer did not show how these two factors and other findings such as that the Applicant had "played an integral role" in the personal growth of one of his godchildren and "has been there through every milestone" were balanced against the negative finding on criminality.

[66] The case law allows me to look at the underlying record to assist in determining whether the Decision is reasonable. Here, the underlying record does not assist my review. Neither of the negative decisions by the Minister's delegate is in the record. There is only a reply letter to the Applicant on October 5, 2015 from the reviewing officer who made the positive recommendation. The relevant paragraph states that:

> Your application and supporting documentations have been thoroughly and sympathetically reviewed. Unfortunately, the Director of Operations, C.I.C. Montreal-Island Service, who has the delegated authority to approve rehabilitation, is not satisfied that you are rehabilitated.

[67] No reasons for that conclusion are provided nor are any facts or other details set out. The decision letter advises the Applicant that the effect of the decision is that he remains inadmissible. The reviewing officer's recommendation is also in the record. That the Officer makes no reference to either document leads me to believe that they were not considered to be important as part of the H&C application.

[68] Given the foregoing, coupled with the lack of any discussion by the Officer of how they balanced the positive and negative factors plus the failure to consider the likelihood of the Applicant re-offending, the Decision lacks the necessary justification, transparency and intelligibility to enable me to understand why the Officer made the Decision. Nor does it permit me to determine whether the conclusion is within the range of possible, acceptable outcomes which are defensible on the facts and the law.

[69] As a result, I find the Officer's conclusion on criminality and rehabilitation fails to meet the *Dunsmuir* criteria.

B. *The BIOC*

[70] There is no explicit test that must be followed by an Officer when considering the BIOC so long as the Officer is alert, alive and sensitive to the best interests of the children directly affected and the child's interests are well identified and defined after which they are to be examined with a great deal of attention in light of all the evidence: *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at para 24.

[71] In *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamay*] the Supreme Court conducted a thorough review of how an officer reviewing an H&C

application is to consider the BIOC. It was stated, citing *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699 [*Baker*] that "[a] decision under s 25(1) will therefore be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered": *Kanthasamy*, at para 39.

[72] The BIOC analysis requires that the children's interests be sufficiently considered, well identified and defined and examined with a great deal of attention in light of all the evidence. Decision-makers "must do more than simply state that the interests of a child have been taken into account": Kanthasamy, at para 39. The best interests of a child who is directly affected are to be considered and those interests are "a singularly significant focus and perspective": Kanthasamay at para 40.

[73] The Applicant objects that the Officer considered whether removing him would be a significant negative impact for his godchildren and children of the community, not whether his removal would go against their best interests. In that respect, the Officer accepted that the Applicant shares a close relationship with his godchildren. As an example the following extract from a letter written by the mother of the Applicant's godchildren was cited by the Officer in the Decision:

> Mr. Babafunmi has played an integral role in Tredel's personal growth and has been there through every milestone. For example, he encouraged his mother to enrol Tredel in Beaver Scouts to help him overcome his shyness and speech impediment.
> Mr. Babafunnmi [*sic*] bought him his first bicycle and has contributed financially to his education. The family also depend[s] on him on occasion to pick him up from school when they are unavailable.

[74] Following this extract, the Officer found that the best interests of Tredel were to be cared for and nurtured by their primary caregivers and there was little evidence to suggest that the Applicant is their primary caregiver. The Officer's view was that their best interests would not be significantly negatively impacted by the Applicant being returned to Nigeria and they could strive to maintain their close relationship by other means.

[75] With respect, whether the Applicant is the caregiver, primary or otherwise, is simply not the test. The Officer recognized that the Applicant "played an integral role" in the child's personal growth but failed to articulate or consider whether going forward, that relationship was in the best interests of the godchildren, particularly Tredel.

[76] The Officer considered that the godchildren's best interests would be to be cared for and nurtured by their primary caregivers. That is not in dispute. It also does not negate the integral role and importance that the Applicant has played in the lives of these children.

[77] As the Officer failed to sufficiently consider the best interests of the godchildren as required by *Baker* and *Kanthasamay*, the Decision is unreasonable.

[78] It is not necessary to comment upon the analysis of the Applicant's son, Olaitan other than to say elements of the Officer's analysis are speculative.

VIII. **Conclusion**

[79] The application is allowed. The matter will be returned for redetermination by a different officer.

[80] There is no serious question of general importance arising on these facts.

JUDGMENT in IMM-2887-17

THIS COURT'S JUDGMENT is that:

1. The application, including the issue of whether a TRP shall be issued to the Applicant, is allowed and the matter remitted for determination by a new officer.
2. The Respondent's name is amended to The Minister of Citizenship and Immigration.
3. There is no certified question arising on these facts.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Ali Esnaashari	FOR THE APPLICANT
Sally Thomas	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mamann, Sadaluk & Kingwell LLP Barristers and Solicitors Toronto, ON	FOR THE APPLICANT
Attorney General of Canada Toronto, ON	FOR THE RESPONDENT