Federal Court Cour fédérale

Date: 20211122

Docket: IMM-4818-20

Citation: 2021 FC 1282

Ottawa, Ontario, November 22, 2021

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

OLUWABIYI ISAAC JUBA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant is a citizen of Nigeria and a failed refugee claimant. He sought an exemption under s 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c 27 [IRPA] on humanitarian and compassionate (H&C) grounds on the basis of his establishment in Canada and the best interests of his Canadian born child (BIOC). The H&C Officer found there was insufficient evidence to warrant an exemption. The Applicant seeks judicial review of that decision, dated August 18, 2020.

[2] For the reasons that follow, I am satisfied that the application should be granted. This is solely on the narrow ground that the Officer failed to adequately take into consideration that the relationship between the Applicant and the mother of the child had broken down to the extent that it was unreasonable to expect that she would cooperate in any way with the Applicant's efforts to maintain a relationship with his son from Nigeria. Had the Officer done so, the decision may have been different.

[3] The Applicant came to Canada as a visitor in 2013 and filed a claim for refugee protection. The claim was rejected by the Refugee Protection Division in January, 2014 and an appeal was dismissed a few months later. The Court upheld the Refugee Appeal Division's decision on September 12, 2014. An initial H&C application was denied on December 4, 2018. In the interim, the Applicant married a Canadian citizen with whom he had a child born on January 23, 2017.

[4] Prior to the underlying application being considered, the marriage had broken down to the extent that the Applicant had to seek the assistance of the police to retrieve his belongings from the matrimonial home. Because his wife refused to let him see the child, the Applicant sought an order from the Family Court to have his access rights formally recognized. Pursuant to that order, he was also paying child support.

[5] On the H&C application, the Officer gave the Applicant positive weight for the degree of establishment he had achieved during his six years in Canada. But that evidence did not exceed that which was reasonably expected of individuals residing here. Moreover, the Officer found

that there was insufficient evidence that the Applicant would be unable to economically re-establish himself in Nigeria since he is well-educated and has professional experience in his native country and immediate family members to rely upon.

[6] The Officer found that the Applicant's evidence of his involvement in the child's life was insufficient and that the child would be well looked after by his primary caregiver, the mother if the Applicant returned to Nigeria.

[7] The sole issue on this application is whether the Officer's decision was reasonable applying the level of assessment required by the Supreme Court of Canada in *Kanthasamy v Canada (Citizenship & Immigration),* 2015 SCC 61 [*Kanthasamy*]. The Officer must always be alert, alive and sensitive to the best interests of the child recognizing that such interests must be given substantial weight but are not necessarily determinative of the application: *Rainholz v Canada (Citizenship & Immigration)*, 2021 FC 121 at para 88.

[8] It is well established that an Officer considering an H&C application need not refer to each item of evidence in the reasons for decision. The Officer will be presumed to have considered all of the evidence before him or her: *Ruszo v Canada (MCI),* 2018 FC 943 at para 34 [*Ruszo]*; *Jama v Canada (PSEP),* 2019 FC 1459 at para 17. However, when an Officer is silent on an important piece of evidence, the more willing the Court may be to infer from the silence that the Officer made an erroneous finding of fact: *Ruszo* at para 34.

[9] In the present matter, the behaviour of the child's mother is an important element of the evidence as it goes directly to the question of whether the Applicant would be able to maintain a relationship with the child if required to return to Nigeria. The Applicant explained in his letter accompanying his application that he does not have a good relationship with his ex-wife and that she had threatened him in the presence of the police that he would never see his child again. The Applicant then had to seek access rights from the family court. There is nothing in the Officer's reasons that suggest any consideration was given to this other than a vague statement to the effect that the Officer was "cognizant of the…difficulties in maintaining a parental relationship remotely."

[10] In many cases of family separation, it may be reasonable to assume that a deported parent will be able to maintain contact with a child remaining in Canada through the use of technology or periodic visits. This is not one of them. For that reason, the application must be granted and returned for reconsideration.

[11] No serious questions of general importance were proposed and none will be certified.

JUDGMENT IN IMM-4818-20

THIS COURT'S JUDGMENT is that the application is granted and the matter is remitted for reconsideration. No questions are certified.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4818-20
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APPEARANCES:

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