Federal Court  Cour fédérale

Date: 20230118

Docket: IMM-3933-21

Citation: 2023 FC 78

Ottawa, Ontario, January 18, 2023

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

JOY AMEHNAWOH OMOMOWO
OLUWATENIOLA OSARIEMEN OMOMOWO (A MINOR)
OLUWATONILOBA OSARETIN OMOMOWO (A MINOR)
OLUWATITO OSAMAGBE OMOMOWO (A MINOR)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of a Senior Immigration Officer [Officer], dated May 21, 2021 [the Decision], in which the Officer refused the Applicants'

application for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds.

[2] As explained in greater detail below, this application is dismissed, because the Applicants' arguments do not undermine the reasonableness of the Decision.

II. **Background**

[3] The first Applicant named above [Principal Applicant] is a 32-year-old woman who is a citizen of Nigeria. The other three Applicants are her children who are also citizens of Nigeria. The Principal Applicant has a fourth child, a Canadian citizen, who is not an Applicant but whose circumstances are relevant to the underlying H&C application.

[4] The Applicants arrived in Canada in September 2017 and subsequently applied for refugee protection. Their application was refused by the Refugee Protection Division and the Refugee Appeal Division in 2018 and 2019 respectively, and their application for judicial review was subsequently dismissed by this Court. The Applicants have not returned to Nigeria following their arrival in Canada.

[5] The Principal Applicant is the sole caregiver of her four minor, dependent children. She holds a bachelor of science degree from Mumbai University and was previously employed as a communications officer in Nigeria.

[6] The Principal Applicant and her now estranged spouse, who is the father of the four children, separated in December 2019. Since that time, the estranged spouse has not provided financial support. The Principal Applicant asserts that she was the victim of domestic abuse from 2016 until her separation from her spouse.

[7] In December 2020, the Applicants submitted the H&C application that is the subject of this application for judicial review.

III. **Decision under Review**

[8] The Applicants based their H&C application on establishment, hardship associated with adverse country conditions in Nigeria, and the best interests of the children [BIOC].

[9] In relation to establishment in Canada, the Officer gave some positive weight to the fact that the Principal Applicant attends church, that she does not have a criminal record, that she has made friends and built relationships within her community, and that she provides good care to her children. However, the Officer gave negative weight to the fact that she has not been employed, that she is currently receiving social assistance, and that she provided very little evidence regarding her establishment and extracurricular activities. Weighing the totality of the available information, the Officer found that establishment merited some favourable consideration.

[10] Turning to hardship, the Officer noted that adverse country conditions are assessed on a forward-looking basis and that a successful H&C application requires that the associated hardships asserted by an applicant be personalized. In assessing hardship, the Officer analysed immigration options and the country conditions in Nigeria.

[11] With respect to immigration options, the Officer found that little explanation was provided as to why the Principal Applicant was not covered by existing legislation, and that there was no great hardship associated with waiting until the Principal Applicant qualified as a permanent resident under another available process.

[12] On country conditions, the Officer accepted that Nigeria faces higher rates of violence, poverty, discrimination, gender-related issues, child marriage, child trafficking and child abuse. However, the Officer noted that these are general country conditions that impact all populations of Nigeria and that there was little personalized evidence provided as to how and why the Applicants would be personally impacted by these hardships. As such, the Officer assigned low levels of hardship to these considerations.

[13] The Officer also acknowledged that the Principal Applicant claimed that her children witnessed abuse she sustained at the hands of her spouse and that she continues to fear mistreatment and hardship in Nigeria due to the abuse by her estranged spouse. However, the Officer noted that the spouse is no longer in the Applicants' lives, is estranged from them, and currently resides in Canada. The Officer also noted there was little evidence provided that the Principal Applicant's estranged spouse continues to seek out the Principal Applicant to cause

harm. Given that hardship is assessed on a forward-looking basis, the Officer assigned a low level of hardship to this consideration.

[14] The Officer further found there to be little evidence to substantiate the Applicants' submissions that they had no realistic support system in Nigeria and that they had no real prospects for employment, medical services or other benefits. The Officer noted that the Principal Applicant is highly educated, that she had been employed for a number of years in Nigeria, and that there was no indication that any of the Applicants had any medical conditions that require professional care. The Officer also noted that the Applicants' immediate and extended family continues to reside in Nigeria, and that there was no evidence that the Principal Applicant previously had issues in accessing education, employment, medical services or any other benefit in Nigeria. In light of this, a low level of hardship was attributed to these considerations.

[15] The Officer also found there to be a low level of financial hardship. While the Applicants submitted that they do not hold any title to property and do not possess any assets in Nigeria, the Officer found there to be very little evidence to demonstrate this. The Officer also took into account that the Principal Applicant had lived in Nigeria for most of her life and did not indicate that she or her family lived in poverty. While the Officer acknowledged that there may be some temporary financial hardship until the Principal Applicant found adequate employment in Nigeria, the Officer did not find this to pose unreasonable hardship given that the Principal Applicant's family resides in Nigeria.

[16] Finally, while the Principal Applicant argued that her lack of transferable skills and her lengthy absence from Nigeria would cause a cultural dissociation, the Officer found little evidence to substantiate these submissions.

[17] The Officer found there to be insufficient evidence to support that any of the Principal Applicant's relationships in Canada were the sort characterized by a degree of interdependency and reliance that would result in challenges if separation were to occur. Alternatively, even if there was hardship experienced due to physical separation, the Officer found that this hardship could be somewhat alleviated by the ease with which relationships could be sustained by using electronic communication.

[18] Finally, the Officer assessed the BIOC. The Officer found that Canada generally offers better living conditions and future opportunities for the children, and that it would therefore be in their best interests to stay in Canada and that their interests are served by remaining with their mother. However, the Officer also noted that the children have rights to citizenship in Nigeria, that they would be returning to family members, and that children are highly adaptable and can adjust quickly to new environments. The Officer also considered that the children would have opportunities to return to Canada in the future, if they so wish, through various immigration processes.

[19] While accepting that the children have some degree of establishment in Canada, the Officer was not satisfied that they were so integrated into Canadian society, or that the country

conditions in Nigeria were so bad for their particular situation, that accompanying their mother to Nigeria would greatly compromise their well-being.

[20] In conducting a global assessment, the Officer found that while the Applicants had some positive establishment, this was itself insufficient to grant relief based on H&C grounds. The Officer also found that the country conditions in Nigeria did not present an exceptional difficulty to the Applicants based on their personal circumstances. Finally, the Officer noted that the weight accorded to the BIOC was not sufficient to justify an exemption, as there was insufficient evidence demonstrating a negative impact on the children if the Applicants leave Canada.

[21] As such, the Officer was not satisfied that the relevant considerations justified an exemption on H&C grounds and therefore refused the application.

IV. **Issues**

[22] Taking into account the parties' respective written submissions, I consider the following articulation of the issues by the Respondent to represent an appropriate framework for analysis of the arguments raised in this application:

A. Whether the Officer's assessment of the Applicants' establishment in Canada is reasonable;

B. Whether the Officer reasonably assessed the Applicants' evidence of hardship;

C. Whether the Officer reasonably assessed the best interests of the children; and

D. Whether the Officer imposed an excessive burden of proof on the Applicants.

[23] As suggested by this articulation of the issues, the standard of review applicable to these issues is reasonableness.

[24] At the hearing of the application for judicial review, the Applicants' counsel raised an additional issue. He advised that he had just identified that the Certified Tribunal Record [CTR] in this matter does not include six pages of documentation that are included in the Application Record as material that was submitted to the Officer in support of the H&C application. The Applicants' counsel took the position that the absence of this material from the CTR demonstrates that it was not considered by the Officer, giving rise to a reviewable error.

[25] The Respondent's counsel explained that the Applicants' counsel had raised this issue with him only in the moments before the commencement of the hearing. The Respondent's counsel took the position that the Respondent was therefore prejudiced in having had no opportunity to investigate and respond to the new issue. I advised counsel that I would hear their oral arguments on the new issue and subsequently consider, and address in my decision in this application, whether it was appropriate for the Court to take the new issue into account. My analysis below begins with this question.

V. **Analysis**

A. *New Issue*

[26] In my view, the appropriate disposition of the new issue turns on the principle explained as follows in *Abdulkadir v Canada (Citizenship and Immigration)*, 2018 FC 318 [*Abdulkadir*] at paragraph 81:

> 81. At the hearing of this application before me, the Applicant raised an issue based upon the RPD's finding that the Applicant and her parents fall into "the secondary category" under the 2004 Directive of the Ethiopian government referred to in the Decision. Respondent's counsel correctly pointed out that this issue had not been raised in written submissions, he was not in a position to deal with it, and the Court should not consider it at this stage. In reply, Applicant's counsel did not take issue with the Respondent's position. The jurisprudence of this Court is that, unless the situation is exceptional, new arguments not presented in a party's Memorandum of Fact and Law should not be entertained as to do so would prejudice the opposing party and could leave the Court unable to fully assess the merits of the new argument. See *Del Mundo v Canada (Citizenship and Immigration)*, 2017 FC 754 at paras 12-14 [*Del Mundo*]; *Mishak v Canada (Minister of Citizenship and Immigration)* (1999), 1999 CanLII 8579 (FC), 173 FTR 144 (TD). Here the Applicant has made extensive arguments about the reasonableness of the RPD's findings related to her parents' identity cards, the interpretation of Dr. Campbell's reports, and the application of the Chairperson's Guidelines. The argument that she and her parents do not fall into the "secondary category" under the 2004 Directive is not simply a more "fleshed out" version of these arguments and would not justify the exception allowed in *Del Mundo*. The Respondent would be prejudiced by the Court entertaining the Applicant's new argument at this late stage and the Court therefore declines to consider this line of argument.

[27] As the Respondent's counsel submits, the Applicants' counsel has been in possession of the CTR for over four months and had ample opportunity to identify and raise an issue surrounding missing documentation. With this issue raised for the first time at the commencement of the hearing, the Respondent would be prejudiced by the Court entertaining this new issue.

[28] I find nothing exceptional about the circumstances in this case that would justify a departure from the principle explained in *Abdulkadir*. I also find no merit to the Applicants' argument that the Respondent's counsel also failed to identify that documents found in the Application Record are not included in the CTR. In addition to it being the Applicants who wish to raise at the last minute a new issue in support of their position in this application, it is also the Applicants' application for judicial review. The onus was therefore on them to identify the issue with the CTR.

[29] I therefore decline to consider the new issue and will turn to the other issues in this application.

B. *Whether the Officer's assessment of the Applicants' establishment in Canada is reasonable*

[30] The Applicants argue that the Decision demonstrates dissonance in the Officer's assessment of their H&C submissions. They note that the Officer afforded positive consideration to certain establishment factors but argue that the Officer erred in arriving at an unreasonably

modest conclusion as to how much weight to afford to establishment and in ultimately refusing their application. The Applicants argue that their submissions satisfied the requirements for a positive H&C decision.

[31] I agree with the Respondent's argument that, while the Applicants' establishment was given positive weight, such a conclusion is not determinative of the outcome of an H&C application, as an officer must weigh this factor along with others in arriving at a discretionary decision (see, e.g., *Hsu v Canada (Citizenship and Immigration)*, 2017 FC 1168 at para 5). The Applicants' position amounts to a request for the Court to reweigh the evidence and reach a conclusion different from that of the Officer, which is not the Court's role in judicial review (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 125).

C. *Whether the Officer reasonably assessed the Applicants' evidence of hardship*

[32] The Applicants argue that the Officer erred by considering whether they may have means of seeking permanent resident status other than through H&C relief, a consideration that the Applicants submit is extraneous to an H&C analysis. I disagree with the Applicants' position. As demonstrated by *Goraya v. Canada (Citizenship and Immigration)*, 2018 FC 341, an officer conducting an H&C analysis does not fall into error when considering an applicant's eligibility for other avenues to permanent residence, as H&C relief is not intended to serve as an alternative path to immigration (at paras 15-16).

[33] Also in connection with the hardship analysis, the Applicants argue that the Officer erred in finding that they failed to particularize the hardship they would experience as a result of adverse conditions in Nigeria. They submit that such a requirement would unreasonably create the need for them to re-litigate aspects of their failed refugee claims. I find nothing unreasonable in this aspect of the Officer's analysis. As Justice McHaffie explained in *Browne v Canada (Citizenship and Immigration)*, 2022 FC 514 at paragraph 48, it is not an error for an officer to conclude that an applicant has not adequately established a link between adverse country condition evidence and their own situation.

D. *Whether the Officer reasonably assessed the best interests of the children*

[34] In challenging the reasonableness of the BIOC analysis, the Applicants note the Officer's conclusion that it would be in the best interests of the Principal Applicant's children to stay in Canada. The Applicants submit that the Officer therefore arrived at an irrational conclusion in rejecting their application.

[35] Again, this argument does not undermine the reasonableness of the Decision. As the Respondent submits, it is trite law that a favourable BIOC conclusion is not determinative of an H&C application (see, e.g., *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at paras 37-38; *Mebrahtom v Canada (Citizenship and Immigration)*, 2020 FC 821 at paras 18-19). Moreover, as the Respondent notes, the Decision discloses an analysis of factors underlying the Officer's conclusion that the children's well-being and development would not be significantly negatively impacted by moving to Nigeria.

E. *Whether the Officer imposed an excessive burden of proof on the Applicants*

[36] Finally, the Applicants submit that the Officer imposed an excessive burden of proof upon them. In advancing this argument, they reference the Officer's conclusion, in relation to country conditions in Nigeria that personally affect the Principal Applicant, that those conditions do not represent an exceptional difficulty for her and that she could re-establish herself in Nigeria to a level where she can support herself and her children. The Applicants submit that, in arriving at these conclusions, the Officer failed to give due consideration to their supporting evidence, which they argue demonstrates how they would be affected by conditions in Nigeria.

[37] In my view, the Applicants' argument again amounts to a disagreement with the Officer's weighing of the evidence and does not support a conclusion that the Decision demonstrates application of an erroneous burden of proof or any other reviewable error.

VI. **Conclusion**

[38] Having considered the parties' arguments, I find that the Decision is reasonable and that this application for judicial review must be dismissed. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT in IMM-3933-21

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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