Date: 20080222

Docket: IMM-1493-07

Citation: 2008 FC 240

Ottawa, Ontario, February 22, 2008

PRESENT: The Honourable Barry Strayer, Deputy Judge

BETWEEN:

KEZIA AFOCHA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] This is an application for judicial review of a decision of March 26, 2007 rejecting the Applicant's request for an exemption on humanitarian and compassionate grounds to allow her to apply for permanent residence status from within Canada.

Facts

[2] The Applicant is a citizen of Nigeria. She is now 75 years old. Her husband died in 1966. In 2003 she applied in Nigeria for a visitor's visa to Canada. In that application she said that she had six children, five of whom lived in Nigeria and one daughter living in Canada. Her application indicated that she lived with a daughter in Nigeria. She obtained a visa and arrived in Canada as a temporary resident on December 22, 2003. Since then she has lived with her daughter, Azuka and her grandson, Victor. Azuka's husband does not live with them. Azuka, a Canadian citizen, has been in Canada since 1989, married here, and gave birth to her son Victor here. She is now 51 years old and is unable to work. She receives an income of some $20,000.00 a year due to her injuries from work, paid by the Workplace Safety and Insurance Board. She has tried to sponsor her mother for permanent residence but was deemed not to have sufficient income to support herself, her mother, and her son. There was material on file which was before the Immigration Officer showing that the Applicant's niece, a medical doctor in the United States, assists her aunt and cousin financially and has indicated in a letter that she intends to continue to do so. The Applicant also has a nephew in Canada who contributes to her support.

[3] The Applicant applied for an exemption on humanitarian and compassionate grounds so as to be able to apply for a permanent residence from within Canada. Her application information did not coincide in all respects with the information she had provided in Nigeria in order to obtain a visitor's visa. In her H&C application she only mentioned having one son in Nigeria and said that she had lived alone in Nigeria. She said:

> I am currently receiving treatment here. It will be impossible to go back to Nigeria to apply for a perment (*sic*) resident.
> I am in pain and need this medical treatment. I have no one to take care of me back home. I am old and need my daughter around. I would also like to spend more time with my grandson and daughter.

Accompanying the application was a letter from her daughter, Azuka, supporting her mother's request. She confirmed that her mother was being supported by herself and by her niece and nephew in the United States and Canada. She went on to say:

> While staying with us, my mother has emotionally and physically been strengthened over the period. The relationship has benefited both of us, as we rely on each other so much in all respects. If my mother is to return to Nigeria and have her paper processed from there, the void created by loneliness will affect her health so much that she might not live to see her application to its completeness.
>
> Our 'new family' (my mother, son and myself) will be disrupted and this would be tough for my son since he has already experienced the bitterness of a broken home.

The Applicant's grandson also wrote a letter as follows:

> My name is Victor Oladunjoye. Before my grandma came here to Canada; I didn't know what having a grandma is all about. In fact, I didn't now what having a grandparent was about since I have met her once. But since she is in Canada, I love her more every day, especially since my father doesn't live in our home. The only family I have here with me is my mother and grandma. When I get home from school, she's always there to make something for me to each because my mother is not felling well. If she has to leave, it would leave a big gap in the family and it would be very heartbreaking. I have come to grow to love her and relate to her. I would be very unbearable to me if she had to leave.

There are other letters attesting to her membership, and volunteer work, in her church and with respect to other volunteer work and participation in community activities.

[4] In her consideration of the application, the Immigration Officer noted the discrepancies in facts as between the earlier application for a visitor's visa and the application for humanitarian and compassionate consideration. She had asked for a clarification of these matters and the Applicant had provided none. She took note of the medical evidence and interpreted it as indicating conditions that were "minimal; mild". With respect to family relationships, she said only this:

> I recognize that the Applicant has redeveloped a relationship with her daughter in Canada; as well she has developed a bond with her 15 year old grandson since her arrival here in Dec '03. This daughter came to Canada in 1989 and was granted PR status in 1996. There is no indication that the Applicant has previously visited Canada or that the daughter has visited Nigeria since 1989. I recognize that the Applicant may help out with chores and other duties in her daughter's home. However, I am not satisfied, based on the information before me that the daughter would not be able to manage on her own, with the assistance of her 15 year old son if need be.

She concluded by saying she was not satisfied that the Applicant would be unable to return to Nigeria to reside with one of her five children while making her application for permanent residence from there. She therefore dismissed the application.

[5] The Applicant asks that that decision be set aside on the basis that it failed to assess properly the best interests of the Canadian child, that is the Applicant's grandson, Victor; and that the Officer failed to assess the totality of the evidence.

Analysis

[6] The jurisprudence has affirmed that the standard of review for decisions on humanitarian and compassionate applications should normally be reasonableness and I see no reason to depart from that in this case.

[7] These decisions are made under subsection 25(1) of the *Immigration and Refugee Protection Act* which provides that the Minister may grant an exception if the Minister

… is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	… s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

It will be noted that the best interests to be taken into account are those of "a child directly affected". It is not confined to the children of an applicant: *Momcilovic v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 100 at para. 45. Thus the Immigration Officer was obliged to take into account the interests of the Applicant's grandson, Victor, when those were brought to her attention.

[8] Counsel for the Respondent relied on a Federal Court of Appeal decision, *Owusu v. Canada (Minister of Citizenship and Immigration)*, [2004] 2 F.C.R. 635 where the Court upheld a decision of an immigration officer refusing an H&C application. It had been argued that the officer had not given adequate consideration to the best interests of the applicant's children. The Court reviewed

the jurisprudence in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 75 where it was said that an officer considering an agency application must be "alert, alive and sensitive" to the best interests of children. It said however, that this duty only arises when it is sufficiently clear that an application for a favourable H&C consideration relies on this factor, at least in part. The Court held that the application in question in that case had not adequately and clearly raised the issue of the best interests of the children. In that case the only reference to the children in the 7-page letter was the following:

> Should he be forced to return to Ghana [Mr. Owusu] will not have any ways to support his family financially … .

The Court found this "too oblique, cursory and obscure" to impose an obligation on the officer to inquire further about the best interests of the children. With respect I believe the present case can be distinguished on its facts. Here, there were letters from both the Applicant and her daughter referring to their own potential hardship but also referring to the relationship between the Applicant and her grandson. The grandson himself wrote a letter completely devoted to the value of his relationship with his grand-mother. In my view, the issue is clearly raised and documented. But the only consideration of this in the Officer's reasons was part of a sentence where she said that:

> I recognize that the Applicant … has developed a bond with her 15-year-old grandson since her arrival here in Dec. '03.

I do not consider this to demonstrate that the Officer was "alert, alive and sensitive" to the grandson's interests. She devotes far more attention to the discrepancies between the visa application and the H&C application. While those remained unexplained, they do not have much to do with the humanitarian and compassionate issues raised by sending a 75-year-old woman, who

can be readily supported by her family in North America, back to Nigeria to make an application, thus severing the relationship she has developed with her grandson (a grandson she had never known before) over the last four years. While I accept that it is for the Minister's representative to weigh the various factors, it is not clear in this case what factors of public policy militated against the interests of the grandson.

[9] While the Applicant also contends that the Officer failed to consider all the evidence, I do not think the medical evidence was compelling or that the Officer erred in not giving it a greater significance, I do however conclude that she failed to take into account the best interests of the grandchild.

Disposition

[10] I will therefore set aside the decision of March 26, 2007 and refer the matter back to the Minister for reconsideration by a different officer in accordance with these reasons. Counsel did not request that any questions be certified and none will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The decision on behalf of the Minister of March 26, 2007 refusing the Applicant's request for an exemption on humanitarian and compassionate grounds be set aside and the matter be referred back to the Minister for reconsideration by another officer in accordance with the reasons herein.

"B.L. Strayer"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1493-07
STYLE OF CAUSE:	**KEZIA AFOCHA** **and** **THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Toronto
DATE OF HEARING:	February 14, 2008
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