Date: 20081008

Docket: IMM-1554-08

Citation: 2008 FC 1133

Ottawa, Ontario, October 8, 2008

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

DOROTHY OGECHI OKOYE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Dorothy Ogechi Okoye is a citizen of Nigeria who came to Canada in January 2004 and submitted a refugee claim. After her refugee claim was rejected, Ms. Okoye applied for permanent residence from within Canada on humanitarian and compassionate grounds. A pre-removal risk assessment officer (officer) rejected that claim because the officer was not satisfied that sufficient humanitarian and compassionate grounds existed to warrant a positive exercise of discretion. This application for judicial review of that decision is allowed because the officer erred in law in two respects. First, the officer erred in law by not assessing the relevant facts against the test of unusual

and undeserved or disproportionate hardship. Second, the officer erred in law by failing to demonstrate that the best interests of Ms. Okoye's three-year-old daughter, Bianca, were properly considered.

[2] The officer concluded that Ms. Okoye and her daughter do not "face hardship that would be unusual and undeserved or disproportionate in terms of personalized risk" if Ms. Okoye is returned to Nigeria for the following reasons:

- Ms. Okoye failed to submit corroborative evidence to rebut the finding of the Refugee Protection Division (RPD) that it was not credible that she was being forced into an arranged marriage. The RPD considered that Ms. Okoye was a well educated woman of Ibo ethnicity who lived in a large urban center, and it assessed her claim against documentary evidence which the RPD viewed to be reliable.
- Ms. Okoye identified new risks not considered by the RPD. They were the risk that Bianca would be forced to undergo female genital mutilation (FGM) and the risk that, by Ibo custom and tradition, custody of Bianca would be given to her father. As Ms. Okoye is estranged from Bianca's father, she fears that she would not have access to Bianca if she returns to Nigeria with Bianca. With respect to the first risk, there was insufficient evidence of personalized risk to Bianca. Ms. Okoye, as her mother, could resist the demand for the traditional cultural right of FGM.
- As well, an internal fight alternative existed because Ms. Okoye could relocate to another part of Nigeria where family members who are pressuring for Bianca to undergo FGM would not be able to trace them.

- With respect to the second new risk, insufficient evidence was submitted to corroborate the claim that Bianca's father was demanding custody of her.
- There was insufficient evidence to establish that Ms. Okoye and her daughter would face hardship that is unusual and undeserved or disproportionate in terms of personalized risk if Ms. Okoye returns to Nigeria.
- The officer was not satisfied that Ms. Okoye is established in Canada to a degree where she would suffer unusual, underserved or disproportionate hardship should she return to Nigeria.
- Ms. Okoye would not encounter undue, undeserved or disproportionate hardship in rebuilding her life in Nigeria because of her education, her employment experience in Nigeria, and the skills she acquired in Canada.

Standard of Review

[3] For the reasons given in *Zambrano v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 601 at paragraph 30, the question of whether the officer applied the correct tests in assessing the humanitarian and compassionate claim is a question of law, reviewable on the standard of correctness.

Did the officer assess the facts against the wrong test?

[4] It is settled law that on an application such as Ms. Okoye's, the officer was obliged to consider whether the requirement that she apply for permanent residence from abroad would cause her unusual and undeserved or disproportionate hardship. The fact an officer quotes the correct test

in her reasons does not conclusively establish that the correct test was applied. See, for example, *Rebaï v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 43 (F.C.), and the authorities cited therein.

[5] In the present case, the officer did refer to the correct test on a number of occasions. However, for the following reasons, I am satisfied that the officer applied the wrong test.

[6] First, on at least three occasions the officer considered whether the evidence established "personalized risk". On two occasions, the officer equated unusual and undeserved or disproportionate hardship with personal risk.

[7] Second, distilled to its essence, the officer's decision is that there is insufficient evidence to establish any risk of forced marriage or loss of custody. With respect to the risk of FGM faced by Bianca, her mother could refuse and could also relocate in Nigeria.

[8] Missing, however, from the officer's analysis is any consideration of what, if any, hardship would be entailed if Ms. Okoye, a single mother, rejected her family's demand for compliance with their tradition and/or moved to a place where her family could not find her. Consideration of the consequences of these actions was particularly required when the country condition documentation otherwise relied upon by the officer reported that: women experience considerable economic discrimination in Nigeria; unmarried women in particular endured many forms of discrimination; and, women overall remain marginalized.

[9] The officer's finding of the existence of an internal flight alternative would be, with respect, deficient in the context of a refugee claim because the officer neither specifies its location, nor considers the reasonableness of requiring Ms. Okoye to settle in that location. Consideration of those factors was equally required in the context of this humanitarian and compassionate application.

[10] In sum, while the officer recited the correct legal test, she did not apply it.

Did the officer fail to properly consider the best interests of Ms. Okoye's three-year-old daughter?

[11] Subsection 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, imposes a statutory duty on the officer to consider the best interests of Bianca. As a matter of law, Bianca's best interests are determined by considering the benefit to her of her mother's non-removal from Canada, as well as the hardship Bianca would suffer should she return to Nigeria with her mother.[1] The officer's task is to determine, in all the circumstances, the likely degree of hardship to Bianca caused by the removal of her mother, and to weigh this degree of hardship together with other factors that militate in favour of, or against, the removal of Ms. Okoye. See: *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, [2003] 2 F.C. 555 at paragraphs 4 and 6 (C.A.).

[12] At the same time, the best interests of a child are not determinative of their parent's status. See: *Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] 4.F.C. 358 at paragraph 12 (C.A.). Further, it is incumbent on an applicant to raise, and to support with evidence, any

specific issue said to give rise to unusual and undeserved or disproportionate hardship. See: *Ahmad v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 814 (F.C.).

[13] In the present case, Ms. Okoye expressly raised Bianca's best interests in her humanitarian and compassionate application, and provided medical evidence from Bianca's pediatrician that she requires treatment for acute asthma attacks. This distinguishes the decision of *Ahmad*, referred to above, where it was not clear that the parents raised as an issue their children's best interests.

[14] The officer's reference in her reasons to Bianca was almost passing in nature. While the officer referred to the doctor's letter, Bianca's medical needs were not mentioned in the analysis portion of the officer's reasons. In that analysis, the officer's consideration of Bianca consisted solely of finding no personal risk of FGM and the following paragraph:

> Bianca is only three years old. She has not started formal school education. I do not find there is sufficient evidence to establish that the applicant and her daughter face hardship that would be unusual and undeserved or disproportionate in terms of personalized risk if the applicant is to be returned to Nigeria.

[15] The officer does not address how Bianca's interests will be affected by her mother's departure from Canada, does not address what hardship Bianca would face in Nigeria and does not address Bianca's best interests. This analysis was particularly required when country condition documentation otherwise relied upon by the officer reported that in Nigeria public schools are substandard, and many children do not have access to education. In many parts of the country, girls are discriminated against in access to education. The literacy rate for women is 41% and only 17% of girls receive complete immunization from childhood diseases.

[16] It follows that the officer failed to properly consider Bianca's best interests. By so conducting her assessment, the officer erred in law.

[17] For these reasons, the application for judicial review will be allowed. Counsel posed no question for certification, and I agree that no question arises on this record.

1. In this case, there was no suggestion that Bianca, a Canadian citizen, would remain in Canada.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed and the officer's decision of February 21, 2008 is hereby set aside.

2. The matter is remitted for redetermination by a different officer.

"Eleanor R. Dawson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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