Federal Court		Cour fédérale

Date: 20100616

Docket: IMM-5687-09

Citation: 2010 FC 652

Toronto, Ontario, June 16, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

NIKE OKAFOR
SYDNEY JUNIOR OKAFOR (Minor)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of the decision of a Pre-Removal Risk Assessment Officer (the Officer) where Nike Okafor and Sydney Junior Okafor's application for

permanent residence from within Canada on humanitarian and compassionate (H&C) grounds was refused.

[2] At the beginning of the hearing, the parties agreed that the name of the minor should be spelled “Sydney” instead of “Sidney”.

[3] The Applicant’s claim for refugee protection was denied on June 2, 2005 on the ground of credibility issues. In early 2006, she submitted a permanent resident application on the basis of H&C grounds. On July 9, 2009, a negative risk opinion was rendered regarding the risk allegations made in the H&C application. The H&C application was refused on August 26, 2009 and is the subject of this judicial review.

[4] Review of decisions on H&C applications is to be held to the reasonableness standard (*Kisana v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, (2009), 392 N.R. 163 at paragraph 18). The Court looks to the justification, transparency and intelligibility of the decision and whether it falls within the range of acceptable outcomes defensible on the facts and in law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 47). As to procedural fairness, the standard of review is correctness (*Soares v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 190, 308 F.T.R. 280).

[5] The Applicant submits that the Officer failed to be alert, alive and sensitive to the best interests of the children in this case. She argues that he simply listed facts and made a hasty conclusion instead of considering the benefit of her non removal from Canada and the hardships

that Praise (the Applicant's second son, born in Canada) would suffer from either her removal or from a voluntary departure to accompany her. The Applicant further contends that the Officer erred by not considering the issues of culture and adaptation required of the children in Nigeria.

[6] In *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2003] 2 F.C. 555, the Federal Court of Appeal held that an officer assessing the best interests of a child should usually assess the degree of hardship that is likely to result from the removal of its parents from Canada and then to balance that hardship against other factors that might mitigate their removal. Furthermore, it was held that an officer is presumed to know that living in Canada will generally provide children with many opportunities that are not available to them in other countries and that residing with their parents is generally more desirable than being separated from them (paragraphs 4 to 6).

[7] The Applicant argues that the Officer failed to conduct an analysis of the kind prescribed in *Hawthorne*. I disagree; the Officer gave adequate consideration to the best interests of the children in this case and the decision is reasonable in this regard.

[8] The Officer's reasons show that he assessed the necessary factors, for example – he recognizes that the Applicant is the sole caregiver of the children and that their father is deceased. He also notes that it would be in the best interests of the children to remain with their mother wherever that might be and that the Applicant indicated that she will act in the best interests of her children and that she is devoted to their care. However, the Officer finds that very little information

was submitted to show that the children would be without the proper care or support required to meet their basic needs. The Officer also discusses the relation between these factors and others. It is true that an Officer must be alert, alive and sensitive to the best interests of the children but he need not treat this as the only determinative factor.

[9] With regard to the question of the required cultural adaptation required of the children in Nigeria, I would first note that the Officer found that both children are of an age where they can adapt to changes as long as they have their mother to care and guide them. Furthermore, the Applicant's H&C submissions do not detail particular concerns on this issue; they only say that the children do not know Nigeria.

[10] The Applicant also submits that the Officer breached the duty of fairness owed to her as he failed to take into consideration the rebuttal response to the risk opinion. She admits that this response was filed after the deadline to do so but claims that she responded long before the decision on her application was received (at paragraph 5 of her affidavit, she states that she received the final decision on October 19, 2009) and that her response to the risk opinion should have been considered.

[11] The Respondent counters that the Applicant has admitted that her response was dated September 9, 2009, which was a full two weeks after the H&C application was decided. In its further memorandum of argument, the Respondent argues that the doctrine of *functus officio* prevents the consideration of new evidence once the tribunal has made a final decision and that it

does not matter that the Applicant responded to the risk opinion before she received the final decision on the H&C application.

[12] At the hearing, the Respondent suggests that there is no need to apply the doctrine of *functus officio* to dismiss the present application because the evidence adduced in the rebuttal response from the Applicants was outdated or irrelevant.

[13] I note that the position advanced by the Respondent on the doctrine of *functus officio* is at odds with the recent decision of Justice Mactavish in *Kurukkal v. Canada (Minister of Citizenship and Immigration*), 2009 FC 695, 347 F.T.R. 60 where it was held that *functus officio* does not apply to H&C decisions. The Respondent argues that the correct approach is set out in the Supreme Court of Canada's decision in *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848.

[14] A question was certified on the issue of *functus officio* in *Kurukkal* but has yet to be addressed by the Federal Court of Appeal.

[15] I have reviewed the additional documents enclosed with the September 9, 2009 letter from the Applicants' counsel (Applicants' record, pages 134 to 164) and I must say that numerous articles are outdated and those that post date the risk opinion of July 9, 2009 are practically the same to the ones (Applicants' record, documents submitted, page 17) analyzed and considered by the Officer.

[16] Therefore, I conclude that there was no breach of procedural fairness even if the Officer could have considered the Applicants' rebuttal.

[17] Though the Court has sympathy for the Applicant's situation, it is not its role to substitute its own assessment over the Officer's on the H&C application.

[18] No question for certification was submitted and none arises.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed. No question is certified.

"Michel Beaudry"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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