Federal Court  Cour fédérale

Date: 20110614

Docket: IMM-4836-09

Citation: 2011 FC 692

Ottawa, Ontario, June 14, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

EMMANUEL MIKE MBAKWE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), for judicial review of a decision by an immigration officer (Officer), dated 5 May 2008 (Decision). The Officer refused to grant the Applicant's application for permanent residence based on humanitarian and compassionate (H&C) considerations.

BACKGROUND

[2] The Applicant is a 57-year-old citizen of Nigeria. He came to Canada on 24 April 2000 and made a claim for refugee protection based on a well-founded fear of persecution by reason of his religion. He is a Christian. He grew up in Owerri. He claims that his father was the chief priest of a pagan group which practised ritual sacrifices. When his father died in 1988, the Applicant was expected to succeed him but he refused to do so. This decision was highly unpopular with his mother and other elders of the religious community.

[3] The Applicant claims that, in 1990, he moved to Kaduna and opened a Christian bookstore. In 2001 during a period of religious riots, his shop was gutted by fires that had been deliberately set by Muslim fundamentalists. These same "religious thugs" kidnapped and detained him, but the Applicant bribed them to set him free. He claims that if he goes back to any part of Nigeria, his life will be endangered by Muslim fundamentalists. He also claims that he will be ostracized because he will be perceived as having abandoned his children by coming to Canada and losing touch with them. In his view, this amounts to inhumane treatment.

[4] The Applicant has submitted various applications since his arrival in Canada, among them an application for Convention refugee status, which was rejected by the Convention Refugee Determination Division (CRDD) on 26 March 2001. The tribunal hearing this application found that the Applicant lacked credibility. The evidence in his PIF differed radically from his evidence at the

hearing with respect to how long he was allegedly detained by the religious thugs, which was the most important incident in his claim. The tribunal found that the Applicant's story, in general, was a "complete fabrication, designed to obtain [permanent] resident status in Canada without going through the proper channels."

[5] The Applicant's application for a Pre-Removal Risk Assessment (PRRA) was rejected on 5 May 2008. The Officer who heard the Applicant's PRRA application is the same officer who rendered the Decision under review.

DECISION UNDER REVIEW

[6] The Applicant's H&C application was based both on his assertions of risk should he be returned to Nigeria and on his degree of establishment in Canada. The analysis can be divided into four parts.

[7] First, the Officer analyzed the Applicant's allegations of risk in Nigeria. He noted that the risks enumerated in the Applicant's H&C application had previously been considered in the 2001 Convention refugee claim and the 2008 PRRA but that risk considerations in an H&C application are "potentially broader." The Officer quoted directly from his decision rejecting the Applicant's PRRA application; he observed that there was no "change in the [country] conditions in Nigeria which would expose [the Applicant] to a new and/or additional risk not already contemplated by the

CRDD" and that there was no substantive change in the circumstances of the Applicant as a Christian since the rejection of his refugee claim in 2001.

[8] The Officer found that the CRDD's negative credibility findings were "worthy of significant weight" in the H&C assessment and that, ultimately, the Applicant's evidence concerning the religious thugs and the riots in Nigeria did not substantiate his allegations of risk or refute the CRDD's findings. The hardship consideration in an H&C application calls for credible evidence and, in this case, the Applicant did not provide it.

[9] First, the Officer specifically commented on two aspects of the Applicant's evidence: his reasons for leaving Owerri and his reasons for leaving Kaduna. The Applicant claimed that his refusal to assume the role of chief priest in Owerri resulted in a confrontation with his mother and the elders of the shrine that became so intense that his mother threw scalding water in his face. The Officer pointed out, however, that this incident occurred in 1990, over 18 years ago. There was no evidence that the Applicant's mother or the elders had ever pursued him to Kaduna or that they still harboured an intention to harm him. The Applicant also claimed that his shop in Kaduna was looted and burned. The Decision notes, however, that the building depicted in the photos provided by the Applicant is not obviously a bookstore; there is no police report or documentation to show either that the Applicant owned a bookshop or that it was vandalized. Having considered the evidence as a whole, the Officer concluded that there was insufficient evidence to demonstrate that the Applicant would be at risk of undue and undeserved or disproportionate hardship were he to return to Nigeria.

[10] Second, the Officer analyzed the Applicant's establishment in Canada. He observed that the Applicant had been in Canada since 2000 but that his lengthy stay was not due to circumstances beyond his own control. He had worked hard and consistently while in Canada; he had invested in Canadian real estate and was financially self-sufficient; he actively participated in community activities; and he had undergone training in relation to his employment. Nevertheless, the Officer concluded that there was little about the Applicant's establishment in Canada that could be characterized as exceptional, given that he had been in Canada for eight years. The Officer also commented that the skills acquired by the Applicant during his stay in Canada were transferable and that he would likely find employment should he return to Nigeria.

[11] Third, the Officer analyzed the Applicant's claim that he would face psychological and physical danger and expulsion from the community in Nigeria because he has had no contact with his children and will be perceived as having abandoned them. The Applicant gave conflicting evidence as to whether or not he had maintained contact with his children during his time in Canada. This inconsistency remains unexplained and therefore casts doubt on the Applicant's claim.

[12] Finally, the Officer observed that, following a negative decision, the Applicant would return to a country where he is familiar with the language, culture and customs. His lack of supportive family in Nigeria, while stressful, would not be an undue hardship. The Applicant has no close family ties here in Canada, but he has managed to be self-sufficient nonetheless.

[13] Ultimately, the Officer concluded that the Applicant had failed to demonstrate that he was so firmly established in Canada that severing ties with the community and with his financial investments would impose on him a hardship that is unusual, undeserved or disproportionate.

[14] For the above-noted reasons, the H&C application was denied.

STATUTORY PROVISIONS

[15] The following provisions of the Act are relevant to these proceedings:

Objectives — immigration	**Objet en matière d'immigration**
3. (1) The objectives of this Act with respect to immigration are	**3.** (1) En matière d'immigration, la présente loi a pour objet :
[…]	[…]
(*c*) to support the development of a strong and prosperous Canadian economy, in which the benefits of immigration are shared across all regions of Canada;	*c*) de favoriser le développement économique et la prospérité du Canada et de faire en sorte que toutes les régions puissent bénéficier des avantages économiques découlant de l'immigration;
[…]	[…]
Humanitarian and compassionate considerations	**Séjour pour motif d'ordre humanitaire**
25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or	**25.** (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est

who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act 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.	interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, 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.

ISSUES

[16] The Applicant raises the following issues:

a) Whether the Officer erred in determining that the Applicant did not have sufficient humanitarian and compassionate grounds to warrant an exemption from the requirements of the Act;

b) Whether the Officer's Decision was based on an erroneous finding of fact that was made in a perverse or capricious manner or without regard to the material before him; and

c) Whether the Officer failed to observe a principle of natural justice.

STANDARD OF REVIEW

[17] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[18] The first issue concerns the standard of review for an H&C decision. The Federal Court of Appeal recently held in *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at paragraph 18, that the appropriate standard is reasonableness. See also *Thandal v Canada (Minister of Citizenship and Immigration)*, 2008 FC 489 at paragraph 7.

[19] The second issue pertains to the Officer's assessment of the Applicant's credibility and the Officer's treatment of the evidence. Findings of fact and credibility are within the Officer's expertise and, therefore, they attract a standard of reasonableness on review. See *Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315, 42 ACWS (3d) 886 (FCA); *Aguirre v Canada (Minister of Citizenship and Immigration)*, 2008 FC 571 at paragraphs 13-14; and *Dunsmuir*, above, at paragraphs 51 and 53.

[20] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-

making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47; and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[21] The third issue raises questions of natural justice and procedural fairness. These are reviewed on a standard of correctness. A breach of procedural fairness will result in the decision being set aside. See *Dunsmuir*, above, at paragraph 129.

ARGUMENT

The Applicant

The Applicant's Removal Will Result in Unusual, Undeserved or Disproportionate Hardship

[22] The Applicant submits that he is now elderly. He has contributed significantly to the Canadian economy through his employment, during which time he has been a diligent and dependable worker. He has maintained stable employment; possesses three real estate properties, which demonstrates sound financial management; and is an active member of his church community.

[23] The Applicant contends that the Officer failed in his duty to give due consideration to these factors in assessing the Applicant's degree of establishment in Canada. He thereby breached the rules of procedural fairness.

The Respondent

Subsection 25(1) Is Not an Alternate Method of Immigration into Canada

[24] The Respondent argues that subsection 11(1) of the Act requires a foreign national to apply for a visa or any other document required by the regulations before entering Canada. Subsection 25(1) of the Act allows the Minister to grant a foreign national permanent residence status or an exemption from an obligation under the Act if such an exemption is justified based on H&C considerations. The subsection 25(1) exemption should not be used as an alternate method of immigration into Canada. Justice Barry Strayer of this Court, in *Vidal v Canada (Minister of Employment and Immigration)* (1991), 13 Imm LR (2d) 123, [1991] F.C.J. No. 63 (QL), recognized that such exemptions constitute special and discretionary benefits.

The Decision Is Reasonable, Based on the Evidence

[25] The Respondent states that, in an H&C application, the burden is on the applicant to demonstrate that, in his personal circumstances, applying for a permanent residence visa outside Canada (as is normally required) would constitute unusual, underserved or disproportionate

hardship. Only when the applicant has met this onerous burden will an H&C exemption be warranted. See *Owusu v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 94 at paragraphs 11-12.

[26] The Officer recognized that the risks alleged in this H&C application were the same as those alleged in the refugee claim and in the PRRA application. Conditions in Nigeria have not changed since the Applicant's refugee claim in 2001 and his PRRA application in 2008. His own situation as a Christian has not changed either. The Applicant adduced no evidence to indicate that anyone in Nigeria had pursued him from Owerri to Kaduna or maintained a continuing interest in harming him because he refused to become a chief priest and, instead, became a Christian. In addition, there was insufficient photographic and documentary evidence to show that the Applicant owned a bookstore and that it was targeted by Muslim fundamentalists. The Applicant also gave inconsistent evidence regarding his level of contact with his family in Nigeria, and he failed to explain this inconsistency.

[27] The Respondent contends that the Officer considered all of the evidence. The Officer listed the evidentiary material that formed the basis of his Decision, and he quoted from the Applicant's submissions on numerous occasions. It does not appear that the Officer's findings of fact were in error or made in a perverse or capricious manner without regard to the evidence, as the Applicant claims.

[28] The Officer considered the Applicant's degree of establishment in Canada. He concluded that, based on the evidence, it was the Applicant's choice to establish himself in Canada; there was

nothing to prevent the Applicant from returning to Nigeria. The difficulties associated with uprooting himself are a consequence of his choice to make his home in a country where he does not have permanent resident status.

The Respondent's Further Memorandum

[29] The Respondent states further that, in applications submitted in 2001 and 2005, the Applicant indicated that his mother was deceased. Clearly, the Applicant faces no risk of persecution from her.

[30] The Respondent notes additional inconsistencies in the Applicant's evidence regarding his relationship with his children. In documents from 2001 and 2005, the Applicant claimed ignorance of his children's addresses; in a different 2005 document, he identified the city in Nigeria where his children were living; in a letter from 2008, he stated that all of his children had left Nigeria. In each instance, the Applicant failed to indicate the source of his information regarding his children's whereabouts. The Officer did not err in finding that the Applicant's evidence concerning his relationship with his children and his degree of contact with them was inconsistent.

ANALYSIS

[31] In my view, the Applicant has presented a particularly weak case for review. His complaints amount to mere assertions and there is a distinct lack of substance to back them up.

Error of Law

[32] The Applicant says that he discharged the burden of proof upon him and proved unusual, undeserved and disproportionate hardship.

[33] The Applicant, however, simply disagrees with the Decision. When the Decision is examined it is clear that the Officer provides justification, transparency and intelligibility in the decision-making process and that the Officer's conclusions do not fall outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law. In other words, it is possible to disagree with the Decision, but disagreement does not take it outside of the *Dunsmuir* range. Even if a positive decision might have been reasonable on the facts, this would not mean that the Decision was unreasonable. See *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59.

Establishment

[34] The Applicant appears to think that the Decision is unreasonable because he has managed to establish himself quite well in Canada and he does not want to leave. However, as the Officer points

out in the Decision, the test is not whether the Applicant would be, or is, a welcome addition to the Canadian community. Establishment is only one of the factors that has to be examined to determine whether there would be unusual, undeserved or disproportionate hardship. Clearly the Officer takes the degree of establishment into account and applies the correct test.

[35] The Applicant says that the Officer failed to consider adequately the degree of his establishment in Canada. There is, however, nothing in the Decision to support this assertion. Establishment was given a full and fair consideration. Once again, the Applicant simply disagrees with the Officer's conclusions. Disagreement is not sufficient to establish a ground for judicial review.

Breach of Procedural Fairness

[36] The Applicant says that the Officer breached procedural fairness because he failed to follow the policy considerations in Inland Processing Manual IP5 and "by failing to consider relevant issues."

[37] It is not clear what the Applicant means by this unsupported assertion. In any event, the Officer fully considered the positive factors related to the Applicant's establishment in Canada and deemed them insufficient to make a case for unusual, undeserved or disproportionate hardship. At the hearing of this matter before me in Calgary on 14 February 14 2011, the Applicant presented a new argument, one that was not in the written submissions**,** that, as regards the lack of evidence on cultural ostracism, the Officer had a duty or an obligation to obtain on his own initiative, or to

contact the Applicant and ask him to provide, independent objective information on the subject of cultural ostracism.

[38] Counsel provided no legal authority for this position and, in my view, it would be contrary to the consistent position taken by this Court that the onus is upon the applicant in an H&C application to provide the evidence that he wants the Officer to take into account. See , for example, *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at paragraph 5. This principle has been followed in numerous cases by this Court including: *Rizvi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 463; *Sharma v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1006; *Monteiro v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1322; *Samsonov v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1158; *Hamzai v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1108; *Liniewska v Canada (Minister of Citizenship and Immigration)*, 2006 FC 591; *Ruiz v Canada (Minister of Citizenship and Immigration)*, 2006 FC 465; *Nguyen v Canada (Minister of Citizenship and Immigration)*, 2005 FC 236; and *Legault v Canada (Minister of Citizenship and Immigration)*, [2002] 4 FC 358 (FCA).

[39] Moreover, Citizenship and Immigration Canada's Inland Processing Manual IP5 also states this finding throughout, section 5.7 being just one example. It says:

> The onus is entirely upon the applicant to be clear in the submission as to exactly what hardship they would face if they were not granted the requested exemption(s). Officers do not have to elicit information on H&C factors and are not required to satisfy applicants that such grounds do not exist. The onus is on the applicant to put forth and H&C factors that they believe are relevant to their case.

[40] The problem in the present case is not just a lack of evidence regarding cultural and social ostracism in Nigeria. The Applicant failed to demonstrate with credible evidence how and why he would be personally subjected to ostracism if he were to return to Nigeria and make his application for permanent residence to Canada from that country.

Certification

[41] The Applicant has submitted the following questions for certification:

> In an application for exceptional relief pursuant to s. 25 of the Immigration and Refugee Protection Act, when the reviewing officer, has questions that goes to the "central issue" of a matter that is endemic to a specific country, that is raised by the applicant, of which the officer lacks the requisite knowledge of the subject matter; is there an obligation on the officer to educate him- or herself on the subject matter prior to rendering a decision on the application?
>
> In analyzing evidence that has arisen after the Board has rejected a refugee claim and, is therefore "new," should the PRRA officer, in assessing the new information, take into consideration factors such as the nature of the information, its significance for the case and the impact on the applicant? Is there an obligation on the officer to conduct independent research on the subject similar to that of the Response to Information Requests done by the Refugee Board?
>
> If the officer is applying his or her assessment of these "new" factors from the PRRA application to the assessment of risk/hardship in the humanitarian and compassionate application, as an expert in the field, should not the officer base the assessment on objective documentary information that was examined and applied to the case in a meaningful way?

[42] These questions do not meet the test for certification in that they are clearly an attempt by the Applicant to shift the burden of proof in an H&C application despite authority which states that

the law is clear that “an applicant has the burden of adducing proof of any claim on which an H&C application relies.” See *Owusu*, above, at paragraph 5. In the present case, the Applicant simply disagrees with a decision that has reasonably resulted from his failure to adduce sufficient credible evidence to justify his H&C claim.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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