Federal Court Cour fédérale

Date: 20150911

Docket: IMM-7118-14

Citation: 2015 FC 1068

Ottawa, Ontario, September 11, 2015

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

JOHN NJUGUNA IBABU

Applicant

and

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION)

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. John Njuguna Ibabu challenges a decision of a senior immigration officer [the Officer] refusing his application for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds. He had claimed that his establishment in Canada, the hardship he would face in Kenya based on his fear of risk at the hands of the Mungiki criminal

group, the best interest of his two youngest children and mental health issues were factors supporting his request for an H&C exemption pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[1] The Officer rejected his application as she concluded that individually and cumulatively, the elements presented by Mr. Ibabu were insufficient to establish that he would suffer unusual and undeserved or disproportionate hardship if he had to apply for permanent residence from outside of Canada.

[2] Mr. Ibabu contends that the Officer's decision was unreasonable in light of the evidence on the record, that the Officer applied the wrong legal test with regard to hardship and that the Officer breached his right to procedural fairness by failing to provide an oral hearing. He asks this Court to quash the decision and order another immigration officer to reconsider his application for permanent residence on H&C grounds.

[3] For the reasons that follow, this application for judicial review is dismissed. Having considered the decision, the evidence before the Officer and the applicable law, I find no basis for overturning the Officer's decision. The decision thoroughly reviewed the evidence and the Officer's conclusions fall within the range of acceptable and possible outcomes based on the facts and the law. I am also satisfied that the Officer applied the correct legal test in her analysis and did not breach any principle of natural justice in the treatment of Mr. Ibabu's application.

[4] The issues to be determined in this application for judicial review are as follows:

- Did the Officer breach procedural fairness by failing to provide Mr. Ibabu with an oral hearing?
- Did the Officer make findings of fact without regard to the evidence?
- Did the Officer formulate the correct legal test in assessing the hardship faced by Mr. Ibabu if he was to return to Kenya?
- Did the Officer err in assessing the best interests of the children [BIOC]?

II. Background

A. *Facts*

[5] Mr. Ibabu is a 51 year-old citizen of Kenya. He has a wife and five children who continue to live in Kenya. Two of his children are minor.

[6] Mr. Ibabu's grandfather passed away in May 2013, leaving Mr. Ibabu with several acres of land. Mr. Ibabu's father and uncles became angry over the inheritance and demanded that he give up on the land. When he refused, Mr. Ibabu's family hired an organized criminal group in Kenya known as the Mungiki gang, to force him to relinquish the land. Members of the Mungiki gang allegedly beat Mr. Ibabu, sexually assaulted his wife and burned his home to the ground. Mr. Ibabu agreed to give up the majority of the land but the Mungiki gang continued to target him and his family.

[7] Mr. Ibabu moved to various areas of Kenya with his family, but he still received threats. He eventually made the decision to come to Canada. He was issued a temporary resident visa in Nairobi and entered Canada on August 16, 2013. Upon his arrival, he applied for refugee protection. His claim for protection was refused by the Refugee Protection Division [RPD] on November 28, 2013 and he subsequently applied to the Refugee Appeal Division [RAD]. The RAD refused his appeal on January 20, 2014.

[8] Mr. Ibabu then applied for permanent residence based on H&C grounds, seeking an exemption from the requirement to apply for permanent residence from outside of Canada. The Officer denied his application on September 30, 2014.

B. *Decision*

[9] The Officer's refusal to grant Mr. Ibabu's H&C application was based on the following determinations.

(1) Establishment

[10] The Officer was not satisfied that Mr. Ibabu's degree of establishment was greater than what would be expected of other individuals attempting to adjust to a new country. True, Mr. Ibabu had taken steps to establish himself in Canada, but the Officer found this insufficient to justify his request to apply for permanent residence from within Canada. The Officer acknowledged Mr. Ibabu's full-time employment in Canada since March 2014, the funds he was sending to his spouse in Kenya and his volunteer work with the Ministry of Hospitality of St.

Thomas More's Parish. The Officer gave positive consideration to those factors, as well as to the letters of support submitted by Mr. Ibabu's friends and members of the local community. However, the Officer found that the evidence did not establish that Mr. Ibabu's departure from Canada to apply for permanent resident status from abroad would impose unusual and underserved or disproportionate hardship on Mr. Ibabu, on the St. Thomas More Parish or on members of Mr. Ibabu's community.

(2) Hardship arising out of risk and adverse country conditions

[11] In assessing hardship, the Officer reviewed the allegations of Mr. Ibabu regarding the Mungiki gang, first noting that the RPD, an expert body in the determination of risk, and the RAD had both denied Mr. Ibabu's claim.

[12] The Officer analyzed the evidence submitted by Mr. Ibabu, namely two letters confirming how dangerous and violent the Mungiki are and two photographs showing his burned down house. However, the Officer was unable to give the letters their full weight in supporting Mr. Ibabu's allegations of risk as none of the writers were direct witnesses to any of the evidence described and their knowledge of the events came from Mr. Ibabu. The Officer also found that the two photographs on file did not substantiate Mr. Ibabu's allegations of risk at the hands of the Mungiki gang. The Officer could not establish that either picture depicted property belonging to Mr. Ibabu or his family or the manner in which the property was destroyed.

[13] The Officer noted the absence of key documentary material that would corroborate Mr. Ibabu's allegations of risk, such as documents demonstrating that Mr. Ibabu had inherited any property from his grandfather, statements from individuals who directly witnessed the alleged events, or evidence that Mr. Ibabu and his family had been threatened or harmed by the Mungiki. The Officer further found that Mr. Ibabu had not provided sufficient evidence that he and his family had been personally targeted by the Mungiki. On the balance of probabilities, the Officer was unable to conclude that Mr. Ibabu would likely face hardship arising out of the need for continuous hiding or constant relocation due to the Mungiki gang.

[14] The Officer also observed that, since the Mungiki were hired for the purpose of extorting the land, there would be no reason to pursue Mr. Ibabu once that purpose had been fulfilled. The Officer further noted the little to no information (no police reports, no witness statements, no affidavits from his nuclear family) demonstrating that the Mungiki have an ongoing interest in locating and harming Mr. Ibabu and his family.

[15] The Officer also looked at publicly available documents concerning the Mungiki and the protection available from the government of Kenya, as Mr. Ibabu had not submitted any evidence to the effect. According to the Immigration Refugee Board's Research Directorate, the Mungiki extort money from locals and taxi-bus operators in Kenya, relying on basic methods such as knives and machetes. The Officer accepted that the Mungiki are an illegal violent sect which is operational in Kenya, with the ability to harm individuals who refuse to make extortion payments. However, the Officer also found that the Mungiki did not have the capacity, resources or intent to locate individuals throughout Kenya and that they did not pursue their victims once

their demands have been satisfied. Although acknowledging that "the protection offered by Kenya's security apparatus can be sporadic", the Officer concluded that on the balance of probabilities, there was not enough evidence to establish that Mr. Ibabu would be pursued by the Mungiki on his return and that he would thus face hardship on that basis.

[16] Finally, the Officer recognized that Mr. Ibabu and his family would be adversely affected financially through the loss of his employment in Canada. However, Mr. Ibabu has lived most of his life in Kenya, has several years of post-secondary education and working experience, and considerable social support which would help him resettle and re-enter the workplace. Any hardship faced by Mr. Ibabu on that front would therefore not be unusual and undeserved or disproportionate.

(3) Best interest of the children

[17] Concerning the BIOC, Mr. Ibabu had submitted that his two minor children were unable to attend school in Kenya because the alleged threats from the Mungiki gang. They had to remain in hiding and were in a remote village, doing odd jobs to sustain themselves and living from the funding Mr. Ibabu sends them. The Officer once again stated that Mr. Ibabu had not provided sufficient evidence to establish that the Mungiki have an ongoing interest to locate and harm Mr. Ibabu and his family. Because of this, the Officer was unable to conclude that the children were required to constantly relocate or that they are unable to attend school in Kenya.

[18] The Officer acknowledged that Mr. Ibabu supports his wife and children by working in Canada and that his return would disrupt the family income. However, the Officer noted that Mr. Ibabu's return would likely add stability to the children's lives as it is typically in the children's best interest to have both parents present. The Officer also observed that Mr. Ibabu would likely be able to re-establish himself promptly, given his level of education, history of employment in Kenya and Canada and his demonstrated adaptability in a new country/environment. Therefore, the potential negative impact to the BIOC was not sufficient to warrant an H&C application or an exemption in conjunction with establishment and other factors cited.

(4) Mental health issues

[19] Finally, the Officer did not place any weight on Mr. Ibabu's assertion that he had been diagnosed with post-traumatic stress disorder as a result of his ordeal, as there was little to no documentary evidence of this.

C. *H&C Exemption*

[20] Subsection 25(1) of the IRPA contains the relevant H&C exemption. The provision carves out an exemption to the general immigration rule, set out in section 11, requiring foreign nationals to apply for visas from outside of Canada. It provides that the Minister may grant this relief if "[he] is of the opinion that the exemption is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected".

[21] It has been consistently held that an H&C exemption is an exceptional and discretionary remedy (*Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 [*Legault*] at para 15; *Adams v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1193 [*Adams*] at para 30; *Lee v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1152 at para 20; *Barrak v Canada (Minister of Citizenship and Immigration)*, 2008 FC 962 [*Barrak*] at para 27). Such an exemption cannot become an alternative means to secure permanent residence status unless H&C grounds are found to justify the remedy. It is not an alternative immigration stream or an appeal mechanism for failed asylum claimants (*Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 [*Kanthasamy*] at para 40).

[22] Consequently, there is a very high threshold to meet when requesting an H&C exemption. The H&C process is not designed to eliminate all hardship that applying for a visa from outside of Canada can cause; it is designed to provide relief from "unusual and undeserved or disproportionate hardship" that would ensue should the applicant be required to leave Canada and apply to immigrate through normal channels (*Lalane v Canada (Minister of Citizenship and Immigration)*, 2009 FC 6 [*Lalane*] at para 42). This Court has described "unusual and undeserved or disproportionate hardship" as hardship that goes beyond that which is inherent in having to leave Canada (*Kanthasamy* at paras 40-42; *Chandidas v Canada (Minister of Citizenship and Immigration)*, 2013 FC 258 [*Chandidas*] at para 81). To obtain relief on H&C grounds, the test is not whether Canada would be a more desirable place to live than the applicant's country of origin. An applicant must demonstrate something more than the usual consequences of having to apply for permanent residence through the normal process *(Kanthasamy* at para 41*)*.

[23] Furthermore, it has been consistently held that the onus of establishing that the H&C exemption is warranted lies with the applicant (*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 [*Kisana*] at para 45; *Barrak* at para 28; *Adams* at para 29). "It is up to the applicant, in his opinion, to decide what ground are relevant H&C factors in his particular circumstances" (*Lalane* at para 42). Lack of evidence or omission to adduce relevant information in support of an H&C application is at the peril of the applicant (*Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 [*Owusu*] at paras 5 and 8; *Nicayenzi v Canada (Minister of Citizenship and Immigration)*, 2014 FC 595 [*Nicayenzi*] at para 16).

D. *Standard of review*

[24] The standard of correctness applies to an immigration officer's choice of the legal test in the H&C context (*Toussaint v Canada (Citizenship and Immigration)*, 2011 FCA 146 at para 29; *Gonzalez v Canada (Citizenship and Immigration)*, 2015 FC 382 [*Gonzalez*] at para 34). When applying the correctness standard, a reviewing court will not show deference to the decision-maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision-maker; if not, the court will substitute its own view and provide the correct answer (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 50).

[25] However, the applicable standard to the analysis of the evidence performed by an immigration officer in the context of an H&C application made under section 25 of the IRPA is reasonableness (*Dunsmuir* at para 47; *Baker v Canada (Minister of Citizenship and*

Immigration), [1999] 2 SCR 817 [*Baker*] at para 62; *Kanthasamy* at para 18; *Lene v Canada (Minister of Citizenship and Immigration)*, 2008 FC 23 at para 5).

[26] This means that considerable deference is to be accorded to the outcome reached by the decision-maker on the record of evidence before him or her. If the decision-maker's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law, the court is not allowed to intervene even if its assessment of the evidence might have lead it to a different outcome (*Dunsmuir* at para 47; *Kanthasamy* at paras 81-84). Under the reasonableness standard, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, a reviewing court should not substitute its own view of a preferable outcome (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*] at para 59). Given the highly discretionary nature of H&C decisions, immigration officers have a broad range of acceptable and defensible outcome and a large margin of appreciation available to them (*Kanthasamy* at para 84).

[27] Issues of procedural fairness command a stricter standard of review; it is that of correctness. This means that when such issues arise, the court must determine whether the process followed by the decision-maker satisfies the level of fairness required in all the circumstances (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Khosa* at para 43; *Eshete v Canada (Minister of Citizenship and Immigration)*, 2012 FC 701 at para 9).

[28] Parties are in agreement that the issues concerning procedural fairness and the formulation of the correct legal test should be decided under the correctness standard. Parties are also in agreement that Officer's findings of fact and assessment of the BIOC are reviewable on a standard of reasonableness.

III. Analysis

A. *Did the Officer breach procedural fairness by failing to conduct an oral hearing?*

[29] Mr. Ibabu alleges that the Officer's repeated references to the lack of evidence do not reflect a true lack of evidence but instead hide a "veiled credibility finding". Given the fact that credibility was an issue, he claims that an oral hearing should have been conducted (*Hamadi v Canada (Minister of Citizenship and Immigration)*, 2011 FC 317 at para 14; *Duka v Canada (Minister of Citizenship and Immigration)* 2010 FC 1071 [*Duka*] at para 13). In particular, in questioning what was on the photographs submitted by Mr. Ibabu or the supporting letters he provided, the Officer was not assessing the relevance of the evidence, or its probative value, but was rather disbelieving Mr. Ibabu.

[30] I disagree.

[31] Procedural fairness does not always require an oral hearing. An interview is not generally required to ensure procedural fairness when evaluating H&C decisions of an immigration officer (*Baker* at para 34). Such decisions only require a "meaningful participation" in the decision-

making process and to allow the applicant to put before the immigration officer the information relevant to his application (*Baker* at para 33).

[32] It has been recognized that an H&C applicant has no right or legitimate expectation that he or she will be interviewed by the immigration officer (*Owusu* at paras 5-8; *Leonce v Canada (Minister of Citizenship and Immigration)*, 2011 FC 831 [*Leonce*] at para 6). However, the rules of natural justice are capable of flexibility when the circumstances warrant it and the case law has established that where the decision-maker's decision is clearly based on credibility findings, the requirement for an oral interview may be "triggered" (*Alwan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 37 at para 16; *Duka* at paras 11-13; *Doumbouya v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1186 at para 74). The crucial question is therefore whether the Officer's decision relied primarily on a finding of negative credibility to dismiss the allegations of risk in his consideration of Mr. Ibabu's hardship.

[33] I am satisfied that credibility was not central to the Officer's determination of Mr. Ibabu's H&C claim. Having read the decision in light of the totality of the evidence, I am not persuaded that the Officer made any credibility findings (*Leonce* at para 8). This case was not a matter of disbelief but rather one of lack of evidence. The Officer found that there was simply no evidence that Mr. Ibabu was threatened by the Mungiki, or that his children were relocated or unable to attend school. On the photographs, the Officer questioned what they depicted. On the alleged events, the letters did not provide direct witness evidence of what happened. There were no direct witness or documentary evidence (in the form of police reports, medical reports or affidavits) corroborating Mr. Ibabu's allegations of risks.

[34] An adverse finding of credibility is different from a finding of insufficient evidence or an applicant's failure to meet his or her burden of proof. As stated by the Court in *Gao v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 59, at para 32, and reaffirmed in *Herman v Canada (Minister of Citizenship and Immigration)*, 2010 FC 629 at para 17, "it cannot be assumed that in cases where an Officer finds that the evidence does not establish the applicant's claim, that the Officer has not believed the applicant". This was reiterated in a different way in *Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067 at para 23, where Justice Zinn stated that while an applicant may meet the evidentiary burden because evidence of each essential fact has been presented, he may not meet the legal burden because the evidence presented does not prove the facts required on the balance of probabilities.

[35] There was just not enough evidence upon which a positive determination could have been made by the Officer. Simply stated, it was for Mr. Ibabu to put forward sufficient evidence to support his claim but he failed to submit sufficient information to establish the facts on which his claim for H&C rested. In this case, the Officer's conclusion hinges on the insufficiency of evidence provided rather than on questions of credibility. In those circumstances, the Officer was under no duty to assist Mr. Ibabu in discharging the burden of making his case or to highlight the case's weaknesses and request further submissions to allow him to overcome these weaknesses (*Kisana* at paras 43-45).

[36] There was no breach of procedural fairness. The Officer's decision not to have an oral hearing was correct.

B. ***Did the Officer make findings of fact without regard to the evidence?***

[37] Mr. Ibabu further submits that some of the Officer's findings were made without regard to the evidence. The Officer found that Mr. Ibabu's "demonstrated resourcefulness" would help mitigate any hardship in returning to Kenya, as would his "considerable social support in that country". Mr. Ibabu submits that these findings were speculative and not based on any fact. He claims that there was nothing in the evidence before the Officer to indicate his "resourcefulness". Furthermore, he says that he did not have considerable social support as his own family turned a violent gang against him.

[38] I do not agree with Mr. Ibabu's submissions.

[39] The factual question is whether the Officer reasonably concluded that Mr. Ibabu's "demonstrated resourcefulness" and his "considerable social support" would help him resettle and re-enter the workforce in Kenya. The legal issue is whether the Officer's conclusions fell within the range of possible, acceptable outcomes defensible on the facts and the law. Given Mr. Ibabu's post-secondary education and apprenticeship training, as well as experience working in Canada, and that his wife sister and children reside in Kenya, it was not unreasonable for the Officer to determine that Mr. Ibabu had considerable social support. Neither was it speculative to say that this resourcefulness would assist Mr. Ibabu on his return to Kenya.

[40] The only evidence of a potential lack of social support was in relation to the alleged fear of the Mungiki, which was found to be non-existent by the Officer.

[41] This is not a situation where findings of facts are based on mere speculation, as was the case in *Nicayenzi* at para 34, cited by Mr. Ibabu. I am satisfied that, in the circumstances, it was reasonable for the Officer to conclude to a form of resourcefulness and social support upon Mr. Ibabu's return to Kenya and that this would save him from unusual and undeserved or disproportionate hardship.

C. *Did the Officer formulate the correct legal test in assessing the hardship faced by Mr. Ibabu if he was to return to Kenya?*

[42] Mr. Ibabu submits that the Officer did not formulate the correct legal test for the assessment of hardship. Mr. Ibabu submits that the Officer must assess hardship on the basis of the individualized circumstances of an applicant and determine whether the adverse country conditions would have a direct and negative impact. The proper legal test does not involve an analysis of "personalized" vs. "generalized" risk.

[43] I do not agree that the Officer applied the wrong legal test.

[44] In H&C cases, hardship must be unusual and undeserved or disproportionate. In *Kanthasamy*, the Federal Court of Appeal held that undue, undeserved or disproportionate hardship must affect the applicant personally and directly (at para 48). There must be a link between the evidence of hardship and the individual situation of the applicant (*Lalane* at para 42).

[45] However, the hardship does not have to be unique to the applicant. This Court has recognized in *Gonzalez* that an H&C applicant may raise "hardship that is also faced by others in the country of removal" (at para 55). The hardship must not necessarily differ from that faced by others, but there has to be a link between his personal circumstances and the alleged hardship. As stated at para 56 of *Gonzalez*, this "position is sound because it reconciles the individualized nature of an H&C assessment with the clear intention of Parliament that an Officer's exercise of discretion should not be fettered by any other provision of the *IRPA*, including the bar on generalized risk found at subparagraph 97(1)(b)(ii)."

[46] The bare assertion of general adverse conditions in the country of removal would not be enough. While risk factors considered under sections 96 and 97 of the IRPA may be used, the officer must examine the facts relevant to the risk allegations through "a lens of hardship". The legal test to be applied concerning the analysis of hardship is whether Mr. Ibabu is personally and directly suffering unusual and undeserved or disproportionate hardship in having to apply for permanent residence from outside of Canada (*Kanthasamy* at para 75; *Joseph v Canada (Citizenship and Immigration)*, 2015 FC 661 at para 48).

[47] This is what the Officer did in this case. Ultimately, the Officer found that Mr. Ibabu was only able to show a generalized risk and not a personal, direct, unusual and undeserved hardship. Such a generalized risk was not a sufficient indicator of hardship. I am satisfied that the Officer considered how Mr. Ibabu was personally affected, and how the hardship would impact him. True, the Officer did consider the general country conditions in Kenya, but did so with the

objective of determining whether they would specifically affect Mr. Ibabu. The Officer was looking for a nexus between the general situation in Kenya and Mr. Ibabu, but did not find one.

[48] I acknowledge that the Officer made an unfortunate choice of words in the treatment of this issue. But, when the whole decision is considered, I am convinced that the correct test was applied. The Officer stated: "I find that the applicant has adduced insufficient evidence to demonstrate that he and his family have been personally targeted by the Mungiki in the past, or that they would be more likely than the rest of the Kenyan population to become victims of extortion and violence at the hands of this sect in the future. As such, on a balance of probabilities, I am unable to conclude that the applicant would likely face hardship arising out of the need for continuous hiding or constant relocation". The conclusion is clearly linked to Mr. Ibabu's personal situation and to the finding that he would not suffered unusual and undeserved or disproportionate hardship.

[49] There was no hardship attributable to the threats and abuse from the Mungiki. Because Mr. Ibabu has not provided sufficient evidence, the Officer found that Mr. Ibabu and his family were not more likely than the rest of the Kenyan population to become victims of extortion and violence at the hands of the Mungiki. It is not a situation where the Officer imported the test under sections 96 and 97 of the IRPA, confounded a section 97 risk analysis with an H&C hardship analysis and consequently eviscerated section 25 of its purpose (*Aboubacar v Canada (Minister of Citizenship and Immigration)*, 2014 FC 714 at para 4). The Officer effectively looked at whether it would constitute undue or disproportionate hardship to return Mr. Ibabu to his country in these particular circumstances. The Officer did not simply assess whether the

circumstances faced by Mr. Ibabu were not generally faced by others in his country of origin (*Diabate v Canada (Minister of Citizenship and Immigration)*, 2013 FC 129 at para 36).

[50] Contrary to Mr. Ibabu's submissions, the analysis of the Officer is not based on the risk Mr. Ibabu and his family would encounter, but rather on the lack of hardship they would suffer, "as on the balance of probabilities, [the Officer] is unable to conclude that [Mr. Ibabu] would likely face hardship arising out of the need for continuous hiding or constant relocation".

[51] I therefore conclude that the Officer did apply the correct legal test and reached a reasonable conclusion on the absence of unusual and undeserved or disproportionate hardship. There is no question that Mr. Ibabu and his family would undoubtedly suffer some hardship following his return to Kenya. But it was reasonably open to the Officer to conclude that such hardship would not reach the unusual and underserved, or disproportionate threshold, relative to others who must leave Canada.

D. ***Did the Officer err in assessing the best interest of the children [BIOC]?***

[52] Mr. Ibabu rejects the Officer's findings that there is insufficient evidence to establish that his children are unable to attend school in Kenya. He also rejects the Officer's finding that his income will be re-established promptly once he returns to Kenya and is working again. Mr. Ibabu contends that the Officer failed to articulate what exactly is in his children's best interests. He says that the Officer failed to draw conclusions about the specific best interests of his children, without following the requirements outlined in *Kolosovs v Canada (Minister of Citizenship and Immigration)*, 2008 FC 165 [*Kolosovs*].

[53] Mr. Ibabu submits that a key factor in the BIOC analysis is the financial support he provides to his children, which allows them to attend secondary school. Mr. Ibabu's return would disrupt the stream of funding and would therefore take away from the stability in his children's lives.

[54] I do not agree with Mr. Ibabu's reading of the decision. There is no reviewable error in the Officer's decision as the Officer did properly consider the BIOC elements in her analysis.

[55] Whether an immigration officer applied the correct legal test for assessing the BIOC is a question of law to be reviewed against the standard of correctness (*Judnarine v Canada (Minister of Citizenship and Immigration)*, 2013 FC 82 at para 15). However, an officer's treatment of the evidence is to be reviewed against the standard of reasonableness (*Mandi v Canada (Minister of Citizenship and Immigration)*, 2014 FC 257 at para 19).

[56] When assessing a child's best interests, an officer must first establish what those interests are; second, the degree to which the child's interests are compromised by one potential decision over another; and finally, the weight that this factor should play in the ultimate balancing of the factors to be assessed in the H&C application (*Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166 [*Williams*] at para 63; *Chandidas* at para 66). While the *Williams* case provides useful guidelines for immigration officers, no specific formula or test is prescribed or required for a BIOC analysis (*Webb v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1060 at para 13; *Beggs v Canada (Citizenship and Immigration)*, 2013 FC 903 at para 10). There is no "magic formula" to be used by immigration officers in the exercise of their

discretion (*Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 [*Hawthorne*] at para 7). The decision of an officer must simply demonstrate that the analysis was done.

[57] Ultimately, the correct legal test is whether the immigration officer was "alert, alive and sensitive" to the best interests of the child in conducting a BIOC analysis (*Baker* at para 75; *Hawthorne* at para 10; *Kolosovs* at para 8). In order to demonstrate that the immigration officer is alert, alive, and sensitive to the BIOC, it is necessary for his analysis to address the "unique and personal consequences" that removal from Canada would have for the children (*Ali v Canada (Minister of Citizenship and Immigration)*, 2014 FC 469 at para 16; *Tisson v Canada (Minister of Citizenship and Immigration)*, 2015 FC 944 at para 19).

[58] The law is also settled that a decision-maker conducting an H&C analysis must properly identify and define the BIOC factor and then balance it against the countervailing factors that might mitigate the adverse consequences of removal (*Legault* at para 12; *Kisana* at para 24; *Hawthorne* at para 5). The BIOC factor does not necessarily trump other factors for consideration in an H&C application. However, in order to fall within the range of reasonable, the decision-maker must consider children's best interests as "an important factor, give them substantial weight and be alert, alive and sensitive to them." (*Baker* at para 75). Stated differently, the presence of children does not call for a certain result (*Legault* at para 12; *Kisana* at para 72). The BIOC is but one factor to be weighed along with the others in H&C exemptions. Despite its importance, the BIOC factor is not determinative since it will almost always be the case that a child will benefit

from continued presence in Canada, in the company of his or her parents or other family members (*Baker* at para 75; *Hawthorne* at paras 2 and 6; *Kisana* at para 24).

[59] I am satisfied that in this case, the Officer was alert, alive and sensitive to the best interests of the children. The Officer looked specifically at the situation of Mr. Ibabu's children and did not fail to engage in the analysis. The Officer applied the correct legal test, and his assessment of the best interests of the children fell within the range of reasonable outcomes. The Officer ascribed significant positive weight to this factor but ultimately concluded that it did not outweigh the other negative factors. He performed a reasonable BIOC analysis which took various relevant factors into account. Any imperfections in his analysis can be remedied by reference to the record (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 15).

[60] The Officer accepted the evidence that Mr. Ibabu is supporting his children (and their mother) financially and that his return would disrupt the family's income, albeit temporarily. The Officer clearly articulated the impact of a negative decision as a loss of the family's income and gave significant weight to this factor. But she noted the stability resulting from Mr. Ibabu's return as a positive factor. She applied that to the situation of Mr. Ibabu, with his resources and network, and looked at the particular possibility of him re-establishing his income promptly, given his level of education, history of employment and ability to adapt quickly in a new environment. In the end, the potential negative impact on the children was not sufficient to warrant an exemption, alone or considered with other factors.

[61] In addition, based on the evidence, the Officer found that Mr. Ibabu has not established that he or his family are pursued by the Mungiki. As a result of that, the Officer was unable to conclude that Mr. Ibabu's children are constantly required to relocate or cannot attend school in Kenya.

[62] Furthermore, I note that, as pointed out by the Minister's counsel, the issue of funding was not tied to the education of Mr. Ibabu's minor children, but rather to his older children. Having regard to the evidence on the record, I am satisfied that the Officer's assessment of the best interests of Mr. Ibabu's children was not unreasonable. The assessment had a reasonable basis and was within the range of possible, acceptable outcomes defensible on the facts and the law. The decision in this respect was transparent, intelligible and appropriately justified.

IV. Conclusion

[63] The Officer's refusal of Mr. Ibabu's application for a permanent resident on H&C grounds represented a reasonable outcome based on the law and the evidence. On a standard of reasonableness, it suffices if the decision subject to judicial review falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. Furthermore, the Officer applied the correct legal test and there was no breach of procedural fairness. Therefore, I must dismiss this application for judicial review.

[64] Neither party has proposed a question of general importance to certify. I agree there is none.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed, without costs;

2. No question of general importance is certified.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	CALGARY, ALBERTA
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JUDGMENT AND REASONS:	GASCON J.
DATED:	SEPTEMBER 11, 2015

APPEARANCES:

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