Federal Court  Cour fédérale

Date: 20170721

Docket: IMM-88-17

Citation: 2017 FC 713

Toronto, Ontario, July 21, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

VIVIEN ADAOBI UGWUEZE
(AKA ADAOBI VIVIEN UGWUEZE)
CHIKWUNONSO DAVID AKUDU (MINOR)

Applicants

and

THE MINISTER OF IMMIGRATION,
REFUGESS AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is an application for judicial review pursuant to section 72(1) of *the Immigration and Refugee Protection Act*, S.C. 2002, c. 27 [IRPA] of a decision [Decision] of the Immigration Appeal Division [IAD, Board] refusing to exercise their request for humanitarian and

compassionate [H&C] relief to overcome a breach of IRPA's section 28 residency requirement, during the period between August 2009 and 2014.

[2] Ms. Ugwueze, the Principal Applicant [PA], is a citizen of Nigeria. She became a permanent resident [PR] on August 5, 2009 after landing as a skilled worker with her dependent son, the second applicant in this judicial review. The PA and her son returned to Nigeria in October of 2009, where she attended her upcoming wedding and cared for her sick mother. She and her son returned to Canada in January of 2010. In February of 2010, she returned to Nigeria for a medical assessment of her son. He was said to be suffering from an allergy to the cold weather.

[3] The PA left her son in Nigeria, purportedly under the doctor's recommendation that he avoid cold weather climates. In the intervening time period, the PA returned to work in Canada, going back and forth to Nigeria. In October of 2013, she gave birth to her second child while in Canada and returned with him to Nigeria to be with the child's father. During a subsequent stay in Nigeria, the Applicants requested travel documents to return to Canada because their PR cards had expired. These were refused by a visa officer because they failed to meet the residency requirement (of at least 730 days in the preceding five year period). The PA appealed to the IAD, submitting there were sufficient H&C considerations to overcome her 49-day residency shortfall.

II. Decision under review

[4] The IAD took various H&C factors into account, most notably the following:

A. *Reasons for return to Nigeria (mother and son)*

[5] The IAD concluded that the Applicants have not met their residency obligations, a fact conceded by the Applicants. The PA returned to Nigeria periodically to attend to her mother, whose health had improved, as well as to attend to her wedding requirements.

[6] The IAD questioned the authenticity of two of the doctors' notes pertaining to the son – one from 2010, which declared his condition, and the second from 2015, which deemed him to be better. They that the letters contained several inconsistencies and failed to mention certain details of his medical history. For instance, the letters state that the son received treatment in Texas the year before from a professional with 'specialist expertise', but this was inconsistent with the PA's testimony that the examining physician was her family doctor, rather than a specialist. Further, there are inconsistencies between the stamp and signature of the doctor. Finally, the PA failed to apply for a Canadian health insurance card after immigrating, waiting until 2016 to obtain a health card.

B. *Establishment in Canada*

[7] The IAD found minimal establishment in Canada, based on the PA's income tax Notices of Assessment for the relevant period which showed inconsistent and scant income earned in Canada, while greater earnings and steadier work in Nigeria. However, the PA claimed and received the child tax benefit during the entire period, including the years the son was in Nigeria. The IAD noted that the PA does not own property in Canada. Finally, her efforts to find steady

employment, and/or to become licensed in the real estate and/or healthcare fields, were found to have been mixed at best.

C. *Family Ties in Canada*

[8] The IAD found that the PA has no family ties to Canada. Her siblings, mother and husband all live in Nigeria, as do both her sons (the older son with the alleged cold allergy, and the younger son, a Canadian citizen who has remained in Nigeria but does not form part of this application).

D. *Hardship in Nigeria*

[9] The IAD noted that the PA elected not to seek medical attention for her son in Canada, instead choosing to take him to Nigeria. There have been no issues reported with their access to medical care or education in Nigeria. Finally, the climate in Nigeria was found to be more suitable to a cold allergy sufferer than the cold climate in Canada.

E. *Best Interests of the Child [BIOC]*

[10] Similarly, the child's best interests (apart from the allergy) were not deemed to be in Canada, since the bulk of his life was spent in with close relatives in Nigeria.

[11] Furthermore, the IAD also inferred from the record that the PA never intended for her older son to reside with her in Canada, but instead intended to ensure he obtained residency status to secure benefits for him (such as the child tax benefit). As for the younger son, there was

no evidence to reverse the presumption that it is always in the best interests of every child to be raised by both parents.

[12] Based on the various grounds enumerated above, the IAD did not find that there were sufficient H&C considerations to warrant relief from the loss of permanent residence status.

III. Issues and Analysis

[13] The Applicants submit that the IAD erred in its assessment of:

A. The breach of residency;

B. Establishment in Canada; and

C. BIOC.

[14] Put simply, the issue for determination in this application is whether the IAD's conclusion that the Applicants had not established sufficient H&C grounds to justify the retention of PR was reasonable, which the parties agree is the applicable standard of review (*Samad v Canada (Citizenship and Immigration)*, 2015 FC 30 at paras 20-23 [*Samad*]).

[15] The Applicants conceded that they breached their residency requirements under the IRPA. Being unable to point the Court to any unreasonable finding, but rather disagreeing with the outcome in its totality, the PA is in essence asking the Court to reweigh the evidence (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 61). While the PA challenged each of the findings above as being unreasonable, the closest she came to justifying this submission was citing facts raised during the hearing that were not specifically raised in the

Decision; for instance, the fact that she could not write her real estate exams given that she missed them when her PR travel document was refused.

[16] However, as pointed out to counsel for the Applicant during the hearing, even the finding relating to the Applicant's labour market establishment was not an error; rather the Board simply decided it was not material to the decision. After all, that fact arose after the relevant period, i.e. after the breach had already occurred.

[17] Ultimately, this judicial review comes down to a general challenge of the interpretation of the various components of the Board's H&C findings outlined above. While I agree that not all tribunal members may have weighed and decided those various individual H&C factors in the way the IAD did here, those realities do not render the Board's Decision unreasonable in the present circumstances.

[18] The IAD assessed and weighed relevant factors, taking into account the degree of establishment, ongoing contact with family members, the hardship of PR loss and return to their country of origin, living situation outside Canada, attempts made to return to Canada, BIOC, and any other special or particular circumstances that would warrant special relief: *Samad* at para 18.

[19] Specifically, the IAD was not convinced that the PA's mother's illness, her son's purported condition, the marriage, and the other reasons provided for the shortfall justified the breach. For instance, the Board's assessment that the mother could have been cared for by others, including the caregiver that took care of her in the PA's absence, while still meeting the

residency obligation was reasonable in light of the evidence. It was also reasonable for the IAD to have serious concerns regarding the doctors' notes, including oddities with the signatures, the son's name, and failure to mention prior treatment (in Texas).

[20] The PA asserted that the Board erred in its assessment of the evidence. While evidence and testimony is presumed to be true, this presumption may be rebutted where there is good reason, and here the IAD was entitled to draw negative inferences given the authenticity concerns, and accompanying explanations: *Maldonado v Minister of Employment and Immigration (1979)*, [1980] 2 FC 302 at 305 (FCA).

[21] Finally, I note the Board's conclusions regarding the explanations for her failure to meet her residency obligations make it clear that the PA did not demonstrate an intention to reside in Canada permanently, but rather to visit. The IAD wrote at para 26 of the Decision:

> While the appellant's level of breach is not on the higher end of the spectrum; she has failed to persuade me that her presence in Nigeria for such lengthy periods of time was justified in the circumstances that she has relayed, or that her conduct of visiting Canada only periodically was consistent with an intention to maintain her residency. This factor is not in the appellants' favour.

[22] I find that this summarized the key finding of the Board, and why it decided not to grant H&C discretion. While others may have chosen a positive outcome, that does not render the discretion to be unreasonable, as the IAD justified its findings on the evidence, and those findings were both intelligible and transparent.

[23] In short, the finding that H&C factors did not overcome that her breach of these obligations was reasonable, as was the explanation and consideration of the intent displayed.

IV. Conclusion

Ultimately, the Board arrived at a reasonable conclusion that (i) the evidence did not reflect an intention to return at the first opportunity to settle in Canada; (ii) the PA's pattern of travel "reflects periodic stays with returns to more established life in Nigeria", but from a PR perspective, she failed to show that her presence in Nigeria was justified in the circumstances; (iii) minimal establishment in Canada was demonstrated; (iv) family ties to Nigeria were much stronger, (v) lack of any demonstrated personal hardship in Nigeria, and (vi) the optimal BIOC in this case was in Nigeria. These considerations all properly come within the IAD's H&C analysis and discretion. Even if another member might have come to a different conclusion, I see no basis upon which to interfere with the Decision.

JUDGMENT in IMM-88-17

THIS COURT'S JUDGMENT is that

1. This application for judicial review is dismissed;

2. Counsel presented no questions for certification, nor do any arise;

3. No costs will be awarded.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-88-17
STYLE OF CAUSE:	VIVIEN ADAOBI UGWUEZE (AKA ADAOBI VIVIEN UGWUEZE), CHIKWUNONSO DAVID AKUDU (MINOR) v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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