Date: 20060509

Docket: IMM-1548-05

Citation: 2006 FC 582

Toronto, Ontario, May 9, 2006

PRESENT: The Honourable Mr. Justice von Finckenstein

BETWEEN:

ABBEY OKANLAWON BENJAMIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicant, Abbey Okanlawon Benjamin arrived in Canada in December 1999, and made a refugee claim upon arrival. This was denied on July 18, 2001.

[2] The Applicant met his current wife, Teresa Michelle Benjamin, in April 2001. They were married September 2, 2001. The Applicant thereupon made an H&C application requesting an exemption from the requirements set out in the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) such that the Applicant could have his Permanent Residence Application processed from within Canada.

[3] On February 17, 2005 that application was denied and the Applicant is now seeking judicial review of that decision.

I. Standard of Review

[4] An H&C decision per s. 25(1) of the Act is a discretionary one. The case law is clear that the standard of review is reasonableness *simpliciter*. (*Agot v. Canada (Minister of Citizenship and Immigration)* (2003), 28 Imm. L.R. (3d) 24, 2003 FCT 436; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193; *Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358, 2002 FCA 125).

II. Issue

[5] Did the Immigration Officer (the Officer) commit a reviewable error when it rejected the H&C application?

III. Argument and Analysis

[6] The Applicant essentially makes three arguments:

a) the officer pre-judged the application;
b) the officer failed to make a risk assessment taking into account new evidence; and
c) the officer failed consider the best interest of the Applicant's two step daughters.

[7] In my view, none of these arguments can succeed for the following reasons.

[8] The Applicant argues that the officer disregarded his degree of establishment in Canada. He states in his factum:

16. In assessing the applicant's degree of establishment, **IP 5, section 11.2** provides that "the degree of the applicant's establishment in Canada may include such questions as; 1) does the applicant have a history of stable employment? 2) is there a pattern of sound financial management? 3) has the applicant integrated into the community through involvement in community organizations, voluntary services or other activities? 4) has the applicant undertaken any professional, linguistic or other study that show integration into Canadian society so the applicant and family members have a good civil record in Canada (e.g., no interventions by police or other authorities for child or spouse abuse, criminal charges)?

17. It is submitted that a careful review of the Officer's notes and the applicant's application clearly show that most of those questions are answerable positively for the applicant. It is difficult to fathom how instead of the Officer utilizing the level of the applicant's integration and other positive achievements and contributions in Canada, same was used to determine that the applicant can easily re-integrate into the Nigerian society.

[9] Yet the Officer observed:

> The Applicant shows a degree of establishment which is normal for someone who has lived/worked in Canada for the past 6 years. It is expected that refugee claimant find work and support themselves while waiting the outcome of their claims. The level of establishment is one factor to be considered with all other factors in arriving at an H&C decision.
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> Applicant's Record, p.9; Reasons, p.2

[10] While this is not as detailed an assessment as one would like to see, there is nothing unreasonable about it. The court must keep in mind the characterization of the H&C process as described in *Nazim v. Canada (Minister of Citizenship and Immigration),* [2005] F.C.J. No. 159, 2005 FC 125 at paragraph 15:

> The humanitarian and compassionate process is designed to provide relief from unusual, undeserved or disproportionate hardship. The test is not whether the applicant would be, or is, a welcome addition to the Canadian community. In determining whether humanitarian and compassionate circumstances exist, immigration officers must examine whether there exists a special situation in the person's home

> country and whether undue hardship would likely result from removal. The onus is on the applicant to satisfy the officer about a particular situation that exists in their country and that their personal circumstances in relation to that situation make them worthy of positive discretion.

[11] The Applicant further alleges that the Officer did not make a proper risk assessment as he did not take into account the present situation in Africa as stated in a letter from the Applicant's mother.

[12] Yet a careful reading of the risk assessment shows that it dealt with the threat described in the mother's letter. This is sufficient. As has been held in *Rodriguez v. Canada (Minister of Citizenship and Immigration),* [2001] F.C.J. No. 664, 2001 FCT 414 at paragraph 16:

> The immigration officer does not have to conduct her own risk assessment in determining an H&C application, as this is not a refugee claim. It is sufficient that she considered the Applicant's claim on this issue in coming to her decision.

[13] Finally, the Applicant argues that the Officer did not sufficiently address the issue of his two dependent step-children. The issue of children in H&C proceedings was well summarized in *Dias Fonseca v. Canada (Minister of Citizenship and Immigration),* 2005 FC 709, at paragraph 17:

> In Legault v. Canada (Minister of Citizenship and Immigration), [2002] 4 F.C. 358 (C.A.), the Court of Appeal made clear that the best interests of the children are important factors, though not the determinative factor in an H&C decision. In Hawthorne v. Canada (Minister of Citizenship and Immigration), [2003] 2 F.C. 555 (C.A.) that Court also affirmed that, in considering such an application, careful and sympathetic assessment must be given to the best interests of the children, and it is not sufficient merely to refer to those interests or the relationships with children involved. By its decision in Owusu, supra, that Court acknowledged that in considering an H&C application, the officer concerned must be alert, alive and sensitive to the best interests of the children when it is clear the applicant indicates that he or she relies on their best interests as a factor. The applicant has the burden of establishing that he relies on

> that factor, and of establishing a claim that their best interests would be adversely affected if the decision is not favourable to the applicant.

[14] Here the Officer stated:

> I have considered the applicant's marriage to a Canadian citizen. There is an overseas sponsorship (family class) mechanism available to the applicant and it is up to him to take advantage of this opportunity. It is a known fact there is an immense number of people who travel from not only their own village, but to different countries and suffer a great expense in order to facilitate their immigration matters. While the department is conscious of the inconvenience that this may cause, it is also true that whenever possible, clients are facilitated through paper screening and the use of the mail to expedite the transmittal of documents. It is possible that an applicant may be processed and never come into face to face contact with a visa office official. In addition, routine immigration (spousal – sponsorship) case cases are processed in 6-9 months.
>
> The applicant states that in his absence from Canada there will be no one to support his wife and she may have to resort to being on public assistance. It is noted from the submissions that the applicant's wife has not worked consistently over the past number of years. However, it is also noted that she found employment in February 2003 as a 'fruit packer'. I therefore derive from this submission that the applicant's wife is capable for finding work. I also wish to add that if she chooses to go on public assistance, then that is a decision that only she can make. Information is not before me to show that she is unable to work or has any conditions preventing her from working.
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> …
>
> The role in which the applicant plays in the lives of his 2 step daughters is unknown.Whether he supports them or they are supported by other means is unknown.

[15] However cursory this assessment seems to be, it reflects the sparse information found in the application. In it the Applicant alleged:

> Also I am married to a Canadian citizen and we rely on each other for emotional support. I would suffer immense emotional hardship should I be required to apply outside Canada (see further submissions by counsel)

[16] His counsel's submission was of no benefit either. It stated:

> Mr. Benjamin is married to a Canadian citizen, Teresa Michelle Benjamin (nee Jacobs). They have been married since September 2, 2001. They live together with her two daughters to whom he serves as a father-figure. The children and their step-father have a very living and good relationship. For the better part, Mr. Benjamin has been the breadwinner of the home. To require him to leave would mean no one available to support his wife and her two children short of going on public assistance. His continued presence in Canada would ensure that his wife does not become a burden on the already over-stretched public purse.

[17] How could the Officer be alive to the interest of the children if the Applicant failed to present the barest thread of evidence? In light of the evidence presented, the Officer's decision was not unreasonable. Accordingly, this application cannot succeed.

IV. Addendum

[18] This case was twice postponed to allow the Applicant to make an application under the 'Public Policy under A25(1) of *IRPA* to Facilitate Processing in the *Spouse or Common Law Partner* in Canada Class' dated August 26, 2005. This has since been done on December 31, 2005 and the application is in process. It is expected that the Respondent will grant the Applicant an administrative deferral of removal as set out in section "E" of that policy. This Court can see no benefit in removing the Applicant to Nigeria, while his application (sponsored by his wife) is being considered, only to bring him back to Canada in an expedited fashion should his application be successful, as was suggested by the Respondent. Such a procedure totally fails to take into account the pain, dislocation and emotional toil entailed in any removal. The Respondent should keep the aforementioned factors in mind before attempting a removal while the Applicant's 'spouse in Canada application' is pending.

ORDER

THIS COURT ORDERS that this application be dismissed.

"Konrad W. von Finckenstein"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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