Federal Court  Cour fédérale

Date: 20220203

Docket: IMM-322-21

Citation: 2022 FC 129

Ottawa, Ontario, February 3, 2022

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

ADAEZE RACHEL OGBOLU
OLADIJI BABALOLA FAGBEMI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants are spouses and citizens of Nigeria. The Applicants seek judicial review of a negative decision of a Senior Immigration Officer [Officer] dated January 4, 2021 refusing their application for permanent residence based on humanitarian and compassionate [H&C] grounds under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The Applicants asserts that the Officer misstated, misconstrued or ignored relevant evidence that was before the Officer regarding the three factors that were assessed in the decision - namely, establishment, hardship and the risk of female genital mutilation [FGM]. The Applicants further assert that they were denied procedural fairness when the Officer reached a negative credibility finding about the Primary Applicant's FGM-related hardship claim without expressly saying so and without giving the Applicants the opportunity to explain themselves, and by the Officer's failure to provide the Applicants with an opportunity to provide corroborative evidence on the issue of FGM given the Officer's concerns regarding the sufficiency of the evidence provided.

[3] For the reasons that follow, the application for judicial review is dismissed.

I. Background

[4] The Primary Applicant, Ms. Ogbolu, is 30 years old, and Mr. Fagbemi, the Male Applicant, is 40 years old.

[5] The Primary Applicant entered Canada in August 2013 on a study permit. In October 2015, the Primary Applicant obtained a work permit, which was subsequently extended on a number of occasions. However, in January 2019, the Principal Applicant's work permit was refused.

[6] In May 2019, the Applicants submitted an application to remain in Canada on H&C grounds. On January 4, 2020, the Officer determined that they were not satisfied that the

Applicants' H&C considerations justify granting them an exemption under section 25(1) of the *IRPA*.

II. Decision at Issue

[7] In the decision, the Officer addressed establishment, hardship and FGM, weighing each of these factors separately and then conducted a cumulative assessment before refusing the Applicants' application.

[8] With respect to establishment, the Officer gave some positive weight to the Applicants' establishment in Canada. The Officer considered the seven years the Applicants had been in Canada, that the Principal Applicant was currently employed at TFI Global as an Account Officer on a full-time basis, that the Male Applicant had worked at several hotels, that the Applicants were active in their community by joining their local church, that the Applicants had established a social network while living in Canada and that letters of support from friends, coworkers and fellow church members had been provided to attest to the Applicants' good character and work ethic. The Officer also noted that the Applicants had no criminal record and paid taxes.

[9] With respect to hardship, the Officer considered the Applicants' arguments and evidence regarding the hardship they would face if removed from Canada due to the lack of employment prospects, the high level of homelessness and the deficiencies of the health care system in Nigeria as a whole and the high crime rate in the Principal Applicant's home region of Niger Delta. The Officer found that the educational background and work experience obtained by the Applicants in Canada could be used as an asset to obtain similar occupations in Nigeria and that the Applicants

had been able to support themselves in Nigeria prior to their arrival in Canada, albeit with some difficulties along the way. The Officer found that the Applicants had not established that they had personally experienced poverty while living in Nigeria and that they presented insufficient evidence that they would be unable to support themselves should they return to Nigeria.

[10] The Officer also considered the Principal Applicant's assertion that she was helping her brother in Nigeria by sending him money. However, the Officer found there was insufficient information to suggest that the brother would suffer greatly if the Applicants were removed from Canada. The Officer noted that it was likely that the Applicants would be able to secure employment at some point in Nigeria and thus could help the brother and that, given that the brother was now 21 years old, he may be able to support himself to some degree in the near future. Overall, the Officer found that they were unable to determine how much this lack of support would affect her brother and thus assigned only some weight to this aspect of the application.

[11] The Officer then considered the Applicants' argument regarding their established social network in Canada. The Officer noted that the Principal Applicant had several family members living in Nigeria and found that the Applicants had not provided sufficient evidence to show that the Applicants would not be able to create a new social network in Nigeria. The Officer also stated that the hardship of physical separation could be minimized by means of long-distance communication.

[12] Regarding the poor healthcare system in Nigeria, the Officer found that given the adult Applicants' profile and the lack of information provided, there was insufficient documentation to

indicate that health care plans were so expensive that they would not be able to obtain a health care plan in Nigeria for themselves, if such a plan was needed.

[13] Finally, regarding the Applicants' argument of high crime rates in the Principal Applicant's hometown of Niger Delta, the Officer found that the Principal Applicant had lived the majority of her life in Nigeria and had returned to Nigeria at least twice since arriving in Canada and that nothing indicated she had personally faced any issues related to crime on these occasions. The Officer only gave some weight to this aspect of the application.

[14] On the issue of the Principal Applicant's assertion that she will be subject to FGM if she returns to Nigeria, the Officer stated:

> The primary applicant indicates that she will be subjected to Female Genital Mutilation (FGM) if she is returned to Nigeria. She states that she comes from a tribe in the Niger Delta area where the practice of FGM is still prevalent and customarily enforced. According to the PA, it is the practice of her community for the first daughter to be circumcised upon the father's death or in preparation for marriage. Where the first daughter (the applicant) is unavailable, the second daughter will stand in her place for the purpose of burying the father. Monetary compensation may be accepted when both daughters are unavailable. I note that the second daughter (applicant's sister) is currently living in Canada on a valid work permit.
>
> Overall, the applicant has not submitted any evidence to support that she will be subjected to FGM upon a return to Nigeria. For example, she has not included any affidavits from friends or family to support this risk. Importantly, I note that the second daughter (applicant's sister) has submitted a letter of support and she does not mention FGM as a potential hardship. In addition, the applicant has not included any documentary evidence from members of her community to confirm this tradition.
>
> Additionally, I note that the applicant indicates that her father passed away in February 2015. However, according to the applicant's passport, she returned to Nigeria approximately one year later on January 8th, 2016. There is little indication that she experienced any

> associated hardship during this trip. For all of these reasons, I assign little weight to this hardship.

[15] In conclusion, the Officer held that the Applicants' hardships, even when considered cumulatively, were not sufficient to warrant relief due to the mitigating factors, which included the lack of evidence regarding FGM, the minimal likelihood of the general country conditions affecting the Applicants and their available network of support in Nigeria.

III. Issue and Standard of Review

[16] The Applicants submit that the following issues arise on this application: (a) Are the Officer's findings reasonable in light of all the evidence? (b) Did the Officer mistake and/or ignore the evidence on the record? And (c) Did the Officer fetter his/her discretion and/or impose excessive burden on the Applicants?

[17] The Respondent submits that the sole issue on this application is whether the Officer's decision was reasonable.

[18] Having considered the submissions of the parties, I am satisfied that the issues for determination are as follows:

A. Was the Officer's decision reasonable?

B. Was there a breach of procedural fairness?

[19] In relation to the first issue, the applicable standard of review of an H&C decision is reasonableness [see *Kanthasamy v Canada (Citizenship and Immigration),* 2015 SCC 61 at para 44]. In assessing whether a decision is reasonable, the Court will assess whether the decision is appropriately justified, transparent and intelligible. To meet these requirements, the decision must reflect "an internally coherent and rational chain of analysis" and be "justified in relation to the facts and law that constrain the decision maker". Both the outcome and the reasoning process must be reasonable [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 83, 85 and 99].

[20] In relation to the second issue, breaches of procedural fairness in administrative contexts have been considered reviewable on a correctness standard or subject to a "reviewing exercise ... 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied" [see *Canadian Pacific Railway Company v Canada (Attorney General),* 2018 FCA 69 at para 54]. The duty of procedural fairness is "eminently variable", inherently flexible and context-specific. It must be determined with reference to all the circumstances, including the *Baker* factors [see *Vavilov*, *supra* at para 77]. A court assessing a procedural fairness question is required to ask whether the procedure was fair, having regard to all of the circumstances [see *Canadian Pacific Railway Company*, *supra* at para 54].

IV. Analysis

A. *Was the Officer's decision reasonable?*

[21] Subsection 25(1) of the *IRPA* gives the Minister discretion to exempt foreign nationals from the ordinary requirements of that statute and grant permanent resident status in Canada if the Minister is of the opinion that such relief is justified by H&C considerations. An H&C determination under section 25(1) of the *IRPA* is a global one, where all the relevant considerations are to be weighed cumulatively in order to determine if relief is justified in the circumstances. Relief is considered justified if the circumstances would excite in a reasonable person in a civilized community a desire to relieve the misfortunes of another [see *Kanthasamy*, *supra* at paras 13, 28; *Caleb v Canada (Citizenship and Immigration),* 2020 FC 1018 at para 10].

[22] The granting of an exemption for H&C reasons is deemed to be exceptional and highly discretionary and therefore "deserving of considerable deference by the Court" [see *Qureshi v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 335 at para 30]. There is no "rigid formula" that determines the outcome [see *Sivalingam v Canada (Citizenship and Immigration*), 2017 FC 1185 at para 7].

[23] The Applicants assert that, in general, the Officer misstated and/or misconstrued the evidence, ignored relevant evidence, imposed an excessive and unreasonable burden on the Applicant and fettered their discretion in making their decision. I will address the specific assertions of the Applicants on a factor-by-factor basis.

(1) Establishment

[24] The Applicants assert that the Officer improperly discounted the Applicants' establishment by imposing an impossible burden on the Applicants to show that they would not be able to create a new social network. I reject this assertion. The issue of the creation of a new social network was not raised by the Officer in his consideration of the establishment factor. Rather, it was raised under the Officer's consideration of hardship. I fail to see any basis to suggest that this consideration played any role in the determination of the weight given by the Officer to the establishment factor.

[25] Notwithstanding, the Officer addressed the Applicants' submission that they would suffer hardship from the loss of their social network in Canada by noting that the Applicants have several family members living in Nigeria, including the Principal Applicant's mother, brother and two younger sisters. Given the support available from her family, the Officer found that there was insufficient evidence to demonstrate that the Applicants could not create a new social network. I do not see the Officer's reasons as imposing an insurmountable burden as suggested by the Applicants. Rather, the existing evidence before the Officer did not sufficiently support the Applicants' assertion of a loss of their social network.

[26] The Applicants further assert that the Officer failed to take into consideration that the Applicants have expended seven years of their adult lives in school and working in Canada and that it would be impractical to start all over again in Nigeria due to their length of absence and the drastic change of social and economic circumstances in Nigeria.

[27] I reject this assertion. The Officer's reasons demonstrate that he gave the Applicants credit for the duration of their stay in Canada, their respective employment experience, their active involvement in the community, their established social network and their stature in the community, finding that overall the establishment factor warranted some positive weight. The Officer also considered, as part of his global assessment of the factors, that there will inevitably be some hardship associated with being required to leave Canada and that this alone is generally not sufficient to warrant H&C relief, which statement is correct.

[28] The Applicants further assert that the Officer erred in unreasonably discounting the value of physical and emotional relationships with the Applicants' social network in Canada, by suggesting that the Applicants could maintain those relationships by electronic means. I see no error in the Officer's consideration of this aspect of their establishment and in any event, it is not the role of the Court to reweigh the value of such relationships on judicial review.

[29] While the Applicants also state that the Officer failed to appreciate the poor state of the infrastructure in Nigeria (which would inhibit long-distance communication), the Applicants do not refer to any specific documentary evidence that the Officer had before him that would render such communications problematic.

[30] Overall, I find that the Applicants have failed to show any shortcomings in the Officer's reasons or any unreasonable assessment of the evidence regarding the establishment factor.

(2) Hardship

[31] The Applicants assert that, in considering the Applicants' prospects for employment in Nigeria, the Officer unreasonably concluded that the Applicants could easily transfer their skills given the evidence before the Officer of the very high unemployment rate and serious security challenges (such as kidnapping, police brutality, and killing of minority groups) that would plague the Applicants in Nigeria. The Applicants have not asserted any other errors in relation to the Officer's hardship analysis.

[32] I see no error in the Officer's consideration of the Applicants' respective prospects for employment in Nigeria. The Officer considered the educational and work experience of the Applicants and took into consideration the country condition documents provided by the Applicants. The Officer's chain of analysis is coherent and transparent in addressing the many variables of the present case, and the Applicants did not point out to any precise factual element the Officer missed or misapprehended. The arguments of the Applicants were considered by the Officer and ultimately the Officer found, on the evidence before him, that the Applicants had provided insufficient evidence that they will be unable to support themselves should they return to Nigeria. The Applicants are asking this Court to reweight the evidence regarding the economic situation in Nigeria and the challenges they will face in looking for work, which the Court will not do on an application for judicial review.

(3) FGM

[33] The Applicants assert that the Officer made a number of errors in their consideration of this factor. Specifically, the Applicants assert that:

A. In stating that "the applicant has not submitted any evidence to support that she will be subjected to FGM", the Officer failed to appreciate that the Primary Applicant's statement constitutes evidence. The Applicants assert that this is an error of law, to be reviewed on a standard of correctness.

B. The Officer's assessment of the evidence was unreasonable due to the Officer's conclusion that additional evidence was required beyond that which had been provided by the Applicants. As the Applicants' credibility was not openly impugned, no corroborating evidence was required.

C. The Officer's concern regarding the absence of corroborating evidence from friends and relatives "is not but a convenient excuse" as this type of evidence is routinely seen by Officers are self-serving and consequently assigned little or no weight.

D. The Officer ignored the objective evidence submitted by the Applicants of the risk of FGM.

E. The Officer disregarded the Principal Applicant's evidence that the only way that she could return to Nigeria to mourn her father's death was a year later and in secret, which contradicts the Officer's finding that "there is little indication that she experienced any associated hardship during this trip".

[34] I reject the Applicants' assertions that the Officer did not appreciate that the Principal Applicant's statement constituted evidence and that it was ignored. I find that it is reasonable to infer that the Officer's statement that the Principal Applicant "[o]verall […] had not submitted any evidence" meant no evidence beyond that of the Principal Applicant, which the Officer had just summarized. It is plain on the face of the reasons that the Officer took the Principal Applicant's evidence into consideration.

[35] Moreover, it cannot be assumed that in cases where an officer finds that an applicant's evidence does not establish the applicant's claim that the officer has not believed the applicant. An applicant may have tendered evidence of each essential fact to make out a particular claim, but she may not have met the legal burden because the evidence presented does not prove the facts required on a balance of probabilities [see *Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067 at para 23; *Gao v Canada (Minister of Citizenship and Immigration)*, 2014 FC 59 at para 32]. In this case, I find that the Officer made no finding regarding the Principal Applicant's credibility (veiled or otherwise). Rather, the Officer was simply not satisfied that sufficient evidence had been presented by the Applicants on this issue. Officers are entitled to significant deference where findings of sufficiency are concerned, provided that the insufficiency is explained and not used as a disguised means of making credibility findings [see *Magonza v Canada (Minister of Citizenship and Immigration)*, 2019 FC 14 at para 35]. Here, the Officer adequately explained the deficiency in the Applicants' evidence by pointing to the types of evidence that had not been provided.

[36] The Applicants assert that the Officer had before them objective evidence of the risk to the Principal Applicant of being subjected to FGM upon her return to Nigeria – namely a Thomson Reuters Foundation's article entitled "*Nigeria: The Law and FGM*". However, a review of that article reveals that it does not address the specific tribal practice of FGM feared by the Principal Applicant and described in her application form. Rather, the article acknowledges the prevalence of FGM by region, but focuses on the domestic legal framework addressing FGM.

[37] I agree with the Applicants that the Officer's reasons do not take into account the Principal Applicant's evidence that she was only able to return to Nigeria in hiding and thus the Officer's reasoning regarding the import of her trip to Nigeria in 2016 is flawed. However, I agree with the Respondent that, in light of the Officer's insufficiency finding regarding this factor, this flaw is not sufficiently central or significant to render the decision unreasonable [see *Vavilov, supra* at para 100].

[38] Accordingly, I am not satisfied that the Applicants have demonstrated that the decision of the Officer was unreasonable.

B. *Was there a breach of procedural fairness?*

[39] The Applicants assert that the Officer breached the Applicants' procedural fairness rights in: (a) failing to provide the Applicants with an opportunity to provide corroborative evidence on the issue of FGM given the Officer's concerns regarding the sufficiency of the evidence provided; and (b) insinuating that the Principal Applicant's evidence regarding the risk of FGM was not

credible without giving the Principal Applicant an opportunity to explain herself or clarify her evidence.

[40] I find that the Officer was not obligated to alert the Applicants to the Officer's concern regarding the sufficiency of the evidence provided regarding the issue of FGM. The onus was on the Applicants to include pertinent information and evidence in support of their submissions. Lack of evidence or failure to adduce relevant information in support of an H&C application was at the peril of the Applicants [see *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at paras 35, 45 and 61; *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 5].

[41] Moreover, in the H&C context, an applicant has no right or legitimate expectation that they will be interviewed [see *Owusu*, *supra* at para 8]. Exceptions to this rule have been made in some cases where an officer's decision is clearly based on a credibility finding [see *Duka v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1071; *Shpati v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 1046]. However, in this case, I am not satisfied that the Officer made any credibility findings. Rather, as noted above, the Officer's determination turned on the sufficiency of the evidence put forward by the Applicants.

[42] Accordingly, I find that there was no breach of procedural fairness by the Officer either in not requesting additional information from the Applicants or in not convoking an interview.

V. Conclusion

[43] As I have found that the Applicants have not demonstrated that the Officer's decision was unreasonable and that there was no breach of procedural fairness, the application for judicial review shall be dismissed.

JUDGMENT in IMM-322-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The parties proposed no question for certification and none arises.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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