Federal Court  Cour fédérale

Date: 20220331

Docket: IMM-1179-21

Citation: 2022 FC 449

Ottawa, Ontario, March 31, 2022

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

OLUWASEUN MODUPE OLADEKOYE
OLUWAFEMI OLADIMEJI OLADEKOYE
PRECIOUS IFEOLUWA OLADEKOYE
ABIOLA OLUWAGBEMIGA OLADEKOYE
PEACE ABISOLA OLADEKOYE
FAVOUR DAMILOLA OLADEKOYE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is the judicial review of a decision of an immigration officer [H&C Officer] refusing the Applicants' application for permanent residence. The application was based on humanitarian and compassionate [H&C] grounds pursuant to s 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] For the reasons that follow, the application is granted.

Background

[3] The Applicants are Oluwaseun Modupe Oladekoye [Principal Applicant], and her five children [Minor Applicants]: Oluwafemi, Precious, Abiola, Peace, and Favour, who were between the ages of 5 and 15 at the time of the H&C decision. The Principal Applicant and the four eldest Minor Applicants are citizens of Nigeria. The youngest child is a citizen of the United States.

[4] The Applicants arrived in Canada on April 15, 2017 with a visitor visa and, shortly thereafter, made a claim for refugee protection. Copies of the negative Refugee Protection Division [RPD] and Refugee Appeal Division [RAD] decisions were not provided by the Applicants in their application record. However, the H&C Officer's reasons indicate that the Principal Applicant claimed that she faced persecution in Nigeria as a bisexual woman and because she was perceived as a witch. Those reasons indicate that the RPD rejected the Applicants' claim on the basis that the Principal Applicant lacked credibility, including with respect to her assertion of being a bisexual woman. The H&C Officer's reasons also indicate that on February 27, 2019, the RAD upheld the negative decision of the RPD and that on July 11, 2019, this Court dismissed an application for leave and judicial review of the RAD decision (leave was denied).

[5] The Applicants filed an H&C application on October 31, 2019, and filed supplementary documents on November 19, 2019 and March 31, 2020. In support of their H&C application, the

Applicants provided additional evidence post-dating the rejection of their refugee claim by the RPD and RAD, including letters and emails from family members and other individuals in Nigeria, which purported to show that the Principal Applicant was actively sought by Nigerian police because of a bisexual relationship in Nigeria prior to her fleeing that country. The Officer denied the Applicants' request for H&C relief by decision dated January 5, 2021, which decision is the subject of this judicial review.

Decision under review

[6] The H&C Officer considered establishment in Canada, hardship upon return and the best interests of the children.

[7] With respect to establishment, the H&C Officer notes that the Applicants have been in Canada for over four years, that the Principal Applicant is now employed and is self-sufficient, and that there are reference letters attesting to the Principal Applicant's character. The H&C Officer found that the Applicants have been in Canada a short period of time and that their degree of establishment is unremarkable and modest. With respect to their ties to Canada, the H&C Officer considered letters of support, including from the Principal Applicant's partner, but found that the nature of these relationships did not persuade them that the Applicants would experience hardship if they were required to leave Canada. The H&C Officer noted that the Applicants do not have any family in Canada but do have immediate family in Nigeria and concluded that the Applicants have stronger personal ties there than in Canada. The H&C Officer gave the family ties factor some weight in their decision.

[8] As to hardship, the H&C Officer recounts the conclusions of the RPD and RAD, who found that the Principal Applicant's allegation that she was bisexual were not credible. The H&C Officer acknowledges that the test at the IRB is different than the one used for H&C applications, but gave the credibility findings of the RPD and RAD significant weight. The H&C Officer notes the Principal Applicant's submission that she would suffer hardship due to persecution based on her bisexuality and refers to her evidence submitted in support of the H&C application. The H&C Officer found that the submitted letter from the police states that the Principal Applicant's driver had reported her for being involved in a relationship with a woman in 2017. Further, all of the remaining documents suggest that the police were pursuing the Principal Applicant in 2019, over two years after the Principal Applicant's complaint and departure from Nigeria. The Principal Applicant did not provide an explanation for the delay in the police investigation. The H&C Officer refers to country condition documents and found that it was unlikely that police in Lagos would investigate the Principal Applicant as a bisexual woman based on a single complaint made two years earlier. The H&C Officer concluded that because the Principal Applicant had been previously found not credible in her claim to be a bisexual woman, and because of the prevalence of fraudulent documents in Nigeria, the Principal Applicant would not experience hardship on the grounds of her sexual orientation if she returned to Nigeria.

[9] With respect to the best interests of the children, the H&C Officer notes the documentation submitted with respect to their school and other activities and found that as most of the children are of a young age, moving to Nigeria would not result in a negative outcome. The children between the ages of five and ten should be able to adapt to the change in country

conditions with relative ease, if accompanied by the Principal Applicant who accounts for the majority of their socialization. They would also be in the presence of their grandmother, aunts, and uncles in the same city. Finally, although the removal of the older children would result in additional difficulty as they had established greater ties to their community and surroundings; this would be mitigated by the accompaniment of their other family members.

[10] Based on a global assessment of the above, the H&C Officer concluded that the Applicants did not demonstrate sufficient grounds to grant an exemption.

Issues and standard of review

[11] The sole issue arising in the matter is whether the H&C Officer's decision was reasonable. More specifically, whether the H&C Officer erred in their assessment of:

i. hardship upon return due to the Principal Applicant's sexual orientation;
ii. establishment; and
iii. the best interests of the child.

[12] The parties submit and I agree that the standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 23 and 25). On judicial review, the Court "asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

Analysis

i. Hardship upon return

[13] The Applicants submit that the H&C Officer erred in their assessment of the new objective evidence and country conditions documents submitted by the Applicants to support their claim of hardship associated with the risk arising from the Principal Applicant's sexual orientation. They submit that the H&C Officer failed to engage in any meaningful assessment of this evidence; instead relying almost exclusively on the negative credibility findings of the RPD and RAD.

[14] Conversely, the Respondent submits that the Applicants' H&C application relied on allegations already found not to be credible, which the H&C Officer reasonably dismissed.

[15] As the Respondent points out, the Applicants did not include or refer to the RPD or RAD decisions in the application record filed in this application for judicial review. However, nor do they dispute the findings as described by the H&C Officer.

[16] Instead, they submit that the new evidence provided in support of the H&C application goes well beyond the evidence that they submitted in support of the RPD and RAD decisions, including:

- A September 18, 2019 letter from Animashaun Olajumoke who describes herself as a female friend to the Principal Applicant and that the Principal Applicant has been a lovely and romantic friend and a wonderful partner;

- A letter purporting to be from the Principal Applicant's brother, dated September 20, 2019, stating that the police are actively looking for the Principal Applicant and her husband in relation to Shola Oloyede, with whom the Applicant had a same sex relationship in Nigeria and who the brother says was set ablaze and killed in the market place by a mob because of her sexual orientation;

- A police "Letter of Invitation Case of Same Sex Relationship (Bisexual)" dated July 21, 2019, stating the Principal Applicant's driver had reported a case against the Principal Applicant and Shola Oloyede on April 20, 2017 and advising the Principal Applicant to come forward to face the allegations against her;

- An email attaching a "wanted" poster, dated January 7, 2020, under the banner "Oodua People's Congress" purporting to show the Principal Applicant's photograph and stating that the organization had this "case" on its list for two years and the case is now drawing a lot of unrest in the community because of the Principal Applicant's "involvement in sexual activities between male to male, female to female among the community children" and that the children caught "in this devilish act have accused her of been [*sic*] their source of sex ideology";

- A December 23, 2019 anonymous text message threat;

- A November 7, 2019 email purported to be from the girlfriend of the Principal Applicant's brother, advising that the Principal Applicant's brother, his friend and the Principal Applicant's mother were arrested the day before by the Nigerian police who alleged that they had been hiding the Principal Applicant and demanded to know her

whereabouts. The email author claims to have secretly taken the attached pictures said to be related to the incident.

[17] The Applicants submit that the H&C Officer dismissed this evidence because of the prior negative credibility findings and because fraudulent documents are available in Nigeria. The Applicants submit that it is not permissible to discount evidence based on earlier credibility findings. I note that in support of this submission the Applicants reference *Okoli v Canada (Citizenship and Immigration)*, 2009 FC 332 at para 32, which is not concerned with an H&C officer's treatment of prior credibility findings.

[18] It must be kept in mind that the role of an H&C officer is not to reassess the findings of the RPD and the RAD and that s 25(1) "is not meant to duplicate refugee proceedings under s. 96 or s. 97(1), which assess whether the applicant has established a well-founded fear of persecution, risk of torture, risk to life, or risk of cruel and unusual treatment or punishment". (*Valencia Martinez v Canada (Citizenship and Immigration)*, 2017 FC 748 [*Valencia*] at para 24 citing *Kanthasamy v Canada*, 2015 SCC 61 at paras 24 and 51 [*Kanthasamy*]).

[19] In *Miyir v Canada (Citizenship and Immigration)*, 2018 FC 73 [*Miyir*], Justice Diner addressed the interplay between a failed refugee claim and an H&C application found that that it is a difficult task to overcome previous findings when applicants seek to present a story which was already not found to be credible. This is particularly the case when the applicant's new evidence is merely a corroborative of a story already found not to be credible (*Miyir* at para 25

citing *Gomez v Canada (Minister of Citizenship & Immigration)*, 2005 FC 859 at para 5; see also *Zingoula v Canada (Citizenship and Immigration)*, 2019 FC 201 at para 22).

[20] The Applicants face this difficulty because their refugee claim was premised on the Principal Applicant's assertion of being bisexual – which was rejected as not credible by both the RPD and the RAD. As stated by Justice McVeigh in *Demetrio v Canada (Citizenship and Immigrations)*, 2021 FC 1139 [*Demetrio*], if a story as a whole is not credible, further evidence or argument which merely doubles down on the same story will not "move the needle" of credibility, so to speak, unless it provides sufficient linkage to establish that the claims which were previously non-credible now appear to be credible (at para 15).

[21] Here the H&C Officer dismissed the new documents as evidence of hardship because the Principal Applicant offered no explanation for why the police would now be looking for her, more than two years after the complaint was made by her driver and her departure from Nigeria. In that regard, the H&C Officer notes country condition reports indicate that in larger cities, such as Lagos, there is a higher tolerance for sexual minorities and that many of the arrests that have taken place under Nigeria's anti-LGBTI laws occurred at large gatherings. The H&C Officer also notes the wide prevalence of fraudulent documentation in Nigeria. The H&C Officer concludes, based on the country conditions research, that it was unlikely that the police in Lagos would investigate the Principal Applicant as a bisexual woman based on a single compliant made two years earlier and "[a]s the applicant has previously been found not credible as a bisexual woman and the prevalence of fraudulent documents, I find she would not experience hardship in Nigeria on these grounds if she were to return there".

[22] In my view, it was not reasonable for the H&C Officer to make the general statement that fraudulent documents are readily available in Nigeria and to use this, in part, as a basis for not assessing the new evidence to determine whether it supported the claim of hardship. As stated in *Lin v Canada (Citizenship and Immigration)*, 2012 FC 157, just because fraudulent documents are readily available does not, for that reason alone, mean that an applicant's documents are fraudulent (at para 53).

[23] In *Oranye v Canada (Citizenship and Immigration)*, 2018 FC 390 [*Oranye*] Justice Ahmed was reviewing a decision of the RAD. When conducting its independent assessment of the affidavit evidence the RAD relied on documents contained in the national documentation package [NDP] to support that fraudulent documents are easily available in Nigeria but provided no further analysis and made no factual finding that the affidavits were, in fact, fraudulent. The RAD afforded the affidavits low probative value. Justice Ahmed found that this was impermissible:

> [27] Fact finders must have the courage to find facts. They cannot mask authenticity findings by simply deeming evidence to be of "little probative value." As Justice Mactavish so rightly put it in *Sitnikova v. Canada (Citizenship and Immigration)*, 2017 FC 1082 at para. 20, which I will reproduce in its entirety:
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> > This Court has, moreover, previously commented on the practice of decision-makers giving "little weight" to documents without making an explicit finding as to their authenticity: see, for example, *Marshall v. Canada (Citizenship and Immigration)*, 2009 FC 622 (CanLII) at paras. 1-3, [2009] F.C.J. No. 799 and *Warsame v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 1202, at para. 10. If a decision-maker is not convinced of the authenticity of a document, then they should say so and give the document no weight whatsoever. Decision-makers should not cast aspersions on the authenticity of a document, and

> then endeavour to hedge their bets by giving the document "little weight". As Justice Nadon observed in *Warsame*, "[i]t is all or nothing": at para. 10.
>
> This improper approach is precisely the one employed by the RAD in the case before me. While the RAD has tried to mix the issue of fraudulent documents with "cumulative credibility concerns and [an] overall lack of credibility" on the part of the Applicant, the credibility of the Applicant's oral testimony has nothing to do with the authenticity of the affidavits in question. It is either the affidavits are authentic or fraudulent, but the RAD makes no finding on the point and instead opts to "hedge" by according them little probative value. This is an error of law.
>
> …..
>
> [29] It is unfortunate that generalizations about the "easy availability of fraudulent documents" are frequently relied upon as though they constitute incontrovertible evidence of fraud. Where they appear in country condition documents, these generalizations can only properly serve to alert the decision-maker to the issue. The finding about the authenticity of a document cannot depend or even be influenced by mere suspicion from the reputation of a given country. Each document must be analyzed individually and its authenticity decided on its own merits. If there is evidence of fraud, it speaks for itself and the decision-maker should accord it no probative value. The alternative – that is, relying on the prevalence of fraud in a given country to impugn the authenticity of a document – amounts to finding guilt by association.

[24] A similar finding was made by Justice McVeigh in *Ogbebor v Canada (Citizenship and Immigration)*, 2021 FC 994 [*Ogbebor*] in the context of the judicial review of a Pre-removal Risk Assessment [PRRA] decision. In that case, the RAD had refused the refugee claim based on credibility concerns with the applicant's wife's claim of being bisexual. The applicant sought a PRRA where he submitted new evidence, including a police report showing that the applicant's brother was arrested for aiding and abetting the escape of the applicant and his wife. The PRRA

officer quoted an article from the NDP highlighting the level of corruption in Nigerian government agencies and departments, the fact that it is difficult to determine the authenticity of specific documents, the prevalence of documentary fraud, and the fact that "all forms of genuine documents can be obtained using false information…". The officer, when combining the corruption with the prior significant credibility concerns, assigned low weight to the police report.

[25] Justice McVeigh held that:

> [17] The Officer, in the reasons, does exactly what it is instructed not to do by this Court in *Sitnikova* and *Oranye* (*Sitnikova v Canada (Minister of Citizenship and Immigration*, 2017 FC 1082; *Oranye v Canada (Minister of Citizenship and Immigration),* 2018 FC 390). In the reasons, the Officer assigns low weight to the new evidence, not no weight. The Officer did this the reasons say because of the prevalence of fraudulent documents from Nigeria, and credibility concerns about the Applicant. However, there was no explicit finding or discussion that the new evidence itself was fraudulent.

[26] Justice McVeigh noted that the decision in *Oranye* was in the context of a RAD appeal review, whereas *Sitnikova* was a PRRA review, as was the matter before her. However, she saw no reason why the principles in *Sitnikova* and *Oranye* would not also be applicable to the matter before her.

[27] Justice McVeigh concluded that if there were specific reasons why the police report should have been rejected – based on the document itself – then the PRRA officer was required to explain this in the reasons. However, the officer's reasons did not indicate anything at all about the document which rendered it suspect, other than that it came from Nigeria and the

applicant had credibility issues. Justice McVeigh found that this was completely on point with the jurisprudence, rendering this approach unreasonable.

[28] Although in the matter before me the H&C Officer did not hedge their bets by affording the documents low weight, the error remains. This is because the Officer has simply thrown the generalization about the easy availability of fraudulent documents in with the prior negative credibility findings of the RAD and the RPD and the Officer's country conditions analysis, to conclude that the Principal Applicant would not experience hardship if she were returned to Nigeria – without actually making a finding that the new evidence was fraudulent.

[29] While the Respondent's written submissions did not address the H&C Officer's reference to the prevalence of fraudulent documents in Nigeria, when appearing before me the Respondent submitted that this was but one of the reasons given by the H&C Officer given for finding that the Applicant would not experience hardship in Nigeria and that the underlying credibility findings of the RPD and RAD as to her sexual orientation remain. That is true. And I also recognize that when an applicant seeks to present essentially the same story that has been found not to be credible as a whole by the RPD or the RAD, a H&C officer is entitled to reject it (*Zingoula* at para 11, *Miyir* at para 25).

[30] But, as I have indicated above, the problem here is that the H&C Officer bundled their reasons and did not assess the new evidence to determine if it was, or was not, fraudulent. The Court is unable to ascertain from the H&C Officer's reasons what weight the H&C Officer

afforded to this basis for disregarding the new evidence as compared to the other factors the H&C Officer identified.

[31] Given this, the matter must be sent back for redetermination. The Officer's decision is unreasonable as it is not justified in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov* at para 99). Accordingly, I need not deal with establishment and the best interests of the children.

JUDGMENT IN IMM-1179-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted;

2. The decision is set aside and the matter shall be remitted to another officer for redetermination;

3. There shall be no order as to costs; and

4. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Vakkas Bilsin	FOR THE APPLICANTS
Charles J. Jubenville	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lewis & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT