Federal Court  Cour fédérale

Date: 20220603

Docket: IMM-1658-20

Citation: 2022 FC 819

Ottawa, Ontario, June 3, 2022

PRESENT: Madam Justice McDonald

BETWEEN:

OREOLUWA DAMILOLA AKINKUGBE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of a Senior Immigration Officer, dated February 17, 2020, denying the Applicant's application for permanent residence on humanitarian and compassionate (H&C) grounds.

[2] For the reasons that follow, this judicial review is granted as I have concluded the Officer erred in the consideration of the Applicant's establishment in Canada.

I. Background

[3] The Applicant is a 32-year-old citizen of Nigeria. She came to Canada as an international student in 2007. Her study permit was for studies at the University of Toronto, but the Applicant withdrew from the program, and later completed her studies at Humber College. After several applications for study permits were refused, the Applicant submitted an H&C application in 2014, which was also refused. She submitted a second H&C application in August 2018, which is the subject of this judicial review. Her application was based on her establishment in Canada, and hardship upon return to Nigeria.

II. H&C Decision Under Review

[4] In considering her establishment in Canada, the Officer considered support letters from friends, and the Applicant's relationship with her brother, who is a permanent resident. However, the Officer noted that none of the friends indicated how their relationship would be affected if the H&C application was refused. The Officer held the Applicant's friends and brother could maintain contact abroad through other means.

[5] With respect to the Applicant's involvement in her church community, the Officer acknowledged that she donates to the church, volunteers with various programs and activities, and considered letters from her fellow congregants and pastor. However, the Officer stated, "there is little evidence provided to indicate that she is unable to practice her religion in Nigeria" and "little evidence that the church cannot continue to run the programs for youth without the Applicant's contribution".

[6] The Officer further considered that the Applicant was unable to receive a Post-Graduate Work Permit (PGWP) because her study permit specified that she had to study at the University of Toronto, and therefore her studies at Humber College were not authorized. The Officer found "her inability to qualify for a PGWP is a result of her own actions" and therefore gave little weight to this factor.

[7] The Officer also held the Applicant had not shown why she would be unable to apply for a worker visa from abroad. The Officer stated:

> If the Applicant wish [sic] to work in Canada, she needs to apply for a worker visa from abroad. I note that any foreign national who wish to work in Canada has to apply for a worker visa from abroad. There is little information provided to demonstrate how her situation differs from any other foreign national who wish to work in Canada. The Applicant has provided little reasons why she is unable to apply for a worker visa from abroad. I note that the Applicant speaks English, has Canadian post-secondary education and previous work experience in Canada all of which may facilitate her application for a worker visa. Furthermore, the Applicant already has an employment offer with the House of Praise. I note that her employment offer specified that "this offer of employment is null and void if you are not legally entitled to work in Canada or cease to be so during the term of your employment." She could perhaps ask her future employer to assist her in her worker visa application by providing her a Labour Market Impact Assessment. I do not find that the Applicant is unable to apply for a worker visa from abroad.

[8] Finally, the Officer considered the Applicant's statement that she would be unable to find employment in Nigeria. The Officer held there was little evidence provided to indicate her education and skills were not transferrable. The Officer also noted the Applicant's parents live in Nigeria, and there was little evidence provided to indicate they were unwilling or unable to assist the Applicant to resettle there. The Officer considered the parents' statement that they had

sold a property and taken out loans to pay for their children's school fees, which the Officer held demonstrates they are willing to do anything to support the Applicant.

[9] As a result, the H&C application was denied.

III. Issue and Standard of Review

[10] The sole issue is whether the Officer's decision was reasonable.

[11] The parties agree that the standard of review is reasonableness. In reviewing a decision on a reasonableness standard, 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" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 99).

IV. Analysis

[12] The Applicant argues it was unreasonable for the Officer to speculate that she could apply for a work permit from outside of Canada. The Applicant relies on a number of cases where this Court has held it is unreasonable to consider temporary avenues for immigration within the context of considering an application for permanent residence on H&C grounds, including *Bernabe v Canada (Citizenship and Immigration)*, 2022 FC 295 at paras 31 and 33 [*Bernabe*] and *Rocha v Canada (Citizenship and Immigration)*, 2022 FC 84 at paras 36-37 [*Rocha*].

[13] In *Bernabe*, Justice Sadrehashemi found:

> First, the family does not financially qualify for the parent super visa multiple-entry program, as mentioned by the Officer. But, more importantly, the super visa or regular visitor visas are requests for temporary relief and not the equivalent to what the Applicant is seeking — permanent residence in Canada.
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> […]
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> In my view, the more significant issue is that the consideration of these avenues for temporary relief are irrelevant to the question that was actually before the Officer—whether there were exceptional circumstances to grant permanent status in Canada, not whether Ms. Bernabe could stay temporarily. As noted by this Court in *Greene v Canada (Minister of Citizenship and Immigration)*, 2014 FC 18 at paragraph 10, and more recently by Justice Zinn in *Rocha v Canada (Minister of Citizenship and Immigration)*, 2022 FC 84 at paragraph 31, it is an error to suggest temporary residency is "a suitable alternative to permanent residency" (at paras 31, 33).

[14] Similarly, in *Rocha*, Justice Zinn held:

> With respect to a study permit for Facundo, I agree with the Applicants and the reasoning in *Greene* that it is unreasonable to suggest a study permit, a temporary remedy, as a suitable alternative for permanent residence in Canada. The question before the Officer was whether the Applicants should be allowed to apply for permanent residence from within Canada, not whether they should be allowed to remain in Canada temporarily.
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> The availability of these pathways was cited as a factor weighing against the Applicants' establishment in Canada. The Officer unreasonably relied on these avenues in granting only "little positive consideration" to the Applicants' long standing ties with Canada (at paras 36-37).

[15] As in *Rocha* and *Bernabe*, the Officer here fell into the same error. The Officer fails to properly assess the Applicant's 13 years of establishment in Canada, because, according to the Officer, she can apply for a temporary work permit from Nigeria. Such an assessment is

unreasonable. The question before the Officer is whether the Applicant should be permitted to apply for permanent resident status from within Canada – not whether she may be able to avail herself of a temporary work permit from Nigeria.

[16] Further, the Applicant argues the Officer erred in discounting the evidence of establishment with respect to her church involvement on the basis that she can continue to practice her faith in Nigeria. The Applicant relies on *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 [*Lauture*], where Justice Rennie held a similar analysis was unreasonable. In *Lauture*, the Officer dismissed the applicants' involvement in their church given they had not shown they would be unable to practice their faith in Haiti. Justice Rennie stated:

> Instead of assessing whether the applicants would be able to volunteer and attend church in Haiti, the Officer should have assessed the applicants' evidence of employment, volunteer work, and integration in their community *in Canada*. The Officer then should have considered whether this factor favours the application, is neutral, or weighs against the application.
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> […]
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> In other words, an analysis of the applicants' degree of establishment should not be based on whether or not they can carry on similar activities in Haiti. Under the analysis adopted, the more successful, enterprising and civic minded an applicant is while in Canada, the less likely it is that an application under section 25 will succeed (at paras 23, 26). [Emphasis in original]

[17] In response, the Respondent relies upon *Zhou v Canada (Citizenship and Immigration)*, 2019 FC 163 [*Zhou*] at para 17 and *Tosunovska v Canada (Citizenship and Immigration)*, 2017 FC 1072 at paras 22-23 [*Tosunovska*]. In *Zhou*, the Officer gave positive weight to establishment, but held that when balanced against negative credibility findings and the

applicants' familiarity with China, it was not sufficient to warrant an H&C exemption. Similarly, in *Tosunovska,* the Officer assessed the applicants degree of establishment in Canada, found it was not beyond what would normally be expected, and afforded it moderate weight. These cases are distinguishable as the Officer properly weighed the establishment factor.

[18] Unlike *Zhou* and *Tosunovska,* it is unclear whether the Officer here gave any weight to the Applicant's establishment, but merely assessed whether the Applicant could continue practicing her religion in Nigeria. In dismissing the Applicant's involvement in the church because she can practice her faith in Nigeria, the Officer failed to address the appropriate question – that is, whether the Applicant's establishment in Canada was such that it would "excite in a reasonable person in a civilized community a desire to relieve their misfortunes" (*Zhang v Canada (Citizenship and Immigration),* 2021 FC 1482 at para 19, citing *Kanthasamy v Canada (Citizenship and Immigration),* 2015 SCC 61).

[19] Although the Applicant raises other issues with the reasonableness of the Officer's decision, in my view the Officer's unreasonable treatment of the above issues is a sufficient basis upon which to allow this judicial review.

V. Conclusion

[20] This judicial review is granted and the matter is remitted for reconsideration by a different officer. There is no question for certification.

JUDGMENT IN IMM-1658-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the matter is remitted for redetermination before a different officer; and

2. There is no certified question.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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