Date: 20090202

Docket: IMM-4272-07

Citation: 2009 FC 108

Ottawa, Ontario, February 2, 2009

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

KOLAWOLE IKPONMWOSA INNEH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is a judicial review of the rejection of the Applicant's humanitarian and compassionate (H&C) application. The central issue in this case is whether the Respondent properly considered the best interests of the children in rendering that decision.

II. BACKGROUND

[2] The Applicant is a citizen of Nigeria who married his wife, a permanent resident of Canada, on November 25, 2006. He had previously been married to a Canadian citizen but that marriage apparently was dissolved.

[3] The Applicant is the father of a two-year old son, who is also a Canadian citizen. The Applicant's wife has two children, ages six and eight, who apparently accept the Applicant as their father.

[4] The Applicant's mother and his other son and daughter all live in Nigeria.

[5] The Applicant filed a refugee claim on October 7, 2001 in which he claimed that he would be persecuted because of his Christian religion and his refusal to join cults. That refugee application was rejected on the grounds of contradictions in the Applicant's narrative and implausibility of his story. Leave to appeal was rejected on October 1, 2002.

[6] The Applicant filed an H&C application on November 18, 2002 and a PRRA application on April 15, 2003. That PRRA application was rejected and a warrant was issued based on the Applicant's failure to appear at his removal hearing.

[7] At the time of filing his H&C application in 2002, the Applicant claimed the risk of persecution and the interdependence of the couple, both financially and emotionally, as the basis for the application. The application was updated in 2004 and alleged the same grounds.

[8] In 2007, the H&C application was again updated. This time the Applicant raised the same risk as earlier indicated, the existence of his marriage, the birth of his latest child, and his responsibilities to the two other children from his wife's first relationship as grounds for the application. He also alleged that the separation would be a hardship for the family. In addition, the Applicant asserted that his wife presently worked and that he was prepared to do so as soon as he could.

[9] The H&C decision rejecting the Applicant's application noted that the risk claimed was the same as that which had been rejected by the Immigration and Refugee Board (IRB). The Officer found that there were no good grounds for deciding differently from the IRB.

[10] The Officer then went on to address the issue of hardship. He noted that marriage is only one factor to be considered in the analysis of an H&C, that the hardship caused by separation is also a factor to be considered, but that the Applicant was aware of his uncertain immigration status when he married and had a child, and that his situation was similar to that of many people. As a result, there was nothing unusual, undeserved, or disproportionate about the hardship arising from separation.

[11] The Officer, in considering the best interests of the children, included in his consideration both the children in Canada and in Nigeria. The Officer noted that the best interests of the children do not necessarily outweigh all other factors in an H&C analysis. The Officer reiterated that separation would cause the same hardship and was subject to the same considerations as earlier described.

[12] At this judicial review, the Applicant submitted affidavit evidence indicating that his wife continued to be employed and that the husband's role was now that of a caregiver for the children. This evidence was not before the Officer at the time of the decision. It is noteworthy that the Applicant's role as a caregiver for the children is inconsistent with the information, updated as recently as 2007, indicating that the Applicant intended to work outside the home.

III. ANALYSIS

[13] The standard of review for H&C determinations in general has been found to be reasonableness (*Ahmad v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 646). It was also recognized in that decision, the reasoning of which I adopt, that H&C decisions are discretionary in nature and therefore there is a wider scope of possible reasonable outcomes available.

[14] While the Officer's decision and the focus on the best interests of the children are somewhat sparse; as found in *Ahmad*, above, the Officer can hardly be faulted if matters are not raised in the course of the application. A review of the information provided in the updated submissions indicates

that the Officer was given little or nothing to consider in respect of the particular circumstances of the best interests of the children.

[15] In addition, the Officer noted that the best interests of the children are but one factor in the H&C analysis. As held by the Federal Court of Appeal in *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, while an officer must seriously consider the best interests of the children and that merely mentioning the existence of the children is not sufficient, the best interests of children are not superior to other interests and do not create a *prima facie* assumption that the children's best interests should always prevail. In this regard, the Court of Appeal noted that it would be better to describe this factor as the "children's interests" rather than the "children's best interests" (*Legault*, above, at paragraph 13).

[16] In this matter, the Officer considered the interests of the children, both inside and outside Canada. The only element advanced by the Applicant was the hardship which would be caused by separation. There was no detail regarding the occurrence of hardship. The assumption by the Applicant that separation of a parent and child amounts, *per se*, to hardship meriting an H&C exemption cannot be sustained.

[17] The Officer then went on to consider other factors in the H&C analysis, including that of "establishment" and "risk." The Officer found that the Applicant's degree of establishment did not justify invoking the H&C exception, noting in particular that the Applicant was not currently employed.

[18] On the matter of risk, the Officer noted that the country conditions in Nigeria are not favourable, but accepted the finding of the IRB with respect to the absence of risk and found that no undeserved or disproportionate hardship would arise from requiring the Applicant to apply for permanent residence from outside Canada.

[19] The Officer's decision, viewed as a whole, shows that the Officer was alert, alive, and sensitive to the interests of the children, but that the application itself was so devoid of substantive evidence and submissions that there was nothing that would make this factor compelling. The Officer considered the interests of the children against the other factors of establishment and risk, and reached a reasonable conclusion that the circumstances of this case did not justify an exemption from the usual rules for permanent residence applications.

IV. CONCLUSION

[20] Therefore, this application for judicial review will be dismissed. There is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4272-07
STYLE OF CAUSE:	KOLAWOLE IKPONMWOSA INNEH and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 27, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	Phelan J.
DATED:	February 2, 2009

APPEARANCES:

Mr. Simeon A. Oyelade	FOR THE APPLICANT
Ms. Nina Chandy	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MR. SIMEON A. OYELADE Barrister & Solicitor North York, Ontario	FOR THE APPLICANT
MR. JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT