Date: 20091015

Docket: IMM-2161-09
IMM-2162-09

Citation: 2009 FC 1045

Ottawa, Ontario, October 15, 2009

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

NKESE OLAWUNMI OLUWAFEMI,
OMOBOLA OLUDAMI OLUWAFEMI,
OMOYEMI MOSHEBO OLUWAFEMI,
OMOTARA WURAOLA OLUWFEMI,
OMOTAYO OLABIMP OLUWAFEMI

Applicants

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION,
THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPARDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] These two applications are for judicial review of two decisions rendered by an Immigration Officer who denied the applicants' pre-removal risk assessment (PRRA) application in a decision dated March 19, 2009 and the applicants' humanitarian and compassionate (H&C) application for permanent residence under s. 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) in a decision dated March 18, 2009.

FACTS

Background

[2] The applicants are citizens of Nigeria. Nkese Oluwafemi is the forty-six (46) year old mother. She has four minor daughters who are also applicants in this matter, Ms. Ombola Oludami Oluwafemi (19), Ms. Omoyemi Ms. Moshebo Oluwafemi (16), Omotara Waraola Oluwafemi (14), and Omotayo Olabimp Oluwafemi (10).

[3] The applicant family entered Canada as visitors on June 7, 2007 through Montreal with false British Passports. The applicants applied for refugee protection in Ottawa on June 18, 2007.

[4] On July 21, 2008 a panel of the Convention Refugee Determination Division of the Immigration and Refugee Board (the Board) heard the applicants' claim for refugee protection.

[5] The basis of the applicants' claim for refugee protection was fear of persecution at the hands of the applicant mother's former common law spouse, Bernard Alo.

[6] The applicants claimed that Mr. Alo was initially a kind spouse and step father but after 2002 he began to change. Mr. Alo allegedly forbade the applicant mother from working outside the home. Arguments with Mr. Alo became angrier and he absented himself from the house for long trips. During one argument he allegedly poured hot oil over the applicant mother's thigh and forbid her from seeking medical assistance. Mr. Alo later informed the applicant mother that

he was a member of MEND (movement for the Emancipation for Nigerian Delta), as well as a member of a cult.

[7] In May 2007, while Mr. Alo was away, the applicant mother found firearms and photographic evidence of Mr. Alo's association with militant groups. One of Mr. Alo's "boys" informed the applicant mother that Mr. Alo was also a trafficker of drugs and women and that on occasions, Ms. Ombola Oludami Oluwafemi, the eldest child applicant, was conscripted to make drug deliveries on behalf of Mr. Alo. The applicant children affirmed their mother's allegations and further claimed that Mr. Alo inappropriately touched them and threatened them. The applicant mother contacted the police who responded by confiscating Mr. Alo's firearms and militant photographs but were otherwise unwilling or unable to arrest or stop Mr. Alo from beating the applicant mother allegedly in front of them in retaliation. The applicant made a complaint to the police in response to her beating but Mr. Alo was not arrested, instead boasting he was untouchable because of his connections. Mr. Alo then threatened to kill the applicant mother over the latest complaint.

[8] The applicants fled to several of their family members' houses and eventually hired a smuggler who supplied them with false British passports which they used to enter Canada. The applicants claimed that after leaving Nigeria the applicant mother's sister was beaten to death by Mr. Alo's "boys".

[9] The Board held that there was no nexus between the fear of the applicants and the Refugee Convention grounds under s. 96 of IRPA because it was fear of criminal violence or personal vendetta.

[10] In assessing the applicants' claim for protection under s. 97 of IRPA the Board found that the evidence produced by the applicants was untrustworthy and not credible. The Board found that the affidavits purportedly sworn by the applicant family's grandmother and the applicant mother's sister, which supported the applicants' claims, contained logical inconsistencies with regard to why the affidavits were produced, the manner of production, and receipt by the applicants of those affidavits. The Board assigned little weight or credence to the two affidavits for those reasons, and for the failure of the applicants to supply the Board with the originals.

[11] The Board determined that the documentary evidence of the applicants' complaints to the police appeared to be made in one of Nigeria's document factories.

[12] The Board similarly assigned little weight to undated photographs that purported to show the applicant mother's thigh injuries. The Board drew an adverse inference from the applicants' failure to obtain a physician's report that would verify that such injuries could be caused from a hot oil burn. In keeping with the previous credibility findings, the Board held that photographs failed to sufficiently provide trustworthy and credible evidence to prove that the applicant mother was in fact injured by Mr. Alo.

[13] On August 14, 2008 the Board rendered a negative decision, concluding that the applicants did not satisfy their burden of establishing a serious possibility under a Convention ground or that it is more likely than not that they would personally face a risk to their lives, or risk of cruel and unusual treatment or punishment.

[14] The applicants subsequently filed a PRRA application and an H&C application for permanent residence on August 25, 2008.

[15] The PRRA application was based upon the applicants' same risk in Nigeria from Mr. Alo. The applicants argued that Nigeria provided inadequate state protection to women and children who were the victims of gender based violence. The applicants provided news articles and country condition documentation as well some medical documentation and photographs to support the applicants' narrative. The applicants submitted two pieces of new evidence. First, the eldest child applicant disclosed that she had been raped by Mr. Alo. Second, the applicants disclosed that since the negative Board decision the applicant mother's sister was beaten to death by Mr. Alo.

[16] The H&C decision was based on the same risks that were cited in the PRRA application. In addition to risk, the applicants argued that it was not in the best interests of the applicant children to be sent back to Nigeria because they would be at risk of abuse at the hands of Mr. Alo who may prevent the family from applying for permanent residence visas from Nigeria. The applicants argued that Mr. Alo may prevent the eldest child from going to university and try to use her for prostitution

and drugs. The applicant submitted that departure from Canada would sever many social and communal ties they had to Canada cause the applicant mother to lose her current employment.

[17] The immigration officer rendered the H&C decision on March 18, 2009 and PRRA decision on March 19, 2009.

Decisions under review

PRRA decision

[18] The immigration officer states at page 4 of the decision that the risks cited by the applicants are the based on the same allegations that were made to the Board. The immigration officer held that the applicants failed to provide objective documentary evidence which supports the allegation that the eldest child applicant was raped or subjected to trafficking by Mr. Alo.

[19] The immigration officer examined the news article that purported to report on the murder of the applicant mother's sister. The immigration officer had reservations about the authenticity of the news article since the original newspaper was not provided, no other supporting documentation was provided to prove the sister's murder, and the article mentioned the adult applicant, but none of the victim's other sisters or mother in Nigeria.

[20] The immigration officer stated that even if the incident in the news article took place, the suggestion that Mr. Alo may harm the applicant family in the future was speculative. The officer

was satisfied that the article, if true, demonstrated that Nigerian police acted appropriately in arresting Mr. Alo and investigating the allegations.

[21] The immigration officer reviewed the medical evidence and photographs that purported to show the extent of injuries suffered by the applicant mother and accepted the existence of those injuries. However, the immigration officer held that the medical evidence could not establish that the aforementioned injuries were sustained at the hands of Mr. Alo.

[22] The immigration officer canvassed the country condition documentation and news articles but held that they did not indicate that the applicants faced a personalized risk. The immigration officer noted that Nigeria's police and justice systems were not perfect but were nevertheless adequate for a developing democracy and the applicants had not provided clear and convincing proof of lack of state protection.

[23] The immigration officer stated that the general country conditions had not changed with respect to the applicants since the RPD hearing. The PRRA application was therefore denied.

H&C Decision

[24] The H&C decision relied on the same objective evidence that was cited in the PRRA decision. The officer concluded that it would not constitute undue hardship for the applicants to avail themselves of Nigeria's adequate state protection. The immigration officer determined that the evidence on the record did not establish that Mr. Alo is currently seeking the applicants.

[25] The immigration officer held that none of the personal ties the applicants have forged in Canada would cause the applicants undue hardships if they were to return to Nigeria. Employment, friendships, and community ties were expected to be severed in removal situations, and in the absence of sufficient evidence of a significant negative impact that would constitute an unusual and undeserved or disproportionate hardship, the severing of these ties could not be held to be a determinative valid H&C factor.

[26] The immigration officer considered the best interests of the child and held that the applicant children would not face unusual and undeserved or disproportionate hardship in relocating to Nigeria because they grew up in Nigeria and were enrolled in the private school system.

[27] The immigration officer determined that the degree of establishment in Canada was not beyond what was expected from refugee claimants who spent a year and half in Canada. The applicants were all engaged in some form of volunteer and employment relationships in their community. There was no evidence that the applicants were integrated in Canada to such an extent that unusual and undeserved or disproportionate hardship not anticipated by IRPA would result from their removal.

[28] On the other hand, the applicants had familial ties to Nigeria and recently lived, studied, and worked there. The applicants had knowledge of Nigerian culture and society.

[29] The officer acknowledged that Canada may a more desirable place to live then Nigeria, but the difference in desirability is not determinative of an H&C assessment.

[30] The H&C application was therefore denied.

LEGISLATION

[31] Section 25 of IRPA permits the Minister to exempt an applicant from one or more requirements of IRPA if the Minister is satisfied that humanitarian and compassionate reasons justify the granting of the exemption:

25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

[32] Section 112(1) of IRPA allows persons subject to a removal order to apply to the Minister for protection:

112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).	112. (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).
…	…

[33] Section 113(a) of IRPA allows a PRRA applicant to present only evidence that arose after the rejection of the refugee claim:

113. Consideration of an application for protection shall be as follows:	113. Il est disposé de la demande comme il suit :
(*a*) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;	*a*) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;
…	…

[34] Subsection 161(2) of the IRPR requires the applicant to identify new evidence:

…	…
(2) A person who makes written submissions must identify the evidence presented that meets the requirements of paragraph 113(*a*) of the Act and indicate how that evidence relates to them.	(2) Il désigne, dans ses observations écrites, les éléments de preuve qui satisfont aux exigences prévues à l'alinéa 113*a*) de la Loi et indique dans quelle mesure ils s'appliquent dans son cas.

ISSUES

[35] The sole issue on this application is reasonableness of the immigration officer's PRRA and H&C decisions.

STANDARD OF REVIEW

[36] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question (see *also Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at para. 53)."

[37] The Federal Court of Appeal recently held in *Kisana v. Canada (MCI)*, 2009 FCA 189, per Justice Nadon at para. 18 that the standard of review of an immigration officer's H&C decision is reasonableness.

[38] This case concerns the relative weight assigned to evidence, the interpretation and assessment of such evidence, and whether the officer had proper regard to all of the evidence when reaching a decision. It is clear as a result of *Dunsmuir* and *Khosa* that such questions are to be reviewed on a standard of reasonableness (see also my decisions in *Pathmanathan v. Canada (MCI)*, 2009 FC 885; *Lionel v. Canada (MCI)*, 2009 FC 236; *Christopher v. Canada (MCI)*, 2008 FC 964, *Ramanathan v. Canada (MCI)*, 2008 FC 843; and *Erdogu v. Canada (MCI)*, 2008 FC 407, [2008] F.C.J. No. 546 (QL), per Justice Mandamin).

[39] In reviewing the Board's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir* at paragraph 47; *Khosa*, *supra*, at para. 59).

ANALYSIS

The adequacy of the applicants' evidence and its consideration

[40] The applicants submit that the immigration officer made several errors in requiring more objective evidence than the applicants could reasonably be expected to produce.

[41] First, the applicants submit that the officer erred in requiring objective documentary evidence to support that the eldest child applicant, Omobola, was raped or subjected to trafficking by Mr. Alo. In regard to Omobola's disclosure of rape, the applicants submit that the officer failed to consider the Board's Gender Guidelines.

[42] Second, the applicants submit that the officer erred by drawing an adverse inference from the applicants' failure to produce the original newspaper that reported on the applicant mother's sister's murder. Third, by requiring the applicants to produce a death certificate or police report of the applicant sister's death. Fourth, by requiring the applicants to provide supporting objective documentary evidence indicating that the applicants continue to be sought by Mr. Alo. Fifth, by holding that the medical letter written by a registered nurse Laura Kollenberg did not further the applicant mother's claim for hardship.

[43] This Court has held that a PRRA application is not an opportunity to reargue a failed refugee claim but rather an opportunity to present evidence that demonstrates a development that is new, different or additional to the evidence that was before the Board (see my decisions in: *Kaybaki v. Canda (Solicitor General of Canada)*, 2004 FC 32, 128 A.C.W.S. (3d) 784; *Singh v. Canada (MCI)*, 2009 FC 774, at para. 18). An immigration officer deciding a PRRA must respect the negative refugee determinations of the Board "unless there is new evidence of facts that might have affected the outcome of the RPD hearing if the evidence had been presented to the RPD" (*Raza v. Canada (MCI)*, 2007 FCA 385, 370 N.R. 344, per Justice Sharlow at para. 13).

[44] The applicants in this case raised the same risks that were raised in front of the Board. The Board rejected the applicants' claims because their evidence was deemed to be untrustworthy and without credibility.

[45] Considering the negative credibility findings of the Board, it was not unreasonable for the officer to require objective documentary evidence to support the risks which the applicants submitted they would face upon removal to Nigeria.

[46] The evidence produced by the applicants was equivocal when it came to demonstrating hardship for the purposes of the H&C application. This Court may believe the applicants when they state that they sincerely believe that hardship will befall them upon return to Nigeria. However, it was incumbent upon the applicants to adduce proof of any claim upon which the H&C application lies (*Owusu v. Canada (MCI)*, 2004 FCA 38, per Justice Evans at para. 5).

[47] The applicants' evidence, if accepted as credible which was not, may have established past hardship, but it could not establish future or ongoing hardship to the applicants or their family. It was therefore open to the officer to hold that the evidence provided by the applicants did not establish the probability of hardship as a result of harassment by Mr. Alo.

[48] With regard to the eldest daughter's allegations of rape by Mr. Alo, this Court is of the view that it was reasonably open for the officer to require objective documentary evidence. There was nothing stopping the applicants from submitting a psychological report that would have allowed the officer to conduct a "careful and compassionate" assessment (*Fernandez v. Canada (MCI)*, 2008 FC 232, per Justice Hughes at para. 5). The allegation of rape by the mother in her PRRA application was not even mentioned by the daughter in her own PRRA application. This omission undermines the credibility of the "last-minute" rape allegation, which, in any event, ought to have been

presented before the Refugee Protection Division. It is not new evidence, and the daughter would have mentioned it to her mother earlier if it was true.

[49] This Court is of the view the evidence presented to the immigration officer for both the H&C and PRRA was reasonably found to not show a risk or hardship on a forward looking basis. The officer was therefore reasonable in concluding that applicants have failed to discharge their evidentiary onus.

Best interests of the children

[50] The applicants submit that the officer was not alert, alive and sensitive to the best interests of the children. The officer erred by limiting the discussion of the best interests to the availability of private schooling in Nigeria. On the question of schooling, the officer is alleged to have assumed that the applicant mother could pay the children's tuition, even though in her Personal Information Form the applicant mother states that the Mr. Alo was the one who paid the children's tuition.

[51] The H&C officer engages in a detailed review of the children's individual circumstances, noting their level of schooling and success in Canada. The officer states that the applicants have not been forthcoming with claims of specific hardships other than the risk presented by Mr. Alo. This determination was reasonably open to the officer. The record reveals no other hardship claims except for the risk posed by Mr. Alo, which was fully addressed above, and the educational concerns of the children, which the officer evaluated.

[52] The officer considered the applicant children's past experience in Nigeria and reasonably determined that there was no indication why they would not be able to reintegrate into their old lives once they return:

> Submissions indicate that the PA's children attended Pampers Private School and Jewels International School while living in Nigeria and the submission before me indicate that the children would not be able to return to these private learning centres.

[53] The officer provided reasons for the above determination, basing it on the following facts:

> Submissions show that the children's mother tongue is English and Efik and that they are fluent in both languages; the children have been raised in Nigerian culture and it is noted that they were of school age when they arrived in Canada, and have been educated in the private school system in their home country; it is reasonable to expect that they are familiar with Nigerian society and their adjustments in re-settling in Nigeria would be minimal.

[54] In my view the officer provided a reasonable analysis for his conclusion that the best interests of the children in this case did not point toward a hardship not expected by IRPA if the applicants were to be removed to Nigeria. The evidence indicated that the applicant mother is a qualified nurse who could provide for her children in Nigeria. Not being able to return to a private school in Nigeria is not a hardship warranting an H&C or PRRA application.

[55] This ground of review must therefore fail.

Availability of state protection

[56] The applicants submit that the immigration officer erred in finding that adequate state protection exists in Nigeria and that the applicants failed to provide clear and convincing evidence

that they made reasonable efforts to avail themselves of that protection. The applicants concede that the officer appreciated the difference between the hardship test in an H&C application and a PRRA application. They argue that the officer did not evidence in his reasons a consideration of whether Mr. Alo managing to find the applicants would constitute hardship (*Singh v. Canada (MCI)*, 2008 FC 1263, per Justice Pinard at para. 20).

[57] The applicants submit that the finding of adequate state protection which the applicants could have accessed through the Nigerian Police Forces (NGF), Criminal Investigation Unit (CID), and National Human Rights Commission (NHRC), is contradicted by the findings of the officer who held that the documentary evidence indicated that the NPF operates with impunity and that the NHRC is not empowered to act cases such as this.

[58] In *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, the Supreme Court of Canada held that refugee protection is a form of "surrogate protection" intended only in cases where protections from the home state are unavailable.

[59] Further, the Court held that except in situations where there has been a complete breakdown of the state apparatus, there exists a general presumption that a state is capable of protecting its citizens. While the presumption of state protection may be rebutted, this can only occur where the refugee claimant provides "clear and convincing" evidence confirming the state's inability to provide protection. Such evidence can include testimony of similarly situated individuals let down

by the state protection arrangement, or the refugee claimant's own testimony of past incidents in which state protection was not provided (see *Ward, supra*, at 724-725).

[60] In *Kadenko, supra*, the Federal Court of Appeal held that in order to rebut the presumption of state protection**,** refugee claimants must make "reasonable efforts" at seeking out state protection**,** and that the burden on the claimant increases where the state in question is democratic.

[61] Consequently, the applicants had to adduce relevant and reliable evidence with sufficient probative value that satisfies the trier of fact on a balance of probabilities that state protection is inadequate.

[62] In the case at bar the officer found that the applicant mother contacted the local police on two occasions, after the applicant mother discovered Mr. Alo's firearms, and when Mr. Alo beat her in front of the police. The local police became involved a third time with the applicants' family when the applicant mother's sister was allegedly murdered by Mr. Alo. For that incident the officer found that the police acted appropriately.

[63] It is clear that state protection in Nigeria is not perfect. The officer acknowledged this by canvassing the substantial volume of country condition information. However, state protection need not be perfect; rather adequacy of state protection is all that is required.

[64] In my view the officer reasonably held that the applicants failed to discharge their evidentiary burden. The evidence of state protection in this case is mixed. The police in this case investigated the applicants' allegations and allegedly arrested Mr. Alo at least once.

[65] Having weighed the country condition evidence against the evidence produced by the applicants, it was reasonably open to the officer to hold that adequate state protection was available for the applicants and that it would not constitute an unusual and undeserved or disproportionate hardship for the applicants to avail themselves of that protection.

CERTIFIED QUESTION

[66] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

The application for judicial review is dismissed.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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