Federal Court  Cour fédérale

Date: 20120928

Docket: IMM-1190-12

Citation: 2012 FC 1148

Ottawa, Ontario, September 28, 2012

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

QUEEN VIVIAN IDEHEN
ENIYE RUTH OGBEVOEN IDEHEN
AND SARAH OGBEVOEN

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of a decision of a Citizenship and Immigration Officer (the Officer) dated September 21, 2011, declining the applicant's application under subsection 25(1) of the Act to have her permanent residence application processed from within Canada on humanitarian and compassionate (H&C) grounds.

Factual Background

[2] Ms. Queen Vivian Idehen (the principal applicant) is a citizen of Nigeria. Also parties to this application are her daughters, Eniye Ruth Ogbevoen Idehen (Ruth), twelve (12) years old and Sarah Ogbevoen (Sarah), ten (10) years old. Both daughters were born in Spain, but only Ruth has Spanish citizenship, Sarah having been born when Spain did not recognize citizenship by birth. The principal applicant also has a Canadian-born son, Joshua Iyosayi Osekpo Ogbevoen (Joshua), six (6) years old, who is a Canadian citizen and not a party to this application. Joshua suffers from asthma. The principal applicant and her daughters are currently without status in Canada.

[3] In 1996, the principal applicant's family arranged her marriage to Greg Osarieman Ogbevoen. The principal applicant met him for the first time when she joined him in Spain in 1997. She claimed refugee status in Spain but was denied. She remained in the country under a temporary resident permit.

[4] The principal applicant gave birth to both daughters in Spain, where she resided with her husband from 1997 to 2004. In 2004, when her temporary permit was not renewed, she allegedly moved back to Nigeria with her two daughters and pregnant with her son.

[5] While in Nigeria, the principal applicant's husband's family allegedly threatened to excise the applicant's daughters. The principal applicant refused and was supported by her husband, but family pressures allegedly persisted. In order to avoid the said pressures, the applicant's husband left Nigeria with Ruth on June 1, 2005, and went back to Spain. She followed him with Sarah on

June 26, 2005, but maintains that her husband did not want her and the children there with him. She thus decided to make arrangements to come to Canada. Because of financial limitations, the principal applicant initially traveled to Canada with only her daughter Sarah in September 2005. Her husband arranged to have Ruth sent to Canada in December of 2005, without the principal applicant's prior knowledge.

[6] The applicant entered Canada and claimed refugee protection on September 9, 2005. The Immigration and Refugee Board (the Board) denied the claim on August 3, 2006 because they did not find the applicant credible. The Board concluded that there was no serious possibility that Sarah and Ruth would be subjected to female genital mutilation (FMG) against the principal applicant's will if they returned to Nigeria. Leave to seek judicial review of the Board's decision was denied by this Court on November 16, 2006. A Pre-Removal Risk Assessment application was received on September 1, 2010, and denied on September 20, 2011. The applicants applied for permanent residency from within Canada on H&C grounds on January 29, 2007. The negative H&C decision is the one under review before this Court.

[7] The record shows that since her arrival in Canada, the principal applicant has been involved in her church, has worked sporadically, is assisted by Batshaw Youth and Family Centres to improve her budgeting skills and parenting techniques, and both daughters are enrolled in school.

Decision under Review

[8] The Officer denied the applicants' H&C application in a decision signed September 21, 2011.

[9] The Officer first examined the principal applicant's establishment in Canada. He took note of letters of support submitted to attest the applicant's good civil record, the fact that she speaks English, and that she has a child born in Canada and two (2) children born outside but residing in Canada. Although favourable, these factors were deemed insufficient to show that the applicants would suffer unusual and undeserved or disproportionate hardships if forced to apply for permanent residency from outside Canada. The Officer concluded that her employment history was not stable and that there were limitations in terms of financial independence, the applicant having only worked sporadically since her arrival in Canada. The Officer assigned limited weight to letters attesting to her volunteer work because they did not indicate the number of hours per week spent volunteering. The Officer recognized the establishment difficulties associated with being a single mother without family support in Canada, but concluded that such challenges would be no different in Nigeria, and might actually be alleviated by the support from which she would benefit in that country. The Officer noted that the applicant's family ties were still in Nigeria and that she could adapt in this country because it is familiar to her and because she has acquired transferable skills while in Canada. The Officer concluded that the establishment efforts made by the applicant were insufficient to infer that she would face unusual and undeserved or disproportionate hardships if she had to make her application for permanent residence from outside Canada.

[10] The Officer then examined the best interests of the children. He concluded that Joshua, who has Canadian citizenship, would benefit from the rights and privileges associated to it whether he is on Canadian soil or not. All the children could also benefit from Nigerian citizenship, as it flows from that of their parents, and could thus benefit from schools and hospitals in Nigeria. The Officer was not convinced that the applicant's son's asthma would be particularly difficult to treat in

Nigeria. He relied on objective evidence of child welfare initiatives, organizations working to democratize access to medicine in Nigeria, and a national health insurance system to conclude that although the health care system is not perfect, it can treat most illnesses, including asthma. The Officer further noted that, although the children have few ties to Nigeria, their most important relationship is with their mother. This would still be the case in Nigeria with the added support of the applicant's extended family (parents and siblings). The Officer considered the children's young age to be an advantage in terms of adaptation to new environments.

[11] The Officer then examined the risk of return, particularly as it pertains to the risk of female genital mutilation (FGM) for the principal applicant's daughters and a risk of potentially fatal punishment for the applicant herself for not having had her daughters excised. The Officer attributed little weight to a letter from Amnesty International (AI) submitted by the applicant describing the risks women face in Nigeria with regards to FGM because it offered no new evidence in relation to what was already considered before the Board for her refugee claim. He noted that the risks outlined by the AI's letter and the applicant's allegations that she would be fatally punished were already assessed by the Board, which had concluded that the applicant was not credible with regards to these allegations. The Officer dismissed the fact that the principal applicant herself had been excised as being an indication that her daughters would face the same risk because of lack of evidence pertaining to the circumstances surrounding her own excision. Additionally, the Officer noted that when the applicant was pressured from her in-laws to submit her daughters to such mutilation, she was able to obtain protection within her own family (Tribunal's decision, CTR, at p 11).

[12] Finally, the Officer considered country conditions with regards to the same two (2) concerns of FGM and risk of death for the principal applicant. The Officer concluded that there were certain risks, but that the applicant was from an urban area and from a tribe which is not known as high-risk for the practice of FGM. He also took note that FGM is most often performed within seven (7) days of birth. He found that there was no objective evidence as to negative consequences, or punishment, for parents who do not have their daughters excised. Finally, the Officer noted that, although there is no national law prohibiting the practice, the state of Edo where the applicant is from has enacted legislation prohibiting FGM.

[13] The Officer denied her application because he did not find that the principal applicant had established that she and her children would suffer unusual and undeserved or disproportionate hardships if she were forced to apply for permanent residence from Nigeria.

Issues

[14] The Court is of the opinion that the relevant issues in this case are :

1. Did the Officer err in his analysis of the best interests of the children?
2. Did the Officer err in his assessment of the risks faced by the applicants in Nigeria?

Statutory Provisions

[15] Subsection 11(1) of the *Immigration and Refugee Protection Act* requires persons who wish to immigrate to Canada to file an application for permanent residence from outside the country:

PART 1	PARTIE 1
IMMIGRATION TO CANADA	IMMIGRATION AU CANADA

Division 1	Section 1
Requirements Before Entering Canada and Selection	Formalités préalables à l'entrée et sélection
Requirements before entering Canada	*Formalités préalables à l'entrée*
Application before entering Canada	Visa et documents
11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**11.** (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

[16] However, subsection 25(1) of the *Immigration and Refugee Protection Act* allows the Minister to waive any requirement on H&C grounds. It provides that:

Humanitarian and compassionate considerations – request of foreign national	Séjour pour motif d'ordre humanitaire à la demande de l'étranger
25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible or does not meet the requirements of this Act, and may, on request of a foreign national outside Canada who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent	**25.** (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident

resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

Standard of Review

[17] The principal applicant submits that the erroneous analysis of the children's best interests is reviewable on a standard of reasonableness, while the other issues are reviewable on a standard of correctness as they are questions of law. The respondent, on the other hand, submits that all issues are reviewable on a standard of reasonableness because they are all questions of mixed fact and law, and the applicant is erroneously trying to re-define these issues as questions of law.

[18] When assessing the best interests of children, past jurisprudence has established that the standard of review is reasonableness as it involves the weighing of different factors of fact, law, and public policy considerations (*Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2003] 2 FC 555 [*Hawthorne*]; *Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166, [2012] FCJ No 184 (QL) [*Williams*]; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 FC 358; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]). Similarly, weighing evidence and assessing state protection (issue 2) are issues that implicate both fact and law. Therefore, these issues are reviewable on a standard of reasonableness (*Dunsmuir*, above). In this case, the only issue that is reviewable on a standard of correctness is the choice of legal test to apply. Being strictly a question of law, it is

reviewable on a standard of correctness (*Williams*, above; *Sahota v Canada (Minister of Citizenship and Immigration)*, 2011 FC 739 at para 7, [2011] FCJ No 927 (QL)).

Analysis

1. *Did the Officer err in his analysis of the best interests of the children?*

[19] It is trite law that the best interests of children affected by an H&C application are an important factor to be considered but they are not determinative (*Legault*, above). In considering an H&C application, the Officer must undertake a careful and sympathetic assessment of the children's best interests (*Hawthorne*, above).

[20] The applicants submit that the Officer did not conduct a proper assessment of the best interests of the children because he merely acknowledged the elements put forth by the applicants, namely the fact that the children have no links to Nigeria, are well integrated in Canada and need stability, instead of examining them attentively. She also submits that the Officer's analysis is deficient because he focused solely on their ability to adapt, without first identifying what would be in their best interests. On the other hand, the respondent submits that the Officer correctly assessed the children's best interests and thoroughly explained his conclusions.

[21] The Court finds that the Officer conducted a proper analysis of the children's best interests (intérêt supérieur des enfants). The Officer provided reasons explaining why the factor of the children's best interests was not a determinative factor in this case. Although, as forcefully argued by the applicants, the Officer might not have explicitly stated that it would be in the children's best interests to remain in Canada with their mother, but the Court refers to *Hawthorne*, above, at paras

4-6, where the Federal Court of Appeal observed that "such a finding will be a given in all but a very few, unusual cases".

[22] With that in mind, the Court notes that the Officer's assessment in terms of how the best interests of the children might be compromised by the potential decision of refusing the H&C application is considered in two (2) pages in the Officer's decision. It is apparent that the Officer considered and was receptive to the best interests of the children in the context of the evidence before him. More particularly, the Officer (i) discussed the children's status, namely their citizenship; (ii) took great length to examine the Health care, public services and schools in Nigeria, (iii) indicated that the children's young age will ease the issue of adaptation, (iv) mentioned the fact that the applicant's daughters have lived in Spain before returning to Nigeria and prior to coming to Canada; (v) stated that the children have family in Nigeria; and, most importantly (vi) emphasized the children's key relationship with their mother.

[23] In the Court's view, the Officer's assessment of the children's best interests is reasonable and the Court sees no reason to intervene on this ground.

2) *Did the Officer err in his assessment of the risks faced by the applicants?*

The evidence

[24] The applicants argue that the Officer examined the evidence in a piecemeal fashion, which led to the denial of the H&C application, while the respondent argues that the Officer arrived at the same conclusion precisely by looking at the evidence as a whole and including the Board's negative findings on credibility.

[25] The Court recalls that an H&C application is not an appeal, or an indirect way to remedy the flaws of a negative refugee decision by presenting similar evidence on the same risks at the H&C level (citing *Padda v Canada (Minister of Citizenship and Immigration)*, 2009 FC 738, 179 ACWS (3d) 895 [*Padda*], *Kouka v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1236, [2006] FCJ No 1561 (QL); *Hussain v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 751 (QL), 97 ACWS (3d) 726).

[26] In this case, the Officer was correct to take into account the negative credibility findings the Board made in regards to the principal applicant's allegations. The Officer's assessment of the evidence was reasonable since he took into account the Amnesty International's letter provided by the applicants. It was open to the Board to give it little weight because it reiterated risks that were already previously assessed (*Padda* and *Hussein*, above).

The Test applied by the Officer

[27] The applicants also allege that the Officer applied the wrong legal test as it confounded legal test and standard of proof. In assessing an H&C application, the Officer must determine whether there is sufficient evidence to show that an applicant would face unusual, undeserved or disproportionate hardship in obtaining a permanent resident visa from outside Canada. The applicant argues that when alleging risk in the context of an H&C application, an applicant must meet a lower standard of "reasonable chance" (*Masanganise v Canada (Minister of Citizenship and Immigration)*, 2004 FC 993 at para 23, 256 FTR 166), thus referring to the standard of proof required.

[28] The principal applicant further submits that the Officer held her to a higher standard than "reasonable chance" because of the wording used throughout the decision, such as: " […] the applicant has not established with this note that her daughters would face female genital mutilation" (Translated decision, CTR at p 23); "although the objective evidence consulted reveals certain risks, the applicant has not established that she would be subject to unusual and undeserved or disproportionate hardships upon return to Nigeria" (Translated decision, CTR at p 24)).

[29] On the other hand, the respondent submits that the applicants are rebranding this issue as a question of law, by framing it as an issue of wrong legal test, for what is really a question of weighing evidence, and thus a question of facts.

[30] A review of the Officer's decision does not provide any indication that the Officer used a higher test when he examined the risk in the context of this H&C application. The fact that he concluded that "the objective evidence consulted reveals certain risks" (emphasis added) does not amount to a reasonable chance of harm in the applicants' case because, as further discussed below, the applicants failed to demonstrate how the objective documentation evidence was linked to their personal situation.

[31] Indeed, on the basis of the objective documentary evidence, the applicants do not fit the profile or the ethnicity that would be at risk. For instance, in considering the objective documentary evidence, the Officer noted that the applicants are part of the Béni tribe in the South west and the FGM is more prevalent amongst the Yoroubas and Ibos tribes. FGM is more prevalent in rural areas than in urban areas and the applicant is from an urban area. The children at risk (within seven (7)

days of birth) are much younger than the principal applicant's children and the evidence demonstrates that the principal applicant's family is opposed to the practice of FGM. Finally, the state of Edo in Nigeria, where the principal applicant is from, has enacted legislation prohibiting FGM (Tribunal's decision, CTR, at p. 12).

[32] With respect to the medical note provided by the applicant which attests to the deplorable treatment experienced by the principal applicant in the past, it does not corroborate the allegation that her daughters will also be subject to FMG in the future. There is also no evidence explaining the circumstances or the context which led to the principal applicant's deplorable treatment.

[33] It is settled law that the burden is on an applicant in an H&C application to file evidence to support his or her claim (*Owusu v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 94, [2003] 3 FC 172; *Zhou v Canada (Minister of Citizenship and Immigration*), 2012 FC 638, [2012] FCJ No 644 (QL)). The Court is of the view that the applicants have failed to meet their evidentiary burden as there is nothing to tie the applicant or her daughters specifically to the risk alleged (*Momudu v. Canada (Minister of Citizenship and Immigration*), 2012 FC 793, [2012] FCJ No 817*; Li v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1225, [2009] FCJ No 1512). Finally, with respect to state protection, the Court notes that the principal applicant made no effort to obtain state protection in Nigeria and, moreover, the lack of personalized risk is, in these circumstances, determinative of the application (*Sayed v Canada (Minister of Citizenship and Immigration*), 2010 FC 796, [2010] FCJ No 978).

[34] Given the evidence on record, the Officer's finding is reasonable and the conclusions falls within the range of possible and acceptable outcomes (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708).

[35] For all of these reasons, and despite able argument by counsel for the applicants, the Court's intervention is not warranted.

[36] Neither party proposed a question for certification. None will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Richard Boivin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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