Federal Court  Cour fédérale

Date: 20150506

Docket: IMM-3182-14

Citation: 2015 FC 595

Ottawa, Ontario, May 6, 2015

PRESENT: The Honourable Mr. Justice S. Noël

BETWEEN:

ELIZABETH BEAUTY OGUNYINKA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application by Elizabeth Beauty Ogunyinka [the Applicant] for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision of Citizenship and Immigration Officer [H&C officer], dated April 7, 2014, denying the Applicant's request for permanent residency based on humanitarian and compassionate considerations [H&C application] under subsection 25(1) of IRPA.

II. Alleged Facts

[2] The Applicant is a Nigerian woman born on November 12, 1964.

[3] The Applicant came to Canada with her husband on a visitor's visa on November 29, 2011.

[4] Shortly after her arrival in Canada, she and her husband were diagnosed as being HIV positive.

[5] The Applicant's husband passed away on August 8, 2013.

[6] The Applicant's three children are all in Canada on student visas.

[7] The Applicant submitted an H&C application dated December 20, 2013. This application was denied on April 7, 2014. This is the decision under review.

III. Impugned Decision

[8] The H&C officer first summarized the Applicant's counsel's submissions before assessing the letters provided in support the Applicant's H&C application. With regards to all the letters presented, the H&C officer commented that none of the authors offered expert opinions about the country conditions in Nigeria and that the Applicant had not presented any evidence that she would be denied any required medical treatment in Nigeria.

[9] The H&C then assessed the documentation pertaining to the country conditions in Nigeria with regards to discrimination and stigmatization of people living with HIV, current health policy in Nigeria and other international reports on medicals services and treatment available in Nigeria for people living with HIV/AIDS. The H&C officer determined that the Applicant had not presented any objective evidence neither of unavailability of treatment or medication for her health condition in Nigeria nor that she would be discriminated against in Nigeria. The H&C officer also noted that the documentary evidence showed that the state of Lagos, where the Applicant previously lived, has anti-discrimination laws. The H&C officer further specified that health care facilities and treatment are available for the Applicant in Nigeria.

[10] With regards to the Applicant's argument that she would face backlash from her husband's family, the H&C officer concluded that she did not provide objective evidence that she is at risk from her in-laws or by anyone else in Nigeria.

[11] As for the Applicant's time spent in Canada, the H&C officer does not grant it significant weight because the Applicant did not demonstrate a reasonable expectation that she would be allowed to stay in Canada. Moreover, the Applicant entered Canada on a visitor's visa and should have expected the likelihood of having to return to Nigeria. The H&C officer also noted that her three children are all in Canada on student visas and are expected to leave at the expiration of their visas.

[12] For these reasons, the H&C officer concluded that the Applicant's H&C application is not justified.

IV. Parties' Submissions

[13] The Applicant submits that the H&C officer breached her right to procedural fairness by relying on undisclosed extrinsic evidence to which she had no opportunity to respond. The Applicant specifically refers to the document referenced to as "Motherland Nigeria: Healthcare" in the decision, which refers to the health policy in Nigeria. The Applicant further argues that the H&C officer placed more weight on this evidence than over the current available expert information from Steve Aborisade.

[14] The Respondent replies that there was no breach of procedural fairness because documents do not need to be disclosed to the Applicant if they are in the public domain, general in their nature and neutral. The Respondent adds that the Applicant only needs to be informed of novel and significant information which may affect the disposition of the case.

[15] The Applicant submits that the H&C officer made findings of fact without due regard to the evidence, with respect to being threatened or subjected to abuse in Nigeria by her in-laws, not having the assistance of her family members in Nigeria, not being able to be an active member of her church, remaining in Canada due to circumstances beyond her control, the unavailability of treatment in Nigeria and discrimination and stigmatization of people living with HIV in Nigeria.

[16] The Respondent responds however that the Applicant simply disagrees with the weight the H&C officer afforded to the evidence and the ultimate result of the decision, which is insufficient to overturn the H&C decision. The Respondent is of the opinion that the H&C officer adequately weighted all of the evidence presented.

V. Issues

[17] I have reviewed the parties' submissions and respective records and frame the issues as follow:

1. Did the H&C officer breach procedural fairness by relying on an undisclosed document to which the Applicant had no opportunity to respond?

2. Is the H&C decision reasonable?

VI. Standard of Review

[18] The question as to whether the H&C officer breached procedural fairness by relying on an undisclosed document to which the Applicant had no opportunity to respond raises the standard of review of correctness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Nadesan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1325 at para 8). As such, the Court will show no deference "to the decision maker's reasoning process; it will rather undertake its own analysis of the question" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9 at para 50 [*Dunsmuir*]).

[19] The question as to whether the H&C officer's decision is reasonable attracts the standard of review of reasonableness. "Considerable deference should be given to immigration officers exercising the powers conferred by legislation, given the fact specific nature of the inquiry, its role [subsection 25(1) of the IRPA] within the statutory scheme as an exception, the fact that the decision maker is the Minister, and the considerable discretion evidenced by the statutory language" (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] SCJ No 39 at para 62; see also *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 18; *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 at paras 82-84 [*Kanthasamy*] and *Lemus v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 114 at para 18).

VII. Analysis

A. *Did the H&C officer breach procedural fairness by relying on an undisclosed document to which the Applicant had no opportunity to respond?*

[20] According to the principles established by the Federal Court of Appeal in *Mancia v Canada (Minister of Citizenship and Immigration)*, [1998] 3 FC 461, 161 DLR (4th) 488 at para 22 (CA), the leading case on this question, a decision-maker is not required to give an opportunity to comment evidence from a public source which is available:

1. Fairness does not require the disclosure of documents from public sources in relation to general country conditions if they were available and accessible in documentation centres at the time submissions were made by an applicant;

2. As to documents from public sources in relation to general country conditions which were available and accessible after the applicant had filed his submissions, fairness requires disclosure where they are novel and significant and where the evidence changes in the general country conditions that may affect the decision (see also *Dereva c Canada (Ministre de la Citoyenneté et Immigration)*, 2015 CF 417 at para 12 and (*Hoyte v Canada (Minister of Citizenship and Immigration)*, 2015 FC 175 at para 15 [*Hoyte*]).

[21] The only document at issue here is the one the H&C officer referred to as "Motherland Nigeria: Healthcare" in her decision.

[22] The Respondent argues that the information contained in the document in question is in the public domain since the Applicant found the information on the internet following the H&C decision. This argument is inaccurate. As the affidavit of Mrs. Dianne Aimee Molina Verano demonstrates (Applicant's Record [AR], Volume II, pages 380-383), after multiple different attempts to find the said document as referenced by the H&C officer, it could not be found. Ms. Molina eventually retraced the information cited by the H&C officer in her decision by typing the words as cited by the H&C officer in Google. Only then did she find the information on two different blogs. The document itself, as cited and presented by the H&C officer, could not be found. There is also no such document in the Certified Tribunal Record [CTR]. Both parties however discussed at the hearing how a document contained in the CTR, titled *Federal Republic of Nigeria, Revised Health Policy, Federal Ministry of Health, Abuja* [*Revised Health Policy*] (CTR pages 19 to 27), which contains similar information, sometimes almost verbatim, as the one presented by the H&C officer, referenced as "Motherland Nigeria: Healthcare". There is

however no mention of "Motherland Nigeria: Healthcare" in the *Revised Health Policy*. In addition, the footnote used by the H&C officer to reference the document only states "Motherland Nigeria: Healthcare". Therefore, contrary to what the Respondent said, "Motherland Nigeria: Healthcare" cannot be qualified as being in the public domain. The document was neither available nor accessible to the Applicant. The requirements of *Mancia*, above, have therefore not been met.

[23] The H&C officer also spent almost a complete page of her decision citing information from the inaccessible document. This emphasis on the information contained in the document indicates that it was important for the purposes of her decision. Furthermore, the H&C officer presented the information contained in the document as the "Current Health Policy in Nigeria". However, the document contained in the CTR, *Revised Health Policy*, which contains similar information, is dated September 2004. The current health policy in Nigeria, the H&C officer is referring to, might therefore not be so current. Since the H&C officer relied on the document in her decision, without providing the proper reference for the Applicant to find it and without giving her a chance to respond to it, it was impossible for her to properly assess the information it contained and make submissions as to its content. The document in question should have been disclosed to the Applicant. The H&C officer thus breached procedural fairness by relying on an unavailable and inaccessible document to which the Applicant had no opportunity to respond. The intervention of this Court is warranted. That said, I will make a few comments below as to the reasonableness of the decision as well.

B. *Is the H&C decision reasonable?*

[24] The test to be applied in a H&C application is if at the time the H&C application is made, the Applicant's personal circumstances are such that the hardship of having to apply for a permanent resident visa from outside Canada in the normal manner would cause unusual and underserved or disproportionate hardship. The onus is on the Applicant to meet that test (*Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 8; *Kanthasamy*, above at para 48). The starting point of the Court's analysis is the reasoning of the H&C officer, where the issue is whether the decision, "considered as a whole, can sustain a somewhat probing examination by the Court" (*Frank v Canada (Minister of Citizenship and Immigration)*, 2010 FC 270 at para 17). As long as the H&C officer considers the relevant, appropriate factors from the H&C perspective, the Court should not interfere with the weight the H&C officer gives to those different factors, even if the Court would have weighed the factors differently (*Ambassa v Canada (Minister of Citizenship and Immigration)*, 2012 FC 158 at para 48 [*Ambassa*]).

(1) Discrimination in Nigeria

[25] The Applicant argues that the H&C officer did not properly assess the evidence with regards to her claim of potentially being threatened or subjected to abuse and that she would be a victim of discrimination and stigmatization as a person living with HIV in Nigeria. The Applicant states that her affidavit explains how she would suffer hardship in Nigeria and would not be safe. She relies on *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302, to support her argument that once an applicant swears under oath that the allegations are true, a presumption that those allegations are true is created.

[26] In the case at bar, the H&C officer concluded that the Applicant had not presented sufficient objective evidence that she would be discriminated against in Nigeria. This conclusion is unreasonable. There is ample documentary evidence in the CTR that corroborates the Applicant's statements from her affidavit. First, her HIV status is not disputed, as can be seen from the Ottawa Hospital letter contained in the CTR (CTR pages 160-161). Second, the *UK Border Agency, Nigeria, Country of origin information (COI) Report* [*UK Report*], dated 14 June 2013, specifically mentions that there is "widespread societal discrimination against persons living with HIV/AIDS" (CTR page 53 at point 26.15). Although the H&C officer referred to this document in her decision, she only cited a section of the document which is only concerned with the availability of medical treatment and drugs in general, and not the specific portions of the document which speak directly to the situation of people living with HIV/AIDS. Third, the CTR also contained another document, the *Immigration and Refugee Board of Canada Response to Information Requests* [*IRB Information Request*], which specifically addresses the societal treatment of individuals living with HIV (CTR page 69 and following). This document specifically says:

> […] people living with HIV and their family members experience stigma and discrimination on a daily basis as a result of their HIV status, either by their immediate family members, friends, work place colleagues, at the community level and or at the health centres by their care givers. There are reported exclusion and discrimination at the community level by mostly women living with HIV, students living with HIV and by workers at the work place including the Nigerian Police Force (CTR page 70, point 3).

[27] This speaks directly to the situation of the Applicant. Fourth, the H&C officer completely ignored the Applicant's brother's affidavit, which corroborates the Applicant's statements and the situation of individuals living with HIV in Nigeria. Finally, the H&C officer also disregarded

the letter by Steve Aborisade, who, by his credentials, seems particularly knowledgeable of the situation of people living with HIV in Nigeria (CTR pages 168-171). This letter was written specifically to assess the Applicant's situation. The H&C officer considered the letter from M. Aborisade to be general in nature and not personal to the Applicant (AR, H&C decision at page 10). However, after presenting the situation of individuals living with HIV in Nigeria, M. Aborisade concluded as follow:

> From my experience, I am certain that your client faces a greater risk of being stigmatized for the twin reasons of being HIV positive, and in this instance, a greater level of strong negative reaction—the fact that they were returned from abroad is enough stigma in itself in the context of the misconception that HIV is a white man's disease.
>
> From these realities, my informed opinion will be to consider her special situation, and the good in prolonging her life in the context of accessing better qualitative care and treatment and an environment devoid of the needless rigour of HIV/AIDS discrimination (CTR page 171) (my emphasis).

[28] It is hard to understand how such a document can be qualified as general and not personal to the Applicant.

[29] As for the discrimination the Applicant would suffer from her own family and that of her late husband's family, the H&C officer unreasonably concluded that the Applicant had not provided evidence to support her allegations that she is at risk from her in-laws, or would not have the support of her mother and other family members in Nigeria (CTR, H&C decision at page 9). This is again supported by the Applicant's brother's affidavit and the documentary evidence, as can be seen from the *IRB Information Request* cited above.

[30] The H&C officer thus ignored evidence which clearly contradicted her conclusion and selected general information to support her erroneous conclusion (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, 157 FTR 35; *Andrade v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1490). The H&C officer had no evidence before to show that the Applicant's statements in her affidavit were untrue; it is rather quite the opposite. The H&C officer also did not explain why the sworn affidavit was insufficient to establish the lack of support in Nigeria (*Westmore v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1023 at para 44). This renders the H&C decision unreasonable.

(2) Availability of Treatment in Nigeria

[31] The Applicant also argues that the H&C officer erred in her assessment of the availability of treatment in Nigeria. I agree. To that effect, at the judicial review hearing, the Applicant pointed to the *Global Report: UNAIDS report on the global AIDS epidemic 2013* (CTR pages 179-213). This report list Nigeria as the nineteenth country where 90% of the people live with an unmet need for antiretroviral treatment (CTR page 183). It later states that "Nigeria has the second-largest population of people living with HIV, with only one-third of treatment-eligible individuals receiving HIV treatment […] (CTR page 212). The UK report, discussed above, also explains that, in Nigeria, "a huge gap between persons accessing anti-retroviral drugs and those requiring them […]" exists (CTR page 53 at point 26.16). The H&C officer, in her decision, after analyzing the availability of the general health services and of HIV treatment in health facilities in Nigeria concluded that she was not satisfied that the Applicant "suffers from any condition whose treatment would not be available in Nigeria" (CTR, H&C decision page 8). Given the above information, the H&C officer did not provide an analysis that adequately reflected the

reality of the availability of treatment for individuals living with HIV in Nigeria. This warrants the intervention of this Court.

(3) Remaining in Canada for circumstances beyond the Applicant's control

[32] As for the Applicant's establishment in Canada, I again agree with her that she remained in Canada due to circumstances beyond her control, due to her late husband's health problems. As she states in her affidavit, she never intended to remain in Canada, it is only due to the unexpected health situation of her husband in November 2011 that the Applicant remained in Canada for an extended period of time. This information is not contested. Moreover, the Applicant visited Canada on a visitor's visa on numerous occasions over the last twelve (12) years, and always returned to Nigeria when required. The H&C officer's determination that there is insufficient evidence that the Applicant remained in Canada due to circumstances beyond her control is thus unreasonable.

VIII. Conclusion

[33] The H&C officer improperly relied on an unavailable and inaccessible document: "Motherland Nigeria: Healthcare". In addition, the H&C officer did not give the Applicant an opportunity to respond to this document. Furthermore, the reasons the H&C officer provided to assess the Applicant's H&C request were unreasonable as the Applicant's statements in her affidavit were supported by the evidence. The H&C decision is thus unreasonable and does not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above at para 47). The intervention of this Court is thus warranted.

[34] Parties were asked to suggest a certified question but declined.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed and the matter is to be returned for reconsideration before another H&C officer.

2. No question is certified.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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