

Federal Court



Cour fédérale

Date: 20170125

Docket: IMM-2556-16

Citation: 2017 FC 87

Toronto, Ontario, January 25, 2017

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

STEPHEN ONYANGO

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant has applied for judicial review of a decision of an immigration Officer [the Officer] dated May 31, 2016 (the Decision) in which he found; on a reconsideration, that there were insufficient humanitarian and compassionate [H&C] grounds to grant the Applicant's application for permanent residence [PR]. This application is brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA].

[2] The Applicant is a 53 year old male citizen of Kenya. He made his refugee claim while in Canada in 1998 as a participant in a cultural exchange program sponsored by Canadian Crossroads International.

[3] The Applicant had been a member of the Kenyan Police 'Flying Squad Unit,' which conducted surveillance of the government's political opponents. Documentary evidence showed that the unit was involved in extra-judicial killings and torture. On March 22, 2000, the Applicant's refugee claim was rejected because he was excluded from refugee protection pursuant to Article 1(f)(a) of the *Refugee Convention* for crimes against humanity.

[4] While his refugee claim was pending, and further to a study permit, the Applicant obtained an Ontario high school equivalency certificate and a one year diploma in Law and Security Administration. He married Michelle, a Canadian citizen, on June 9, 2001. She subsequently applied to sponsor him.

[5] On July 4 2002, the Applicant was convicted of assault causing bodily harm. He worked as a security guard at a night club and says that he acted in self-defence, but pled guilty on the advice of his criminal lawyer. As a result, the sponsorship application was rejected.

[6] The Applicant learned that he is HIV positive following his immigration medical examination on January 7, 2003.

[7] The Applicant obtained and renewed Temporary Residence Permits [TRPs] and was granted a pardon on July 27, 2007. Michelle then re-applied to sponsor him, but she died on October 20, 2008. On January 12, 2011, the Applicant he was advised that the second sponsorship application had been rejected because of his wife's death.

[8] On February 16, 2011 the Applicant submitted an H&C application.

[9] The Applicant's PRRA, which had been submitted on March 7, 2011 was denied on April 14, 2011. He was deported to Kenya on May 26, 2011 and still lives in Kenya. There he has two daughters who are in their mid and late 20's.

[10] On January 4, 2013 the H&C application was refused (the Initial Decision). However, on judicial review, the Court concluded that the decision was unreasonable because the Applicant's establishment, his ability to finance his daughters' education and the impact of his HIV status on his life in Kenya had not been properly assessed. A reconsideration was ordered.

I. The Decision on the Reconsideration

[11] Although the Applicant submitted that he had maintained steady employment in Canada, the Officer found that the single letter he provided to substantiate his employment history was insufficient.

[12] The Officer also noted the Applicant's submission that he owned a home in Windsor, but said that he had "no documentation...that would corroborate" this assertion.

[13] The Officer reviewed: (1) letters attesting to volunteer activity with Habitat for Humanity, the Special Olympic Summer Games, and Canadian Crossroads International; (2) letters from the Kenyan Community of Windsor and the Windsor Masonic Lodge praising his contributions; (3) letters from friends supporting his good character; and (4) his high school and college diplomas. The Officer found that the Applicant had “volunteered and been active in the community as well as furthering his education.”

[14] The Officer noted that while he was in Canada, the Applicant financially supported his adult daughters’ education and that he struggled to continue to provide this support after he returned to Kenya. The Officer considered the daughters’ ages and the lack of evidence that they could not provide for themselves. The Officer noted the Applicant’s concern that children he volunteered with in Canada before his removal would be adversely affected by his failure to return. However the Officer found “insufficient objective evidence before me that any children have been or are adversely affected in any way.”

[15] The Officer was concerned that very little documentation had been provided about the Applicant’s HIV status and conditions in Kenya. The Officer noted that the Applicant has not been denied medical treatment but “chooses not to see a doctor because of the high costs involved.” The Applicant “maintains the treatment initiated by his doctor in Canada and buys the drugs over the counter.” According to the Officer, the Applicant does not indicate that he has been stigmatized in any way by Kenyan society because of his HIV status.

[16] Lastly, the Officer notes that the Applicant is financially less well off in Kenya, and that he still owns a house in Canada. The Officer concludes: “If, indeed, the applicant is facing financial difficulties in Kenya it does not appear to be a reasonable objective for him not to sell his house in Windsor.”

II. Issues

- A. Was it unreasonable of the Officer to find insufficient evidence of employment and home ownership without giving the Applicant notice of those concerns, particularly since they had not been issues in the Initial Decision?
- B. Was it reasonable of the Officer to suggest that any financial hardship experienced by the Applicant in Kenya could be solved by the sale of his home in Windsor when the Officer found that there was insufficient evidence to establish the ownership of that home?

III. Discussion and Conclusions

A. *Issue I*

[17] The Applicant applied for H&C relief on February 11, 2011 (the Application). The Application included the following notice on page 2 of 3:

You must provide evidence to support any statement you make on this form.

[18] The Applicant listed his employers but provided no documents to support his work history in the period from 1998 to 2011. The exception was one letter dated January 20, 2011 which stated that he had worked as a Commissionaire between September of 2010 and January 2011. No pay or hours of work were stated.

[19] The Applicant also indicated that he purchased a home in Windsor in 2007 but no supporting documents were provided.

[20] After the reconsideration was ordered the Applicant was sent a letter dated May 12, 2014 giving him 30 days to send in additional written submissions if so advised. The Applicant's counsel contacted him and asked for updated information on all the H&C factors.

[21] The reply email dated June 6, 2014 was before the Officer as new evidence on the reconsideration. It did not attach any documents. It read:

Access to treatment is expensive as such I just continue to buy my drugs over the counter and continue with the dose as was prescribed by my Dr. In Windsor. I have not been able to do any tests to check for viral loads and such as this requires a lot of money, which I would rather use in buying my drugs. I don't have access to a regular doctor because I can not afford consultation fees required for doctors' visit. My financial situation is not good, I do temporary jobs on and off, as such my standard of living is much lower than what I had in Canada. I still provide for my daughters albeit with a lot struggle and difficulties. Yes I still own the house in Windsor which is rented out but just able to cover for mortgage. I have no documents to show my employment status as I do temporary jobs. My flight was payed for by the government because they refused to give me time to get my pay and buy the ticket myself.

I hope this gives you a clear picture of my situation.

[22] In the Initial Decision, the officer set out the Applicant's employment history as it was stated in answer to question 17 on the Application. However, the officer did not make a finding about whether it was proven and accepted. The officer made no mention of the house the Applicant says he owns in Windsor.

[23] In my view, the employment history and home ownership were not accepted in the Initial Decision. However, even if they had been accepted, the Applicant's submission would fail because a reconsideration is a fresh *de novo* consideration of the Application. An applicant is not entitled to assume that an officer on a reconsideration will reach the same conclusions as those reached in an initial decision and is not entitled to notice if different conclusions are contemplated on the reconsideration.

B. *Issue II*

[24] The Application makes it clear that the proof of home ownership required supporting documentation. It was not provided and the Officer found therefore that there was insufficient probative evidence. In other words, proof had not been submitted to the required standard. In my view, this was not a finding that the Applicant did not own the home and it did not prevent the Officer from relying on the home's existence later in his decision when he questioned why the Applicant retained a home in Canada if he had financial difficulties in Kenya.

IV. Certification

[25] No questions were posed for certification for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is hereby dismissed.

“Sandra J. Simpson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2556-16

STYLE OF CAUSE: STEPHEN ONYANGO v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

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