Federal Court  Cour fédérale

Date: 20171205

Docket: IMM-1218-17

Citation: 2017 FC 1103

Ottawa, Ontario, December 5, 2017

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

SOPHIA ERAKPOWERI AKPONAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision dated on February 24, 2017 [Decision] by a senior immigration officer [Officer] refusing the Applicant's humanitarian and compassionate [H&C] application pursuant to section 25(1) of the IRPA.

[2] The Applicant argues that the Decision is unreasonable due to its overreliance on the determinations of the Refugee Appeal Division [RAD], in particular in adopting its conclusion

that challenging economic and social conditions in Nigeria could be mitigated by the Applicant moving to Abuja, which the RAD found to be an internal flight alternative [IFA].

[3] The Court concludes that reliance upon an IFA finding in a refugee claim to mitigate economic and social circumstances in an H&C application without consideration of the underlying evidence supporting the IFA, or the contradictory evidence of the Applicant, raises a reviewable error, such that the application is allowed.

I. Background

[4] The Applicant, Sophia Erakpoweri Akponah, is a citizen of Nigeria. She has two Canadian born daughters with unknown fathers. Her first daughter was born on January 2, 2015 and the second on August 19, 2016.

[5] The Applicant entered Canada on September 29, 2014 and made her claim for refugee protection on November 6, 2014.

[6] On February 11, 2015, her refugee claim was refused by the Refugee Protection Division [RPD]. On June 10, 2015, the RAD dismissed her appeal of the RPD decision.

[7] On October 5, 2015, this Court denied the Applicant's leave application of the RAD decision.

[8] The Applicant also sought leave to judicially review the decision of the Pre-Removal Risk Assessment officer that she was not in need of protection. The leave application was dismissed by this Court in March 2017.

[9] On February 24, 2017, the Applicant made a H&C application seeking an exemption from the requirement under the IRPA to obtain a permanent resident visa at a visa office outside Canada. The Officer denied her H&C application on the grounds that there were insufficient H&C considerations to justify an exemption under section 25(1) of the IRPA.

II. The Impugned Decision

[10] After having examined and considered cumulatively all the factors the Applicant put forth in her application, the Officer found that the requested exemption from the normal processing of an application for permanent residence was not justified.

[11] The Officer considered the Applicant's degree of establishment in Canada, but concluded that it was not unusual and not beyond the degree of establishment expected of someone who had been residing here since September 2014.

[12] The Officer also considered the best interests of the Applicant's daughters, and concluded that there was insufficient objective evidence to demonstrate that the Applicant's removal from Canada would adversely affect her two daughters. The Officer concluded that the level of dependency between the young pre-school children and the Applicant is high, and that they

would have and will continue to have the full benefit of care from their mother to guide them through the transitional phase in their life that resettlement abroad would entail.

[13] With respect to fears that the practice of female genital mutilation [FGM] poses a threat to her life and that of her children, the Officer relied upon the adverse credibility findings of the RAD against the Applicant and the country conditions evidence to conclude that there was insufficient evidence to corroborate that she had been asked to engage in the cultural practice or that she would suffer any punitive consequences or have to comply with the practice being performed on her daughters.

[14] With respect to the social political and economic challenges facing a single mother, the Officer relied upon the decision of the RAD, which relied upon the findings of the RPD, that given the Applicant's profile as an educated single woman, her employment potential and proven ability to provide for herself in Canada, that she could reasonably be expected to find employment in Abuja and support herself, such that relocation there was a reasonable option to mitigate any potential economic or social hardship.

III. Issues

[15] This application raises the following issues:

1. Whether the Officer's treatment of the social and economic evidence concerning hardship was reasonable?

2. Whether the Officer committed a reviewable error in finding that relocation to Abuja had been identified by the RAD as a reasonable option to mitigate any potential economic or social hardship?

3. Whether the Officer breached the Applicant's right to procedural fairness by relying on the finding of the RAD without first providing notice to the Applicant?

IV. Standard of Review

[16] The standard of review of the Officer's conclusions with respect to findings of fact, mixed fact and law, in the exercise of his discretion, is reasonableness. Under this highly deferential standard of review, this Court should not intervene unless the Officer's conclusions do not fall within the range of possible acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47, 53 and 55; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44. An officer's decision under subsection 25(1) is highly discretionary since this provision "provides a mechanism to deal with exceptional circumstances," and the officer "must be accorded a considerable degree of deference" by the Court: *Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 15.

[17] The standard to review for issues of procedural fairness is correctness: *Mission Institution v Khela*, 2014 SCC 24 at para 79. Moreover, the Court must determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the circumstances of the matter: *Suresh v Canada (Minister of Citizenship and Immigration*), 2002 SCC 1 at para 115.

V. Analysis

[18] The Court concludes that the primary issue in this matter is whether the Officer was transparent and fettered the decision by relying on the RAD's conclusions from its IFA analysis, that the Applicant and her children would not be subject to undue hardship with respect to her employment opportunities and her ability to support herself and her children, if removed to Nigeria.

A. *Reliance on the Nigeria 2014 Report of the United Kingdom Home Office*

[19] A collateral issue in this matter relates to a submission by the Respondent that the Applicant made reference to the Nigeria 2014 Report of the United Kingdom Home Office [UK Report] that was not properly before the Officer. The Court agrees with this submission, but ironically concludes that it ought to have been before the Officer as part of her record, as it is the primary document relied upon in concluding that relocation to Abuja would mitigate any potential economic or social hardship.

[20] The UK Report was referred to implicitly by the Officer in her conclusion that the Applicant could find employment in Abuja and support herself. The following quotation from paragraphs 97 and 98 of the RAD decision formed the basis for the Officer's decision:

> The RPD went on to find, given the documentary evidence [48] that the availability of job opportunities is not a significant factor in relocating to large cities, and given the Appellant's level of education and capabilities, she could reasonably be expected to find employment in Abuja and support herself.
>
> […] The RPD acknowledged that the Appellant stated in her BoC that she has family members in Nigeria, namely, her mother and

> siblings. Given the Appellant's university education, employment potential, and ability to provide for herself, as evidenced by her ability to establish and provide for herself in Canada, the RAD concurs with the RPD's finding, on a balance of probabilities that the appellant could reasonably support herself in Abuja. Further there was no persuasive evidence of the details of any connections her father may have had with Abuja and on the balance of probabilities, there was no persuasive evidence to establish she would be recognized or sought out in Abuja.
>
> [Footnotes omitted and square brackets added for emphasis]

[21] The Officer's quotation of the RAD in the Decision was not exact however. It did not include footnote number 48, which I have emphasized above, with square brackets in the first paragraph. The footnote, as it turns out, references the UK Report. As is obvious from the passage above, it formed the basis for the RPD's conclusion that the Applicant "could reasonably be expected to find employment in Abuja and support herself".

[22] The Respondent argues that the UK Report "was never included as part of her evidence to the officer". Given that the Officer specifically quoted the reference in the RAD decision above, which specifically footnoted the UK Report, although not referenced in the Officer's Decision, the Court has no initial difficulty with the Applicant referring to the UK Report. However, the Court notes that the Applicant never introduced the UK Report into evidence. Instead, she only referred to passages from it in her memorandum. There is no evidentiary foundation for the Court to consider the UK Report, as a memorandum of argument cannot be used to introduce evidence.

B. *The Officer's lack of transparency in relying on the UK report*

[23] The fact that the UK Report was not properly introduced into evidence before the Court does not lead to the conclusion that it is not a relevant document in these proceedings. Indeed, it is the Court's conclusion that the Officer should have consulted the UK Report and referred to it in her decision. It alone forms the basis, via the conclusion of the RPD, and thereafter the RAD, for her conclusion that the Applicant could reasonably be expected to find employment and support herself in Abuja. Yet, the Court finds no basis to conclude that the Officer consulted the document in arriving at her decision. The footnote reference to in the UK Report in the RAD passage cited is omitted. Moreover, the RPD was only indirectly mentioned as referred to by the RAD, as in the passage cited above. References to the RAD decision were footnoted in the Officer's decision. The Respondent included the RAD decision in its responding materials, but not that of the RPD, presumably because it was not in the certified record.

[24] It is problematic that the source document for the Officer's conclusion that the Applicant could be expected to find employment in Abuja was not considered or mentioned by the Officer. The Applicant provided evidence that appears to contradict this conclusion which was not considered by the Officer. Moreover, the Applicant's evidence was found in reports which the Officer referred to and relied upon in rejecting the Applicant's submissions regarding a separate issue of a risk of FGM for her and her daughters upon return to Nigeria: "Response to Information Request, NGA103907.E".

[25] There is no reference in the H&C decision to the problems outlined in these reports facing single women in obtaining suitable employment and housing in Nigeria. The reports refer

to the difficulties confronted by unmarried women, in particular with respect to being victims of discrimination, gender stereotyping and violence; that women in general face considerable economic discrimination; that laws intended to protect them are ineffective in their implementation in practice; and that without a male or family support, women face major challenges in the cost of running a home.

[26] Perhaps most importantly with respect to the Applicant's profile as an educated and capable person, the reports refer to the high unemployment rate among educated women in urban areas; that educated single women require social status in order to use "family connections" to obtain employment; that women face discrimination in accessing formal employment support; and that they are discriminated against in almost all private industries in respect of obtaining promotions and salary increases.

[27] The Court's transparency concerns are therefore at two levels. First, there is no objective evidence concerning the reasonable employability of single women in Abuja, apart from a reference in the RAD decision based upon a conclusion drawn by the RPD, where the source document appears not to have been considered by the Officer, and is not available for review by the Court. Second, at the same time, there is evidence in documents provided by the Applicant suggesting considerable employment problems facing a single educated woman relocating to urban areas not referred to in the Officer's decision, despite the document containing this information being replied upon by the Officer to support other conclusions.

C. *Reliance upon unsupported conclusions of an IFA for the purposes of an H&C application*

[28] Besides the transparency concerns described above, the Court concludes that findings from the RAD and RPD in regard to an IFA are not directly transferable to an H&C analysis without the Officer conducting her own personalized assessment of the underlying evidence.

[29] Nothing prevents the Officer from reviewing the evidence supporting an IFA and considering it in its determination of whether the Applicant may benefit from an internal relocation alternative to mitigate hardship, if applicable. This is not at issue, contrary to the Applicant's submissions. But the Officer cannot simply accept a conclusion on a factor which appears applicable to an H&C decision without regard to the objective evidence underlying the conclusion. This is because H&C hardship conclusions are not relevant to risk and safety conclusions in RPD/RAD decisions, so that the same principle must apply when reversing the situation of adopting evidence from a refugee proceeding.

[30] In *Ranganathan v Canada (Minister of Citizenship and Immigration*), [2001] 2 FCR 164 at paras 15−18 [*Ranganathan*], the Federal Court of Appeal concluded that H&C factors were not relevant to the determination of the second prong of the IFA test (whether it is objectively unreasonable to relocate):

> [15] We read the decision of Linden J.A. for this Court as setting up a very high threshold for the unreasonableness test. It requires nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area. In addition, it requires actual and concrete evidence of such conditions. The absence of relatives in a safe place, whether taken alone or in conjunction with other factors, can only amount to such condition if it meets that

threshold, that is to say if it establishes that, as a result, a claimant's life or safety would be jeopardized. This is in sharp contrast with undue hardship resulting from loss of employment, loss of status, reduction in quality of life, loss of aspirations, loss of beloved ones and frustration of one's wishes and expectations.

[16] There are at least two reasons why it is important not to lower that threshold. First, as this Court said in *Thirunavukkarasu* [at page 599], the definition of refugee under the Convention "requires claimants to be unable or unwilling by reason of fear of persecution to claim the protection of their home country in any part of that country". Put another way, what makes a person a refugee under the Convention is his fear of persecution by his home country in any part of that country. To expand and lower the standard for assessing reasonableness of the IFA is to fundamentally denature the definition of refugee: one becomes a refugee who has no fear of persecution and who would be better off in Canada physically, economically and emotionally than in a safe place in his own country.

[17] Second, it creates confusion by blurring the distinction between refugee claims and humanitarian and compassionate applications. These are two procedures governed by different objectives and considerations. As Rothstein J. said in *Kanagaratnam* at page 133:

> While in the broadest sense, Canada's refugee policy may be founded on humanitarian and compassionate considerations, that terminology in the Immigration Act and the procedures followed by officials under it, has taken on a particular connotation. Humanitarian and compassionate considerations normally arise after an applicant has been found not to be a Convention refugee. The panel's failure to consider humanitarian and compassionate factors in its Convention refugee determination in this case was not an error.
>
> Indeed, the guidelines applicable to humanitarian applications are both generous and flexible: see *Immigration Manual* (1999), Chapter 6, The H & C Decision: Immigrant Applications in Canada made on H & C grounds, at pages 13-32. They are certainly broad enough, in my view, to be of assistance to the respondent should she decide to make such an application. The more humanitarian grounds are allowed to enter the determination of a refugee claim, the more the refugee procedure resembles and blends into the humanitarian and

> compassionate procedure. As a result, the more likely the concept of persecution is to be replaced in practice by that of hardship in the definition of refugee.
>
> [Emphasis added]

[31] The RAD, in relation to the Applicant, specifically referenced the foregoing case law describing the high threshold facing an applicant on the issue of an IFA at paragraph 101 of its decision (with the word "not" accidentally included) as follows:

> [101] Once the issue of an internal flight alternative is raised, the onus is on the refugee claimant to show that the option does not exist, by establishing that either of the two tests cited in *Rasaratnam* criteria is not met. The Federal Court of Appeal in *Thirunavukkarasu* stated that an applicant need only show that there is a serious possibility of being persecuted in the new location or that their removal to Nigeria would [~~not~~] subject them personally to a risk to life or of cruel and unusual treatment or punishment, or a danger, believed on substantial grounds to exist of torture. The RAD finds that the Appellant has failed to show that the IFA Option is not available to her.
>
> [Footnotes omitted]

[32] Almost all of the RAD's evidence concerning "employment opportunities" in its IFA conclusion, where reference was made to adverse country conditions relating to single women, pertained to safety and risk issues, such as those of domestic violence, ethnic affiliation, vulnerability to abuse, harassment and trafficking, or being targeted by unscrupulous men. The only reference not relating to safety issues was that of the availability of employment opportunities of single women in relocation to Abuja. In the Court's view, the tenor of the RAD decision throughout, related to risk issues and not those of hardship. Indeed, the passage cited by the Officer from the RAD concludes by stating that she would not be at risk of being found by

her father or recognized or sought out in Abuja, relating to safety concerns, not those of hardship.

[33] The threshold for demonstrating that a "claimant's life or safety would be jeopardized" is far more demanding in terms of the severity of prejudice to the applicant in a refugee matter, than it is required to demonstrate hardship in an H&C complaint. The Officer cannot rely on the RAD's IFA conclusion because it was never intended to reflect H&C issues. They only come into consideration after refugee proceedings were completed, when it has been determined that the "very high threshold for the unreasonableness test" for an IFA has been met.

[34] The Court is not implying that principles of relocation within the country to avoid hardship are not relevant issues. Nor is the Court suggesting that decisions of the RPD and RAD concerning an IFA are not relevant and cannot be relied upon by the Officer. The issue in this matter is the apparent total reliance upon a conclusion of employability in the RAD decision, without responding to the evidence in the Applicant's documents which raised issues as to the availability of suitable employment, or discrimination in the workplace affecting the Applicant's ability, as a single divorced woman, to support herself and her children in Abuja.

[35] I find this view to be similarly supported in the recent decision of Mr. Justice Boswell in the matter of *Baco v Canada (Citizenship and Immigration),* 2017 FC 694 at para 21[*Baco*]. It stands in part for the proposition that an officer conducting an H&C assessment may "look to the existence of an IFA" in the context of assessing hardship:

> [21] In my view, it is inappropriate to import case law concerning refugee decisions in the context of an H&C application

> because an H&C officer cannot assess risk pursuant to subsection 25(1.3) of the *IRPA*.[…] An IFA is an integral aspect of whether a refugee claimant requires Canada's protection, since the availability of a place within a claimant's home country where the claimant would not have a well-founded fear of persecution, or face a risk to life, or a risk of cruel and unusual treatment or punishment, relieves Canada from its obligations under the *Convention relating to the Status of Refugees*, 22 April 1954, 189 UNTS 150. This is not to say, however, that an H&C cannot look to the existence of an IFA in the context of assessing hardship when determining whether to grant or not grant an exemption under section 25(1) of the *IRPA*.
>
> [Emphasis added]

[36] I would add however, that it is not simply because that the H&C officer cannot assess risk, but as indicated in the *Kanagaratnam* and *Ranganathan* decisions because the "very high threshold for the unreasonableness test" prevents an IFA finding from being directly imported into an H&C decision without carrying out a personal assessment of the applicability of its underlying evidence to the Applicant's situation in an H&C matter. I would understand "looking to the existence of an IFA", in the context of assessing hardship, to mean considering its underlying evidence to determine its applicability to relocation to avoid or mitigate conditions of undue hardship.

[37] As a further factor, the Court notes that the RAD never considered the risk issues relating to the Applicant's children relocating, as they were not applicants in the refugee proceedings, and therefore never figured in the decisions. With respect to the best interests of the children issue, the Officer principally relied upon the profile of the Applicant as an educated and capable woman to conclude that "they have and will continue to have the full benefit of care from their mother to guide them through the transitional phase in their life that resettlement abroad would entail". Given that the children's interests require the full benefit and care of the Applicant, her

employment situation could impact her ability to provide the care required if relocated to Abuja, and therefore is a possible factor to consider in the relocation scenario.

D. *The procedural fairness requirement to provide notice of a relocation option as a factor in an H&C assessment*

[38] The Applicant raises a procedural fairness issue as to whether she should have been afforded an opportunity to respond to the issue of her relocation to Abuja. By analogy it would seem logical that if there is a fairness principle that applies to an IFA argument in refugee proceedings, it should also apply to an H&C application. This was the ratio of the *Baco* decision at paragraphs 21 and 22 of the reasons as follows:

> [21] […]It is to say though, from a procedural fairness perspective, the Officer in this case should have afforded the Applicants an opportunity to address the viability of an IFA in Fier. The Applicants' H&C submissions did not raise this issue.
>
> [22] Fairness dictates that the Applicants should have had notice that the Officer was going to address whether their hardship could be mitigated by relocating to a different part of Albania. For all the Officer knew, there may have been some facts or factors within the Applicants' knowledge, unidentified by or unknown to the Officer, which may have affected the Officer's finding that their hardship could be mitigated or reduced by relocating to Fier.

[39] In *Baco*, there was no mention of an IFA in the refugee proceedings, thus taking the applicant by surprise when finding it to be a factor in the H&C decision. In this matter, the Applicant was aware of the IFA finding in both refugee proceedings. The Applicant should also be aware that relocation within the country which mitigates or eliminates hardship is a similar consideration in an H&C decision.

[40] Therefore, the extent that the evidence considered in the refugee proceedings could be relevant to a requirement for the Applicant to relocate, the Applicant should anticipate and address the issue. That appears to be the situation in this matter where the RPD and RAD addressed evidence concerning the economic and social conditions in Abuja that bear on the hardship issue. These circumstances distinguish the situation from that in the *Baco* decision. Accordingly, I find no breach of procedural fairness in not providing the Applicant with an opportunity to address the relocation issue.

VI. Conclusion

[41] The Court finds that the Officer made a reviewable error in adopting the finding from the IFA conclusion of the RAD that the Applicant could mitigate any potential economic or social hardship by relocating to Abuja without regard to the underlying evidence supporting the conclusion in the face of contrary evidence from the Applicant. The issue is of sufficient importance to impact the outcome of the decision.

[42] Accordingly, the application is allowed and the decision is set aside. The matter is to be referred to a different officer for decision.

VII. Certified Question

[43] To be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance. As a corollary, the question must also have been raised and dealt with by the court below, and it must arise from the case, not from the Judge’s reasons:

Liyanagamage v Canada (Secretary of State), 176 NR 4 at para 4; *Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 at paras11−12; *Varela v Canada (Minister of Citizenship and Immigration*), 2009 FCA 145 at paras 28−29 and 32; *Zhang v Canada (Citizenship and Immigration*), 2013 FCA 168 at para 9.

[44] Both parties proposed a question for certification. The Respondent argued that that no question should be certified. This argument was based upon its position that the Officer could consider and rely upon the IFA finding. In the alternative, were a question was to be certified, the Respondent proposed the following wording:

> Recognizing that the officer is not bound by the findings of the RPD or the RAD, is it permissible for the officer, when making humanitarian and compassionate determinations, to consider and rely upon a finding made by the RAD or the RPD that an applicant may relocate within his/her country as a means to mitigate any potential economic or social hardship?

[45] There is no issue as to the Officer being able to consider an IFA finding, meaning that consideration of the evidence supporting an IFA finding is relevant to an H&C assessment. Insofar as I find reliance upon the conclusion is based on the adequacy of the consideration by the Officer of the RPD or RAD reasoning, there is no question for certification.

[46] The Applicant proposed the following question:

> Can an officer assessing an IRPA S. 25(1) application consider an internal flight alternative? If the officer can do so, what are the parameters? In particular, is the officer required to give prior notice of an IFA issue to the applicant?

[47] The Court concludes that there is also no issue that an officer in an H&C application may consider an IFA to mitigate hardship in the manner described above, or that notice of the issue may be required depending upon the factual circumstances reasonably forewarning that the issue may arise in the H&C application.

[48] As the questions proposed do not raise legal issues that are contentious, and are fact driven in application, none are certified for appeal.

JUDGMENT for IMM-1218-17

THIS COURT'S JUDGMENT is that the application is allowed and the matter is to be referred back to a different officer for reconsideration. No question is certified for appeal.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Kingsley I. Jesuorobo	FOR THE APPLICANT
Bridget A. O'Leary	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Kingsley I. Jesuorobo Barrister and Solicitor Toronto, ON	FOR THE APPLICANT
Deputy Attorney General of Canada	FOR THE RESPONDENT